Research Essay

"The Plea of Ignorance"

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INTRODUCTION

How is it possible for a commander to be held responsible for the individual conduct of hundreds or thousands of troops operating in the most strenuous conditions? Is it humanly feasible? To what extent does the Law of Armed Conflict apply to either UN peacekeeping or peace-enforcing operations? Does the Law of Armed Conflict apply to Canadian Forces operating outside Canada, either as part of a NATO or a UN led military operation? Does the concept of "command responsibility" apply to CF personnel? In the context of a UN military operation, to what extent is a Canadian Contingent Commander responsible for the actions or omissions of his subordinates? When the Force Commander, who may not be a Canadian, has operational control over the same troops and therefore exercises direct tactical command over them, can the Contingent Commander plead ignorance as a defence? Finally, is responsibility the same thing as accountability?

This paper will focus on the responsibilities of every officer and specifically of any commander, whatever the size of his command, regarding the application of the Law of Armed Conflict (LOAC). This paper will first demonstrate that there exists a doctrine of "command responsibility" in conventional and customary international law. The trials at the end of World War II applied the Hague Convention of 1907, supplemented by the four Geneva Conventions of 1949 and the Additional Protocols of 1977 impose a responsibility upon a commander for the illegal acts of his subordinates. Acceptance of a command imposes upon the commander a duty to supervise and control the conduct of his subordinates in accordance with the Law of Armed Conflict.

Then the paper will examine to what extent, this doctrine of "command responsibility" applies to United Nations (UN) military operations and to Canadian Forces (CF) personnel

employed in these operations. We shall see that the doctrine of "command responsibility" applies to all UN operations. Also, according to Canadian law and CF regulations, the spirit and principles of the Law of Armed Conflict do apply to all CF operations other than domestic operations.

Finally, the paper will analyse the "plea of ignorance". Having defined the responsibilities of a commander, based on the doctrine of "command responsibility" and Canadian law, we will conclude that when a commander carries out his duty diligently there is very little room to plead ignorance for the misconduct of his subordinates. Although this does not mean that the commander is automatically criminally responsible for the actions of others, he remains accountable to his superiors for the performance of his troops. The concept of "command responsibility" is so encompassing that it cannot be the burden of the sole commander, although in the final analysis, the buck stops at his feet. Troops have to be trained in the Law of Armed Conflict and know their responsibilities. Officers must know what is going on in their command at all times. Non-commissioned officers, more than ever, must maintain and enforce discipline. A failure in "command responsibility" is in fact a failure of diligence of the whole chain of command, and a failure of discipline.

DISCUSSION

Law of Armed conflict and "command responsibility"

It has long been recognised that when a superior orders a subordinate to perform unlawful acts, he is criminally responsible. Since World War II, the literature and opinions of courts have concentrated on the second aspect; namely the commander's responsibility for the unlawful acts

of his subordinates if he failed to prevent the unlawful activity when he "knew" or "should have known" of the activity. [1]

The second aspect is essentially based on "the commander's failure to act in order to: 1) prevent a specific unlawful conduct; 2) have established measures to prevent or deter unlawful conduct; 3) investigate allegations of unlawful conduct; and, 4) prosecute, and upon conviction, punish the author of the unlawful conduct. …The choice of any legal standard and test is ultimately a matter of legal policy. Thus to place a reasonably higher level duty on commanders on the assumption that this would maximise their vigilance and thus minimise the potential violations of subordinates, is a policy that leads to the adoption of a 'should have known test'."[2]

To hold a command position imposes the legal duty to supervise, control, prevent, investigate and punish unlawful conduct by subordinates. Failure to do so becomes the basis for criminal responsibility. The military standards are higher than their civilian counterparts for two reasons: the requirement to enforce discipline in a military structure, and the effectiveness of deterrence in both international and national military laws. However, failure to act and failure to punish depend on knowledge and opportunity to act. Moreover, the mitigation of penalty for a subordinate under the defence of "obedience to superior orders" does not imply that the superior is criminally responsible if the order was misunderstood or wrongly executed by the subordinate.[3]

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[1] M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law (London: Martinus Nijhoff Publishers, 1992), 390.

[2] Bassiouni, 368.

[3] Bassiouni, 371.

The essential element in terms of "command responsibility" is that of causation. Obviously, to establish a chain of cause and effect is more difficult as one goes up the chain of command. As the more removed a superior is from the scene of the crime, the more difficult it is to factually assess his responsibility. "The applicable standard, which applies to both military law and civilian criminal law, is the objective standard of 'reasonableness' in light of the existing circumstances, i.e., reasonableness in terms of actual knowledge or knowledge that should have been known. …To hold a superior accountable on the basis of omission for the conduct of a subordinate, therefore, requires intent or knowledge that the omission can actually or reasonably and foreseeably lead to a violation act and that the superior is in a position or has the ability to act in the prevention of the violative act".[4]

Actually, no theory of absolute liability has found acceptance in either international or domestic law. After World War II, contrary to the approach taken by the Yamashita Military Commission (comprised of American officers, none of whom had legal training), the Canadian Military Court in Meyer case and the United States Court in "The High Command Case" did reject the strict liability theory that a commander could be held criminally responsible only on the basis of the commander/subordinate relationship in which he is under the duty to know.[5] In the last case, the tribunal stated "that military subordination is a comprehensive but not a conclusive factor in fixing criminal responsibility. …Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction that can occur only where the act is directly traceable to him or where his failure to properly

[4] Bassiouni, 372.

[5] William H. Parks, "Command responsibility for War Crimes", Military Review, Vol. XXVII (1989): 63.

supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a **personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.**"[6]

The ruling of the Military Commission in the case of General Yamashita on December 7, 1945, and its subsequent confirmation by the United States Supreme Court on February 4, 1946 confirmed the existence of an affirmative duty on the part of a commander to take such measures as within his power and appropriate in the circumstances to wage war within the limitations of the laws of war. In particular, it affirmed the requirement to exercise control over his subordinates, and established that the commander who disregards this duty has committed a violation of the law of war. Finally, it affirmed the legality "of subjecting an offending commander to trial by a properly constituted tribunal of a state other than his own".[7]

The Canadian Military Court in Germany in the case of Brigadefuhrer Kurt Meyer ruled that:[8]

> (4) Where the evidence **that more than one war crime has been committed** by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as prima facie evidence of the responsibility of the commander for those crimes.
> (5) Where there is evidence that a war crime has been committed by members of a formation, unit, body or group and **that an officer or non-commissioned officer was present** at or immediately before the time when such a crime was committed, the court may receive that evidence as prima facie evidence of the responsibility of such officer or non-commissioned officer, and of the commander of such formation, unit, body, or group, fort that crime.

When "knowledge is obvious, given the failure to act, the commander will be deemed responsible." In the case of General List,[9] the Tribunal imputed responsibility on the basis that

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[6] Bassiouni, 384.

[7] Parks, 37.

[8] L.C. Green, " Superior Orders and Command Responsibility," Canadian Yearbook of International Law XXVII (1989):196; War Crimes Regulations (Canada), P.C. 5831, Aug. 30, 1945.

"any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf." [10] As well, the Tribunal concluded that liability also arises when an illegal order from a superior HQ is passed through that commander's staff to his subordinates; even when the commander himself is not aware.[11]

The case of Captain Medina, the immediate superior to Lieutenant W. L. Calley, Jr., in the Mai Lay case (1971-1973), brought the command responsibility doctrine full circle from the Yamashita "must have known" through The High Command Case "should have known" to simple "actual knowledge". Most experts consider the Medina case as being an anomaly in the United States jurisprudence.[12] Already in 1956, the US Army Field Manual acknowledged that "the commander is responsible if he has actual knowledge, or should have knowledge, through

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[9] Known as the "Hostage Case", this trial was the second joint trial at Nuremburg. General List, fifth ranking field marshal in the German Army, was charged with being principal and accessory to the murder and deportation of thousands of civilians committed by units under his command while serving as Armed Forces Commander Southeast and as Commander-in-Chief of Army Group A on the Russian front.

[10] Parks, 89.

[11] Parks, pp. 60 and 77. Similarly, in the High Command case, the Tribunal imputed responsibility to General von Kuechler on the basis that "it was his business to know". The Tokio Tribunal in convicting General Muto and the Military Commission in convicting General Yamashita concluded, "a commander may normally be presumed to have knowledge of offenses occurring within his area of responsibility when he is present therein." (Parks, 89.) Finally, the Canadian rule of 1945 in considering the responsibility of General von Roques for crimes committed within his area of responsibility, over which he had control, concluded that there is an imputation of "constructive knowledge" where it is established that under the circumstances he must have known. (Parks, 90.)

[12] L.C. Green, "War Crimes, Crimes against Humanity, and Command Responsibility," National War College Review, Vol. L, no2, (Spring 1977): 41-42; also Bassiouni, 386.

reports received by him or other means".[13] This position corresponds to contemporary international norms as defined by Articles 86 and 87 of the 1977 Additional Protocol I to the Geneva Convention of 1949, which impose upon the commander a duty to supervise and control the conduct of his subordinates.[14] In addition, Article 43 of Protocol I imposes the obligation to discipline the troops.[15] Finally, Article 12 of the 1991 Draft Code of Crimes re-affirms the responsibility of a commander for the crimes committed by his subordinates.[16]

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[13] U.S. Department of the Army, Field Manual 27-10: Law of Land Warfare (Washington, D.C.: U.S. Government Printing Office, 1956), para. 501.

[14] Adam Roberts, and Richard Guelff, Documents on The Laws of War (Oxford: Clarendon Press, 1989), 439. Article 86 para. 2 of Protocol I states:
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The argument that there exists a doctrine of "command responsibility" in conventional and customary international law is supported by the Kahan Commission set up by Israel to investigate the massacres at the refugee camps at Sabra and Shatilla after Israel's invasion of Lebanon in 1982. The Commission concluded that the Minister of Defence, General Ariel Sharon, who commanded Israeli operations in Lebanon at the time, was "indirectly" responsible for the massacres of roughly 300 to 3000 people.[17] "Insofar as Israel has not signed Protocol I and given no indication of adhering thereto, this practice indicates that it is now established in the customary law of armed conflict that compliance with an illegal order provides no defence to the military man carrying out the order, at least when the illegality is manifest, and that the superior who issues such an order carries personal liability for so doing."[18]

Finally, Article 28 of the newly adopted, but not yet ratified 1998 Rome Statute of the International Criminal Court defines the responsibility of commanders and other superiors.[19]

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disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

[16] Bassiouni, 746. The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

[17] Green, Superior Orders, 199-200; also Bassiouni, 389.

[18] Green, Superior Orders, 202.

[19] Office of the Canadian Forces Judge Advocate General, Conduct of Hostilities: Collection of Hague Conventions, Other Treaties and related Canadian Statutes (Ottawa: Queen's Printer1998), 186. In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
(a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

Article 28 codifies the concept of "command responsibility" in conventional and customary international law based on the 1899 and 1907 Hague Conventions and the four 1949 Geneva Conventions.

Applicability of the Law of Armed Conflict to UN Peace support operations

Having established that there exists a doctrine of "command responsibility" in conventional and customary international law, we will now examine its application to peace support operations conducted under UN mandate.

Simply stated the problem is that most of the armed conflict rules of the Geneva Conventions bind a state party only when the state is a party to the armed conflict. As Hoffman has written:[20]

> "From the earliest days of the UN's interest in peace enforcement, however, it has been argued that military operations conducted under the authority of Chapter VII of the UN Charter are not covered by the Hague or Geneva Conventions. Because the UN is not a state, it is ineligible to adopt those treaties. It follows that military forces are not traditional parties to a conflict when operating under UN Security Council resolutions based on Chapter VII. Forces committed to a Chapter VII operation do not take sides in any conflict; in principle they are intervening in a state or region to end a threat to international peace and security. Because they are not parties to a conflict, they are held not to have a vested interest in how it ends. Consequently, military forces committed to peace enforcement under Chapter VII are not covered by law of war."

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

2. With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission or to submit the matter to the competent authorities for investigation and prosecution.

[20] Michael H. Hoffman, "War, Peace, and International Armed Conflict: Solving the Peace Enforcer's Paradox," Parameters Vol. XXV. No.4 (Winter 1995-96): 44-45; see also L.C. Green, The Contemporary Law of Armed Conflict (Manchester: University Press, 1993), 52-53.

This is why both the UN and the troops contributing nations are unwilling to recognise that UN forces when operating under either a Chapter VI, Chapter VII or VIII operation are a participant in the conflict itself. In other words, the above statement applies to NATO troops now operating as part of IFOR/SFOR under UN resolution, but clearly does not apply to conflict such as the Gulf and Korean interventions. Technically, the LOAC does not apply to the former case, but does apply to the latter. In practice, though, the LOAC is found in IFOR's ROE and Op orders and therefore does apply. Another aspect of the problem is that, as discussed above, the LOAC imposes an obligation to discipline the troops and the UN does not have its own internal disciplinary system.[21]

From a logical point of view, it appears that the drafters of Chapter VII of the UN Charter clearly anticipated that UN forces would act rapidly and, if necessary, forcefully to restore peace and security in a manner similar to the role of a police force in the context a of state. The basic purpose of the LOAC is to reduce or mitigate the horrors of war. The role of the UN is to "maintain international peace and security, and to that end to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of peace."(UN Charter, Article 1.) It follows that "those who seek to act in the cause of lawfulness and humanity must surely themselves, in principle, be willing to be bound, at the minimum, by the basic humanitarian norms of the jus in bello"(the conduct of war).[22]

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[21] Note from D Law/T, LCol K. Watkin , 30 September 1998.

[22] Hilaire McCoubrey and Nigel D. White, The Blue Helmets: Legal regulations of United Nations Military Operations (Brookfield USA: Dartmouth Publishing Company Limited, 1996), 159.

Various international bodies have addressed the application of the laws of war to UN forces. The 1954 Hague Intergovernmental Conference approved a resolution recommending that the UN ensure the application of the 1954 Hague Cultural Property Convention by UN forces. In 1971, the Institute of International Law adopted the 1971 Zagreb Resolution on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces may be engaged. The Commission assumed both the existence of UN forces, and the possibility that such forces might be involved in armed hostilities. Article 2 of the Resolution provides that: "**The humanitarian rules of the law of armed conflict apply to the United Nations as of right, and they must be complied with in all circumstances by United Nations Forces which are engaged in hostilities.**" [23]

McCoubrey and White argue that the United Nations is an organisation having international legal personality, therefore its actions, including military actions, must be in accordance with the applicable provisions of international law. "It may be accepted, as it is suggested it must, that jus in bello (the justly conduct of war) provisions are prima facie

[23] Roberts and Guelff, 371, 373-374. Article 2 of the Resolution provides that: The humanitarian rules of the law of armed conflict apply to the United Nations as of right, and they must be complied with in all circumstances by United Forces which are engaged in hostilities.
The rules referred to in the preceding paragraph include in particular:

(a) the rules pertaining to the conduct of hostilities in general and especially those prohibiting the use or some uses of certain weapons, those concerning the means of injuring the other party, and those relating to the distinction between military and non-military objectives;
(b) the rules contained in the Geneva Conventions of August 12, 1949;
(c) the rules which aim at protecting civilian persons and property.

Article 3 B. adds:
If United Nations Forces are composed of national contingents with regard to which the United Nations has not issued any regulations such as those mentioned in the preceding paragraph, **effective compliance with the humanitarian rules of armed conflict must be secured through agreements** concluded between the Organisation and the several States which contribute contingents.
These agreements shall at least confer upon the United Nations the right to receive all information pertaining to, and the right **to supervise at any time and at any place, the effective compliance with the humanitarian rules of armed conflict by each contingent**.

applicable to UN forces engaged in military hostilities."[24] Addressing the question of the UN not being a state party of those treaties comprising the jus in bello, they argue that although a treaty usually bind only those states which are party to it, Article 38 of the Vienna Convention on Treaties provides that "nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognises as such….Clearly, if a treaty simply restates a principle or principles of customary law, it will bind all states in so far as the restatement is accurate."[25] According to this rationale, the 1889 and 1907 Hague Conventions, the four Geneva Conventions of 1949 are recognised as having the status of customary law. Their provisions would therefore apply to UN military operations. Whether or not the two Additional Protocols of 1977 have also the status of customary law, is debatable. It seems that Protocol I would fall into that category, but it could be argued that Protocol II has not achieved such a status yet. But because the provisions of Protocol II are much fewer and far less restrictive than those of Protocol I, it may be a moot point.

The Draft Code of Crimes Against the Peace and Security of Mankind of 19 July 1991, although still not adopted, gives a general codification of offences against the peace and security of mankind. Article 3 re-affirms the personal liability of the individual. Article 12 stipulates that crimes against the peace and security of mankind are likely to result in some higher body's instruction. It confirms the principle of command responsibility by virtually reproducing Article 86 of Protocol I.

As to an international criminal code, the International Law Commission adopted in 1994 a Draft Statute for an International Criminal Court. Part 3 of the draft comes close to providing

[24] McMoubrey and White, 158.

[25] McMoubrey and White, 159.

an international criminal code. There is nothing in the Draft Statute dealing with the issue of command responsibility. Professor Green points out, however, that the rules already expounded indicate that command responsibility would apply.[26] "This is important, since the jurisdiction of the Court extends over serious violations of the laws and customs of war, and over other offences arising from listed treaties. By bringing together under its jurisdiction the grave breaches of the four Geneva Conventions as well as of Protocol I, the Court brings within its jurisdiction all significant breaches of both the customary and conventional law of armed conflicts."[27] The adoption of the 1998 Rome Statute of the International Criminal Court on 17 July 1998, although not yet ratified, gave reason to Professor Green as Part 2 defines the jurisdiction, admissibility and applicable law. Part 3 goes a step further than the 1994 Draft as Article 28 specifies the responsibility of commanders and other superiors.

A second aspect concerns the legal distinction between international and non-international conflicts. Simply stated, most rebellions, revolutions or civil wars do not fall within the purview of the Law of Armed Conflict. Article 2(7) of the Charter of the United Nations specifies that the organisation has no right to intervene in the internal jurisdiction of states unless international peace and security is threatened. In such a case, the Security Council may decide to take action under Chapter VII of the Charter.[28]

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[26] Green, War Crimes, 56.

[27] Green, War Crimes, 53.

[28] The adoption of the Additional Protocols to the 1949 Geneva Conventions in 1977 brought changes to the formal distinction between international and non-international conflicts. Article 1(4) of Protocol I stipulates that the provisions of the Protocol apply to " armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations among States in accordance with the Charter of the United Nations." (Green, "War Crimes" 55.) When the Protocol is in effect regarding such conflict, all the rules, including Articles 86 and 87, concerning failure to act and the duties of commanders, do apply.(Roberts and Guelff 450.)

The concept of "crimes against humanity" applies loosely to a variety of crimes committed against civilian populations. The Commission of Experts on the former Yugoslavia, established by the Security Council's resolution 780 (1992) defined the term as to be: "gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victims."[29] The Commission of Experts established by the Security Council (Resolution 935 (1994) to examine grave violations of international law in Rwanda adopted the same language.

Concerning Yugoslavia, the United Nations Security Council decided in 1991 to establish an ad hoc tribunal with the task of trying those responsible for the commission of grave breaches, war crimes, and crimes against humanity. By using the term "international humanitarian law" and referring to the entire territory of the former Yugoslavia, the Court avoided the legal debate between the international and non-international aspects of the conflict. According to Professor Green, genocide or crimes against humanity or international humanitarian law are now recognised "as governing the conduct of all persons in time of conflict or of peace".[30] The

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Protocol II is designed to deal with the protection of victims on non-international conflicts and seeks "to develop and supplement Article 3 common to the Geneva Conventions" of 1949, by introducing some measure of humanitarian control in what were previously conflicts unregulated by law. However, Article 1(2) specifies that it "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." (Green, "War Crimes" 55.)

Furthermore, Article 3 provides that " nothing in this Protocol shall be invoked as a justification for intervention, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs". However, the Security Council may decide to take action and intervene in the conflict because it represents a threat to international peace. In practice, the law governing war crimes does not apply to such conflict. Nevertheless, to the extent that such offence amount to genocide or crimes against humanity, the normal rules will apply, including those related to command responsibility. (Green, "War Crime" 56.)

[29] Green, War Crimes, 57.

[30] Green, War Crimes, 59-60.

Statute of the Ad Hoc Tribunal for Rwanda copies the same terms as that for the former Yugoslavia.

The net result is that war crimes and grave breaches of the Geneva Conventions and Protocol I constitute most of the time crimes against humanity, as long as they are "systemic and wide spread" breaches committed against civilians. Consequently, "it may well be that as a result of the jurisprudence stemming from the activities of the ad hoc tribunals for the former Yugoslavia and Rwanda, we will witness a lessening of the significance of the concept of war crimes as such".[31] The adoption of the1998 Rome Statute of the International Criminal Court gave reason to Professor Green. Part 2, Articles 5 through 8 define precisely what constitutes genocide, crimes against humanity, and war crimes. The jurisdiction of the Court will apply to both international and non-international conflicts, once sixty countries have ratified the Statute. Its ratification will provide the world with an international jurisprudence in the cases of genocide, crimes against humanity, war crimes, including command responsibility and the crime of aggression. The Court will have jurisdiction over "the most serious crimes of concern to the international community as a whole"; "lesser" war crimes such as rape or a breach of the law of armed conflict will fall under the jurisdiction of national military tribunals.[32]

Therefore, it is reasonable to conclude that normal rules regarding criminal liability of both the soldier and his superiors do apply to UN mandated peace operations. As a minimum the UN forces are subject to the rules of humanitarian law, including those of the Geneva Conventions and Protocol I. [33]

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[31]Green, War Crimes, 62.

[32] Green, War Crimes, 53.

[33] Green, War Crimes, 62.

Having examined the legal aspect, we will now look at the position adopted by the United Nations through various documents. First, it is worth noting that in late 1950, during the Korean War, the UN command in Korea ordered all its forces to observe all the provisions of 1949 Geneva Convention III on prisoners of war. Likewise, Article 44 of the Regulations of the UN Emergency Force in Egypt stated: "The Force shall observe the principles and spirit of the general international Conventions applicable to the conduct of military personnel." The UN Operation in Congo adopted the same article in its Regulations of 15 July 1963.

In a letter to the International Committee of the Red Cross (ICRC) in January 1962, the UN Secretary-General, U Thant, confirmed that the "UNO insists on its armed forces in the field applying the principles of these 1949 Geneva Conventions as scrupulously as possible."[34] Finally, it must be remembered that "National contingents remain bound, to the same extent and the same degree, by the laws of war which would apply if the same forces were engaged in international armed conflict for their own states; states retain a responsibility for their contingents."[35] However, this means that while contingents are bound by customary law, they may not be bound by other parts of the law which do not have the status of customary law.[36]

The "Interoffice memorandum" addressed on 24 May 1978 by Mr. Guyer and Mr. Urquhart to all commanders of UN forces, which was reflected in a second memorandum, dated 30 October 1978, from the Commander-in-Chief of the UN forces to all commanders at General Staff and contingent level, specifies that "in case where the forces have to use their weapons in

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[34] Roberts and Guelff, 372.

[35] Roberts and Guelff, 372.

[36] Green, Contemporary LOAC, 320.

accordance with their mandate, the principle and spirit of the rules of International Humanitarian Law (IHL), should apply, as laid down in the Geneva Conventions of 1949, the Additional Protocols of 1977 and elsewhere."[37]

A letter of 23 October 1978 to the President of the ICRC (in reply to a letter from the President dated 10 April 1978), in which the UN Secretary General stresses that "the principles of humanitarian law… must, should the need arise, be applied within the framework of the operations carried out by United Nations forces".[38] The UN Secretary General in a letter, also dated 23 October 1978, addressed to the permanent representatives of governments sending contingents to the United Nations Interim Force in Lebanon (UNIFIL) points out that in situations "where members of such forces have to use their weapons in self-defence, in conformity with guideline D, the principles and spirit of IHL as contained, inter alia, in the Geneva (Red Cross) Conventions … and the Protocols of 8 June 1977 … shall apply". To this end, the States providing contingents must ensure that their troops fully understand the principles of IHL and the measures to be taken to ensure their observance. The UN, for its part, "undertakes, through the chain of command, the task of supervising the effective compliance with the principle of humanitarian law by the contingents of its peace-keeping forces".[39]

On 9 October 1990, the UN produced a Draft model Status-of-forces agreement between the United Nations and Host Countries. The original document states that "the United Nations peace-keeping operation and its members shall refrain from any action or activity incompatible

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[37] Umesh, Palwankar, "Applicability of international humanitarian law to United Nations peace-keeping forces," The International Review of the Red Cross No. 294, (May-June 1993): 232.

[38] Palwankar, 232.

[39] Palwankar, 233.

with the impartial and international nature of their duties or inconsistent with the spirit of the present arrangements".[40] Nonetheless, it does not specifically refer to the Law of Armed Conflict. However the Model Agreement prepared by the Secretary General in May 1991 is more specific:[41]

> The United Nations peacekeeping operations shall observe and respect the principles and the spirit of the general international conventions applicable to the conduct of military operations. The international conventions referred to above include the four Geneva Conventions of 1949 and their Additional Protocols of 1977 and the UNESCO Convention on the Protection of Cultural Property in the event of armed conflict. The Participating State shall therefore ensure that the members of its national contingent serving with the United Nations peacekeeping operation be fully acquainted with the principle and spirit of these Conventions.

Not surprisingly, the Agreement between the United Nations and the Government of Haiti on the Status of the United Nations Mission in Haiti, which duplicates the Draft model SOFA, includes such a paragraph.[42] It is particularly interesting to note that the Law of Armed Conflict applied in that situation, which had nothing to do with an international conflict. The UN operation in Haiti was clearly a humanitarian intervention based on the will of the international community to stop human right abuses on a large scale. This confirmed as suggested by Professor Green[43] that "should United Nations forces be deployed, as they often were in 1992, in areas where civil wars or non-international conflicts as defined in Protocol II are in progress,

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[40] United Nations Document A/45/594, Draft model Status-of-forces agreement between the United Nations and Host Countries (Report of the Secretary-General, 9 October 1990): paragraph 6.

[41] Green, Contemporary LOAC, 325.

[42] Agreement between the United Nations and the Government of Haiti on the Status of the United Mission in Haiti, 12 October 1993, paragraph 7.
The United Nations will ensure that UNMIH carries out its mission in Haiti in such a manner as to respect fully the principles and spirit of the general international conventions on the conduct of military personnel. These international conventions include the four Geneva Conventions (Red Cross) of 12 August 1949 and the Additional Protocols thereto of 8 June 1977 and the UNESCO International Convention for the Protection of Cultural Property in the Event of Armed Conflict.

[43] Green, Contemporary LOAC, 325.

even though the parties may not have been observing the terms of that Protocol, the role, function, rights and obligations of the United Nations personnel are the same as they are in any peace-keeping operations."

In a letter dated 25 April 1995, addressed to the US Mission to the UN, the Director and Deputy to the Under-Secretary-General for Legal Affairs of the United Nations stated that the UN Model SOFA codifies "customary practices and principles applicable to UN peace-keeping or similar operations."[44] Thus confirming that such is the official position of the United Nations.

In addition Article 20(a) of the UN Convention on the Safety of Peacekeepers of 2 December 1994 refers to the obligation of UN personnel to comply with international humanitarian law and human right laws.[45] Such a Convention would apply in situation other than war. Although very few states have signed and ratified the Convention, it illustrates the UN position, which is consistent with the policy taken in the Model SOFA.

In summary, both the legal analysis and the official position adopted by the United Nations concur to conclude with Professor Green that the guiding principle for all UN military personnel involved on any type of peace support operation is that " they operate at all times in accordance with the principles of international humanitarian law and, when necessary, with the law of armed conflict, as embodied in conventions or customary law."[46]

Canadian Forces and the Law of Armed Conflict

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[44] UN Model SOFA, note to the title.

[45] Nothing in this Convention shall affect:
(a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards.

[46] Green, Contemporary LOAC, 326.

Having determined the existence of a doctrine of "command responsibility" and its applicability to United Nations peace support operations, it is time to look at what the Canadian law and Canadian Forces (CF) regulations have to say concerning the applicability of the law of armed conflict to CF operations.

First of all, CF members are, pursuant to sections 130 and 132 of the National Defence Act, subject to the criminal law of Canada while serving in Canada or abroad and also to the criminal law of the state in whose territories they are serving. They are subject to the concurrent jurisdiction of Canadian service tribunals and the courts of the receiving state.[47]

In practice, the matter is governed by a bilateral agreement between Canada and the receiving state or by a multinational agreement for example the NATO SOFA. In the case of UN operations, the Model SOFA agreement discussed above stipulates that members of a United Nations Mission are immune from legal process in respect of "word spoken or written and all acts performed by them in their official capacity. … Furthermore, military members shall be subject to the exclusive jurisdiction of their respective state in respect of any criminal offences, which may be committed by them in host country territory. However, if the Special Representative certifies that the proceeding is not related to official duties, the proceeding may continue".[48]

The National Defence Act (NDA) makes members of the CF subject to trial by service tribunals for offences against any statute of Canada committed anywhere in the world.[49] CF

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[47] James M. Simpson, Law Applicable to Canadian Forces in Somalia 1992/93 . A study prepared for the Commission of Inquiry into the Deployment of Canadian Forces in Somalia (Ottawa: Minister of Public Works and Government Services Canada, 1997), 4.

[48] UN Model SOFA paragraphs 46, 47 (b), and 49 (b).

[49] National Defence Act, R. S., c. N-5, s. 130(1).

service tribunal can try CF members for offences under other Canadian statutes such as the Criminal Code of Canada and the Geneva Conventions Act. They are also subject to trial by civil courts in Canada on charges arising out of acts or omission abroad.[50] The Criminal code of Canada (1990:7 (3.71-3.77)) states that any grave breach of the 1949 Geneva Conventions or the 1977 Protocols, i.e. a war crime or a crime against humanity, would also amount to a criminal offence under Canadian law.

Article 1 of all four Geneva Conventions of 1949 (Common Article 1) provides that "the High Contracting Parties respect and ensure respect for the Present Conventions in all circumstances". This provision also applies to the Additional Protocol of 1977. These treaties and international customary law impose the following duties on nations:[51]

a. to disseminate to their citizens and in particular their armed forces the norms and rules of the Law of Armed Conflict;
b. to train the members of their armed forces in the Law of Armed Conflict;
c. to comply and promote compliance with the Geneva Conventions and Protocols; and
d. to punish those who fail to comply with their obligations under the Geneva Conventions and the Additional Protocols.

The Canadian Parliament ratified the Geneva Conventions in 1965 and the Additional Protocols in June 1990. Canada and the Canadian Forces are therefore bound by Article 1. In the case of an armed conflict, these obligations are absolute. In respect to peace operations, Canada is not technically bound by international law to abide by the spirit and principles of the LOAC. But

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[50] Section 273 of the NDA, R.S., c. N-5.

[51] Simpson,17.

Canada agrees as a troop-contributing nation to UN operations to abide, in accordance with the UN Model Agreement, by the spirit and principles of the LOAC as a matter of national policy, and to impose that obligation on its troops through orders.

On 2 April 1996, the Court-Martial Appeal Court (CMAC) maintained the verdict of the court martial panel, which acquitted Private Brocklebank. While serving on a peacekeeping mission in Somalia, he was charged with torture, contrary to section 269.1 of the Criminal Code, and negligent performance of a military duty contrary to section 124 of the National Defence Act. In substance, the CMAC concluded that the peacekeeping mission in Somalia could not be equated to an armed conflict within the purview of the Convention IV of the Geneva Conventions. Furthermore, the CMAC concluded that the Canadian Forces Publication 318(4), Unit Guide to the Geneva Conventions, issued by the Chief of Defence Staff on 15 June 1973, as "guide only" did not constitute "specific instructions or imperatives giving rise to an ascertainable military duty."[52] On that basis, the point made by Décary J.A. in his closing remarks becomes very pertinent: [53]

> In closing, I would remark that although I am not prepared to extract from the relevant provisions of the Unit Guide a culpable military duty to safeguard prisoners where no custodial relationship exists between the accused and the prisoner, **I would add that it remains open to the chief of defence staff to define in more explicit terms the standards of conduct expected of soldiers in respect to prisoners who are in Canadian Forces custody. It is open to the chief of defence staff to specify that these standards apply equally in time of war as in time of peace, to impose a military duty on Canadian Forces members either to report or take reasonable steps to prevent or arrest the abuse of prisoners not in their charge and to ensure that Canadian Forces members receive proper instructions not only during their general training but also prior to their departure on specific missions.**

This suggestion has been implemented with the publication of the new Code of Conduct for CF personnel issued in July 1998, by the Office of the Judge Advocate General, under the

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[52] Regina v. Brocklebank, Court Martial Appeal Court of Canada, Stayer C.J., Decary and Weiler JJ.A. (Court File No. CMAC-383, April 2, 1996) 257-258.

[53] Brocklebank, 261.

authority of the Chief of Defence Staff. You will notice that the title refers to a code of conduct not to a mere guide. The Code of Conduct applies to " all Canadian Forces personnel taking part in all military operations other than Canadian domestic operations. …The CF Code of Conduct applies to operations where Canada is a party to an armed conflict as well as to peace support operations".[54] The overall policy is that the CF will apply as a minimum, the spirit and principles of the Law of Armed Conflict in all CF operations other than Canadian domestic operations. Paragraph 10 provides that the Law of Armed Conflict applies across the whole spectrum of warfare. Paragraph 14 states that "you must obey the Law of Armed Conflict. Failure to do so is contrary to the direction of your government; can adversely affect the successful completion of your military mission; dishonours you and your country; and ultimately can leave you or your subordinates open to prosecution".[55] Rule 11 imposes an obligation to report and take appropriate steps to stop breaches of the Law of Armed Conflict and these rules:[56]

> The obligation to obey these rules and the Law of Armed Conflict is a requirement under Canadian military law, which include the Criminal Code of Canada. Breaches of the Law of Armed Conflict or these rules by CF personnel will be dealt with regardless of which side is successful. Canada is committed to see that its forces conduct their operations in compliance with the Law of Armed Conflict. … There is no exception to your obligation to follow Canadian law even when confronted with an opposing force, which refuses to comply with the Law of Armed Conflict.

The message is very clear. Although, the Law of Armed Conflict has always been a part of Canadian military law, the CF Code of Conduct reinforces its application to peace support operations. CF personnel now have a military duty to conduct themselves according to the rules of the Law of Armed Conflict whether they are involved in an international or non-international conflict, under either national, UN or NATO leadership.

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[54] Office of the Judge Advocate General, Code of Conduct for CF personnel (Ottawa: July 1998): 1-1.

[55] JAG, Code of Conduct, 1-3.

[56] JAG, Code of Conduct, 2-20.

The plea of "ignorance"

If subordinates accused of war crimes invariably alleged that they had to obey superior orders, the reverse is also true. Superiors can plead ignorance. Let's examine in more detail to what extent a superior is responsible for the actions of his or her subordinates.

Kelman defines responsibility as referring "to a decision about liability for sanctions based on some judgement rule. Sanctions are usually negative but can include rewards as well as punishments."[57] Usually, as explained by Schafer,[58] when we say someone is responsible for an event, we mean that the person caused the event to happen. If we say that person A holds person B responsible for the occurrence of an event, we mean that A believes that B deserves praise or blame, reward or punishment for doing or failing to do X, if and only if several things hold true. It must be true, that B caused X; that B had a duty with the respect of X; that X is an event or state of affairs that is beneficial (good) or harmful (bad); and that B has no adequate defence or excuse regarding X, such as non-culpable ignorance.

In practice however, when things go wrong in a large organisation, it is often difficult to discover who, if anyone, deserves the blame. Policy formulation is shared by a large number of people. Committees make decisions, no specific individual. The same is true for policy implementation, when many contribute to the outcome, to assign moral responsibility is difficult. According to the Weberian model of hierarchical responsibility, moral responsibility falls almost

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[57] Herbert C. Kelman and V. Lee Hamilton, "Responsibility in Authority Situations," Crimes of Obedience: Toward A Social Psychology of Authority and Responsibility (Yale: University Press, 1989), 195.

[58] Arthur Schafer, The Buck Stops Here: Reflections on Moral Responsibility, Democratic Accountability and Military Values, A Study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (Minister of Public Works and Government Services Canada, 1997), 3.

exclusively on those at the top of the organisation. The higher one's position in the chain of command, the greater one's responsibility. Subordinates would therefore be absolved of moral responsibility for the consequences of their actions as long as they obey superior orders.[59] Two issues come to mind. The first is the fact that officials below those at the very top of the hierarchy do have discretionary authority and discretionary power in bringing about outcomes. Is President Milosevic the only one responsible for the alleged atrocities committed by Serbian security forces in Kosovo? The second difficulty is that it would be too easy to conclude that since we cannot discover who is to blame, no one is to blame; or to say that the tragedy was unavoidable, that it was an act of God.

It seems more reasonable that all and only those culpable actions that contributed to produce the tragedy are blameworthy. Each person is proportionately responsible to the degree of his particular contribution to the outcome. The greatest culpable action deserves the greatest blame; but all who contributed by their wrongdoing bear some responsibility. This is the traditional line of moral reasoning used in the Canadian Forces. The one at the top bears the heaviest moral responsibility when things go wrong, by virtue of their power and authority. General Boyle, however, in his testimony before the Commission of Inquiry into Somalia testified that "if senior officers resigned every time their subordinates made an error, there would never be any leadership". The point being that a superior has a right to expect that subordinates will carry out orders dutifully, diligently and in a legal manner. Therefore, superiors should not automatically be held morally blameworthy simply because something has gone wrong.

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[59] Schafer, 7.

As discussed before, "no theory of absolute liability has found acceptance in either international or domestic law. No man, whether commander or the lowest private, is held responsible for the acts of another absent the establishment of some sharing of the mens rea" (guilty intent).[60] "Individuals are not held to be morally responsible for their conduct unless they do the forbidden act (referred to by lawyers as the actus reus) in the appropriate mental state" (with what jurists call mens rea, i.e. deliberately, knowingly, intentionally, or, at the very least, negligently).[61] A bad outcome generates blame for the superior responsible only when a number of additional conditions have been met. In summary, a commander may be liable for the actions of his subordinates if:[62]

a. he has actual knowledge that an offence has occurred, and he fails to take disciplinary action against the individuals involved; or to take preventive measures to prevent further repetition of the offence; or

b. he fails to use the means available to him to learn of the offence and under the circumstances, he should have known and such failure to know constitutes criminal dereliction; or

c. there is sufficient evidence to impute knowledge.

It is understood that in (b) and (c) a number of criteria must be considered in determining responsibility such as: the rank of the accused, experience of the commander, the duties of a commander by virtue of the command he held, mobility of the commander, isolation of the commander, the "sliding probability ratio" of unit/incident/command, which means that the

[60] Parks,103.

[61] Schafer, 12-13.

[62] Parks, 90.

greater the importance of an offence and/or the unit involved, the higher in the chain of command knowledge may be subjectively imputed. Other factors to be considered are: the size of the staff of the commander, the comprehensiveness of the duties of the staff by the commander, communications abilities, training, age and experience of the troops under his command, composition of the force within the command (a joint or combined force is more difficult to control), and the tactical situation.[63]

As discussed above, for a commander to be held criminally responsible "there must be a personal dereliction that can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a **personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.**"[64]

There exist three degree of negligence: wanton negligence, gross or culpable negligence, and simple negligence, which amounts to the absence of due care. According to Parks, it is only when a commander is showing wanton negligence, namely the doing of a dangerous act or omission with a heedless disregard of the probable consequences, that the said commander manifests the mens rea to be held criminally responsible.[65]

Therefore, it is not sufficient for a superior to assume that his subordinates are carrying out orders dutifully and legally. Leaders have the responsibility to establish control mechanisms and to develop in their organisation an ethical culture appropriate to a military organisation in a

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[63] Parks, 90-94.

[64] Bassiouni, 384.

[65] Parks, 97.

democracy, which implies training. The role of a commander requires the formulation of appropriate policies and, subsequently, careful supervisory follow-up to ensure that his policies are being properly implemented and followed. In other words, a failure to put in place proper information procedures or failure to monitor compliance with existing procedures is not an excuse for self-induced ignorance. Commanders who plea ignorance must show that they did not know, and that they could not reasonably have known. In other words, one must demonstrate that his ignorance is not culpable.[66] In fact, based on the customary international law, the protection of the innocent is one of the fundamental responsibilities of soldiers and more so of officers and commanders.[67]

As expressed by Park[68] "the commander's responsibility lies or should lie in affirmatively manifesting an intolerance for illegal acts under any and all circumstances; and that the dividing line between moral and legal responsibility as it relates to incitement of others to act is a fine one. This dividing line could move depending on the tactical situation of the commander and his command; the casual remarks of the commander of a maintenance unit in a conventional war would seem to have less impact than those of an infantry company commander in a counterinsurgency environment". Therefore, if discipline has been seriously deficient over a long period of time and the commander did nothing to correct the situation, this may constitute prima facie evidence of culpable ignorance. It is worth remembering that Protocol I, Article 87, paragraph 3 imposes a general duty on a commander to maintain discipline, and that includes a

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[66] Schafer, 11 and 17.

[67] Paul Christopher, The Ethics of War & Peace: An Introduction to legal and moral issues (New Jersey: Prentice Hall, 1994), 162.

[68] Parks, 79; also Green, War Crimes, 35.

duty to take action in respect of war crimes committed, or about to be committed, by his subordinates or by other persons under his control.

"Command responsibility" in Peace Support Operations

In the military, the term command is defined as "the authority vested in an individual (the commander) for the direction, co-ordination and control of military forces".[69] In Canada, the Chief of Defence Staff (CDS) exercises command over the Canadian Forces (CF). Commanders exercise command over their own forces at all levels. Command authority is further refined to include either every aspect of military operations and administration (full command) or only part of it. In the context of UN peace support operations, troop-contributing countries retain full command of their respective contingent. Each contingent is under the command of a Contingent Commander who is appointed by the CDS, in the case of Canada, as the National Commander. This Contingent Commander has operational command,[70] including administration and logistics, over the troops assigned to him by the national authorities. In turn, part of the contingent is assigned under operational control,[71] to the UN Force Commander. Operational control represents a lesser degree of authority, which does not include administrative or logistics

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[69] Canada. B-GL-300-003/FP-000. Land Force Command. (Ottawa: Queen's Printer, 1997), 4.

[70] Canadian Force, B-GG-005-004/AF-000-Canadian Forces Operations, (Ottawa: Minister of Public Works and Government Services, 1997), GL-E-6. Operational command is defined as the authority granted to a commander to assign missions or tasks to subordinate commanders, to deploy units, to reassign forces and to retain or delegate operational and/or tactical control as may be deemed necessary.

[71] Operational control is defined as the authority granted to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location; to deploy units concerned, and to retain or assign tactical control of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it, of itself, include administrative or logistic control. Operational control does not include disciplinary authority over the troops assigned.

responsibility, and no direct authority to discipline the troops. Consequently, the authority and the responsibility of each are different.

In the case of a Canadian Contingent Commander, because he has operational command of his troops, the doctrine of "command responsibility" applies fully. He has the authority and obligation to control and discipline the troops under his command. The fact that the UN Force Commander has operational control of the Canadian Contingent does not relieve or attenuate in any way the overall responsibility of the Contingent Commander, even though the Force Commander is senior in rank to the Contingent Commander. This is so because operational control is a lesser degree of authority than operational command.

The Force Commander has only tactical authority over the various contingents placed under his command. As per UN Model SOFA (paragraph 47 b), "military members … shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in host country territory." The authority to administer and discipline the troop remains at all times the prerogative of each Contingent Commander. In a case where disciplinary action seems required, the Force Commander can only discuss the issue with the Contingent Commander concerned. If the matter is of such gravity or if the situation warrants it, he must report to UN Headquarters in New York. In no circumstances, is he authorised to contact the National authorities directly.

A Force Commander will be expected "to take such measures as are within his physical power under the circumstances to prevent or stop war crimes by that subordinate commander. It is the commander's responsibility to take all measures possible to prevent the commission of war crimes by subordinates; lack of administrative control and hence formal administrative remedies

does not foreclose or preclude use of other means."[72] In reality, a tactical commander always has the authority to issue a direct order to a subordinate to prohibit or to stop a specific action. The only difference is that disciplinary action will have to be taken by someone else. In a UN peace support scenario, the Force Commander can always intervene but disciplinary action is the responsibility of each Contingent.

The reverse is also true. A Contingent Commander has the obligation to remain vigilant and informed although he may not exercise direct tactical command during operations. Simply stated the Contingent Commander, as the overall National Commander who has delegated operational control to the Force Commander, retains overall responsibility under the principle that delegation of authority does not mean delegation of responsibility. A Contingent Commander cannot delegate his overall command and control responsibility. This includes the responsibility for orders issued by his own staff. He also has the obligation to think about the legality and consequences of his orders before issuing them.[73]

Responsibility and accountability

A commander may be found responsible for the actions of his subordinates, but is he accountable as well? What is the difference? Is there a relationship between command responsibility and accountability?

According to the Task Force on Public Service Values and Ethics, "accountability can be thought of as enforcing or explaining responsibility ... Accountability involves rendering an account to someone, such as Parliament or a superior, on how and how well one's responsibilities are being met, on actions taken to correct problems and to ensure they do not

[72] Parks, 84.

[73] Green, War Crimes, 39-40. The Kafr Qassem case 1959.

recur. It also involves accepting personal consequences, such as discipline, for problem that could have been avoided had the individual acted appropriately."[74] The Task Force defines responsibility as "all office holders have responsibilities that are defined by their authority. They are responsible for carrying out their authority well, within the law and with respect for ethical values, and, should problems arise, they are responsible for correcting them and doing whatever is reasonable to ensure that they do not reoccur."[75]

Brodeur suggest that accountability is "an information process through which an accurate description of individual, collective and organisational behaviour is presented and through which justification is offered. Responsibility is an action process through which known behaviour is answered for and sanctioned either positively or negatively. This distinction implies that the attribution of responsibility is dependent on the success of the accountability process: if there is no knowledge of what happened in a given situation, it is impossible to determine who was responsible for what."[76] Therefore, accountability is a matter that has more (but not exclusively) to do with institutions and organisations while responsibility is more a matter that has to do with individual people. According to Goldstein, accountability includes more than responsibility. "It covers every aspect of administration of an agency, including its operating efficiency, its hiring and promotion practices, and its financial management. Accountability encompasses as well responsibility for the conduct of individual employees - for the use, which they make of their

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[74] Canada, Privy Council Office, A Strong Foundation. Report of the Study Team on Public Service Values and Ethics (Ottawa: Privy Council Office, 1996), 10.

[75] Public Service Values, 9.

[76] Jean-Paul Brodeur, Violence and Racial Prejudice in the Context of Peacekeeping, A study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (Ottawa: Minister of Public Works and Government Services Canada, 1997), 196.

authority and for their integrity."[77] It follows that the higher one is in a hierarchy and the more authority one has within the organisation, the more one should be accountable for his actions.

Brodeur argues that penal responsibility is a top down process whereas accountability is a bottom up process. In the CF, each commander or individual in the chain of command is accountable to the next superior for their actions and conduct as well as the well-being, performance and conduct of their subordinates. Technical accountability is achieved through observation, inspections, audits, exercises and routine reporting.[78]

A commander, whether or not he is ultimately held responsible for the actions of his subordinates, remains accountable in terms of rendering an account to his superiors, on how and how well he discharges his responsibilities and on actions taken to correct problems. It also involves accepting personal consequences, such as discipline, for problems that could have been avoided had he taken the proper steps to prevent them. "This accountability is the complement of authority, and can never be delegated."[79]

CONCLUSION

The role of a commander is a difficult one. He may delegate his authority, but he cannot delegate his responsibility. He must accomplish the mission within the Law of Armed Conflict, and exercise control over his subordinates to insure compliance. A commander may be found responsible for the actions of his subordinates over whom he has both operational and administrative control, if he had the means to control his troops and failed to do so. He is also

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[77] Brodeur, 266.

[78] Brodeur, 199 and 201.

[79] Land Force Command, 5.

liable if he knew of an offence and failed to do everything within his power to prevent or report the offence. To control his troops means that training is conducted prior and during deployment, proper procedures are instituted and instructions issued, personnel and material made available, occurrence reported, inquiries conducted and periodic inspection carried out. In other words, policies must be clearly enunciated, compliance enforced and discipline maintained. A commander must use all means available to him to know of and prevent war crimes within his command. He cannot ignore the obvious and plead ignorance to escape liability. He is also responsible if an illegal order is passed through him or his staff. He may be held responsible even if he did not give the illegal order but is shown to have encouraged or incited his troops to perpetrate the illegal act. The same is true even if he just acquiesced.

The notion of "should have known" is central to the doctrine of command responsibility. Knowledge can be either factual or presumed if he fails to exercise the means of knowledge at his disposal, such as staff visits, reports. However, there is no absolute liability by which a commander is automatically held responsible for the actions of others unless wanton negligence can be proved. This requires immoral disregard for the actions of others and the consequences amounting to acquiescence in the offence. It must be demonstrated that the commander "shared the criminal intent of his subordinates and that he encouraged their misconduct through failure to discover and intervene where he had the duty to do so."[80]

In the case of a Canadian Contingent Commander, because he has operational command including responsibility for administration, discipline, and logistics over the Canadian Contingent, his overall responsibility cannot be delegated. He has the obligation to remain vigilant and informed even when he does not exercise direct tactical control during operations.

[80] Parks, 103.

Ultimately, whether or not he is held responsible for the actions of his subordinates, he is accountable in terms of rendering an account to superiors, on how and how well he discharges his responsibilities and on actions taken to correct problems. It also involves accepting personal consequences, such as discipline, for problems that could have been avoided had he taken preventive measures.

It appears clearly that the "command responsibility" cannot be the burden of the sole commander. Troops have to be trained in the Law of Armed Conflict and know their duty. Non-commissioned officers, more than ever, must maintain and enforce discipline. Officers must know what is going on in their command at all times. This is what General Patton Jr., meant when he said that there is only one kind of discipline, perfect discipline, anything less is criminal.

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