ESSAY: SPECIAL OPERATIONS FORCES AND WAR CRIMES BY GUERILLAS

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When directed, United States Special Operations Forces conduct unconventional warfare or foreign internal defense missions. These operations include tasks to train, equip, and advise friendly foreign indigenous forces – guerillas.[1] By statute, doctrine, and training, Special Operations Forces ("SOF") must conduct operations in compliance with the law of armed conflict.[2] If U.S. service members violate these laws, U.S. military authorities investigate the incident and prosecute the violators under the Uniform Code of Military Justice.[3] But what happens when U.S. forces provide military assistance to guerillas that committed or are likely to commit war crimes?

Some scholars indicate that U.S. forces might be criminally liable for the guerillas' war crimes under command responsibility theory.[4] One specifically reviewed a SOF team's 2002 operations with Northern Alliance guerillas against the Taliban and Al Qaida in Afghanistan.[5] There were news reports that some Northern Alliance groups had mistreated and even caused the deaths of numerous Taliban and Al Qaida prisoners. The

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[1] JOINT PUBLICATION 3-05, JOINT DOCTRINE FOR SPECIAL OPERATIONS; JOINT PUBLICATION 3-07.1, JOINT DOCTRINE FOR FOREIGN INTERNAL DEFENSE.

[2] Department of Defense Directive 2311.01E, *DoD Law of War Program*, (May 9, 2006); Carr Center for Human Rights Policy, *Ethical Dilemmas for Special Forces*, John F. Kennedy School of Government, Harvard University (June 2003).

[3] *See*, e.g., United States v Calley, 48 CMR 19 (1973).

[4] Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AJIL 573 (Jul 1999); Francis Boyle, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits),* 81 AJIL 86 (Jan 1987).

[5] Jennifer Lane, Comment, *The Mass Graves at Dasht-e Leili: Assessing U.S. Liability for Human Rights Violations During the War in Afghanistan*, 34 Cal W Int'l L J 145 (Fall 2003).

author opined that a SOF team in the vicinity had a general legal duty under command responsibility theory to investigate any rumors of Northern Alliance war crimes and to intervene to prevent any crimes.

This essay assesses if SOF teams have such duties under the law of armed conflict as interpreted by war crimes jurisprudence. It does not address duties imposed by domestic statutes or regulations. Also, given the breadth of this topic, the essay's analysis focuses on the duties of SOF teams in the field – their tactical actions – and not those of higher, strategic or policy level decision makers. It is limited to the following scenario. A SOF team deploys into a foreign country in either a permissive or non-permissive environment with the mission to train, equip, advise, and even lead – in varying degrees – friendly guerillas in combat. Before deploying, the team knows of general rumors that some of the guerilla groups have committed acts that may constitute serious violations of the Law of Armed Conflict. While deployed and providing military assistance, the team hears rumors that the guerilla group with whom they are working might be committing war crimes. No members of the SOF team directly witness or participate in any war crimes.

In this context, this essay first analyzes a SOF team's liability and duties under command responsibility theory – specifically, whether a SOF team's ability to influence the guerillas really amounts to "effective control." Then, it considers the team's potential criminal liability under theories that do not require effective control. Finally, this essay discusses the implications of these theories on a SOF team's duties to investigate, report, intervene, or detach from guerillas. Recognizing the developmental link between international and domestic war crimes law, it draws examples from recent U.S. law, the

International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the International Criminal Court ("ICC"). Based on these sources, this analysis concludes that SOF teams generally have no legal duty under the Law of Armed Conflict to investigate the past war crimes of guerillas or to intervene to stop their future ones. But they have strong moral, ethical, and even practical motives to do so.

I. GUERRILLA WAR CRIMES AND COMMAND RESPONSIBILITY THEORY

For over fifty years, United States courts and international tribunals have applied command responsibility theory to hold commanders responsible for crimes by soldiers or others under their control. The modern doctrine dates from the Nuremburg and Tokyo war crimes trials after World War II.[6] But the most recent and comprehensive consideration of the theory occurred in the ICTY's *Celebici Judgment*, which concerned atrocities committed by Bosnian Muslim and Croat forces against Bosnian Serbs in a prisoner camp.[7] Regardless of the forum, the doctrinal questions for command responsibility are the same - where a crime is committed by a subordinate, under what circumstances is the superior liable and who is a superior? Specifically, the theory has a common formulation that requires three elements: 1) a superior / subordinate

[6] *See, e.g.*, In re: Yamashita, 327 US 1 (1946); United States v. Rockwood, 52 MJ 98 (1999); Beth Van Schaack, Essay, *Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia*, 36 UC Davis L Rev (June 2003); Michal Stryszak, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 USAFA J Leg Stud 27 (2000/2001).

[7] Andrew D. Mitchell, *Failure to Halt, Prevent, or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 Sydney L Rev 381 (Sept 2000).

relationship, 2) knowledge, actual or constructive, by the superior of the crimes committed by the subordinate, and 3) failure by the superior to halt, prevent, or punish the subordinate.[8] Significantly, command responsibility theory creates liability for two types of conduct: positive acts and omissions, where there exists a legal duty to act.[9]

A. Command Responsibility Theory's Dominant First Element – Whether a Defendant Had "Effective Control" Over the Perpetrators of the War Crimes

Under command responsibility theory, a court will likely first determine whether the evidence satisfies the superior / subordinate relationship element. Among the three elements, the proof of a superior / subordinate relationship will effectively drive any court's consideration of the second and third elements. In other words, the existence or nature of an alleged superior / subordinate relationship will determine if an individual had the requisite mental state under command responsibility theory - what he or she knew or "should have known." Further, it will determine the existence and scope of that person's duty to prevent a war crime.

The dependency of the second two elements on the first was exemplified in the ICTY case *The Prosecutor v. Blaskic*.[10] Tihomir Blaskic was a general in the Croatian Defence Council ("HVO"). In his geographic area of responsibility, several Croatian

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[8] Rodney Dixon and Karim Khan, Archbold International Criminal Courts, Practice, Procedure, & Evidence, 293 (Sweet & Maxwell Limited, London, 2003).

[9] The Prosecutor v. Delalic et al., IT-96-21-T, Judgment, Trial Chamber, November 16, 1998, paras. 395-398 (affirmed by the Appeals Chamber on Feb. 20, 2001).

[10] The Prosector v. Blaskic, IT-95-14-T, Judgment, Trial Chamber, March 3, 2000 (affirmed by the Appeals Chamber on July 29, 2004).

police and paramilitary units had committed atrocities against Bosnian Muslim civilians and property. General Blaskic was charged with these war crimes based on command responsibility under the ICTY Statute, Article 7(3).

The Trial Chamber considered General Blaskic's mental state entirely within the context of its analysis of his command relationship to the police and paramilitary forces that committed the crimes. It noted that Article 7(3) had a *mens rea* element that required proof that General Blaskic had either actual knowledge or had reason to know of crimes being committed by troops under his control.[11] For actual knowledge, the Trial Chamber stated, "an individual's command position *per se* is a significant indicium that he knew about the crimes committed by his subordinates." For constructive knowledge, the Trial Chamber opined that General Blaskic's duty to know their crimes stemmed directly from his superior / subordinate relationship to the troops. It quoted the *Celebici* Trial Chamber:

> A superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences, committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.[12]

Because the *Blaskic* Trial Chamber concluded that General Blaskic was a regional commander with some authority over the paramilitary and police forces in his geographic area of responsibility, it held that he had a duty to know – should have known - about their crimes.

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[11] *Id*. at paras. 307-310.

[12] *Id*. at para. 310, quoting *Delalic*, IT-96-21-Tat para. 393 (emphasis added).

The Trial Chamber also considered the third element of command responsibility theory – whether General Blaskic took necessary and reasonable measures to prevent or punish the war crimes – entirely within the context of its examination of the superior / subordinate relationship.[13] The Chamber opined, "[I]t is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator."[14] Again, the Trial Chamber focused on the facts of General Blaskic's relationship to the paramilitary and police forces that committed the crimes. He claimed that those forces reported to a higher authority in the hierarchy and therefore that he did not directly control them and could not take any measures to prevent their crimes. However, the Trial Chamber ruled that General Blaskic was still the superior of those forces within a hierarchy and therefore had a duty to report their atrocities.

Thus, the existence of a superior / subordinate relationship is an indispensable prerequisite to liability under command responsibility theory. It defines the scope and nature of an individual's imputed knowledge and duty to intervene. An individual may have knowledge of the war crimes being committed by others and fail to act to prevent them, but without a superior / subordinate relationship, he will not be liable for the war crimes under this theory. Accordingly, in the context of this essay's hypothetical scenario, the dispositive issue for a SOF team's liability under command responsibility theory is whether the team has a superior / subordinate relationship with the guerillas.

[13] *Id*. at paras. 333-336.

[14] *Id*. at paras. 335, citing *Delalic*, IT-96-21-Tpara. 395.

B. THE SUPERIOR / SUBORDINATE STANDARD REQUIRES EFFECTIVE CONTROL, NOT MERELY THE ABILITY TO INFLUENCE

The standard for a superior / subordinate relationship is "effective command and control," which means that an individual has the material ability to prevent and punish the commission of the alleged offenses.[15] Significantly, the relationship can exist either *de jure* or *de facto*. An individual's title as commander or lack thereof is not dispositive. Article 28 of the ICC summarizes the terms of command responsibility theory developed in international war crimes jurisprudence:

> A military commander or a person effectively acting as a military commander shall be held 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 proper over such forces. . . .[16]

The ICTY cases concerning command responsibility offer the most recent and comprehensive analyses of this standard.

In the *Celebici Judgment* - the ICTY considered whether three individuals - Zejnil Delalic, Zcravko Mucic, and Hazim Delic - had effective control over prison guards who committed numerous atrocities in 1992 against Serbians held at the Celebici prison

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[15] *Delalic*, IT-96-21-T at para. 283.

[16] The Rome Statute for an International Criminal Court, U.N. GAOR, 53rd Sess., U.N. Doc. A/Conf. 183/9, art. 28; DIXON AND KHAN, *supra* note 8, at 293. Of note, the United States is not and does not intend to become a party to the Rome Statute. U.S. Department of State Press Statement, *International Criminal Court: Letter to UN Secretary General Kofi Annan*, May 6, 2002 (available at www.state.gov/r/pa/prs/ps/2002/9968.htm).

camp.[17] Mucic was the alleged commander of the camp. Delalic was the commander of military forces in Konjic, Bosnia, where the camp was located. Lastly, Delic was Mucic's deputy commander of the camp. The Trial Chamber first considered whether each had *de jure* authority over the guards. It examined legislation, laws, written policies, and written orders for definitions of their authority and of a hierarchy that included the defendants and the guards. Then, the Trial Chamber analyzed whether a *de facto* relationship existed between the Celebici defendants and the prison guards – whether they had effective control over the guards. The Trial Chamber considered a variety of factors: the distribution of tasks within the unit; the capacity to issue orders; any previous exercise of disciplinary measures by the defendants; and lastly the defendant's powers of influence. Significantly, it distinguished between influence and effective control, indicating that influence alone does not establish a superior / subordinate relationship. An individual is criminally liable under command responsibility theory only to the extent that he fails to exert proper influence over others upon whom effective control already exists.[18]

In Mucic's case, the Trial Chamber ruled that he exercised *de facto* control over the individuals who committed the crimes but failed to exert proper influence to prevent war crimes. The evidence included Bosnian Army documents that indicated Mucic was the camp commander. Former prisoners also testified that Mucic was recognized as the camp commander by the prisoners and the camp guards. Mucic argued that there were no

[17] *Delalic*, IT-96-21-T; Ann B. Ching, Comment, *Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia*, 25 NC J Int'l L & Comm Reg 167 (Fall, 1999).

[18] Bantekas, *supra* note 4, at 576.

official records showing his appointment as the camp commander and that numerous outside groups had access to the prisoners to abuse them. He also argued that he had tried unsuccessfully to prevent the abuse of the prisoners. The Trial Chamber rejected Mucic's arguments, declaring, "Where there is *de facto* control and actual exercise of command, the absence of a *de jure* authority is irrelevant to the question of the superior's criminal responsibility for the criminal acts of his subordinates."[19] Accordingly, the Trial Chamber held that Mucic's poor attempts to protect the prisoners demonstrated that he had some control over the prison guards.

In contrast, the Trial Chamber ruled that Delalic was not a *de facto* superior of the prison guards at Celebici and distinguished between influence and effective control. It focused on Delalic's functions and activities as the regional coordinator for forces in Konjic area and as the appointed commander of Tactical Group I.[20] The Chamber found that as a coordinator, Delalic's duties consisted of "mediation and conciliation" and that he had "his functions prescribed." It noted that the position of coordinator was not recognized in the Bosnian Army and that it did not place Delalic in a military chain of command. Rather, he acted as a mediator between military and civilian groups in the Bosnian government, facilitated the distribution of supplies, and exercised no independent judgment. Accordingly, the Trial Chamber held that Delalic's job as a coordinator did not make him a superior of the prison guards. Concerning his post as the commander of Tactical Group I, the Chamber noted that the unit was a temporary combat

[19] *Delalic*, IT-96-21-T at para. 736.

[20] *Id*. at para. 700; Ching, *supra* note 16, at 196 (cited in note 16).

unit that did not include non-combat institutions such as prisons.[21] It rejected any inference of a superior / subordinate relationship from an order that Delalic transmitted from higher authority to the Celebici camp commander to appoint a commission to interrogate prisoners. It emphasized that the tactical group existed only to carry out specific combat missions and was merely a conduit in transmitting the order. The Trial Chamber therefore concluded that Delalic was not a regional commander with effective control over the Celebici camp.

Lastly, the Trial Chamber also found that Delic lacked effective control over the prison guards even though he was the deputy commander of the camp.[22] It distinguished between influence and effective control. Several witnesses testified that Delic appeared to be the guards' "boss" because he gave them orders and had an apparent strong intimidating and coercive influence on them. Nevertheless, the Trial Chamber held that Delic's influence was merely the result of his forceful personality, which intimidated the guards and caused them to follow his orders. Hence, it concluded that such influence did not establish that Delic had *de facto* effective control over the Celebici camp.

C. THE SOF TEAM / GUERILLA RELATIONSHIP: INFLUENCE VERSUS EFFECTIVE CONTROL

The *Celebici Judgment* provides a useful framework to apply the effective control standard to this essay's scenario to determine the liabilities and responsibilities of a SOF team for guerillas' war crimes. Logically, a SOF team has some leverage to attempt to influence the guerillas' behavior beyond their performance in combat. It

[21] *Delalic*, IT-96-21-T at paras. 708-714.

[22] *Id*. at paras. 795-810.

provides military assistance to the guerillas and can therefore threaten to influence the guerilla's conduct by threatening to the assistance. In the context of the *Celebici Judgment* analysis, does the team's ability to influence the guerillas amount to a superior / subordinate relationship from which duties of knowledge and prevention flow under command responsibility theory?

First, as with all three of the *Celebici* defendants, a court would be unlikely to rule that a SOF team exercised *de jure* effective control over the guerillas. There is no domestic or foreign legislation that makes guerillas part of U.S. forces. Such a relationship might stem from an international agreement that places a SOF team and the guerillas under a combined commander or within the same military hierarchy. But this is an unlikely scenario especially since the guerillas are typically not fighting on behalf of any recognized government.

Accordingly, a SOF team's liability will likely depend on whether a court determines that it had *de facto* effective control over the guerillas. As in *Celebici*, it is necessary to examine the following factors to determine whether a SOF team's functions include the material ability to punish or to prevent the guerillas from committing war crimes: the distribution of tasks; the capacity to issue orders; any previous exercise of disciplinary measures by the defendants; and lastly the SOF team's powers of influence.

With regard to tasks, the team members serve primarily as advisors and trainers to the guerillas.[23] They also coordinate the delivery of military supplies requested by the guerillas. In this regard, a SOF team's tasks seem analogous to those in *Delalic*, where the primary tasks were coordination of supplies and where the court found that he lacked

[23] JOINT PUBLICATION 3-05, *supra* note 1; *Ethical Dilemmas for Special Forces, supra* note 2.

effective control based on such activities. A SOF team may also direct close air support from U.S. aircraft against targets designated by the team. But this concerns the direction of U.S. forces alone and does not imply a combined chain of command with the guerillas. Finally, a SOF team may exercise *ad hoc*, limited tactical control over movements by the guerillas. But this task seems more analogous to the limited occasional control exercised by Delalic and Delic, than the extensive, prolonged control exercised by Mucic. Thus, based on a task analysis, a court seems likely to rule, as the ICTY did with Delalic and Delic, that a SOF team lacks effective control over the perpetrators of the war crimes.

A SOF team also lacks material methods to issue orders or to exercise discipline over the guerillas. The SOF – guerilla relationship is a voluntary one, where the guerillas agree to work with a SOF team as long as the guerilla leader considers the situation to be beneficial. Accordingly, the guerillas may follow *ad hoc* tactical orders, but only as allowed by the guerilla leader. A SOF team does not function as a regional commander like defendant did in *Blaskic* where the ICTY found effective control to exist. Further, the guerillas are not subject to a SOF team's military justice mechanisms for enforcing discipline. Rather, they follow the discipline of their own leaders. In this regard, a SOF team is entirely dependent on the guerilla leader to enforce discipline over his troops. The team's ability to issue orders and impose discipline is therefore one of influence alone through force of personality – as in *Delalic*, where the ICTY found a lack of effective control. The team's authority over the guerillas seems unlike the actual control that the ICTY assessed in *Mucic*.

Further, the team's actual powers of influence do not indicate a material capacity to punish or to prevent war crimes. A SOF team consists of only a few individuals

compared to the large numbers of guerillas that are being assisted. This asymmetry in numbers does not demonstrate such ability. In a physical battle to prevent a war crime, a SOF team would be dramatically outnumbered. Certainly, the team can draw upon U.S. close air support. But air power is not a realistic mechanism to prevent individual war crimes or a lawful means to punish guerillas for their violations of the Law of Armed Conflict. Rather, the team's primary leverage with the guerillas consists of threatening to withdraw U.S. military aid if the guerillas commit war crimes. By doctrine, SOF teams are trained to make this point as a matter of standard operating procedure immediately upon first meeting with the guerillas.[24] But as already discussed and as the ICTY held in *Delalic*, the ability to coordinate supplies – and to withhold them – does not necessarily mean that a SOF team has effective control over the guerillas.

Thus, in the context of this essay's hypothetical scenario, a SOF team does not have a superior / subordinate relationship with the guerillas. Accordingly, it is unlikely to be criminally liable for the guerilla's war crimes under command responsibility theory. And as discussed below, this theory is therefore not a potential source of legal duties for a SOF team in its relations with the guerillas.

II. Criminal Responsibility Theories Without Effective Control

Although a SOF team is unlikely to be liable under command responsibility theory, it could be liable under several theories which do not contain the requirement of a superior / subordinate relationship between the team and the guerillas. These include aiding and abetting, joint criminal enterprise, conspiracy, and contribution. Like

[24] *Id*.

command responsibility theory, these theories exist on the international level in the ICC Statute and the ICTY Statute and domestically in the Uniform Code of Military Justice ("UCMJ"). Significantly, none require proof of effective control as an element to impose criminal liability.

But all require proof of a higher mental element than command responsibility theory's mental element. All necessitate proof that the defendant had actual knowledge of the subordinates' criminal conduct. In contrast, command responsibility theory only requires proof that defendant knew or should have known – had constructive knowledge - about such conduct. For aiding and abetting, the ICTY opined that under Article 7(1) of the statute, "The aider and abettor of persecution, as a "special intent" crime, must not only have knowledge of the crime he is assisting or facilitating. He must also be aware that the crimes being assisted or supported are committed with discriminatory intent."[25] For joint criminal enterprise theory, the ICTY considered that only three possible scenarios exist to impose criminal liability:

> 1) those where all participants act pursuant to a common design and possess the same criminal intent; 2) those where the accused have personal knowledge of a system of ill-treatment and an intent to further the common system of ill-treatment; and 3) those where there is a common design to pursue a course of conduct but an act is committed outside the common design which is nonetheless a natural and foreseeable consequence of the common purpose."[26]

Significantly, all scenarios require proof of the defendant's actual knowledge of the subordinates' criminal purpose and varying degrees of intentional *mens rea*. Laslty,

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[25] The Prosecutor v. Kvocka, IT-98-30/1-T, Judgment at para. 262 (Nov. 2, 2001)(affirmed by the Appeals Chamber on Feb. 28, 2005)

[26] *Id*.

conspiracy theory also has a higher *mens rea* requirement than "should have known." There must be an agreement to commit a crime coupled with an overt act in furtherance thereof.[27]

Domestically, the Uniform Code of Military Justice also provides for criminal liability in the absence of effective control but only if actual knowledge is proved. Under the UCMJ, there are two general theories for vicarious or imputed criminal liability: principals and co-conspirators.[28] Under the law of principals, an accused may be convicted of a substantive offense committed by the actual perpetrator if he "aided, abetted, counseled, commanded, or procured the commission of the offense. . .or caused an illegal act to be done." Under the law of conspiracy, an accused may be similarly convicted if crimes were done in furtherance of a conspiracy while the accused was a member of it. For a conviction, both require an accused to have actual knowledge of the actual perpetrator's criminal mental state or purpose. The accused need not share the same criminal intent of the perpetrator under these theories, but he must intend that some criminal or unlawful goal would be achieved by his aiding and abetting or participating in the conspiracy.

In *The Prosecutor v. Kvocka*, the ICTY analyzed several aiding and abetting type theories (non-effective control theories) in charges against several civilians, police officers, and minor administrators who worked at the Omarska, Keraterm, and Trnopolje Camps, where numerous atrocities were committed against Bosnian Muslims and Croats

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[27] Richard P. Barrett and Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy in International Tribunals*, 88 Minn L Rev 30, 57-59 (November, 2003).

[28] MILITARY JUDGES BENCHBOOK, DA PAM 27-9, *supra* note 28, paras. 7-1 to 7-1-3. (Sept. 15, 2002).

in 1992. None of the defendants were instrumental in establishing the camps or determining the official policies used on the detainees. All denied any criminal intent to commit the atrocities and claimed that others were the actual perpetrators. Yet, all were charged with individual criminal responsibility for the atrocities under Article 7(1) of the ICTY statute. The prosecution's theories were aiding and abetting and joint criminal enterprise. The Trial Chamber opined:

> [W]hen a detention facility is operated in a manner which makes the discriminatory and persecutory intent of the operation patently clear, anyone who knowingly participates in any significant way in the operation of the facility or assists or facilitates its activity, incurs individual criminal responsibility for the participation in the criminal enterprise, either as a co-perpetrator or an aider and abettor. . . .[29]

The Trial Chamber continued that presence alone at the scene of a crime is not conclusive of aiding and abetting but that silence could be interpreted as tacit approval when it is coupled with some authority. Concerning the degree of assistance, the Chamber ruled:

> The assistance or facilitation provided by the aider or abettor must of course have a substantial effect on the crime committed by a co-perpetrator. The precise threshold of participation in joint criminal enterprise has not been settled, but the participation must be "in some way . . . directed to the furthering of the common plan or purpose.[30]

The Trial Chamber held that the defendants' had actual knowledge of the atrocities being committed by others at the camp and that through their continued participation in the camp's operation, they incurred individual criminal responsibility for the crimes.[31] In other words, it inferred that the defendants had the required criminal mental state based on their actual knowledge of the perpetrator's crimes and their ongoing assistance.

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[29] *Kvocka*, IT-98-30/1-T at 306.

[30] *Id*. at para. 289.

[31] *Id*. at para. 257, 328.

Applying these theories to this essay's scenario, a SOF team might be criminally responsible for guerilla war crimes if the team had actual knowledge of the guerilla's criminal purpose and intent and provided military assistance that assisted the guerillas in committing the crimes. For example, if the guerillas were shooting prisoners and civilians and were using ammunition supplied by SOF, the team might be liable if it had actual knowledge of the executions and yet continued supplying the ammunition. It might be argued that by doctrine and training, the team did not have any criminal intent or mental state or even the criminal purpose of the guerillas when it provided the assistance. But as in *Kvocka*, a court might infer that the team had some criminal intent by its actual knowledge of the guerillas crimes coupled with the team's ongoing participation through military assistance. Moreover, the team need not know all the particulars of the guerilla's intended crimes. Rather, under aiding and abetting theory, a SOF team must simply be aware that their contribution will assist or facilitate the guerillas' crimes or that guerilla crimes in general are a reasonably foreseeable consequence of their assistance.[32]

The SOF team's defense might fairly argue that they lacked actual knowledge of the guerillas' crimes and distinguish the lesser "should have known" mental state required under command responsibility theory. But the team's actual knowledge of the guerillas' criminal purpose might be established from circumstantial evidence of past crimes. The circumstantial evidence of the crimes must be strong enough that actual knowledge of the guerillas' intentions can be imputed to the SOF team. For example, in *Kvocka*, the Trial Chamber stated:

[32] *See,e.g.*, *id.* at para. 262.

> Even if the accused were not eye-witnesses to crimes committed in Omarska camp, evidence of abuses could be seen by observing the bloodied, bruised, and injured bodies of detainees, by observing heaps of dead bodies lying in piles around the camp, and noticing the emaciated and poor condition of the detainees, as well as by observing the cramped facilities or the bloodstained walls.[33]

Accordingly, under aiding and abetting theory, rumors of guerilla war crimes would probably not suffice by themselves to establish circumstantial evidence of a SOF team's actual knowledge. Because the standard is knowledge and not "should have known," aiding and abetting theory does not lead to a general duty for a SOF team to investigate the rumors. But a team's willful ignorance is a perilous path toward criminal responsibility because persistent rumors and other circumstantial evidence could be collectively strong enough to establish the team's actual knowledge.[34]

IV. IMPLICATIONS OF THESE CRIMINAL RESPONSIBILITY THEORIES TO SOF DUTIES

A SOF team's potential criminal liability is therefore unlikely under command responsibility theory but very possible under aiding and abetting and similar theories that do not require effective control but require a team to have actual knowledge of the guerilla's criminal purpose and intent. Certainly, the timing of a SOF team's knowledge is an important aspect of this potential liability. Under aiding and abetting type theories, liability will attach only if the teams have the above actual knowledge before providing or continuing to provide military aid. With this caveat in mind, the different results in applying these theories lead to several important implications on a SOF team's general

[33] *Id*. at para. 324.

[34] *See,e.g.*, United States v. Lyons, 33 M.J. 88 (1991); MILITARY JUDGES BENCHBOOK, DA PAM 27-9, *supra* note 28, at para. 7-2.

legal duties in their interaction with the guerillas in the context of this essay's factual scenario.

A. Duty to Investigate Guerillas' War Crimes

First, without "effective control," a SOF team has no general standing legal duty to investigate rumors of past war crimes committed by guerillas. As already discussed, a SOF team must have actual knowledge of the guerillas' past crimes for criminal liability to attach. The "should have known" standard applies only within command responsibility theory, not within the aiding and abetting type theories. Failure to investigate is therefore not a war crime in the context of this essay's factual scenario. But it would be unwise for a team to ignore rumors that could constitute circumstantial evidence of actual knowledge, which if linked to continuing military aid could lead to criminal liability under aiding and abetting type theories.

B. Duty to Report Guerillas' War Crimes

Next, a SOF team has no general standing legal duty under the law of armed conflict to report rumors of guerillas' past war crimes. There are two possible avenues for a team to make such reports: 1) to higher authority within the U.S. Armed Forces and 2) to the guerillas' leadership. Concerning the first, all U.S. military personnel are required by regulation to report any suspected instances of violations of the Law of

Armed Conflict.[35] This regulatory requirement is typically incorporated into all SOF operational orders. Accordingly, failure to report guerilla war crimes might lead to criminal liability under Article 92 of the UCMJ, "Violation of an Order or Regulation."[36] But this type of regulatory or military crime is not a war crime under the Law of Armed Conflict. For example, it is not among the war crimes in the ICC or the ICTY statutes. This type of crime is a domestic military criminal offense.

Concerning the second avenue of reporting (to the guerilla leadership), the duty to make this report is not required by a U.S. regulation. Rather, it would derive from command responsibility theory's third element that creates a duty for a superior to prevent or punish war crimes. But as stated, a SOF team is unlikely to be liable under this theory because it does not effectively control the guerillas. Further, under aiding and abetting type theories, there is no element that directly requires reports of crimes, but the existence or lack of such reports are certainly probative evidence about whether a team shared the guerillas' criminal purpose and intent. So, from a criminal litigation perspective, it would be unwise for a team not to report the crimes.

C. Duty to Intervene to Prevent Guerillas' War Crimes

Similar to the duty to report, a SOF team has no general legal duty to intervene to prevent the guerillas' war crimes if they acquire knowledge of the guerillas' criminal purpose and intent after delivering the military aid. This general duty derives from

[35] Department of Defense Directive 2311.01E, *supra* note 2; Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 5810.01B, *Implementation of the DOD Law of War Program*, (March 28, 2002); *Ethical Dilemmas for Special Force, supra* note 2.

[36] 10 USC § 892 (2000).

command responsibility theory as one of its elements. But as stated, without effective control, a SOF team will not likely be liable under that theory. Further, the duty to intervene is not part of the aiding and abetting type theories for war crime culpability. None include a failure to meet this duty as an affirmative element to support a charge. Rather, the duty to intervene would only arise in a trial in the context of a defense strategy that attempts to negate charges of aiding and abetting or to prove that the defendants broke off from a conspiracy before the crime occurred.

This does not mean to imply that a SOF team should intervene because of the potential need to disprove an aiding and abetting, joint criminal enterprise, or conspiracy charge. After all, a team's safety and survival could be threatened or in peril by physical intervention against the guerillas. Self-defense and reality might dictate that the prudent military option is to detach and withdraw from the guerillas. Of note, criminal responsibility for war crimes generally excludes reasonable self-defense.[37]

Further, a SOF team's mission might not include intervention. The U.S. Court of Appeals for the Armed Forces considered this issue in the context of non-SOF or conventional soldiers in *United States v. Rockwood*.[38] Captain Rockwood was a counterintelligence officer on the staff of Joint Task Force ("JTF") 190 during the U.S. operations in Haiti in 1994. On September 30, 1994, he left his place of duty at the Light Industrial Complex in Port-au-Prince, Haiti, and went to the National Penitentiary to conduct an inspection and to intervene to protect prisoners. He had heard rumors that the

[37] *See,e.g.*, The Rome Statute, *supra* note 17 at art. 31(1)(c).

[38] *Rockwood*, 52 M.J. 98; Major Edward J. O'Brien, Note, *The Nuremburg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 Milit L Rev 275 (Summer, 1995).

local Haitian soldiers and police were abusing, torturing, and killing prisoners there. Captain Rockwood was charged with several violations of the UCMJ, including leaving his place of duty. In his defense, he argued justification - that his command was criminally negligent by not protecting Haitian prisoners from alleged human rights abuses and that he would have been criminally responsible for war crimes if he had failed to intervene. The U.S. Court of Appeals for the Armed Forces rejected his argument:

> Appellant cites us to no legal authority – international or domestic, military or civil – that suggests he had a "duty" to abandon his post in counterintelligence and strike out on his own to "inspect" the penitentiary. Neither does he suggest any provision of any treaty, charter, or resolution as authority for the proposition. . . . In this circumstance, we conclude that the military judge did not err in declining to provide a justification instruction.[39]

The court noted that the alleged abuses were done by Haitian soldiers, not American soldiers under the command of JTF 190. It further opined that the United States was not an occupying power of Haiti with any regional duty to control Haitian forces. Finally, the court considered that the JTF 190 staff had no actual knowledge of atrocities and that Captain Rockwood's investigation and intervention placed him in personal danger because of the unstable security situation in Port-au-Prince. Accordingly, the court concluded that Captain Rockwood had no general legal duty to investigate rumors of atrocities by Haitian forces or to intervene to prevent any because there was no potential threat of a war crimes conviction. And it upheld Captain Rockwood's conviction, ruling that his investigation and intervention concerning rumored atrocities were not part of his assigned mission in Haiti.

[39] *Rockwood*, 52 M.J. at 108.

As in *Rockwood*, a SOF team should intervene to prevent guerillas' war crimes only as directed by higher military authority or within the parameters of its assigned mission. The decision to do so raises strategic military issues outside of any general legal duty implicit in a potential war crimes prosecution. Intervention might be a departure from the team's assigned mission and could therefore have larger strategic implications. As stated, it might also cause team members to be injured or killed. This might also affect the larger strategic purpose of the team's presence.

Although a SOF team has no general legal duty to intervene, they are required by training and operational orders always to attempt to use less than physical means to influence the guerillas not to commit war crimes. As previously noted, SOF teams must state clearly to the guerillas at their first meeting that all U.S. military support will be withdrawn if the guerillas commit war crimes. This scenario is a key part of the live scenario training that all SOF candidates undergo - "Robin Sage" training. In these scenarios, SOF candidates work through scenarios in the field where SOF instructors and actors play the parts of guerillas that challenge the SOF candidates' ethics by vaguely indicating intentions to commit atrocities. The training poses the dilemma as to how the threat of withdrawing military aid is communicated. After all, it can be done absolutely or with intonations of willful ignorance. For example, one could say, "We cannot know of any war crimes or the United States will withdraw military aid." Robin Sage training is designed to test the personal honor and integrity of SOF candidates to ensure that the threat of withdrawal is properly communicated. In any event, as already discussed, a SOF team may not be violating a general legal duty under the law of armed conflict by improperly communicating the threat of withdrawal of aid. But a court might infer that a

SOF team had actual knowledge of the guerilla's war crimes and even shared their criminal purpose from a team's willful ignorance if the circumstantial evidence of such crimes is self-evident.

D. Duty to Detach and Withdraw Military Aid

A SOF team does have a general legal duty to detach and withdraw further military aid from guerillas if the team has actual knowledge that the guerillas have a criminal purpose to commit war crimes. If it does not do so, then a team might be held criminally liable under aiding and abetting type theories for any war crimes later committed by the guerillas. As in *Kvocka*, a court might infer that a team shared in the guerillas' criminal purpose and intent based on its continued assistance to them.

This duty might be modified if a SOF team acquires actual knowledge of past guerilla war crimes and has bona fide assurances from the guerillas that they are prosecuting the perpetrator and will not commit future ones. In such a scenario, it seems unlikely that a court would infer that a team shared in the guerillas' criminal purpose if the guerillas later committed crimes.

V. Conclusion

In the context of this essay's factual scenario, Special Operations Forces have no general legal duty under the law of armed conflict to investigate the guerillas' past war crimes or to intervene to stop their future ones. They might have strong moral, ethical, and even practical motives to do so. And higher military authority might even order them to do so. But their failure to act on these motives does not turn SOF team members into

war criminals. Nevertheless, a SOF team does have a general legal duty to detach from and not to aid guerillas in the commission of future war crimes. This requires actual knowledge of the guerillas' criminal purpose and intent. And a team could be held criminally responsible for the guerillas' war crimes if it breaches this duty.

Certainly, the real life scenarios that SOF teams encounter during operations will likely vary from the academic hypothetical posed in this essay. The personalities of guerilla groups and the nature of missions might also affect the degree that a SOF team can influence or the guerillas actions. Further, depending on the role of the United States as an occupying power or not, a team may even reach the point of "effective control" over a guerilla group depending on assigned mission and other facts. This goal of this essay was merely to analyze one of the more common scenarios.

Given the myriad of other possible scenarios, it is therefore imperative that commanders and legal advisors for SOF units provide appropriate policy and legal guidance that addresses the legal issues discussed in this essay. Such guidance should provide SOF team members with clear courses of action if they suspect that guerillas committed war crimes and will continue to do so. Further, it should include all legal and regulatory duties without disturbing a military commander's discretion over purely strategic and tactical issues. Based on the conclusions of this essay, such guidance might consist of the following:

1. Report all information to higher authority;

2. Attempt to influence or intervene to prevent the war crime, but only as practicable within the limits of the mission and your own safety;

3. If unsuccessful, separate, detach, and disengage from the guerillas and from providing any further military aid; and

4. Await further guidance from higher authority.

It is significant to note that two of the four guidance items point to higher level authority. The obligations of policy level leaders are beyond the scope of this essay and would be worthy topics for another one. But it should be noted that reports of guerilla war crimes to policy level leaders could implicate the same Law of Armed Conflict obligations that apply to SOF teams in the field - certainly if the reports establish the guerillas' criminal purpose and intent. Similar to SOF teams' actions, policy leaders also risk becoming liable for guerilla war crimes if they indulge in willful blindness or deception concerning their actual knowledge of guerilla conduct. Accordingly, just as SOF teams are well-advised to report guerilla crimes, policy leaders are well-advised to closely read and quickly react to such reports - or to similar reports from other sources.

As such, the above guidance is an appropriate starting point for reactions to guerilla war crimes, regardless of the level of authority over an operation. At the SOF team level, it is the author's experience that this guidance has traditionally been provided in all deployments – typically by the unit's judge advocate. One always hopes for the best in preparing for a military deployment. But it is always the best course of action to prepare for the worst.