INTERNATIONAL LAW STUDIES

Published Since 1895

U.S. Recognition of a Commander's Duty to Punish War Crimes

Brian Finucane

97 INT'L L. STUD. 995 (2021)

Volume 97 2021

Published by the Stockton Center for International Law

ISSN 2375-2831

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* I thank Ian Brasure, Eugene Fidell, Ryan Goodman, Chris Jenks, and Michael Meier for their thoughtful comments. Any errors are my own. This article is adapted from Brian Finucane, *A Commander's Duty to Punish War Crimes: Past U.S. Recognition*, JUST SECURITY (Dec. 4, 2020), https://www.justsecurity.org/72915/a-commanders-duty-to-punish-war-crimes-past-u-s-recognition/.

The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

In 2019 and again in 2020, President Trump pardoned or otherwise granted clemency to a number of men charged with or convicted of conduct constituting war crimes.[1] Trump's actions were widely condemned,[2] including by some legal scholars who argued that Trump's intervention in these cases could itself constitute a war crime under the doctrine of command responsibility.[3]

This article explores one element of the doctrine of command responsibility invoked by those alleging that President Trump's pardons could amount to war crimes: a commander's duty to punish war crimes by his sub-

1. *See* Mihir Zaveri, *Trump Pardons Ex-Army Soldier Convicted of Killing Iraqi Man,* NEW YORK TIMES (May 6, 2019), https://www.nytimes.com/2019/05/06/us/trump-pardon-michael-behenna.html; Nicholas Wu & John Fritze, *Trump Pardons Servicemembers in High Profile War Crimes Cases*, USA TODAY (Nov. 15, 2019), https://www.usatoday.com/story/news/politics/2019/11/15/donald-trump-pardons-clint-lorance-mathew-golsteyn-war-crime-cases/1229083001/; Dave Philipps, *Trump Clears Three Service Members in War Crimes Cases*, NEW YORK TIMES (Nov. 15, 2019), https://www.nytimes.com/2019/11/15/us/trump-pardons.html; Michael Safi, *Trump Pardons Blackwater Contractors Jailed for Massacre of Iraq Civilians*, GUARDIAN (Dec. 23, 2020), https://www.theguardian.com/world/2020/dec/23/trump-pardons-blackwater-contractors-jailed-for-massacre-of-iraq-civilians.

2. *See* Rachel E. VanLandingham*, Betrayer in Chief? Pardoning Troops Accused or Convicted of Murder Would Wound Military,* USA TODAY (May 21, 2019), https://www.usatoday.com/story/opinion/2019/05/21/donald-trump-military-pardons-column/3744561002/ (warning that President Trump's pardon of a convicted war criminal will have a negative effect on U.S. "military good order and discipline"); Chris Jenks, *Sticking It to Yourself: Preemptive Pardons for Battlefield Crimes Undercut Military Justice and Military Effectiveness*, JUST SECURITY (May 20, 2019), https://www.justsecurity.org/64185/sticking-it-to-yourself-preemptive-pardons-for-battlefield-crimes-undercut-military-justice-and-military-effectiveness/; Donald J. Guter et al., *The American Way of War Includes Fidelity to the Law: Preemptive Pardons Break That Code,* JUST SECURITY, (May 24, 2019) https://www.justsecurity.org/64260/the-american-way-of-war-includes-fidelity-to-law-preemptive-pardons-break-that-code/; David Lapan, *President Trump Is Damaging Our Military: War Crimes Cases Are the Latest Example*, JUST SECURITY (Nov. 18, 2019), https://www.justsecurity.org/67310/president-trump-is-damaging-our-military-war-crimes-cases-are-the-latest-example/.

3. *See* Gabor Rona, *Can a Pardon Be a War Crime?: When Pardons Themselves Violate the Laws of War*, JUST SECURITY (Dec. 24, 2020), https://www.justsecurity.org/64288/can-a-pardon-be-a-war-crime-when-pardons-themselves-violate-the-laws-of-war/; Stuart Ford, *Has President Trump Committed a War Crime by Pardoning War Criminals?,* 35 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 757 (2020).

ordinates. Specifically, this piece examines the United States' own past recognition of the duty to punish as an element of command responsibility under the law of war.

The reason for this focus is to demonstrate how deeply rooted the duty to punish is in the United States' stated understanding of command responsibility. The principle that a commander has an obligation to punish war crimes by his subordinates is not a progressive development of the law promoted by the advocacy community. Instead, the duty to punish stands out as an ancient legal norm interwoven into the domestic law of the United States and which the United States has incorporated into international legal instruments. The history reviewed in this article illustrates a through line in the professed values of the United States, from the command of the Continental Army by General George Washington, to the Nuremberg trials, to efforts at accountability for Balkan atrocities and the struggles for justice for the thousands of Americans murdered on 9/11. The lesson from this history is clear, if not always appreciated: commanders who fail to punish their subordinates for war crimes may themselves be war criminals.

This article examines the previous *recognition* by the United States of the duty to punish. It does not seek to undertake a *de novo* review of State practice and *opinio juris*. Nor does this article attempt to delineate the scope or content of the duty to punish, much less apply that duty to any specific set of facts. Finally, this article does not seek to address the many other legal issues raised by President Trump's pardons of specific individuals, including how the duty to punish may interact with other international and domestic legal obligations and authorities, including the President's pardon power under Article II of the Constitution.

II. WAR CRIMES AND COMMAND RESPONSIBILITY

War crimes are generally defined as serious violations of the law of war which entail individual criminal liability under international law.[4] Under the doctrine of command responsibility, a commander may in some circumstances

4. *See* HEADQUARTERS, DEPARTMENT OF THE ARMY, HEADQUARTERS, UNITED STATES MARINE CORPS, FM 6-27/MCTP 11-10C, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE ¶ 8-2 (2019) [hereinafter FM 6-27/MCTP 11-10C] ("For purposes of this publication, war crimes are serious violations of LOAC that are punishable by criminal sanctions.").

incur criminal liability in connection with war crimes committed by his subordinates.[5]

Command responsibility imposes both forward-looking and backward-looking obligations upon a commander to promote compliance with the law of war by his subordinates. *Ex ante*, a commander has an obligation to prevent war crimes by his subordinates. *Ex post*, a commander has an obligation to punish war crimes committed by his subordinates. A commander's failure to uphold either his duty to prevent or duty to punish may give rise to his own responsibility for war crimes.[6]

This duty to punish has been a key element of command responsibility for centuries. As early as 1439, King Charles VII of France issued an ordinance identifying the failure of a commander to discipline a subordinate as a basis for the punishment of the commander.

> The King orders each captain or lieutenant to be held responsible for the abuses, ills, and offenses committed by members of his company, and that as soon as he receives any complaint . . . he bring the offender to justice . . . . If he fails to do so or covers up the misdeed . . . *the captain shall be deemed responsible for the offense, as if he had committed it himself and shall be punished in the same way as the offender would have been.*[7]

III. U.S. RECOGNITION OF THE DUTY TO PUNISH

A. U.S. Articles of War

The duty to punish as an element of command responsibility was embedded in the American understanding of the law of war even before the United States declared its independence. The Provisional Congress of the Massachusetts Bay Colony adopted Articles of War on April 5, 1775, which provided that:

5. For an overview of command responsibility, see generally William H. Parks, *Command Responsibility for War Crimes*, 62 MILITARY LAW REVIEW 1 (1973); Illias Bantekas, *Contemporary Law of Superior Responsibility*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 573 (1999); GUENAEL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY (2009).

6. *See* Bantekas, *supra* note 5 (describing the elements of command responsibility).

7. 13 ORDONNANCES DES ROIS DE FRANCE DE LA TROISIÉME RACE 308 (1782), *quoted in* THEODOR MERON, HENRY'S LAWS AND SHAKESPEARE'S WARS 149 n.40 (1990) (emphasis added).

> Every officer, commanding in quarters or on a march, shall keep good order, and, to the utmost of his power, redress all such abuses or disorders which may be committed by any officer or soldier under his command: If upon any complaint [being] made to him, of officers or soldiers beating, or otherwise ill-treating any person, or of committing any kind of riot, to the disquieting of the inhabitants of this Continent; he the said *commander, who shall refuse or omit to see justice done on the offender or offenders*, and reparation made to the party or parties injured, as far as the offender's wages shall enable him or them, shall, upon due proof thereof, *be punished as ordered by a general court-martial, in such manner as if he himself had committed the crimes or disorders complained of* . . . .[8]

The Second Continental Congress reproduced this language in Article XII of the Articles of War, adopted on June 30, 1775[9] (a week after George Washington was commissioned as Commander in Chief), and again in Article IX of the Articles of War, adopted on September 20, 1776.[10] The 1806 Articles of War incorporated the duty to punish in Articles 32[11] and 33.[12]

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8. Massachusetts Provisional Congress, Articles of War art. XI (1775) (emphasis added).

9. Continental Congress, Articles of War art. XII (June 30, 1775), https://avalon.law.yale.edu/18th_century/contcong_06-30-75.asp.

10. Continental Congress, Articles of War § IX, art. 1 (Sept. 20, 1776), https://avalon.law.yale.edu/18th_century/contcong_09-20-76.asp.

11. Articles of War, 1806, ch. 20, § 1, 2 Stat. 359, 363 ("Every officer commanding in quarters, garrisons or on the march, shall keep good order, and, to the utmost of his power, redress all abuses or disorders which may be committed by any other or soldier under his command; if; upon compliant made to him of officers or soldiers beating or otherwise ill-treating any person, or disturbing fairs or markets, or of committing any kinds of riots, to the disquieting of the citizens of the United States, he, the said commander, who shall reuse or omit to see justice done to the offender or offenders, and reparation made to the party or parties injured, as far as part of the offenders pay shall enable him or them, shall, upon proof thereof, be cashiered, or otherwise punished, as a general court martial shall direct.").

12. *Id.* at 364 ("When any commissioned officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against person or property of any citizen of the United States, such as punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or company, to which the person or persons so accused shall belong; are hereby required; upon application duly made by, or in behalf of; the party or parties injured; to use their utmost endeavors to deliver over such accused person or persons to the civil magistrate, and likewise to be aiding and assisting to the officers of justice to bring him or them to trial. If any commanding officer or officers shall willfully neglect, or shall refuse, upon application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered.").

In addition, during the nineteenth century, the duty to punish was also sometimes inferred as an element of the "general" article of the Articles of War. In his commentary on Article 62,[13] William Winthrop cites the "failure to bring offending inferiors to punishment" as an example of conduct deemed an offence under General Orders issued in 1862 and 1890.[14]

B. *Proposed Post-World War I War Crimes Tribunal*

Although the United States had clearly acknowledged that a commander's duty to punish subordinates was an element of U.S. military law, at the end of the First World War, the United States also took the position that the duty to punish was an element of command responsibility under the international law of war. In 1919, an international "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" convened in Versailles on the margins of the Paris Peace Conference.[15] The Commission was charged, *inter alia*, with inquiring into and reporting upon "[t]he constitution and procedure of a tribunal appropriate for the trial of these offenses (crimes relating to the war)."[16]

The U.S. representatives on the body, Secretary of State Robert Lansing and international lawyer James Brown Scott, acknowledged that in certain circumstances it would be appropriate for an international criminal tribunal (as opposed to the domestic military tribunals of individual belligerents) to try defendants for war crimes under international law.

> [I]f an act violating the laws and customs of war committed by an enemy affected more than one country, a tribunal could be formed of the countries affected by uniting the national commissions or courts thereof, in which event the tribunal would be formed by the mere assemblage of the

13. Articles of War, 1874 art. 62, 18 Stat. 228 (1874) ("All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, of a regimental, garrison, or field-officers' court-martial, according to the nature and degree of the offence, and punished at the discretion of such court.").

14. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 726 (2nd ed. 1920).

15. *Commission on Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AMERICAN JOURNAL OF INTERNATIONAL LAW 95 (1920).

16. *Id.* at 117.

> members, bringing with them the law to be applied, namely, the laws and customs of war . . . .[17]

Nonetheless, the United States had a number of reservations to the Commission's specific proposal for a tribunal, which it detailed in a memorandum. Many of these objections flowed from concerns that the law to be applied by the proposed tribunal would be *ex post facto*.[18] One of these objections related to the standard for command responsibility to be applied by the proposed tribunal. One of the categories of persons to be tried before the tribunal proposed by the Commission was those exercising command responsibility.

> Against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including heads of state, who order, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war (it being understood that no such abstention should constitute a defense for the actual perpetrators).[19]

In its memorandum of reservations, the United States outlined its views of the appropriate contours of command responsibility as a mode of liability. Lansing and Scott stated that they were "unalterably opposed" to an earlier proposed formulation of command responsibility under which "persons were declared liable because they 'abstained from preventing, putting an end to, or repressing, violations of the laws or customs of war.'"[20]

In elaborating on the correct standard for command responsibility under the law of war, Lansing and Scott explained:

> To establish responsibility in such cases it is elementary that the individual sought to be punished should have knowledge of the commission of the acts of a criminal nature and that he *should have possessed the power as well as the authority* to prevent, to put an end to, or *repress them*. Neither knowledge of commission nor ability to prevent is alone sufficient. The duty or obligation to act is essential. They must exist in conjunction, and a standard of liability which does not include them all is to be rejected.[21]

17. *Id.* at 142.
18. *Id.* at 147.
19. *Id.* at 121.
20. *Id.* at 143.
21. *Id.* (emphasis added).

In other words, there was no strict liability under the doctrine of command responsibility. To the contrary, under the law of war a commander could only be held criminally responsible for failing to punish those crimes by his subordinates of which he had knowledge.

C. Post-World War II War Crimes Trials

Although the international criminal tribunal contemplated at Versailles after World War I was never realized, war crimes tribunals were established in the wake of World War II by the victorious allies acting jointly (e.g., the International Military Tribunal at Nuremberg) and by the individual victors acting alone (e.g., the U.S. Nuremberg Military Tribunal). Many of the war crimes tribunals created by the United States recognized command responsibility as a mode of liability for war crimes, though in cases such as *United States v. Tomoyuki Yamashita*[22] and the *Hostage Case*,[23] the tribunals did not articulate the elements of this mode of liability. And though the U.S. Nuremberg Military Tribunal did not specify all the elements of command responsibility in the *High Command Case*, it did reject a strict liability for commanders, echoing the views expressed by the United States at Versailles in 1919. In doing so, the tribunal explicitly contemplated the potential application of the doctrine of command responsibility to the president as commander in chief of the U.S. military.[24]

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22. Trial of Tomoyuki Yamashita, U.S. Military Commission, Oct. 8–Dec. 7, 1945, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS (1948); In re Yamashita, 327 U.S. 1 (1946).

23. United States v. Wilhelm List, et al. (The Hostage Case), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1271 (1950) ("A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area of his command. His responsibility is coextensive with his area of command. He is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprize him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense. Absence from headquarters cannot and does not relieve one from responsibility for acts committed in accordance with a policy he instituted or in which he acquiesced.")

24. United States v. von Leeb et al. (High Command Case), 11 TRIAL OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 543 (1950) ("A high commander cannot keep completely informed of the details

The tribunal in *United States v. Soemu Toyoda*,[25] perhaps mindful of the critiques of the application of command responsibility in the *Yamashita* trial, including in the dissenting opinion of Justice Murphy,[26] provided a more precise explication of the relevant legal standards.[27] The *Toyoda* tribunal took care to specify the elements of command responsibility and clearly identified the duty to punish as one of those elements.

> The Tribunal considers the essential elements of command responsibility for atrocities of any commander to be:
> 1. The offenses, commonly recognized as atrocities, were committed by troops of his command;
> 2. The ordering of such atrocities.
>
> In the absence of proof beyond a reasonable doubt of the issuance of orders, then the essential elements of command responsibility are:
> 1. As before, that atrocities were actually committed;
> 2. Notice of the commission thereof. This notice may be either:
>   a. Actual, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter; or

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of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.").

25. United States v. Soemu Toyoda, International Military Tribunal for the Far East 1948.

26. In re Yamashita, 327 U.S. at 28 (1946) (Murphy, J., dissenting) ("He was not charged with personally participating in the acts or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as a commander to control the operations of the members of his command, permitting them to commit acts of atrocity. The recorded annals of warfare and the established principle of international law afford not the slightest precedent for such a charge.").

27. Hays Parks has suggested the more carefully-worded judgment of the *Toyoda* tribunal, in contrast with the tribunal in *Yamashita*, was a result of General MacArthur's intentional inclusion of a law member on the body. *See* Parks, *supra* note 5, at 70 n.230 (1973).

b. Constructive. That is, the commission of such a great number of offenses within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offense or of the existence of an understood and acknowledged routine for their commission.

3. Power of command. That is, the accused must be proved to have had actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders.
4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violations of the laws of war.
5. *Failure to punish offenders*.[28]

The tribunal summarized the commander's duty to punish under the heading of "Failure to punish offenders":

> [Toyoda's] duty as commander included his duty to control his troops, to take necessary steps to prevent the commission by them of atrocities, and to punish offenders. . . . If he knew, or should have known . . . of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and *punish the offenders, he was derelict in his duties*.[29]

For the purposes of international criminal law generally, and U.S. views of the law in particular, *Toyoda* provides the earliest clear articulation of the elements of command responsibility, including the duty to punish.

D. U.S. Army Field Manual and the Necessary and Reasonable Standard

Following World War II, the commander's duty to punish war crimes by his subordinates was incorporated into the 1956 U.S. Army Field Manual, FM 27-10:

> In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against

28. United States v. Soemu Toyoda, Official Transcript of Record of Trial 5006, International Military Tribunal for the Far East 1948 (emphasis added).
29. *Id.* (emphasis added).

> prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to *punish violators thereof*.[30]

The version of the duty incorporated into FM 27-10 appears to have been the first to adopt language requiring "necessary and reasonable" steps to punish subordinates responsible for war crimes. This necessary and reasonable formulation would be replicated in a number of subsequent codifications of command responsibility in both international and U.S. domestic legal instruments.[31]

E. Codifications of the Duty to Punish and U.S. Views

1. Additional Protocol I

Although the annex to the Fourth Hague Convention of 1907 incorporated the principle of command responsibility at a high-level of generality,[32] Additional Protocol I included the first treaty-based codification of command responsibility as a specific mode of criminal liability and identified the failure of a commander to punish as a potential basis for criminal responsibility.

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30. HEADQUARTERS, DEPARTMENT OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE ¶ 501 (1956) (emphasis added).

31. *See, e.g.*, FM 6-27/MCTP 11-10C, *supra* note 4, ¶ 8-31 ("Under international law, criminal responsibility may also fall on commanders or certain civilian superiors with similar authorities and responsibilities as military commanders if they had actual knowledge or constructive knowledge of their subordinates' actions and failed to take 'necessary and reasonable' measures to prevent or repress those violations.").

32. Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land arts. 1, 43, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539, U.S.T.S. 539 (providing that an armed force must be "commanded by a person responsible for his subordinates" and that the commander of a force occupying enemy territory "shall take all the measures in his power to restore, and ensure as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country").

> 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[33]

Although the United States is not a party to the treaty, a review of Additional Protocol I by the Joint Chiefs of Staff concluded that "[t]he obligations created by Articles 86 and 87 are well within the precedents for war crimes liability established by American tribunals after World War II."[34]

2. The International Criminal Tribunal for the former Yugoslavia

The atrocities that characterized the wars in the former Yugoslavia provided cause for the United States to reiterate, across two presidential administrations, that military commanders as well as civilian superiors were obligated under international law to punish subordinates who committed war crimes. In the waning days of the tenure of President George H. W. Bush, Secretary of State Lawrence Eagleburger was goaded by author and Holocaust survivor Elie Wiesel to publicly "name and shame" suspected Balkan war criminals.[35] In a December 1992 speech in Geneva, Eagleburger identified a number of atrocities—the sniping of civilians, massacres, ethnic cleansing, and the torture of detainees— that had been committed in the wars in the former Yugoslavia and named specific perpetrators who should face trial for these crimes.[36] Eagleburger repeatedly referred in his remarks to the responsibilities of both the political leaders and military commanders leading the forces

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33. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 86, June 8, 1977, 1125 U.N.T.S. 3.

34. John W. Vessey Jr., Chairman, Joint Chiefs of Staff, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949 app. (May 3, 1985).

35. Lawrence Eagleburger, Statement at the International Conference on the Former Yugoslavia, Geneva, Switzerland, *The Need to Respond to War Crimes in the Former Yugoslavia* (Dec. 16, 1992), *reprinted in* 3 DEPARTMENT OF STATE DISPATCH 923, 924 (1992).

36. *Id.* at 923.

that committed these crimes. In concluding his speech, Eagleburger observed that,

> Finally, there is another category of fact which is beyond dispute—namely, the fact of political and command responsibility for the crimes against humanity which I have described. Leaders such Slobadan Milosevic, the President of Serbia, Radovan Karadzic, the self-declared President of the Serbian Bosnian Republic, and General Rathko Mladic, commander of Bosnian Serb military forces, must eventually explain whether and how they sought to ensure, as they must under international law, that their forces complied with international law. They ought, if charged, to have the opportunity of defending themselves by demonstrating whether and how they took responsible action to prevent and *punish the atrocities* I have described which were undertaken by their subordinates.[37]

Although Secretary Eagleburger took care not to squarely conclude (prior to trial) that the named leaders had committed war crimes, he nonetheless endorsed the principle that under international law such civilian superiors and military commanders had an obligation to punish subordinates who committed war crimes.

The subsequent creation by the U.N. Security Council of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—as well as the practice of those courts—were the most significant developments in international criminal law since the post-World War II war crimes trials. The United States played a key role in the establishment of both tribunals and in the drafting of their respective statutes. Contemporaneous statements and positions taken by the United States related to the ICTY echoed Secretary Eagleburger and made clear that the United States regarded the duty to punish as well established under customary international law at the time.

The ICTY was established by Security Council Resolution 827 of May 23, 1993, in which the Security Council decided that the tribunal would have jurisdiction over "serious violations of international humanitarian law committed on the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council."[38] The adoption by the Security Council of an earlier-in-time effective date for the ICTY is notable. In order to avoid the *ex post facto* application of criminal law, the Council implicitly recognized

37. *Id.* at 924 (emphasis added).
38. S.C. Res. 827, ¶ 2 (May 25, 1993).

that the substantive law to be applied by the ICTY already existed in treaty or customary international law. In other words, with respect to the law to be applied by the tribunal, the statute of the ICTY was merely declaratory of existing law.

The United States later explicitly affirmed, in a 1995 amicus brief submitted to the ICTY, that it understood the law applied by the court to be pre-existing international law.[39] The United States explained that in creating the ICTY, "the Council has not attempted to create new humanitarian law or to interfere with the way in which law is developed. The law to be applied by the Tribunal is established by convention and customary law, and affirmed by the General Assembly."[40]

The fact that the substantive law of the ICTY was pre-existing conventional and customary law and understood to be so by the United States is particularly significant with respect to command responsibility.

Article 7(3) of the Statute of the ICTY provides for command responsibility as a mode of responsibility for war crimes, crimes against humanity, and genocide, offenses rooted both in treaty and customary international law.[41] As recognized in the Statute, a commander may incur criminal responsibility for failing to punish his subordinates for war crimes. In language reminiscent of the Army Field Manual's necessary and reasonable formulation, Article 7(3) specifies that:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to *punish the perpetrators thereof*.[42]

Following the Security Council vote establishing the ICTY in 1993, U.S. ambassador to the United Nations Madeline Albright explained U.S. support

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39. Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of the Prosecutor of the Tribunal v. Dusan Tadić, Case No. IT-94-1-T (July 17, 1995).

40. *Id.* at 25.

41. Statute of the International Criminal Tribunal for the former Yugoslavia art. 7(3), S.C. Res. 827 (May 25, 1993), adopting The Secretary-General Report Pursuant to Paragraph 2 of Security Council Resolution 808.

42. *Id.* (emphasis added).

for the tribunal and drew attention to a few legal aspects of the ICTY's statute. She specifically clarified that it was the understanding of the United States that "individual liability arises in . . . the failure of a superior—whether political or military—to take reasonable steps to prevent or punish such crimes by persons under his or her authority."[43] Albright's speech is notable in that she not only recognized that international law imposed a duty to punish upon military commanders, but also that such duty existed for civilian superiors as well.

Subsequent statements by the United States reemphasized its understanding that with respect to the duty to punish, the ICTY Statute merely restated existing law. In November 1993, Secretary of State Warren Christopher wrote in the *Boston Globe* that "[i]n establishing the tribunal, the Security Council has reaffirmed a fundamental principle that binds civilized societies: Those who carry out atrocities must be held accountable for their actions. So must those who have failed their legal duty to prevent and punish war crimes."[44]

In a 1994 speech about the Holocaust and the newly established war crimes tribunal the following year, Ambassador Albright expounded further on the well-established nature of the duty to punish.

> One advantage we have now is Nuremberg itself. Many of the legal arguments put forward by defendants at Nuremberg were disposed of in the judgments there. Today, there should be no question that political and military leaders may be held criminally accountable if they do not stop atrocities by their followers or *do not punish those responsible*.[45]

Again, Albright reiterated that the duty to punish extended to non-military superiors.

Thus, as far as the United States was concerned, by 1994 there was "no question" that under international law a commander had a duty to punish war crimes committed by his subordinates and could be held criminally liable for failing to do so. Moreover, as emphasized by both Secretary Eagleburger

43. U.N. SCOR, 47th Sess., 3217th plen. mtg. at 16, U.N. Doc. S/PV.3217 (May 25, 1993).

44. Warren Christopher, Opinion, *War Crimes Tribunal Will Bring Justice to Those Denied Peace*, BOSTON SUNDAY GLOBE, Nov. 7, 1993.

45. Madeline K. Albright, U.S. Permanent Representative to the United Nations, Address at the U.S. Holocaust Memorial Museum: Bosnia in Light of the Holocaust: War Crimes Tribunals (Apr. 12, 1994) (emphasis added).

and Ambassador Albright, this duty under international law applied to both military commanders and non-military superiors.

3. The Rome Statute

The United States is famously not a party to the Rome Statute of the International Criminal Court (ICC) and strongly objects to the ICC asserting jurisdiction over the nationals of non-State parties, including U.S. nationals. Nonetheless, the United States played a key role in the drafting of what would become Article 28 of the Rome Statute which provides for command responsibility.

In a departure from earlier articulations of command responsibility, including those the United States had recognized as reflecting customary international law (such as Article 7(3) of the Statute of the ICTY), the United States proposed a bifurcated standard for command responsibility for the Rome Statute.

> (a) A commander is criminally responsible for crimes under this Statute committed by forces under his or her command and effective control as a result of the commander's failure to exercise properly this control where:
> > (i) The commander either knew or, owing to the circumstances at the time, should have known, that the forces were committing or intending to commit such crimes; and
> > (ii) The commander failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission [or punish the perpetrators thereof];
>
> (b) A civilian superior is criminally responsible for crimes under this Statute committed by subordinates under his or her authority where:
> > (i) The superior knew that the subordinates were committing or intending to commit a crime or crimes under this Statute;
> > (ii) The crimes concerned activities that were within the official responsibility of the superior;
> > (iii) The superior had the ability to prevent or repress the crime or crimes; and
> > (iv) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission.[46]

46. Proposal Submitted by the United States of America for Article 25, U.N. Doc. A/CONF. 183/C.1/L.2. (June 16, 1998).

Under the U.S. proposal, military commanders would be held to a lower mens rea standard (i.e., knew or should have known) than civilian superiors (i.e., knew).[47] However, under both the military and civilian standards proposed by the United States, a superior has not only an *ex ante* duty to prevent, but also an *ex post* duty to "take all necessary and reasonable measures within his or her power" to repress atrocity crimes and punish the perpetrators thereof.

The bifurcated proposal was the basis for what would ultimately become Article 28 of the Rome Statute. Article 28 provides, in pertinent part, that a military commander or civilian superior may bear criminal responsibility if he or she "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."[48]

The United States does not appear to have contemporaneously indicated in public whether it viewed the formulation of command responsibility ultimately incorporated in the Rome Statute as reflecting customary international law. Nonetheless, one U.S. official involved in the negotiations over the Rome Statute did later note that the United States found the treaty's formulations to be "acceptable."[49]

4. Iraqi Special Tribunal

The duty to punish also featured in the war crimes tribunal the United States helped create in Iraq. Following the 2003 invasion, the U.S.-led occupation authority governing Iraq, the Coalition Provisional Authority, initiated the

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47. *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 2 Official Records Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, at 136, U.N. Doc. A/CONF.183/13 (Vol. II) (2002) (The U.S. delegate explained that "[t]he main difference between civilian supervisors and military commanders lay in the nature and scope of their authority. The latter's authority rested on the military discipline system, which had a penal dimension, whereas there was no comparable punishment system for civilians in most countries.").

48. Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 90.

49. William Lietzau, *International Criminal Law after Rome: Concerns from a U.S. Military Perspective*, 64 LAW AND CONTEMPORARY PROBLEMS 119, 124 (2001) (former Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff and member of the U.S. delegation to the ICC negotiations stating that "a number of provisions regarding general principles of criminal law were acceptably negotiated, including an appropriate definition of command responsibility").

creation of an Iraqi Special Tribunal to try Iraqis for genocide, crimes against humanity, war crimes, and certain violations of Iraqi criminal law.[50] Article 15(e) of the Statute of the Iraqi Special Tribunal provided for command responsibility and included a duty to punish, albeit in somewhat different and broader language than that used in the FM 27-10 formulation.

> The fact that any of the acts referred to in Articles 11 to 14 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts *or to submit the matter to the competent authorities for investigation and prosecution*.[51]

Framed in language reminiscent of Article 28 of the Rome Statute, Article 15(e) is further evidence that the United States recognized the duty to punish under customary international law.

5. Incorporation of the Duty to Punish into U.S. Domestic Law

Although neither Title 18 of the U.S. Code,[52] nor the Uniform Code of Military Justice[53] provide for command responsibility as a distinct mode of criminal liability, the international law standard for command responsibility has been incorporated into two different provisions of U.S. federal law: the Torture Victim Protection Act of 1991 (TVPA) and the Military Commissions Act (MCA). Both statues adopt a standard for command responsibility from international law that includes the duty to punish.

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50. Coalition Provisional Authority Order No. 48, Delegation of Authority Regarding an Iraqi Special Tribunal (Dec. 10, 2003), https://govinfo.library.unt.edu/cpa-iraq/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf.

51. Statute of the Iraqi Special Tribunal art. 15(d), Dec. 10, 2003, *reprinted in* 43 INTERNATIONAL LEGAL MATERIALS 231 (2004) (emphasis added).

52. *See* Beth Van Schaack, *Title 18's Blind Spot: Superior Responsibility*, JUST SECURITY (June 3, 2014), https://www.justsecurity.org/11066/title-18s-blindspot-superior-responsibility/.

53. *See* Geoffrey Corn & Rachel Van Landingham, *Strengthening American War Crimes Accountability*, 70 AMERICAN UNIVERSITY LAW REVIEW 309, 359 (2020) (noting the absence of an explicit command responsibility provision in the Uniform Code of Military Justice (UCMJ) and calling for the UCMJ to be revised to include this mode of criminal liability); Victor Hansen, *What's Good for the Goose Is Good for the Gander—Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 GONZAGA LAW REVIEW 335, 343–44 (2006) (analyzing the failure of the UCMJ to explicitly provide command responsibility liability).

i. Torture Victim Protection Act

The TVPA was enacted to "carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing."[54] Although not mentioned explicitly in the text, the legislative history indicates that *civil* liability under the TVPA was intended to apply under the standard for command responsibility under international criminal law, including the duty to punish.[55]

The two federal circuit courts of appeal to address the issue have held that pursuant to the international law standard to be applied under the TVPA, a superior commander may be liable for civil damages due to a failure to punish subordinates who commit atrocities. In *Ford v. Garcia*, the Eleventh Circuit held:

> The essential elements of liability under the command responsibility doctrine are: (1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes. Although the TVPA does not explicitly provide for liability of commanders for human rights violations of their troops, legislative history makes clear that Congress intended to adopt the doctrine of command responsibility from international law as part of the Act. Specifically identified in the Senate report is *In re Yamashita* . . . a World War II era case involving the command responsibility doctrine in habeas review of the conviction of a Japanese commander in the Philippines by an American military tribunal. *See* S. Rep. No. 102–249, at 9 (1991). Describing *Yamashita's* holding, the Senate Report stated that the Supreme Court found a foreign general "responsible for a pervasive pattern of war

54. Torture Victim Protection Act of 1991, Public Law 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

55. S. REP. NO. 102-249, at 9 (1991) ("Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts—anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.").

> crimes (1) committed by his officers when (2) he knew or should have known they were going on but (3) failed to prevent or punish them."[56]

Notably, the Department of State later excerpted *Ford*'s analysis of command responsibility (again including the duty to punish) in its annual digest of U.S. practice in international law.[57]

In *Chavez v. Carranza*, the Sixth Circuit adopted the same command responsibility standard articulated by the Eleventh Circuit in *Ford*, including the duty to punish.[58]

ii. Military Commissions

In the aftermath of the 9/11 attacks, President Bush ordered the creation of military commissions to try suspected terrorist for "violations of the laws of war and other applicable laws by military tribunals."[59] The Department of Defense subsequently set forth the crimes triable by military commission in Military Commission Instruction No. 2. The instruction explained that the offenses were declaratory of existing international law.

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56. Ford v. Garcia, 289 F.3d 1283, 1288–89 (11th Cir. 2002); *see also* Doe v. Drummond Co., Inc., 782 F.3d 576, 609 (11th Cir. 2015) (quoting *Ford*, 289 F.3d at 1288); Penaloza v. Drummond Company, Inc*.,* 384 F. Supp. 3d 1328, 1344 (N.D. Ala 2019) ("Three indispensable elements are required to support a claim for liability under the command responsibility doctrine: (1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes.").

57. 2002 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW ch. 6, at 348–49.

58. Chavez v. Carranza, 559 F.3d 486, 499 (6th Cir. 2009) ("Three elements must be established for command responsibility to apply: (1) a superior-subordinate relationship between the defendant/military commander and the person or persons who committed human rights abuses; (2) the defendant/military commander knew, or should have known, in light of the circumstances at the time, that subordinates had committed, were committing, or were about to commit human rights abuses; and (3) the defendant/military commander failed to take all necessary and reasonable measures to prevent human rights abuses and punish human rights abusers.").

59. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

> No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that body of law are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.[60]

The instruction specified "command/superior responsibility" as a mode of liability and explicitly identified the duty to punish in language reminiscent of the ICTY Statute.

> Command/Superior Responsibility – Perpetrating
>
> a. *Elements.*
> (1) The accused had command and control, or effective authority and control, over one or more subordinates;
> (2) One or more of the accused's subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;
> (3) The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding or abetting such offense or offenses; and
> (4) The accused failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the offense or offenses.[61]

Thus, Military Commission Instruction No. 2 further reinforces the point that the United States viewed the duty to punish as an element of command responsibility under the pre-existing (customary) law of war in 2003.

Following the Supreme Court's decision in *Hamdan v. Rumsfeld*,[62] which held that the initial incarnation of the military commissions was unlawful, Congress enacted the 2006 Military Commissions Act (2006 MCA).[63] The 2006 MCA states: "This chapter establishes procedures governing the use of

60. U.S. Department of Defense, Military Commission Instruction No. 2, ¶ 3(A) (Apr. 30, 2003).
61. *Id.* ¶ 6(C)(3)(a).
62. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
63. P.L. 109-366, 120 Stat. 2600.

military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission."[64] Echoing the earlier Military Commission Instruction No. 2, the 2006 MCA specified that "the provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission."[65]

Once again, the pre-existing law declared by the 2006 MCA included a duty to punish as an element of command responsibility, in substantially the same language as the earlier Military Commission Instruction No. 2.

> Any person is punishable as a principal under this chapter who—
> (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission;
> (2) causes an act to be done which if directly performed by him would be punishable by this chapter; or
> (3) is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to *punish the perpetrators thereof.*[66]

The 2009 Military Commissions Act also included substantially the same standard for command responsibility as its predecessor, including the duty to punish.[67] The 2009 MCA, signed into law by President Obama, again purported to codify existing law, incorporating "offenses that have traditionally been triable under the law of war or otherwise triable by military commission." Senator Lindsey Graham (at the time a reserve judge advocate in the U.S. Air Force) emphasized this point on the floor of the Senate. "Congress

64. *Id.* § 948b.
65. *Id.* § 950p.
66. *Id.* § 950q (emphasis added).
67. Pub. L. No. 111-84 §§ 1801-07 (2009) (codified at 10 U.S.C. § 950q(3) ("a superior commander who, with regard to [war crimes], knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, is a principal").

has codified offenses which have traditionally been tried by military commissions under customary international law,"[68] he stated.

IV. CONTRARY EVIDENCE

There does not appear to be any indication that the United States has ever specifically rejected or called into question the duty to punish as an element of command responsibility. Moreover, all formulations of the standard for command responsibility endorsed by the United States over the last fifty years as reflecting customary international law have incorporated some version of a duty to punish.

That said, the United States has not always been precise in articulating the standard for command responsibility. This imprecision is especially true with respect to many of the post-World War II war crimes cases (e.g., *Yamashita*, the *High Command Case*, and the *Hostage Case*) which did not clearly define the standard for command responsibility being applied. Likewise, some commentaries on the law of war by the Department of Defense have failed to identify the specific elements of command responsibility.[69]

V. CONCLUSION

The weight of evidence establishes that all three branches of the U.S. government have recognized that under customary international law, a commander has a duty to punish subordinates who commit war crimes and that the failure to fulfill this duty may itself constitute a war crime. Although the formulation and applicability of this duty have evolved since Americans first

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68. 111 CONG. REC. S10663 (daily ed. Oct. 22, 2009) (statement of Sen. Lindsay Graham).

69. *See, e.g.,* OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL 1140–41 (rev. ed. Dec. 2016) (identifying command responsibility as a mode of liability and citing to the ICTY and ICTR statutes, as well as the *High Command Case*, but not specifically identifying or endorsing a standard for command responsibility); *but see* FM 6-27/MCTP 11-10C, *supra* note 4, ¶ 8-6 ("Under international law, criminal responsibility may also fall on commanders or certain civilian superiors with similar authorities and responsibilities as military commanders if they had actual knowledge or constructive knowledge of their subordinates' actions and failed to take 'necessary and reasonable' measures to prevent or repress those violations. That is, commanders may be held responsible if they knew or should have known, through reports received by them or by other means, that troops or other persons subject to their control were about to commit or have committed a war crime and did nothing to prevent such crimes or punish the violators.").

acknowledged it in the colonial period, a few salient points are worth emphasizing regarding U.S. views on the duty to punish.

First, the duty to punish is a duty imposed on individuals by international law, specifically the law of war, not merely domestic law. The individual duty is in addition to whatever obligations a State may have under international law to extradite or punish war criminals. Second, at least since the 1990s, the United States has understood this duty to punish to apply to civilian superiors as well as military commanders. Third, as explained by the U.S. representatives in Versailles in 1919, the duty to punish is not one of strict liability. A commander or superior must have knowledge, either actual or constructive, of the crimes of his subordinates for the duty to be triggered.

Discussions of, and efforts to promote, accountability for atrocity crimes, both domestically and abroad, should be informed by the United States' own long-standing view that a commander's failure to take necessary and reasonable measures within his or her power to punish war crimes by his subordinates may itself amount to a war crime.