THE MASS GRAVES AT DASHT-E LEILI: ASSESSING U.S. LIABILITY FOR HUMAN RIGHTS VIOLATIONS DURING THE WAR IN AFGHANISTAN

I. INTRODUCTION

International law recognizes that commanders and states may be held liable for acts of omission.[1] The fact that a commander or a state did not actually commit a given violation of international law does not always mean that the commander or state is wholly free of liability. That is, if a commander knew that violations were occurring and had the power to stop them, the commander could be held liable for failing to prevent the violations from occurring. Similarly, there are instances in which a state could be held responsible for its failure to act.

In November 2001, a group of investigators from Physicians for Human Rights found mass graves in Dasht-e Leili, Afghanistan.[2] Evidence indicates that these were the graves of hundreds, if not thousands, of men, and while not proven conclusively, that the United States may have had the opportunity to save these men's lives, but chose not to do so.[3] This comment discusses U.S. liability under international human rights law for acts of omission. Part I provides the historical background of human rights violations surrounding the mass graves that were found in Afghanistan in November 2001. Part II focuses on command responsibility, analyzing when commanders may be held liable for acts of omission under international law and how this issue has been examined by international courts and tribunals. Part III does the same in regard to state liability. Finally, Part IV applies these concepts to the United States, and assesses whether the United States could be held liable under international law for failing to prevent the deaths in Afghanistan.

1. *See, e.g.*, 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, at xiv (James Brown Scott ed. & Francis W. Kelsey trans., Oceana Publications 1964).

2. Babak Dehghanpisheh et al., *The Death Convoy of Afghanistan*, NEWSWEEK, Aug. 26, 2002, at 29.

3. *See id.* at 23.

II. HISTORICAL BACKGROUND

The Afghani execution chambers measured 8 feet by 8 feet by 40 feet.[4] In 1997, members of the Taliban died in them.[5] In 1998, it was their enemies' turn.[6] In November 2001, it was the Taliban's turn to die in these chambers once again.[7] The execution chambers had originally been used as foreign aid containers, that is, they were used by foreign countries to send care packages and humanitarian supplies to Afghanistan.[8] However, in 1997, Uzbek general, Malik Pahlawan, found a more sinister, equally efficient, use for them.[9] When he first used the containers in 1997, all of the 1,250 prisoners he stuffed into them were charred to a crisp.[10] "Death by container" is the way that some refer to this form of mass murder.[11]

Unlike the prisoners who were killed in 1997, the prisoners who were crammed into the containers in November 2001—up to 300 people in each[12]—were not "grilled black."[13] Although it was warm, the November temperatures in Afghanistan did not lead to such death by intense heat;[14] instead, the prisoners were slowly strangled to death from the lack of oxygen in the cramped containers.[15] According to Bill Haglund, an investigator for Physicians for Human Rights who discovered the freshly bulldozed mass graves of the suffocated prisoners, "[t]he victims were all young men, and their bodies showed 'no overt trauma'—no gunshot wounds, no blows from blunt instruments . . . [which is] 'consistent' with the survivors' stories of death by asphyxiation."[16] The prisoners who actually survived the transports suffered immensely during the trip. Some chewed each other's skin to quench their thirst.[17] Others were lucky enough to be given air and water by truck drivers who were conscripted to transport the containers from Konduz to the prison at Sherberghan near Dasht-e Leili.[18] The drivers gave the pris-

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4. *Id.* at 27.

5. In 1997, Uzbek general, Malik Pahlawan, decided to turn international aid containers into infernos. *See id.*

6. *Id.*

7. Claus Christian Malzahn, *Afghanistan: Die Todeswüste des Generals*, Spiegel Online, Aug. 05, 2002, *at* http://www.spiegel.de/spiegel.

8. *Id.*

9. Dehghanpisheh et al., *supra* note 2, at 27.

10. *Id.*

11. *Id.*

12. Marianne Wellershoff, *"Das Massaker von Afghanistan" Tote kann man nicht aufrechnen*, Spiegel Online, Dec. 19, 2002, *at* http://www.spiegel.de/kultur/gesellschaft.

13. Dehghanpisheh et al., *supra* note 2, at 27.

14. Malzahn, *supra* note 7.

15. *Id.*

16. Dehghanpisheh et al., *supra* note 2, at 22-23.

17. Ingo Stawitz, *Kriegsverbrechen unter US-Schutz*, Bündis Rechts, Aug. 23, 2002, *at* http://www.wno.org/newspages/pol55.html.

18. *Id.*

oners air by drilling holes into the containers.[19] Drilling holes into the sides of the containers was not just a showing of humanitarian concern, it was an act of bravery. Disobeying orders to ignore the prisoners' pleas or creating air holes for them could result in dire consequences. For example, at least one truck driver was publicly beaten with rifle butts by five men for disobeying such orders.[20]

It may never be known exactly how many men died during their confinement in the containers. Some refuse to speculate on the death toll.[21] Those who do speculate give a wide range of estimates. For example, Iren Jamie Doran, a documentary filmmaker who made a film that was aired on the German news channel, ARD, estimated that over 3,000 people died.[22] His estimate included those who actually died in the containers, and those wounded and unconscious men who were allegedly shot by Northern Alliance soldiers upon reaching Sherberghan.[23] In a confidential U.N. memorandum, a witness estimated that 960 people died.[24] The director of the Afghan Organization of Human Rights, Aziz ur Rahman Razekh, is confident that over 1,000 people were killed in the containers.[25] Similarly, a report prepared by Physicians for Human Rights noted that there may be more than 2,000 victims, but said the organization was unable to verify the death toll without exhuming the bodies from the mass graves.[26] Even the perpetrators of the tragedy acknowledge that men died during the transports.[27] Northern Alliance General Abdul Rashid Dostum was in charge of monitoring the surrender of the Taliban troops and their subsequent transfer to Mazar-e Sharif.[28] His spokesperson, Faizullah Zaki, admitted that 100-120 people died in the containers,[29] although Zaki added that, "[the prisoners] suffocated. Died, not killed. Nobody killed anybody."[30]

Even if it is true that nobody intentionally killed anyone, is this really a satisfactory conclusion to the whole story? Or, should there be an investigation to determine whether someone was in the position to prevent these deaths from happening in the first place? If so, would that person be obliged under international law to try to prevent the deaths? What if the party responsible was the United States military? In such a case, could the United

19. *Id.*
20. Dehghanpisheh et al., *supra* note 2, at 27.
21. *See id.* at 23.
22. Wellershoff, *supra* note 12.
23. *Id.*
24. Dehghanpisheh et al., *supra* note 2, at 24.
25. *Id.*
26. Physicians for Human Rights, *Preliminary Assessment of Alleged Mass Gravesites in the Area of Mazar-I-Sharif, Afghanistan: January 16-21 and February 7-14, available at* http://www.phrusa.org/research/afghanistan/report_graves.html (last visited Apr. 6, 2003).
27. *See* Dehghanpisheh et al., *supra* note 2, at 25.
28. *Id.*
29. *Id.*
30. *Id.*

States be deemed responsible for these "deaths by container"?[31] If it could be ascertained that the U.S., or a U.S. military commander, knew about the containers and the hazards they posed, would the military commander or the U.S. be liable for the deaths in Afghanistan?

According to articles published by "Newsweek," the German magazines "Spiegel" and "Bündis Rechts," the United States military was in the area at the time the deaths occurred.[32] Although no evidence suggests that American forces had advance notice of the deaths, or that they witnessed the containers being loaded or unloaded, it is doubtful that they were totally unaware of the container transports and the high mortality rate associated with them.[33] Despite protests by U.S. officials that the U.S. knew nothing about the atrocities, some believe that U.S. service members witnessed the deaths.[34] To support this contention, some cite the fact that the 595 A-team from the Fifth Special Forces Group based at Fort Campbell, Kentucky, led by Captain Mark D. Nutsch, was "the crucial link between the Northern Alliance militia on the ground and U.S. firepower in the air."[35] The 595 A-team was also the unit that was assigned to work with General Dostum.[36] In fact, the team was with General Dostum during the surrender negotiations of the men who later died in the containers.[37] Members of the team were also present during the surrender of the men at Konduz,[38] and were in the vicinity of the Sherberghan prison when the containers started to arrive.[39] It is possible that members of the A-team even knew that large numbers of people died during the transport.[40] If these reports and allegations could be substantiated, could the U.S. be held liable under international human rights law for acts of omission during the Afghanistan conflict? Could Captain Mark D. Nutsch, the leader of the 595 A-team from the Fifth Special Forces Group, be held responsible for acts of omission during the war?

III. COMMAND RESPONSIBILITY

International law recognizes that acts of omission may be punishable offenses. Specifically, the doctrine of command responsibility demonstrates

31. Dehghanpisheh et al., *supra* note 2.

32. *Id.*; Malzahn, *supra* note 7; Ingo Stawitz, *supra* note 17.

33. Pentagon speaker, Dave Lapan, said that the Pentagon position is that there is no evidence that the troops participated in the killings, knew of the killings, or were present during the killings. Susanne Koelbl, *Kriegsverbrechen: Tod im Container*, Spiegel Online, Dec. 16, 2002, *at* http://www.spiegel.de/politik/ausland.

34. Nicole Janz, *Europa-Parlament startet Untersuchung*, Spiegel Online, June 25, 2002, *at* http://www.spiegel.de/politik/ausland.

35. Dehghanpisheh et al., *supra* note 2.

36. Stawitz, *supra* note 17.

37. *Id.*

38. *Id.*

39. *Id.*

40. Dehghanpisheh et al., *supra* note 2.

that a commanding officer can be held liable for the acts of another or, alternatively, for failing to prevent another from committing an illegal act.[41] Therefore, under the doctrine of command responsibility, a military commander may be held liable for the actions of those under his control.

A. Liability for Acts of Omission Under International Law

International law has long recognized that acts of omission are punishable offenses. For example, Hugo Grotius wrote one of the first treatises on international law in the early seventeenth century,[42] and in his treatise, Grotius questioned when punishments could be "shared."[43] He found that one need not personally inflict the damage to be at fault for a given wrong.[44]

> Therefore, those who order a wicked act, or who grant to it the necessary consent, or who aid it, or who furnish asylum, or those who in any other way share in the crime itself; those who give advise, who praise or approve; those who do not forbid such an act although bound by law properly so called to forbid it, or those who do not bring aid to the injured although bound to do so by the same law; those who do not dissuade when they ought to dissuade; those who conceal the fact which they are bound by some law to make known—all these may be punished, if there is in them evil intent sufficiently to deserve punishment.[45]

He later noted that those who have control over others commit a crime if they either tolerate the crimes of those under their control or give refuge to the perpetrators of such crimes.[46] This liability only attaches, however, when the person in control could have prevented such crimes from being committed.[47]

The 1907 Hague Conventions also contain Articles that define the responsibility of commanding officers for the acts of those under their control. For example, Article 3 of the Hague Convention (IV), Convention Respecting the Laws and Customs of War on Land, reads: "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."[48]

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41. As discussed below, such liability has also been extended to civilians who exercise command and control over others.

42. GROTIUS, *supra* note 1, at xiv.

43. *Id.* at 522.

44. *Id.*

45. *Id.* at 522-23.

46. *Id.* at 523.

47. *Id.* at 524.

48. James Brown Scott, *The Proceedings of the Hague Peace Conferences*, I THE CONFERENCE OF 1907 621 (2000) (translation of the official texts) (prepared in the Division of International Law of the Carnegie Endowment for International Peace).

Following World War I, a Preliminary Peace Conference was held on January 25, 1919.[49] The Commission was formed to determine, among other things, who should be responsible for the war, which laws of war had been breached by the German government, and whether German leaders could be held responsible for war offenses.[50] Regarding command responsibility for acts of omission, the American delegation asserted that an individual could be held responsible if that person had knowledge about the commission of the crime, and the authority to stop the crime from being committed.[51] They added that "[n]either knowledge of commission nor ability to prevent is alone sufficient. The duty or obligation to act is essential. They must exist in conjunction, and a standard of liability which does not include them all is rejected."[52] Thus, liability for acts of omission attaches when a commander knows that people under his control are committing crimes and has the authority to stop them.

Several decades passed before command responsibility began to be recognized again under international law. Under Geneva Protocol I of 1977, it was determined that a commander could be held responsible for violations of international law perpetuated by his or her subordinates.[53] This liability applies only if the commander knew, or should have known that the crime would be committed and did nothing to prevent the crime from being committed.[54] In addition, Protocol I says that commanders have a duty to prevent their subordinates from breaching international law.[55]

The 1998 Rome Statute of the International Criminal Court also embraces the doctrine of command responsibility.[56] Per the Rome Statute, a

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49. *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J INT'L L. 95 (1920).

50. *Id.*

51. *Id.* at 143.

52. *Id.*

53. Specifically, Article 86(2) of Geneva Protocol I of 1977 reads: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 86(1), 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978).

54. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 86(2), T.I.A.S. No. 17512 (entered into force Dec. 7, 1978) [hereinafter Protocol I].

55. *Id.* art. 87(1) ("The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.").

56. Rome Statute of the International Criminal Court (July 17, 1998), UN Doc. No. A/CONF. 183/9, 37 I.L.M 999, 1017 (entered into force July 1, 2002) [hereinafter Rome Statute].

military or civilian commander can be held liable in the International Criminal Court for the criminal acts of his or her subordinates if the commander knew the act would be committed and did not take reasonable steps to prevent the crime from being committed.[57]

The Rome Statute is the most recent codification of command responsibility under international law. The Rome Statute has both *mens rea* and *actus reus* requirements. Regarding the *mens rea* requirement, a military commander must have had actual or presumed knowledge of the crimes of his or her subordinates in order to be held liable[58] and civilian commanders are held liable when they "consciously disregard[] information which clearly indicate[s] . . . the subordinates were committing or about to commit such crimes."[59] Under both standards, the *mens rea* element is measured at the time the subordinate commits the crime.[60] The *actus reus* requirement is the same for military and civilian commanders. It is satisfied if five criteria are met: (1) the commander must be a military or civilian superior;[61] (2) he or she must have effective command and control over his or her subordinates;[62]

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57. *Id.* Specifically, Article 28 of the Rome Statute reads:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
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> 1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
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> (a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
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> 2. With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and
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> (c) 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.

Id.

58. 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 849 (Antonio Cassese et al. eds., 2002) [hereinafter COMMENTARY].

59. Rome Statute, *supra* note 56, at art. 28.

60. COMMENTARY, *supra* note 58, at 549.

61. *Id.*

62. *Id.*

(3) there must be a causal relation between the commission of crimes by the subordinate and the failure to exercise authority on the part of the commander;[63] (4) the commander must fail to "take the 'necessary and reasonable measures within his or her power'" to prevent the crimes from being committed;[64] and (5) after the crimes have been committed, the commander must fail to prosecute his or her subordinates in the appropriate forum.[65] If all five of these criteria have been met, and the commander has met the *mens rea* requirements of Article 28, the commander can be held liable for the crimes of his or her subordinates.[66]

As this historical overview demonstrates, the doctrine of command responsibility has long been recognized under international law. The doctrine has been recognized in both custom and statute, giving unquestionable precedent to support the conclusion that U.S. Commander Nutsch should be held responsible for the deaths by container if he knew that crimes were being committed, had the power to stop them, but failed to do so.

B. Concepts as Examined by International Courts and Tribunals

In addition to analyzing the statutes pertaining to command responsibility, it is necessary to examine how international courts and tribunals have addressed the statutes in cases brought before them. Tribunals such as the Tokyo and Nuremberg tribunals following World War II, and the International Criminal Tribunals for the Former Yugoslavia and Rwanda have heard various cases regarding command responsibility.[67] The decisions rendered in these tribunals and courts demonstrate how the statutes and rules of command responsibility are implemented in practice.

1. Tribunals for Japan

One of the most notorious cases following World War II was the case of the Commanding General of the Imperial Japanese Army in the Philippine

63. *Id.* at 850.

64. *Id.*

65. *Id.*

66. *See id.* at 849-50.

67. *See, e.g.*, U.N. WAR CRIMES COMMISSION, case no. 21, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1948); U.N. WAR CRIMES COMMISSION, case no. 72, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1948) (Summary: The German High Command Trial: Trial of Wilhelm von Leeb and Thirteen Others) [hereinafter Wilhelm von Leeb]; Prosecutor v. Delalic, ICTY Case No. IT-96-21-T, Trial Chamber Judgment (1998), *reprinted in* 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1997-1999 363 (André Klip & Göran Sluiter eds., 2001); Prosecutor v. Kayishema, Case No.: ICTR-95-1-T, Trial Chamber Judgment (1999), *reprinted in* 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994-1999 555 (André Klip & Göran Sluiter eds., 2001).

Islands, General Tomoyuki Yamashita.[68] General Yamashita was first prosecuted before the United States Military Commission in Manila.[69] The commission noted that the troops under Yamashita's command committed widespread atrocities, such as withholding medical attention and food from prisoners of war, pillaging, burning and destroying homes and buildings, and torturing, raping, and murdering civilians.[70] General Yamashita did not deny these allegations,[71] although he did deny ordering his troops to commit such atrocities[72] or having the "power to discipline, promote, demote or remove members of the naval land forces."[73] He did admit, however, that he was responsible for commanding the prisoner-of-war and civilian internment camps, and that his approval was required before any death sentences could be carried out in them.[74] He also admitted that he never inspected the camps.[75] Ultimately, the commission concluded that:

> [i]t is absurd . . . to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where 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 . . . . [The Commission then addressed General Yamashita by saying:] a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command . . . [and] during the [time] in question you failed to provide effective control of your troops as was required by the circumstances. Accordingly . . . , the Commission finds you guilty as charged and sentences you to death by hanging.[76]

General Yamashita subsequently challenged the decision of the military commission to the Supreme Court of the United States, but the Supreme Court confirmed the decision of the military commission.[77] Consequently, General Yamashita was held liable for failing to prevent his troops from vio-

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68. *In re* Yamashita, 327 U.S. 1 (1946); *see also* U.N. WAR CRIMES COMM'N, CASE NO. 21, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1948) (Summary: Trial of General Tomoyuki Yamashita) [hereinafter Yamashita Summary].

69. *In re* Yamashita, 327 U.S. at 3.

70. *Id.* at 18.

71. *Id.*

72. *Id.* at 22.

73. *Id.* at 21.

74. *Id.* at 23.

75. *Id.* at 22.

76. *Id.* at 35.

77. General Yamashita made several challenges to his conviction before the military commission. Namely, he challenged: (1) the lawfulness of the military commission; (2) that the charges against him were not charges recognized within the laws of war; (3) the jurisdiction and authority of the commission; and (4) the lack of notice. *In re* Yamashita, 327 U.S. at 6.

lating international humanitarian laws under the doctrine of command responsibility.[78]

2. *Tribunals for Germany*

German commanders were also held responsible for the actions of their troops. For example, the United States Military Tribunal at Nuremberg addressed the issue of command responsibility in the trial of Wilhelm von Leeb and thirteen other high-ranking officers of the German Navy and Army.[79] The tribunal noted that "[c]riminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction [of duty]."[80] The tribunal continued by noting that a commander may be in dereliction of duty when the commander fails to "properly supervise his subordinates . . . amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence."[81] The tribunal concluded that a military commander may be held responsible for the acts of his subordinates if he knew the offenses were being committed yet failed to intervene.[82]

Another case regarding the doctrine of command responsibility during the tribunals for Germany concerned a series of events in which subordinates murdered prisoners of war.[83] The court discussed three separate groups of murders committed by troops under Major Karl Rauer's and his fellow officers' control, and analyzed them together to determine what the commanders knew, or should have known, based on the totality of the circumstances of all three groups of murders.[84] The evidence presented at the tribunal showed that after the first incident, a report was issued stating that the prisoners of war were shot while trying to escape.[85] A similar report was issued after the second incident, which occurred close in time to the other shootings.[86] The court found that although the commanders may not have ordered the murders of the prisoners of war, they were responsible for the deaths in the second and third incidents.[87] The reason for this decision was that "it was less reasonable for these officers to believe after the second incident that the prisoners involved were shot while trying to escape than it was after the first, and that measures should have been taken after the first shootings to prevent a

78. *See id.* at 25.
79. Wilhelm von Leeb, *supra* note 67.
80. *Id.* at 76.
81. *Id.*
82. *Id.* at 77.
83. U.N. WAR CRIMES COMMISSION, CASE NO. 23, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 113 (1948) (Summary: Trial of Major Karl Rauer and Six Others) [hereinafter Major Karl Rauer].
84. *Id.*
85. *Id.* at 113-14.
86. *Id.* at 114, 116.
87. *Id.* at 115.

repetition."[88] That is, after hearing that prisoners were shot while trying to escape once, Major Rauer and his fellow officers should have investigated subsequent similar reports because they were more likely to arouse suspicion in a reasonable person than one isolated report.

A cursory overview of cases involving command responsibility during the trials for German war criminals reveals that commanding officers were held responsible for the acts of their subordinates.[89] They were held responsible for failing to intervene when they knew that violations of international law were occurring, as well as for tolerating such violations.[90] The tribunals also noted that disregarding the atrocities committed by a commanding officer's subordinates amounted to acquiescence, and that an officer could be held responsible for failing to prevent those atrocities from occurring.[91] Finally, the tribunals noted that a standard of reasonableness needed to be used to determine whether a commanding officer knew his or her subordinates were violating international law.[92]

3. International Criminal Tribunal for the Former Yugoslavia

The first post-World War II tribunal to be created was the International Criminal Tribunal for the Former Yugoslavia (ICTY).[93] The ICTY was created in 1993 and, as with its predecessors, the ICTY recognized the doctrine of command responsibility.[94]

One example of the ICTY's recognition of the doctrine of command responsibility was in the *Celebici* case, or *Prosecutor v. Delalić*.[95] The *Celebici* case arose out of a series of events, in the middle of 1992, when a group of Bosnian Muslims and Bosnians Croats took over a Serbian village known as Celebici, and turned it into a prison camp.[96] Prisoners in the camp were

88. *Id.* at 117.

89. *See also* U.N. WAR CRIMES COMMISSION, CASE NO. 47, 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34 (1948) (The Hostages Trial: Trial of Wilhelm List and Others).

90. *See* Major Karl Rauer, *supra* note 83, at 113.

91. *See* Wilhelm von Leeb, *supra* note 67, at 76.

92. *See* Major Karl Rauer, *supra* note 83, at 113.

93. Michael P. Scharf, *The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade*, 37 U.S.F. L. REV. 865, 865 (2003).

94. *See, e.g.*, Prosecutor v. Delalic, ICTY Case No. IT-96-21-T, Trial Chamber Judgment (1998), *reprinted in* 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1997-1999 363 (André Klip & Göran Sluiter eds., 2001); Prosecutor v. Aleksovski, ICTY Case No. IT-95-14/1-T, Trial Chamber Judgment (1999), *reprinted in* 4 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA 1999-2000 279 (André Klip & Göran Sluiter eds., 2002).

95. Prosecutor v. Delalic, ICTY Case No. IT-96-21-T, Trial Chamber Judgment (1998), *reprinted in* 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1997-1999, 363 (André Klip & Göran Sluiter eds., 2001).

96. *Id.* at 405.

"killed, tortured, sexually assaulted, beaten, and otherwise subjected to cruel and inhuman treatment."[97] Zejnil Delalic, Zdravko Mucic, Hazim Delic, and Esad Landzo were charged with 49 counts of violations of international law, including charges of rape, murder, torture, and causing serious injury to others.[98] Ultimately, only Zdravko Mucic was found guilty on counts involving command responsibility.[99]

During the case, Mucic and his co-defendants raised several defenses. One defense was that they were civilians, and thus could not be held liable under the doctrine of command responsibility.[100] The court reviewed the case history of the German and Japanese war crimes tribunals and concluded that "the applicability of the principle of superior responsibility in Article 7(3) [of the Statute of the ICTY] extends not only to military commanders but also to individuals in non-military positions of superior authority."[101] Another defense they raised was that they did not have any formal authority to command.[102] The court reviewed the case history again, and found that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.[103]

In the end, Mucic was found guilty under the doctrine of command responsibility regarding acts of murder, torture, causing great suffering or serious injury, and inhumane acts committed by his subordinates.[104] The tribunal found Mucic guilty under the doctrine of command responsibility, because he was the commander of the prison camp for approximately six months,[105] yet he failed to act to prevent the abuses, even though he "was fully aware of the fact that the guards at the Celebici prison-camp were engaged in violations of international humanitarian law."[106] Although Mucic received other separate sentences for crimes he personally committed, the tribunal sentenced him to a combined total of 56 years imprisonment for the crimes he was liable for under the doctrine of command responsibility.[107]

As the *Celebici* case demonstrates, the ICTY recognizes the doctrine of command responsibility.[108] The accused, in such cases, does not need to be a

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97. *Id.* at 653.
98. *Id.* at 653-61.
99. *Id.* at 640-41.
100. *See id.* at 453.
101. *Id.*
102. *See id.* at 456.
103. *Id.* at 457.
104. *Id.*
105. *See id.* at 371-72.
106. *Id.* at 541.
107. *See id.* at 640-41.
108. *See also* Prosecutor v. Aleksovski, ICTY Case No. IT-95-14/1-T, Trial Chamber Judgment (1999), *reprinted in* 4 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA 1999-2000 279 (André Klip & Göran Sluiter eds., 2002).

military commander. Rather, a civilian exercising similar command responsibility may also be held liable under the doctrine.[109] In order to be held responsible, however, the person only needs to have authority, though not necessarily formal authority, over the people who are committing the crimes, such that the commander can give them orders and discipline them for insubordination.[110] In addition, in order to be culpable, the commander must know, or should know, that the crimes are being committed but do nothing to stop them.[111]

4. International Criminal Tribunal for Rwanda

The second post-World War II tribunal that recognized the doctrine of command responsibility was the International Criminal Tribunal for Rwanda (ICTR).[112] The ICTR addressed the doctrine of command responsibility in *Prosecutor v. Kayishema.*[113] There, the tribunal analyzed, among other things, whether Clement Kayishema, as Prefect of the Kibuye Prefecture, could be held responsible for the actions of his subordinates. The prosecution alleged that Clement Kayishema ordered people to massacre Tutsis who had taken refuge in a Catholic church, a complex building, and a stadium located in the Kibuye Prefecture using guns, grenades, machetes, spears, cudgels, and other weapons.[114] He was also charged for the deaths of thousands of men, women, and children within the area of Bisesero.[115] The tribunal noted that even if Kayishema was not found individually responsible for his own actions, he could still face liability for the actions of his subordinates.[116] Thus, a person would not escape command responsibility for the actions of his or her subordinates merely because the commander acted in concert with his or her subordinates.

In this case, the tribunal noted that the prosecution would have to show three things in order to hold Kayishema liable under the doctrine of command responsibility: (1) that Kayishema was a commander; (2) that he had control over the particular person committing the crime; and (3) that he knew enough about the actions of his subordinates to make him liable under

109. *See id.* at 453.

110. *See id.* at 457.

111. *See id.* at 541.

112. Michael P. Scharf, *The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade*, 37 U.S.F. L. REV. 865, 865 (2003).

113. Prosecutor v. Kayishema, Case No.: ICTR-95-1-T, Trial Chamber Judgment (1999), *reprinted in* 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994-1999 555 (André Klip & Göran Sluiter eds., 2001).

114. *Id.* at 560-61.

115. *Id.* at 563.

116. *Id.* at 598.

the doctrine of command responsibility.[117] Ultimately, the tribunal found that the prosecution had met its burden of proof and found that Kayishema was liable under the doctrine of command responsibility for genocide in the massacres at the church, building complex, stadium, and in the area of Bisesero.[118] Thus, the ICTR also recognizes the doctrine of command responsibility.[119]

As these cases show, international tribunals have held commanders liable for actions of their subordinates time and time again. They have been held liable under the doctrine of command responsibility for failing to supervise their subordinates and for failing to conduct adequate investigations into questionable circumstances. They have also been held liable when they work in concert with their subordinates or even in some instances where they have no formal authority over their subordinates. The case at hand could be analogized to many of the cases discussed above. As such, it is possible that Captain Nutsch would have been held liable too for the "deaths by container," if the facts surrounding his case would have been tried by the international tribunals discussed above.

IV. STATE RESPONSIBILITY

As with commanders, international law recognizes that states may also be liable for acts of omission. Under the doctrine of state responsibility, a country is held liable for violations of international law that the country, or those countries under its control has committed, as well as for failing to prevent violations of international law from occurring when certain elements of control and knowledge are present.

A. Liability for Acts of Omission Under International Law

The law of state responsibility recognizes that acts of omission may lead to responsibility by the non-acting State party. The first time this doctrine was addressed in international law was when a Preparatory Committee met to draft rules on state responsibility in 1930.[120] In the late 1940s, the topic was addressed again when the General Assembly of the United Nations formed the International Law Commission.[121] Although the commission did not place too much emphasis on developing the rules of state responsibility,

117. *See id.* at 598-99.

118. *Id.* at 663.

119. *See also* Prosecutor v. Akayesu, Case No.: ICTR-96-4-T, *reprinted in* 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994-1999, 399-554 (André Klip & Göran Sluiter, eds., 2001).

120. SHABTAI ROSENNE, THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY 4 (Martinus Nijhoff Publishers 1991).

121. *International Law Commission*, annex to General Assembly Resolution 174 (II) of November 21, 1947.

it was during this period that the commission began to realize how important it was to codify such rules.[122]

Since the early 1960s, the law of state responsibility has developed dramatically. In the late 1960s, the International Law Commission discussed how the laws of state responsibility had been developed by private bodies, regional bodies, and under the League of Nations.[123] Then they planned for the codification of the laws of state responsibility under the United Nations,[124] noting that the objective element leading to liability under the rules of state responsibility included an "act or omission objectively conflicting with an international legal obligation of the State."[125] They also noted that a state violates an international legal obligation when it violates "a rule of international law whatever its origin and in whatever sphere."[126]

In 1970, the International Law Commission said that, "an internationally wrongful act exists where [c]onduct consisting of an action or omission is imputed to a State under international law[,] and [where] [s]uch conduct, in itself or as a direct or indirect cause of an external event, constitutes a failure to carry out an international obligation of the State."[127] When the International Law Commission described why it included acts of omission in its definition, the commission noted that the concept of states being responsible for acts of omission "is not disputed, [and thus] there is no need to dwell on it further, except perhaps to stress that it seems particularly advisable to state expressly, in the statement of the conditions for the existence of an internationally wrongful act, that internationally wrongful conduct imputed to a State can equally well be an omission as an action."[128]

In subsequent years, the International Law Commission defined state responsibility for acts of individuals, groups of individuals acting in their private capacity,[129] and for those acting as part of an insurrectional movement.[130] They also discussed cases in which a state would be liable for

122. ROSENNE, *supra* note 120, at 22-23.

123. Roberto Ago, *First Report on State Responsibility,* [1969] 2 Y.B. Int'l L. Comm'n 125, 127-32, U.N. Doc. A/CN.4/217.

124. *Id.* at 132-41.

125. *Id.* at 139.

126. *Id.*

127. *State Responsibility,* [1970] 2 Y.B. Int'l L. Comm'n 195, U.N. Doc. A/CN.4/233.

128. *Id.* at 188.

129. In the fourth report, the Commission said that acts of individuals are not acts of State, but this rule "is without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the individual or group of individuals and failed to do so." Roberto Ago, *Fourth Report on State Responsibility,* [1972] 2 Y.B. Int'l L. Comm'n 71, 126, U.N. Doc. A/CN.4/264.

130. The Commission noted in their fourth report that a state could be liable for the acts of "a person or group of persons acting in the territory of a State as organs of another State or of an international organization" when they fail to prevent "a person or group of persons acting in the territory of a State as organs of an insurrectional movement directed against that State and possessing separate international personality" from committing violations of international law. *Id.* at 143.

failing to prevent a breach of international law from occurring.[131] Significantly, the International Law Commission also proposed an article assessing liability to a state for aiding another state to commit an internationally wrongful act.[132] In this regard, the International Law Commission noted that a state could be held liable for the international wrongful acts of another state if they controlled the other state, or coerced the other state to commit the unlawful acts.[133]

Finally, in 1980, the Draft Articles on State Responsibility were produced by the International Law Commission.[134] These articles are replete with examples of states being held responsible for failing to prevent their own violations of international law and failing to prevent violations of international law committed by other states.[135] Sixteen years later, in 1996, the International Law Commission published another Draft Articles on State Responsibility, and in 1997 the Commission dedicated itself to completing a second reading of the Draft Articles on State Responsibility by 2001.[136] The purpose of this second reading was to clarify some of the issues that remained unresolved following the publication of the first draft.[137] Finally, in November 2001, the International Law Commission published the Articles on the Responsibility of States for Internationally Wrongful Acts.[138] Thus, after nearly sixty years, a set of rules codifying the laws of state responsibility has been completed.

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131. In the seventh report on state responsibility, the International Law Commission discussed liability for failing to prevent an event from occurring. Roberto Ago, *Seventh Report on State Responsibility,* [1978] 2 Y.B. Int'l L. Comm'n 31. In this regard, the Commission proposed the following article: "There is no breach by a State of an international obligation requiring it to prevent a given event unless, following a lack of prevention on the part of the State, the event in question occurs." *Id.* at 37.

132. Specifically, the Commission proposed the following article: "The fact that a State renders assistance to another State by its conduct in order to enable or help that State to commit an international offence against a third State, which thus becomes an accessory to the commission of the offence and incurs international responsibility thereby, even if the conduct in question would not otherwise be internationally wrongful." *Id.* at 60.

133. In this regard, the Commission proposed the following article: "An internationally wrongful act committed by a State in a field of activity in which that State is not in possession of complete freedom of decision, being subject, in law or in fact, to the directions or the control of another State, does not entail the international responsibility of the State committing the wrongful act, but entails the indirect international responsibility of the State which is in a position to give directions or exercise control." Roberto Ago, *Eighth Report on State Responsibility,* [1979] 2 Y.B. Int'l L. Comm'n 3, 26-27, Doc. A/CN.4/318. The International Law Commission also noted that a state would also be responsible if it coerced another state to commit an internationally wrongful act." *Id.* at 27.

134. *State Responsibility,* [1980] 2 Y.B. Int'l L. Comm'n 26, 30-34, U.N. Doc. A/52/10.

135. *See id.*

136. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 4 (Cambridge University Press 2002).

137. *Id.*

138. *Report of the International Law Commission: Articles on the Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10, at 59, 68, U.N. Doc. A/56/10 (2001).

An historical overview of the codification of the laws of state responsibility reveal that international law recognizes that a state may be held liable for failing to prevent international law violations by people within their own state, or for failing to prevent the international law violations of states under their control. As such, the United States could be held liable under the doctrine of state responsibility if it is determined that the United States had control over General Dostum's troops for the death by container, but failed to prevent them from violating international law.

B. Concepts as Examined by International Courts and Tribunals

The doctrine of state responsibility for acts of omission has also been well-documented under international case law. By analyzing the case law of two international courts, namely, the International Court of Justice and the European Court of Human Rights, one will see that several decisions have been rendered holding states responsible under the doctrine of state responsibility.

1. International Court of Justice

The International Court of Justice (I.C.J.) was established in 1945 as the judicial branch of the newly created United Nations, replacing the Permanent Court of International Justice.[139] One of the cases that has been heard by the I.C.J., involving the issue of state responsibility is the *Corfu Channel* case. In that case, the Court was asked to determine whether Albania was responsible for the deaths and damages incurred by two British ships as they passed through Albanian waters.[140] Evidence revealed that the ships were damaged by mines that were part of a recently laid minefield.[141] Although the Court was able to determine what caused the damages to the ships, it did not have enough evidence to determine which state actually laid the minefields.[142] Nevertheless, the Court found it necessary to continue by examining whether Albania was responsible for the deaths and damages incurred by the British ships, even if the court could not positively determine which state laid the minefields.[143]

Regarding state responsibility for the damages, the Court found that because Albania had exclusive control over its territorial waters, the burden of proof would fall on Albania to show that Albania did not know that the mines were there.[144] The Court found that it was improbable that Albania did

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139. MARK W. JANIS & JOHN E. NOYES, CASES AND COMMENTARY ON INTERNATIONAL LAW 260 (2d ed. 2001).

140. *Corfu Channel*, 1949 I.C.J. 4, 6 (Merits of April 9).

141. *Id.* at 15.

142. *Id.* at 17.

143. *See id.* at 4.

144. *See id.* at 18.

not know about the mines, because the mines must have been laid at a time when Albania was vigilantly watching the Corfu Channel, and that, based on the geography of the channel, it would have been nearly impossible to lay the mines without being noticed.[145] Based on this finding, the Court further noted that Albania was obligated to notify the United Kingdom that the Corfu Channel had been mined, or at least attempt to notify the British ships of the existence of the mines.[146] Because Albania failed to act, the Court found that Albania was "responsible under international law for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage and loss of human life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom."[147]

In another case, the I.C.J. analyzed whether the doctrine of state responsibility would apply to a state that failed to protect another state from non-state actors who were violating international law.[148] That case concerned a group of armed protesters who overran the United States Embassy in Tehran on November 4, 1979, and took the diplomatic and consular staff at the embassy as hostages.[149] Although security personnel were near the embassy at the time the protesters entered the building, the security personnel did nothing to deter or prevent the protesters from taking over the building.[150] Following the takeover, repeated calls for help from the hostages and from diplomats in Washington were ignored by the Iranian government.[151]

The first issue examined by the Court with respect to the doctrine of state responsibility was whether the initial takeover by the protesters could be imputed to the Iranian government.[152] Although the leader of Iran previously made statements that some may have interpreted to encourage such action, the Court did not impute liability for the initial takeover to the Iranian government.[153] The second question examined by the Court, however, was whether the Iranian government could be held liable for failing to take any measures to protect the diplomatic and consular staff from being taken hostage at the embassy.[154] In this regard, the Court found that Iran had a special

145. *Id.* at 20.

146. *Id.* at 22.

147. *Id.* at 23.

148. Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

149. *Id.* at 12.

150. *Id.*

151. *Id.* at 12-13.

152. *Id.* at 29-30.

153. *Id.* at 29. The Ayatollah Khomeini had "declared that it was 'up to the dear pupils, students and theological students to expand with all their might their attacks against the United States and Israel, so they may force the United States to return the deposed and criminal shah, and to condemn this great plot[.]" *Id.* This statement, however, was not deemed by the Court to constitute an authorization by the State to take over the United States Embassy. *Id.*

154. *Id.* at 30-31.

duty to protect the staff because the embassy personnel were foreign diplomats.[155] Ultimately, the Court found that although Iran knew of its duties under international law and was aware that pleas for help were made, Iran failed to comply with its international obligations, despite possessing the means to comply.[156] As a result, the doctrine of state responsibility applied, making Iran liable for failing to protect the consular staff.[157]

The I.C.J. has also found that a country may be held liable under the doctrine of state responsibility for failing to prevent one state from committing an internationally wrongful act against another state. The Court mentioned this possibility in dicta, in the *Corfu Channel* case discussed above. Regarding the obligation to prevent one state from violating international law and consequently harming another state, the Court noted that states have "the obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[158] The Court did not spend too much time on this issue, however, because the Court focused instead on the greater obligation of a state to inform another state about imminent dangers.[159]

2. European Court of Human Rights

As with the I.C.J., the European Court of Human Rights (E.C.H.R) has also recognized the doctrine of state responsibility. The E.C.H.R. addressed the doctrine of state responsibility regarding the potential actions of another state. In *Soering v. United Kingdom*, a German national alleged that the United Kingdom would violate his rights under the European Convention if it extradited him to the United States on a murder charge.[160] He argued, among other things, that exposure to the "death row phenomenon"[161] would violate the European Convention's prohibition against inhuman and degrading treatment.[162] Ultimately, the Court found that if the United Kingdom extradited Soering to the United States and if he faced the possibility of being subject to the "death row phenomenon," such actions would violate the European Convention's prohibition against degrading and inhuman treatment.[163] Thus, the E.C.H.R. determined that England could be held liable under the doctrine of state responsibility for the actions of another state. That is, if England deported Soering to the United States, it would risk placing

155. *Id.*
156. *Id.* at 32-33.
157. *See id.*
158. *Corfu Channel*, 1949 I.C.J. at 22.
159. *Id.*
160. Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) at 439 (1989).
161. *Id.* at 463. "Death row phenomenon" refers to the conditions of life on death row, including the long wait between sentencing and the time the sentence is carried out," *id.* at 474, "extreme stress, psychological deterioration, and risk of homosexual abuse and physical attack." *Id.* at 460.
162. *Id.* at 463.
163. *Id.* at 478.

him in a situation where another country might violate his rights under the European Convention.

The E.C.H.R. addressed the same issue regarding a Sikh separatist from India, who was accused of terrorism[164] and, thus, was considered a threat to national security and ordered deported from England.[165] The English government encouraged the Court to conduct a balancing test between its right to protect national security and the applicant's right to not be subjected to inhuman or degrading treatment upon deportation back to India.[166] Ultimately, the Court refused to conduct such a balancing test.[167] The Court held that, even in expulsion cases, the prohibition against inhuman and degrading treatment is paramount above all other concerns and "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."[168]

The case law of the E.C.H.R. reveals that the Court recognizes the doctrine of state responsibility.[169] The cases discussed demonstrate that the E.C.H.R. will find a state responsible for the acts of another state if a person is subjected to the risk of inhuman or degrading treatment through deportation.

As noted, both the I.C.J. and the E.C.H.R. have assessed liability to a state in cases where a state could have prevented the international law violations of another state, or when their own state violated international law. If one of these courts were to obtain jurisdiction over the United States and initiate an action against the U.S. for the crimes committed by General Dostum's troops at Dasht-e Leili, they would find the United States liable under the doctrine of state responsibility if they found that the United States had control over Dostum's actions, but failed to stop him.

V. U.S. LIABILITY FOR ACTS OF OMISSION DURING THE AFGHANISTAN CONFLICT

International law recognizes that states or commanders may be held responsible for the actions of others.[170] This is evident by looking at the doctrines of command responsibility and state responsibility. The question remains, however, as to whether the United States, or Captain Mark D.

164. Chahal v. United Kingdom, 23 Eur. Ct. H.R. 413 (1996).

165. *Id.*

166. *Id.* at 456.

167. *Id.*

168. *Id.* at 457.

169. *See also* Plattform "Arzte fur das Leben" v. Austria, 13 Eur. Ct. H.R. (ser. A) at 204 (1991).

170. *See, e.g.*, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference, 14 AM. J. INT'L L. 95, 143 (1920); Protocol I, *supra* note 54; Rome Statute, *supra* note 56.

Nutsch, the leader of the 595 A-team from the Fifth Special Forces Group, could be held liable for acts of omission during the Afghanistan conflict.

What is known is that hundreds, perhaps thousands, of surrendered Taliban soldiers were killed by suffocation in the foreign aid containers that were used by General Dostum's Northern Alliance army to transport the surrendered men.[171] Though no evidence suggests that American soldiers were present when the containers were finally opened, the 595 A-team from the Fifth Special Forces Group was working with General Dostum as the link between U.S. air forces and Northern Alliance ground forces at the time the events occurred.[172] The 595 A-team was also present at the surrender negotiations and at the actual surrender of the Taliban soldiers.[173] In addition, the 595 A-Team was working to secure prison security at the time the containers were delivered to the area.[174] Though the 595 A-Team may have thought that reports about the atrocities that occurred during the ten days that the container transports were taking place were exaggerated, they surely heard reports of the deaths.[175] Though Pentagon and Defense Department officials have avoided questions about the incidents and have made claims that all reports are false,[176] the veracity of their responses is questionable. Even if it is true that the United States knew absolutely nothing of the transports, the question remains as to whether the U.S. should have known about the transports. Under the circumstances, it is necessary to consider whether the United States or Captain Mark D. Nutsch can be held responsible for acts of omission during the Afghanistan conflict.

A. Command Responsibility

As noted above, the doctrine of command responsibility attaches when a commander knew, or should have known, that atrocities were occurring, yet the commander did not take reasonable steps to prevent the abuses.[177] This doctrine applies regardless of whether a person was acting in an official capacity, so long as the person had control over the people who committed the internationally wrongful acts.[178] The standard of whether a commander knew

171. Dehghanpisheh et. al., *supra* note 2, at 25; Physicians for Human Rights, *supra* note 26.

172. Dehghanpisheh et al., *supra* note 2, at 29.

173. *Id.* at 30.

174. *Id.*

175. *Id.* at 24.

176. *Id.*

177. *See, e.g., Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT'L L. 95, 143 (1920); Protocol I, *supra* note 54; Rome Statute, *supra* note 86, at art. 28.

178. Prosecutor v. Delalić and Others, Case No.: IT-96-21-T, *reprinted in* 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1997-1999 (André Klip & Göran Sluiter, eds., 2001).

that atrocities were being committed by his or her subordinates is subject to a standard of reasonableness.[179] That is, although it may be reasonable to believe that one isolated event occurred that, when viewed in one context is legal under international law and in another is illegal, it may not be reasonable to believe that several similar events occurring within a short period of time were all legal under international law.[180] Thus, an officer who knows that events are occurring that could be either legal or illegal based on the context of the events, has a duty to investigate the events to make sure that they were all, in fact, legal under international law. In addition to being liable for failing to investigate suspicious events, a commander is deemed to have acquiesced to the actions of his or her troops if he or she fails to supervise those under his or her command and control.[181]

Returning to the question of whether Captain Mark D. Nutsch could be held responsible for failing to prevent the Northern Alliance from killing Taliban soldiers in transport containers, one must analyze the events that occurred in Afghanistan, while keeping the rules and standards of international law in mind. Even if Captain Nutsch did not actually know that the surrendered soldiers were asphyxiated in transport containers, a reasonableness standard would dictate that he should have known about the atrocities. This standard was used by the Nuremberg tribunal in the *Rauer* case.[182] Rauer was convicted for failing to investigate questionable reports given to him by his subordinates. As noted earlier, the court held him responsible for the murder of prisoners because he did not investigate his subordinates' reports, even though he received several reports that prisoners had been shot while trying to escape.[183] Similarly, Nutsch was in the area at the time the transport containers arrived and was involved with providing security for the prison. He must have heard some of the reports about the deaths. As such, after hearing one or more reports about the deaths, he should have conducted an investigation to substantiate or refute the reports made by incoming prisoners. Thus, he either knew, or should have known, that the atrocities were taking place and should have at least taken measures to investigate the reports of the deaths. By not doing so, his inaction could be interpreted as acquiescence, just as Rauer's actions, or inactions, were deemed to be acquiescence by the Nuremberg tribunal.[184]

In addition, Captain Nutsch cannot claim immunity based on the fact that he is not a major or a general, because even civilians can be liable under the doctrine of command responsibility if they have control over their subor-

179. Major Karl Rauer, *supra* note 83, at 117.

180. Such as in the Rauer case discussed earlier where it was reasonable to believe that on group of prisoners were shot while trying to escape, but not several in a short period of time. *Id.*

181. Wilhelm von Leeb, *supra* note 67, at 77.

182. Major Karl Rauer, *supra* note 83, at 116.

183. *Id.* at 113.

184. *Id.* at 117.

dinates. The *Celebici* case shows that civilians, and those who do not have formal authority over troops, can be held liable for the actions of their subordinates, so long as they have sufficient control over them.[185] Thus, the fact that Nutsch is not a major or a general is irrelevant to liability under the doctrine of command responsibility. His position as captain is clearly one that implies command and control.[186] The question remains, however, as to whether Captain Nutsch had control over the Northern Alliance. If Captain Nutsch could exert control or influence over the Northern Alliance troops, then he clearly could be held liable for the deaths of the Taliban soldiers under the doctrine of command responsibility. In that case, he could be held liable for his failure to act, because he either knew or should have known that the atrocities were occurring and had control over the people committing the internationally wrongful acts.

One further question is, even if Captain Nutsch could not control the troops of the Northern Alliance, could he have prevented the deaths by ordering his troops to take action to prevent them? Thus far, the courts have not addressed this issue under the doctrine of command responsibility. There is no evidence to suggest that commanders have a positive duty to prevent other troops that are not under their control from violating international law. While Captain Nutsch could be held liable under the doctrine of command responsibility if he had control over the Northern Alliance troops, he probably could not be held liable for his acts of omission in the absence of such control.

B. State Responsibility

The other doctrine which must be examined regarding U.S. liability for acts of omission during the Afghanistan conflict is the doctrine of state responsibility. As noted above, the doctrine of state responsibility attaches as a result of the commission of internationally wrongful acts, or omissions amounting to internationally wrongful acts.[187] It also applies when a state fails to prevent individuals, states, or organizations under that state's authority from committing internationally wrongful acts.[188] Indeed, states are sometimes required to take positive steps to prevent violations from occurring.[189] In addition, states may be held responsible under the doctrine of state responsibility for subjecting a person to the danger that another state may

185. Prosecutor v. Delalic, ICTY Case No. IT-96-21-T, Trial Chamber Judgment (1998), *reprinted in* 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1997-1999, 363 (André Klip & Göran Sluiter eds., 2001).

186. *See id.*

187. *Report of the International Law Commission: Articles on the Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10, at 59, 68, U.N. Doc. A/56/10 (2001).

188. *State Responsibility*, [1980] 2 Y.B. Int'l L. Comm'n 26, 31, U.N. Doc. A/52/10.

189. Plattform 'Arzte fur das Leben' v. Austria, 13 Eur. Ct. H.R. (ser. A) at 210 (1991).

commit a violation of international law against them.[190] States may also be held liable for the illegal actions of civilians[191] or for failing to warn another state of imminent dangers.[192]

Here, there is no question that killing soldiers by asphyxiation in transport containers is a violation of international law.[193] Thus, the Northern Alliance violated international law by killing the surrendered Taliban soldiers in this manner. Regarding liability for acts of omission, however, one must conduct a more detailed analysis. Since states may be held liable for failing to prevent another state from committing an internationally wrongful act, it may be argued that the United States could be held liable for failing to prevent the deaths of the Taliban soldiers in Afghanistan in November 2001. It might further be asserted that the United States had a positive duty to ensure that the surrendered soldiers were protected from harm. That is, as with the extradition cases in the European Court of Human Rights discussed above, in which the United Kingdom was threatened with violating international law if it extradited people who faced a serious threat of torture or inhuman and degrading treatment,[194] the United States could be held liable for allowing the surrendered Taliban soldiers to be transported by General Dostum and his troops when there was a likelihood they would be mistreated.[195] In addition, General Dostum was notorious for being "one of Afghanistan's most ruthless and effective warlords,"[196] yet the United States allowed the

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190. *See* Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) at 440 (1989); Chahal v. United Kingdom, 23 Eur. Ct. H.R. 413, 414 (1996).

191. Case Concerning United States Diplomatic and Consular Staff in Iran, 1980 I.C.J. 3, 32-33 (May 24, 1980).

192. The Corfu Channel Case, 1949 I.C.J. Merits 4, 21-22 (April 9, 1949).

193. For example, Article 3 of the Universal Declaration of Human Rights provides that "[e]veryone has the right to life," and Article 5 provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948), *at* http://www.amanjordan.org/english/un&re/un3.htm (last visited Jan. 5, 2004); Article 6 of the International Covenant on Civil and Political Rights also provides that everyone has the right to life and that this right should not be taken away arbitrarily. In addition, Article 7 prohibits torture or cruel, inhuman, or degrading treatment. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976), *at* http://www.amanjordan.org/english/un&re/un5.htm (last visited Jan. 5, 2004); Article 2 of the European Convention for the Protection of Human Rights protects the right to life and Article 3 prohibits torture or inhuman or degrading treatment. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively), *at* http://www.robin.no/~dadwatch/echr/echr.html (last visited Jan. 5, 2004).

194. *See* Soering v. United Kingdom, Eur. Ct. H.R. (ser. A) at 439 (1989); Chahal v. United Kingdom, 23 Eur. Ct. H.R. 413 (1996).

195. Once again, it must be noted that the United Kingdom would have been held liable under its duties arising from the European Convention on Human Rights, an instrument that the United States is not bound to follow.

196. Dehghanpisheh et al., *supra* note 2, at 25.

surrendered Taliban soldiers to be surrendered to troops under his command.[197] It might be argued that the United States could be held liable for exposing the soldiers to a serious threat of torture or inhuman and degrading treatment. The facts of the container death situation shows the potential risk of allowing soldiers to be surrendered to Dostum's troops was not abstract. The risk was real, as demonstrated by the fact that General Dostum had a reputation of being a ruthless warlord and that he lived up to his reputation in November in Afghanistan by allowing hundreds, perhaps thousands, of surrendered soldiers to die by asphyxiation in transport containers.

Finally, it may be argued that the United States could be held liable for failing to warn the Taliban soldiers of the potential danger of surrendering to General Dostum. The duty to forewarn was defined in the *Corfu Channel* case, discussed above, where Albania knew, or should have known, that its channel was mined.[198] However, it is not likely that a court will find the United States liable under this theory because the events that occurred in Afghanistan can be distinguished from the facts of the *Corfu Channel* case. In the *Corfu Channel* case, the Court addressed the duty to warn another State, not individuals. In addition, it is highly unlikely that the surrendering Taliban soldiers were unaware of the dangers they were facing, unlike the British ships in the *Corfu Channel* case. It could also be argued that the United States did not know of the danger posed to the surrendered soldiers until it was already too late. Thus, it is not likely that the United States could be held liable for failing to warn the surrendering soldiers of the imminent harm that they faced. This does not mean, however, that the United States could not be held liable under the doctrine of state responsibility based on other arguments discussed above.

VI. CONCLUSION

This comment has focused on possible U.S. state and command liability under international law for acts of omission that occurred during the Afghanistan conflict. Based on the doctrine of command responsibility, Captain Mark D. Nutsch would be held liable for the deaths by container of the Taliban soldiers. Captain Nutsch knew, or should have known, what was happening, but did nothing to stop the Northern Alliance from killing the surrendered soldiers. Nutsch may argue that he did not have effective control over the actions of General Dostum's troops. Perhaps this fact would release him from liability, but a court would first have to determine if Nutsch, in fact, had no control over the troops, and whether this meant that he had no power to stop the violations from occurring.

If it is determined that the United States had control over Dostum's troops, the United States could also be held liable for the "deaths by con-

197. *Id.*

198. The Corfu Channel Case, 1949 I.C.J. Merits 4, 21-22 (Apr. 9, 1949).

tainer" of the Taliban soldiers. Facts do suggest that the United States had some form of control over the area. That is, they were occupying the area as a military presence and they were in charge of the prison that the prisoners were being transported to. They were also working in concert with Dostum's troops. As such, it is likely that a court would find that the United States had sufficient control over the area to hold them responsible for the deaths by container.

Even assuming, that Captain Nutsch or the United States could be held liable under the doctrines of command or state responsibility for their acts of omission during the war in Afghanistan, it is important to note that it is highly unlikely that either Captain Nutsch or the United States will be prosecuted. One obstacle that a potential prosecutor would face is finding the appropriate forum in which to prosecute the acts of omission. Even assuming that the case were prosecuted in an international court, tribunal, or other forum, and further assuming that Captain Nutsch or the United States were found liable under the doctrines of command responsibility or state responsibility analyzed above, it might be impossible to enforce a judgment against Captain Nutsch or the United States.

Thus, the doctrines of command and state responsibility seem to dictate that Captain Nutsch or the United States could be held liable for their acts of omission during the Afghanistan conflict. Regarding Captain Nutsch, while he probably could be held liable under the doctrine of command responsibility, he may negate this conclusion by demonstrating that he did not have effective control over the Northern Alliance troops. As stated above, the United States could also be held liable under the doctrine of command responsibility. Regardless, the difficulty (or impossibility in) finding an appropriate forum to adjudicate and enforce such a decision make it extremely unlikely that either Captain Nutsch or the United States will ever be successfully prosecuted for their actions or inactions during the Afghanistan conflict.

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