

THE LAST LINE OF DEFENSE: *THE DOCTRINE OF COMMAND RESPONSIBILITY, GENDER CRIMES IN ARMED CONFLICT, AND THE KAHAN REPORT (SABRA & SHATILLA)*

Sherrie L. Russell-Brown*

Upon publication of his principles of war, Sun Tzu was summoned before a leading warrior king and asked to submit his theories to a test; Sun Tzu consented. Two companies of women, untrained in military matters, were formed up and each placed under the command of one of the king's favorite concubines. They were armed and given cursory instruction in the then-current manual of arms and close order drill. Then, to the sound of drums, Sun Tzu gave the order, "Right turn!" The only response of the "companies" was one of laughter. Sun Tzu remarked: "If the words of command are not clear and distinct, if orders are not thoroughly understood, then the general is to blame." Again uttering the same command and receiving the same response, Sun Tzu then declared: "If the words of command are not clear and distinct, if orders are not thoroughly understood, the general is to blame. But if his orders are clear, and the soldiers nevertheless disobey, then it is the fault of their officers." So saying and much to the consternation of the warrior king, Sun Tzu ordered the two company commanders beheaded and replaced by a member of each company. The execution was viewed by all, the drum was again sounded for drill, and the companies thereafter executed all maneuvers with perfect accuracy and precision, never venturing to utter a sound.¹

INTRODUCTION

The relevance and timeliness of an Article on the topic of preventing or deterring gender crimes in armed conflict is illustrated by the AIDS pandemic in Sub-Saharan Africa and the world community's focus on the crisis. In January 2000, the United Nations Security Council held its

* Assistant Professor of Law and an Associate Director of the Center on Children and the Law, University of Florida, Fredric G. Levin College of Law; B.A. (Government), 1989, Pomona College; J.D., 1992, Columbia University School of Law; LL.M. (International Law, International Human Rights Law), 1999, Columbia University School of Law. I would like to thank Professors Christopher Slobogin, Bill Page, and Gaylin Sponis for their comments.

¹ Major William H. Parks, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. 1, 4 (1973).

first meeting on the African AIDS pandemic.² Dr. Peter Piot, Executive Director of UNAIDS and Under Secretary-General of the United Nations, acknowledged the connection between AIDS, armed conflict and gender crimes.³ Dr. Piot stated that, “[w]ar is the instrument of AIDS and rape is an instrument of war. Conflict and the resulting movements of people, whether armed combatants, or refugees, fuel the epidemic. In one study, 17 percent of raped women, previously negative, became sero-positive. Refugee men and particularly women, become highly vulnerable to HIV infection. Indeed, another study showed that refugee women were six times more likely to become infected in camps than the outside population.”⁴ It is not surprising, therefore, that of the countries in Africa with the highest prevalence of HIV infection, half are engaged in conflict.⁵ And in those war torn countries, the rate of HIV infection among soldiers is 2 to 3 times higher than the rate in Africa’s civilian population.⁶ In some conflict zones, the rate rises to 50 times higher.⁷

The current AIDS pandemic in Sub-Saharan Africa reflects an escalation of the consequences of wartime rape. However, throughout history, although prohibited by the laws of war, gender crimes have occurred within internal and international armed conflicts and remain a continuing problem in international humanitarian law.⁸ For example, on

² Aids Becoming Africa’s Top Human Security Issue, UN Warns, *at* <http://www.unaids.org/whatsnew/press/eng/pressarc00/ny10100.html>.

³ Statement of Dr. Peter Piot, Executive Director of UNAIDS, on the occasion of the Security Council meeting on HIV/AIDS in Africa, *at* <http://www.unaids.org/whatsnew/speeches/eng/ny100100.html>.

⁴ *Id.*

⁵ Protecting African Development and Security in the Age of Aids, *at* <http://inweb18.worldbank.org/AFR/afr.nsf/0/2BA9FCD5C792244685256AFB0057BAE5?OpenDocument.9999>.

⁶ The Gender Aspects of the HIV/AIDS Pandemic, *at* <http://www.un.org/womenwatch/daw/csw/hiv aids/matlinspence.html>.

⁷ *Id.*

⁸ “During the Second World War, some 200,000 Korean women were forcibly held in sexual slavery to the Japanese army. During the armed conflict in Bangladesh in 1971, it is estimated that 200,000 civilian women and girls were victims of rape committed by Pakistani soldiers. Mass rape of women has been used since the beginning of the conflict in the Former Yugoslavia. Throughout the Somali conflict beginning in 1991, rival ethnic factions have used rape against rival ethnic factions. During 1992 alone, 882 women were reportedly gang-raped by Indian security forces in Jammu and Kashmir. In Peru in 1982, rape of women by security forces was a common practice in the ongoing armed conflict

July 2, 2003, 650 Kenyan women who allege that they were sexually assaulted and in many cases gang-raped by British soldiers on military assignment in their country, won the right to sue the British Ministry of Defense for compensation.⁹ The lawyer for the women, Martyn Day, said that the rapes the women had recounted were not impulsive, but appeared to have been premeditated and planned by soldiers participating in annual exercises in remote parts of the East African country.¹⁰ Mr. Day said that the soldiers would “specifically ambush the women, they would pounce on them with a clear and coordinated understanding of what they were going to do.”¹¹ Mr. Day said that he was “totally amazed and shocked” when he first heard the accounts of the rapes, but that he is now absolutely convinced the accounts are true.¹² Apparently, there was not much of a sense among these soldiers that they would be held accountable for their conduct. Where were the commanders when these soldiers were planning and executing 650 sexual assaults? Where was the sense of command responsibility?

The doctrine of command responsibility¹³ is an international humanitarian and military law doctrine, according to which military and

between the Communist Party of Peru, the Shining Path, and government counterinsurgency forces. In Myanmar, in 1992, government troops raped women in a Rohingya Muslim village after the men had been inducted into forced labor. Under the former Haitian military regime of Lt. Gen. Raoul Cedras, rape was used as a tool of political repression against female activists or female relatives of opposition members.” Human Rights Watch/Africa, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* n.39 (September 1996) [hereinafter, *Shattered Lives*]; Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AM. J. INT’L L. 424, 425 (1993) (“Rape by soldiers has of course been prohibited by the law of war for centuries, and violators have been subjected to capital punishment under national military codes, such as those of Richard II (1385) and Henry V (1419).”).

⁹ See Warren Hoge, *Kenyan Women Accuse British Troops of Rape*, N.Y. TIMES, July 3, 2003, at A4.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Some legal scholars refer to the doctrine as “superior responsibility” in order to capture the responsibility of civilian as well as military commanders. See Sonia Boelaert-Suominen, *Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War*, 41 VA. J. INT’L L. 747, 750 (2000-2001) (“The term ‘superior’ properly encapsulates the categories of persons who may be accountable and the forms of control or authority over perpetrators that are

non-military “commanders” alike can be held criminally liable, if certain prerequisites are present, for the crimes committed by their “subordinates” as if the commanders had personally committed the crimes.¹⁴ A purpose of

required. In particular, as described in this article, the doctrine incorporates military commanders, paramilitary leaders, leaders of irregular structures and even civilian leaders.”). Since I am primarily concerned with the criminal responsibility of military commanders, I will refer to the doctrine as “command” not “superior” responsibility.

¹⁴ See Boelaert-Suominen, *supra* note 13, at 750 (“The theory of liability that allowed the Prosecution to rely on the imputed responsibility of these four accused is known as ‘command’ or ‘superior’ responsibility. It is a doctrine in international law whereby a person in authority may, under certain circumstances, be held criminally responsible for acts committed by subordinates because of a failure to prevent them from committing such acts or a failure to punish them after the acts have been committed.”); Lieutenant Commander Weston D. Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra*, 107 MIL. L. REV. 71, 76 (1985) (“Command responsibility, by way of introduction, may be defined as the responsibility of military commanders for war crimes committed by subordinate members of their armed forces or other persons subject to their control.”); Ann B. Ching, *Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia*, 25 N.C. J. INT’L L. & COM. REG. 167, 176 (1999) ([Command responsibility] “presents two sides of the coin – the commander’s responsibility for war crimes committed by a subordinate, and the plea of the subordinate that he or she was ‘acting in accordance with orders.’”); Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455 (2001) (“‘Command responsibility’ is an umbrella term used in military and international law to cover a variety of ways in which individuals in positions of leadership may be held accountable.”); Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 4 (1982) (“Although historically blurred, command criminal responsibility means specific criminal responsibility of the commander and not the general responsibility of command.”); 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, 123-124 (1995-1996) (“The concept of command responsibility imposes personal criminal responsibility on a superior for international crimes committed by persons under his or her command or control.”); L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT’L L. & CONTEMP. PROBS. 319, 320 (1995) (“The concept of command responsibility embraces two branches. In the first place it concerns the responsibility of a commander who has given an order to an inferior to commit an act which is in breach of the law of armed conflict or whose conduct implies that he is not averse to such a breach being committed. It also covers the plea of the inferior that he is not responsible for a breach because he was acting in accordance with orders or what he presumed to be the wishes of his commander, a plea that is more commonly described as that of ‘compliance with

the doctrine is the deterrence of violations of international humanitarian law.¹⁵ The doctrine of command responsibility is society's "last line of

superior orders."); Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 9 TULSA J. COMP. & INT'L L. 1 (2001) ("The doctrine of command responsibility imposes a duty on military commanders and civilian officials to ensure that subordinate troops adhere to the requirements of the law of war."); Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility and the Defense of Captain Rockwood*, 149 MIL. L. REV. 275, 286 (1995) ("Command responsibility is a legal doctrine whereby commanders, in some situations, may be held responsible for the unlawful conduct of their subordinates."); Yuval Shany & Keren R. Michaeli, *The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility*, 34 N.Y.U. J. INT'L L. & POL. 797, 802-803 (2002) ("According to [the doctrine of command responsibility], a superior may be held criminally responsible under certain circumstances for crimes perpetrated by his or her subordinates if he or she failed to take adequate measures to prevent the commission of the crimes or to punish their perpetrators."); Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 YALE J. INT'L L. 89, 92 (2000) ("One type of individual criminal culpability is the doctrine of command responsibility, 'under which a commander incurs certain legal responsibility for the acts of his subordinates.'"); Timothy Wu & Yong-Sung (Jonathan) Kang, *Criminal Liability for the Actions of Subordinates – The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT'L L. J. 272 (1997) (The "customary international law doctrine of command responsibility may nevertheless hold superiors liable for their dereliction with respect to the duties that accompany their position.").

¹⁵ See Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT. L. 573 (1999) ("In the bloody aftermath of World War I it became apparent that those in military or civilian authority provided a cornerstone for the good conduct of those under their command, and hence should carry some liability for their actions."); Damaska, *supra* note 14, at 471-475 ("The argument most frequently advanced in support of imputed command responsibility is the special deterrence needs of international criminal justice."); Lippman, *supra* note 14, at 90-93 ("Command culpability is designed to encourage military commanders and civilian superiors to fulfill their legal duty to control the conduct of combatants."); Shany & Michaeli, *supra* note 14, at 803 ("Because the application of the doctrine [of command responsibility] leads to the imposition of vicarious liability upon commanders, it introduces a major incentive for commanders to exercise control over their troops and to suppress violation of the laws of war."); Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 165-167 (2000) ("If the purpose of the laws of war is to prevent unnecessary suffering, the commander is in the best position to prevent violations of these humanitarian goals . . . Commanders are 'society's last line of defense' against war crimes."); Vetter, *supra* note 14, at 92 ("Individual criminal responsibility, and command responsibility in particular, are important, because, to deter human rights

defense” against war crimes.¹⁶ *Can the doctrine of command responsibility be used to deter or prevent the commission of gender crimes in armed conflict?* While scholars have addressed gender crimes in armed conflict and the doctrine of command responsibility as separate issues, they have ignored the application of the doctrine of command responsibility to gender crimes in armed conflict.

I propose that the International Criminal Court (“ICC”)¹⁷ use the doctrine of command responsibility to maximize the prevention of gender crimes in armed conflict.¹⁸ The language of the Rome Statute – the multilateral treaty that establishes the ICC – clearly authorizes the ICC to apply the doctrine of command responsibility to gender crimes in armed conflict.

The Rome Statute limits the ICC’s jurisdiction to: 1) genocide; 2) crimes against humanity; 3) war crimes; and 4) the crime of aggression.¹⁹ In the Rome Statute, gender crimes can constitute acts of genocide, and are included as constitutive elements in the definitions of both crimes against humanity and war crimes.²⁰ Specifically, Article 7 of the Rome Statute provides:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: . . . (g) Rape, sexual slavery, enforced

abuses, potential perpetrators must perceive ICC prosecution as a possible consequence of their actions.”); Wu & Kang, *supra* note 14, at 290 (“From a regulatory standpoint, it is often a military or a civil leader who is the only, or at least best-situated, person to prevent the commission of atrocities – society’s last line of defense.”).

¹⁶ See Smidt, *supra* note 15, at 167; Wu & Kang, *supra* note 14, at 290.

¹⁷ The ICC entered into force on July 1, 2002, “the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations,” in accordance with Article 126(1) of the Rome Statute for the ICC (the “Rome Statute”). See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, July 17, 1998, reprinted in 37 I.L.M. 999 (1998), Article 126(1), available at <http://www.un.org/law/icc/>.

¹⁸ Throughout this Article, I will use the terms “armed conflict” and “war” interchangeably and international humanitarian law, the law of war and the law of armed conflict, interchangeably.

¹⁹ See the Rome Statute, *supra* note 17, Articles 5-8.

²⁰ See Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 Berkeley J. Int’l L. 350 (passim); the Rome Statute, *supra* note 17, Articles 7 and 8.

prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.²¹

According to Article 8 of the Rome Statute:

For the purpose of this Statute, “war crimes” means: . . . [o]ther serious violations of the laws and customs applicable in international armed conflict [and in armed conflicts not of an international character], within the established framework of international law, namely, any of the following acts: . . . [c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions [or constituting a serious violation of article 3 common to the four Geneva Conventions].²²

The structure of the doctrine of command responsibility is set forth in Rome Statute Article 28, which provides that military and non-military leaders alike can be held responsible for crimes within the ICC’s jurisdiction, including gender crimes, committed by their subordinates.²³ The three prerequisites to liability under the doctrine are: 1) a commander/subordinate relationship; 2) “knowledge” that subordinates are committing or about to commit the crimes; and 3) the failure to prevent or punish the crimes.

In this Article, I propose a conceptualization of Article 28 that should make it easier to impose on leaders criminal command responsibility for the commission of gender crimes within the jurisdiction of the ICC. It is my hope that this imposition of command responsibility will in turn lead to more effective prevention of such crimes. The basic feature of my proposal is that the “knowledge” prerequisite for imposition of command responsibility under Article 28(a)(i) of the Rome Statute be satisfied with historical information, and common or public knowledge of the widespread occurrence of gender crimes in armed conflict. Because, throughout history, gender crimes have occurred within internal and international armed conflicts, I propose that knowledge of their

²¹ See the Rome Statute, *supra* note 17, at Article 7.

²² *Id.* at Article 8.

²³ *Id.* at Article 28.

commission should be assumed, and that the focus of any inquiry into imposition of command responsibility for gender crimes should shift to the third prerequisite of the doctrine, i.e. whether a military commander took all necessary and reasonable measures within his or her power to prevent or repress the commission of gender crimes or to submit the matter to the competent authorities for investigation and prosecution.²⁴

Although the intended result of my proposal is a shifting of the emphasis onto the “necessary and reasonable measures” taken by a commander, for a variety of reasons I will not address in this Article what those measures should be. First, whether or not a military commander took “all necessary and reasonable measures” within his or her power to prevent or repress the commission of gender crimes or to submit the matter to the competent authorities for investigation and prosecution is a particularly case-specific analysis. Second, I do not want to limit the range of measures that a military commander could take by listing examples or suggestions. Further, I do not think that I, as someone with no military experience, am adequately equipped to make such suggestions. Most importantly, however, it is not my belief that the widespread perpetration of gender crimes in armed conflict is a continuing problem due to a lack of clearly defined preventative or punitive measures. For example, I do not believe that the British soldiers in Kenya possibly gang-raped women because the British military lacked clearly articulated methods of prevention, training or education. It is my belief that the heart of the problem is not a lack of clearly defined “necessary and reasonable measures” but rather a lack of will or incentive on the part of military commanders to implement already articulated measures.

There could be a number of reasons why military commanders are lax about or allow their subordinates to commit gender crimes. It is possible that, in the chaos of war, while the commission of gender crimes by subordinates might be viewed as reprehensible, the prevention of these

²⁴ I should note here that the Rome Statute entered into force on July 1, 2002 and provides that no person shall be held criminally responsible under the Statute for conduct *prior to that date*. See Rome Statute, *supra* note 17, at Article 24(1). In addition, under Article 126(2) of the Rome Statute, “[f]or each State ratifying, accepting, approving or acceding to [the Rome Statute, after July 1, 2002] the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.” *Id.* at Article 126(2). Thus, in evaluating Rome Statute Article 28(a)(i)’s knowledge prerequisite, I am concerned with the commission of gender crimes in armed conflicts as of July 1, 2002 and thereafter.

crimes may not be a high priority. Allowing the commission of gender crimes could also be viewed as a tactic of war, a way to demoralize, terrorize, and in the case of Bosnia and Rwanda, a way to destroy one's enemy. Notwithstanding the possible motivations, what is clear from the continued and historical perpetration of gender crimes in armed conflict is that there is a lack among military commanders of a sense of consequences or accountability for allowing their subordinates to commit gender crimes. Going back to the Kenyan example, not only did the soldiers apparently lack a sense that justice might be brought to bear on their behavior, but apparently their commanders also lacked a sense that they, the commanders, might in turn suffer any grave consequences. This lack of any sense of consequences or accountability may be attributable to the ease with which a commander could claim lack of knowledge that subordinates were committing or about to commit gender crimes. This claim offends history and common knowledge as to the widespread perpetration of gender crimes in armed conflict.

Under my proposal, by limiting a military commander's ability to claim that he or she neither knew nor, owing to the circumstances at the time, should have known that his or her forces were committing or about to commit gender crimes, the prosecution of commanders is easier because only two prerequisites of the doctrine of command responsibility – a commander/subordinate relationship and a failure to prevent or punish – remain to be satisfied. By making it easier for military commanders to be held criminally liable for the gender crimes committed by their subordinates, my proposal provides the vital incentive and will for military commanders to implement preventative or punitive measures that in all likelihood are already in place. In sum, this Article focuses on laying out the argument for allowing, exclusively with respect to gender crimes, the knowledge prerequisite of the doctrine of command responsibility under the Rome Statute to be satisfied with historical information, and common or public knowledge that gender crimes have been committed in internal and international armed conflicts, because it is through the satisfaction of the knowledge prerequisite that the incentive to prevent or deter is provided.

Precedent for my proposal can be found in a 1983 report²⁵ – the Kahan Report – issued by the Israeli Commission of Inquiry into the

²⁵ See The Commission of Inquiry into the Events at the Refugee Camps in Beirut, Final Report (1983) (Authorized Translation), reprinted in 22 I.L.M. 473 (1983) [the "Kahan Report"].

Events at the Refugee Camps in Beirut. In the Kahan Report, the Commission held the State of Israel and several individuals, including military commanders, “indirectly” responsible for a massacre committed by a Lebanese armed force in September 1982 at two largely Palestinian refugee camps – the Sabra and Shatilla camps – in Beirut, Lebanon.²⁶ With respect to the “indirect responsibility” of certain military commanders, the Commission imposed responsibility, in part, because violence by the Lebanese armed force against the Palestinians had historically occurred in the *past*; based on that historical information, the Commission found that the military commanders should have known that there was a risk of *future* violence by the Lebanese armed force against the Palestinians, and should have taken measures to guard against such violence.²⁷

In Part I, I discuss the Rome Statute, the doctrine of command responsibility and the knowledge prerequisite of the doctrine under Rome Statute Article 28(a)(i). Part II addresses the Kahan Report and its use of historical information and common or public knowledge. In Part III, I examine the application of the standard adopted under the Kahan Report to Article 28(a)(i) of the Rome Statute, specifically with respect to gender crimes. I conclude that the application to Rome Statute Article 28(a)(i) of the standard adopted by the Kahan Report should increase the likelihood of prosecution and conviction for gender crimes committed in armed conflict, which likelihood should increase the incentive to prevent the commission of gender crimes in armed conflict.

²⁶ See the Kahan Report, *supra* note 25 (passim); Linda A. Malone, *The Kahan Report, Ariel Sharon and the Sabra-Shatilla Massacres in Lebanon: Responsibility Under International Law for Massacres of Civilian Population*, 1985 UTAH L. REV. 373, 374 (1985); Shany & Michaeli, *supra* note 14, at 808, 813-816.

²⁷ See the Kahan Report, *supra* note 25, at 496-499, 502-503, 505-507; Shany & Michaeli, *supra* note 14, at 813-816.

I. THE ROME STATUTE, THE DOCTRINE OF COMMAND RESPONSIBILITY,
AND THE KNOWLEDGE PREREQUISITE OF THE DOCTRINE OF COMMAND
RESPONSIBILITY UNDER ARTICLE 28(A)(I) OF THE ROME STATUTE

According to Colonel William G. Eckhardt:

- the very heart of military professionalism is command responsibility;²⁸
- productive dialogue between commanders and lawyers is stressed, and the need for reordering our training regarding professional conduct on the battlefield is recognized;²⁹
- the humanitarian and the soldier must “get in step;”³⁰
- a properly articulated and understood standard of command responsibility allows the teaching and preventive functions of the law to be appropriately exercised;³¹
- an agreed-upon standard of command responsibility is the cornerstone for the application of reasoned moral judgment and the rule of law on the battlefield;³²
- through the friction and fog of war, it is primarily the authority of the commander that gets things done;³³
- states, soldiers and citizens trust their “all” to the commander;³⁴
- knowledge is and will continue to be the primary issue in cases involving command responsibility;³⁵ and

²⁸ See Eckardt, *supra* note 14, at 8.

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 3.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 18.

- the knowledge expected of an officer or of a noncommissioned officer must be precisely defined.³⁶

I hope to advance the above themes by working towards articulating an expressed, acceptable, workable and practical standard of command responsibility. My evaluation of and attempt at “precisely” defining the knowledge prerequisite of the doctrine of command responsibility is where I begin.

A. The Rome Statute and the Doctrine of Command Responsibility

Under Article 28 of the Rome Statute:

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

a. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

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

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

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

³⁶ *Id.* at 21.

- (i) The superior knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.³⁷

This regime is referred to as the doctrine of “command responsibility.”

As explained above, the normative appeal of using the doctrine of command responsibility to maximize the prevention of gender crimes is based upon a purpose of the doctrine – the deterrence of violations of international humanitarian law.³⁸ Command responsibility is society’s “last line of defense.”³⁹ The modality and hierarchical nature of the military illustrate its preventative capacity:

It is to the leader that a young soldier looks for guidance in terms of distinguishing appropriate and inappropriate uses of force during military operations . . . In combat, where soldiers are routinely asked to participate in conduct that under normal conditions would be labeled as immoral or unlawful, often the leader becomes the soldier’s surrogate conscience. Soldiers learn to rely on the commander’s guidance as the soldier surrenders some of his own discretion, judgment, and inhibitions to play a role in the collective success of the unit and to further the higher cause in which they are engaged. The soldier learns, to a degree, to subordinate his instincts for survival and ideas of right and wrong to his leader’s orders. The soldier has a general obligation to obey a superior’s orders and to presume that the orders received from the superior are lawful . . . The military, [therefore], is a unique society where the commander has tremendous authority over subordinates not normally extended to superiors in the civilian sector. Coupled with this significant lawful control over the troops is the commander’s stewardship over a unit’s tremendously awesome destructive

³⁷ *Id.*

³⁸ *See supra* note 15.

³⁹ *See supra* note 16.

capabilities. *Mankind must, therefore, rely on commanders to use their authority to control both a military force's organic capacity for destruction and the conduct of their subordinates. Commanders have both a moral and legal role in preventing atrocities that could potentially be committed by subordinates against non-combatants, including the wounded and sick, civilians, and prisoners of war, as well as the destruction of civilian property lacking in military value.*⁴⁰

I will digress here very briefly to discuss the agreements and disagreements among international law scholars about some aspects of the doctrine of command responsibility. Upon realizing that in any two pieces of scholarship on the doctrine, I could read two completely opposite interpretations of the same factual, historical material, I decided to examine, catalog and organize the issues on which scholars agreed and disagreed. Because it was a lengthy propaedeutic to sift through the confusion, I think that it might be beneficial and might advance the scholarship on the doctrine of command responsibility to present a distillation of the areas of agreement and disagreement about the doctrine. By doing so, I am attempting to pinpoint and clarify the remaining open questions that might need to be addressed either by the ICC or in future scholarship.

The main disagreement among international law scholars about the doctrine of command responsibility is over the knowledge prerequisite and what the currently recognized standard is for satisfying that prerequisite under customary international law. Scholars also disagree about the appropriate analogous characterization of the doctrine in United States statute or common law terms.

With respect to the currently recognized standard for satisfying the knowledge prerequisite, there are two competing standards. Under the “should have known” standard, also known as a “simple negligence” standard, the standard is whether the commander failed to *acquire* information that would have alerted the commander about the possible commission of crimes by his or her subordinates. Under a stricter standard, the standard is whether a commander who was *in possession* of information failed to conclude that his or her subordinates were going to commit crimes.

⁴⁰ See Smidt, *supra* note 15, at 158 and 166 [emphasis added].

Some international law scholars contend that the post-World War II treaties and the statutes for the modern international criminal tribunals, in which command responsibility is addressed, all rely on a “should have known” standard and that, therefore, that standard, is the currently recognized standard to satisfy the knowledge prerequisite for imposition of command responsibility.⁴¹ Other international law scholars contend that the currently recognized standard, as espoused in the post-World War II treaties and the statutes for the modern international criminal tribunals, is the stricter standard requiring possession of some information.⁴² With respect to the issue of the appropriate analogous characterization of the doctrine in United States statute or common law terms, scholars disagree about whether the doctrine is different from or a type of accomplice liability⁴³, and whether the doctrine of command responsibility can be characterized as one of imputed responsibility, vicarious liability, both or neither.⁴⁴

⁴¹ See e.g., *id.* at 200-201 (“The *Yamashita* ‘knew or should have known’ standard for command responsibility is the one currently recognized by the international community, as customary international law. In addition to *Yamashita* and the other post-World War II international tribunal decisions, post-World War II treaties and the statutes for the modern international criminal tribunals all rely on *Yamashita*.”).

⁴² See e.g., Major Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293, 299-300 (1995) (“Although the United States has not ratified Protocol I, the delegates’ rejection of the ‘should have known’ standard proposed by the United States signals that the *Yamashita* precedent may not carry any weight in the international community . . . Even in United States courts, *Yamashita* has lost favor. If it ever stood for a strict liability standard, that strict standard never has been enforced again. The Protocol I standard is probably the best indication of what the international community would find acceptable, and that standard rejects any strict liability. Comparing the Protocol I standard with that established by the United Nations Security Council in creating the International Criminal Tribunal for the Former Yugoslavia, the two appear to be quite similar.”).

⁴³ See Vetter, *supra* note 14, at 98 (“Command responsibility is different in origin and formulation from accomplice liability.”); Wu & Kang, *supra* note 14, at 284 (“Command responsibility is in some ways a kind of accomplice liability, and the existing international law of command responsibility seems to support a *mens rea* requirement analogous to the ‘knowing facilitation’ rule of United States accomplice liability.”).

⁴⁴ See Bantekas, *supra* note 15, at 577 (“It is obvious, thus, that the doctrine of command responsibility refers to ‘imputed liability’ and not, as erroneously state in the *Celebici* judgment, to ‘vicarious liability.’”); Eckhardt, *supra* note 14, at 5 (“Nor does [command responsibility] mean imputed criminal responsibility which has been so publically and emotionally misargued by persons with impressive credentials. Command criminal

I make no attempt to settle the disagreements over what the current standard is for satisfaction of the knowledge prerequisite under the doctrine of command responsibility. As discussed in further detail below, whether the ICC interprets Rome Statute Article 28 as incorporating a “should have known”/“simple negligence” or stricter/“some information” standard, the use of historical information, and common or public knowledge to satisfy the knowledge prerequisite renders the debate over the standard moot.⁴⁵

As for the areas of agreement among international law scholars, with respect to the origin of the doctrine of command responsibility, international law scholars agree that the theoretical underpinnings of the doctrine and the notion of general responsibility of commanders have existed for centuries⁴⁶, and that the first international recognition of the command responsibility doctrine occurred with the Hague Convention IV 1907.⁴⁷ Scholars also agree that it was not until the end of World War I

responsibility for actions of subordinates requires personal involvement, connection, knowledge, or intent . . . Vicarious punishment is repulsive to a civilized society.”); Shany & Michaeli, *supra* note 14, at 804 (“Hence, the doctrine should be narrowly construed so as to conform to its underlying rationales, which justify the imposition of vicarious liability . . .”); Vetter, *supra* note 14, at 99 (“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 orders initiating the unlawful behavior.”); Wu & Kang, *supra* note 14, at 282 (“The critical issue here arises from the fact that the liability of the superior is derivative in some sense, even though it is not and should not be ‘imputed’ or ‘vicarious.’”).

⁴⁵ See *infra* Part III.

⁴⁶ See Boelaert-Suominen, *supra* note 13, at 754-755 (“the concept of superior responsibility was recognized early on in international criminal law”); Burnett, *supra* note 14, at 77 (Hagenbach, 1474); Ching, *supra* note 14, at 176 (Sun Tzu, 500 B.C.); Christopher N. Crowe, *Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution*, 29 U. RICH. L. REV. 191, 193 (1994) (190 B.C.); Green, *supra* note 14, at 321 (Charles VII of France, 1439); Howard S. Levie, *Command Responsibility*, 8 U.S. A.F. ACAD. J. LEGAL STUD. 1 (1997-1998) (Grotius, 1625); Parks, *supra* note 1, at 1, 3 and 19 (Sun Tzu, 500 B.C.); Shany & Michaeli, *supra* note 14, at 816 (Grotius, 1625); Smidt, *supra* note 15, at 169-170 (Hagenbach, 1474).

⁴⁷ See Bantekas, *supra* note 15, at 573 (“The Hague Conventions IV (1907) and X (1907) establishing the doctrine of ‘command responsibility.’”); Boelaert-Suominen, *supra* note 13, at 755 (“It is often suggested that the roots of the modern doctrine of command responsibility may be found in the Hague Convention of 1907.”); Burnett, *supra* note 14, at 131 (“A general description of the military commander’s role in hostilities first surfaced in the Fourth and Tenth Hague Conventions of 1907.”); Ching, *supra* note 14, at 177

that the concept of individual criminal responsibility for the failure to take the necessary measures to prevent or to repress crimes was given explicit expression in an international context⁴⁸, and that it was the war crimes trials after World War II that gave international application to and consummated the doctrine of command responsibility.⁴⁹ Further, scholars

(“Perhaps the first international recognition of the command responsibility doctrine occurred in the Hague Convention IV of 1907.”); Fenrick, *supra* note 14, at 112 (“The roots of the customary law doctrine of military command responsibility can be found in Hague Convention IV of 1907 and in decisions of certain war crimes tribunals following World War II.”); Green, *supra* note 14, at 325 (“The first treaty obligation making a superior liable for breaches of humanitarian law committed during war is to be found in Article 3 of the IV Hague Convention of 1907 Respecting the Laws and Customs of War on Land.”); Shany & Michaeli, *supra* note 14, at 817 (“The first international legal instrument that implicitly recognized the doctrine of command responsibility was the 1907 Hague Convention Respecting the Laws and Customs of War.”); Smidt, *supra* note 15, at 171 (“The first attempt to codify the customary concept of command responsibility in international law appears in the Fourth Hague Convention of 1907.”).

⁴⁸ See Boelaert-Suominen, *supra* note 13, at 755 (“It was not until the end of World War I, however, that the notion of individual criminal responsibility for failure to take necessary measures to prevent or to repress breaches of the laws of armed conflict was given explicit expression in an international context.”); Burnett, *supra* note 14, at 131 (“By the end of World War I, however, the concept of [command responsibility] was becoming increasingly criminal in its normative content in the international community . . .”); Lippman, *supra* note 14, at 9 (“The issue of command responsibility arose during the debate over the prosecution of war crimes committed during World War I.”); Shany & Michaeli, *supra* note 14, at 817 (“The earliest attempt to prosecute commanders for crimes perpetrated by troops subject to their authority was made in the aftermath of World War I.”).

⁴⁹ See Bantekas, *supra* note 15, at 573 (“Subsequent proceedings after World War II have provided ample legal precedent in support of the doctrine of command responsibility and have elaborated on its content.”); Boelaert-Suominen, *supra* note 13, at 756 (“It was only in the aftermath of World War II that the doctrine of command responsibility for failure to act received its first judicial recognition in an international context.”); O’Brien, *supra* note 14, at 285 (“The post-World War II Tribunals consummated the doctrine of command responsibility and the duty to control one’s soldiers.”); Parks, *supra* note 1, at 76-77 (“The trials upon the conclusion of World War II gave international application on a major scale to a custom first given substantial recognition by its codification in Hague Convention IV of 1907.”); Shany & Michaeli, *supra* note 14, at 816 (The “first instance in which the doctrine of command responsibility was systematically developed and applied was at the end of World War II in the context of the trials of Nazi and Japanese war criminals.”); Smidt, *supra* note 15, at 176 (“It was during the [WWII] war crimes trials themselves that the doctrine of command responsibility developed.”); Wu & Kang, *supra* note 14, at 274

agree that the 1977 Protocol I is the first international treaty to explicitly address the doctrine of command responsibility.⁵⁰ According to Article 86(2) of Protocol I, responsibility can be imposed on a commander if the commander “knew, or had information which should have enabled [the commander] to conclude in the circumstances at the time, that [a subordinate] was committing or was going to commit” a breach of the Geneva Conventions or of the Protocol itself, and “did not take all feasible measures within [the commander’s] power to prevent or repress the breach.”⁵¹

Returning to the main point of this Article, as there are disagreements about some aspects of the doctrine of command responsibility, there are also different interpretations as to the scope of the doctrine.⁵² According to some interpretations of the doctrine, it encompasses both the direct responsibility of a commander who has given a subordinate an order to commit an act in breach of the law of armed conflict, and the indirect responsibility of a commander for acts committed by a subordinate because of a *failure to prevent* the subordinate from committing the act or a *failure to punish* the subordinate after the act had been committed.⁵³ In this Article, I am concerned with the latter type of

(“The modern doctrine of command responsibility is one of the products of the developments in the law of armed conflict associated with the Nuremberg and Tokyo trials at the end of World War II.”).

⁵⁰ See Crowe, *supra* note 46, at 224 (“In 1977, a field of international delegates amended the 1949 Geneva Conventions of 12 August 1949 and, for the first time, specifically addressed the doctrine of command responsibility.”); Fenrick, *supra* note 14, at 118 (“The first treaty to explicitly address the doctrine of command responsibility is the Additional Protocol I of 1977 . . .”); Smidt, *supra* note 15, at 201-202 (“The first international attempt to codify command responsibility appears in the 1977 Additional Protocol I to the 1949 Geneva Conventions (Protocol I.”); Wu & Kang, *supra* note 14, at 276 (“The first international treaty to codify the doctrine of command responsibility is Protocol I Additional to the Geneva Conventions of 1949.”).

⁵¹ Protocol I Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 16 Int’l Legal Materials 1442 (1977), [hereinafter, “Protocol I”], Article 86(2).

⁵² See *supra* note 14.

⁵³ See Ching, *supra* note 14, at 176 (“Furthermore, the commander’s responsibility is twofold: commanders may be directly liable for issuing illegal orders and may also be liable for the unlawful acts subordinates, if the commanders knew or should have known about the illegal acts, but failed to prevent or punish them.”).

indirect responsibility, based upon a commander's failure to properly discharge his or her duties to prevent or punish.

Specifically, because my analysis is based on Article 28(a) of the Rome Statute, I define command responsibility as the criminal responsibility of a "military commander or person effectively acting as a military commander . . . for crimes within the jurisdiction of the [ICC] 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.*"⁵⁴ Also, the term "commander" means, in accordance with Article 28(a), a "military commander or person effectively acting as a military commander"⁵⁵ and "subordinate" means someone under a commander's "effective command and control, or effective authority and control as the case may be."⁵⁶ Thus, command responsibility means the personal, individual criminal liability of a commander, under certain circumstances, for the crimes committed by his or her subordinates.

In its indirect form – based on the failure to act as opposed to direct action such as the issuance of illegal orders – some variants of the doctrine of command responsibility may not be consistent with the culpability-restricting principles of municipal law.⁵⁷ Professor Mirjan Damaska argues that both the failure to prevent and the failure to punish comprise two variants.⁵⁸ The first variant of the *failure to prevent* includes situations in which a commander "knows" that his or her subordinate is about to commit a crime, but fails to take appropriate measures to prevent the commission of the crime.⁵⁹ The first variant of the *failure to punish* includes situations in which a commander's failure to punish contributes to further criminal activity of those under his or her command.⁶⁰ In these situations, Damaska contends, the commander's conduct arguably shades into accomplice liability.⁶¹ The second variants of the failure to prevent or to punish include, respectively, situations in which the commanders negligently failed to obtain information capable of putting them in a

⁵⁴ See the Rome Statute, *supra* note 17, Article 28(a).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Damaska, *supra* note 14, *passim*.

⁵⁸ *Id.* at 461 and 467.

⁵⁹ *Id.* at 461.

⁶⁰ *Id.* at 467.

⁶¹ *Id.* at 462 and 467.

position to prevent their subordinates' criminal activity or commanders failed to call their subordinates to task after the commanders had learned about what their subordinates had done.⁶² Professor Damaska argues that in the second variants of a commander's failure to prevent or punish, the commander's liability is divorced from his or her culpability to such a degree that conviction no longer mirrors his or her underlying conduct and actual *mens rea*.⁶³

Similarly, in its indirect form, the second variants of the doctrine of command responsibility (as well as the notion of using criminal punishment to promote the deterrence of future crimes) run counter to the classical Kantian view of a retributive or "just deserts" theory of justice, which holds that punishment should be proportionate to the level of moral iniquity.⁶⁴ Criminal punishment can be justified on two grounds: utilitarian and retributivist.⁶⁵ For utilitarians, criminal punishment is justified by the future benefit it provides, namely a reduction in future crimes.⁶⁶ Jeremy Bentham argued that "[g]eneral prevention ought to be the chief end of punishment, as it is its real justification."⁶⁷ To Bentham "an offender's punishment ought to be set not according to the amount deserved, but rather according to the amount needed to deter future instances of the offense."⁶⁸ In contrast, according to those who subscribe to the "retributivist" or "just deserts" view, to give an offender "what he or she deserves for a past crime is a valuable end in itself and needs no further justification."⁶⁹ Kant argued that:

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on

⁶² *Id.* at 462-464 and 468.

⁶³ *Id.* at 464 and 468.

⁶⁴ Immanuel Kant, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 138 (1999 ed.); see also Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454-455 (1997) (summarizing Immanuel Kant's theory of "just deserts" which held that punishment should be proportionate to "their internal wickedness").

⁶⁵ See Robinson & Darley, *supra* note 64, at 454.

⁶⁶ *Id.*

⁶⁷ JEREMY BENTHAM, *Principles of Penal Law*, in 1 *THE WORKS OF JEREMY BENTHAM* 396 (John Bowring ed., 1962).

⁶⁸ See Robinson & Darley, *supra* note 64, at 455.

⁶⁹ *Id.* at 454.

the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else and can never be included among objects of the Law of things [*Sachenrecht*]. His innate Personality [that is, his right as a Person] protects him against such treatment, even though he may indeed be condemned to forfeit his civil Personality. He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens.⁷⁰

The utilitarian and retributivist views are generally considered irreconcilable although there have been recent attempts to “reconcile” them.⁷¹

The second variants of the doctrine of command responsibility run counter to the retributivist view of criminal punishment because under those two variants, criminal punishment can be imposed upon a commander notwithstanding the absence of a culpable state of mind. Arguably, under the second variants of the indirect form of doctrine of command responsibility, the commander is getting more than his or her “just deserts” for the benefit of a future reduction in war crimes.

Professor Jeffrie Murphy questioned whether Kant has a theory of punishment and whether it is proper to continue to think of Kant as a paradigm retributivist in the theory of punishment.⁷² Based on an analysis of Kant’s writings other than the *Metaphysical Elements of Justice*, Murphy proposed the following “reasonably consistent [Kantian] philosophical account of state punishment:” “[t]he role of criminal punishment . . . is instrumental . . . justified solely by reference to the end of maintaining a peaceful system of ordered liberty. It will accomplish this end primarily through deterrence.”⁷³ I prefer Murphy’s interpretation of Kant’s theory of criminal punishment. In addition, because of the continuing violations of women’s human rights during war and the implications of those violations (including the transmission of HIV), the adoption of a utilitarian or Benthamian view of criminal punishment with respect to command responsibility and gender crimes is justified.

⁷⁰ See Kant, *supra* note 64, at 138.

⁷¹ See Robinson & Darley, *supra* note 64, *passim*.

⁷² See Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment*, 87 Colum. L. Rev. 509 (1987).

⁷³ *Id.* at 512-516.

B. The Knowledge Prerequisite of the Doctrine of Command Responsibility Under Article 28(a)(i) of the Rome Statute

The doctrine of command responsibility under Rome Statute Article 28(a) can be divided into three prerequisites: 1) status, 2) knowledge, and 3) failure to take action. Specifically, in order to impose criminal responsibility under Article 28(a), at the time of the commission of the crime(s): 1) the defendant had to have the status of “commander” and the person or persons committing the crime(s) had to have the status of “subordinate(s)”;⁷⁴ 2) the commander/defendant had either to know, or “owing to circumstances at the time, should have known” that the subordinates were committing or about to commit such crimes;⁷⁵ and 3) the commander/defendant had to have failed to take “all necessary and reasonable measures within his or her power to prevent or repress” the subordinate’s crimes, “or to submit the matter to the competent authorities for investigation and prosecution.”⁷⁶

I confine myself in this Article to the second prerequisite of command responsibility namely, the knowledge prerequisite. The fundamental question is then what, under Rome Statute Article 28(a)(i), is the meaning of the phrase “owing to the circumstances at the time, should have known.”

⁷⁴ See the Rome Statute, *supra* note 17, at Article 28(a).

⁷⁵ *Id.* at Article 28(a)(i).

⁷⁶ *Id.* at Article 28(a)(ii).

II. THE KAHAN REPORT, HISTORICAL INFORMATION, AND COMMON OR PUBLIC KNOWLEDGE

Putting aside cases in which there is evidence of actual knowledge that forces were committing or about to commit gender crimes, I propose only with respect to gender crimes that historical information, and common or public knowledge that gender crimes have occurred throughout history within internal and international armed conflicts, should be deemed to satisfy the “owing to the circumstances at the time, should have known” prerequisite for imposition of liability under Rome Statute Article 28(a)(i).

In short, because the perpetration of gender crimes in armed conflict and the knowledge of the perpetration are pervasive and widespread, I propose that, solely with respect to gender crimes, knowledge should be assumed. The Kahan Report provides precedent for this proposal.

On September 16, 1982, Israeli Defense Forces (I.D.F.) – in West Beirut as a result of Israel’s invasion of Lebanon on June 6, 1982 – permitted the Phalangists, a Lebanese Christian armed force, to enter the Sabra and Shatilla refugee camps.⁷⁷ From 6:00 p.m. on September 16th until 8:00 a.m. on September 18th, the Phalangists tortured, raped, kidnapped and massacred men, women, and children, mostly Palestinians and Lebanese, but also including Iranians, Syrians, Pakistanis and Algerians.⁷⁸ Because some of the people killed were taken away in trucks or buried in mass graves, an exact number of casualties could not be ascertained.⁷⁹ However, estimates of those killed range from 300 to 3,000 people.⁸⁰

⁷⁷ See the Kahan Report, *supra* note 25, at 477, 480 and 481; Burnett, *supra* note 14, at 152 and 155; Linda A. Malone, *The Appointment of General Yaron: Continuing Impunity for the Sabra and Shatilla Massacres*, 32 CASE W. RES. L. REV. 287, 288 and 290 (2000); Malone, *The Kahan Report*, *supra* note 26, at 374; Shany & Michaeli, *supra* note 14, at 808 and 810.

⁷⁸ See the Kahan Report, *supra* note 25, at 482-493; Burnett, *supra* note 14, at 156-159; Malone, *The Appointment of General Yaron*, *supra* note 77, at 291-300; Malone, *The Kahan Report*, *supra* note 26, at 374; Shany & Michaeli, *supra* note 14, at 797 and 810-813.

⁷⁹ See the Kahan Report, *supra* note 25, at 491; Burnett, *supra* note 14, at 159; Malone, *The Appointment of General Yaron*, *supra* note 77, at 300-301; Malone, *The Kahan Report*, *supra* note 26, at 374; Shany & Michaeli, *supra* note 14, at 797 and 810-813.

⁸⁰ See the Kahan Report, *supra* note 25, at 491; Burnett, *supra* note 14, at 159; Malone, *The Appointment of General Yaron*, *supra* note 77, at 300-301; Malone, *The Kahan Report*, *supra* note 26, at 374; Shany & Michaeli, *supra* note 14, at 797 and 810-813.

On September 28, 1982, the Government of Israel decided to establish the Commission charged with investigating the “Sabra and Shatilla” massacre.⁸¹ The Commission was comprised of then President of the Israeli Supreme Court, Yitzhak Kahan, then Justice Aharon Barak, and Major General in reserve Yona Efrat.⁸² On February 7, 1983, the Commission published its Kahan Report, in which it found the State of Israel and several individuals “indirectly” responsible for the massacre.⁸³ Specifically, the Commission found then Minister of Defense Ariel Sharon and Lieutenant General Rafael Eitan indirectly responsible for the massacre committed by the Phalangists. The Commission found that Sharon and Eitan had knowledge that violence by the Phalangists against the Palestinians had historically occurred in the past, and based on that historical information Sharon and Eitan should have known that there was a risk of future violence by the Phalangists against the Palestinians and, consequently, should have taken measures to guard against such violence.⁸⁴

The Commission began its analysis of the indirect responsibility of the State of Israel for the atrocities committed at Sabra and Shatilla by examining “whether persons acting and thinking rationally were dutybound, when the decision was taken to have the Phalangists enter the camps, to foresee, *according to the information that each of them possessed and according to public knowledge*, that the entry of the Phalangists into the camps held out the danger of a massacre and that no little probability existed that it would in fact occur.”⁸⁵ In articulating its analysis, the Commission explained that, in its view:

[E]veryone who had anything to do with events in Lebanon *should have felt apprehension* about a massacre in the camps, if armed Phalangist forces were to be moved into them *without the I.D.F. exercising concrete and effective supervision and scrutiny of them*. All those concerned *were well aware* that combat morality among

⁸¹ See the Kahan Report, *supra* note 25, at 473; Burnett, *supra* note 14, at 75-76; Malone, *The Appointment of General Yaron*, *supra* note 77, at 287; Malone, *The Kahan Report*, *supra* note 26, at 374; Shany & Michaeli, *supra* note 14, at 806.

⁸² See the Kahan Report, *supra* note 25, at 473; Shany & Michaeli, *supra* note 14, at 806.

⁸³ See the Kahan Report, *supra* note 25 (passim); Malone, *The Kahan Report*, *supra* note 26, at 374; Shany & Michaeli, *supra* note 14, at 806, 813-816.

⁸⁴ See the Kahan Report, *supra* note 25, at 496-499, 502-503, 505-507; Shany & Michaeli, *supra* note 14, at 813-816.

⁸⁵ See the Kahan Report, *supra* note 25, at 497-498 [emphasis added].

the various combatant groups in Lebanon differs from the norm in the I.D.F., that the combatants in Lebanon belittle the value of human life far beyond what is necessary and accepted in wars between civilized peoples, and *that various atrocities against the noncombatant population had been widespread in Lebanon since 1975. It was well known that the Phalangists harbor deep enmity for the Palestinians, viewing them as the source of all the troubles that afflicted Lebanon during the years of the civil war.* The fact that in certain operations carried out under close I.D.F. supervision the Phalangists did not deviate from disciplined behavior could not serve as an indication that their attitude toward the Palestinian population had changed, or that changes had been effected in their plans – which they made no effort to hide – for the Palestinians.⁸⁶

The Commission also mentioned that there were news articles in the press stating that “excesses could be expected on the part of the Christian fighters.”⁸⁷

Further, the Commission clarified that it was not saying that “the decision to have the Phalangists enter the camps should under no circumstances have been made and was totally unwarranted.”⁸⁸ The Commission explained that:

*[H]ad the decision-makers and executors been aware of the danger of harm to the civilian population on the part of the Phalangists but had nevertheless, having considered all the circumstances, decided to have the Phalangists enter the camps while taking all possible steps to prevent harm coming to the civilian population, it is possible that there would be no place to be critical of them, even if ultimately it had emerged that the decision had caused undesirable results and had caused damage.*⁸⁹

On the issue of the indirect responsibility of Ariel Sharon, then Minister of Defense, Sharon’s position was that “no one had imagined the

⁸⁶ *Id.* at 498 [emphasis added].

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 498-499 [emphasis added].

Phalangists would carry out a massacre in the camps and that it was a tragedy that could not be foreseen.”⁹⁰ Sharon stressed that:

[T]he director of Military Intelligence, who spent time with him and maintained contact with him on the days prior to the Phalangists’ entry into the camps and at the time of [I.D.F.’s] entry into the camps, did not indicate the danger of a massacre, and that no warning was received from the Mossad [the Israeli intelligence agency], which was responsible for the liaison with the Phalangists and also had special knowledge of the character of this force.⁹¹

In response to Sharon’s position, congruent with the views it expressed about the indirect responsibility of the State of Israel, the Commission held that:

[I]n our view, even without such warning, it is impossible to justify the Minister of Defense’s disregard of the danger of a massacre. We will not repeat here what we have already said above about the *widespread knowledge* regarding the Phalangists’ combat ethics, their feelings of hatred toward the Palestinians, and their leaders’ plans for the future of the Palestinians when said leaders would assume power. Besides this *general knowledge*, the Defense Minister also had special reports from his not inconsiderable [number of] meetings with the Phalangist heads before Bashir’s assassination.⁹²

Finally, the Commission held that:

If in fact the Defense Minister, when he decided that the Phalangists would enter the camps without the IDF taking part in the operation, did not think that that decision could bring about the very disaster that in fact occurred, the only possible explanation for this is that *he disregarded any apprehensions* about what was to be expected because the advantages – which we have already noted –

⁹⁰ *Id.* at 502.

⁹¹ *Id.*

⁹² *Id.* [emphasis added].

to be gained from the Phalangists' entry into the camps distracted him from the proper consideration in this instance.⁹³

On the issue of the indirect responsibility of the I.D.F. Chief of Staff, Lieutenant General Rafael Eitan, Eitan, like Sharon, took the position that:

[I]t had never occurred to him that the Phalangists would perpetrate acts of revenge and bloodshed in the camps. He justified this lack of foresight by citing the experience of the past, whereby massacres were perpetrated by the Christians only before the Peace of Galilee War and only in response to the perpetration of a massacre by the Muslims against the Christian population, and by citing the disciplined conduct of the Phalangists while carrying out certain operations after the IDF's entry into Lebanon.⁹⁴

Again, congruent with its views of Sharon's and the State of Israel's indirect responsibility, the Commission held that:

We are not prepared to accept these explanations. In our view, none of these reasons had the power to cancel out the serious concern that in going into the refugee camps, the Phalangist forces would perpetrate indiscriminate acts of killing. We rejected arguments of this kind in the part of this report that deals with indirect responsibility, as well as in our discussion of the responsibility borne by the Minister of Defense, and the reasons we presented there likewise hold for the Chief of Staff's position. . . . Past experience in no way justified the conclusion that the entry of the Phalangists into the camps posed no danger. The Chief of Staff *was well aware that the Phalangists were full of feelings of hatred towards the Palestinians and that their feelings had not changed since the "Peace for Galilee" War. . . . [t]he absence of a warning from experts cannot serve as an explanation for ignoring the danger of a massacre. The Chief of Staff should have known and foreseen – by virtue of common knowledge, as well as the special information at his disposal – that there was a possibility of harm to the population in the camps at the hands of the Phalangists. Even*

⁹³ *Id.* [emphasis added].

⁹⁴ *Id.* at 505.

if the experts did not fulfill their obligation, this does not absolve the Chief of Staff of responsibility.⁹⁵

As the Commission had stated with respect to Minister Sharon, it held that:

If the Chief of Staff did not imagine at all that the entry of the Phalangists into the camps posed a danger to the civilian population, his thinking on this matter constitutes *a disregard of important considerations that he should have taken into account*. Moreover, considering the Chief of Staff's own statements quoted above, it is difficult to avoid the conclusion that the Chief of Staff ignored this danger out of an awareness that there were great advantages to sending the Phalangists into the camps, and perhaps also out of a hope that in the final analysis, the Phalangists' excesses would not be on a large scale. This conclusion is likewise prompted by the Chief of Staff's behavior during later stages, once reports began to come in about the Phalangists' excesses in the camp.⁹⁶

In sum, in the Kahan Report, the Commission found Sharon and Eitan "indirectly" responsible for the Sabra and Shatilla massacres based upon historical information about the nature of Phalangist forces and the nature of the relationship between the Phalangists and the Palestinians. The Commission found that Sharon and Eitan were well aware of the combat morality of the Phalangists, that combatants in Lebanon belittled the value of human life, that the Phalangists harbored deep enmity for the Palestinians, and, most importantly for the purpose of this Article, *that various atrocities against the noncombatant Palestinian population had been widespread in Lebanon since 1975*. Because of this *historical information and common or public knowledge* regarding the Phalangists' combat ethics and their feelings of hatred toward the Palestinians, the Commission held that Sharon and Eitan should have known and foreseen, and should have felt apprehension that entry of the Phalangists into the camps held out the *danger* of a massacre. However, had the I.D.F. exercised concrete and effective supervision and scrutiny of the Phalangist forces, it is possible that there would have been no place to be critical of them, even if ultimately it had emerged that the decision had caused

⁹⁵ *Id.* [emphasis added].

⁹⁶ *Id.* at 505-506 [emphasis added].

undesirable results and had caused damage. Thus, the historical and widespread knowledge of past atrocities triggered a duty to be aware of possible future atrocities and to take measures to prevent them.

On the issue of command responsibility, a Trial Chamber of the International Criminal Tribunal for Yugoslavia (ICTY) stated in *Prosecutor v. Blaskic* (the *Blaskic Case*) that it considered the findings of the Commission in the Kahan Report “to constitute further evidence of the state of customary international law.”⁹⁷ Further:

With respect to the responsibility of [Eitan], the Commission held that his knowledge of the feelings of hatred of the particular forces involved towards the Palestinians did not justify the conclusion that the entry of those forces into the camps posed no danger. Accordingly, ‘The absence of a warning from experts cannot serve as an explanation for ignoring the danger of a massacre. [Eitan] should have known and foreseen – *by virtue of common knowledge*, as well as the special information at his disposal – that there was a possibility of harm to the population in the camps at the hands of the Phalangists. Even if the experts did not fulfill their obligation, this does not absolve [Eitan] of responsibility.’⁹⁸

It has been interpreted that the ICTY Trial Chamber in the *Blaskic Case* adopted a simple negligence, duty to know standard, whereby “the commander need not be in possession of ‘telling’ information. It suffices that he failed to implement measures which could have yielded this kind of information, provided that he ‘should have known’ that the failure to implement these measures was a ‘criminal dereliction.’”⁹⁹ In the *Blaskic Case* itself, in interpreting the Kahan Report, the Trial Chamber stated that:

The Commission clearly held that the applicable standard for imputing responsibility is negligence: If [Eitan] did not imagine at all that the entry of the Phalangists into the camps posed a danger to the civilian population, his thinking on this matter constitutes a disregard of important considerations that he should have taken into account. [...] We determine that [Eitan’s] inaction [...]

⁹⁷ *Prosecutor v. Blaskic*, Judgment, Case No. IT-95-14-T, para 331 (ICTY, March 3, 2000), available at www.icty.org.

⁹⁸ *Id.* [emphasis added].

⁹⁹ See Damaska, *supra* note 14, at n. 18; Shany & Michaeli, *supra* note 14, at 863-864.

constitute[s] a breach of duty and dereliction of the duty incumbent upon [him]. In conclusion, the Trial Chamber finds that if a commander has exercised due diligence in the fulfillment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.¹⁰⁰

The command responsibility standard adopted by the ICTY in the *Blaskic Case* has arguably been rejected by the ICTY in a later ICTY Appeals Chamber decision, the *Celebici Case*.¹⁰¹ In the *Celebici Case*, the Appeals Chamber upheld the Trial Chamber's interpretation of the "had reason to know" standard, which interpretation was that, "a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates. This is consistent with the customary international law standard of *mens rea* as existing at the time of the offences charged in the Indictment."¹⁰² Further clarifying the holding of the Trial Chamber in *Celebici*, the Appeals Chamber stated,

[T]he Trial Chamber did not hold that a superior needs to have information on subordinate offences in his actual possession for the purpose of ascribing criminal liability under the principle of command responsibility. A showing that a superior had some *general information* in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he "had reason to know." The ICRC Commentary (Additional Protocol I) refers to "reports addressed to (the superior), [...] the tactical situation, the level of training and instruction of subordinate officers and their troops, and their character traits" as potentially constituting the information referred to in Article 86(2) of Additional Protocol I. As to the form of the

¹⁰⁰ See the *Blaskic Case*, *supra* note 97, para 332.

¹⁰¹ Prosecutor v. Delalic, Judgment, Case No. IT-96-21-A, paras 215-241 (ICTY, Feb. 20, 2001), available at www.icty.org.

¹⁰² See the *Celebici Case* *supra* note 101, para 241.

information available to him, it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system. This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge. Finally, the relevant information only needs to have been provided or available to the superior, or in the Trial Chamber's words, "in the possession of." It is not required that he actually acquaint himself with the information. In the Appeals Chamber's view, an assessment of the mental element required by Article 7(3) of the Statute should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question. Thus, as correctly held by the Trial Chamber, as the element of knowledge has to be proved in this type of cases, command responsibility is not a form of strict liability. A superior may only be held liable for the acts of his subordinates if it is shown that he "knew or had reason to know" about them. The Appeals Chambers would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of *strict imputed liability*.¹⁰³

While the ICTY Trial Chamber in the *Blaskic Case* cited to the Kahan Report in support of its adoption of a simple negligence, duty to know standard, arguably, the findings and analysis in the Kahan Report are more consistent with the ICTY's Appeal Chamber's interpretation in the *Celebici Case* of Article 7(3)'s "had reason to know" test. This interpretation, according to some legal scholars, is the correct interpretation of the knowledge prerequisite under customary international law.¹⁰⁴ In the Kahan Report, indirect responsibility was imposed upon Sharon and Eitan because they were in possession of general historical information which should have made them aware of future risk of violence. Indirect responsibility was not imposed based upon a general duty to know.

¹⁰³ *Id.* at paras. 238-239 [emphasis added].

¹⁰⁴ See Shany & Michaeli, *supra* note 14, at 863-864.

As careful reading of the Kahan Report attests, the Commission did not find that Eitan or Sharon had a general duty to know. Rather, the Commission found that both Eitan and Sharon were in possession of sufficient, “telling” information – historical information and information of common or public knowledge – which should have alerted them that measures needed to be taken. Sharon and Eitan possessed information. What is important to this Article about the Kahan Report is the *type* of information that Sharon and Eitan possessed, upon which information the Commission found indirect responsibility: namely, historical information and common or public knowledge.

Professor Damaska has argued that the use of the Kahan Report as evidence that imputed command responsibility has acquired customary status in international criminal law is “monument to this mistake” of implying that “the responsibility of commanders for the misdeeds of their underlings” should be vicarious.¹⁰⁵ Damaska points out that the Commission never specifically invoked the doctrine of command responsibility and explains that:

While the Commission’s findings do stand for the proposition that mere negligence in preventing criminal acts of one’s subordinates can engage superior responsibility, the findings are completely silent on the issue of superior responsibility for failure to punish. More importantly, there is no reference whatsoever in the [Kahan Report] as to the specific nature of superior responsibility . . . [I]ts members never contemplated endorsing the concepts of primary responsibility of a commander for crimes committed by those under his control. It was never their intention to suggest that the atrocities perpetrated by the Phalangists could be attributed to the Israeli military brass by operation of the imputed responsibility doctrine.¹⁰⁶

Although the Commission might not have “contemplated endorsing the concepts of primary responsibility of a commander” for the atrocities committed by the Phalangists, in applying the doctrine of command responsibility under Article 28(a) of the Rome Statute, the ICC can draw on the analysis in and findings of the Kahan Report. In addition, the Kahan Report has been cited to by several international law scholars (as well as

¹⁰⁵ See Damaska, *supra* note 14, at 492-493.

¹⁰⁶ *Id.* at 493.

the ICTY, as discussed above) as an example of the application of the doctrine of command responsibility.¹⁰⁷

¹⁰⁷ See Burnett, *supra* note 14, passim; Malone, *The Appointment of General Yaron*, *supra* note 77, passim; Malone, *The Kahan Report*, *supra* note 26, passim; Shany & Michaeli, *supra* note 14, passim.

III. THE APPLICATION OF THE KAHAN REPORT TO ARTICLE 28(A)(I) OF THE ROME STATUTE, SPECIFICALLY WITH RESPECT TO GENDER CRIMES

In this Article I advance the position, as recognized in the Kahan Report, that knowledge about the widespread and historical occurrence of gender crimes in armed conflict is the type of information that should be deemed to satisfy the knowledge prerequisite under Rome Statute Article 28(a)(i). A foundational precept of my proposal is that the continuing commission of gender crimes in war must end, and that it is unacceptable to allow commanders to escape criminal responsibility for their subordinates' gender crimes on the basis that the commanders lacked "knowledge" that subordinates were committing or about to commit such crimes. Again, gender crimes in internal and international armed conflict have occurred throughout history. If it ever was, it is now no longer plausible or possible to justify the disregard of the danger of gender crimes in armed conflict. I propose that the historical record of the continuing occurrence of gender crimes in armed conflict, in violation of international humanitarian law, be paired with the doctrine of command responsibility in an attempt to stop gender crimes. As the Kahan Report stated and as I discussed earlier, it is difficult to avoid the conclusion that commanders ignore the danger of gender crimes – despite the widespread and continuing commission of such crimes – perhaps out of an awareness that there are advantages to such excesses.

The standard I propose is not a strict liability standard. A commander can be relieved of criminal liability if, as referenced in the Kahan Report, he or she took all possible steps to prevent sexual violence against women. What this standard does is to make it easier for commanders to be held individually criminally responsible for the commission of gender crimes by his or her subordinates. I am hoping that commanders, assuming that a commander/subordinate relationship exists, will recognize that the only remaining barrier between them and prosecution before the ICC is a persuasive demonstration that they took all necessary and reasonable measures within their power to prevent or punish the commission of gender crimes and will have a heightened incentive to take such measures. Adding to this incentive should be the knowledge that any analysis by ICC judges of whether or not a commander took "all necessary and reasonable measures" will be retrospective and likely undertaken by lawyers who may have no military experience. I hope that this combination of incentives – satisfaction of the knowledge prerequisite

with historical and common or public knowledge and the awareness of a retrospective analysis by non-military personal – will serve to better protect women from sexual violence during war.

Admittedly, an argument can be made that, because atrocities, in general, have historically been committed during war and are a matter of common or public knowledge, such knowledge cannot be deemed to satisfy the knowledge prerequisite of Article 28(a)(i) as that prerequisite would always and necessarily be met, rendering the prerequisite a nullity. However, I limit the application of my proposal of using historical information and common or public knowledge to satisfy the knowledge prerequisite of Article 28(a)(i) to gender crimes because, unlike other “atrocities”, gender crimes are always violations of international humanitarian law and can never be justified by military necessity.

As explained above, using historical information and common or public knowledge to satisfy the knowledge prerequisite makes the prosecution of commanders easier because only two prerequisites – status and failure to act – remain to be satisfied. The tension between military necessity and humanity are always at play during war.¹⁰⁸ With respect to atrocities in general committed during war, in the fog of war, given the needs of military operations, it might be difficult to distinguish between permissible and impermissible behavior under international humanitarian law. For example, with respect to the treatment of prisoners of war, the application of a standard which would make it easier to convict a commander for all atrocities committed by subordinates might serve to undermine principles of military necessity.¹⁰⁹ However, rape and other forms of sexual violence against women during war clearly violate international humanitarian law, and no acceptable argument can be made that such conduct is militarily necessary. A standard making it easier for commanders to be held criminally responsible for gender crimes committed by their subordinates does not or at least should not serve to undermine military necessity.

As explained above in Part I, leading commentators on the doctrine of command responsibility debate whether Article 28(a)(i) adopts a simple negligence/“should have known” or the stricter/“some information”

¹⁰⁸ See Burnett, *supra* note 14, at 76-77; Eckhardt, *supra* note 14, at 2; Smidt, *supra* note 15, at 156-159.

¹⁰⁹ See Smidt, *supra* note 15, at 158-159.

standard.¹¹⁰ My proposal should work, regardless of which standard the ICC chooses to adopt. Under my proposal, the issue is not *whether* the commander had “telling” information, but rather the *type* of information that the commander had. Under my proposal, the commander is assumed to have ample information about the historical and widespread occurrence of gender crimes in armed conflict – enough information to impel him or her to act or to seek more information. Thus, my proposal should be able to meet either of the competing knowledge standards of liability.

¹¹⁰ See Lippman, *supra* note 14, at 86 (The language in Article 28 of the Rome Statute “is directly drawn from the Geneva Protocol.”); Smidt, *supra* note 15, at 211 (“Other than the fact that the drafters of the ICC Statute clearly intended to establish the *Yamashita* ‘knew or should have known’ standard of command responsibility . . .”); Vetter, *supra* note 14, at 122 (“The ‘owing to the circumstances at the time’ clause immediately preceding the phrase ‘should have known’ in Article 28 of the Rome Statute, makes a substantial difference and probably makes the ICC standard closer to the ICTY standard than to the mythical ‘should have known’ standard.”).

CONCLUSION

Rape and other types of gender crimes have historically been committed against women during war. Given the AIDS pandemic in Sub-Saharan Africa and the correlation between the widespread transmission of the HIV virus and rape by soldiers during armed conflict, the international community needs to seriously address finding ways to prevent or deter the commission of rape and other gender crimes during armed conflict. A purpose of the international humanitarian and military law doctrine of command responsibility is to deter the commission of war crimes. The three prerequisites to liability under the doctrine are: 1) a commander/subordinate relationship; 2) “knowledge” that subordinates are committing or about to commit the crimes; and, 3) the failure to prevent or punish the crimes. A possible avenue to the prevention of gender crimes during armed conflict is through the application by the ICC of the doctrine of command responsibility to gender crimes, because the specter of prosecution before the ICC will lead to better preventative measures. Specifically, I propose that, for gender crimes, the prerequisite of knowledge for imposition of liability under Rome Statute Article 28(a)(i) would be satisfied by historical information and common or public knowledge that gender crimes have occurred throughout history within internal and international armed conflicts. As the above discussion makes clear, the Kahan Report provides precedent for using historical information and common or public knowledge in order to satisfy the knowledge prerequisite of command responsibility. My proposal should increase the likelihood of prosecution and conviction for gender crimes committed during armed conflict, which likelihood should in turn increase the incentive to prevent their commission.¹¹¹

¹¹¹ There are additional issues related to command responsibility that I hope to address in future articles. For example, one issue which deserves exploration is the definition of a “person effectively acting as a military commander” under Rome Statute Article 28(a), as well as the definition of the non-military superior/subordinate relationship under Article 28(b). Given situations like that in Rwanda, where a year before the genocide, the government armed forces intentionally “privatized” the violence against the Tutsi and “delegated” the violence to civilians specifically in order to avoid criminal responsibility (*see* Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with Particular Reference to Colonial and other Dependent Countries and Territories, Extrajudicial, summary or arbitrary executions, Addendum, Report by Mr. B.W. Ndiaye, Special Rapporteur, on his mission to Rwanda from 8 to 17 April 1993,

E/CN.4/1994/7/Add.1 at ¶ (11 August 1993) [hereinafter, the “UN Report”]), an important issue to explore is whether the Rwandan Hutu government armed forces effectively avoided criminal responsibility before the ICTR. An examination of the jurisprudence of the ICTR might suggest that the ICTR has been unable to impose criminal responsibility on either military commanders or civilian superiors for the conduct of the civilian armed bands that largely committed the genocide, because the ICTR might be finding it difficult to establish the existence of a superior/subordinate relationship between the civilian or military leaders and the civilian “subordinates” who committed the genocide. Consequently, in part, because of the conscious “privatization” of violence by formal armed forces, the ICTR might only be able to impose criminal responsibility on those individuals whom the ICTR can prove were somehow personally involved, which would not set good precedent.

Another possible issue, given the recent federal litigation in Florida involving command responsibility under the Alien Torts Claim Act and Torture Victims Protection Act (*see Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002); *Romagoza v. Garcia*, Case No. 99-8364 CIV-HURLEY, verdict *available at* http://www.cja.org/cases/Romagoza_Docs/RomagozaVerdict.htm) is the effective use of the United States federal judicial system in holding non-national commanders civilly responsible for gender crimes committed in armed conflict.