**Rethinking Yamashita: Holding Military Leaders Accountable for Wartime Rape**

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*I. Introduction*

*"Thirty men with guns entered in the village. Some of them found me in my house. Three of them raped me and I fell unconscious. The men locked me inside my house (straw hut) and set it on fire. I managed to get out of the house through the burning grass*" [1]
—Anonymous, October 17, 2004, West Darfur

During the genocide in Rwanda in 1994, soldiers often concluded the rape of thousands of women by "sexual mutilat[ing] the vagina and pelvic area with machetes, sticks, boiling water, and in one case, acid."[2] As part of the ethnic conflict in Bosnia, soldiers selected women at random from overcrowded "detention centers," and raped the women in front of other detainees or took them to a different location where they were raped and brutally murdered.[3] More recently, in Darfur, men wearing military uniforms routinely kidnapped girls as young as thirteen in broad daylight, held them at knifepoint, and raped them in front of their peers.[4]

The last decade has witnessed some of the most sickening examples of wartime sexual violence in recent history. In nearly all recent conflicts—including those in the former Yugoslavia, Sierra Leone, India (Kashmir), Rwanda, Sri Lanka, the Democratic Republic of Congo (DRC), Angola, Sudan, Cote d'Ivoire, East Timor, Liberia, Algeria, the Russian Federation (Chechnya), and northern Uganda—combatants have used rape to

[1] Medecins Sans Fronteirs, *The Crushing Burden of Rape: Sexual Violence in Darfur*, March 8, 2005.
[2] Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath,* September 1996, Introduction.
[3] Final Report of the Commission of Experts Pursuant to Security Council Resolution 780 (1992), U.N. SCOR, Annex 1, ¶ 248, U.N. Doc S/1994/674
[4] *See e.g.* Medecins Sans Fronteirs, *The Crushing Burden of Rape: Sexual Violence in Darfur*, March 8, 2005).

"terrorize and control civilian populations."[5] While it is undisputed that sexual violence has long been a part of ethnic warfare and armed conflict,[6] a significant amount of evidence exists to suggest that it has increasingly begun to play a more central role in military combat and ethnic conflict. The abuse and victimization of innocent civilian women and girls is high on the agenda of many combatants during these times of violence.

Increased media attention, the codification of laws preventing such violence, the rise of international war crimes tribunalsand an increase in awareness concernin g violence against women has done little to reduce wartime rape.[7] The continuing existence of such brutality indicates that the international community's response has been largely ineffectual. This note proposes that the solution lies not in punishing the soldiers who commit such heinous acts, but in making it easier to convict the military leaders who allow the violence to flourish. In some situations, it is apparent that military leaders have explicitly ordered their subordinates to commit rape and other forms of gender-based violence as part of a national policy of ethnic cleansing.[8] In other situations, soldiers may have perpetrated such crimes without the express consent of their superiors. While the modern war crimes tribunals have made it somewhat easier to punish such commanders, the current legal standard adopted by these courts does not appear to be having a significant deterrent effect. This note will contend that the continued occurrence of rape in times of war results in large part from the international community's reluctance to

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[5] LaShawn R. Jefferson, *In War as in Peace: Sexual Violence and Women's Status*, Human Rights Watch (2004), avaliable at http://hrw.org/wr2k4/15.htm.
[6] See e.g., SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975).
[7] Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELY J. INT'L LAW 288, 297 (2003).
[8] *See, e.g.*, Roy Guttman, *Rape Camps: Evidence Serb Leaders in Bosnia Ok'd Attacks*, Newsday, April 19, 1993.

punish high-level military officials who neither physically perpetrated the crime, were not present at the crime scene, and did not necessarily order rape.

This note will explore the current controversy over the proper standard for punishing commanders whose subordinates have committed rape, and examine the interplay between the nature of rape, the underlying theories of command responsibility, and an international legal system that has failed to produce fruitful results. Part I looks at the history of rape in times of war. Part II discusses the social science data available on wartime rape, and focuses on how and *why* military operations have come to use sexual violence as a weapon of war. Part III explores the theories underlying the principle of command responsibility, and then compares and contrasts various legal results and standards.

Finally, Part IV argues that the International Criminal Court (the "ICC") should return to a presumption of knowledge standard used by early war crimes tribunals for punishing commanders. The note proposes a slight expansion of the presumption standard used by these early courts, whereby general, historical knowledge of rape would satisfy the mens rea requirement of command responsibility. In addition, the note will propose a series of measures that military officials can use to both deter the commission of rape by subordinates and rebut the knowledge presumption. Finally, the note examines how the ICC could use such a standard to punish commanders for the atrocities currently under investigation in Darfur. The proposed standard will effectively punish military leaders even when they did not directly participate in the rape, were not present at the crime scene, and did not specifically order the offense. The adoption of this legal

standard should result in an overall reduction in the quantity of certain types of wartime rape.

*II. The Nature of Rape in Armed Conflict*

Rape has played a crucial role in war and armed conflict for centuries.[9] Societies have tacitly accepted rape as an "unfortunate byproduct" of war since time immemorial.[10] Even the Old Testament includes examples of such violence: "For I [God] will gather all the nations against Jerusalem to battle, and the city shall be taken and the houses looted and the women raped; half the city shall go into exile, but the rest of the people shall not be cut off from the city."[11] The Ancient Romans and Greeks, as well as other cultures have recorded examples of wartime rape.[12] It is not until recent times, however, that combatants have come to use rape as a tool of war.

**A. History of Wartime Rape**

In modern times, soldiers have committed the crime of rape in numerous conflicts not well-known to modern audiences. During World War I, for example, German soldiers habitually raped civilians in Belgium and France.[13] Both Japan and Germany used rape strategically during the Second World War, as did occupying Russian troops in Germany at the end of the war.[14] However, the scale of rape and sexual violence appears to have expanded exponentially during the twentieth century.[15] In the mid-1990's, news reports highlighted the widespread and organized rape of Bosnian Muslim women by

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[9] JUDITH G. GARDAM AND MICHELLE J. JARVIS, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW 27 (2001).
[10] Catherine N. Niarchos, *Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, 17 HUM. RTS. Q. 649, 650 (1995).
[11] *Zechariah* 14:2 (King James).
[12] *See* Brownmiller, *supra* note 5, at 33-34.
[13] Patricia Viseur Sellers and Kaouru Okuizumi, *International Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & CONTEMP. PROBS 45, 46 (1997).
[14] JAN JINDY PETTMAN, WORLDING WOMEN: A FEMINIST INTERNATIONAL POLITICS 101-115 (1994).
[15] Askin, *supra* note 6, at 297.

Bosnian Serb military forces as well as the campaign of sexual violence perpetrated by Hutu militia groups and the Rwandan Armed Forces against Tutsi women. Civilian rape also played a key role during recent fighting in Bangladesh, Uganda, Myanmar, and Somalia,[16] as well as various other conflicts not as well-reported by the mainstream press. It is undeniable that rape is nearly endemic in modern warfare.

**B. Staggering Statistics**

While it may be impossible to deduce an exact number, authorities have reported a mind-numbing amount of rapes in times of war. Experts approximate that soldiers raped between 250,000 and 400,000 women during the 9-month war for independence in Bangladesh in 1971.[17] The United Nation estimates that during the 100-day Rwandan genocide of 1994, combatants raped between 250,000 and 500, 000 women and girls.[18] In addition, "thousands women were individually raped, gang-raped, raped with objects, such as sharpened sticks or gun barrels, held in sexual slavery, or sexually mutilated."[19] Many Rwandese women contracted the AIDS virus as a result of the rape, and are now dead or waiting to die.[20]

During the war in Bosnia, European Community figures suggestthatenemy forces raped over 20,000 women, while the Sarajevo State Commission for Investigation of War Crimes estimates the number was closer to 50,000.[21] Throughout the conflict,

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[16] M.J Toole & RJ Waldman, Complex Emergencies: Refugee and Other Populations in *The Public Health consequences of Disasters*, 425 (Noji EK, ed.) (1997).
[17] BROWNMILLER, *supra* note 5, at 79.
[18] Amnesty International, *Women of Rwanda: Marked for Death*, (April 7, 2004), available at http://web.amnesty.org/actforwomen/rwa-070404-action-eng.
[19] Coalition for Women's Humans Rights in Conflict Situations, *Rwandan Rape Victims denied Justice by U.N. Tribunal*, (March 10, 2003), available at http://www.womensrightscoalition.org/newsReleases/2003-03-rwanda_en.php.
[20] *Id.*
[21] Siobhan K. Fisher, *Occupation of the Womb: Forced Impregnation as genocide*, 46 DUKE LAW JOURNAL, 91, fn 4 (1996).

soldiers raped women in their own homes, in brothels, and in various prison camps.[22] In some of these "prison camps," located in Brcko, Dboj, Foca, Gorazde, Kalinobik, Vesegrad, Keatern, Luka, Manjaca, Omarska and Tronopolje, soldiers used the barbaric practice of "forced impregnation," to abuse the women.[23] In the crime of forced impregnation a soldier rapes a woman with the goal of impregnating her.[24] Once the woman is pregnant, the soldier holds in her captivity and forces her to carry the child to term.[25]

**B. Darfur: the latest example**

This note is particularly concerned with the allegations of massrape in the province of Darfur in western Sudan. The United Nations Security Council has recently voted to refer this situation to ICC prosecutors.[26] It is likely that the ICC will hear cases resulting from the conflict in the near future. Authorities have accused Sudanese forces and government-backed Arab militias called the "Janjaweed" of using systematic rape, murder, and forcible depopulation against the villages of black Africans in the Darfur region since at least May of 2003.[27] These militia and government forces have engaged in a "widespread and systematic campaign" of rape and violence against women of the African Fur, Masalit, and Zaghawa ethnic groups.[28]

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[22] BEVERLY ALLEN, RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA (1996).
[23] Inge Skejlsbaek, *Sexual Violence and War: Mapping Out a Complex Relationship*, 7 EUR. J. OF INT'L REL., 211, 220 (2001).
[24] Spyros A. Sofos, *Inter-Ethnic Violence and Gendered Constructions of Ethnicity in Former Yugoslavia*, 2 SOC. IDENTIES 73, 86 (1996).
[25] *See id.*
[26] Human Rights Watch, *ICC Takes Step to Bring Justice to Darfur: Khartoum Should Cooperate with the International Criminal Court*, (June 6, 2005), available at http://hrw.org/english/docs/2005/06/06/sudan11076.htm.
[27] Nicholas D. Kristof, *A Policy of Rape*, N.Y.TIMES, June 5, 2005, at C2.
[28] Report of the International Commission of Inquiry on Darfur to the United Nations-Secretary-General, January 25, 2005, pg. 3, available at http: www.un.org/News?dh/sudan/com_inq_darfur.pdf

The reports of rape and other forms of sexual violence are horrific and outraging. Militia have raped and brutalized tens of thousands of women and girls.[29] In a single attack near the village of Tawila, troops raped more than one hundred women; six of whom they raped and killed in front of their own fathers.[30] While the motive behind the attacks—ethnic cleansing—appears to be similar in character to that of the 1994 conflict in Rwanda,[31] "[r]ape appears to be a feature of most attacks in Fur, Masalit, and Zaghawa areas of Darfur."[32] This outbreak of violence indicates that the legal standard adopted by the existing war crimes tribunals to punish and deter this violence has been inadequate. Given this apparent expansion of sexual violence, it is increasingly important that the ICC find novel methods of punishing, deterring, and preventing such heinous acts of gender-based violence.

**C. Rape as a Tool of War**

During World War I civilian casualties accounted for approximately 5% of deaths, by 1990 that proportion had risen to 90%.[33] The focus of war has traditionally been to overpower the opponent's forces, in recent years, however, troops have used rape as part of the fighting itself. Acts of sexual violence are increasingly committed "systematically and strategically, such that sexual violence forms a central and fundamental part of the attack."[34] It is undisputed that soldiers have always used rape to

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[29] Georgette Gagnon and Brenda Dinnick, *Sudan: Words are Not Enough*, Human Rights Watch, available at http://hrw.org/english/docs/2004/06/11/sudan8812.htm, (last visited January 1, 2006).
[30] BBC News, *Mass rape atrocity in West Sudan,(March 19, 2004) available at http://news.bbc.co.uk/2/hi/africa/3549325.stm.* (last visited January 1, 2006).
[31] *See id*.
[32] *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, 16 Human Rights Watch, 1, 33 (2004). [herinafter *Darfur Destroyed*]
[33] RUTH L. SIVARD, WORLD MILITARY AND SOCIAL EXPENDITURES, (World Priorities Inc. 14th ed. 1991).
[34] Askin, *supra* note 6, at 297.

abuse women during times of war.[35] It should come as no surprise that recorded examples of wartime rape date back to Ancient Greece.[36] In ancient times, however, the conquerors would typically rape women *after* they had won the battle as a means of celebration.[37] This does not appear to be the case in current-day conflicts.

With increasing frequency, since at least the early twentieth-century, rape has become part of the attack itself in many global conflicts. One author, who has examined the problem in depth, has written that:

> [r]ape was a weapon of terror as the German Hun marched through Belgium in World War I; gang rape was part of the orchestrated riots of Kristallnacht which marked the beginning of Nazi campaigns against the Jews. It was a weapon of revenge as the Russian Army marched to Berlin in World War II, it was used when the Japanese raped Chinese women in the city of Nanking, when the Pakistani Army battled Bangladesh, and when the American GI's made rape in Vietnam a 'standard operating procedure aimed at terrorizing the population into submission'"[38]

Antony Beevor's book documenting rape by Russian soldiers suggests thatduring th e final months of World War II "in response to the vast scale of casualties inflicted on them by the Germans, the Soviets responded in kind and that included rape on a vast scale…in many towns and villages every female from age 10 to 80 was raped."[39] Interestingly, these Russian soldiers began their campaign of rape while the war was *ending* with the justification that the women were "sex-starved" and enjoyed such violence.[40] The Soviet situation, however, is quitedifferent from modern campaigns in which combatants use

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[35] National Organization for Women, *Viewpoint: Armies at War use Rape as a Weapon*, available at http://www.now.org/nnt/fall-99/viewpoint.html ("Marauding armies have always used rape as a means of controlling the minds and bodies of those they sought to conquer.").
[36] *See e.g.*, BROWNMILLER, *supra* note 5.
[37] *See* Heather A. Blackburn and Stacey M. Thomas, *Rape Warfare*, (Feb. 25, 1998), available at http://jrscience.wcp.muohio.edu/Research/HNatureProposalsArticles/RapeWarfare.html.
[38] Maria B. Olujic, *Women, Rape, and War: The Continued Trauma of Refugees and Displaced persons in Croatia,* 13 ANTHROPOLOGY OF E. EUR. REV., Spring 1995.
[39] Peter Almond, *Feature: book on World War II rapes upsets Russians*, at http://www.cdi.org/russia/johnson/6043-11.cfm.
[40] ANTONY BEEVOR, THE FALL OF BERLIN 1945, 31 (2002).

rape not as a personal reward, but as a strategy to cripple the enemy. Rape has become a way to frighten and intimidate the opponent into submission,[41] and in cases of ethnic genocide, to destroy the enemy's race, sometimes through the heinous practice of forced impregnation.[42]

Scholars have postulated various theories to explain the recent phenomenon of wartime rape. One author has observed that rape in times of war is the inevitable result of rape in times of peace, but that the scale of horror is vastly different.[43] Rape during times of armed conflict follows specific patterns.[44] It does not appear to occur randomly or haphazardly: "There is an ominous repetition in the stories of war rape and sexual torture internationally. The same techniques and scenarios recur, from Mozambique to El Salvador to the Philippines."[45]

Some theorists have posited that rape be classified as "asymmetric" warfare, which focuses less on gaining territory and more on inflicting trauma on the victim.[46] The enemy soldier attacks a civilian woman, only indirectly with the aim of occupying a territory: "[t]he prime aim of war rape is to inflict trauma and thus to destroy family ties and group solidarity within the enemy group."[47] Rape results from a dehumanization of enemy women and allows the combatant to conceptualize the opponent as a foreign "other," instead of as a human being.[48] This "enemy dehumanization" subsumes morality

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[41] *See e.g.*, Claudia Card, *Rape as a Weapon of War* 11 HYPATIA: A J. OF FEMINIST PHILOSOPHY 223, 223 (1996).
[42] Todd A. Salzaman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia*, 20 HUM. RTS. Q. 348, 359. (1998).
[43] Catherine A. Mackinnon, Rape, *Genocide, and Women's Human Rights*, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA HERZEGOVINA 54, 55 (Alexandra Stigmayer ed. & Marion Faber trans., 1994).
[44] PETTMAN, supra note 14, at 102.
[45] *Id.*
[46] *See* Bulent Diken, *Becoming Abject: Rape as a Weapon of War*, 11 BODY & SOC'Y. 111, 111 (2005).
[47] *Id.* at 112.
[48] Viewpoint, *supra* note 33.

and common decency in times of war and allows the "combatant…to destroy human life in the name of protecting the security of the motherland".[49] Thus, while a soldier might consider rape immoral during times of peace, it becomes perfectly acceptable to rape enemy women during times of war.

Other social scientists have asserted that a cult of masculinity accounts for the high incidence of wartime rape: "[t]he invasion of women's bodies is another consequence of the masculine privilege that extends from this warfare.[50] But, instead of death, "it leaves behind a permanent legacy of suffering and sense of failure long after the battlefields have quieted."[51] A cult of virility is well-known among combatants to make them feel stronger, and the enemy weaker.[52] Military training also frequently "creates a link between sexuality and violence. Very consciously, the association between sexual potency, the penis and the gun is encouraged. It is well known that in dictatorships the idea is systematically propagated that women belong to one of two groups: on the one hand, mothers of the homeland who must be respected, and on the other, whores."[53] As such, young male recruits may feel it is warranted and, in fact, necessary to sexually abuse these "whores."

Clearly rape has become more than a deplorable side-effect of war, and has become a *weapon* of war. Whether due to a cult of masculinity, the perception that rape is an easy way to dominate the enemy, or the belief that rape can destroy the enemy's race, many soldiers appear to believe this type of violence is acceptable in modern

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[49] *Id.*
[50] *See e.g.*, JEAN JACQUES FRESARD, THE ROOTS OF BEHAVIOUR IN WAR: A SURVEY OF THE LITERATURE 47 (2004).
[51] Viewpoint, supra note 33.
[52] ROOTS, *supra* note 45.
[53] *Id.* at 47 (citing Boppel, *Pourquoi les hommes torturent,* Amnesty International, May 1993, quoted by Eric David.).

warfare. Accordingly, the international legal system must act to alter these perceptions before more women suffer the same fate.

*III. The Doctrine of Command Responsibility*

The notion that commanders have a duty to control the actions of their subordinates has existed for centuries.[54] During the twentieth century, various legal bodies began to formally recognize the concept as a theory for liability.[55] In general, the doctrine holds that leaders may incur responsibility for failing to halt, prevent, or punish the commission of crimes by subordinates.[56] This section examines the way different courts have interpreted the doctrine's mens rea requirement.

**A. Wartime leaders and Rape**

Military commanders hold an extremely powerful position in the chain of army command. They have the power to give orders, control the actions of their troops, and set the overall tone for the military operation. In her book, *Against Our Will*, Susan Brownmiller argues that wartime leaders have long accepted the inevitability of rape in times of war.[57] She quotes General Patton as saying: "I then told him that, in spite of my most diligent efforts, there would unquestionably be some raping, and that I should like to have the details as early as possible so that the offenders could be properly hanged."[58] Likewise, in Russia, towards the end of World War II, Stalin is reported to have accepted and even condoned the rape of Polish and Russian women after they were liberated from

[54] *See. e.g.*, Stuart E. Hendin, *Command Responsibility and Superior Orders in the Twentieth Century: A Century of Evolution*, 10 MURDOCH UNIVERSITY ELECTRONIC JOURNAL OF LAW, (2003).

[55] *See id.*
[56] Andrew D. Mitchell, *Failure to Halt, Prevent, or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 SYDNEY L. REV. 381, 388 (2000).
[57] BROWNMILLER, *supra* note 5, at 31.
[58] *Id.*

various concentration camps.[59] In his novel, *The Downfall of Berlin*, Beevor asserts that Stalin responded to a Yugoslavian leader who was complaining about the rape of Russian, Croatian and Hungarian women by Soviet troops by asking: "[c] an't he understand it if a soldier has crossed thousands of kilometers through blood and fir and death has fun with some women or takes a trifle?"[60]

The situation was different during the recent conflict in Bosnia, in which Bosnian Serb Commanders claimed that the rape of Muslim women was "good for raising fighter morale."[61] In Bosnia, military leaders appeared to be aware of, and even encouraged, the abuses perpetrated by their subordinates. This note, however, focuses on situations where commanders did not necessarily order rape, but allowed it to occur whether due to apathy or a feeling that rape may be an acceptable tool of war. Given that the phenomenon is so visible in the modern world, it is nearly impossible to conclude that a leader could be unaware of the problem. This note will propose a method of holding these military leaders liable for the crimes of their subordinates based on the notion that they *must* be aware of the high risk of rape in these situations.

**B. History of Command Responsibility**

Although the concept of command responsibility has attained greater notoriety as of late, the concept is not a novel one: In the 4th century BC, Sun Tzu, the famous Chinese military strategist and general, acknowledged that military leaders should be responsible for the control of their troops.[62] In 1439, Charles VII of France articulated

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[59] Almond, supra note 37.
[60]. *Id.*
[61] William M. Walker, *Making Rapists Pay: Lessons from the Bosnian Civil War*, 12 ST. JOHN'S J.L. COMM., (1997) 449, 452.
[62] Michal Stryszak, *Command Responsibility: How much Should a Commander be Expected to Know,* 11 U.S. AIR FORCE J. OF LEGAL STUD. 27, 28 (2002).

that all "French capatains or lieutenants would be liable for abuses, ills, and offenses occurring through his subordinates in cases where such leaders failed to take action or covered up the misdeed."[63] The doctrine has appeared sporadically throughout history at other times. Approximately two hundred years after Sun Tzu's death, the Swedish King, Gustavo's Adolphus, ordered that: "No Colonel or Capitaine shall command his soldiers to doe any unlawful thing: which who so does, shall be punished according to the discretion of the Judges."[64] While not formally titled "command responsibility," it is readily apparent that this notion has existed for centuries.

In modern times, during the period immediately following World War I, there was a general feeling that the law should hold military commanders liable for the actions of those under their command.[65] During The Hague Conventions IV (1907) and X (1907), various countries came together to officially recognize the doctrine for the first time.[66] The statutes of the Nuremberg and Tokyo tribunals did not specifically include a provision on command responsibility, but developed such a form of punishment nonetheless in their jurisprudence due to a general feeling that the law should hold leaders accountable for the crimes of subordinates.[67] The Military Tribunal in Nuremberg was concerned only with direct liability of high-level Nazi officials, while the Military Tribunal in Tokyo convicted both civilian and military people for failing to punish or prevent atrocities.[68]

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[63] Hendin, *supra* note 54.
[64] William H. Parks*, Command Responsibility for War Crimes, 62* MIL. L. REV. 1,4 (1973).
[65] Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573 (1999) (suggesting that this might have been a result of World War I's high casualty rate).
[66] *Id*.; *see also* Ann Ching, *Evolution of the Command Responsibility in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia*, 25 N. C. J.INT'L L. AND COM. REG. 167, 177 (1999).
[67] *Id*.
[68] Bantekas, *supra* note 64, at 573.

The doctrine experienced a decline in popular status immediately following World War II, and was not included in the Geneva Convention of 1949.[69] It languished for a period of over thirty years following the Geneva Conventions.[70] During this period, national forums were reluctant to punish commanders for the actions of their subordinates.[71] The end of the twentieth century, however, witnessed a rebirth in the use of command responsibility, in part due to the emergence of the war crime tribunals at the end of the last century.[72] The principle appears in both article 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") and Article 6(3) of the Statute of the International Criminal Tribunal for Rwanda (the "ICTR"). Prior to the ICTY's *Celebici*[73] decision, however, both tribunals only prosecuted commanders for direct participation, because it was easier to convict the accused under such an interpretation.[74] The inclusion of command responsibility in Article 28 of the ICC's Rome Statute signifies its reemerging influence in international law.

**C. The Doctrine**

The legal theory of command responsibility is "predicated upon the power of the superior to control the acts of his subordinates."[75] In its modern form, the principle of command responsibility maintains thatc ourts may hold civilian and military officials vicariously liable for the crimes of a subordinate.[76] Command responsibility is society's

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[69] *Id.* at 574.
[70] *Id.*
[71] *Id*.
[72] Mitchell, *supra* note 53, at 388.
[73] Prosecutor v. Delalic, Case No.IT-96-21-T, Judgment, (Nov., 16 1998) [hereinafter *Celebici*].
[74] Bantekas, *supra* note 64, at 575.
[75] Stryszak*, supra* note 54, at 376.
[76] *See e.g.* Mathew 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").

"last line of defense against war crimes."[77] Typically, the doctrine applies when a subordinate has committed a heinous act, such as killing a civilian or torturing an innocent. Command responsibility emerges from the notion that commanders have immense power over their subordinates.[78] Just as commanders can lead their army to greatness, they also have the power to persuade subordinates to engage in atrocious acts to accomplish these goals.[79] Because activities unacceptable in peacetime (i.e., killing) become acceptable in times of war, a young soldier may desensitize certain forms of violence.[80] Commanding officers may begin to act as a soldier's surrogate "conscience," enabling the troop to commit various abuses.[81] Although the principle originated in military law, it now also includes the responsibility of civil authorities for abuses committed by persons under their direct authority.[82]

In general, there are two forms of command responsibility. The first is direct responsibility for instructions that are patently illegal, such as when a military official officially authorizes the killingor rape of civil ians.[83] The second is imputed responsibility for situations in which a superior had actual or "constructive" notice of a subordinate's illicit actions.[84] This imputed responsibility hinges on whether or not the superior had actual or constructive notice of the crimes *and* was in a position to stop

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[77] Major Michael L. Smidt, *Yamashita, Medina & Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL L. REV. 155, 165-6. (YEAR)
[78] *Id.*
[79] *Id.* at 158.
[80] *Id.*
[81] *Id.*
[82] *See* Major-General A.P.V. Rogers, Command Responsibility Under the Law of War, lecture given at the Lauterpracht Research Center for International Law, Cambridge University: (1999), available at http://www.law.cam.ac.uk./RCIL/Archive.html. This note, however, will focus on its application to military leaders only.
[83] Human Rights Watch, *A Face and a Name: Civilian Victims of Insurgent Groups in Iraq,* 17 HUM. RTS. WATCH 1, 29. (2005).
[84] *Id.*

them.[85] This note is concerned primarily with the second form of command responsibility which holds that a commander can incur liability for his subordinates' actions if he failed to take appropriate measures to control the subordinate, prevent the crime, or punish the offending soldier.[86]

**D. Actus Reus Requirement**

Although the doctrine can take several forms, it typically consists of two non-mental elements: (i) a superior-subordinate relationship and a chain of command; and (ii) failure by the superior to halt, prevent, or punish the subordinate.[87]. The key to establishing a superior-subordinate relationship lies in establishing that a person is in a position of authority or control over another person.[88] Legal analysts generally accept that this authority can be either *de jure* or *de facto*.[89] That is, the authority must be either formally vested by an official office (*de jure*), or evidence must show that a person has assumed a position of authority over another person or persons (*de facto*).[90] In either case, the court will look to factors such as the degree of direction, power, and restraint that one person has exerted over another.[91] Such authority may arise at any point along the chain of command.[92]

Regardless of the type of authority, there must be evidence that the superior exercised "effective control" over the subordinate, such that he was in a position prevent

[85] *See id.*
[86] *See generally* Stryszak, supra note 52.
[87] *Celebici*, Case No.IT-96-21-T at 346.
[88] Bantakas, *supra* note 64, at 578.
[89] *Id.* at 578-9;
[90] M. Lippman, *The Evolution and Scope of Command Responsibility*, 13 LEIDEN J. OF INT'L L., 131, 159 (2000).
[91] Mitchell, *supra* note 60, at 384 (2000).
[92] *Id.*

the subordinate from committing the crime.[93] In *Celebici*, the ICTY examined the issue of superior responsibility for crimes that had been committed against Bosnian Muslims in the Foca prison camp. The ICTY defined the concept of "effective control" as the superior having "the material ability to prevent and punish the commission of" violations of international law.[94] The Court also held that:

> A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by subordinates…It follows that there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offense and, accordingly, cannot properly be considered their "superiors"…[G]reat care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.[95]

The second non-mental element requires that the superior neglected to act in some material way. Typically, this means that the superior failed to prevent the crime or punish the person committing the offense.[96] Courts have interpreted this element to mean that superiors have a "duty to prevent, punish, and control the commission of crimes by subordinates."[97] In *Celebici*, the Court held one of the accused commanders criminally liable merely because he had failed to act to *stop* the war crimes occurring at his camp:

> This is a case in which the Accused chose to bury his head in the sand and to ignore the responsibilities and power which he had as warden… he aided and abetted in the commission of these crimes, in that he was aware that these crimes were being carried out, and that, by his failure to take any action as warden in relation to these crimes, he knowingly contributed in a substantial way to the continued maintenance of those offenses by encouragement to those who carried them out."[98]

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[93] Jamie A. Williamson, *Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda*, 14 CRIM. L. F. 365, 368 (2002).
[94] Celebici, Case No.IT-96-21-T ¶ 378.
[95] *Id.* 377.
[96] *See e.g.* Mitchell, supra note 60, at 386
[97] *Id.*
[98] *Id.*

Accordingly, it is incumbent upon commanders to either prevent these actions or actively punish the subordinate who has committed the crime.

**E. Mens Rea Requirement**

While the major non-mental elements of the crime have remained consistent over time, the mens rea standard has been the subject of controversy. In general, two standards of knowledge have emerged in international jurisprudence. Article 28 of the ICC's Rome Statute reflects these two standards. It holds that a "military commander or person" may incur liability when he "either knew" or "should have known" that subordinates had committed or were about to commit a crime. The standard is either one of negligence ("should have known") or of actual knowledge ("knew"). Some courts have used the negligence approach. For example, in the*Hostage Case* ,[99] the defendant military leaders were convicted for allowing subordinates to execute civilians in retaliation for attacks on German forces in the Balkans. Here, the tribunal held that a commander could incur liability simply by ignoring or failing to seek out material information and that the accused could not use ignorance as a defense.[100] Liability essentially rested on the defendant's inaction in the face of blatant and widespread atrocities.[101]

Other Courts have held that only actual knowledge will satisfy the mens rea requirement. Under the actual knowledge standard, the prosecution must bring to light some affirmative evidence of the commander's mental state. In the *High Command*[102]

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[99] United States v. List, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 759, 1230 (1951) [hereinafter *Hostage* Case].
[100] *Hostage*, 1271.
[101] *See e.g.*, Bentakas, *supra* note 64, at
[102] United States v. Von Leeb 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1, 462 (1950). [hereinafter *High Command*] In this

case, for example, the Court convicted high-ranking German military officials for allowing subordinates to carry out Hitler's extermination program. [103] The main defendant argued that he was unaware of the crimes committed by his subordinates.[104] The Court held that in order to incur liability "the occupying commander *must have knowledge* of [the] offenses and acquiesce or participate or criminally neglect to interfere in their commission."[105] . Proof of knowledge was essential because "it must be accepted that certain details of activities within the sphere of his subordinates would not be brought to his attention."[106] Here, the mere existence of the widespread crimes would not satisfy the mens rea requirement. These two standards of mens rea have competed for acceptance in international jurisprudence.

*II. Returning to an Old Standard: Presumption of Knowledge & Yamashita*

Following World War II, the *Yamashita*[107] case articulated a new standard for the knowledge requirement necessary to establish command responsibility. In this case, the Court imputed liability to General Yamashita merely because the crimes had occurred and Yamashita must have known about them.[108] In order to effectively deter rape, it is

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case, high-level German commanders were charged with liability for the crimes of their subordinates, who had helped carry out Hitler's extermination program by killing communists and other civilians.
[103] *Id.* at 545.
[104] *Id.* at 547.
[105] Christopher Crowe, *Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution*, 29 U. RICH. L. REV. 191, 215 (1994).
[106] *High Command*, *supra* note 92, at 555.
[107] Trial of General Tomoyuki Yamashita, UNITED NATIONS WAR CRIMES COMMISSION, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS, 1, 88 (1945). [hereinafter *Yamashita*].
[108] *See e.g.*, Ann Marie Prevost, *Race and War Crimes:The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 303, 328 (2002)

necessary that Courts use an expanded version of this older standard which would allow general, historical knowledge of wartime rape to satisfy the mens rea requirement.

### A. The *Yamashita* standard

*Yamashita* is the seminal case for the international recognition of command responsibility as a basis for criminal responsibility. General Tomoyuki Yamashita was the commanding general of the Fourteenth Army Group of the Imperial Japanese Army in the Philippines during the Second World War.[109] Japanese soldiers murdered thousands of civilians, and raped more than five hundred women in the areas of the Philippines under Yamashita's control.[110] Authorities charged Yamashita as having "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes."[111] The prosecution acknowledged that there was little precedent for imposing command responsibility, but pointed to the fact that a number of international conventions supported the doctrine.[112]

The goal of the Prosecution was to establish that the widespread nature of the atrocities was so pervasive that Yamashita *must have known* they were occurring.[113] The fact that Yamashita had not properly inspected his troops troubled the Commission [114] It agreed that the widespread nature of the crimes indicated thatthe military leader had

[109] Robert Smith, THE WAR IN THE PACIFIC: TRIUMPH IN THE PHILIPPINES, 58 (1983).
[110] RICHARD LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY, 140 (1982); *See also* Bantekas, *supra* note 58, at 585.
[111] *Yamashita*, *supra* note 87, 3-4.
[112] Crowe, *supra* note 85, at 196.
[113] Lael, *supra* note 104, at 12-14.
[114] *Id*. at 35

either secretly ordered the crimes or tacitly allowed them to occur.[115] The Commission ultimately found Yamashita guilty and sentenced him to death.[116]

In reviewing the case as a habeas petition, the United States Supreme Court concurred that "the crimes were so widespread…they must either have been willfully permitted by the accused, or secretly ordered by the accused."[117] Under the *Yamashita* standard, a commander could incur liability by the mere fact that the acts of violence had occurred, even when the Prosecution could not directly prove thatthe com mander was aware of this. The mere existence of widespread violence in the specific circumstance satisfied the knowledge requirement. Other legal bodies have since adopted a similar standard.[118]

In denying relief to Yamashita, the Supreme Court held that military commanders have an "affirmative duty to take such measures as [are] within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."[119] This note will propose a similar, but expanded, standard for approaching command responsibility in situations of mass rape and argue for the imposition of an expanded commander duty using the Court's language in *Yamashita* as precedent .

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[115] *Yamashita*, *supra* note 87, at 35.
[116] *See* Lael, *supra* note 85, at 95.
[117] Lietenant Commander Weston D. Burnett, *Commmand Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogram at Shatila and Sabra*, 107 Mil. L. Rev. 71, 95 (1985).
[118] Bentakas, supra note 58, at 588. Article 10(4) of the Canadian War Crimes Regulation, whereby crimes committed by troops were *prima facie* evidence of liability. In addition, the Supreme Court, in the *High Command* case used a similar standard.
[119] *In re* Yamashita, 327 US 1,16(1946) . It also agreed with the Commission's holding that: "'a series of atrocities and other high crimes have been committed by members of the Japanese armed forces" under command of petitioner "against people of the United States, their allies and dependencies…; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers"; (2) that during the period in question petitioner "failed to provide effective control of… [his] troops, as was required by the circumstances." The Commission said: "…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, for the lawless acts of his troops, depending on their nature and the circumstances surrounding them.

### B. Customary International Law & *Yamashita*

Legal scholars are presently conflicted over whether or not customary international law has accepted the presumption of knowledge standard articulated by the *Yamashita* Court. Some international scholars, as well as the ICTY, have rejected the *Yamashita* test. In *Celebici*, the ICTY expressly denied the existence of any such rule of presumed knowledge "where the crimes of subordinates are a matter of public notoriety, are numerous, occur over a prolonged period, or over a wide geographical area."[120] The Court indicated that the knowledge requirement articulated by the *Yamashita* Commission was unclear, and that neither *Yamashita*, nor *High Command* implied any such presumption of knowledge rule.[121] Accordingly, the ICTY has held that the prosecution must establish knowledge through circumstantial or direct evidence of the subordinate's crimes.[122] The Court would not assume knowledge merely because the crimes had occurred.[123] Some legal scholars have reached a similar conclusion.[124] Command Responsibility expert Ilias Bantekas, has suggested that although "[a]rticle 28(1)(a) of the ICC Statute, the explicit reference in the ICRC Commentary, and the unambiguous post-World War II case law" suggest that customary international law has accepted a presumption of knowledge standard, it would be premature to conclude that it

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[120] *Celebici*, Case No.IT-96-21-T ¶ 384.
[121] *Id.* ¶ 385
[122] *Celebici*, Case No.IT-96-21-T ¶ 395.
[123] *Id.* ¶ 386.
[124] Major Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293, 299-300 ("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 has never 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 similair).

has become a norm of customary international law.[125] Other scholars, however, have suggested that the *Yamashita*'s presumption of knowledge standard *is* an accepted norm of Customary International Law. Military expert and scholar, Michael Smidt, has argued that the Restatement (Third) of Foreign Relations Law and the treaties and Statutes of the international tribunals have adopted the *Yamashita* test. [126]

**A. Why an expanded *Yamashita* test is preferable**

Although the standard adopted by customary international law remains unclear, the presumption of knowledge standard is appropriate and more useful in the deterrence of rape than a standard requiring proof of commander awareness. Because wartime rape is so prevalent in the modern world, it is contrary to logic and evidence to conclude that a commander could be unaware of the risk. Commanders may be unaware of a particular rape or series of rape, but they must realize thatit is *highly likely* that their troops will commit such a crime. Given this reality, I disagree with the ICTY's interpretation of the mens rea requirement for command responsibility. The Court's assertion that *Yamashita* does not suggest that a presumption of knowledge is part of customary international law also appears unfounded. In fact, both cases *do* appear to suggest that the customary international law had accepted the standard at the time.

The deterrence of future crimes underlies much of the theory behind the creation of the international war tribunals,[127] but these courts have been ineffective in preventing wartime sexual violence. The ICTY's standard, requiring evidence of knowledge has not

[125] Bentakas, *supra* note 58, at 590.
[126] Smidt, *supra* note 75, at 200-01.

[127] *See e.g.*, David J. Scheffer, Ambassador at Large for War Crimes Issues, U.S. Dep't of State, Challenges Confronting International Justice Issues, Address delivered to International Law Professors of the Boston area at dinner hosted by the New England Center of International Law and Policy at the New England School of Law, (January 14,1998), *in* 4 NEW ENG. INT'L & COMP. L. ANN., July 2000, at 6.

deterred rape. The Court decided *Celebici* in the late 1990's, but wartime rape continues to rage unabated throughout the globe. As this note will discuss later, the *Celebici* standard makes it too easy for commanders to aid a covert national policy of rape and avoid liability by hiding their knowledge. Evidence and logic dictatethat co mmanders know their soldiers will likely engage in some form of rape; hence, commanders have a responsibility to deter such crimes. The adoption of a presumption of knowledge standard would both acknowledge this realityand heighten the duty requirement on commanders to prevent rape. Under such a standard, military leaders could not sit by idly while their troops commit horrendous acts of sexual violence.

*III. Imposing a duty on commanders to take proactive measures*:

The proposed standard is not strict liability. It would allow the accused persons to rebut the presumption by showing that they have taken affirmative measures to avert such violence. In essence, this is a slight expansion of the duty requirement in the second non-mental element of the crime: failure by the superior to halt, prevent, or punish the subordinate. Most courts have interpreted this element to mean the superior has a duty "to prevent" the crime in that particular instance. This note is suggesting that a commander has a *general* duty to prevent *all* wartime rapes in areas under his command. This section proposes that courts expand this duty to require that commanders take *affirmative steps* to prevent the general commission of acts of rape by subordinates.

### A. Precedent for the Duty

Critic and Scholar, Kelly Askin, has suggested that the ICTY's decision in two key cases, *Celebici* and *Kvocka* : "can be used, *inter alia*, to hold superiors criminally liable for failing to adequately train, supervise, control or punish subordinates who commit rape crimes."[128] While I disagree with the ICTY's interpretation of the mens rea standard in these cases, I do believe that the cases represent important precedent for an expanded commander duty. Although they use different standards of liability, both cases imply that a commander has a duty to do more than simply "prevent" a particular violent act. The cases impliedly suggest that commanders might avoid liability by taking certain measures to show that they have attempted to discourage such opportunistic sexual violence.

### B. Celebici

The *Celebici* case is remarkable because it is the first case since World War II in which a Court found a war criminal guilty under the doctrine of command responsibility.[129] In May of 1992, Bosnian Serb forces took control of various Bosnian Muslim and Bosnian Croat villages located in central Bosnia and Herzegovina.[130] The soldiers transported most of the men and some of the women to a prison camp in Celebici where they lived for a period of five months.[131] During their five month incarceration, the women and men were "killed, tortured, sexually assaulted, beaten, and otherwise subjected to cruel and inhumane treatment."[132]

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[128] Askin, *supra* note 7, at 327.
[129] *See U.N. Judges Sentence Three for War Crimes Against Bosnian Serbs*, BOSTON GLOBE, Nov. 17, 1998, at A29.
[130] *Celebici*, Case No.IT-96-21-T, Initial indictment.
[131] *Id.*
[132] *Id.*

The prosecution charged the four defendants, among other things, with raping two female prisoners in the Celebici prison camp. All of the four accused held positions within the camp. Esad Landzo was a guard at the camp, Zdravko Mucic and Hazim Delic acted as deputy commanders of the camp, while Zejnil Delalic had superior authority over the camp because of his position as coordinator of the Bosnian Muslim and Bosnian Croat forces [133] Mucic and Delalic were charged with superior responsibility over the Celebici camp for the acts of their subordinates, including rapes committed by Landzo and Delic.[134]

The *Celebici* Court considered the three elements of Article 7(3) of the ICTY statute as relevant to a finding of command responsibility.

> (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.

Ultimately, the ICTY accepted the Prosecution's interpretation of Article (7)(3), noting that commanders with "power to prevent and punish the crimes" of their subordinates, may "under certain circumstances" incur liability for failing to do so.[135] People in positions of influence, "whether civilian or within military structures," can be held criminally liable under Article (7)(3) because of their "*de facto* as well as *de jure* positions as superiors."[136] The Court further asserted that the "mere absence of legal authority" to control those subordinates would not preclude a finding of liability.[137] The

[133] *Id.*
[134] *Id.*
[135] *Celebici*, Case No.IT-96-21-T ¶ 354.
[136] *Id*.
[137] *Id.*

superior must have "effective control" over those who have committed the crime and possess the "material ability to prevent and punish the commission of these offenses."[138].

The ICTY also addressed the mental state necessary to make a finding of command responsibility under their statute. The Court made clear that command responsibility is not a doctrine of strict liability, and *does* require proof of mental state. The superior can incur liability only when he "knew" or "had reason to know" that his subordinates had committed or were about to commit an illegal act.[139] The ICTY ultimately held that "inquiry notice" should be the standard used to determine a commander's negligence (i.e., "had reason to know").[140] The information, itself, need not suggest that crimes had been committed or were about to be committed, but must indicate a need for addito nal investigation.[141]

The ICTY's language is highly indicative of an affirmative duty on commanders to investigate and prevent rape. The Court does not expressly clarify the type or quantity of information required to satisfy the element. However, under the "inquiry notice" standard, the commander appears to have an affirmative duty to investigate any situation in which violence is taking place, and act to stop the violence. As such, a commander might be able to avoid liability by showing he has taken specific steps, (i.e., investigating, reporting monitoring) to deter the acts of sexual violence, even during times of ethnic conflict and genocide.

[138] *Id.* at 378.
[139] *Id.* at 383.
[140] *Id.* at 393.
[141] *Id.*

**C. Akayesu and the ICTR**

Like the ICTY, the ICTR, has indicated that the negligence standard ("should have known") is appropriate in cases of command responsibility. *Akayesu*[142] involved allegations of incitement of a Rwandan local civilian official for the actions of others resulting in genocide against the Tutsi population residing in his commune. The ICTR Trial Chamber adduced that according to Rwandese law, Akayesu's position as "burgomaster" placed him as (1) the head of the communal administration; (2) the *officier de l'état*, and (3) the person responsible for maintaining and restoring the peace.[143] This position was sufficient to establish Akayesu's authority, a necessary element of his conviction for the crime of genocide. The Court held that it was irrelevant if the commander could prevent the crimes or not, where he *didn't attempt to do so*.[144] The modern treatment of command responsibility appears to be moving in the direction of imposing a duty on commanders to take measures to prevent the commission of heinous acts of violence, such as murder, rape, and torture.

**B. Joint Criminal Enterprise as a mechanism for punishing commanders**

In *Kvocka*[145] decided only a few years after *Celebici,* the ICTY appeared to change course with regards to the proper mechanism for punishing military leaders. In this case, the ICTY used the doctrine of joint criminal enterprise as a basis for superior liability.[146] Joint criminal enterprise holds that an individual may incur liability "for all

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[142] *Prosecutor v. Akayesu*, Case No.ICTR-96-4-T, Judgment, (Sept. 2, 1998)
[143] *Id.* ¶ 318.
[144] *Id.* ¶ 320.
[145] Prosecutor v. Kvocka, Case No. IT-98-30-T, Judgment, (Nov 2, 2001)
[146] *See* Mark Osiel, *Perspectives on Transnational Justice: Collective Memory*, 38 CORNELL INT'L L.J 793 (suggesting that the ICTY has essentially made it to easy to prosecute people under the JCE theory because it casts a wider net). I use this case not to suggest that joint crim in place of command responsibility, but

crimes pursuant to the existence of a common plan or design which involves the commission of a crime provided for in the statute if the defendant participates with others in the common design."[147] The *Tadic* case, heard by the ICTY a few years earlier, held that the principle of Joint Criminal Enterprise was implicit in the Court's Statute.[148]

In *Kvocka*, Prosecutors charged the accused with seventeen counts of crimes against humanity and violations of the wars or customs of law.[149] The charges included murder, torture, beating, sexual assault and rape.[150] Between April and August of 1992, Bosnian Serb authorities forcibly moved Bosnian Muslims, Bosnian Croats, and other non-Serbs from their homes in northwestern Bosnia to a prison camp named Omarska.[151] Miroslav Kvocka was the first commander of the camp, and became the deputy commander in June of 1992.[152] As deputy commander, he was in a position of authority superior to everyone in the camp other than the camp commander. Dragoljub Prcac replaced Miroslav Kvovka as deputy commander in June of 1992.[153] Milojica Kos and Mladjo Radic acted as shift commanders, and when present at the camp, were in a position of superior authority to all camp personnel, other than the commander or deputy commander, and most visitors. [154]

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because it tightens the knowledge requirement and indicates even more powerfully than *Celebici* that commanders have a duty to take steps to prevent sexual violence.

[147] Prosecutor v. Vasiljevic, Judgement, Case No.: IT-98-32-T, ICTY Appeals Chamber ¶¶ 94-101 (Feb. 25, 2004) [hereinafter *Kvocka*]

[148] Kelly Askin, *Omarska Camp, Bosnia: Broken Promises of Never Again*, American Bar Association, Human Rights Magazine.

[149] *Kvocka*, Case No.: IT-98-32-T, Indictment.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

The *Kvocka* Court defined joint criminal enterprise as existing whenever "two or more people participate in a common criminal endeavor."[155] Liability arises when a person "knowingly participate[s] in the criminal endeavor, and [his] acts or omissions significantly assist or facilitate the commission of the crimes."[156] While knowledge is required, it need not be direct. Visitors to the Omarska camp would have seen the "bloodied, bruised, and injured bodies of the detainees, heard the screams and cries of pains and suffering, and smelled the deteriorating corpses and the urine and feces soiling the detainees' clothes."[157] Accordingly, a participant in the joint criminal enterprise need not be an eye-witness to a crime, and could easily fulfill the knowledge requirement through his mere presence in the camp. The accused must have knowledge *and* have participated in the criminal activity, either through an affirmative act or by failing to act.[158] The Court concluded that the Omarska Camp qualified as a joint criminal enterprise; "a facility used to interrogate and abuse those of non-Serbian descent."[159]

The ICTY makes explicit that the doctrine of joint criminal enterprise casts a wide net. Liability may attach for crimes that are a "natural and foreseeable" consequence of the enterprise.[160] That is, assuming the camp's purpose was merely to restrain prisoners, "participants" in the enterprise might incur liability for acts of sexual violence occurring in the camp, even if they did not intend such acts. The ICTY held that it would be illogical to "expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual

[155] *Kvocka*, Case No. IT-98-30-T, ¶ 307.
[156] *Id.* at 308.
[157] *Id.* at 324.
[158] Askin, *supra* note 138, at 128.
[159] *Id.* ¶ 323.
[160] *Id.* ¶ 326.

violence…[l]iability for foreseeable crimes flows to aiders and abettors as well as co-perpetrators of the criminal enterprise."[161] The ICTY found the commanders vicariously guilty of rape *merely because they had been in the camp*.

When read in conjunction with *Celebici*, these cases strongly imply that military commanders have an implicit affirmative duty to take measures to prevent rape. In addition, the language in *Kvocka* suggests that proof of knowledge is not an actual requirement; the Court essentially inferred knowledge. Accordingly, it is incumbent upon commanders to be able to show courtsthatthey havetaken steps to prevent rape if they have any hope of avoiding liability.

IV. *Factors the Court may consider in determining whether leaders have successfully rebut the presumption:*

As suggested earlier, this note is not suggesting strict liability. It would be patently unfair to hold leaders liable who have made a good faith attempt to prepare for and prevent such gender-based violence. The standard proposed would allow commanders to rebut the presumption by showing that they have taken reasonable steps to prevent rape. While this standard will not work for rogue or insurgent groups, it would likely have a significant effect on state-sponsored military operations. The measures outlined below are not a panacea, but may be factors a commander can use to rebut the presumption.

**A. Training**

Many governments and military bodies do not adequately train troops to avoid sexual violence. In countries where troops receive little or no education about sexual

[161] *Id.*

violence, the problem appears to run rampant. For example, during the nine-year conflict in Sierra Leone, soldiers repeatedly raped and abused thousands of women.[162] A report by Human Rights Watch found that the Sierra Leonean army had established no specific program to train any military or police force with regards to women's rights and bodily integrity.[163] This is particularly problematic in cultures where enemy women are dehumanized.[164] Young soldiers might think nothing of raping a woman in societies where women have attained low peacetime status.[165] An eighteen-year-old recruit whose society has indoctrinated him with such attitudes since birth, may not realize he is committing an illegal or immoral act. Therefore, it is incumbent on adult commanders to educate soldiers about acceptable conduct in war.

Because wartime rape may be a product of a peacetime culture which denigrates women, it should be incumbent upon military commanders to take action before an armed conflict has arisen. In this way, new troops can slowly adjust to the notion that sexual violence is unjust and immoral. LaShawn Jefferson of Human Rights Watch, for example, has considered various methods that military personnel might use to deter wartime sexual violence. He has suggested that National governments, the UN, civil society, and regional actors take action during peacetime to prevent the sexual violence that is virtually inevitable in times of armed conflict.[166] Jefferson has proposed that

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[162] Human Rights Watch, *Sexual Violence within the Sierra Leone Conflict*, (26 February 2001), *available at* http://www.hrw.org/backgrounder/africa/sl-bck0226.htm.
[163] *Id.*
[164] *See* Michael D. Diederich, Jr., *"Law of War" and Ecology--A Proposal for a Workable Approach to Protecting the Environment Through the Law of War*, 136 MIL. L. REV. 137, 138 (1992).
[165] *See id.*; Sarnata Reynolds, *Deterring and Preventing Rape and Sexual Slavery During Periods of Armed Conflict*, 16 LAW & INEQ. J. 601, 615 (1998).
[166] Lashawn Jefferson, Human Rights Watch, *In War as in Peace: Sexual Violence and Women's Status,* (2004).

better training of combatants is a necessary first step.[167] While acknowledging that such increased training is unlikely to affect fringe rebel groups, he feels thatit wil l "affect a core group of uninformed soldiers and officers under state authority."[168] These soldiers should receive "timely, clear, consistent, and regular training and reinforcement on the illegality and unacceptability of sexual violence in conflict."[169] I agree with Jefferson that military commanders should ensure that this training begins at the outset of the recruit's formal training and continues periodically throughout the course of their relationship with the military. State governments in connection with high-level military officials should work to develop and implement such a program as a prerequisite for all those seeking to join the military. Commanders must be responsible for ensuring that it occurs vigorously, properly and regularly.

**B. Monitoring, Reporting, & Intervention**

While a well-orchestrated training program is of utmost importance, Courts should also consider whether or not high-level military personnel have established a program to monitor acts of sexual violence. Such a program may require the hiring of specific agents trained to monitor and, perhaps, intervene in situations having the potential for sexual violence. Lower-level agents should be required to report acts of violence to higher level commanders, who should then take action to prevent or stop the sexual violence before it occurs (or stop it from reoccurring).

In situations where commanders feel they are ill-equipped to prevent the violence, they should report the happenings to independent observer agencies such as the United Nations Commission on Human Rights (UNCHR). These groups can sometimes take

[167] *Id.*
[168] *Id.*
[169] *Id.*

active measures to stop or reduce the violence.[170] For example, in Somali refugee camps, in Kenya, the UNCHR successfully diminished the number of rapes occurring in those camps by planting electric fences and thorn bushes around camp sites to protect women, offering human rights training to Kenyon police officers, and constructing a police post near the refugee camps.[171]

This note is not suggesting that a commander must engage in all of the above activities in order to avoid liability for rape crimes, but all are methods that might prove effective in the deterrence of rape. Courts should consider these factors in determining if an accused commander has taken the steps to rebut the knowledge presumption. While other methods may be just as useful in the deterrence of rape, evidence that commanders have acted to properly train troops, established mandatory reporting procedures, and developed and implemented intervention strategies should be chief among a court's considerations in deciding if the accused has successfully rebut the knowledge presumption.

*V. How the ICC could use this standard to punish criminals in Darfur*

The Rome Statute which created the ICC expands the mens rea requirement contained in the statutes of the ICTY and ICTR, and allows the court to consider surrounding circumstances in reaching a decision about a commander's knowledge.[172] While it is impossible to predict how the ICC will interpret this language, it is preferable that they read it to allow general, historical knowledge of rape to satisfy the mental state

[170] Reynolds, supra note 155, at 618.
[171] *Id.*
[172] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Art. 28 (a)(i) (1998) [hereinafter Rome Statute]

requirement. Such a reading would allow the ICC to more easily punish the military leaders who may be responsible for much of the violence in Darfur.

### A. Sexual Violence and the Rome Statute

The Rome Statute gives the ICC broad jurisdiction over four major crimes: (1) the crime of genocide; (2) crimes against humanity; (3) war crimes; and (4) the crime of aggression.[173] The ICC can prosecute rape as a crime against humanity (Article 7) or as war crime (under Article 8). The Rome Statute enumerates the following crimes of sexual violence: rape, enforced prostitution, sexual slavery, forced pregnancy, enforced sterilization, and other forms of sexual violence of comparable gravity. This note is not suggesting that rape is the *only* gender-related crime that the ICC could punish under the proposed standard. It is, in fact, conceivable that the Court might choose to review other crimes under a similar standard. Rape, however, is the most common form of sexual violence occurring in armed conflict.[174] As this article has suggested, a plethora of evidence exists to show that rape has been an ongoing problem in war. The other forms of sexual violence may be as prevalent as rape, but researchers have not produced enough evidence to support such an assertion. The argument of this notehinges on the fact that rape has historicallybeen so obvious and widespread , that a commander must be aware of it. The same evidence does not exist for the other forms of sexual violence enumerated in the Rome Statute.

### B. Meaning of "time" in Article 28 of the Rome Statute

[173] *Id.*at art.5.
[174] *See e.g.*, Marcus Richardson, *The Prevalence of Sexual Violence Against Women in War*, available at http://codmanacademy.org/branches/jus0405/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=79

Under Article 28 of the Rome Statute:

> (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:
>
> > (i) The superior either 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.

Article (7)3 of the ICTY's Statute and Article (6)(3) of the ICTR's Statute on command responsibility contain similar language to that found in Article 28 of the Rome Statute. All three statues contain the same mens rea language of "known" or "should have known." While the Rome Statute uses the "knew" or "should have known" language, it

qualifies this standard with the phrase "*owing to the circumstances of the time*." This important addition indicates that the ICC may presume some degree of knowledge.

A plain reading of the language indicates that the ICC can consider the environment and surrounding conditions during the period in which the rapes occurred in reaching a conclusion about the mental state of the accused. Factors such as widespread reporting of violence by the media, visibly violent conditions, or the presence of death camps might suggest that the commander *should have known* about the crimes. However, the ICC is free to interpret this language as encompassing a broader meaning. The noun form of the word "time" has at least fourteen different meanings, one of which is "an historic period."[175] Accordingly, the ICC may construe this word more broadly as meaning "the modern era" in which enemy soldiers have used rape in nearly every global conflict to control and humiliate civilians. Such an interpretation would enable the ICC to presume commander knowledge. This reading has much greater potential to effectively decrease the high incidence of wartime rape than the standard currently adopted by the ICTY.

### A. Applying this standard to Darfur

As indicated earlier in this note, the atrocities in Darfur are currently under investigation by ICC prosecutors. It is likely that the ICC will try many of the military commanders involved in the conflict in the near future. By all accounts, rape has been a component of nearly every attack in Darfur.[176] Many of the soldiers committing the

[175] MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, 1345 (10th ed., 2005)
[176] *See e.g.*, *Darfur Destroyed, supra* note 14.

crimes are government-backed Sudanese forces.[177] Accordingly, the ICC will likely be considering rape in conjunction with command responsibility. It is not yet clear whether government and military officials ordered the rapes.[178] However, given that the conflict lasted for nearly two years and that rape was widely reported media outlets, it is difficult to imagine that leaders were unaware of the crimes.

Under the ICTY's mens rea standard, it may be difficult to prove that commanders had knowledge of the attacks. Military leaders in Darfur may not have been present at the crime scenes, and most likely did not physically perpetrate the crime. Therefore, should the ICC adopt the *Celebici*. standard, many military leaders might be able to avoid liability because no proof exists to either tie them to the crime scene or suggest that they ordered the rapes. Leaders would merely need to "cover their tracks" (i.e., shred documents, hide communications, or avoid being present in areas of violence) in order to avoid liability It would be patently unfair for these criminals t o avoid liability. The ICC should use the standard this note has proposed to convict leaders who might otherwise go free under the *Celebici* standard.

*VI. Conclusion*

The ICC has the power to change the course of history. The United Nations Security Council created the ICTY and ICTR as temporary courts meant to try only

[177] Human Rights Watch, *Darfur: U.N 'Safe Areas' Offer No Real Security: U.N. Security Council Should Rejec t Plan That Could Undermine Return of Civilians*, available at http://hrw.org/english/docs/2004/09/01/darfur9286.htm

[178] *See, e.g.*, Human Rights Watch, *Entrenching Impunity: Government Responsibility for International Crimes in Darfur*, 17 Human Rights Watch, 1. (2005)

specific geographically-restricted crimes.[179] Unlike these tribunals, the ICC is a permanent freestanding court of justice[180] and has jurisdiction to try many of the most serious and shocking crimes from all over the globe for years to come.[181] One of the most significant goals underlying the creation of the ICC was the deterrence of future crimes.[182] Many of the countries who took part in the creation of the Court hope its message will be powerful enough to prevent potential criminals from committing these atrocious acts of violence.[183] This goal was also implicit in the creation of the ICTY and ICTR.[184] It may be impossible to know how much a deterrent effect these older tribunals have actually had, but many have quietly acknowledged that it has been negligible.[185] The violence in Darfur began less than a decade after the ICTR and ICTY issued formal judgments condemning many of the criminals in Bosnia and Rwanda. It is readily apparent that the tribunals' message has not been powerful to prevent the recurrence of such crimes.

Because rape continues to destroy the lives of millions of women and girls across the globe, it is imperative that the ICC find novel ways of punishing rapists. Article 28 gives the ICC wide latitude in punishing commanders who have allowed or secretly condoned the commission of rape by subordinates. It is vital that the ICC punish these leaders even when no evidence exists to link them to the crime scene, or show that they

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[179] *See e.g* Patricia M. Wald,. *Punishment of War Crimes By International Tribunals* 69 SOC. RES. 1, 69. (2002).
[180] *See e.g.*, Val P. Nanda, *The Establishment of a Permanent International Criminal Court: Challenges Ahead*, 20 HUM RTS Q. 413, 413 (1998)
[181] See Jamie Mayerfield, *Who Shall Be the Judge:The United States, The International Criminal Court and the Global Enforcement of Human Rights,* 25 HUM RTS Q. 93 (2003).
[182] *See id.* at 98.
[183] *See id.*
[184] *See* Scheffer *supra* note 126.
[185] *See e.g*., Jack L. Snyder &Leslie Vinjamuri, *Trials and Errors: Principles and Pragmetism in Strategies of International Justice*, 28 INT'L SECURITY, 5, 23 (2003).

ordered rape. The ICC must send an unequivocal message to military leaders about their duty to ensure that soldiers adhere to proper conduct of war. A war crimes tribunal that allows commander to avoid liability for the crimes of his subordinates has failed its mission. The interpretation of command responsibility that this note has offered allows the ICC to hold commanders liable with or without evidence of knowledge because in fact this knowledge *must* exist given the current state of affairs. This strict standard is necessary if the ICC has any hope of ending at least some of the global violence against women. While it is unlikely that wartime rape will ever vanish, the ICC may be able to help many future generations of women to avoid the lifelong scars that modern warfare inflicts upon them.