The Impact of Military Justice Reforms on the Law of Armed Conflict:

How to Avoid Unintended Consequences

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I. Introduction

We are in the midst of a military justice revolution. That revolution is driven by the notion that 'traditional' military justice systems no longer work effectively and a belief that they should conform to society's broader understanding of what constitutes a fair system of justice. Minor modifications are not enough. Many reformers, particularly those in common law countries, have called for fundamental changes to bring military justice into the modern age. If there is one overarching theme to these reforms it is a clear trend towards "civilianizing military justice", that is, reforming military justice so that it mirrors the civilian justice system.

There are a number of influences driving this reform. The most important of these influences come from the human rights community and from those who argue that a division of institutional authority is essential to be considered fair. The human rights focus on military justice has largely been comparative. Reformers in this camp primarily examine the procedures and protections available in a given military justice system and compare them with civilian systems. To the extent that procedures in the military differ and seem to provide less protection, human rights advocates contend they should be overhauled. Many of these criticisms do not focus on individual cases or specific examples of injustice within the military justice system. They instead assume that, if these processes differ and seem less protective of individual rights than civilian systems, military justice is inherently unfair and must be better aligned with civilian law.

Other reformers gauge the fairness of a military justice system by focusing on the way in which authority is divided. For example, are the key decisions on the disposition and adjudication of cases given to a single authority? I refer to those who focus on these questions as 'separation of power reformers'. They are critical of military justice systems that give a single office, typically the military commander, absolute authority to decide who to bring to trial, for what offenses and the final disposition of the case. Separation of power reformers do not focus on proving injustices in specific cases, but instead argue that a system where so much power rests in one office is inherently unfair and must be changed.

The focus of this paper is on the role of the military commander in the traditional military justice system. The paper asks whether reforms reducing the role of the commander in military justice systems have adequately considered the commander's obligations under the law of armed conflict (LOAC). The last section of the paper identifies those features of military justice where the commander's continued involvement is essential if the commander is to meet LOAC obligations and those areas where reforms can and should be made without diminishing the commander's essential functions.

II. The Role of the Military Commander and the Law of Armed Conflict

Understanding the key role of the commander in military justice matters is important to an assessment of the merit of reforms to military justice. Certainly some rationale for placing the commander at the head of military justice derives from the fact that the commander needs to control all aspects of military operations to be effective. But if this is the only reason for the commander to remain at the apex of military justice, perhaps the reforms that have occurred in many countries are justified. This is because there are other offices and processes that can

perform criminal justice functions as effectively as the military commander and in a way that provides greater protections for the accused service member. Efforts to better align military justice with civilian systems are only part of the equation. The critical issue of a military commander's responsibilities under the law of armed conflict is often unrecognized.

The law of armed conflict is a unique legal regime. It seeks to inject humanitarian regulation into the brutal endeavor of warfare. A person who has not experienced war can never truly understand the demands placed on warriors, officers and non-commissioned officers responsible for their leadership. Military training involves developing a genuine killer instinct—a willingness to take life on order and without hesitation. Professional warriors must also be able to essentially suspend that instinct at a moment's notice in order to exercise humanitarian constraint and preserve the crucial line between legitimate and illegitimate violence, the ultimate objective of LOAC.

The brutality, intensity and sheer terror of warfare therefore stress the ability of military leaders to ensure that their subordinates respect LOAC obligations. Commanders, staff officers, and their legal advisors must understand these obligations and correctly apply the law during ongoing military operations. Beyond the commander's responsibility to know the law and harmonize operational decisions to the dictates of LOAC, commanders also bear the additional and critical responsibility to prepare their subordinates to respect these obligations and to establish a command culture that prioritizes fidelity to the law.

The person responsible for molding a group of individuals into an efficient and effective military unit is the commander. The commander holds a unique position in a military organization. Primarily through the use of positive leadership and example, the commander sets the tone for the unit and ensures that soldiers are well trained and prepared to conduct military

operations and achieve the unit's objectives. The commander is the focal point of military discipline and order within the unit and is thus responsible for maintaining command and control over subordinate forces. The commander stands on the line that separates a disciplined military unit from a lawless mob. Through the use of all available resources, including moral authority, law, and collective purpose, the military commander ensures that forces under command effectively execute military operations—which often involve the decisive application of deadly combat power—in a manner that fully complies with LOAC. When military units fail to do so, it is largely attributable to the commander's failings.

A commander can fail this most vital responsibility in any number of ways. There are situations when the commander's actions are directly responsible for LOAC violations committed by his forces. For example, if a commander participates in the unlawful targeting and killing of civilians, there is direct criminal liability under LOAC for the resulting harm. Likewise, a commander who orders forces to attack a protected place is, as a result of ordering unlawful conduct, responsible for the subsequent LOAC violation. Similarly, a commander who encourages forces to kill or otherwise mistreat prisoners of war, or a commander who assists subordinates in covering up evidence of a past war crime, is criminally liable for those LOAC violations. In these examples, the commander's complicity with an LOAC violation is direct and punishable through the application of accomplice liability theory. Even if the commander's involvement is not direct, it is easy to see the way in which encouragement and assistance can contribute to LOAC violations, resulting in culpability.

There are numerous scenarios where a commander's action or inaction can have a close and direct nexus to the war crimes committed by subordinates. Even if a commander did not directly order forces under command to engage in conduct in violation of LOAC, the commander

may have permitted or acquiesced in those violations. In such cases, the nexus between commander inaction and a subordinate's war crime exists because soldiers frequently and unquestionably interpret the commander's inaction and acquiescence as approval and permission.

One of the most important components of LOAC, therefore, is the mechanism that evolved to hold commanders accountable where their direct participation, encouragement, incitement, involvement, knowledge and/or acquiescence in LOAC violations is either direct, or where the nexus between the commander's actions and the crime is clear. Even if the commander's involvement was less direct, such as ordering forces to commit unlawful killings but not directly participating in those killings, the doctrine of accomplice liability would provide a solid basis for criminal accountability. If a commander ordered, encouraged, or otherwise supported forces in committing war crimes, and shared in the criminal purpose or design of the perpetrators and this action or failure to act aids, abets, counsels, or commands the perpetrator to commit the offense, then the commander could be guilty as a principal.[1]

A. The Command Responsibility Doctrine

None of this is in any way remarkable. It is merely an application of traditional accomplice liability principles to cases where the offense is charged as a war crime or a violation of the Uniform Code of Military Justice in the United States. LOAC relies so heavily on commanders executing their responsibilities that it is logical that legal mechanisms exist to hold commanders accountable when evidence establishes the commander is either directly involved in

[1] UCMJ art. 77 (2008).

LOAC violations or that the commander has acceded as an accomplice or an accessory. Without such legal mechanisms, LOAC principles would be largely ineffective and unenforceable.

This legal structure would be incomplete, however, if these were the only mechanisms available to establish command responsibility for LOAC violations. Direct liability, accomplice liability, and the liability of an accessory only address situations of commander complicity; where the evidence establishes the commander has some independent or shared intent to commit war crimes or prevent their detection. Punishing commanders in these situations will certainly deter such complicity, but will not necessarily foster a command culture that emphasizes LOAC compliance and condemns violations.

How does the law address situations where a commander's dereliction of duty contributes to subordinate LOAC violations? What about a commander who remains willfully ignorant of battlefield reports indicating LOAC violations, or who upon receiving such reports, fails to take appropriate remedial action? In these instances, it is the lack of action that contributes to subordinate violations, often without any intent to violate LOAC on the part of the commander. And yet, in such instances, the commander's failings may set the conditions for the commission of war crimes by the forces under command. As the individual in the critical position directly responsible for ensuring LOAC compliance within a military unit, should commanders bear responsibility when the risk becomes reality?

The answer is found in the doctrine of command responsibility, developed in customary international law.[2] Its purpose was to align the scope of a commander's criminal accountability for war crimes committed by subordinates with the full extent of the commander's obligation to

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Mirjan Damaska, The Shadow Side of Command Responsibility, 49 AM. J. COMP. L. 455,455 (2001)

ensure subordinate compliance with the law. The doctrine accounts for two situations: first, where responsibility for war crimes is established by traditional complicity principles; and second, where the commander was not complicit in the traditional sense but was derelict in the duty to ensure respect for the law by forces under command. If evidence establishes the commander's dereliction under this second prong of the doctrine, criminal responsibility may be imputed to the commander for the war crimes committed by soldiers. The commander is punished *as if he or she* had committed those crimes, not merely for dereliction of duty as a commanding officer. Extending a commander's legal responsibility for subordinate misconduct beyond situations of traditional complicity ultimately provides a necessary incentive to train, monitor, supervise, and correct subordinates, and in so doing, to establish a command culture of commitment to compliance with the law of armed conflict.

Command responsibility was firmly established as a legal doctrine in the war crimes tribunals following World War II but the idea of holding a commander responsible for subordinates' criminal and law of war violations had much earlier origins. One of the most frequently cited examples is the Ordinance of Orleans, issued in 1439 by Charles VII of France.[3] The Lieber Code developed in the American Civil War is another example. Article 71 of the Lieber Code established that:

> Whosoever intentionally inflicts additional wounds on an enemy already

[3] The ordinance provided: The King orders that each Captain or lieutenant be held responsible for the abuses, ills and offenses committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, 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. Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, at 149 n.40 (2006).

> wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.[4]

The Fourth Hague Convention of 1907 respecting the laws and customs of war on land was the first modern treaty to impose a form of command responsibility as a matter of express international legal obligation. Article 3 states, ''A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.''[5] The underlying premise of the modern command responsibility doctrine is also reflected in Chapter 1, Article 1 of the Hague Convention, which established what is recognized as a key characteristic of an army or other organized militia: The military organization is ''commanded by a person responsible for his subordinates.''[6]

These historical antecedents to the contemporary command responsibility doctrine have several common themes. They all recognize the unique position a commander holds in a military organization. They all reflect the axiom that command authority includes both the legal authority and the legal obligation to control subordinate conduct in order to achieve military objectives while respecting the then existing humanitarian limits on the conduct of hostilities. All of these antecedents also implicitly recognize that imposing responsibility on the commander for the conduct of subordinates enhances the probability of such respect. These antecedents also recognize that a commander can be held accountable for subordinates' law of war violations if

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[4] RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OFWAR 45, art. 71 (Chicago: Precedent Publishing 1983).
[5] Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2290 T.S. 539.
[6] *Id.* at 2277, 2290.

the commander was directly involved, or even in some cases where the involvement was less direct or obvious. From this foundation, the modern doctrine of command responsibility emerged at the end of World War II.

The most well-known case of command responsibility was the trial of General Yamashita. At the end of World War II, General Yamashita was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. The Japanese government placed General Yamashita in command of these forces just ten days before the American forces landed in the Philippines. This was a desperate time for the Japanese forces, which turned Manila into a battlefield. The Japanese military was responsible for the death of an estimated 100,000 Filipino civilians and committed many other atrocities.

The prosecution argued that these violations were so flagrant and enormous they must have been known to General Yamashita if he had made any effort to fulfill his responsibilities as a commander.[7] If General Yamashita did know of these offenses, he was complicit by his failure to stop them. If he did not know of these acts, it was because he ''took affirmative action not to know.'[8]' In either case, he bore individual criminal responsibility.

The military commission that tried General Yamashita rejected the assertion that because he took no part in the crimes committed by his troops, and because did not know what was occurring under his command, he was not criminally liable. The commission found the ''crimes were so extensive and widespread, both as to time and area, that they must either have been

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[7] *See* U.N. War Crimes Commission IV, LAW REPORTS OF TRIALS OFWAR CRIMINALS Case 21: The Trial of General Tomoyuki Yamashita, at 17 (Feb. 17, 1948) (prepared by Mr. Brand).
U.N. WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, (William S. Hein & Co. 1997) at 17(1948).

willfully permitted by [Yamashita], or secretly ordered by [him]."[9] The president of the commission stated:

> [W]here murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[10]

The key elements of the command responsibility doctrine emerged from this case. A commander's responsibility and liability is predicated on (1) a command relationship between the superior and subordinate; (2) information or knowledge that triggers the commander's duty to act; (3) if the duty to act is triggered, the commander must take some action regarding the ongoing or anticipated law of war violations by subordinates; and (4) a causal relationship between the commander's omission and the war crimes committed by the subordinates.

In 1977 Additional Protocol I to the 1949 Geneva Convention (AP I) was promulgated and it included the first express treaty provision establishing individual criminal command responsibility.[11] The doctrine of command responsibility is central to the accountability framework in API. Articles 86 and 87 develop the command responsibility doctrine by articulating specific duties for a commander to ensure law of war compliance. The commander has the duty to prevent and repress breaches of AP I and the Geneva Conventions.[12] Commanders also have a duty to prevent, suppress, and report breaches to the Convention. Commanders must also prevent violations, or take penal or disciplinary actions against violations

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[9] *Id.* at 34.
[10] *Id.* at 35.
[11] Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 72 AM. J. INT'L L. 457 (1978) (hereinafter AP I).
[12] *Id.* at Article 86.

of which they become aware.[13] Collectively, the commander's duties are to prevent future war crimes, suppress or stop ongoing crimes, and report and punish past crimes.

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) initiated the contemporary evolution of the command responsibility doctrine. The command responsibility provision in the statutes for each tribunal, promulgated in 1993 and 1994 respectively, are virtually identical. Article 7(3) of the ICTY states:

> The fact that any of the acts referred to in articles 2 and 5 of the present Statute [Grave Breaches of the Geneva Conventions of 1949 and Crimes Against Humanity] was committed by a subordinate does not relieve his superior of criminal liability 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.[14]

The Rome Statute for the International Criminal Court provides the most recent international codification of command responsibility doctrine. The Rome Statute vests the International Criminal Court (ICC) with jurisdiction for cases involving genocide, crimes against humanity, war crimes, and the crime of aggression. Article 28 of the Rome Statute is entitled ''Responsibility of Commanders and Other Superiors'' and provides:

> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

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[13] *Id.* at Article 87 (1), (3).
[14] S.C. Res. 808, U.N. Doc. S./RES/808, at 15 (May 3, 1993). The equivalent provision of the Statute of the ICTR is located in Art 6 (3) of S.C. Res. 995, U.N. Doc. S./RES/955, at 5 (Nov. 8, 1994).

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

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

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

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

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

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[15]

The Rome Statute explicitly provides that a culpable commander ''shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control.'' This is a reflection of the traditional scope of command responsibility, holding the commander accountable not merely for a dereliction, but for the offenses caused by that dereliction. Since Yamashita, this concept has been a key component of the doctrine but the Rome Statute is the first specific codification of this imputed liability theory under international law.

B. Command Responsibility and the Role of the Commander in Military Justice

[15] The Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, *reprinted in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: MATERIALS, at 3 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002) [hereinafter ROME STATUTE: MATERIALS].

The doctrine of command responsibility reflected in both customary law and various international treaties and statues, has important implications for the role of the commander with respect to military justice. Commanders are expected to control the forces under their command. They are expected to train their forces to comply with the laws of war, to assert positive leadership over their forces and to be fully engaged in combat operations. Most importantly commanders must prevent, suppress, and punish the forces under their command for law of war violations. Commanders who fail in any of these duties, ether due to negligence or willful blindness, may be held personally liable for the crimes committed by their subordinate forces.

If reforms and efforts to civilianize military justice systems reduce the commander's role in the system, what are the consequences to his liability under the doctrine of command responsibility? If commanders lose a significant portion of the disciplinary authority, do they no longer occupy that critical position of responsibility over the forces under their command? Recent efforts to reform military justice based on human rights and separation of power principles have not focused on the way in which these reforms could impact on the commander's obligations with respect to the law of armed conflict and the doctrine of command responsibility.

III. Reform Efforts and the Essence of Command

In many jurisdictions, reforms to military justice have occurred in response to judicial decisions. The cases which have sparked these reforms have focused almost exclusively on comparing military justice systems to their civilian counterparts. This civilian focus can be seen most clearly in the reforms themselves. In Canada and the United Kingdom for example, the commander has been essentially removed from the charging and convening process. These functions are now performed by offices independent from the commander. Similarly, calls for

reform in the United States and Australia seek to give military judges more authority and independence; the kind of authority and independence that judges in civilian courts enjoy. In addition, reformers in the United States want to abolish summary courts because of the control and influence the commander has over the process. These and other reforms appear designed to remove the commander from the military justice process because of concerns about command influence and the unfairness it might cause.

There is little indication, however, that courts and reformers gave much if any consideration to the impact of reforms on the commander's responsibilities under the law of armed conflict. The opinions in the European Court of Human Rights and in the Canadian Supreme Court make no mention of the doctrine of command responsibility or the obligations of commanders.[16] Nor do these cases consider how the military justice system and the commander's involvement in that system can aid the commander in meeting these obligations. The failure to directly consider the impact of reforms on command responsibility does not necessarily invalidate reforms to military justice but disregarding or ignoring the relationship between military justice and the commander's obligations under the law of armed conflict can have unintended consequences. Many questions relating to command responsibility are raised by reforms to military justice. Can prosecutors or judges be held criminally liable if they either fail to prosecute or convene a court-martial to try service members for law of war violations? Must these, or similarly situated, officials be consulted and involved in the training of service

[16] Could you provide reference to a couple of relevant cases as example of this point here, eg R. v. Généreux, [1992] 1 S.C.R. 259, 286 (Can.), ECHR cases? Findlay v. United Kingdom, App. No. 2210/93, 24 Eur. H.R. Rep. 221 (1997)?

members and in the planning of military operations because they now have the responsibility for prosecuting and convening courts for law of war violations? Is the commander, who has lost some authority by losing the ability to maintain discipline through the military justice system, in a situation where he or she is given responsibility to maintain discipline and control without having sufficient authority to meet that obligation? Is the commander still likely to be held criminally liable for failings that are now beyond his control? Are the military forces less likely to respect and abide by the directions and commands of an officer who they know has little ability to punish them for their misconduct? What are the essential roles that a commander must perform in military justice? Under the law of armed conflict what are the functions of the commander that cannot be derogated to others?

If the commander is accountable for taking all reasonable and necessary measures to prevent, suppress and punish war crimes committed by subordinate forces, and also has an affirmative duty to know what subordinate forces are doing during military operations, certain obligations are non-delegable. These include disciplining subordinates and understanding both the context of misconduct and its impact on order and discipline within the unit, establishing and modeling respect for the rule of law, specifically the obligations of the law of armed conflict, training subordinates on law of war compliance, and ensuring that operations are conducted in compliance with the law of armed conflict. These represent the core functions of command as it relates to compliance with the law of armed conflict. Each function will be examined separately.

A. The Commander as the Source of Discipline

As the commander is potentially responsible for the war crimes committed by subordinates, the commander must possess the ability to discipline those subordinates in order to

prevent, suppress and punish law of war violations. Without this ability, any demands imposed by the commander to abide by the law will ring hollow. Subordinates who are not accountable to the commander have little incentive to comply with orders to conduct military operations in accordance with the law. Even in the best of times, it can be challenging for the commander to get his subordinates to comply with all legal requirements through the tenants of positive leadership alone. For at least some members of the military unit, only the possibility of criminal and other disciplinary sanctions will provide the incentives for them to obey. These challenges are exacerbated during military operations, so it is essential that the commander has disciplinary authority which subordinates know can be enforced.

The commander is often also in the best position to understand the context in which alleged misconduct took place. There is certainly the real risk that commanders may seek to cover-up misconduct out of fear that it will bring disrepute to the unit or subject the unit to additional investigations. That does not mean that commanders lack the ability and responsibility for putting potential misconduct in its proper context or applying the disciplinary tools that will best ensure good order and discipline. At times, for example, commanders may rightly employ severe disciplinary tools because they identify a danger that others in the unit will engage in similar misconduct. At other times, the commander may realize that a severe response is unwarranted due to mitigating factors that arise in combat.

The ability to assess the impact of a a service member's alleged misconduct on unit cohesion is an essential part of what it means to be a commander. This responsibility cannot be delegated because the commander is in the unique position of ensuring good order and discipline within the ranks of his subordinate forces. The primary reason for the command responsibility

doctrine is to identify the commander as the one person in the military unit who can best assure law of war compliance. If the disciplinary tools are taken away from the commander so this authority can no longer be exercise, the commander has the responsibility for ensuring compliance but not the necessary authority to carry out those obligations.

B. Establishing and Modeling Respect for the Rule of Law

In addition to disciplinary authority, commanders can best ensure law of war compliance through positive leadership, modeling appropriate respect for the rule of law in the commander's own conduct. This modeling occurs in several ways. The most obvious is in training and preparing forces to comply with the laws of war in the context of military operations. Perhaps the least effective way to accomplish this is to simply ask the unit's legal advisor to brief members of the command on the requirements of the law of war. Commanders who opt for this approach may meet the minimal requirements but will do little to help their unit understand the application of the law. Such commanders also send a message to the unit that they view these rules as obligations with which the military is forced to comply. Worse still are commanders who denigrate these obligations to subordinates. Telford Taylor, the United States chief prosecutor at the Nuremberg tribunals said of this kind of training, "Of what use is an hour or two of lectures on the Geneva Conventions if the solider sent into combat sees them flouted on every side?"[17] On the other hand, commanders who understand both the legal obligations and the rationale behind them will seek to provide robust, contextualized and realistic training to subordinates. The commander will look for opportunities to raise law of war compliance issues

[17] Telford Taylor, *Nuremberg in Son My*, N.Y. TIMES, November 21, 1970.

throughout the full spectrum of military operations and demonstrate the importance of following the law.

Regardless of the approach a particular commander takes, the point is simply that the commander holds a unique position within the unit and can do more than any other single official to either create an environment where compliance with LOAC is a fundamental aspect of every military operation, or the commander can create an environment where compliance with the law of war is an external obligation that is seen to conflict with mission accomplishment. The responsibility for setting the tone on this issue cannot be delegated. The command responsibility doctrine recognizes that essential aspect of command. If the military justice system does not support the commander's ability to set the appropriate tone for law of war compliance, there is a risk that subordinates will disregard their legal obligations.

C. Ensuring that Operations are Conducted in Compliance with the Law of Armed Conflict

In addition to establishing and modeling respect for the rule of law, the commander is ultimately responsible to ensure that all military operations comply with the laws of war. It will never be easy for commanders operating in a combat environment to place a high priority on law of war compliance, but they are expected to do precisely that. Among all of the competing demands placed on a commander, law of war compliance must be a top priority. That is the rationale behind the command responsibility doctrine. By holding the commander responsible and accountable for preventing, suppressing, and punishing law of war violations, the doctrine encourages the commander to make law of war compliance a key component of any military operation. Military justice reforms must not unintentionally remove that incentive or dilute the

applicability of the command responsibility doctrine. The primary responsibility of ensuring law of war compliance cannot be delegated to anyone else in the military unit. If law of war compliance is not a top priority for the commander, it will not be a top priority for the military unit.

IV. Essential Areas of Involvement

In light of the critical role that the commander must play in ensuring law of war compliance and the responsibilities that cannot be delegated to others, the critical question, and the one that has not yet been fully explored by most reformers is: in what ways can a military justice system be reformed while preserving these essential aspects of command? This section explores this question by focusing on a number of proposed reforms to the military justice system in the United States. As noted above, some of these reforms have already been adopted by other countries. In those instances the question is whether some of these reforms should be reconsidered.

This section examines five areas that have been the focus of advocates for reform in the United States. These are: the commander's investigating authority; the commander's role in convening courts-martial and exercising clemency; summary courts and the commander's ability to impose summary punishment; the role for military judges in the pre-referral phase of a court-martial; and tenure for military judges. There are certainly other possible reforms but these particular functions are ones where the commander has the greatest involvement in the process and serve as intersections between military justice reform and the commander's obligations under the law of armed conflict.

A. The Commander's Investigating Authority

In many military justice systems the commander has the authority to initiate and conduct investigations into misconduct within the unit. US commanders typically appoint an investigating officer within the unit to investigate allegations of misconduct. Serious allegations of misconduct are usually investigated by military professionals trained in criminal investigations. These criminal investigations do not require the unit commander's approval before they are initiated. In either case, once the investigations are completed, reports are provided to the commander.

A system that relies so heavily on the commander's authorization before investigations into misconduct can be initiated is subject to manipulation and potential cover-up by the initiating commander. There are modern examples from the My Lai massacre in Vietnam to the killing of Iraqi civilians in Haditha during the Iraq war where allegations of command cover-up and inaction surfaced. These and similar cases have led to calls for the removal of the commander from the investigative process. Under these proposed reforms the commander of the unit involved in the alleged misconduct would not be responsible for initiating or conducting investigations. This investigative function would be passed to another office outside the unit's command structure, such as a centralized office of military prosecutions.

Such reforms have the advantage of removing those who might have the most at stake personally and professionally from initiating and conducting investigations. This might lead to greater independence and reduce the risk that allegations of misconduct will go unreported and uninvestigated. However, completely removing the commander from the investigative process can conflict with the commander's command responsibility obligations to prevent, suppress and

punish law of war violations. Having the authority to investigate allegations is critical to suppressing and punishing these violations. As commanders can be held criminally liable for failing to suppress and punish offences, they arguably have a greater incentive to ensure that credible allegations are investigated. A responsible commander is likely to be keener than one who has no command responsibility to initiate investigations and discover the relevant facts. Completely removing the commander from the investigative process violates a fundamental principle of the command responsibility doctrine and removes the incentive for the commander to meeting relevant obligations under the law of armed conflict.

This is not to suggest that the commander must be the sole authority to initiate and conduct investigations. The risk of command cover-ups always exists, even if the commander could ultimately be held liable for the crimes because of the concealment. The best approach is to give commanders the authority and responsibility to conduct investigations, but also vest investigative authority into offices outside the chain of command. This hybrid approach addresses the risk of command cover-up while still encouraging he commander to take personal responsibility to investigate allegations of misconduct. Investigative responsibilities could be either shared in any number of ways, or investigations could be conducted simultaneously.[18]

B. The Commander's Role as the Convening Authority

1. The Charging Decision

[18] Simultaneous investigations often occur in the United States military, particularly in very serious cases. In the Abu Ghraib abuse cases for example, multiple investigations by the Congress, the Department of Defense, the Department of the Army, and military criminal investigators, took place at the same time.

Closely related to the removal of the commander from the investigative process are reforms that remove commanders from playing a role in the process for charging an alleged offender or the process of convening a court-martial to try the accused service member. These charging and convening authorities have been taken from the commander and given to other offices outside of the chain of command. Such reforms are said to provide the accused service member with a more independent tribunal free from undue influences of the military commander. These were at the heart of the reforms in both Canada[19] and the United Kingdom [20]and are high on the agenda for reform advocates in the United States.

The most significant responsibility a commander/convening authority possesses under the United States' Uniform Code of Military Justice is the convening authority's ultimate responsibility for deciding the disposition of a case.[21] It is the convening authority alone who decides if a service member should be tried and if so, what level of court-martial should be convened to try the alleged offender. Although the convening authority is required to make this decision only after consulting with a legal advisor, the ultimate decision rests with the commander and it cannot be delegated to others within the chain of command.

If the commander is to continue to be the source of discipline within the unit, the authority to convene courts-martial should not be given to some other office or authority. Removing the commander from this essential function risks undermining the commander's authority and violate the principles of command responsibility. It is critical for the commander

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[19] Jerry S.T. Pitzul & John C. Maguire, A Perspective on Canada's Code of Service Discipline, 52 A.F. L. REV. 1, 9 (2002).
[20] Simon P. Rowlinson, The British System of Military Justice, 52 A.F. L. REV. 17, 18-19 (2002).
10 U.S.C. § 815 (2000).

to have final responsibility for imposing discipline within the unit and this requires that the commander to convene courts-martial. Simply having input into the convening determination or having the ability to refer cases to some other office is not sufficient. Imagine if the commander believes alleged misconduct within the unit warrants a court-martial but the office in charge of convening a court-martial disagrees and elects to take no action. Such a scenario would seriously undermine the commander's authority. Members of the unit might in the future question or doubt whether the commander has the ability to punish them or initiate disciplinary proceedings against them. How can commanders prevent, suppress, and punish law of war violations as required under the command responsibility doctrine if their subordinates doubt their disciplinary authority? The authority to convene courts-martial is such a fundamental aspect of discipline and command authority that it cannot be taken away from the commander without undermining the command responsibility doctrine under the law of armed conflict.

While it is essential that the commander has the authority to convene courts-martial, many of the convening authority's other functions can and should be given to other offices outside of the chain of command. In the United States' system the convening authority has additional responsibilities, such as personally selecting the court members who will sit in judgment of the accused service member, deciding witness funding and availability issues, the authority to approve court-martial findings imposing sentences and exercising clemency on behalf of a service member. I will address these additional responsibilities in turn.

2. Court Member Selection

The first, and by far the most controversial power that a convening authority has under the United States military code is selecting those who will serve as the court members that sit in

judgment of the accused service member. This power was contentious when it was codified in the UCMJ and that criticism has continued.[22] It is not surprising that reformers have focused on this issue. It is not difficult to imagine a convening authority that could manipulate or unduly influence the outcome of a court-martial by using the authority to choose those members who will be inclined to see the case in a similar way rather than deciding the case on its merits. While there are few reported cases of commander's overtly manipulating the process, the risk is real.

This provision of the UCMJ has long been a target for reformers but the military has been resistant to change. The military's arguments focus primarily on the logistical challenges of abandoning the current system for a system of random selection. There are undoubtedly some significant logistical and other challenges that would come with any reform but the important question is whether the commander's personal selection of the court members is such an essential aspect of command that its removal would undermine command responsibilities. It is difficult to see how choosing the members of a court-martial facilitates the commander's responsibilities to prevent, suppress, and punish service members for law of war violations. There does not appear to be a strong nexus between this power and command responsibilities. Accordingly, transferring this power from commanders to independent offices seems justified.

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[22] *See* Lederer & Hundley, *supra* note 110, at 646; *see also* Major Guy P. Glazier, *He Called for His Pipe, And He Called for His Bowl, And He Called for His Members Three – Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 1 (1998); Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 SW. U. L. REV. 481, 534-41 (1999) (calling for virtual abolition of the military justice system except in time of war or other overseas deployments); Matthew J. McCormack, Comment, *Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders and Military Justice*, 7 GEO. MASON L. REV. 1013, 1049-51 (1999) (arguing that the military should remove the convening authority's power to handpick court-martial panel members); Lindsy Nicole Alleman, Note, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT'L L. 169, 190-92 (2006) (suggesting a random selection method for choosing panel member that is tailored to meet needs of U.S. military).

3. Witness Funding

Convening authorities in the United States also enjoy considerable discretionary power over witness funding.[23] Before a service member's charges are referred to a court-martial the convening authority's decisions are not subject to review or appeal. Once the case is referred to trial, if the military judge determines that the convening authority's denial of witness funding is not justified, the military judge can abate the proceedings until the funds are made available. As with selecting court members, decisions regarding witness funding are administrative in nature. There is nothing in the nature of command that gives the commander any special insight into funding issues. These decisions do not go to the essence of command, and there is some risk that a commander could manipulate witness funding in order to inappropriately influence the trial. Reforms that give this authority to someone other than commanders do not prevent the commander from meeting their responsibility to prevent, suppress, and punish war crimes.

4. Approval Authority and Clemency

After the conclusion of a court-martial, no conviction or punishment is final until the findings and sentence are approved by the convening authority. Before the convening authority takes final action, it must first review the record of trial and obtain advice from a legal advisor on the factual and legal correctness of the findings and sentence.[24] The convening authority may dismiss any charge or specification by setting aside findings of guilt, change the findings of guilt

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Rule for Courts-Martial (R.C.M.) 703(d). In some regards, the convening authority's power to fund and authorize witness employment and travel is limited by the military judge's ability to abate the proceedings if the convening authority refuses to fund a witness that the military judge has deemed essential to the case. Nevertheless, obtaining the convening authority's authorization for witness funding is not a mere formality, and the convening authority's use of the power of the purse can certainly have an impact on the trial.

10 U.S.C. § 860(c)(1)-(2) (2000).

to a lesser included offense, modify the sentence to any lesser sentence, or order a proceeding in revision or rehearing.[25] A finding of not guilty cannot be reconsidered. The convening authority can also grant clemency to the service member and has a broad discretion on the form of any clemency.[26]

Reform efforts that remove the commander from the charging and referral process also would take away the commander's authority to approve the court-martial findings or to exercise clemency on behalf of a convicted service member. This authority is more than an administrative function and like the charging decision, goes to the essence of command. Commanders are in a position to place misconduct in the broader context of order and discipline within the unit. A commander is best suited to appreciate the overall tenor within a unit and understand how exercising clemency in a particular case will impact both the service member and the unit. Clemency decisions can have a direct relationship to how the commander will prevent, suppress, and punish law of war violations. A commander who abuses this authority and fails to meaningfully punish violations can create an atmosphere of indiscipline within the unit and therefore increase the risk that subordinates will not take their obligations seriously enough to abide by the laws and customs of war. Similarly, commanders who are overly harsh can create resentment within the unit and a belief that they act arbitrarily and unfairly. This too can lead to a lack of discipline.

See id. § 860(c)(3)(A).
Id. § 860(e)(2)(A).

If such decisions are passed to someone other than the commander then they will be made by an official who does not have the key insights of the commander. It also undermines the commander's ability to exercise appropriate control over subordinates. Reforms that take away the commander's ability to exercise appropriate control are inconsistent with the principles of command responsibility and should be rejected.

5. Summary Courts

A number of military systems contain summary courts-martial or similar proceedings, which allow commanders to take swift disciplinary action. In the U. S. commanders at medium and high levels of command have the authority to convene summary courts. These courts are quite limited in the types of punishment that can be imposed.[27] Critics of the summary court system point to the minimal procedural protections and the risk of undue command influence.[28]

In some sense these summary courts are anachronistic and come from a bygone era but summary proceedings can assist the commander in maintaining discipline. Some cases clearly warrant swift action. One is a combat environment, where the commander may need to quickly address misconduct to prevent the spread of indiscipline. The time and resources may simply not be available for a more formal proceeding. In those instances, summary courts are an effective tool for the commander to maintain discipline. This tool can support and enhance the commander's ability to prevent, suppress, and punish war crimes.

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10 U.S.C. § 820 (2000).

See, e.g., John S. Cooke, The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X, 156 MIL. L. REV. 1 (1998), Cox Commission, National Institute of Military Justice, Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice 2 (May 2001), available at http://www.nimj.org/documents/Cox_Comm_Report.pdf.

There should be appropriate limits on this authority to prevent the commander from abusing the power. If summary courts determine only relatively minor offenses and impose limited punishments, their use could strike the right balance between supporting the commander's responsibilities while also protecting service members from the more serious consequences that might flow from unfair or arbitrary action. Reforms that completely remove the commander's authority to convene summary courts would go too far.

C. The Role for Military Judges in the Pre-Referral Phase

Courts-martial are ad hoc tribunals available in numerous military justice systems around the world. Civilian systems typically have permanent courts and sitting judges to whom an accused can petition throughout the pre-trial and trial phase of a case. In military systems, there is no such authority until a court is actually convened. In the United States before a case is referred to a court-martial the convening authority has the ultimate authority to decide and rule on all issues[29] and such decisions are virtually absolute until the case is referred to trial and the issues can be brought before a military judge. This is particularly true for witness availability and pre-trial resource issues. This system can be problematic and unfair to service members. For example, service members who want assistance from an independent investigator to investigate or analyze evidence or interview witnesses before a case is referred to trial must request these resources from the convening authority.[30] In order to demonstrate the necessity for assistance, the defense must often reveal case strategy and other case-sensitive information to the convening authority and to the legal advisor. The convening authority has the sole

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See, Rule for Courts-Martial (R.C.M.) 306; (R.C.M.) 401.
R.C.M. 703(d) & (e).

responsibility for deciding these questions and typically does so after obtaining advice from a legal advisor, who is the same officer who supervises the prosecution of the case. Under this system, it can be difficult for the defense to obtain independent consideration of the issues. Waiting until the case is referred to trial so that the request can be made to the military judge might be too late, particularly when the issues involve investigatory resources.

Given the potential for unfairness, this area is ripe for reform. Such reform would not impact on the commander's essential responsibilities to maintain order and discipline over the forces. One logical reform is to expand the role of military judges, enabling them to decide these issues even before the case is actually referred to a court-martial. Allowing military judges to decide such issues would ensure that someone with legal training, and intimate knowledge of both the rules and the legal precedents, decide important procedural decisions. Such changes would also streamline the trial process and prevent relitigation of the issues once cases are referred to a court-martial. The involvement of a decision maker who was independent of the chain of command would also facilitate greater overall fairness within the system. Transferring this authority from the commander to a military judge does not undermine the commander's responsibility or authority. The commander is not precluded from exercising disciplinary responsibilities but is instead relieved from the burden of deciding technical legal issues and can therefore focus attention on matters of command.

D. Tenure for Military Judges

One final reform that has featured in both Canada and the United Kingdom is granting military judges a greater degree of independence from the chain of command and the executive.[31] There have been also been calls for some type of tenure for US military judges, to give them the independence needed to decide issues and cases without fear of professional retribution by the command or the executive. Providing a more independent military judiciary would not adversely impact on the commander's ability to legitimately maintain order and discipline. Military justice must balance maintaining discipline and order and preserving fundamental fairness for the accused service member. If the commander can manipulate the system by sanctioning or adversely affecting a military judge's career, or be perceived to exercise that influence, there will be a chilling effect on judicial independence and undermine confidence in the system. The often stated rule of civilian legal systems, that justice must be done but also be seen to be done, has equal force in the military. Widespread distrust of military justice in a unit can undermine discipline in the same way as a lax command climate would. Commanders do not lose their legitimate authority when military judges are given meaningful independence and are free to decide issues and cases without undue influence from the commander.

Conclusion

Over the past 20 years there has been a virtual revolution in military justice. One overarching theme of these changes is increasingly alignment of military justice to prevailing civilian standards. While the United States was at the forefront of military justice reform in the

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(yes), Findlay v. United Kingdom, 24 Eur. H.R. Rep. 221 (1997); Simon P. Rowlinson, The British System of Military Justice, 52 A.F. L. REV. 17, 18-19 (2002).

years following World War II, many reformers in the United States now look with envy to the civilianization that has taken place elsewhere and advocate similar reforms.

In the push to modernize and civilianize military justice, the important reasons why military justice is separate from the civilian system should not be forgotten. A significant reason for a separate and different system is the obligations the law of armed conflict places on the military commander to ensure order and discipline within the military unit and to prevent, suppress and punish war crimes. Reforms to military justice should not undermine the commander's authority and responsibility to ensure law of war compliance. After all, no other office or official to take the place of the commander can meet these obligations. This paper has looked at a number of proposed reforms. Many of these changes have already been implemented in other systems and are at the top of the list for reform advocates in the United States. Courts and legislative bodies must engage in careful analysis to ensure that changes do not have unintended consequences. This discussion and analysis has been generally absent in reform efforts and proposals moving forward must embrace the concept of command responsibility before any significant structural changes are made to the current military justice system.