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# EXAMINING THE ROLE OF LAW OF WAR TRAINING IN INTERNATIONAL CRIMINAL ACCOUNTABILITY

Laurie R. Blank\*

## I. INTRODUCTION

*The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to their armed forces and to the entire population.*<sup>1</sup>

As this opening quote from the Geneva Conventions affirms, the drafters of the Geneva Conventions, as well as those negotiating earlier law of war treaties, understood the essential role that training in the basic rules and principles of international law during armed conflict plays in ensuring lawful military operations and the protection of those who are vulnerable during wartime. This irreplaceable role for training has often failed to garner its due attention, however, in the course of the critical emphasis on accountability for international crimes over the past twenty-plus years. In effect, neither training nor accountability is sufficient on its own to fulfill the core purposes of protecting civilians and mitigating the suffering and effects of armed conflict. In tandem, however, these two ends of the spectrum of law compliance can form a formidable partnership, reinforcing that commanders, soldiers, political leaders and others must take positive and regular steps to create an environment that demands adherence to the law, creates the conditions for such adherence, and holds accountable those who violate the law.

The challenges of contemporary conflicts and abuses committed by military personnel and members of non-state armed groups in violent conflicts around the world emphasize again and again the central importance of the implementation of

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<sup>1</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 47, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 48, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 127, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 144, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

the law of armed conflict (LOAC) for the protection of combatants, prisoners, medical personnel and civilians, as well as cultural and religious landmarks and hospitals. The law of armed conflict (LOAC)—otherwise known as the law of war or international humanitarian law—governs the conduct of both states and individuals during armed conflict and seeks to minimize suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare.<sup>2</sup> LOAC applies during all situations of armed conflict, whether between two or more states, between a state and a non-state group, or between two or more non-state groups.<sup>3</sup> For international armed conflict, common Article 2 of the Geneva Conventions of August 1949 states that the Conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”<sup>4</sup> For non-international armed conflict, common Article 3 of the Geneva Conventions of August 1949 sets forth minimum provisions applicable “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>5</sup> International armed conflicts are governed by the full panoply of LOAC, including the four Geneva Conventions, Additional Protocol I where applicable, and customary international law. In contrast, non-international armed conflicts are subject to the more limited legal regime of Common Article 3, Additional Protocol II where applicable, and the steadily growing customary international law

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<sup>2</sup> See *What is International Humanitarian Law?*, INT’L COMMITTEE RED CROSS (Dec. 31, 2014), [https://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf) [<https://perma.cc/G8BA-YNE9>]. The law of armed conflict is codified primarily in the four Geneva Conventions of August 14, 1949 and their Additional Protocols. See sources cited *supra* note 1; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

<sup>3</sup> OSCAR M. UHLER ET AL., INT’L COMMITTEE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 26 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) [hereinafter GC IV COMMENTARY] (“Born on the battlefield, the Red Cross called into being the first Geneva Convention to protect wounded and sick military personnel. Extending its solicitude little by little to other categories of war victims, in logical application of its fundamental principle, it pointed the way, first to the revision of the original Convention, and then to the extension of legal protection in turn to prisoners of war and civilians. The same logical process could not fail to lead to the idea of applying the principle to *all* cases of armed conflict, including internal ones.”).

<sup>4</sup> Geneva Convention I, *supra* note 1, art. 2; Geneva Convention II, *supra* note 1, art. 2; Geneva Convention III, *supra* note 1, art. 2; Geneva Convention IV, *supra* note 1, art. 2.

<sup>5</sup> Geneva Convention I, *supra* note 1, art. 1; Geneva Convention II, *supra* note 1, art. 3; Geneva Convention III, *supra* note 1, art. 1; Geneva Convention IV, *supra* note 1, art. 3.

applicable in non-international armed conflict, including the principles of military necessity, humanity, distinction, and proportionality.<sup>6</sup>

Dissemination and training in LOAC is the direct connection between the principles and obligations of the law and the action of military personnel and fighters during all types of armed conflict. Calls for dissemination of rules for the conduct of war date back at least as far as the ancient Romans, who “announced their laws so that no soldier could plead ignorance.”<sup>7</sup> In the late nineteenth century, during the first wave of law of war treaty codifications and negotiations, the preface to the Oxford Manual of 1880 offered an emphatic reminder of why law of war training is so important:

It is not sufficient for sovereigns to promulgate new laws. It is essential, too, that they make these laws known among all people, so that when a war is declared, the men called upon to take up arms to defend the causes of the belligerent States, may be thoroughly impregnated with the special rights and duties attached to the execution of such a command.<sup>8</sup>

Disseminating the law of war and training soldiers to fight in accordance with the law is thus central to the effective implementation of LOAC.

Since the Hague Convention in 1899, the law has required soldiers to be trained in LOAC. Article I of the 1899 Hague Convention II with Respect to the Laws and Customs of War on Land mandated that all “High Contracting Parties shall issue instructions to their armed forces which shall be in conformity with the ‘Regulations respecting the laws and customs of war on land,’ annexed to the present Convention.”<sup>9</sup> The modern law of war affirms and reemphasizes the role of training and dissemination as a key tool for any law-compliant military. The Geneva Conventions mandate that all state parties disseminate information about LOAC and provide training to their military personnel to ensure that they

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<sup>6</sup> Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 100–27 (Int’l Crim. Trib. for the former Yugoslavia, Oct. 2, 1995) (highlighting the development and applicability of necessity, distinction, humanity, and proportionality to internal armed conflict); *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 6 rev. ¶¶ 176–77 (1997).

<sup>7</sup> William R. Hagan, *The Yet-Unpaid Debt of King Gustavus Adolphus: The Development of Military Law in Europe During the Cinquecento*, [http://www.pegc.us/\\_LAW/\\_Hagan\\_Military\\_Law.pdf](http://www.pegc.us/_LAW/_Hagan_Military_Law.pdf) [https://perma.cc/N95G-X3V9] (citing MATTHEW SUTCLIFFE, *THE PRACTICE PROCEEDINGS, AND LAWS OF ARMES* 303 (1593)).

<sup>8</sup> INSTITUTE OF INTERNATIONAL LAW, *OXFORD MANUAL ON THE LAWS OF WAR ON LAND* (1880), in *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 37 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988).

<sup>9</sup> Convention with Respect to the Laws and Customs of War on Land and Its Annex: Regulation Concerning the Laws and Customs of War on Land, art. 1, July 29, 1899, 32 Stat. 1803 (entered into force Sept. 4, 1900) [hereinafter Hague II].

understand and are equipped to adhere to their obligations. As the quotation at the start of this article notes, states are explicitly required to “include the study [of the law] in their programmes of military . . . instruction, so that the principles may thereof become known to all their armed forces.”<sup>10</sup> In essence, if a military “want[s] [its] troops to ‘Fight it Right,’ then [they] must teach them what is right.”<sup>11</sup> All countries need to ensure that their military personnel receive training in LOAC, not only to fulfill their obligations under the Geneva Conventions to provide such training, but also to prepare their militaries to apply these rules when deployed. In many ways, LOAC “developed as a restraining and humanizing necessity to facilitate commanders’ ability to accomplish the military mission even in the midst of fear, moral ambiguity, and horrific scenes of violence.”<sup>12</sup>

Training is, of course, prospective in nature; it is about taking measures in advance of military operations to maximize adherence to the law and minimize violations. At the other end of the spectrum lies accountability — efforts after the fact to identify, prosecute and punish those responsible for international crimes. As in other legal regimes, enforcement and accountability for violations of LOAC are key to effective implementation of and adherence to the law. LOAC thus provides for individual criminal responsibility for violations; indeed, it was one of the first branches of international law to do so. Military justice and disciplinary measures date back at least as far as the Roman Empire and, in more modern times, to King Gustavus Adolphus of Sweden, whose codification of military justice rules “formed a philosophical and structural basis for many of the military codes that followed.”<sup>13</sup>

Modern LOAC mandates that states take action to prevent and punish serious violations of LOAC. Based on the principle of *aut dedere aut judicare*, the four Geneva Conventions require that states 1) provide effective penal sanctions for persons committing or ordering to be committed grave breaches of the Geneva Conventions; 2) search for and prosecute or extradite persons alleged to have committed or ordered the commission of such crimes; and 3) suppress all other violations of the Geneva Conventions. At the same time, it is a well-established rule of customary international law that a person can only be convicted of an offense on the basis of individual criminal responsibility. The Fourth Geneva Convention provides that “no protected person may be punished for an offence he or she has not personally committed.”<sup>14</sup> Additional Protocols I and II also reaffirm

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<sup>10</sup> Geneva Convention I, *supra* note 1, art. 47; Geneva Convention II, *supra* note 1, art. 48; Geneva Convention III, *supra* note 1, art. 127; Geneva Convention IV, *supra* note 1, art. 144.

<sup>11</sup> Charles H. B. Garraway, *Training: The Whys and Wherefores*, 69 SOC. RES. 949, 949–62 (2002).

<sup>12</sup> Michael A. Newton, *Modern Military Necessity: The Role & Relevance of Military Lawyers*, ROGER WILLIAMS U. L. REV. 877, 880–81 (2007).

<sup>13</sup> LAWRENCE J. MORRIS, *MILITARY JUSTICE: A GUIDE TO THE ISSUES* 2 (2010).

<sup>14</sup> Geneva Convention IV, *supra* note 1, art. 33.

this rule,<sup>15</sup> as do the military manuals of numerous countries.<sup>16</sup> Individual criminal responsibility can rest on direct perpetration of a crime or on command or superior responsibility stemming from the accused's role as the superior in a command relationship.

Beginning with Nuremberg and then with the international tribunals for the former Yugoslavia and Rwanda in the mid-1990s, the twentieth century brought a focus on international criminal responsibility for atrocities, to fill the gap left by inadequate or nonexistent national prosecutions in too many conflict situations. In the past few decades, there has been an extraordinary development in international criminal jurisprudence and options for holding perpetrators accountable for atrocities — tribunals for Yugoslavia, Rwanda, Sierra Leone, East Timor, Cambodia, and the International Criminal Court. At the most basic level, prosecution of LOAC violations accomplishes the same retributive and deterrent effect as prosecution for ordinary domestic crimes: the perpetrator is punished and, in most cases, removed from society through incarceration, thus unable to repeat his or her crimes. In the area of armed conflict and mass atrocities, accountability also serves several broader thematic purposes:

The regular prosecution of war crimes would have an important preventive effect, deterring violations and making it clear even to those who think in categories of national law that [LOAC] is law. It would also have a stigmatizing effect, and would individualize guilt and repression, thus avoiding the vicious cycle of collective responsibility and of responsibility and punishment at the level of the individual. It shows that the abominable crimes of the twentieth century were not committed by nations but by individuals. By contrast, as long as the responsibility was attributed to States and nations, each violation carried within it the seed of the next war. That is the civilizing and peace-seeking mission of international criminal law favouring the implementation of [LOAC].<sup>17</sup>

International criminal responsibility thus forms a critical endpoint to a continuum of efforts to regulate the conduct of war and provide protection for both civilians and combatants or fighters during armed conflict: training and dissemination, implementation, and enforcement.

This article explores the intersection between training and enforcement in the context of international criminal prosecutions. Neither training nor prosecution alone can fulfill the crucial need to maximize compliance with the law. Criminal

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<sup>15</sup> Additional Protocol I, *supra* note 2, art. 75(4); Additional Protocol II, *supra* note 2, art. 6(2)(b).

<sup>16</sup> See 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMMITTEE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, r. 102, at 373 (2005) [hereinafter CIHL].

<sup>17</sup> 1 MARCO SASSÒLI ET AL., INT'L COMMITTEE RED CROSS, HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW, Ch. 13, at 44 (3d ed. 2011).

prosecution, whether at the national or international level, plays a critical deterrent role, but will not be sufficient on its own to ensure protection of civilians. Training and other mechanisms for dissemination and education are key tools to ensure compliance with the law before and during armed conflict, to help prevent crimes from being committed in the first place. In the end, coordinated and concerted efforts across the spectrum of LOAC implementation — from training to accountability — are essential to promote LOAC's key objectives: protect civilians, minimize unnecessary suffering, and enable effective military operations.

At a much more specific level, however, training and accountability intersect directly in the context of criminal prosecutions where LOAC training — the fact of training, the lack of training, or the quality of training — plays a role in the prosecution of, or sentencing for, crimes before an international tribunal. Similarly, LOAC training has also proven to be relevant in assessing a state's responsibility for violations of LOAC. Although rarely the determinative factor in assessing responsibility, LOAC training factors into the accountability and responsibility paradigms in several different ways. Understanding how and why LOAC training matters in the accountability context is thus one more useful consideration in emphasizing the importance and purpose of training. This article analyzes several different ways in which LOAC training contributes to the resolution of a defendant's responsibility or sentence. Part I addresses command responsibility and the manner in which LOAC training is a key component of each element of command responsibility: effective control, knowledge, and measures to prevent or punish. Part II examines the role LOAC training or the lack thereof plays in sentencing, whether as a mitigating factor or an aggravating factor. Finally, although the focus of this analysis is on LOAC training in the context of international criminal prosecutions — that is, individual accountability — the final section briefly explores issues that arise with respect to the responsibility of the state. These issues do not emerge in individual criminal cases but bear directly on the obligation to provide training and are therefore relevant in understanding the full spectrum of how LOAC training intersects with responsibility: first, the contribution that information about LOAC training can make in examining a state's responsibility for alleged violations of LOAC committed by its troops during armed conflict; and second, the linkage between LOAC training and a state's obligations under Common Article 1 of the 1949 Geneva Conventions.

## II. COMMAND RESPONSIBILITY AND LOAC TRAINING

Beyond direct criminal responsibility for war crimes committed pursuant to his orders, a commander can face individual criminal responsibility for the failure to ensure that his subordinates do not commit violations of LOAC. Command, or superior, responsibility is thus a form of liability used in military and international law to hold an individual in a leadership position accountable for the actions of his subordinates. In essence, command responsibility refers to the commander's liability for the criminal conduct of her underling and is a crucial element of

enforcement of LOAC.<sup>18</sup> LOAC entrusts commanders with ensuring that their subordinates respect and comply with LOAC, including by taking necessary measures to prevent or punish subordinates committing violations.<sup>19</sup> In all military operations, if the commander of an attack or other operation knew or should have known of unlawful actions committed by troops or other individuals under his control, the commander can be held accountable for such actions. The commander is thus held responsible for a sin of omission: the failure to properly supervise and control his or her subordinates who committed war crimes or other violations. When most crimes are committed by enlisted personnel or low-level officials because their superiors failed to prevent such violations, command responsibility enables national and international authorities to impose criminal responsibility beyond the direct perpetrator.

Command responsibility is a longstanding rule of customary international law,<sup>20</sup> in both international and non-international armed conflict, and is codified in Additional Protocol I, the Rome Statute, and other treaties, as well as numerous military manuals. Article 86(2) of Additional Protocol I affirms that the fact that a breach of the Conventions 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.<sup>21</sup>

The statutes of the ad hoc and hybrid tribunals use the same formulation,<sup>22</sup> and the Rome Statute presents a more comprehensive codification of the same basic rule:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes . . . committed by forces under his or her effective command and control, or effective

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<sup>18</sup> CASSESE'S INTERNATIONAL CRIMINAL LAW 182 (Cassese et al. eds., 2013).

<sup>19</sup> Additional Protocol I, *supra* note 2, art. 87.

<sup>20</sup> CIHL, *supra* note 16, rr. 152–53, at 556–63.

<sup>21</sup> Additional Protocol I, *supra* note 2, art. 86(2). Article 87 of AP I then sets forth the commander's duty to act, including "to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol"; to "ensure that members of the armed forces under their command are aware of their obligations under" the law; and, if the commander "is aware that subordinates or other persons under his control are going to commit or have committed a [violation of LOAC], to initiate such steps as are necessary to prevent such violations . . . and, where appropriate, to initiate disciplinary or penal action against violators thereof." *Id.* art. 87.

<sup>22</sup> See Updated Statute of the International Criminal Tribunal for the former Yugoslavia, art. 7(3), S.C. Res. 1877 (July 7, 2009); Statute of the International Criminal Tribunal for Rwanda, art. 6(3), S.C. Res. 1901 (Dec. 16, 2009); Statute of the Special Court for Sierra Leone, art. 6(3), S.C. Res. 1315 (Aug. 14, 2000).



authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.<sup>23</sup>

Command responsibility rests on three essential elements: the existence of a superior-subordinate relationship, the fact that the commander knew or should have known that crimes were or were about to be committed, and the commander's failure to prevent or punish such violations. As the Nuremberg Military Tribunal stated, "under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility."<sup>24</sup> The existence or lack of training in LOAC has contributed to international tribunals' analysis of each of these three components of command responsibility.

#### *A. Effective Control*

The relationship between superior and subordinate is the foundation for command responsibility. As the ICTY stated, "[i]t is the position of command over the perpetrator which forms the legal basis for the superior's duty to act, and for his corollary liability for a failure to do so."<sup>25</sup> Command authority can be based on

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<sup>23</sup> Rome Statute of the International Criminal Court, art. 28, 2187 U.N.T.S. 90 (July 17, 1998).

<sup>24</sup> *United States v. von Leeb (High Command Case)*, 11 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, p. 512 (1951); *see also* *Trial of General Tomoyaki Yamashita*, Case No. 21, Judgment (U.S. Mil. Comm'n, Manila Oct. 8, 1945–Dec. 7, 1945), *reprinted in* 4 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 35 (1945) (convicting General Yamashita based on command responsibility because "he failed to provide effective control of [his] troops as was required by the circumstances").

<sup>25</sup> *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, ¶ 359 (Int'l Crim. Trib. for the former Yugoslavia Jan. 31, 2005); *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 16 (Int'l Crim. Trib. for the former Yugoslavia July 16, 2003); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, ¶¶ 72, 76 (Int'l Crim. Trib. for the former Yugoslavia Mar. 24, 2000); *Prosecutor v. Kunarac*, Case No. IT-96, 23-T & IT-96-23/1-T, ¶¶ 394–99 (Int'l Crim. Trib. for the former Yugoslavia Feb. 22, 2001); *Prosecutor v. Perisic*, Case No. IT-04-81-A, Appeals Judgement, ¶¶ 86–87, 119 (Int'l Crim. Trib. for the former

either *de jure* status or *de facto* control and depends on the nature of the control the superior exercises over the subordinates. Within the military chain of command, command responsibility generally rests on the presumption that a commander has the ability and authority to prevent an attack, by giving direct orders not to attack, and to punish perpetrators through the imposition of disciplinary measures.<sup>26</sup> In the context of groups without a formalized command structure or other situations lacking evidence of *de jure* authority, it is important to be able to determine accountability based on effective control or *de facto* authority, to ensure enforcement of LOAC against both individual offenders and their superiors.<sup>27</sup> The language of Article 87 of Additional Protocol I confirms this broad scope of command responsibility, reaching beyond commanders and subordinates formally assigned to their units. Rather, the treaty provision references both “forces under their control” and “other persons under their control,” thus recognizing that the duties inherent in the command relationship are not limited to a formal military unit relationship or to members of the armed forces more generally, but could extend as well to individuals or groups informally operating under their authority.

Similarly, the Commentary to Additional Protocol I explains that “we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control. . . . The concept of the superior . . . should be seen in terms of a hierarchy encompassing the concept of control.”<sup>28</sup> The absence of *de jure* authority does not preclude the imposition of command responsibility; rather, “the influence that an individual exercises over the perpetrators of the crime may provide sufficient ground for the imposition of command responsibility if it can be shown that such influence was used to order the commission of the crime or that, despite

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Yugoslavia Feb. 28, 2013); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgement, ¶¶ 771–74 (Int’l Crim. Trib. for Rwanda Dec. 1, 2003).

<sup>26</sup> Strugar, *supra* note 25, ¶¶ 395–408.

<sup>27</sup> See, e.g., Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Judgement, ¶ 195 (Int’l Crim. Trib. for the former Yugoslavia Feb. 20, 2001) (“The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organized hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against *de facto* superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander.”).

<sup>28</sup> CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 3544 (1987) [hereinafter AP I COMMENTARY].

such *de facto* influence, the accused failed to prevent the crime.”<sup>29</sup> Thus, for example, the International Criminal Tribunal for Rwanda (ICTR) determined that Clément Kayishema, prefect of Kibuye prefecture, had *de facto* control over perpetrators of genocide in Rwanda because, even where his *de jure* control was indeterminate or nonexistent, he instructed and led their attacks, transported them to the massacre sites, rewarded them for attacks, and otherwise directed and encouraged the attacks.<sup>30</sup>

LOAC training plays at most a minor role in the assessment and analysis of effective control for the purposes of assigning command responsibility. In the law-compliant military, LOAC training is one of many manifestations of responsible command — commanders are required to ensure that their troops are properly trained in the rules and principles of LOAC. In other situations, however, inconsistent and improper training of troops may enable the tribunal to confirm the commander’s effective control while at the same time condemning the lack of effective training.

For example, the International Criminal Court (ICC) took this approach in the case of Jean-Pierre Bemba. Bemba was the leader of the Mouvement de Libération du Congo (MLC) and the commander of the Armée de Libération du Congo, its armed wing, and was charged with command responsibility for multiple crimes against humanity and war crimes committed on the territory of the Central African Republic (CAR) in 2002 and 2003.<sup>31</sup> The Trial Chamber details the training and dissemination regime Bemba implemented for his troops, including a Code of Conduct, and then notes that the very fact of such training and dissemination demonstrated that he had sufficient authority to provide appropriate and comprehensive training, including a more complete Code of Conduct, that would have better equipped his troops to adhere to the law.<sup>32</sup> The fact that Bemba established such a Code of Conduct, training and dissemination, along with a disciplinary system to — at least ostensibly<sup>33</sup> — enforce the obligations and rules set forth in the Code of Conduct and the training for his troops, therefore was one component in demonstrating that he had effective control for purposes of

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<sup>29</sup> Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1, Judgement, ¶ 492 (Int’l Crim. Trib. for Rwanda May 21, 1999).

<sup>30</sup> *Id.* ¶¶ 501–04.

<sup>31</sup> Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 2 (Int’l Crim. Court Mar. 21, 2016) (declaring that the Pre-Trial Chamber had “confirmed that there was sufficient evidence to establish substantial grounds to believe that Mr. Bemba is responsible as a person acting effectively as a military commander within the meaning of Article 28(a) for the crimes against humanity of murder, Article 7(1)(a), and rape, Article 7(1)(g), and the war crimes of murder, Article 8(2)(c)(i), rape, Article 8(2)(e)(vi), and pillaging, Article 8(2)(e)(v), allegedly committed on the territory of the Central African Republic (“CAR”) from on or about 26 October 2002 to 15 March 2003”).

<sup>32</sup> Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 65 (Int’l Crim. Court June 21, 2016).

<sup>33</sup> See *infra* Section I.C.

command responsibility. In particular, among the factors the Trial Chamber relies on to demonstrate that Bemba retained effective control over MLC forces fighting in the CAR — and thus was liable under command responsibility for crimes they committed — was the fact that “the MLC Code of Conduct remained applicable to the MLC contingent in the CAR throughout the 2002-2003 CAR operation.”<sup>34</sup> Although the Code of Conduct was insufficient in terms of the rules it set forth, the crimes it included, and the language in which it was promulgated,<sup>35</sup> it nonetheless was one demonstration of Bemba’s effective authority and control.

In addition, a commander cannot use the lack of training or provision of insufficient training to undermine or defeat a finding of effective control. The fact that Bemba provided or ordered training that was meager at best, incomplete as to the rules and fundamental principles underlying them, and in a language requiring translation on the spot, did not mean that he could then argue that he did not exercise effective control as a way to evade command responsibility. Ten years before the Bemba case, the International Criminal Tribunal for the former Yugoslavia (ICTY) issued a stern statement regarding situations “where a commander intends to use undisciplined soldiers to defend the front lines,” reaffirming that command entails responsibility:

Commanders, by virtue of their authority, are qualified to exercise control over their troops and the weapons they use, thus ensuring that persons and objects afforded protection by international humanitarian law are in fact protected. A commander who knows or has reason to know that the troops he uses in combat have committed acts prohibited by international humanitarian law runs the risk of later being held criminally responsible for crimes committed by those troops. If a commander uses soldiers while knowing or having reason to know that there is a serious risk they will not obey his orders, especially orders to comply with international humanitarian law, he may not claim to have lacked effective control over them in order to avoid his responsibility under Article 7(3) of the Statute. A commander may not exonerate himself by claiming to lack effective control if his conduct before the crimes were committed demonstrates that he accepted the possibility that subsequently he might not be able to control his troops.<sup>36</sup>

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<sup>34</sup> Bemba, *supra* note 31, ¶ 703.

<sup>35</sup> *Id.* ¶¶ 392–93 (explaining that the Code of Conduct provided “that a number of ‘infractions,’ including ‘murder of a civilian or of some other person’ and ‘abduction and rape’ ‘may be punishable by death.’ The Code of Conduct does not provide further details as to these ‘infractions,’ for example, the meaning of the phrase ‘some other person,’ the distinction between civilians and combatants, or the concept of protected persons. Further, it contains no provision prohibiting the crime of pillaging. . . . The Code of Conduct was written in French only, and the commanders had the responsibility of translating it into Lingala for dissemination, usually orally, to lower ranked soldiers”).

<sup>36</sup> Prosecutor v. Hadžihasanović & Kubura, IT-01-47-T, Judgement, ¶ 89 (Int’l Crim. Trib. for the former Yugoslavia Mar. 15, 2006).

*B. Knew or Had Reason to Know*

The imposition of command responsibility is not limited to situations where the commander has actual knowledge that crimes have been committed or are about to be committed by persons under her control, but extends also to situations in which the commander had reason to know of such crimes or potential crimes. This formulation of constructive knowledge plays an important role to ensure that commanders take steps to be aware of what their subordinates are doing and do not evade responsibility for willfully ignoring crimes and other disciplinary problems that create an environment accepting of or conducive to LOAC violations. Additional Protocol I, military manuals, and international jurisprudence use slightly different formulations of this concept of constructive knowledge, all focused on assigning responsibility in situations where the commander had information or access to information that demonstrated the existence of crimes or the likelihood such crimes were happening or were about to happen. For example, Additional Protocol I assigns command responsibility if a superior “had information which should have enabled [him] to conclude in the circumstances at the time [that a subordinate was committing or about to commit a violation.]”<sup>37</sup> The ICTY Statute uses “had reason to know” and the Tribunal has held that when crimes are widespread, prolonged or receive public attention, such that the commander is on notice that such crimes were likely,<sup>38</sup> or when “absence of knowledge is the result of negligence in the discharge of his duties,”<sup>39</sup> the commander can be presumed to have had reason to know so as to satisfy the standard for command responsibility.

The Rome Statute imposes command responsibility for military commanders who knew or should have known that forces under their control were committing or were about to commit violations of LOAC, which is a broader standard than that in either Additional Protocol I or the ICTY Statute and is similar to a negligence standard.<sup>40</sup> Note that the Rome Statute distinguishes between the mental state

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<sup>37</sup> Additional Protocol I, *supra* note 2, art. 86(2).

<sup>38</sup> Prosecutor v. Delalić, Case No. IT-96-21-T, Judgement, ¶ 393 (Int’l Crim. Trib. for the former Yugoslavia Nov. 16, 1998).

<sup>39</sup> Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 332 (Int’l Crim. Trib. for the former Yugoslavia Mar. 3, 2000); *see also* Prosecutor v. Baglishema, Case No. ICTR-96-IA-T, Judgement, ¶ 131 (Int’l Crim. Trib. for Rwanda Sep. 2, 1998).

<sup>40</sup> The Rome Statute’s formulation matches closely to that used in the trials after World War II both at Nuremberg and Tokyo. The Hostages Trial: Trial of Wilhelm List and Others (Case No. 47) Judgment (U.S. Mil. Trib., Nuremberg, July 8, 1947, to Feb. 19, 1948), *reprinted in* VIII LAW REPORTS ON THE TRIALS OF WAR CRIMINALS 34 (1949); Yamashita, *supra* note 25, at 35; von Leeb, *supra* note 25, at 603. U.S. Army Field Manual assigns command responsibility if the commander “has actual knowledge, or should have knowledge” of the conduct. U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE ¶ 501 (1956). The UK Manual on the Law of Armed Conflict uses this same formulation as well. *See* U.K. MINISTRY OF DEF., JSP 383: THE JOINT SERVICE

required for command responsibility for military commanders or person acting as a military commander and that required for civilian superiors, establishing a higher standard that a civilian leader knew or “consciously disregarded information which clearly indicated”<sup>41</sup> that subordinates were committing or were about to commit LOAC violations. Although the instant analysis focuses on military commanders and persons acting effectively as military commanders — the individuals most likely to be providing, ordering and supervising training in LOAC and related obligations — the distinction serves as a useful reminder of the extent of the commander’s more active duty to inform herself of her subordinates’ activities.<sup>42</sup>

Tribunals can rely on many sources and types of information to demonstrate that the accused knew or had reason to know that forces under his or her commander were committing or were about to commit international crimes, including direct reports from subordinates, media reports, international commission reports and other similar sources. In the context of LOAC training, tribunals have used information about training in two primary ways: to demonstrate the accused’s knowledge of the rules and principles of LOAC and to demonstrate that the accused knew certain troops were not trained in LOAC and therefore more likely to commit crimes. Both of these techniques use the fact of LOAC training as an important factor in the tribunal’s conclusion that the accused meets the mental standard for command responsibility — either that he knew crimes were being committed or had been committed, or he knew they were likely to be committed given the readiness or lack of readiness in his troops.

First, an accused’s training in, and thus awareness of, the basic rules and principles of LOAC can be sufficient to demonstrate that he knew that certain acts constituted crimes. Zlatko Aleksovski was a Bosnian Croat prison commander during the armed conflict in Bosnia and was convicted of command responsibility for outrages upon personal dignity for the violence inflicted on detainees at the Kaonik prison he commanded.<sup>43</sup> In assessing whether the accused knew or had reason to know that his subordinates were committing crimes, the tribunal considered both whether he knew about the acts of violence and whether he knew that those acts of violence and mistreatment were violations of the law, that is, whether they were prohibited. After dispensing of the first aspect of knowledge, the tribunal then pointed to the fact that the accused was aware of basic rules for

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MANUAL ON THE LAW OF ARMED CONFLICT ¶¶ 16.36 (2004). The U.S. Department of Defense Law of War Manual notes that “the commander’s personal dereliction must have contributed to or failed to prevent the offense.” U.S. DEP’T OF DEF., LAW OF WAR MANUAL ¶ 18.23.3.2 (2015).

<sup>41</sup> Rome Statute, *supra* note 23, art. 28(2)(a).

<sup>42</sup> Kayishema, *supra* note 29, ¶ 227 (highlighting this distinction in the Rome Statute).

<sup>43</sup> Aleksovski, *supra* note 25, ¶ 228 (“[T]he violence in question constitutes an outrage upon personal dignity and, in particular, degrading or humiliating treatment within the meaning of Common Article 3 of the Conventions and therefore constitutes a violation of the laws or customs of war within the meaning of Article 3 of the Statute for which the accused must be held responsible under Articles 7(1) and 7(3) of the Tribunal’s Statute.”).

treatment of prisoners, including those set forth in LOAC. Specifically, the tribunal found that

[g]iven his training and previous experience at Zenica prison, the accused could not have been unacquainted with the rules relative to the treatment of prisoners and conditions of detention. He had also admitted having knowledge of the Geneva Conventions and their contents. The Trial Chamber therefore finds on the basis of the evidence tendered at trial that the accused knew that crimes were being committed in Kaonik prison.<sup>44</sup>

In effect, because he received training in LOAC and in other rules regarding treatment of detainees, he knew or had reason to know that the acts of which he was aware were crimes, thus meeting the requirement for command responsibility that he know or have reason to know that his subordinates are committing or have committed crimes.

Second, the fact that a commander provides training in LOAC can also demonstrate that he knew or had reason to know that forces under his command are committing or are likely to commit crimes. Enver Hadžihasanović was the commander of the 3rd Corps of the Army of Bosnia and Herzegovina and subsequently Chief of Staff of the Army, and was charged with command responsibility for numerous war crimes during the conflict between Bosnian forces and Croat forces in 1993 and 1994, including murder, cruel treatment, wanton destruction, plunder, and willful damage to religious institutions.<sup>45</sup> The training regimen that he established for his regular troops played a significant role in the tribunal's analysis of the knowledge requirement for command responsibility. In the course of his tenure as commander of the 3rd Corps, Hadžihasanović "organised the distribution of the Geneva Conventions and drew his troops' attention to the obligations they entailed,"<sup>46</sup> created a Legal Department,<sup>47</sup> and trained "his troops in military discipline, which implied respecting orders."<sup>48</sup> Military police units within the 3rd Corps also received "instruction on respect for the Geneva Conventions and obligations stemming from the laws of war."<sup>49</sup>

In effect, the tribunal demonstrated that the accused knew that training was an essential component of military preparedness and adherence to fundamental legal obligations. Some of the crimes for which Hadžihasanović was charged, however were committed by mujahedin units that were incorporated into the 3rd Corps and then had responsibility for one or more detention centers. As in all cases of command responsibility, the tribunal had to be satisfied that the accused knew or

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<sup>44</sup> *Id.* ¶ 114.

<sup>45</sup> Prosecutor v. Hadžihasanović, *supra* note 36, ¶ 11. Hadžihasanović was convicted, based on command responsibility, for murder and cruel treatment. *Id.* at 620–25.

<sup>46</sup> *Id.* ¶ 857.

<sup>47</sup> *Id.* ¶ 858.

<sup>48</sup> *Id.* ¶ 859.

<sup>49</sup> *Id.* ¶ 883.

had reason to know that subordinates under his command were committing or were likely to commit crimes. Having highlighted the training Hadžihasanović established for the regular troops and the military policy in the 3rd Corps, the tribunal then noted that there was “no indication that, as from when the El Mujahedin detachment was integrated into the . . . 3rd Corps on 13 August 1993, the Accused Hadžihasanović promoted the teaching and dissemination of international law among the troops of that detachment.”<sup>50</sup> Concluding that he “could therefore not been unaware of the detachment’s lack of training in customary international humanitarian law, the Geneva Conventions and the Additional Protocols,”<sup>51</sup> the tribunal found that Hadžihasanović was “on notice of the real and present risk that the mujahedin were about to commit criminal acts similar to those they had already carried out on several occasions in similar circumstances.”<sup>52</sup> The provision of training to one group under his command and the conspicuous absence of training provided to another group also under his command was sufficient to determine that he knew or had reason to know in accordance with the required mental state for command responsibility.

*C. Available and Necessary Measures to Prevent or Punish Violations*

Article 86(2) of Additional Protocol I obliges commanders and other superiors to take all feasible measures to prevent or repress war crimes and other LOAC violations. Indeed, it is the affirmative duty in Article 87 that forms the foundation for command responsibility — commanders are under a duty to control the acts of their subordinates and to prevent or repress violations of the Geneva Conventions or Additional Protocol I. As the Commentary to Additional Protocol explains, “the first duty of a military commander . . . is to exercise command” and Article 87 mandates that “the control of the application of the Conventions and the Protocol [be] part of the duties of military commanders.”<sup>53</sup> The failure to exercise this duty is the omission that triggers international criminal responsibility. Thus, if commanders “refrain from taking the requisite measures [to prevent abuses], or if, having taken them, they do not ensure their constant and effective application, they fail in their duties and incur responsibility.”<sup>54</sup> Similarly, a commander who is aware of violations and takes no steps to prevent further breaches has also failed to fulfill his obligations.

The types of measures a commander is expected to take range across the spectrum of LOAC implementation and enforcement, from training in accordance

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<sup>50</sup> *Id.* ¶ 1434.

<sup>51</sup> Hadžihasanović, *supra* note 36, ¶ 1434.

<sup>52</sup> *Id.* ¶ 1435; *see also id.* ¶ 1456 (“[H]e knew that there was a risk that the mujahedin had not been punished for [earlier] crimes and that they had not had the benefit of any training in international humanitarian law. Consequently, on 20 October 1993, he had reason to know that his subordinates were preparing to commit the crimes of murder and mistreatment against their prisoners.”).

<sup>53</sup> AP I COMMENTARY, *supra* note 28, ¶¶ 3549, 3552.

<sup>54</sup> *Id.* ¶ 3548.



with LOAC, to orders mandating lawful action and prohibiting unlawful acts, and finally to the imposition of disciplinary and criminal authority over those who violate such orders and LOAC. In examining the extent of this duty, the jurisprudence of the international tribunals focuses on the duty to take necessary and reasonable measures — which are necessarily limited by what is possible in the circumstances at the time. As the ICTY held, it is important to recognize “that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures within his powers . . . [or] within his material possibility.”<sup>55</sup> Giving orders to halt indiscriminate shelling or other unlawful attacks on protected persons or objects, for example, falls directly within a commander’s power, as does action to hold accountable those who engaged in such unlawful attacks or failed to prevent them.<sup>56</sup> Indeed, the ability of a superior to exercise authority over subordinates in any manner will suffice to attach an obligation to take reasonable measures to prevent violations. For example, the authority to hire and fire employees consequently means that such superior has the ability to “remov[e], or threaten[] to remove, an individual from his or her position . . . if he or she was identified as a perpetrator of crimes.”<sup>57</sup>

Training and dissemination can figure prominently in the analysis of whether a commander took available and necessary measures to prevent violations from occurring. The very essence of command involves the obligation to “ensure that [subordinates] act within the dictates of international humanitarian law and that the laws and customs of war are therefore respected.”<sup>58</sup> There can be little doubt that instructing one’s troops in the basic principles and rules of LOAC is an essential and necessary preventative measure to protect against violations of the law during armed conflict. International tribunals have focused on two particular aspects of training in the context of this element of failure to take necessary measures to prevent crimes: first, the absence of training as an example of a necessary measure that was not taken; and second, the existence and provision of training as a demonstration that the commander in fact has the ability to take preventive measures and that such measures are available. For example, the ICTY detailed a number of measures that Zdravko Mucić, the commander of the Čelebići prison camp, could and should have taken to prevent the crimes committed in that camp. In particular, the tribunal highlighted testimony by one witness who noted that “an important gap in any preventive efforts made by [his co-accused] is that he as commander never gave any instructions to the guards as to how to treat the detainees.”<sup>59</sup> As a result, the tribunal found that he failed to make the necessary and reasonable measures to prevent crimes.

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<sup>55</sup> Delalić, *supra* note 38, ¶ 395.

<sup>56</sup> See Strugar, *supra* note 25, ¶¶ 421, 444.

<sup>57</sup> Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgement, ¶ 880 (Int’l Crim. Trib. for Rwanda Jan. 27, 2000).

<sup>58</sup> Prosecutor v. Halilović, Case No. IT-01-48-T, Judgement, ¶ 39 (Int’l Crim. Trib. for the former Yugoslavia Nov. 16, 2005).

<sup>59</sup> *Id.* ¶ 773.

The ICC and the ICTY's convictions of Bemba and Hadžihasanović offer useful examples of how the provision of training, however insufficient or episodic, affirms a commander's ability to take necessary measures — and how such poor training then proves the failure to take such measures. When Hadžihasanović provided substantial training in LOAC generally and the Geneva Conventions specifically to his regular troops in the 3rd Corps, but no such training at all to the mujahedin he used for any number of military operations and prison camps, the ICTY appropriately concluded that not only did he have the capacity to provide such training and the knowledge of the need for and value of such training, but that the lack of such training demonstrated a failure to take necessary measures. Thus, “even though international humanitarian law forbade him from using those troops in combat operations so long as he had not received assurances that they had received training in customary international humanitarian law, the Geneva Conventions and Additional Protocol, . . . the Accused Hadžihasanović allowed, or even created, all of the conditions conducive to the repeated commission of crimes.”<sup>60</sup>

Similarly, rather than view Bemba's attempts to provide training and a Code of Conduct, meager as they were, as a sign of his good faith efforts to exercise reasonable command, the ICC held that they demonstrated “the means at Mr Bemba's disposal to take measures to prevent and repress crimes.”<sup>61</sup> As a result, given “his extensive material ability to prevent and repress the crimes,” the accused could have added to or improved his insufficient measures with steps including, “*inter alia*, (i) ensur[ing] that the MLC troops in the CAR were properly trained in the rules of international humanitarian law, and adequately supervised.”<sup>62</sup> First, the tribunal found that the steps he did take, including the training, the Code of Conduct, and warnings to his troops in the CAR not to attack civilians, however ineffective, demonstrated that he “had the authority and ability to take measures to prevent and repress the commission of crimes.”<sup>63</sup> Providing some training therefore shows that a commander has the ability to provide better and more effective training. Second, the tribunal reaffirms that training works to prevent crimes. Its analysis of the evolution of Bemba's troops operations and crimes showed that “clear training, orders, and hierarchical examples indicating that the soldiers should respect and not mistreat the civilian population would have reduced, if not eliminated, crimes motivated by a distrust of the civilian population, as enemies or enemy sympathisers.”<sup>64</sup> Finally, building on these two initial conclusions, the tribunal determines that the inconsistent and often minimal training, as well as the incomplete and often incorrect Code of Conduct, proved to be direct evidence of Bemba's failure to take necessary measures to prevent

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<sup>60</sup> Hadžihasanović, *supra* note 36, ¶ 1483. Indeed, the tribunal notes that, by doing so, “he risked being incapable of taking the necessary and reasonable measures that might be required.” *Id.*

<sup>61</sup> Bemba, *supra* note 32, ¶ 65.

<sup>62</sup> Bemba, *supra* note 31, ¶ 729.

<sup>63</sup> *Id.* ¶ 738.

<sup>64</sup> *Id.* ¶ 739.

crimes.<sup>65</sup> His failure to remedy the deficiencies in training, both before deployment and after receiving reports of crimes committed in the CAR, to provide more training, and to ensure clear orders and instructions in the Code of Conduct, directly contributed to the commission of the crimes. Effective and comprehensive training is the natural first step in carrying out the obligation to take necessary measures to prevent violations of LOAC — and the incorporation of information about the existence and quality of such training has proved to be a useful tool in assessing the responsibility of commanders for the violations committed by their subordinates.

### III. SENTENCING AND LOAC TRAINING

Sentencing at the international tribunals encompasses a wide range of legal, normative, political and procedural issues, ranging from the fundamental purposes of punishment in the criminal law to the need for consistency across sentencing procedures and rules for the types of considerations that can be addressed in reaching a final sentencing decision. LOAC training touches on sentencing only at the margins, in the context of aggravating or mitigating circumstances. As a result, the general philosophical, procedural and normative considerations in sentencing remain outside the scope of this article. Although efforts to present LOAC training, or the lack thereof, as a mitigating or aggravating circumstance have been few and far between, tribunals have considered how training might play a role in assessing the appropriate punishment for perpetration of or participation in international crimes. At present, no tribunal has applied an aggravating circumstance related to LOAC training, although the ICTY did raise the possibility in *Prosecutor v. Obrenović*. Reaffirming the leadership obligations and role of commanders, the ICTY implied that a commander's failure to live up to his or her "duty, which stems from [his or her] position, training, and leadership skills, to set an example for their troops that would promote the principles underlying the laws and customs of war"<sup>66</sup> and thereby encourage or even promote the commission of crimes, could be an aggravating circumstance.

LOAC training has appeared on a few occasions with regard to mitigating circumstances, in contrast. Interestingly, there does not yet seem to be any consensus view on how LOAC training should factor into any consideration of mitigating circumstances, and the cases produce varying results, primarily depending on the role and authority of the accused. For example, Esad Landžo was nineteen years old at the time he was a guard at the Čelebići prison camp. In determining his sentence for murder, torture and cruel treatment, the tribunal considered several mitigating circumstances, including his lack of knowledge regarding the norms and principles of LOAC. In particular, one of the three

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<sup>65</sup> *Id.* ¶¶ 736–37.

<sup>66</sup> *Prosecutor v. Obrenović*, Case No. IT-02-60/2-S, Sentencing Judgement, ¶ 100 (Int'l Crim. Trib. for the former Yugoslavia Dec. 10, 2003). The Trial Chamber declined to find such an aggravating circumstance for Obrenović.

primary factors the tribunal noted explicitly was that “he had no proper military training or instruction in how to comport himself in relation to detainees such as those in the Čelebići prison-camp.”<sup>67</sup> Perhaps as a reminder of the important role of leadership in disseminating LOAC, the fact that he had not been taught either the principles to guide his behavior or the tactical procedures that comported with the law weighed in his favor as the tribunal assessed the appropriate sentence for his crimes.

For commanders and others in positions of leadership, even low-level or *de facto* leadership, the foundational obligation to promote and ensure compliance with the law appears to drive how tribunals consider the value of LOAC training as a mitigating circumstance. Bemba argued that his implementation of training and dissemination of a Code of Conduct was a mitigating circumstance because most other commanders and superiors charged with command responsibility for international crimes were found to have taken no action to prevent such crimes or had deliberated, promoted, or even participated in such crimes.<sup>68</sup> The tribunal, however, took a different view, finding that

such minimal and inadequate measures, as well as the incomplete Code of Conduct, deficiencies in its dissemination, uneven training regime, and the MLC disciplinary system, demonstrate the means at Mr Bemba’s disposal to take measures to prevent and repress crimes. Such ability underscores Mr Bemba’s superior failures. They do not reduce his culpability or justify mitigation.<sup>69</sup>

The commander’s duty is not satisfied with measures that simply do lip service to the obligations of responsible command, so mediocre, insufficient or ineffective measures provide no basis for mitigation on the grounds of providing LOAC training and dissemination.

In contrast, good faith efforts at and demonstrations of responsible command in the context of training or dissemination of the law will be taken into account as a possible or actual mitigating circumstance. The ICTY assessed precisely these considerations as personal mitigating factors in sentencing Hadžihasanović on grounds of command responsibility for murder and cruel treatment. Thus, the fact that

he worked to enforce the rules of international humanitarian law to protect Croatian people and property, be it through his calls to respect the law, or through the training sessions on the principles of international humanitarian law that he organised for 3rd Corps soldiers and officers<sup>70</sup>

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<sup>67</sup> Delalić, *supra* note 38, ¶ 1283.

<sup>68</sup> Prosecutor v. Bemba, Case No. ICC-01/05-01/08-3376-Conf, Public Redacted Version of Submissions on Sentence ¶¶ 68–72 (April 26, 2016).

<sup>69</sup> Bemba, *supra* note 32, ¶ 65.

<sup>70</sup> Hadžihasanović, *supra* note 36, ¶ 2080.

contributed directly to the tribunal's conclusion that he had "a character which can be rehabilitated and . . . thus merits a reduced sentence."<sup>71</sup> Although Hadžihasanović fell short in mandating training for the mujehadin and therefore failed to take the necessary measures to prevent crimes committed by those subordinates, as discussed above, the tribunal did consider and give weight to his overall commitment to disseminating LOAC and requiring training for his regular troops as a personal or reputational consideration.

#### IV. THE RESPONSIBILITY OF THE STATE AND LOAC TRAINING

Beyond the role that LOAC training can play or has played in assessing individual criminal responsibility or sentencing in international criminal prosecutions, a brief examination of two other ways in which LOAC training is relevant to LOAC responsibility determinations is useful. In particular, as set forth in the introduction above, the primary obligation for training and dissemination of LOAC and for promoting and mandating adherence to the law lies with the state. Within this framework, the approach of two adjudicatory mechanisms to how training in the fundamental principles and obligations of LOAC may affect a state's responsibility for violations committed by its own troops or other forces it is supporting provides an interesting companion to the individual accountability analysis. Indeed, on some level, the conclusions in these two instances mirrors the overall approach to individual accountability with respect to the importance and role of ensuring appropriate training and dissemination of LOAC.

When faced with allegations of failing to respect LOAC in the face of violations, a state will understandably point to its program of training and instruction in LOAC to demonstrate its commitment to this essential body of law. In the arbitration of claims after the 1998-2000 war between Eritrea and Ethiopia, both states relied on evidence of training in LOAC, specifically with respect to treatment of prisoners of war, for exactly this purpose. Among numerous claims under both *jus ad bellum* and *jus in bello*, the Eritrea-Ethiopia Claims Commission heard claims from both states regarding mistreatment and killing of prisoners of war.<sup>72</sup> In the final determination of responsibility, the Claims Commission found Eritrea responsible both for failing to protect against unlawful killing and for permitting abusive treatment of prisoners at or shortly after the point of capture.<sup>73</sup> With regard to Ethiopia's responsibility, the Claims Commission similarly assigned responsibility for beatings and other abusive treatment of prisoners at the time of capture, but not for killing of prisoners.<sup>74</sup> One key difference for the

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<sup>71</sup> *Id.*

<sup>72</sup> See Partial Award on Prisoners of War (Eritrea's Claim 17), 42 I.L.M. 1083 (Eri.-Eth. Claims Comm'n 2003) [hereinafter Eritrea's Claim 17]; Partial Award on Prisoners of War (Ethiopia's Claim 4), 42 I.L.M. 1056 (Eri.-Eth. Claims Comm'n 2003) [hereinafter Ethiopia's Claim 4].

<sup>73</sup> Ethiopia's Claim 4, *supra* note 72, ¶ 68.

<sup>74</sup> Eritrea's Claim 17, *supra* note 72, ¶¶ 59-63.

Commission: the provision and, most importantly, the effectiveness of LOAC instruction and training regarding the treatment of prisoners of war.

Both Ethiopia and Eritrea provided such training. As the Commission noted, “Ethiopia presented substantial evidence regarding the international humanitarian law training given to its troops.”<sup>75</sup> Similarly,

Eritrea offered detailed and persuasive evidence that Eritrean troops and officers had received extensive instruction during their basic training, both on the basic requirements of the Geneva Conventions on the taking of POWs and on the policies and practices of the Eritrean People’s Liberation Front (“EPLF”) in the war against the prior Ethiopian government, the Derg, for independence, which had emphasized the importance of humane treatment of prisoners.<sup>76</sup>

Notwithstanding that training, there was evidence of extensive and repeated beatings and other mistreatment of prisoners on both sides, and both states were held responsible for that mistreatment. The difference — and the impact of training — ultimately lay in the analysis of the claims of killing of prisoners. The Commission heard evidence of recurring and widespread killing of Ethiopian prisoners by Eritrean troops, but only isolated such killings of Eritrean prisoners by Ethiopian troops.<sup>77</sup> In reaching opposite determinations regarding the two states’ respective responsibilities, the Commission relied not only on the existence of training, but on information demonstrating the effectiveness of that training. Thus, with regard to Eritrea, the Commission found no “evidence of . . . steps Eritrea took, if any, to ensure that its forces actually put this extensive training to use in the field,”<sup>78</sup> and the reports of regular and repeated killings of prisoners corroborated that conclusion.

In contrast, Ethiopia’s training proved effective in this regard — not only in protecting prisoners from unlawful killing, but also in demonstrating that Ethiopia should not be held responsible for the isolated violations that did occur. Highlighting that “several Eritrean [prisoner of war] declarants described occasions when Ethiopian soldiers threatened to kill Eritrean [prisoners] at the front or during evacuation, but either restrained themselves or were stopped by their comrades,” the Commission determined that the “accounts of capture and its immediate aftermath presented to the Commission . . . suggest that [Ethiopia’s] training generally was effective in preventing unlawful killing, even ‘in the heat of the moment’ after capture and surrender.”<sup>79</sup> The fact of LOAC training and whether such training worked, even if not perfectly, was decisive in assessing the responsibility of both states. The approach to state responsibility thus emphasizes

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<sup>75</sup> *Id.* ¶ 60.

<sup>76</sup> Ethiopia’s Claim 4, *supra* note 72, ¶ 67.

<sup>77</sup> *Id.* ¶ 66; Eritrea’s Claim 17, *supra* note 72, ¶ 59.

<sup>78</sup> Ethiopia’s Claim 4, *supra* note 72, ¶ 67.

<sup>79</sup> Eritrea’s Claim 17, *supra* note 72, ¶ 60.

the same considerations as seen above in individual accountability: providing not only training, but effective training, is an essential obligation and an important consideration in determining responsibility.

Finally, the converse can also be true — training or dissemination that includes instructions at odds with LOAC’s fundamental rules and principles is, in and of itself, a violation of LOAC. Although there have been no international criminal prosecutions raising this question, perhaps because evidence of such training or instruction would likely bear directly on direct criminal responsibility for the acts in question, the International Court of Justice did address it in *Nicaragua v. U.S.* In the course of tackling the overarching issues of self-defense and intervention, the Court also addressed potential LOAC violations. Although it determined that it could not impute violations by the *contras* to the United States,<sup>80</sup> the Court identified one particular violation of LOAC by the United States: the obligation to respect and ensure respect for LOAC under Common Article 1 of the four Geneva Conventions of 1949.<sup>81</sup> Noting that this obligation “derive[s] not only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression,”<sup>82</sup> the Court held that the United States was under an obligation not to encourage violations of Common Article 3, the relevant applicable framework to the conflict in Nicaragua.

Unlike above, where training was presented as evidence of a commitment to LOAC for the purposes of minimizing or eliminating responsibility, here, the training and instruction that the United States provided to the *contras* in military operations and the applicable rules was the actual violation. In 1983, the United States had disseminated several thousand copies of a *Psychological Operations in Guerrilla Warfare*, a Central Intelligence Agency training manual, that, “while expressly discouraging indiscriminate violence against civilians, considered the possible necessity of shooting civilians who were attempting to leave a town”<sup>83</sup> and advised in favor of “neutralizing” local judges and officials for propaganda purposes. Finding that the publication and dissemination of the manual was “an encouragement . . . to commit acts contrary to general principles of international humanitarian law,” the Court held that the United States had thus violated its obligation to respect and ensure respect for LOAC. In effect, training that allowed for or promoted conduct prohibited under LOAC — attacks on civilians, in this case — ran directly counter to the state’s obligation under both treaty and customary law to respect and promote respect for the law.

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<sup>80</sup> *Military and Paramilitary Activities in & Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 115, 216 (June 27).

<sup>81</sup> Geneva Convention I, *supra* note 1, art. 1; Geneva Convention II, *supra* note 1, art. 1; Geneva Convention III, *supra* note 1, art. 1; Geneva Convention IV, *supra* note 1, art. 1 (“The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”); *see also* Additional Protocol I, *supra* note 2, art. 1(1). This rule is also recognized as customary international law. CIHL, *supra* note 16, at Rule 139.

<sup>82</sup> *Nicar. v. U.S.*, *supra* note 80, ¶ 220.

<sup>83</sup> *Id.* ¶¶ 117, 122.

## V. CONCLUSION

Training and dissemination of the fundamental rules and principles of LOAC is the first step in any process to ensure lawful military operations. A soldier, a military unit, an entire military must know the rules and parameters for appropriate, lawful and effective action during armed conflict. In the same manner, accountability for violations of LOAC — whether individual criminal accountability or state responsibility — is an equally essential tool for enforcing the law. Exploring the intersection between these two endpoints of the spectrum of LOAC implementation highlights how training and accountability can actually work together to maximize each one's effectiveness. The way in which information about training contributes to accountability under command responsibility is a strong reinforcement of the message that commanders must ensure that their troops are properly trained in LOAC and that such training is effective and provided to all troops, regular or irregular. A commander's commitment to providing training can also be evidence of his or her good character for purposes of mitigation. And a state's failure to implement a regular and effective program of training and instruction can help determine its responsibility for regular or repeated abuses by its troops.

Overall, the fundamental message is that LOAC training is not a box to be checked on a long to-do list before military deployment. The lesson from international cases addressing LOAC training in the context of both individual and state responsibility is that LOAC training must be ongoing, regular and proactive — the central consideration is not simply that military personnel are trained in LOAC, but that those personnel adhere to LOAC. Inadequate or inconsistent training does not meet that threshold, as Bemba discovered in his judgment and sentencing. Comprehensive training for regular troops but not irregulars is also not sufficient, as Hadžihasanović's conviction based on command responsibility for the crimes of the mujahedin demonstrated. No less, training that is regular and even comprehensive but does not produce the proper behavior also falls short, as the different conclusions regarding Eritrea and Ethiopia's responsibility for killings of prisoners of war manifests. LOAC is not a regime of passivity, but demands affirmative action to educate about, comply with, and enforce the law. Indeed, the intersection between training and accountability highlights that no commander, no state, and no soldier can be a bystander, but rather must take the necessary steps to ensure that anyone under her command or acting on its behalf is equipped and dedicated to applying the law.