Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)

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Delegates from approximately 150 nations gathered in Rome during the summer of 1998 to negotiate and finalize the treaty establishing the world’s first permanent international criminal court. The convention delegates had to contend with a wide array of issues. They had to negotiate the provisions of the court’s jurisdiction and substantive law and decide many procedural and administrative matters. The Rome convention and resulting treaty culminated a multi-year process to establish a permanent criminal court. The United Nations and the Non-Governmental Organization (NGO) community led this process. The resulting court, if implemented, will symbolize humankind’s stuttering but determined progress toward curbing human rights abuses.

The court that may arise from this progress stands in stark contrast to the recent human rights abuses in the former Yugoslavia and Rwanda. These abuses cap a deadly century of war crimes, crimes against humanity, and

genocide,7 with the last year of the millennium witnessing ethnic cleansing in the province of Kosovo in the former Yugoslavia.8 Many hope that a permanent court with worldwide jurisdiction over the most egregious crimes will help vindicate the rule of law.9 To be successful, the court arising from the Rome convention must grow in strength and stature as an institution perceived to be capable of bringing violators to justice.10 If realized, these goals might allow the International Criminal Court (ICC) to cast a shadow of deterrence on future human rights violators.11

The ICC faces numerous challenges and obstacles impeding its momentum toward these aspirations. One set of barriers has been and will be of a political nature. To go into effect, the Rome treaty needs sixty countries to ratify it.12 One major player, the United States, expressed opposition to the court, and initially threatened to use its influence to pressure other countries not to sign or ratify the Rome treaty.13 Another set of barriers arises from the

7. See David Stoelting, Rome Treaty Marks Historic Moment in International Criminal Law, N.Y. L.J., Aug. 28, 1998, at 1 ("[T]he Rome treaty stands as a giant step toward a just rule of law at the close of a century wracked by unparalleled injustice.").


10. See Orentlicher, supra note 9, at xi. Orentlicher describes the prospects of the International Criminal Court (ICC) as follows:

Transforming the ICC from the concept envisioned in the Rome statute into a viable, credible and effective institution will demand the commitment, support, and—when necessary—criticism of a concerned and engaged public. There will be countless opportunities for the court to founder; its success is scarcely assured. Still, when the ICC is created, it will enjoy one significant advantage that the ICTY [International Criminal Tribunal of Yugoslavia] and ICTR [International Criminal Tribunal of Rwanda] lacked: the assurance from recent example that an international court can meet extraordinary challenges, mount effective trials, and at last honor the humanity of those who endured epic crimes.

11. See Bassiouni, supra note 3, at 1-2 ("The purposes of the ICC include: dispensing exemplary and retributive justice; providing victim redress; recording history; reinforcing social values; strengthening individual Renitude; educating present and future generations; and more importantly, deterring and preventing future human depredations." (emphasis added) (citation omitted)). The members of Amnesty International published 16 principles for the permanent court. Principle nine stated:

An independent prosecutor should have the power to initiate investigations on his or her own initiative, based on information from any source, subject only to appropriate judicial scrutiny, and present search and arrest warrants and indictments to the court for approval. This is [the] only . . . truly effective method to ensure that all cases which should be brought before the court are brought.


daunting administrative and practical requirements necessary to establish an institution such as the ICC. A cursory review of the headings of the ICC Statute illustrates the subjects decided in Rome or at the preparatory meetings leading up to the Rome convention. The decisions on all of these subjects impact the court's effectiveness to some degree. The delegates had to negotiate and agree to language for 128 provisions categorized in the thirteen headings of the ICC Statute: (1) establishment of the court; (2) jurisdiction, admissibility, and applicable law; (3) general principles of criminal law; (4) composition and administration of the court; (5) investigation and prosecution; (6) trial procedure, evidence, and other court functions; (7) penalties; (8) appeal and revision; (9) international cooperation and judicial assistance; (10) enforcement; (11) assembly of states parties; (12) financing; and (13) other miscellaneous matters.14

Within this panoply of issues related to establishing the court, individual criminal responsibility provisions are particularly important for an effective court. One type of individual criminal culpability is the doctrine of command responsibility, "under which a commander incurs certain legal responsibilities for the acts of his subordinates."15 The form of the doctrine at issue in this Article imputes criminal responsibility to a leader who fails to control his or her subordinates, and is thus a type of imputed culpability based on the leader's omissions.16 The doctrine has three elements: superior-subordinate relationship, knowledge, and inaction.17

Individual criminal responsibility, and command responsibility in particular, are important because, to deter human rights abuses, potential perpetrators must perceive ICC prosecution as a possible consequence of their actions.18 Historically, the doctrine of command responsibility has been an important tool to hold accountable leaders who plan, participate in, or acquiesce in large-scale human rights abuses.19 One way that the doctrine increases deterrence is by providing an ICC prosecutor another legal theory that can generate additional counts to charge against a leader.20 Thus, the

15. RATNER & ABRAMS, supra note 6, at 119.
18. See RATNER & ABRAMS, supra note 6, at 135 ("[A]ccountability may deter future violations by either demonstrating to those contemplating such offenses the prospect of punishment or more generally by promoting justice, institutional reform in government, and the rule of law.").
20. An example of this approach is the set of charges filed against the deputy camp commander, Hazim Delic, in the Celebicij camp case from the International Criminal Tribunal for the former Yugoslavia (ICTY). Prosecutor v. Delalic, No. IT-96-21-T (ICTY Nov. 16, 1998), available at In the Trial Chamber (visited Oct. 22, 1999) <http://www.un.org/icty/celebicij/trialc2/jugement/partI. htm> [hereinafter Celebicij]. The court detailed 49 counts against the defendants, see id. annex B, paras. 16–37, several of which charged that "with respect to those counts above where Hazim Delic is charged as a direct participant, he is also charged here as a superior," id. para. 22. Two experts further note:
“scope of the command responsibility doctrine remains one of the most
important issues in prosecuting human rights atrocities.” The scope of the
discipline determines the degree to which a leader can insulate himself from
criminal culpability when the criminal acts were committed by others but
were caused by the leader’s lack of diligence, resulting in “poorly trained and
disciplined [subordinates who are] likely to have scant regard for the dictates
of human rights or humanitarian law.”

To consider a hypothetical example, a prosecutor’s initial claim might be
da direct criminal responsibility claim, such as that the leader ordered soldiers
to rape and kill civilian women. To show how the command responsibility
doctrine allows the prosecutor to bring additional counts, assume that the
soldiers did rape and kill civilian women, but that the evidence was in dispute
as to whether the leader ordered the soldiers’ action. In this scenario, the
prosecutor could also bring a command responsibility claim against the leader,
charging that the leader is criminally responsible for the soldiers’ actions if the
leader knew or had reason to know of the soldiers’ unlawful acts and did not
act to stop or punish them. The command responsibility doctrine creates an
extra incentive for a leader to exercise control over subordinates, and it
diminishes the chances that a leader with evil designs can build a defense to
prosecution by remaining willfully blind.

Given the command responsibility doctrine’s importance, and given
the ICC’s primary goal of deterring international criminals, especially those
who lead rights-abusing movements, the Rome convention developed
surprising new language describing the conditions under which a leader would
be held criminally responsible for the actions of subordinates. The Rome
negotiations delivered a new command responsibility standard that may
weaken the reach of the doctrine for civilian superiors, that is, civilians whose
subordinates have committed crimes that violate the ICC Statute, compared to
the doctrine’s reach for military commanders. Amnesty International warned
against weakening command responsibility. It published a list of “ten ways to
wreck the court.” Item seven from the list specifically mentioned that one

The purpose of the principles of individual criminal responsibility relating to “official
position,” “command responsibility” and “superior orders” is to ensure the criminal
responsibility of all persons throughout the chain of command who contributed directly
or indirectly to the commission of war crimes or crimes against humanity. This would
include the senior government official who formulated the policies that provided the basis
for criminal activity (such as ethnic cleansing or unrestricted warfare), the superior who
ordered his subordinate to commit the atrocities or looked the other way knowing that
such things were taking place, as well as the subordinate who actually committed the
heinous act.

1 MORRIS & SCHARF, supra note 19, at 93.
21. RATNER & ABRAMS, supra note 6, at 128.
22. Id.
23. See generally id. at 119–20 (discussing a commander’s responsibility for subordinates).
25. See RATNER & ABRAMS, supra note 6, at 128.
26. See id. at xxxiii (appraising goals of international criminal law); Bassiouni, supra note 3,
at 2.
27. See AMNESTY INTERNATIONAL, supra note 11, pt. V.
way to wreck the court was to “weaken principles of criminal responsibility, such as superior responsibility.”

A weaker civilian command responsibility standard is undesirable because it will not deter civilian superiors to the same extent as military commanders. Command responsibility cases decided in the wake of World War II as well as recent events demonstrate that civilian superiors can be intimately associated with violations of human rights law. Civilian superiors should be held no less accountable than military commanders for their involvement with, complicity in, or lack of diligence contributing to these crimes, as long as civilian accountability does not extend beyond an objectively justifiable capability to control subordinates, know of atrocities, and take action to stop them or punish the subordinate offenders. These capabilities should be objectively judged so that the doctrine can reach those who purposefully design a civilian hierarchy that allows them to remain willfully blind. Given that the ICC statute makes criminal only the most egregious of crimes, a weaker civilian command responsibility doctrine undercut the court’s goal of strong, individual deterrence. Individual accountability was the watershed development arising from the Nuremberg trials, and individual accountability is what will enable the ICC to meet its aspirations of deterring human rights abuses and vindicating the rule of law.

Recognizing the importance of the command responsibility doctrine, the existing international criminal courts include this doctrine in their individual accountability was the watershed development arising from the Nuremberg trials, and individual accountability is what will enable the ICC to meet its aspirations of deterring human rights abuses and vindicating the rule of law.

28. Id.
30. See infra Part VI (discussing the indictment of Slobodan Milosevic).
31. See generally Ratner & Abrams, supra note 6, at 128–29 (discussing strict liability of superiors for abuses of subordinates).
32. See Celebici, supra note 20, para. 387; Osiel, supra note 24, at 1040–41.
33. See Rome Statute, supra note 2, at 2, 5 (listing those crimes considered “criminal”).
34. See Bassionii, supra note 3, at 1–2 (listing the purposes of the ICC).
35. See Lyal S. Sunga, Individual Responsibility in International Law for Serious Human Rights Violations 35 (1992); id. at 48 (“The trials made clear that even the highest official could be held liable to the most severe penalty for acts amounting to serious human rights violations.”).
36. Traditionally, the doctrine goes by the term “command responsibility.” See W.J. Fenrick, Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia, 6 Duke J. Comp. & Int’l L. 103, 110 n.21 (1995). However, “command responsibility” may sometimes be used with a restricted meaning to include only military commanders. See Patricia Viseur Sellers & Kaoru Okuizumi, Intentional Prosecution of Sexual Assaults, 7 Transnat’l L. & Contemp. Probs. 45, 63 (1997). The ICC Statute avoids the problem of confusion between the terms “superior responsibility” and “command responsibility” by entitling article 28 “Responsibility of commanders and other superiors.” Rome Statute, supra note 2.
This Article will avoid confusion in terminology with several techniques: (1) It will not use the term “superior responsibility” except where it appears in quoted material; (2) it will use the term “command responsibility” to refer to the doctrine generally, whether the leader is a military commander or a civilian superior; (3) it will follow the ICC article 28 approach of referring to military leaders as commanders, and civilian leaders as superiors, with the exception of references to the defense of Superior Orders, discussed in Section II.D, infra; (4) it will use the term “subordinate” to refer to the
criminal responsibility provisions. Like the ICC, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) each have a command responsibility provision. In contrast, the Nuremberg and Tokyo international military tribunals did not contain an explicit command responsibility provision. However, despite this, these two World War II era courts applied the command responsibility doctrine to some defendants. Thus, command responsibility is a recognized doctrine in international law, and its inclusion in the ICC Statute was to be expected.

Article 28 of the ICC Statute provides that military commanders and non-military superiors “shall be criminally responsible for crimes within the jurisdiction of the [ICC] committed by [those] under [their] effective authority and control.” Then, in an expression of the doctrine that appears to be unique, the ICC Statute textually bifurcates the concept of command responsibility between military commanders and non-military superiors. The latter category will most likely be construed as meaning ordinary civilians, bureaucrats, and political leaders. While the issue is open to debate, the ICC command responsibility standard for military commanders is essentially the current customary international law standard. However, the ICC civilian standard is to some degree weaker and would likely allow some civilian authorities to escape conviction where the court could reach and punish military commanders.

underlings of either a military commander or civilian superior; and (5) it will use the term “leader” to refer to either a military commander or civilian superior. Additionally, the meaning of these terms is further clarified by remembering that this Article focuses on imputed criminal responsibility, not “direct” command responsibility, discussed in Section II.B, infra.


39. See BASSIOUNI & MANIKAS, supra note 16, at 346 (“The doctrine of command responsibility originated in national military law and gradually became a basis of international criminal responsibility.”).

40. Rome Statute, supra note 2, art. 28(1), (2).


42. See RATNER & ABRAMS, supra note 6, at 296 (“Human rights abuses can range from one rogue policeman to an entire bureaucracy of governmental officials supported by numerous private citizens.”).

43. See infra Sections III.B–III.D.

Both recent courts and courts from the post-World War II era have had occasion to construe and apply the command responsibility doctrine. The ICC has arisen during a time when two UN-chartered, country-specific international tribunals operate specifically in response to planned, large-scale, systematic human rights violations. The ICTY was established on May 25, 1993, while the ICTR was established on November 8, 1994. Both courts' statutes contain command responsibility provisions. In contrast, the Nuremberg and Tokyo international military tribunals operated just after World War II. Both the Nuremberg and Tokyo international military tribunals tried and convicted superiors based on the crimes of their subordinates, despite the absence of a specific command responsibility provision in their court-authorizing statutes.

In light of the experience of these four international criminal courts, and in light of the experience of other post-World War II courts, this Article compares the command responsibility provisions embodied in article 28 of the ICC Statute with the command responsibility doctrine that arose after World War II, and as implemented and interpreted since then by the ICTY and the ICTR. In doing this, the Article's goal is to focus on the issue of civilian command responsibility as codified in the ICC Statute.

To proceed, Part II provides background to sharpen the later discussion of command responsibility. Specifically, Part II introduces the command responsibility doctrine and discusses several related doctrines. Next, Part III completes the preliminary subjects necessary for the Article's main arguments by briefly tracing the emergence of the command responsibility doctrine and discussing which variants of the doctrine should be compared to the new ICC civilian command responsibility standard.

This Article's main arguments rest in Part IV and Part V. The former argues that changes in two of the key elements of the command responsibility doctrine produce a civilian command responsibility standard that hinders the deterrent power of the doctrine for civilian leaders. This argument relies on: (1) the differences in the text of the ICC military commander standard versus the ICC Statute's civilian superior standard; and (2) the recent influences on

45. See BASSIOUNI & MANIKAS, supra note 16, at 351-68.
46. See RATNER & ABRAMS, supra note 6, at xxxi-xxxii; Bassiouni, supra note 3, at 18-19.
50. See Parks, supra note 38, at 77.
the command responsibility doctrine by the Celebici\textsuperscript{52} case from the ICTY, the first international tribunal case since the post-World War II cases to apply the command responsibility doctrine.\textsuperscript{53} Part V expands the argument by analyzing the facts of several past cases against the ICC civilian command responsibility standard.

Only a handful of civilian command responsibility cases exist. The Article selects from this handful those cases whose facts can illustrate how the new ICC civilian standard would produce a different outcome than when the case was originally adjudicated. Part VI then uses the indictment of Slobodan Milosevic in the ICTY to review the application of the ICC command responsibility doctrine at the highest level in the chain of command. Finally, Part VII concludes by emphasizing the effect of the changes in the knowledge element and the superior-subordinate relationship element of the new ICC civilian command responsibility standard.

II. THE LARGER CONTEXT OF THE COMMAND RESPONSIBILITY DOCTRINE

In Part IV, this Article will focus on the issue of when, or whether, under the ICC Statute, a person in a position of authority and control over a subordinate or subordinates can be held criminally liable for the acts of the subordinates. In other words, when can a leader be held criminally responsible under the command responsibility doctrine? The doctrine can create direct criminal liability, as in the case where a leader orders a subordinate to commit a crime, and the doctrine can create imputed criminal responsibility when a leader fails to exercise sufficient diligence in monitoring and controlling his or her subordinates.\textsuperscript{54} This second form of the doctrine creates liability from the leader's omissions, and it is typically expressed in three elements.\textsuperscript{55} While many slightly varying formulations exist, these three elements are: (1) the superior-subordinate relationship element; (2) the knowledge element; and (3) the inaction element.\textsuperscript{56} The superior-subordinate relationship element concerns whether the commander or superior had sufficient control of the subordinates; the knowledge element concerns whether the commander or
superior understood or knew that crimes were being committed; and the inaction element concerns whether the commander or superior acted on his or her duty to intervene.\(^5\)

Before examining the command responsibility doctrine in greater detail, this part first discusses the broader context and related doctrines surrounding command responsibility. This frames the Article’s primary focus, the efficacy of the ICC’s civilian command responsibility standard, for later treatment. In this undertaking, this part associates the doctrines that provide the broader context with the relevant provisions in the ICC Statute. Like the ICC Statute’s implementation of command responsibility in article 28, it delineates these other doctrines by implementing them in designated provisions.

### A. Other Forms of Criminal Responsibility

Command responsibility shares some characteristics with other forms of criminal liability for an accomplice, including, loosely, the concepts of complicity, accomplice liability, and aiding and abetting.\(^5\) All of these doctrines have the common feature that one is criminally responsible because of one’s relationship or association with others. However, command responsibility is different in origin and formulation from all of these doctrines.\(^5\) The criminal responsibility provisions of the ICC Statute recognize this distinction.

In article 25, the statute assigns individual criminal responsibility for one who aids, abets, assists in, or provides the means for a crime or its attempt.\(^6\) Article 25 reaches one who “contributes to the commission or attempted commission of ... a crime by a group of persons acting with a common purpose.”\(^6\) Further, for genocide, article 25 reaches one who “directly and publicly incites others to commit genocide.”\(^6\) Thus, the structure of the ICC Statute clearly delineates these other forms of criminal responsibility from command responsibility.\(^6\)

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\(^5\) See Hessler, supra note 17, at 1276–77. This author characterizes the three elements as (1) status, that is, superior-subordinate relationship; (2) mental standard and mental object, that is, knowledge; and (3) duty to intervene, that is, inaction. See id.


\(^7\) See Ratner & Abrams, supra note 6, at 119.

\(^8\) See Rome Statute, supra note 2, art. 25(3)(c). Article 5 of the ICC Statute states that the “jurisdiction of the Court will be limited to the most serious crimes of concern to the international community.” Id. art. 5. Article 5 then lists the crimes: (a) genocide, (b) crimes against humanity, (c) war crimes, and (d) crimes of aggression. See id. Articles 6 through 8, which define these crimes, do not refer to any other international law instruments for the definitions, but instead provide the complete definition within the ICC Statute. See id. arts. 6–8.

\(^9\) See Rome Statute, supra note 2, art. 25(3)(f).

\(^10\) Id. art. 25(3)(d).

\(^11\) Id. art. 25(3)(e).

\(^12\) See Ratner & Abrams, supra note 6, at 118–19. The authors further state: Notions of conspiracy and complicity received a clear endorsement in the Nuremberg Charter, article 6(a) of which criminalized both preparing and conducting aggressive war and a “common plan or conspiracy” to do so. The [Nuremberg] International Military Tribunal interpreted the conspiracy charges strictly, limiting the term to acts most closely involved with the planning of the war and thereby acquitting most of the Nazi leaders.
B. "Direct" Command Responsibility

The ICC Statute encodes "direct" command responsibility in article 25, while article 28, the section under discussion in this Article, encodes "imputed" command responsibility. These two types of criminal culpability are conceptually distinct, yet sometimes they are described as two sub-types of the command responsibility doctrine. The key distinction is that under direct command responsibility the commander or superior "is held liable for ordering unlawful acts." In contrast, imputed command responsibility exists "where the commander is held liable for a subordinate's unlawful conflict which is not based on the commander's [or superior's] orders." Thus, while some references to the command responsibility doctrine discuss the concept of ordering one's subordinates to commit a crime, a complete statement of the doctrine emphasizes imputed command responsibility as well.

The ICC Statute emphasizes the conceptual distinction between these two forms of criminal responsibility by placing each in a separate article. For direct command responsibility, article 25 of the ICC Statute, entitled "Individual Criminal Responsibility," reaches one who "[o]rders, solicits, or induces the commission of such a crime which in fact occurs or is attempted." Thus, under the ICC Statute, ordering one's subordinates to perform a crime is not a form of vicarious criminal liability, but rather is individually culpable criminal behavior. Conveying patently illegal orders down the command chain would also fall under the direct command responsibility rubric. Imputed command responsibility under the ICC is described in article 28, and is a form of vicarious criminal liability because the liability arises from the relationship between the superior and the subordinate, and not from the commander or superior's direct action to communicate with them. Control Council Law No. 10 [of the non-international Nuremberg military tribunals] took a broader view, singling out accessories, those who took a consenting part, those connected with plans for the crimes, and members of organizations connected with the crime.

Id.

65. See BASSIOUNI & MANIKAS, supra note 16, at 345.
66. Id.
67. Id.
69. See BASSIOUNI & MANIKAS, supra note 16, at 345 ("Command responsibility includes two different concepts of criminal responsibility[.] . . . direct responsibility . . . [and] imputed criminal responsibility . . . ."); RATNER & ABRAMS, supra note 6, at 119-20.
70. Rome Statute, supra note 2, art. 25.
71. Id. art. 25(3)(b).
72. Vicarious criminal liability is generally defined as when the defendant is made liable for the bad conduct of someone else. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 250 (2d ed. 1986).
74. See Parks, supra note 38, at 77.
orders initiating the unlawful behavior.\textsuperscript{75} Thus, imputed command responsibility is based on a failure of the commander or superior to act.\textsuperscript{76} For example, a military officer might be held criminally responsible under imputed command responsibility for "failing to establish policies and procedures for the prevention of violations and for the punishment of violators, and for failing to implement them."\textsuperscript{77}

Because this Article focuses on imputed command responsibility, understanding direct command responsibility is only necessary to provide background and context for the discussion of imputed command responsibility. Accordingly, the remainder of the Article uses the term "command responsibility" to refer to imputed command responsibility.

C. Individual Responsibility and Official State Capacity

The prosecutions after World War II established as one of the Nuremberg Principles the doctrine that individuals can be held criminally liable for acts which violate international law, even when acting as agents of the state.\textsuperscript{78} One's capacity as a state official does not provide a defense. Prior to the post-World War II prosecutions, a commander was much more likely to escape criminal responsibility because the commander was supervising soldiers in his or her capacity as an official of the state.\textsuperscript{79} The state itself would be the only entity responsible for the act, even though the state could not be held criminally responsible.\textsuperscript{80} For example, assume that a Nazi military

\textsuperscript{75.} See BASSIOUNI & MANIKAS, supra note 16, at 347. The authors explain: "A person who issues an order is responsible for that order. This is clearly a standard of direct personal responsibility; a standard well recognized in the world’s major criminal justice systems and in international criminal law. This responsibility is direct . . . ." \textit{Id.}

\textsuperscript{76.} See id. at 348. Below, the author describes the commander's duties that make the failure to act culpable:

\begin{itemize}
  \item Imputed command responsibility is based on the commander's failure to act in order to:
    \begin{itemize}
    \item 1) prevent a specific unlawful conduct; 2) provide for general measures likely to prevent or deter unlawful conduct; 3) investigate allegations of alleged conduct; and 4) prosecute, and upon conviction, punish the author of the unlawful conduct.
    \end{itemize}
\end{itemize}

\textit{Id.}

\textsuperscript{77.} \textit{Id.} at 349.


\textsuperscript{79.} See Parks, supra note 38, at 19. Parks notes that "few instances are recorded prior to the end of World War II where that responsibility was either criminal or international in nature. The responsibility existed prior to that time, but there was not sufficient warrant or authorization to interfere in what was essentially an area of 'state action.'" \textit{Id.}

\textsuperscript{80.} See RATNER & ABRAMS, supra note 6, at 15. Ratner and Abrams also point out that "State criminal responsibility for certain violations of international law has proved to be exceptionally controversial. . . . [I]nternational criminal law, to the extent it has developed to cover violations of human rights, has centered on individual culpability, on the theory that personal accountability and
commander follows state policy and orders his forces to turn over prisoners to the Nazi death camp system. If prosecuted for this action, the Nazi commander would plead that his role required him to follow the state policy of turning over prisoners to the camp system. The Nuremberg Principles negate this plea if the Nazi commander knew that the prisoners were being murdered or mistreated in the camp system. Thus, piercing the veil of "official state capacity" is similar to the doctrine that says that "superior orders is not a defense," discussed in the next section. An accused who claims a defense of state responsibility or official capacity is claiming that the accused's position, and not some specific order, required or validly authorized the unlawful acts.

The ICC Statute follows the now well-established international law norm that official capacity does not immunize a leader. Thus, being a state actor is not a defense to command responsibility liability. On the other side of the coin, the ICC Statute also ensures that holding the individual criminally responsible does not limit the state's responsibility under other forms of international law for the violations.

D. The Defense of Following Superior Orders

The ICC Statute provides several defenses, and among these is the limited defense of superior orders. Some commentators characterize the superior orders defense as the flip side of command responsibility. The Nuremberg principles expressly limit the defense of superior orders: "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." The ICC Statute confines the defense narrowly so that it does not swallow the entire notion of individual criminal responsibility, whether in the form of direct participation or in the form of imputed responsibility via the superior's relationship with his or her

punishment will serve as the best deterrent." Id.

81. See Rome Statute, supra note 2, art. 25(2) ("A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute."); id. art. 27(1) ("This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity . . . shall in no case exempt a person from criminal responsibility under this Statute . . . ."); SUNGA, supra note 35, at 35, 48.

82. The ICC Statute states that "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." Rome Statute, supra note 2, art. 25(4).

83. See id. arts. 26, 30–33. Defenses include: persons under eighteen, mental element, mental disease or defect, intoxication, self-defense, duress, mistake of fact or law, and superior orders. See id.

84. See Anthony D'Amato, Superior Orders vs. Command Responsibility, 80 AM. J. INT'L L. 604, 604 (1986); Howard S. Levie, Some Comments on Professor D'Amato's 'Paradox', 80 AM. J. INT'L L. 608, 608–609 (1986). See generally Jeanne L. Bakker, Note, The Defense of Obedience to Superior Orders: The Mens Rea Requirement, 17 AM. J. CRIM. L. 55, 56 (1989) (arguing that "the existence or non-existence of the defense of superior orders, alone, is not determinative of mens rea; rather, a number of other elements should be considered, including the nature of the orders, the nature of the threats upon disobedience, and the circumstances surrounding the subordinate when given the orders").

85. Nuremberg Principles, supra note 78, at 924.
subordinates. If the superior orders defense were not limited, then "the acceptance of superior orders on the one hand, and the lack of knowledge as to [the crimes,] execution by subordinates, on the other, would lead to the abolishment of any penalty."

E. Summarizing the Context Surrounding Command Responsibility

In sum, the concepts of (1) individual responsibility (as opposed to state responsibility or official capacity), (2) direct participatory "command responsibility," (3) complicity and accessory liability, and (4) the defense of superior orders provide a context for the core command responsibility doctrine. In essence, these four doctrines delimit the outer conceptual boundaries of command responsibility as discussed in this Article. The structure of the ICC Statute also acknowledges these different doctrines and their distinct role compared to the role of command responsibility. The ICC Statute isolates the command responsibility doctrine in article 28, recognizing its unique character as a criminal liability provision based on neglect of one's duty to supervise and control subordinates. As recently stated by the ICTY in the Celebici case: "[T]he criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act." This omission-based character of the command responsibility doctrine underscores the potential breadth of the doctrine and perhaps explains why it has not been without controversy.

Next, Part III discusses the doctrine's elements, which this Article uses to compare the ICC Statute's civilian command responsibility standard with its military standard. Some elements do not change between the ICC civilian and military standards. Analyzing the differences that do exist in the wording and structure of the elements generates the thesis of this Article: that the new civilian standard weakens the court's ability to bring civilian perpetrators to justice for the purpose of deterring human rights abuses.

86. See Ratner & Abrams, supra note 6, at 121–22. The ICC Statute defines the superior orders defense as follows:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
   (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
   (b) The person did not know that the order was unlawful; and
   (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

Rome Statute, supra note 2, art. 33.

87. Roechling, supra note 29, at 1106.
88. Celebici, supra note 20, para. 334.
89. See Bassioune & Manikas, supra note 16, at 345 ("Liability . . . is essentially based on the commander's failure to act . . . ").
90. See Hessler, supra note 17, at 1276–77.
III. ESTABLISHING THE BASIS OF THE COMPARISON

This Article’s thesis is that the civilian command responsibility standard codified in article 28(2) of the ICC Statute reduces the efficacy of the permanent international criminal court. This argument rests on the premise that the new civilian standard is less strict than the ICC military standard and perhaps less strict than the prior law of command responsibility as applied to civilians.\(^9\) It also rests on the presumption that individual accountability in the ICC will help deter human rights abuses and that a less strict standard allows a civilian superior to either exercise less diligence in controlling subordinates, or have less fear of being convicted when intentionally allowing or encouraging subordinates to commit human rights abuses. To support these arguments, this part briefly examines the development of the command responsibility doctrine to frame the comparison undertaken in Part IV.

A. To What Degree Is the Command Responsibility Doctrine Applied to Civilians?

Prior to the ICC Statute, one issue in international law was whether the command responsibility doctrine embodied a single standard that applied to military commanders (or those effectively acting as military commanders) and non-military commanders.\(^9\) Even though it arose in military law, the command responsibility doctrine has in a few instances been applied to civilian leaders.\(^9\) Compounding this issue, article 28 of the ICC Statute uses similar language to provide separately two command responsibility standards, one for military commanders and another for civilian superiors.\(^9\)
Some argue that the command responsibility doctrine should have a different standard when applied to civilians, and recently the ICTR has even questioned whether the command responsibility doctrine should be applied to civilians at all. However, international law seems to recognize that the doctrine applies to civilians in some form. Furthermore, the post-World War II cases discussed in Part V do not implement a lesser standard for civilian superiors. In any event, whether the pre-ICC civilian command responsibility standard is different from the pre-ICC military standard is an issue that will likely remain open to debate, and it is not the purpose of this Article to directly address or end this debate. Given this debate, the ICC drafters had a choice: either encode a single standard and apply it to both military and civilian leaders or encode separate standards for each. By choosing to encode separate standards, they have raised the issue of whether separate standards hinder or support the underlying goals of the court.

commit such crimes; and
(b) the [commander] [superior] failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission [or punish the perpetrators thereof].


One footnote of the draft statute describes the purpose of the alternative, bracketed text as "highlight[ing] the question whether command responsibility is a form of criminal responsibility in addition to others or whether it is a principle that commanders are not immune for the acts of their subordinates." Id. art. 25 n.13.

Another footnote to draft article 25 states that “[m]ost delegations were in favour of extending the principle of command responsibility to any superior.” Id. art. 25 n.10. However, this bracketing does not suggest that the delegates went into the conference considering an option for a new civilian standard. Other articles of the draft statute specifically list optional provisions entitled “option 1,” “option 2,” etc. Such specific designation of alternatives stands in contrast to the mere bracketed text in draft article 25. However, interestingly, the negotiators could have split draft article 25 along the lines of the bracketed text to create final article 28.

One clue as to the possible source of the civilian command responsibility standard is provided by the comments of David Scheffer before the U.S. Senate Committee on Foreign Relations. Discussing the efforts of United States negotiators, Mr. Scheffer stated that “among the objectives we achieved in the statute of the court [includes] [a]cceptable provisions based on command responsibility and superior orders.” Hearings on the Establishment of a Permanent International Criminal Court Before the Senate Comm. on Foreign Relations (July 23, 1998) (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court), available at <http://www.lgc.org/icc/html/gov.shtml> (visited Sept. 1, 1999); see also Hall, supra note 5, at 129-30 (“The basic wording and structure of the article concerning command or superior responsibility was worked out in a cooperative effort led by France and the United States at the first session . . . The opinions in the text still reflect differences between legal systems . . . ”).

97. See Celebici, supra note 20, para. 363; BASSIOUNI & MANIKAS, supra note 16, at 346, 368-70 (“A non-military commander is responsible for omissions which lead to the commission of crimes.”); Fenrick, supra note 36, at 117-18.
The remainder of this part traces the evolution of the command responsibility doctrine and examines, in Section III.D, the specific law to be used in the comparison undertaken by this Article in Part IV.

B. The Law from the Post-World War II Tribunals

The ICTY and the ICTR statutes contain explicit command responsibility provisions. In contrast, the international military tribunals at Nuremberg and Tokyo did not.\(^{98}\) This section reviews command responsibility as established at the Nuremberg and Tokyo international tribunals and by other post-World War II military court cases.\(^{99}\)

The Nuremberg and Tokyo charters are essentially equivalent.\(^{100}\) The London Agreement of August 8, 1945, chartered the Nuremberg international military tribunal (IMT-N).\(^{101}\) The Tokyo tribunal in the Far East (IMT-FE) "was set up by proclamation of General Douglas MacArthur . . . on January 19, 1946."\(^{102}\) Both the IMT-N and the IMT-FE contained the following language: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."\(^{103}\) Thus, the text of each tribunal’s statute only articulated “direct” command responsibility. However, the United States had proposed a definition that was never incorporated into any promulgating order, but that would have established responsibility for the “omission of a superior officer to prevent war crimes when he knows of, or is on notice as to their commission or contemplated commission and is in a position to prevent

\(^{98}\) See Fenrick, supra note 36, at 112. Additionally, Fenrick notes: Neither the Nuremberg Charter nor the Judgment of the International Military Tribunal for the Trial of German Major War Criminals addressed the responsibility of military commanders or other leaders for a failure to act, probably because the degree of participation by leaders in the offenses for which they were convicted made consideration of this issue unnecessary.

\(^{99}\) See Bassioumi & Manikas, supra note 16, at 354 ("The issues of command responsibility were plentiful in the post-World War II prosecutions before the IMT, IMTFE, Subsequent Proceedings, and the other prosecutions.").


\(^{101}\) See War Crimes, War Criminals, and War Crimes Trials: An Annotated Bibliography and Source Book 9 (Norman E. Tutorow ed., 1986) [hereinafter War Crimes]. Additionally, Tutorow notes: The IMT Charter gave the signatory nations the power to try and punish the major war criminals for crimes committed either as individuals or as members of criminal organizations, as defined in the Charter. The circularity of having victors create a charter that gave them jurisdiction over areas of law contained in that selfsame charter was not lost on critics of war crimes tribunals.

\(^{102}\) Id. at 13; see also Law of Armed Conflict, supra note 78, at 911.

them." Thus, formal, explicit command responsibility was considered but not included in these two charters.

The most significant command responsibility cases to come from Nuremberg came from the military trials conducted under Control Council Law No. 10, not the IMT-N. In the High Command case, the U.S. military court in Nuremberg rejected a strict liability concept of criminal liability. The defendants "held various leading command or staff positions in the German Armed Forces." They were charged with various counts relating to acts such as slaughtering enemy troops, executing partisans, and mistreating prisoners. In requiring personal dereliction of duties for culpability, the High Command court resisted the "near-strict-liability" standard that some scholars attribute to the In re Yamashita case, a U.S. military trial of a Japanese general for crimes committed by his troops in the Philippine Islands.

Perhaps the most cited and discussed post-World War II case, Yamashita, engenders considerable controversy both for procedural issues and for the command responsibility standard applied to General Yamashita. The

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104. Parks, supra note 38, at 17.
105. See id. at 38, 58.
106. United States v. Von Leeb (High Command Case), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462 (1951) [hereinafter High Command Case].
107. See Low, supra note 58, at 252 ("Strict liability dispenses with the mens rea. It is normally imposed on one who has committed a criminal act, but who lacks any moral fault as to one or more components of the act."). The flip side of strict liability is vicarious liability, which "dispenses with the actus reus. It is imposed on a defendant who has engaged in no criminal act, based on a crime committed by a person who stands in a specified relationship to the defendant." Id.; see also LAFAVE & SCOTT, supra note 72, at 250 (discussing the concept of strict liability in general criminal law).
108. See High Command Case, supra note 106, at 542-49; see also RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 125-27 (1982) (discussing the Yamashita case and arguing that the Yamashita precedent was eroded by subsequent developments); Parks, supra note 38, at 43. Parks quotes the heart of the High Command case's description of command responsibility:

Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means coextensive. . . . Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only 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.

High Command Case, supra note 106, at 543-44, quoted in Parks, supra note 38, at 43 (emphasis added).
109. Introduction to the High Command Case, 10 TRIALS OF WAR CRIMINALS BEFORE THE NÜRNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 3 (1949).
110. See id.
111. 327 U.S. 1 (1946).
112. See id. at 10, 13-16. A second important Nuremberg military court command responsibility case was the Hostage case. See id. at 58 ("The accused, all high-ranking officers of the military, were charged with being principals and accessories to the murder and deportation of thousands of civilians . . . by troops under their command . . .").
113. See LAEL, supra note 108, at 121; Fenrick, supra note 36, at 114; Bruce D. Landrum, The Yamashita War Crimes Trial: Command Responsibility Then and Now, 149 Mil. L. Rev. 293, 293, 297-98 (1995). Landrum notes:
General denied knowing about the atrocities, an orderly pattern of execution of thousands of civilians, and denied giving orders to massacre Filipinos, and there was some dispute as to whether effective communications existed from his location to the troops in the field.\textsuperscript{114} The case is particularly significant in U.S. domestic law because after his conviction by the military tribunal, the Supreme Court denied General Yamashita's \textit{writ of habeas corpus}.\textsuperscript{115} Even the Supreme Court's ruling is disputed, however, as some commentators claim that the Court endorsed the \textit{command responsibility} doctrine,\textsuperscript{116} while others assert that the Court merely held that the military tribunal had the power to try General Yamashita.\textsuperscript{117} For this Article's purposes, these distinctions are not critical. More important is the synthesized effect of the military tribunal cases, including \textit{Yamashita} and \textit{High Command}, that "a commander's knowledge of widespread atrocities within the command area was rebuttably presumed

\begin{footnotes}
\footnote{Opinions vary widely on General Yamashita's personal responsibility for the war crimes on Luzon. Some writers have called him a victim, an "honourable Japanese general" tried and executed on "trumped-up charges," the subject of a "legalized lynching." Perhaps Supreme Court Justice Murphy's dissenting opinion in the case best summarizes the argument that Yamashita was a scapegoat. In Justice Murphy's view, the victors in the battle had done everything possible to disrupt Yamashita's command, control, and communications, and now they were charging him with having committed a war crime for not having effectively controlled his troops.}

\footnote{On the other hand, in a well-researched and persuasively written article, William H. Parks points out evidence in the record that General Yamashita personally ordered or authorized at least 2000 summary executions. Other evidence, although perhaps more questionable in reliability, indicated that Yamashita had ordered an extermination campaign against all Filipinos. This seems unlikely considering that most of the atrocities occurred in sectors physically distant from Yamashita. As Richard Lael observes in his book, \textit{The Yamashita Precedent: War Crimes and Command Responsibility}, if Yamashita had ordered the atrocities, there probably would have been more offenses in his sector. Of course, the Manila sector was the most densely populated area, so inevitably more atrocities occurred there.}

\footnote{In any case, Parks takes the view that Yamashita was not held to a standard of commander's strict liability, as many have claimed, but had participated personally in the war crimes. Lael, on the other hand, believes that Yamashita was held to "strict accountability," but agrees that the case has been misinterpreted. That the Supreme Court upheld the verdict of the military commission has been misinterpreted by many to mean that the Court approved the strict standard that the commission applied to Yamashita. To the contrary, the Supreme Court merely held that a commander has a duty to protect prisoners and civilians, but did not hold that Yamashita had violated the duty under the facts of that case.}

\footnote{Id. at 297–98 (citations omitted).}

\footnote{\textit{See Yamashita}, 327 U.S. at 14, 33–34.}

\footnote{See id. at 24–26.}

\footnote{\textit{See Christopher N. Crowe, Note, Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution}, 29 U. RICH. L. REV. 191, 204 (1994). The U.S. Supreme Court, in an opinion delivered by Justice Stone, stated, inter alia, that the "gist of the charge" leveled against Yamashita was for "unlawful breach of duty." Thus, the Court was concerned with whether an army commander is duty bound to "take such appropriate measures as are within his power to control the troops under his command" and whether violations of the law of war that result from the commander failing this duty attach to him personal responsibility. The Court was impressed with the law of war's purpose "to protect civilian populations and prisoners of war from brutality." This purpose is defeated when an invading commander is allowed to neglect with impunity the protection of civilians and prisoners of war and, accordingly, "the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates." Id. (citations omitted).}

\footnote{See, e.g., Landrum, \textit{supra} note 113, at 296.}
rather than irrebuttably presumed," because this assessment indicates the evidentiary burden allocated to the prosecutor and defendant in the knowledge element of the doctrine.118

Just as some of the most important command responsibility cases at Nuremberg came from military tribunals, and not the international military tribunals,119 the Yamashita case illustrates this same phenomenon in the Far East. As in post-World War II Germany, military tribunals in the Far East produced significant command responsibility cases.120 The IMT-FE, or Tokyo tribunal, also contributed to the international law of command responsibility. Even though a specific command responsibility provision was lacking, the defendants at IMT-FE were charged under Count 55121 with negative criminality—that they "deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches of the laws and customs of war."122

118. See id. at 298. Landrum also notes that:
Yamashita marked the high point for a commander's criminal responsibility for subordinates' actions. In 1948, two cases tried before the Nuremberg Military Tribunals adopted more limited liability standards for commanders. In The Hostage Case, the command responsibility concept was primarily refined from a "must have known" standard to more of a "should have known" standard.

Id. (citations omitted). Parks synthesizes the three cases in the following passage:
As in Yamashita, there was seldom any question that offenses occurred [in the High Command and Hostage cases]; the question left for resolution concerned the standard of responsibility and, given the determination of that standard, the individual responsibility of each accused. Yamashita had confirmed the existence of duty and responsibility; the High Command and Hostage tribunals sought to achieve some definitional value for each. Yamashita addressed the duty and responsibility of the commander with a broad brush; the High Command and Hostage cases provided more of the detail necessary to complete the picture. Significantly, both minimum and maximum lines were drawn, the latter in express rejection of any purported Yamashita-strict liability theory. That rejection was not merely of the strict liability theory per se but of the proposition that Yamashita represents such a theory.

Parks, supra note 38, at 63–64.
119. Military tribunals, unlike international military tribunals, derive their authority from a single country. See Parks, supra note 38, at 17–20.
120. See id. at 64–73.
121. See 1 TOKYO TRIAL TRANSCRIPT, supra note 29, at 70–71.
122. MINER, supra note 100, at 67 (citing Count 55); see also Parks, supra note 38, at 65 (discussing Count 55). Parks further states:
Two points raised previously in the Yamashita trial were again raised by the military leaders in the Tokyo trial. The first was an objection to the theory of vicarious responsibility for acts committed by subordinates . . . . Where a commander had the responsibility to act, while he could delegate the authority, he could not delegate the responsibility; in the words of the tribunal, "He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application."
The second defense went to the subjective standards in individual cases. Like General Yamashita, the defendants argued that their failure of compliance was based upon impossibility of performance; that the allied offensive had forced conditions to deteriorate not only in prisoner of war camps but overall, and that it was impossible for military commanders in the field to maintain communication and control of their troops because of the deteriorating conditions.

Id. at 66–67.
Having reviewed application of the command responsibility doctrine in some of the most influential post-World War II cases that apply the doctrine, the Article next discusses the evolution of the doctrine after World War II.

C. More Recent Developments

In the interim between the post-World War II tribunals and the ICTY and ICTR tribunals, the most significant development for the international law of command responsibility is the encoding of the doctrine in 1977 as part of Additional Protocol I of the Geneva Conventions of 1949. After rejecting two "should have known" formulations, the delegations negotiating the Protocol settled on the following standard:

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

The Additional Protocol directly influenced the Celebici court's construction of article 7(3), the command responsibility provision of the ICTY. The ICTY and ICTR command responsibility provisions are substantially equivalent and describe command responsibility as follows:

The fact that any of the acts... was committed by a subordinate does not relieve his or her 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.


124. See LAEL, supra note 108, at 134–35. The first rejected formulation was: "if [the commander] knew or should have known that [the subordinate] was committing or would commit such a breach and if [the commander] did not take measures within their power to prevent or repress the breach . . . ". Id. at 135. The second rejected formulation was "if [the commander] knew or should reasonably have known in the circumstances at the time that [the subordinate] was committing or would commit such a breach . . . ." Id. (emphasis added).

125. Protocols I and II, supra note 123, art. 86(2) at 1428–29 (emphasis added); see also LAEL, supra note 108, at 134 (quoting the Protocols); Crowe, supra note 116, at 225 (same); Green, supra note 68, at 341 (same).

126. See Celebici, supra note 20, paras. 390–93. However, one commentator believes that the ICTY statute moves the standard closer to Yamashita than to the Protocol: Finally, Article 7(3) of the Statute of the International Tribunal for the Former Yugoslavia disregards the limitations placed on the responsibility of commanders for acts of their subordinates contained in Article 86(2) of the 1977 Additional Protocol I ("if they knew, or had information which should have enabled them to conclude in the circumstances at the time") and adopts a test more closely resembling the much-maligned rule of the Yamashita Case: "if he knew or had reason to know." Levis, supra note 3, at 13 (citations omitted).
While many of the indictments in both the ICTY and the ICTR contain counts based on command responsibility, the Celebici case in the ICTY is the first international military tribunal opinion to hold a defendant liable under this formalization of command responsibility.128 This Article examines the Celebici opinion more closely in Part IV when discussing the specific elements of command responsibility. The Celebici opinion reviewed and discussed all of the command responsibility cases and legal developments highlighted here in Part III. The discussion in this part shows that the doctrine of command responsibility has evolved historically in close proximity to some of the most monstrous events of the modern world, and this history of the doctrine forms its current content and creates a starting point to compare the doctrine with the ICC command responsibility provision.

D. Which Law To Compare?

The drafters of the ICC Statute created separate provisions for the military and civilian command responsibility standards that are structurally similar but differ in wording with respect to the superior-subordinate element and the knowledge element. This invites a comparison of the new ICC civilian standard with the ICC military standard. The ICC military standard will be interpreted in light of existing customary international law. Therefore, the comparison should start with the military command responsibility standard in customary international law.129 On the civilian side, it is difficult to assess whether the ICC civilian standard is a departure from prior customary international law for civilian command responsibility for two reasons: (1) The holdings of the handful of civilian cases tried after World War II are subject to various interpretations;130 and (2) the source of a civilian superior’s duty may be difficult to determine and may be less onerous than a military commander’s duty.131 Thus, to the extent that a lower standard may have developed for

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127. See ICTR Statute, supra note 37; ICTY Statute, supra note 37.
   This Judgement is the first elucidation of the concept of command responsibility by an international judicial body since the cases decided in the wake of the Second World War. It emphasizes that the doctrine of command responsibility encompasses “not only military commanders, but also civilians holding positions of authority” and “not only persons in de jure positions but also those in such positions de facto.”
   Id. (emphasis omitted).

129. The text of the ICC has not yet been interpreted by a court, although the ICTY has noticed the ICC text and commented on article 28 of the ICC Statute. See Celebici, supra note 20, paras. 342, 393. In conjunction with its declaration that it “makes no finding as to the present content of customary law” with respect to command responsibility, the court also referred to the recently enacted ICC treaty and its command responsibility provisions in article 28. Id. para. 393. Thus, the ICC Statute may also influence customary international law to the extent that the ICC military standard is different.
130. See, e.g., Fenrick, supra note 36, at 115–18.
131. See BASSIOUNI & MANIKAS, supra note 16, at 346, 368–70; Fenrick, supra note 36, at 118 (“[P]olitical and bureaucratic leaders may be held responsible for the acts of subordinates when the
civilians command responsibility, one could argue that the ICC standard merely codifies this lower standard. However, it is also plausible that the civilian standard is being newly developed for international tribunals that have explicit command responsibility provisions in their charters. The different paths taken by the ICTY and ICTR in the Celebici and Akayesu cases suggest this possibility. In Akayesu, the ICTR declined to apply a broad version of the command responsibility doctrine to the mayor of a town in Rwanda where the local militia committed abuses against displaced Tutsis taking refuge in the town. Further, it is unlikely that a clear synthesis of a civilian command responsibility standard will emerge from the post-World War II cases, although some of the cases can be “used as a guide for establishing that civilian leaders can be held culpable for certain acts of subordinates.”

Given that the pre-ICC status of the civilian command responsibility standard is plausibly in dispute, this Article compares the text of the ICC civilian standard to the text of the ICC military command responsibility standard because the ICC drafters clearly chose to delineate the two standards. This Article also compares the ICC standard to the most recent case interpreting the command responsibility doctrine, the Celebici prison camp case. This comparison is informed by the command responsibility doctrine’s history prior to Celebici. During this history the doctrine operated primarily in the military context, but was on occasion applied to civilians. Strictly speaking, the court’s reasoning in Celebici merely construes the ICTY statute’s command responsibility provision en route to convicting the prison camp commander under that provision. However, the Celebici court treats command responsibility in great detail and uses the doctrine to convict a commander. Furthermore, the Celebici court extensively reviews the command responsibility doctrine as applied to civilians, probably for the purpose of supporting its holding to the extent that the camp commander could be characterized as a civilian leader. Thus, it is likely that the current best evidence of customary international law for command responsibility is the Celebici case because of its thorough treatment of the doctrine. The leaders have a duty established either directly by international law or indirectly by domestic law or practice to ensure that their subordinates comply with the law . . . .

133. Fenrick, supra note 36, at 117–18.
134. See BASSIOUNI & MANIKAS, supra note 16, at 343, 368.
135. Celebici was the location of a prison camp that housed Bosnian Serbs; its commander, its deputy commander, and a guard were convicted of various human rights abuses of the prisoners. See Trial Information Sheet: Delalic & Others Case (IT-96-21-A) (visited Nov. 3, 1999) <http://www.un.org/ic/lou/glance/celebici.htm>; infra Section IV.A (providing a synopsis of the Celebici case).
136. See Celebici, supra note 20, para. 775.
137. See id. paras. 355–63.
138 See id. paras. 333–43. Another commentator foreshadows the effect the ICTY and ICTR might have on the command responsibility doctrine while commenting that the doctrine inserts a due diligence standard in Article 86(2) of Additional Protocol I to the Geneva Conventions (“if they did not take all feasible measures within their power to prevent or repress the breach”), and, in somewhat different language, [inserts a due diligence standard] in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. The future case law of these two Tribunals may further clarify
court self-consciously declares that "the principle of individual criminal responsibility of superiors for failure to prevent the crimes committed by subordinates forms part of customary international law."\(^{139}\)

The fact that *Celebici* is the first international criminal tribunal since the post-World War II tribunals to hold a superior criminally liable under the command responsibility doctrine\(^{140}\) further supports the argument that *Celebici* is good evidence of the state of customary international law.\(^{141}\) On the other hand, *Akayesu*, an ICTR case, which this Article analyzes in Section V.C, also discussed command responsibility and hesitated to apply the military standard to civilians.\(^{142}\) Thus, the ICTR construed command responsibility for civilians differently than the court in *Celebici*.\(^{143}\) As the analysis in Section V.C demonstrates, *Celebici* seems better reasoned and better rooted in evidence of customary international law. Although the defendant in *Akayesu* is more readily characterized as a civilian, this characterization is open to dispute. Thus, the two cases tangentially contribute to the debate while neither conclusively resolves the issue. Indeed, searching for conclusiveness in a prior civilian standard may be futile because the post-World War II cases are subject to the overriding criticism that they embody victor's justice and retroactive application of the law.\(^{144}\) In contrast, the establishment of the ICC, whose charter defines in detail the substantive crimes that can be brought before the court,\(^{145}\) eliminates these criticisms for cases that would eventually come before the ICC.

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\(^{141}\) See Minear, *supra* note 100, at xi, 12–19; R. John Pritchard, *General Preface to the Collection, in 2 The Tokyo Major War Crimes Trial: The Transcripts of the Court Proceedings of the International Military Tribunal for the Far East at xvi–xlvii* (R. John Pritchard ed. 1998); Bussiouni, *supra* note 3, at 8; May & Wierda, *supra* note 141, at 764. Minear writes that "where the present state of international law was unclear or unsatisfactory—as, for example, in regard to individual responsibility for acts of state—then the Big Four would codify international law in such a way that German and Japanese acts became criminal and individual enemy leaders became accountable." Minear, *supra* note 100, at 16.

\(^{142}\) See Minear, *supra* note 100, at 16.
To answer the question of “which law to compare,” this section has indicated that the primary comparison will be between the text of the ICC military and civilian standards. Comparing the text of each standard is the purpose of Part IV. Then, to give the comparison greater meaning, Part V applies the facts of several command responsibility cases involving civilian leaders to the ICC text. These cases were selected from the small number of civilian command responsibility cases because their facts show how a civilian leader could plausibly escape conviction under the ICC civilian standard, but probably would not escape conviction if the language of the ICC military standard were applied. Each case in Part V helps underscore different aspects of the comparison between the ICC civilian and military standards.

IV. THE ICC STANDARD—COMPARING CIVILIAN AND MILITARY COMMAND RESPONSIBILITY

This part will compare the ICC civilian standard to the ICC military standard by focusing on the first element, the superior-subordinate relationship, and on the second element, the standard of knowledge for the superior, because these two elements have significant textual differences between the two standards. This Article’s comparison does not address the third command responsibility element, the inaction element, because in the ICC this element is substantively identical for either type of leader, military or civilian.146 Within the first element, the concern is whether a pre-ICC requirement exists for a connection between the crime and the leader’s control of the subordinate, because the ICC Statute may have added this new nexus element for civilian superiors to be held liable. Within the second element, the concern is with the level of diligence a leader must exercise in monitoring and controlling subordinates.

A. The Elements of Command Responsibility That Frame the Comparison

The ICTY in the Celebici case expounded upon the intricacies of each element of the command responsibility doctrine. The case concerned a prison camp used by Croat forces to house Serb prisoners during the civil war in the former Yugoslavia.147 Of the four defendants, three were charged with command responsibility for various human rights violations such as murder, torture, and cruel treatment, which included acts of rape.148 One of the three, the camp commander, Zdravko Mucic, was convicted for the command responsibility counts.149 The court stated its holding as follows:

Mr. Mucic was the de facto commander of the Celebici prison-camp. He exercised de facto authority over the prison-camp, the deputy commander and the guards. Mr. Mucic is accordingly criminally responsible for the acts of the personnel in the

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146. See infra notes 155–158 and accompanying text.
147. See Celebici, supra note 20, paras. 109, 120, 122, 130, 141–43, 146–57.
148. See id. paras. 3–29.
149. See id. paras. 775.
Celebici prison-camp, on the basis of the principle of superior responsibility.\textsuperscript{150}

The ICTY in the \textit{Celebici} case construed the following three elements from the text of article 7(3) of the ICTY statute:

(i) the existence of a superior-subordinate relationship;
(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.\textsuperscript{151}

These same three elements are readily apparent in article 28(1), the ICC military commander standard, as shown below.

\begin{quote}
1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, \textit{[relationship element]} 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; \textit{[knowledge element]} 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. \textit{[inaction element]}\textsuperscript{152}
\end{quote}

The ICC civilian standard, article 28(2), additionally embodies these same three elements. It is presented below in a manner to show the changes between article 28(2) and article 28(1).

\begin{quote}
1.2. A military commander or person effectively acting as a military commander With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces subordinates under his or her effective command authority 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 subordinates where:
\end{quote}

\textsuperscript{150} Id. para. 776.
\textsuperscript{151} Celebici, supra note 20, para. 346.
\textsuperscript{152} Rome Statute, supra note 2, art. 28(1) (emphasized and bracketed text added to identify elements).
(a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committed or about to commit such crimes; and
(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.

While the ICC civilian standard has the same three elements as the military standard, it may arguably add a fourth element with the provision of article 28(2)(b), a requirement for a nexus between the criminal activity of the subordinate and the subordinate's activities that the superior can control. On the other hand, one could also interpret article 28(2)(b) as merely a modification of the superior-subordinate relationship element.

As the ICC provisions reveal, the heart of the comparison of civil and military command responsibility requires examination of the superior-subordinate relationship element and the knowledge element. The change to the inaction element does not require analysis because it is not substantive. The Celebici court treatment of the inaction element was terse and straightforward, also indicating that this element poses the fewest doctrinal challenges. Additionally, the language of the ICC inaction element is similar to the ICTY and ICTR inaction element language, suggesting that the ICC

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153. Id. art. 28(2).
154. Id. art. 28(2)(b) ("The crimes concerned activities that were within the effective responsibility and control of the superior . . .").
155. See Celebici, supra note 20, paras. 394–95. The Celebici court's analysis of the inaction element is given below:

The legal duty which rests upon all individuals in positions of superior authority requires them to take all necessary and reasonable measures to prevent the commission of offences by their subordinates or, if such crimes have been committed, to punish the perpetrators thereof. It is the view of the Trial Chamber that any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard in abstracto would not be meaningful.

It must, however, be recognized that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers. The question then arises of what actions are to be considered to be within the superior's powers in this sense. As the corollary to the standard adopted by the Trial Chamber with respect to the concept of superior, we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility. The Trial Chamber accordingly does not adopt the position taken by the ILC on this point, and finds that the lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior.

Id.
156. ICTR Statute, supra note 37, art. 6(3) ("[T]he superior failed to take the necessary and
might construe articles 28(1)(b) and 28(2)(c) along the lines that the Celebici court construed the inaction element.\textsuperscript{157} In sum, it is unlikely that the legal standard for the inaction element will differ greatly for civilian superiors versus military commanders.\textsuperscript{158}

B. The Superior-Subordinate Relationship Element

1. The Text of the ICC Statute

Article 28(1) of the ICC Statute applies to a “military commander or person effectively acting as a military commander.”\textsuperscript{159} In contrast, article 28(2) applies to “superior and subordinate relationships not described in paragraph 1,”\textsuperscript{160} that is, non-military superior-subordinate relationships. Historically, the military command responsibility doctrine applied not only to military commanders, but also to civilians.\textsuperscript{161} Thus, one can argue that in bifurcating the command responsibility standard based on the type of superior-subordinate relationship, the ICC Statute lessens the efficacy of the permanent court because the bifurcated structure allows a lesser knowledge standard for civilians, that is, “consciously disregarded,” and allows the potentially new nexus element, that is, “crimes concerned activities,” to also potentially bar liability for civilians.\textsuperscript{162}

2. Celebici on the Superior-Subordinate Relationship Element

The court in Celebici discussed the nature of the superior-subordinate relationship at issue in the ICTY Statute’s command responsibility provision. To construe the word “superior,” the court analyzed several cases, including reasonable measures to prevent such acts or to punish the perpetrators thereof.”); ICTY Statute, supra note 37, art. 7(3) (“[T]he superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”).

157. See Celebici, supra note 20, paras. 394–400. The defense also asserted “the existence of a separate requirement of causation,” which the court rejected. Id. paras. 396–99.

158. This Article follows the ICC article 28 approach of referring to military leaders as commanders, and civilian leaders as superiors. See supra note 36.

159. Rome Statute, supra note 2, art. 28(1). The “effectively acting as a military commander” civilian role is rooted in Protocol I of the Geneva Convention. See W. Hays Parks, A Few Tools in the Prosecution of War Crimes, 149 MIL. L. Rv. 73, 77 (1995). Parks further notes: Article 87 of Protocol I is entitled Duty of Commanders while actually setting forth the responsibilities of High Contracting Parties and Parties to a conflict to ensure that their respective military commanders comply with the law of war in their conduct of military operations. Although the title may appear misleading, it is not; a civilian in the command and control chain, such as the President of the United States, is a commander for these purposes, as previously acknowledged in the High Command Case. Applying the term commander or command responsibility to civilians apparently has caused some problems for the ICTY, which has coined the term superior authority to cover all cases.

Id. (citations omitted).

160. Rome Statute, supra note 2, art. 28(2).

161. See Celebici, supra note 20, paras. 355–63. After discussing several post-World War II civilian superior cases from both Germany and Japan, the court concludes that “the applicability of the principle of superior responsibility . . . extends not only to military commanders but also to individuals in non-military positions of superior authority.” Id. para. 363.

162. Rome Statute, supra note 2, art. 28(2)(a), (b).
the High Command and Hostage cases. The Celebici court held that while formal designation as a commander was not necessary, de facto or de jure possession of powers of control over actions of subordinates was in some cases sufficient to qualify one as a “superior.” Further, the court specifically held that a superior may be a military person or a civilian.

However, the final statement in the court’s holding on the superior-subordinate relationship element significantly limits the potential breadth of the language above. The court recognized that there is a “threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences, and, accordingly, cannot properly be considered their ‘superiors’...” Then the court finds that a superior must have “material ability to prevent and punish the commission of these offences,” and further states:

With the caveat that such authority can have a de facto as well as a de jure character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.

Thus, the court concludes that civilian superiors are only liable under command responsibility to the extent that they operate as military commanders, that is, exercise a military-like degree of control over their subordinates. Determining whether an individual operates as a military commander would be a factual inquiry. The more the individual’s organization resembled the traditional armed forces, the more likely this individual, if a leader with formal power and authority within the organization, would be characterized as a military commander. Civilians would be evaluated as a military commander if they were in the chain of command performing the function of a military commander. The Celebici court’s final holding is actually more limited than the facts of the cases that it

163. See Celebici, supra note 20, paras. 365-68; see also supra notes 105-112 and accompanying text (discussing High Command and Hostage).
164. See Celebici, supra note 20, para. 370.
165. See id., para. 377. To the extent that a camp commander would be viewed primarily as a military commander, the Celebici court’s discussion of command responsibility for non-military superiors would be dicta. In introducing its discussion of the responsibility of non-military superiors, the court says that it “deems it appropriate to first set out its reasoning [on command responsibility for] persons in non-military positions of authority.” Id., para. 355.
166. Id., para. 377.
167. Id., para. 378.
168. See Bassioune & Manikas, supra note 16, at 368-69. The authors further explain the nuance between a military commander and a civilian operating as a military commander:

[A] distinction has to be made between the commander-in-chief, who may be a civilian, and other civilians who may be in the military chain of command and who have effective command and control responsibilities. The difference is essentially of an evidentiary nature. Thus, a commander-in-chief, despite the title, may fail to exercise the full powers of the office. Conversely, a civilian who occupy [sic] a position of military command and control may make decisions on strategic or tactical matters or both.

Id. at 368.
This section has explored the superior-subordinate relationship element from the perspective of both a military commander and a civilian superior, pursuant to articles 28(1) and 28(2) of the Statute respectively. Another

169. For example, the defendant in the Roechling case, which the Celebici court discussed, Celebici, supra note 20, paras. 361–63, 376, 389, was an industrialist, and his command and control structure existed in an industrial setting rather than a military command structure, yet the Roechling court held him accountable under a command responsibility theory. See infra Section V.B (analyzing the Roechling case).

170. See supra note 144 and accompanying text.

171. Rome Statute, supra note 2, art. 28(1), (2). Up to this stage, this Article has suggested that the ICC Statute’s bifurcated command responsibility provision may lessen the efficacy of the ICC command responsibility doctrine, especially with regard to civilians. However, a counter-hypothesis should be considered: that the ICC approach actually expands the civilian command responsibility doctrine. This argument would require several steps.

First, one would accept that a dispute exists as to whether prior customary law contained a lesser standard for civilians. See supra notes 91–97 and accompanying text. Second, one would assume that the Celebici holding, that civilian superiors are “superiors” only to the extent that they operate as military commanders, reflects the current state of international customary law, or that it will reflect the future state of international customary law despite the absence of this requirement in the ICC Statute. Third, if the Celebici holding is taken textually, it can be read to be coextensive with the clause in article 28(1) of the ICC Statute, which states: “or person effectively acting as a military commander.” Rome Statute, supra note 2, art. 28(1). Adding up the steps, one would argue that before the ICC Statute the command responsibility status of civilian superiors was ambiguous, or was at best coextensive with military commanders when acting similar to a military commander. Having argued this interpretation of the prior law, one can plausibly contend that the explicit codification of command responsibility for civilian superiors removes the ambiguity of the prior law and explicitly expands the ICC Statute’s reach over civilian superiors who commit human rights atrocities.

There are several persuasive counter-arguments to the hypothesis that the new civilian provisions expand the reach of the command responsibility doctrine. First, despite their deficiencies, the post-World War II precedents are always available as persuasive authority and these courts held civilian superiors accountable using the command responsibility doctrine. In some of these cases, civilians were accountable under a command responsibility theory in situations where the civilian’s control over his or her subordinates was not military-like. See infra Sections V.A and V.B. These cases are of tremendous historical value beyond their legal meaning, and in similar circumstances future courts would likely look to them and to the scholarly work analyzing these post-World War II cases. See generally, Bassiouni & Manikas, supra note 16; Læbel, supra note 108; Minbari, supra note 100; Piccigallo, supra note 100; Ratner & Abrams, supra note 6; Röling, supra note 100; Bassiouni, supra note 4; Cassel, supra note 9; Green, supra note 68; Landrum, supra note 113; Parks, supra note 38. Second, one could attack the assumption that Celebici is the best evidence of civilian command responsibility. Normally, international treaties are better evidence of the state of customary international law than judicial decisions. If it goes into effect, the Rome Treaty will have gathered the signatures of sixty nations. One basis of international law is the consent of states, see Payam Akhavan, The Dilemmas of Jurisprudence, in The Contribution of the Ad Hoc Tribunals to the International Humanitarian Law, 13 AM. U. INT’L L. REV. 1509, 1519 (1998), and the ratification of a treaty by sixty nations acts as a stronger signal about the level of consent among states than a single court holding.

Third, the Celebici holding on the superior-subordinate relationship element, that the control must be military-like for command responsibility to apply to civilians, may not represent current customary international law; in discussing the knowledge element of the ICTY Statute, the Celebici court explicitly states that it makes no holding as to the present content of customary international law. See Celebici, supra note 20, para. 393. Additionally, as the Celebici court concedes, the ICTY command responsibility provision specifically uses a word of broad meaning, “superior,” to indicate which individuals fall under the command responsibility doctrine. Id. paras. 356–57. It violates the plain meaning of the use of this term to restrict its scope of coverage by insisting that it apply only to superiors with military-like control.

Finally, regardless of the type of control necessary to satisfy the knowledge element, the
perspective arises from a sub-element of article 28, the "crimes concerned activities" nexus element of article 28(2)(b). The next section discusses this component of the ICC Statute's civilian command responsibility standard because it affects the superior-subordinate relationship element. This nexus sub-element may further codify a less strict civilian command responsibility standard, or it may simply express the common-sense requirement that before a civilian superior can be found to have criminally neglected his or her duty to control subordinates, the authority to control them must pre-exist.

3. The New "Crimes Concerned Activities" Nexus Element in Article 28(2)(b) of the ICC Statute

Article 28(2), the ICC Statute's civilian command responsibility standard, has a sub-element that requires that the subordinates’ crimes must "[concern] activities that were within the effective responsibility and control of the superior."\(^\text{172}\) This sub-element is not present in the ICC Statute's military command responsibility provision, raising the question of its purpose in the civilian standard. One potential explanation of article 28(2)(b), the "crimes concerned" provision, is that it implicitly embodies a causation element. This suggestion arises from the defense's causation argument in the Celebici case, which the court rejected insofar as it applies to superior responsibility.\(^\text{173}\) The defense in Celebici argued that the prosecution must prove that the superior’s failure directly caused each violation. The court "found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility."\(^\text{174}\) While rejecting causation as a separate element, the court hedged a bit by implying that a causal nexus may be necessary for proof of the inaction element.\(^\text{175}\)

The problem with this proffered explanation is that the language of article 28(2)(b), "crimes concerned activities," does not seem fully to express the idea of causation. First, "concerned," means "relating to, pertaining to, affecting, involving, being substantially engaged in or taking part in."\(^\text{176}\) Only the word "affecting" connotes traditional criminal causation. This definition of

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\(^\text{172}\) Rome Statute, supra note 2, art. 28(2)(b).
\(^\text{173}\) See Celebici, supra note 20, paras. 396-400.
\(^\text{174}\) Id. para. 398. The court noted, however, one exception that did support a causation element. The exception the court noted is from a commentator who, "[a]s part of his analysis of the requirement that the superior has failed to take the necessary and reasonable measures to prevent or punish the crimes of his subordinates, ... suggests the existence of causation as 'the essential element' in cases of command responsibility." Id. para. 398 n.428 (citing M. CHErif BASsIOUNI, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 350 (1996)).
\(^\text{175}\) See Celebici, supra note 20, para. 399 ("In fact, a recognition of a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior’s failure to take measures within his powers to prevent them.").
"concerned" seems to pull the meaning of article 28(2)(b) under the superior-subordinate relationship, specifically under the fairness concern that the superior actually have authority over, or be able to control, the subordinates' actions for which the superior might be criminally liable.

Second, one can argue that article 28(2)(b) simply states the obvious, that civilian superiors do not have the same kind of around-the-clock, seven-days-a-week control over subordinates that military commanders have. Under this argument, article 28(2)(b) is not a causation element, but is a mere recognition of the nature of civilian authority. However, under this interpretation, article 28(2)(b) might be superfluous because the scope of the superior-subordinate relationship is articulated in both articles 28(1) and 28(2). Courts are hesitant to construe a portion of a statute as superfluous; thus, it is unlikely that article 28(2)(b) would be taken as a mere statement of the differences between civilian control and military control. Consequently, while article 28(2)(b) may not express causation, its actual meaning will remain unclear until construed by the ICC.

This completes the discussion of the superior-subordinate relationship element as expressed by the ICC Statute's command responsibility provision. Next, Section IV.C discusses the knowledge element, which contains the most profound changes between the ICC Statute's military and civilian standard. It gives a civilian superior less reason to be diligent because he or she has more legal room to remain willfully blind to the unlawful actions of subordinates.

C. The Knowledge Element

1. The Text of the ICC Statute

Article 28(1)(a) says that a military commander is criminally responsible for crimes of subordinates under his or her effective control when the commander "knew, or, owing to the circumstances at the time, should have known," about the actual or impending crime. In contrast, article 28(2)(a) requires that the civilian superior "either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit" the crime. The civilian formulation sets an easier standard for the accused to exonerate himself or herself via the knowledge element.

2. Celebici on the Knowledge Element

The clear difference in language between "consciously disregarded," and "owing to the circumstances at the time, should have known," makes it unnecessary for this Article to split hairs on the knowledge standard as the Celebici court did. It analyzed the ICTY Statute knowledge element in two parts: (1) actual knowledge, "knew," and (2) "had reason to know." Also,
the *Celebici* court was clearly aware of the ICC Statute.\(^{180}\) With respect to actual knowledge, the *Celebici* court rejected the prosecutors’ proffered “Yamashita-like” presumption that a commander’s knowledge of the crimes can be presumed.\(^{181}\) The court held that actual knowledge cannot be presumed but, in the absence of direct evidence of superior knowledge, can be inferred from circumstantial evidence.\(^{182}\) The *Celebici* court went on to list twelve factors that can inform the inference.\(^{183}\) Thus, actual knowledge can be “established through direct or circumstantial evidence, that [a superior’s] subordinates were committing or about to commit crimes.”\(^{184}\)

With respect to the “had reason to know” standard, the court acknowledged that willful blindness is criminal, and then was careful to distinguish the ICTY standard, “knew or had reason to know,” from “should have known.” In this area the court was carefully respecting these minute differences in language because of the rejected “should have known” formulations offered during the negotiations over Additional Protocol I to the Geneva Conventions.\(^{185}\) The court held that the following standard reflected the practice of customary law at the time of the indictment of the *Celebici* defendants, and was accordingly the mens rea standard for article 7(3) of the ICTY Statute:

[A] superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.\(^{186}\)

Thus, under this standard, a superior may possess the mens rea for criminal liability when “he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offenses by indicating the need for additional investigation in order to ascertain whether

\(^{180}\) The *Celebici* court noted the new ICC civilian knowledge standard. See id. para. 393 n.424.

\(^{181}\) See id. para. 384. The court justified rejecting the presumption as follows: [T]he Prosecution asserts the existence of a rule of presumption where the crimes of subordinates are a matter of public notoriety, are numerous, occur over a prolonged period, or over a wide geographical area. However, the legal authorities cited by the Prosecution in this regard are insufficient to support the operation of such a rule. Among the cases relied upon by the Prosecution in this respect is that of General Yamashita. An examination of the findings of the Military Commission however, does not bear out this claim. In fact, the nature of the mens rea ascribed to General Yamashita in that case is not immediately apparent from the Commission’s decision.

\(^{182}\) See id. para. 386.

\(^{183}\) See id.

\(^{184}\) Id. para. 383.


\(^{186}\) *Celebici*, supra note 20, para. 393.
such crimes were committed or were about to be committed by his subordinates."\textsuperscript{187}

The court then made several statements that seem to indicate the court believed that the ICC Statute may change the state of international customary law. The court expressly said that it "makes no finding as to the present content of customary law on this point."\textsuperscript{188} Then, the court paraphrased the ICC Statute, stating that the ICC Statute makes a commander criminally responsible where he knew or should have known of offenses.\textsuperscript{189} If this were the exact language of the ICC Statute, then, given the amendment history of Protocol I, this might signal a significant change in the command responsibility mens rea standard. However, the Celebici court failed to mention the modifying clause "owing to the circumstances at the time," immediately preceding the phrase "should have known" in the ICC Statute. This clause would make a substantial difference and probably makes the ICC standard closer to the ICTY standard than to the mythical "should have known" standard.\textsuperscript{190}

The concern about whether "had reason to know" is different from "owing to the circumstances at the time, should have known," will be an important issue when article 28(1)(a) is construed by the ICC. But to compare article 28(1) to article 28(2), such precise analysis of the knowledge standard is unnecessary because the civilian knowledge standard is unambiguously less strict. The following table illustrates the point.\textsuperscript{191}

\begin{tabular}{l}
\hline
\textbf{Article 28(1)(a) vs. Article 28(2)}
\hline
\textbf{Knowledge Standard} & Article 28(1)(a) & Article 28(2) \\
\hline
\textbf{Had reason to know} & Yes & No \\
\hline
\textbf{Owing to the circumstances at the time} & No & Yes \\
\hline
\end{tabular}

\textsuperscript{187} Id. para. 383.
\textsuperscript{188} Id. para. 393.
\textsuperscript{189} See id.
\textsuperscript{190} While this observation of the Celebici court's omission does not impact the primary focus of this Article, it does illustrate the scholarly following of such details. Many of the articles cited herein would interpret a "should have known" standard along the lines of the Yamashita precedent. See, e.g., Crowe, supra note 116, at 229. At most, my interpretation of the actual ICC standard is that it simply lets in more types of information as evidence to impute knowledge to the defendant, that is, to the extent that circumstances in the ICC is broader than information in Protocol I.

Also, to the extent that the ICC military standard reflects the second formulation rejected for Protocol I, "knew or should reasonably have known in the circumstances at the time," this supports the Celebici court's view that the ICC military formulation might extend liability. See supra notes 184–186 and accompanying text.

\textsuperscript{191} The only clauses cited in this table are those clauses that are not cited elsewhere in this Article.
TABLE 1 - LANGUAGE OF MENS REA FOR THE KNOWLEDGE ELEMENT OF COMMAND RESPONSIBILITY

<table>
<thead>
<tr>
<th>Most Strict ←</th>
<th>Candidates for the Current International Law Standard(s)</th>
<th>The New ICC Civilian Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strict Liability:</td>
<td>no mens rea.</td>
<td>ICC Non-Military: knew or consciously disregarded information which clearly indicated.</td>
</tr>
<tr>
<td>Rejected for Protocol I:</td>
<td>(a) knew or should have known;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(b) knew or should reasonably have known in the circumstances at the time.</td>
<td></td>
</tr>
<tr>
<td>ICC Military:</td>
<td>knew, or, owing to the circumstances at the time, should have known.</td>
<td></td>
</tr>
<tr>
<td>ICTY &amp; ICTR:</td>
<td>knew or had reason to know.</td>
<td></td>
</tr>
<tr>
<td>Accepted for Protocol I:</td>
<td>knew or had information which should have enabled them to conclude in the circumstances at the time.</td>
<td></td>
</tr>
<tr>
<td>U.S. Army Field Manual:</td>
<td>has actual knowledge, or should have knowledge, through reports received by him or through other means.192</td>
<td></td>
</tr>
</tbody>
</table>

As shown, the ICC civilian standard is sufficiently distinct from the language of the previous standards and from the ICC military standard so that it is unlikely that a court will construe them to be equivalent. Even though the ICC military standard is listed in the middle column, the table also shows that the status of the ICC military standard is open to debate.193 One can argue that the ICC military standard is more strict than the Additional Protocol I standard because its language is nearly identical to the second formulation rejected for Protocol I.

The discussion of Subsections IV.C.1 and IV.C.2 shows that the ICC civilian standard is textually different from the ICC military standard and the other military standards, and therefore, deserves closer evaluation. The next section does this by discussing the effect of the civilian standard on a superior’s duty to remain informed of the subordinate’s activities, and how this effect manifests itself in the evidentiary setting of the court room.

3. The “Consciously Disregarded” Standard in the Knowledge Element in Article 28(2)(a) of the ICC Statute

The new civilian knowledge standard suggests a significantly lessened duty of the civilian superior, compared to the military commander, to remain informed of events within the superior’s domain. The ICTY standard, “knew or had reason to know,” implies that the superior or commander meets the knowledge requirement when he or she has enough information to conclude


193. See BASSIOUNI & MANIKAS, supra note 16, at 366 ("National courts, however, have set different legal tests ranging from 'could have known' to 'having actual knowledge.'").
that the crimes are occurring or have occurred. 194 “Consciously disregarded” may go much further, and perhaps represents the “willful blindness” that the Celebici court said was actionable. 195 The word “consciously” means being “well aware of some object, impression, or truth.” 196 The Celebici court said willful blindness is when a superior “simply ignores information within his actual possession compelling the conclusion that criminal offenses are being committed or about to be committed.” 197 Given these meanings, the most important question about the “consciously disregarded” standard is whether it reduces the superior’s duty, from a criminal liability perspective, to remain informed. If the duty remains at the same level, and is subject to the same scrutiny, then the superior should be receiving the same reports, information, and communications from subordinates. 198 If the duty remains the same, the difference between article 28(1)(a) and 28(2)(a) is perhaps not as great as it could be. The degree of difference then turns on the loosening of the standard implied by the new phrase “consciously disregard.”

On the other hand, if the ICC construes article 28(2)(a) to lessen the duty of the superior to stay informed, this would change the evidence available at trial because superiors might systematically “fail to acquire such knowledge.” 199 In the long run, even a marginal reduction in the superior’s duty could have a more significant impact on prosecutions than the loosening of the knowledge imputation standard from “owing to the circumstances at the time, should have known,” to “consciously disregarded information that clearly indicated.” While damaging to the efficacy of the court, this loosening is less damaging than a lowered duty for purposes of command responsibility. With a lowered duty, there could be less evidence available. With the same level of duty, but a “consciously disregarded” standard, the court would have to decide two questions: (1) whether the superior’s actions embody a choice to turn away from the information, and (2) whether the information was clear about the fact that crimes were occurring or about to occur. Under the ICTY Statute, the court has to evaluate these same two questions to decide whether the defendant “had reason to know.” Thus, there are similarities, but under the ICC text the evidentiary burden will likely be higher for the prosecutor when the defendant is a civilian superior.

This part has thus analyzed the ICC Statute from the perspective of the two most relevant elements of the command responsibility doctrine. With this appreciation of the contours of article 28, Part V applies article 28 to the fact patterns of various civilian defendants from past cases.

195. Celebici, supra note 20, para. 387.
197. Celebici, supra note 20, para. 387.
198. A lowered duty to remain informed would take the force out of the Roechling court’s holding that “no superior may prefer this [lack of knowledge] defense indefinitely; for it is his duty to know what occurs in his organization, and lack of knowledge, therefore, can only be the result of criminal negligence.” Roechling, supra note 29, at 1106.
199. Celebici, supra note 20, para. 388.
V. PRIOR CASES RE-EVALUATED UNDER THE ICC STATUTE’S COMMAND RESPONSIBILITY STANDARD

A. The Tokyo Trials and the Hirota Case

The Tokyo trials of the IMT-FE indicted “28 Japanese, who had all, with two exceptions, occupied the highest government and military posts at sometime between 1928 and 1945.” One commentator characterized the Tokyo trials as “the greatest inquisition of political leaders by their foreign enemies that we have seen in this century; that is both its glory and its infamy.” Kōki Hirota, a diplomat and a civilian, was one of the defendants. The IMT-FE found Hirota guilty on Count 55, a command-responsibility-like provision. Hirota had been foreign minister of Japan from 1933–36, served a short stint as prime minister, and was again foreign minister in 1937–38. During Hirota’s second term as foreign minister, Japan’s army was invading China and the Japanese army committed atrocities over a seven-week period in and around the city of Nanking.

Hirota had received reports of these atrocities. When the Japanese took control of Nanking they simultaneously established an embassy with a line of authority traced to Hirota:

Japanese Embassy officials entered the city of Nanking with the advance elements of the Army, and an official of the Embassy informed the International Committee for the Nanking Safety Zone that the “Army was determined to make it bad for Nanking, but that

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200. Piccigallo, supra note 100, at 14; see also 1 Tokyo Trial Transcript, supra note 29, at 686–804.
201. 1 Tokyo Trial Transcript, supra note 29, at xxxi.
202. See id. at 21–75.
203. See 20 id. at 49,792. The judgment of the court characterizes the situation at Nanking as follows below:

Individual soldiers and small groups of two or three roamed over the city murdering, raping, looting and burning. There was no discipline whatever. Many soldiers were drunk. Soldiers went through the streets indiscriminately killing Chinese men, women and children without apparent provocation or excuse until in places the streets and alleys were littered with the bodies of their victims. . . . Chinese were hunted like rabbits, everyone seen to move was shot. At least 12,000 non-combat Chinese men, women and children met their deaths in these indiscriminate killings during the first two or three days of the Japanese occupation of the city.

There were many cases of rape. Death was a frequent penalty for the slightest resistance on the part of a victim or the members of her family who sought to protect her. Even girls of tender years and old women were raped in large numbers throughout the city, and many cases of abnormal and sadistic behavior in connection with these rapes occurred. Many women were killed after the act and their bodies mutilated. Approximately 20,000 cases of rape occurred within the city during the first month of the occupation.

Id. at 49,604–06.
204. See 1 id. at 70–71; Minear, supra note 100, at 67 (noting that the defendants at the Tokyo trial “deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches [of the laws of war].”).
205. See 20 Tokyo Trial Transcript, supra note 29, at 49,788.
206. See id. at 49,604–10.
207. See id. at 49,610–11; 2 id. at 2661.
the Embassy officials were going to try to moderate the action.\footnote{208}

Many of the atrocities occurred at the University of Nanking, which was located next to the Japanese Embassy,\footnote{209} making it plain that Japanese officials at the embassy "were aware of the deplorable situation."\footnote{210} Hirota discussed the reports with the Japanese War Ministry, but he accepted "assurances" from the War Ministry that the problem would be corrected despite continuing reports.\footnote{211} The IMT-FE found this behavior to be a dereliction of duty and criminal negligence.\footnote{212} Hirota was also found guilty of conspiracy to commit aggression and waging a war of aggression against China.\footnote{213} For all these crimes he was sentenced to death.\footnote{214}

Had Hirota's case been evaluated under the ICC civilian command responsibility standard, he likely would escape the Count 55 charge. There is no evidence that Hirota, as foreign minister, was a person "effectively acting as a military commander"\footnote{215} with respect to the troops who committed atrocities at the "Rape of Nanking." Thus, Hirota would fall under ICC article 28(2). Considering first the superior-subordinate relationship element, article 28(2) would likely exonerate Hirota because these atrocities were probably not "committed by subordinates under his or her effective authority and control."\footnote{216} The Japanese army committed the crimes, and unless Hirota's embassy had some authority, control, or significant influence over these troops, it is unlikely that the superior-subordinate relationship element would be satisfied.\footnote{217}

\footnote{208} See 20 id. at 49,608–11.
\footnote{210} BRACKMAN, supra note 209, at 180.
\footnote{211} See 20 TOKYO TRIAL TRANSCRIPT, supra note 29, at 49,791; MINEAR, supra note 100, at 71.
\footnote{212} See 20 TOKYO TRIAL TRANSCRIPT, supra note 29, at 49,791. The court characterized Hirota's criminal lapse as follows:

Hirota was derelict in his duty in not insisting before the cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence.

\textit{Id.} (emphasis added).
\footnote{213} See 1 TOKYO TRIAL TRANSCRIPT, supra note 29, at 27, 33; 20 id. at 49,792.
\footnote{214} See 20 id. at 49,855; BRACKMAN, supra note 209, at 378–84.
\footnote{215} 20 TOKYO TRIAL TRANSCRIPT, supra note 29, at 49,788–92.
\footnote{216} Rome Statute, supra note 2, art. 28(2).
\footnote{217} The difficulty of reconciling Hirota's apparent lack of control over the atrocity-committing individuals with his conviction explains the scholarly objection to the command responsibility aspect of his case. See MINEAR, supra note 100, at 69–73. The court declared that Hirota should have "insisted before the cabinet" that something be done, 20 TOKYO TRIAL TRANSCRIPT, supra note 29, at 49,791, which means that the court must have believed that Hirota, at some level, had authority and influence to apply to the situation. Hirota's prior tenure as prime minister might support this theory.

Taking a different perspective, the IMT-FE may have been transparently applying the concept of de jure authority developed by the court in the \textit{Celebici} case. See \textit{Celebici}, supra note 20, para. 354 ("The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility.").

A third perspective on the case is that Hirota was held culpable on the command responsibility
Second, Hirota would probably be found not culpable on the knowledge element of the ICC Statute, article 28(2)(a), because he did not "consciously disregard[] information which clearly indicated" the atrocities. The information was clear enough for Hirota to act on it. In addition, the fact that he acted by raising the issue with the War Ministry shows that he did not consciously disregard it. However, one could counter-argue that later, after the "assurances," Hirota did consciously disregard the continuing reports.218 Under the ICC Statute, if Hirota had reacted to the reports to the extent of his power and influence, in a timely manner, and reacted to each report as it came in, then it would be difficult to claim that he consciously disregarded the information.

Returning to the superior-subordinate relationship element, this discussion adds a hypothetical fact to the Hirota case to evaluate article 28(2)(b): the ICC's new nexus element. Consider that Hirota likely had civilian foreign service employees in the city of Nanking at the Japanese Embassy. Add the hypothetical fact that some of these employees were participating in atrocities after their work hours. As required by article 28(2)(b), would these crimes "concern" the subordinates' activities under Hirota's control? In this hypothetical, defense counsel might be able to use article 28(2)(b) to exonerate Hirota because the employees committed the criminal activities during off-duty hours. With all other elements being equal, a civilian superior might be exonerated where a military commander running the same institution in the Nanking area staffed with military personnel would be held liable.

The discussion of the Hirota case raises one of the primary concerns with the bifurcated ICC command responsibility standard: that it privileges form over function. Status-based determinations are often highly fact specific, and a wide range of potential defendants will surely plead that they fall outside the confines of article 28(2). In an era of loose, paramilitary organizations practicing terrorism and guerrilla warfare, the difficulties of a status-based, bifurcated standard seem especially pronounced.219

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218. See id. ("Reports of atrocities continued to come in for at least a month.").
219. See RATNER & ABRAMS, supra note 6, at 129. These authors elaborate on the difficulties raised by paramilitary groups:
[A]s a practical matter, the extension of culpability under command responsibility raises special questions in the context of organizations without rigid military hierarchies. Prosecutors will need to determine the chain of command in the absence of clear rank or even formal decision-making structures. Reliance will need to be placed on witness testimony and other indicia of the customary practices observed within a particular group.

Id. at 129.
B. The Nuremberg Trials and the Roechling Case

To further explore the effect of the ICC civilian command responsibility standard, this section applies the facts of the Roechling case to these provisions. Hermann Roechling was a German steel industry executive who owned or operated various production facilities before World War II. As the Third Reich expanded, he supervised and improved steel production in the occupied countries and began taking advantage of compelled labor from the citizens of these occupied countries to operate the factories. Some of the factories using prison labor existed symbiotically with military prison camps where the workers were systematically mistreated.

A French military tribunal tried Hermann Roechling and several others for various counts. The counts against Roechling included: (1) preparing to undertake a war of aggression; (2) undertaking aggressive war; and (3) mistreatment of workers supplied by the German armed forces and state police. The French court analyzed the first two counts under a "direct" command responsibility or direct participation standard. Our task below is to analyze the facts underlying each count against the ICC Statute's command responsibility standard, assuming that all three counts were brought using the command responsibility doctrine.

1. The "Preparing To Undertake a War of Aggression" Count

The first count would have the same outcome under the ICC Statute as in the actual Roechling case. The French superior military court affirmed the general tribunal's holding that merely using low-grade ore in steel

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220. The Roechling case was reported along with the Nuremberg military trials by the U.S. Government printing office because many U.S. court cases cited it. The Celebici court cites and analyzes the Roechling case in its holding that civilian leaders can be liable under command responsibility with mere de facto control and influence:

[T]he Roechling case is best construed as an example of the imposition of superior responsibility on the basis of de facto powers of control possessed by civilian industrial leaders. While the accused in this case were found guilty, inter alia, of failing to take action against the abuse of forced labourers committed by the members of the Gestapo, it is nowhere suggested that the accused had any formal authority to issue orders to personnel under Gestapo command. Instead, the judgement employs the wording "sufficient" authority, a term not normally used in relation to formal powers of command, but rather one used to describe a degree of (informal) influence. This view is further supported by the reasoning employed in the judgement of the court of first instance in this case, which, in response to the claim of one of the accused that he could not give orders to the plant police and the personnel of a punishment camp, as these were under the orders of the Gestapo, makes reference to his status as Hermann Roechling's son-in-law—clearly a source of no more than de facto influence—as a factor affecting his authority to obtain an alleviation in the treatment of workers by the plant police.

Celebici, supra note 20, para. 376 (citations omitted).


222. See id. at 1079, 1086.

223. See id. at 1087–89.

224. See id. at 1061, 1077–78.

225. The superior court is the appellate court. See id. at 1097. The general tribunal is the trial court. See id. at 1061.
production was not sufficient evidence to conclude that Roechling participated in "preparations for aggressive war."\textsuperscript{226} Factually, at issue was whether Roechling knew of the preparations, due to his attendance at several secret conferences with Goering and others in 1936 and 1937.\textsuperscript{227} Roechling asserted that he did not know, and that the discussion at the conferences concerned reviving the German economy.\textsuperscript{228} Focusing only on the knowledge element, under these facts and the ICC civilian standard of knowledge, "knew or consciously disregarded," Roechling would likely be exonerated. There was no evidence that Roechling ever had any information to "consciously disregard" and in this pre-war period it seems logical that, as an industrialist, he would attend such conferences for other purposes. The Roechling court seemed unwilling to impute to Roechling the knowledge of preparing for aggressive war from Roechling's knowing use of uneconomical, low-grade ore to raise steel production. While the inference is perhaps not so illogical, to the court's credit, there are also other plausible explanations for using low-grade ore.

With respect to the new nexus element, Roechling's subordinates' activities probably would be crimes that concerned these activities, but this conclusion flows primarily from the very wide net cast by the broad crime of "preparing for aggressive war." If steel production is adjudged to be punishable under this broad crime, the nexus element is probably met because merely producing excess steel becomes the basis for the crime.

2. \textit{The "Undertaking a War of Aggression" Count}

In the second count, conducting aggressive war, Roechling would likely be exonerated under the ICC civilian standard. The Roechling superior court also exonerated Roechling on this count\textsuperscript{229} after the General Tribunal let the count stand.\textsuperscript{230} The count arose from Roechling's managerial role, once the war was underway, with respect to his steel conglomerate in Germany and steel production facilities in occupied countries.\textsuperscript{231} As in the first count, whether Roechling would meet the new ICC civilian nexus element depends in large part on the breadth of the definition of "conducting a war of aggression."\textsuperscript{232} The ICC civilian knowledge element is again likely to exonerate Roechling if the facts of this count were applied to command responsibility liability. Roechling can easily claim that he was merely producing steel. To meet the "consciously disregard" standard, a prosecutor would have to show both that (1) concrete information was presented to

\textsuperscript{226} Id. at 1108.
\textsuperscript{227} See id. at 1077.
\textsuperscript{228} See id.
\textsuperscript{229} See id. at 1140.
\textsuperscript{230} See id. at 1079.
\textsuperscript{231} See id. ("Due to his talents as technician and also to the pressure which he exercised over the industry of occupied countries, Hermann Roechling was able to eliminate the drop in ferrous production.").
\textsuperscript{232} Id. at 1076.
Roechling informing him that his company's activities were a part of "undertaking a war of aggression," and (2) that Roechling chose to remain willfully blind to this information. With this high hurdle, Roechling would be exonerated unless, following the heritage of the Yamashita and Hirota cases, the ICC adopted a presumption of such knowledge when the activities are widespread. However, judging from the Celebici court's holding, adoption of such a presumption is unlikely. Finally, even with the presumption of exposure to "information that clearly indicated," a prosecutor still would likely have to prove that Roechling chose to "consciously disregard" the information. Thus, the knowledge element of the ICC civilian standard is a significant barrier to prosecution of industrialists like Roechling who participate in conducting a war of aggression.

3. The "Mistreating Workers" Count

In the third count, mistreating workers, Roechling would likely be exonerated under the ICC Statute even though the French court held, under a command responsibility theory, that he was guilty. As a preliminary matter, Roechling was also found guilty of direct participation in commandeering civilians from occupied countries to work in the steel factories on the basis of his requests to the armed forces for more workers. On the primary count, mistreating workers, at the trial level, the French court recognized that the basis of Roechling's liability was not from "having ordered this abominable treatment but of having tolerated it and of not having done anything in order to have [the treatment] modified." In affirming the judgment, the superior

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233. See Crowe, supra note 116, at 200, 203. Crowe notes:

Nevertheless, where murder and rape and vicious, revengeful actions are widespread offenses and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.

*Id.* (citations omitted).

234. See Celebici, supra note 20, paras. 385–86.

235. See Roechling, supra note 29, at 1125.

236. See id. at 1134.

237. See id. at 1085, 1128–34. However, the requests for more workers occurred because the German armed forces had initially established the practice of supplying workers for the factory. Additionally, both courts also found Roechling guilty of plunder. See id. at 1095–96, 1140.

238. Id. at 1088. In addition to the superior court's recognition that the liability arose from the dereliction of duty, the trial court also commented in depth concerning Roechling's neglect of his duty to ensure the wellbeing of workers:

[It] was his duty as the head to inquire into the treatment accorded to the foreign workers and to the prisoners of war whose employment in his war plants was, moreover, forbidden by the rules of warfare, of which fact he must have been aware; that he cannot escape his responsibility by stating that the question had no interest for him; that his double position as chief of an important industry and as president of the RVE would have given him the necessary authority to bring about changes in the inhuman treatment of these workers; that witnesses have stated that at several times he had the opportunity to ascertain what the condition of his personnel was during his visits to the plants; that he himself states that he came in contact with these men from Voelklingen, particularly with the internees from Etzenhofen, who were recognizable by the prison garb, but that he had never considered the condition of their existence, although their miserable situation was
court recognized that Roechling was “not accused of having ordered this horrible treatment, but of having permitted it; and indeed supported it, and in addition, of not having done [his] utmost to put an end to these abuses.” 239 The superior court rejected Roechling’s contention that he was not concerned with “manpower matters.” 240

Under the ICC Statute’s new nexus requirement in article 28(2)(b), Roechling’s liability would turn on whether the mistreatment occurred at the factory or at the nearby camp. Because the armed forces and the SS originally supplied the workers, the SS retained significant aspects of control over the workers. 241 Specifically, at one plant under Roechling’s corporate umbrella, the SS established a nearby punishment camp. 242 Workers who violated various regulations and ordinances were housed in the camp, but transported each day to the factory to work. 243 This fact raises the question of whether Roechling would be held liable under ICC command responsibility for mistreatment at both the factory and the camps. The Roechling court held the defendant liable for mistreatment at both locations. 244 Presumably, under ICC article 28(2)(b), mistreatment at the factory is a “crime concerned” with the activities that Roechling was ultimately responsible for as a manager. However, at the camp, the new ICC nexus requirement would likely shield Roechling from liability for mistreatment, despite the symbiotic relationship between the plant and the factory. 245 Mistreatment at the plant is not a crime concerning any activities under Roechling’s control because the SS ran the punishment camp. Without this new nexus requirement, Roechling might be held liable because workers were subjected to camp punishment because of their original infractions at the factory. 246

Under the “consciously disregarded” knowledge element standard of the ICC Statute, Roechling would probably escape liability where the Roechling

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239. Id. at 1136.
240. Id.
241. See id. at 1135.
242. See id.
243. See id. The manager of this plant, one of the other defendants, “participated, on [his] own initiative, in the implementation of strict measures as prescribed in the regulations and ordinances of the Reich administration for the maintenance of working discipline and repeatedly took the initiative in a manner which exhibits conformity with the views, aims, and measures of that administration.” Id. at 1134.
244. See id. at 1135.
245. The court described the relationship between the factory and the camp as follows: In April 1943, following an agreement between the leaders of the Roechling firm and the Gestapo, a summary court was set up to punish disciplinary offenses by the foreign workers, such as repeated absence, repeated tardiness, stoppage of work, refusal to perform additional work, [and] undisciplined conduct. At the same time a punishment camp was set up about 15 kilometers away at Etzenhofen, by agreement between the leaders of the Roechling firm and the Gestapo, to which the foreigners sentenced by the summary court were to be consigned for a maximum period of 56 days. The persons undergoing sentence who spent the night in Etzenhofen were taken to the Roechling plant in the morning and back to the camp at night. Id. at 1135.
246. See id.
court found liability.\textsuperscript{\textcopyright} The prosecution would have to prove an affirmative action by Roechling that directly enabled him to avoid information concerning the crimes. Roechling claimed to know nothing of the mistreatment or poor conditions at the factory.\textsuperscript{\textcopyright} Some witnesses testified to the contrary.\textsuperscript{\textcopyright} Even if Roechling inspected the factory at issue, he still could avoid liability under the "consciously disregarded" standard unless the prosecution had some evidence that showed that Roechling adopted a particular factory tour route or declined to inspect certain areas. The local plant manager has it in his interest to show Roechling that the plant is running well, so a "sprucing-up" before inspection by local plant management would likely exonerate Roechling under a "consciously disregarded" standard. Thus, the new knowledge element significantly enhances a defendant's ability to escape liability through delegation and shielding information, so long as the shielding or filtering of upward-flowing information has some justification other than as a mechanism for the manager to remain willfully blind. In contrast, under a "had reason to know," or even a "should have known" standard, a court can more readily conduct a factual balancing as to the genuineness of the managers' efforts to stay informed.

Section V.B has recast the facts underlying three of the counts against Roechling onto article 28(2) of the ICC Statute. The recasting shows that the less strict standard can significantly impact case outcomes, and therefore the new ICC civilian standard lessens the permanent court's ability to reach those individuals who are behind an organized movement that produces serious violations of human rights.

C. The ICTR and the Akayesu Case

1. Is There a "Split of Authority" on Civilian Command Responsibility?

In the case of Akayesu, the ICTR declined to state a general rule that the command responsibility doctrine applies to civilians.\textsuperscript{\textcopyright} Mr. Akayesu was elected major of a town in Rwanda approximately a year before the genocide of the Tutsi people.\textsuperscript{\textcopyright} The local militia committed abuses against displaced Tutsis taking refuge in the town.\textsuperscript{\textcopyright} One of the main disputes in the case was

\textsuperscript{\textcopyright} See id. at 1134.

\textsuperscript{\textcopyright} See id. at 1133. Roechling stated that he was "forced to employ the forced workers who were placed at their disposal." Id. at 1113.

\textsuperscript{\textcopyright} See id. at 1136 ("Roechling [had] repeated opportunities during the inspection of his concerns to ascertain the fate meted out to his personnel, since he could not fail to notice the prisoners' uniform[s on those occasions [of a plant visit].").

\textsuperscript{\textcopyright} See Akayesu, supra note 96, § 6.2. Quoting the commentary to Additional Protocol I, the court expressed that there are many "varying views regarding the Mens rea requirement for command responsibility." Id.


\textsuperscript{\textcopyright} See id. para. 11.
whether Mr. Akayesu had authority and control over this local militia. The Akayesu court analyzed the Hirota case from the IMT-FE trials. The court cited Judge Röling's dissent, which expressed concern with holding government officials responsible for the behavior of the army. The Akayesu court then found that "command responsibility for civilians remains contentious," therefore, the ICTR should evaluate civilians on a case by case basis to be sure that the "power of authority actually devolved upon the [civilian]... to take all necessary and reasonable measures" to prevent or punish the crimes.

Thus, compared to the court in Celebici, the Akayesu court articulated a significantly reduced scope of civilian command responsibility. As the only two modern international criminal tribunals to speak on the subject, the courts' differences on the scope of civilian command responsibility are significant enough to be characterized as a "split of authority." In Celebici, the ICTY held unequivocally that command responsibility "extends not only to military commanders but also to individuals in non-military positions of superior authority," even though it later limited its statement to civilian superiors who exercise subordinate control similar to that of military commanders.

These two courts, working from nearly identical and substantively equivalent statutory language, construed significantly different default positions for the scope of the command responsibility doctrine for civilians. Reading the opinions side by side, on the civilian command responsibility issue the Celebici case seems better reasoned because it draws on a balanced set of sources to evidence customary international law; whereas the ICTR court reasons from one judge's dissent in a post-World War II case. These conflicting views of the scope of command responsibility may further muddy the waters with respect to civilian command responsibility in the ICC Statute.

Factually, the Akayesu case is more on point for this Article's examination of the ICC civilian standard. Jean-Paul Akayesu was a civilian, while the prison camp commander and other authorities in Celebici were more

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253. See id.
254. Akayesu, supra note 96, § 6.2. Judge Röling was quoted as stating that a court should:
[B]e careful in holding civilian government officials responsible for the behaviour of the army in the field. Moreover, the Tribunal [IMT-FE] is here to apply the general principles of law as they exist with relation to the responsibility for omissions. Consideration of both law and policy, of both justice and expediency, indicate that this responsibility should only be recognized in a very restricted sense.

Id.

255. Id.
256. Celebici, supra note 20, para. 363.
257. See id., para. 378. One can imagine a variety of situations where civilian superiors exert around-the-clock, seven-days-a-week control over subordinates, including the interesting example of private international security companies. See generally Juan Carlos Zarate, The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder, 34 STAN. J. INT'L L. 75 (1998) (discussing the legal status of private international security companies).
258. See Celebici, supra note 20, paras. 355-63; Akayesu, supra note 96, § 6.2. Nevertheless, he was a highly respected judge, according to editor Antonio Cassese in his work on Judge Röling. See Röling, supra note 100, at vii–ix, 7.
likely to be viewed as military commanders.\textsuperscript{259} However, Akayesu’s status may be debatable. Akayesu was the mayor of Taba in Rwanda.\textsuperscript{260} During his time as mayor, amidst the crisis in Rwanda, “hundreds of civilians . . . sought refuge at the bureau communal” where Akayesu “was responsible for maintaining law and public order.

Thus, given the chaos and abuse for which Akayesu was convicted,\textsuperscript{262} one could counter-argue that the “bureau communal” was similar to a prison camp and that Akayesu’s authority was more like a prison camp commander than a mayor. Thus, Akayesu’s purely civilian role\textsuperscript{263} may be analogized to that of a semi-military official, and thus might fall under the “or effectively acting as a military commander” standard in article 28(1) of the ICC Statute.

Regardless of Akayesu’s status as either a civilian superior or a semi-military commander, the ICTR used inconsistent reasoning to conclude that Akayesu is not liable under command responsibility for any counts.\textsuperscript{264} The Akayesu case holds that the superior-subordinate relationship element is not satisfied, and, therefore, that Akayesu is not liable under the command responsibility count. The court notes that after a certain point in the progression of the Rwandan atrocities, Akayesu met the other two elements of command responsibility (knowledge and inaction).\textsuperscript{265} The next section examines the command responsibility holding for Akayesu and explains how the court’s inconsistent reasoning causes it to mishandle the analysis of the superior-subordinate relationship element.

2. The ICTR in Akayesu Narrowly Construes Criminal Liability for Civilians Arising from Command Responsibility

The record reveals that Akayesu progressed from little or no participation to active participation in the crimes in Rwanda. Akayesu was a teacher and school inspector before becoming bourgmestre (mayor) in 1993. As the mayor of Taba, Akayesu “opposed [the killings] and attempted to prevent them only until 18 April 1994. . . . after which he . . . sometimes even gave orders himself for bodily or mental harm to be caused to certain Tutsi,
and endorsed and even ordered the killing of several Tutsi.\textsuperscript{266} Several facts weighed against Akayesu in the court's holding that he was guilty under "direct" command responsibility.\textsuperscript{267} First, it was alleged that communal police were present during the rape of Tutsi women.\textsuperscript{268} Second, witnesses testified that Akayesu knew of the rape by statements he made.\textsuperscript{269} The court found Akayesu guilty on many of the counts under article 6(1) of the ICTR statute, the direct responsibility provision.\textsuperscript{270}

Under its command responsibility analysis, the court noted that Akayesu "had reason to know and in fact knew that acts of sexual violence were occurring in or near premises of the bureau communal" and took no measures to prevent or punish.\textsuperscript{271} But the court hesitated to attribute some actions to Akayesu.\textsuperscript{272} The court had found Akayesu guilty of direct participation in coercive sexual violence through orders he gave the Interahamwe militia.\textsuperscript{273} Then, under the facts described above and with the stage set to hold Akayesu liable under the command responsibility provisions in article 6(3), the court threw out the command responsibility counts, holding that the superior-subordinate relationship element was not met.\textsuperscript{274} The court felt that there was insufficient evidence that the Interahamwe, the "armed local militia," were subordinate to Akayesu. This reasoning seems highly inconsistent with the court's direct participation liability holding under article 6(1), which was explicitly based on Akayesu's ability to order the Interahamwe to cause a Tutsi female to undress and do gymnastics in a crowded courtyard.\textsuperscript{275}

3. Applying Akayesu to the ICC Statute

The ICTR's holding seems to foreshadow ICC article 28(2)(b) because the court seemed to desire a nexus between the crimes and the activities over which Akayesu could control his subordinates. The Akayesu court stretched to make this holding.\textsuperscript{276} The ICC, on the other hand, will be peppered with defense counsel arguments that article 28(2)(b) precludes liability. This is unfortunate because 28(2)(b) is arguably ambiguous with respect to whether it adds any content to the superior-subordinate relationship element.

\textsuperscript{266} See id. § 7.8; see also Akayesu Summary, supra note 251, para. 26 ("[Akayesu] opposed and attempted to prevent [the crimes] only until 18 April 1994, but then acquiesced and even encouraged their commission."); Bill Berkeley, Judgment Day, WASH. POST, Oct. 11, 1998, at W10 (reporting on the genocide in Rwanda and the Akayesu trial).

\textsuperscript{267} See infra Section II.C.

\textsuperscript{268} See Akayesu Summary, supra note 251, para. 27.

\textsuperscript{269} See id. ("[N]ever ask me again what a Tutsi woman tastes like' . . .").

\textsuperscript{270} See Akayesu, supra note 94, § 7.1.

\textsuperscript{271} Id. § 7.7.

\textsuperscript{272} See id. ("Many of the beatings, rapes, and murders established by the evidence took place away from the bureau communal premises.").

\textsuperscript{273} See id. The allegation was that Akayesu ordered the Interahamwe to undress a female student and forced her to do "gymnastics naked in the public courtyard of the bureau communal in front of a crowd." Id.

\textsuperscript{274} See id. § 7.1.

\textsuperscript{275} See id.

\textsuperscript{276} See supra notes 265–275 and accompanying text.
Under the ICC provision, the Akayesu case facts would generate the same outcome as the actual case, exoneration of Akayesu under the command responsibility counts. Even if Akayesu were held to meet the ICC superior-subordinate relationship standard, including article 28(2)(b), the new knowledge element standard would exonerate him, at least before he began his direct participation. If Akayesu opposed and tried to prevent the crimes through April 18, 1994, then up to that point he would not have "consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes." In fact, because he knew of the crimes, as long as he took action within the limits of his power to stop the crimes, both the knowledge and the inaction elements would exonerate him from command responsibility criminal liability. In this regard, article 28(2) can be seen as setting up perverse incentives because a defendant like Akayesu will have a better defense if he can hide behind "consciously disregarding," as opposed to having to prove that the corrective action he took was not mere token action to prevent the crime or punish the perpetrator. In sum, if he were tried under the ICC Statute, he would have a better defense than his defenses under the ICTR Statute because "consciously disregarding" gives him more protection "should have known" under the command responsibility knowledge element.

VI. THE COMMAND RESPONSIBILITY DOCTRINE AND THE MILOSEVIC INDICTMENT

A. Applying the Doctrine Against a Head of State

Part V has shown that under the ICC civilian command responsibility standard, the cases of Hirota, Roechling, and Akayesu would have different outcomes compared to their outcome if evaluated using the ICC military standard. This analysis underscores the importance of the superior-subordinate relationship element and its concern with the type and degree of control a military commander or civilian superior has over his or her subordinates. This analysis also underscores the critical nature of the knowledge element. Thus, under the ICC, a civilian leader who is not "effectively acting as a military commander," and who is prosecuted for crimes within the ICC's jurisdiction, will benefit from the more favorable civilian command responsibility standards, potentially to the detriment of the efficacy and deterrence power of the court.

This objection is critical because civilian leaders can set policy and objectives. They may exert control and authority in a myriad of ways that are not "effectively military command." Moreover, the less democratic the

277. See Akayesu Summary, supra note 251, para. 26.
278. Rome Statute, supra note 2, art. 28(2)(a).
279. See id. arts. 28(2)(a), (e).
280. Id. art. 28(1).
281. Regarding the Tokyo Trials, one commentator noted that the defendants "were by and large 'Establishment' figures who had achieved prominence in the leadership of Japan and had won the
regime, the more likely it is that the civilian leader’s authority spans across many industries and important societal institutions, including control over the media. In all areas where the civilian leader exercises non-military control, the ICC civilian standard gives the leader a greater opportunity strategically to become willfully blind to the crimes committed by subordinates.

Considering the ICC Statute’s status-based approach, much will turn on the characterization of the civilian leader’s role, because, if the civilian leader is “effectively acting as a military commander,” then ICC article 28(1) and its tougher standards would apply. One possible example of a person effectively acting as a military commander is a civilian head of state who has supreme command powers over that country’s armed forces. This same individual might also fall under “direct” command responsibility, which could apply to either a military commander or a civilian superior. In either its direct form or its imputed form, the command responsibility doctrine envisions and implements criminal accountability that upwardly traverses the chain of command to the culpable leader.

If the command responsibility doctrine is used to traverse the chain of command for accountability then its ultimate use is applying it against a country’s highest political leader who has caused widespread crimes against humanity. Such use has been rare. After World War I, the victors made preparations contemplating a trial of the son of the Kaiser, but the tribunal was never implemented. During the IMT-FE trials, several high-ranking Japanese civilians were tried, but not the Emperor. In 1998 in Rwanda, the ICTR accepted the guilty plea of its former prime minister, making this the first conviction of a head of state by an international tribunal. In the former Yugoslavia, some high-ranking individuals were indicted in 1995.
However, the events in Kosovo in 1999 triggered the first ever indictment "in the history of [the ICTY] to charge a Head of State during an on-going armed conflict with the commission of serious violations of international humanitarian law."\(^{289}\) The ICTY accepted Prosecutor Louise Arbour's indictment of Slobodan Milosevic and four others for direct command responsibility and imputed command responsibility for various crimes against Kosovo Albanians.\(^{290}\) Besides branding Milosevic as a war criminal, the indictment puts the command responsibility doctrine at center stage in the international debate over Kosovo.\(^{291}\)

B. The Milosevic Case Under the ICC Statute

An examination of Milosevic's case under the ICC Statute will summarize and reinforce the ideas presented in the earlier parts of this Article by highlighting the potential outcomes under an ICC approach.

After the Milosevic indictment was on record and the Serbian troops had withdrawn from Kosovo, the international community focused on collecting evidence of the crimes committed by Serbian forces.\(^{292}\) This evidence will determine the strength of the ICTY Prosecutor's case against Milosevic if he is apprehended for trial. Specifically, investigators are interested in any evidence that can support accusations of "direct" command responsibility that Milosevic planned and ordered the ethnic cleansing.\(^{293}\) A direct command

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\(^{289}\) Press Release: President Milosevic and Four Other Senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo, No. JLIPIU/403-E, May 27, 1999, available at <http://www.un.org/icty/pressreal/p403-e.htm> (visited Nov. 5, 1999) (quoting Prosecutor Louise Arbour in her application of indictment to Judge Hunt); see also Charles Trueheart, Kosovo in Crisis, WASH. POST, May 28, 1999, at A1 (referring to the joint indictment as "the first in history against a wartime chief of state.").


\(^{291}\) "The evidence upon which this indictment was confirmed raises serious questions about [Milosevic's and the others'] suitability to be the guarantors of any deal, let alone a peace agreement... they have not been rendered less suitable by the indictment; the indictment has simply exposed their suitability." Trueheart, supra note 289, at A1 (quoting ICTY Prosecutor Louise Arbour).

\(^{292}\) See Elizabeth Neuffer, Indictment of Milosevic to Test NATO's Will, BOSTON GLOBE, May 30, 1999, at E1 ("[E]very shred of evidence will be needed to make the case, should it ever come to trial."); Ambassador David Scheffer, Remarks and Press Backgrounder in Brussels Concerning Kosovo, M2 Presswire, May 18, 1999, available in 1999 WL 17564157 ("We have been co-operating with the Yugoslav Tribunal with an accelerated and intensified information-sharing programme, many hundreds of documents pertaining to Kosovo alone, classified and otherwise, have been provided to the Tribunal.").

\(^{293}\) The Milosevic indictment alleges that Serbian forces engaged in "unlawful deportation and forcible transfer of thousands of Kosovo Albanians from their homes" and "engaged in a number of killings of Kosovo Albanians... at numerous locations," and that the "forces of the FRY and Serbia acting in concert have engaged in a well-planned and co-ordinated campaign of destruction of property." Initial Indictment of Milosevic and Others, May 24, 1999, paras. 34-35, 37, available at <http://www.un.org/icty/milosevic/052399app.htm> (visited Nov. 5, 1999) (hereinafter Milosevic Indictment). The indictment also relates the events in Kosovo to prior events in the former Yugoslavia: Actions similar in nature took place during the wars in Croatia and Bosnia and Herzegovina between 1991 and 1995. During those wars, Serbian military, paramilitary and police forces forcibly expelled and
responsibility claim creates the most solid case against Milosevic, while an
imputed command responsibility claim creates different issues of proof for the
prosecution. If taken into ICTY custody, Milosevic would be tried
according to that court's elucidation of the command responsibility doctrine,
much of which is expressed by the Celebici opinion. However, Part VI,
following the approach of Part V, examines the hypothetical outcome if
Milosevic were tried under the ICC Statute.

This analysis proceeds by considering several alternative classifications
for Milosevic's status under the ICC individual criminal responsibility
provisions. Each alternative, however, assumes that Milosevic is a civilian. By
original training, he is an attorney and his career before politics was in
management, banking, and oil.

First, it is possible that Milosevic would fall under article 25 of the ICC
Statute as one who "orders, solicits, or induces the commission of such a
crime." However, reports suggest that a direct "paper trail" evidencing
direct responsibility is unlikely. Therefore, a prosecutor may find it difficult
to prove that Milosevic personally ordered or solicited or induced the crime. If
this is the case, the second alternative is to consider Milosevic's situation
under ICC article 28(1) as a civilian "effectively acting as a military
commander."

The inquiry into the second alternative would focus more on the pre-
existing relationships between Milosevic and the Serbian forces that were
deployed in Kosovo, rather than on proving that a specific order was
transmitted to these forces to commit atrocities. The indictment recounts
Milosevic's de jure authority over these forces as well as his "extensive de
facto control over numerous institutions essential to, or involved in, the
conduct of the offenses."

Assuming that Milosevic's level of control over
deported non-Serbs in Croatia and Bosnia and Herzegovina from areas under Serbian control utilizing
the same method of operations as have been used in Kosovo in 1999. Id. para. 35. Finally, the
indictment specifically alleges Milosevic's direct command responsibility by stating that "the planning,
preparation and execution of the campaign undertaken by forces of the FRY and Serbia in Kosovo, was
planned, instigated, ordered, committed or otherwise aided and abetted by Slobodan Milosevic." Id.
para. 38.

294. One commentator appraises the evidentiary case against Milosevic under imputed
command responsibility with a Yamashita-like approach:
Since it is unlikely that Milosevic has allowed documentary evidence to be preserved that
would link him to atrocities in Kosovo, the prosecutor's office will have to rely heavily
on circumstantial evidence to build its case. This means identifying a consistent "pattern
of conduct" that links Milosevic to similar illegal acts, to the officers and staff involved,
or to the logistics involved in carrying out atrocities. The very fact that atrocities have
been so widespread, flagrant, grotesque and similar in nature makes it near certain that
Milosevic knew of them; despite his recent protestations to the contrary, it defies logic to
suggest that he could be unaware of what his forces are doing.
Mark S. Ellis, Non-Negotiable; War Criminals Belong in the Dock, Not at the Table, WASH. POST, May

296. See Milosevic Indictment, supra note 293, para. 41.
297. Rome Statute, supra note 2, art. 25(3)(b).
298. See Neuffer, supra note 292, at 61 ("Those familiar with Mr. Milosevic's habits say he
rarely leaves an incriminating paper trail, doesn't use the telephone, and issues no written directives.").
299. Milosevic Indictment, supra note 293, paras. 55–62.
the armed forces is sufficient to qualify him as a civilian effectively acting as a military commander, then his guilt, under the ICC Statute, would turn on whether he “knew, or owing to the circumstances at the time, should have known,” of the atrocities.  There will be strong circumstantial evidence that he knew because of the direct communications from the ICTY Prosecutor warning Milosevic of his responsibilities under international law. Thus, it is likely that a strong case would exist under the ICC to try Milosevic using the military commander standard.

The third alternative in analyzing the Milosevic indictment under the ICC would be to consider the less likely alternative that Milosevic would not be found to be operating as a military commander and would thus fall into the ICC civilian standard of article 28(2). Under the civilian standard, the prosecutor would have to prove, under the knowledge element, that Milosevic “consciously disregarded information which clearly indicated” that crimes occurred. Given the reports that Milosevic is not fond of “paper trails,” this might be an insurmountable burden of proof. Under the superior-subordinate relationship element, the ICC civilian standard would also complicate the prosecutor’s proof process because of the nexus element requiring that the subordinates’ crimes must concern “activities that were within the effective responsibility and control of the superior.” This evaluation would depend on many of the same factors necessary to determine whether Milosevic was “effectively acting as a military commander,” such as the extent and scope of any superior-subordinate relationships, or his degree of power to control and punish those under his authority.

Just as Milosevic’s ultimate culpability at the ICTY will be a function of the evidence, a more detailed evaluation of his situation under the ICC civilian standard is limited when most of the underlying facts supporting prosecutor Arbour’s indictment are under a non-disclosure order to protect witnesses until the five indicted individuals are apprehended. Astonishing volumes of evidence exist that human rights violations occurred in Kosovo, and there is ample circumstantial evidence linking Milosevic through the chain of command to the armed forces that were deployed in Kosovo. But where

300. Rome Statute, supra note 2, art. 28(1)(a).
301. See Press Release—Justice Louise Arbour, the Prosecutor of the International Tribunal, Writes to President Milosevic and Other Senior Officials in Belgrade and Kosovo To Remind Them of Their Responsibilities Under International Law, No. JLIPIU/389-E, Mar. 26, 1999, available at <http://www.un.org/ictr/pressrel/p1403-e.htm> (visited Nov. 5, 1999) (quoting from the Prosecutor’s letter: “[I]n the light of current reports of escalating violence in Kosovo, I am gravely concerned that serious violations of international humanitarian law continue to be committed... I therefore look to you to exercise your authority over your subordinates... to prevent the commission of further crimes.”).
302. Rome Statute, supra note 2, art. 28(2)(a).
303. See supra note 298.
304. Rome Statute, supra note 2, 28(2)(b).
305. See Celebici, supra note 20, para. 354.
306. See Milosevic Review of Indictment, supra note 8, paras. 30–37.
Milosevic would ultimately fall along the ICC scale of article 25 direct command responsibility, versus the article 28(1) military standard, versus the article 28(2) civilian standard, is unknowable until more facts are available about the superior-subordinate relationship element and about Milosevic’s level of knowledge. Regardless of the evidentiary uncertainty underlying these first two elements, with respect to the third element of command responsibility, it is readily apparent that there was either inaction, or ineffective action, to stop the atrocities.

VII. CONCLUSION

The preceding two parts have applied the ICC command responsibility doctrine to several prior civilian cases and discussed how the doctrine might apply to the highest level in the chain of command—the head of state. Although there are only a small number of civilian command responsibility cases, the examples applied to the ICC civilian command responsibility standard illustrate several factors. First, at the ICC, many civilian superiors who might be effectively operating as military commanders will have an alternative plea in defense. They will plead that they should fall under the less strict civilian standard of article 28(2). In close cases, some perpetrators will slip into the civilian standard, and probability dictates that at least some of these do so at the expense of justice.

Second, how helpful this tactic is for defendants depends on the extent to which the lesser knowledge element, “consciously disregarded,” lowers the criminal requirement of a duty to keep informed. In the Hirota case, defendant foreign minister Hirota would likely be exonerated under the new civilian standard. Similarly, in the Roechling case, the defendant industrialist would likely escape liability for mistreatment of workers. The Akayesu case from the ICTR deals a further blow to a robust civilian command responsibility doctrine, to the extent it would be followed for the command responsibility part of its holding. These three case examples reviewed in Part V illustrate the potential effect of article 28(2).

Third, the degree of effect that article 28(2) has on the justice and efficacy of the permanent court depends also on whether article 28(2)(b) introduces a new nexus element for prosecutors to prove. As a summary of the comparison undertaken in this Article, the following table illustrates all of these differences.
 TABLE 2 – SUMMARY COMPARISON OF COMMAND RESPONSIBILITY ELEMENTS

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>superior-subordinate relationship</td>
<td>committed by a subordinate</td>
<td>A military commander or person effectively acting as a military commander . . . committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces</td>
<td>superior and subordinate relationships not described in paragraph 1 . . . 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</td>
</tr>
<tr>
<td>knowledge</td>
<td>knew or had reason to know that the subordinate was about to commit such acts or had done so</td>
<td>knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes</td>
<td>knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes</td>
</tr>
<tr>
<td>inaction</td>
<td>failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof</td>
<td>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</td>
<td>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</td>
</tr>
<tr>
<td>nexus between criminal activities of subordinate and subordinate activities controlled by superior</td>
<td>N/A</td>
<td>N/A</td>
<td>The crimes concerned activities that were within the effective responsibility and control of the superior</td>
</tr>
</tbody>
</table>

The command responsibility doctrine has developed in short bursts and then lain dormant for long stretches of time before resurfacing. The post-World War II international military tribunal cases at Nuremberg and Tokyo provided the launching point for the modern doctrine. Commentators have noted the effect on the doctrine from international treaties such as Additional Protocol I and events such as the My Lai massacre of the Vietnam conflict. More recently, efforts to draft a statute for a permanent international criminal court have paralleled the regretful need to establish the ICTY and ICTR. The aggregate justice and efficacy of the ICC will be the result of many factors. On balance, the civilian command responsibility provisions reduce the court’s power to bring human rights violators before the rule of law because

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308. See BASSIOUNI & MANIKAS, supra note 16, at 351–68.
309. See Green, supra note 68, at 327–40.
310. See Howard, supra note 192, at 8–14; Parks, supra note 38, at 1–2.
311. See Orentlicher, supra note 9, at x. Orentlicher comments that the current tribunals influenced the ICC as follows: The legitimacy of the law emanating from the ad hoc tribunals was put to a critical test during the diplomatic conference to establish [the ICC] . . . . The statute adopted on the final day of that conference provided powerful vindication of the two tribunals’ jurisprudence. Indeed, many aspects of the Rome statute would have been inconceivable without the foundation laid by the Hague [ICTY] and Arusha [ICTR] tribunals.

Id.
they undercut the court’s deterrent goals for civilian violators. In short, the civilian command responsibility standard is one small negative for the court, but a negative that threatens to make real the concerns expressed by Louise Arbour, ICTY prosecutor, in a statement to the U.N. Preparatory Committee for the ICC: Should it be a weak and powerless institution, not only will it lack legitimacy, but it will betray the very human rights ideals that will have inspired its creation.312

Hopefully, the sheer existence of the court and its positive attributes will weigh the balance against Arbour’s concerns.

312. See AMNESTY INTERNATIONAL, supra note 11.