CONSERVATIVE BASTION OR PROGRESSIVE PROBLEM SOLVER: THE EVOLVING FACE OF MILITARY JURISPRUDENCE AND INTERNATIONAL LAW

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The theme of our presentation is "Military Jurisprudence: Bastion of Conservatism or Progressive Problem Solver." I believe that all of us on this panel can agree that in many respects the military and military jurisprudence reflects an innovative pragmatism. This innovative approach is necessary and important if we are to adapt to the evolving nature of warfare. In order to stay relevant and to serve our clients, military lawyers and military law has often been a progressive problem solver.

Yet, the reality is that, in some ways, it definitely is a mixed bag as to whether military jurisprudence is a progressive problem solver or a bastion of conservatism. This mixed bag is often reflected in the way the military has applied the law of war in the international context verses the way the military has developed and applied the law of war domestically.

One interesting aspect of the recently passed Military Commissions Act (MCA)[1] is the portion of Subchapter VII of the act which sets forth the substantive offenses to be tried by military commissions. According to section 950p, the purpose of this subsection is to "codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist . . . but rather codifies those crimes for trial by military commission."[2]

Following this explanation, the MCA then first codifies certain criminal law doctrines that are not enumerated offenses but rather reflect broader

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1. Military Commissions Act of 2006, 120 Stat. 2600 (2006) [hereinafter MCA].

2. *Id.* at § 950p(a).

criminal law concepts that developed in the common law. These broader concepts include liability of a principal, liability of an accessory, and the inchoate concepts of attempt and solicitation.[3]

The MCA next sets out the elements of some twenty-eight offenses that can be tried by military commissions. These offenses include murder of protected persons,[4] murder in violation of the law of war,[5] attacking civilians,[6] attacking protected property,[7] pillaging,[8] denying quarter,[9] taking hostages,[10] rape,[11] sexual assault,[12] and other offenses. I view the codification of these crimes that are triable by military commission as a positive development. This codification provides clearer standards and greater clarity which should allow both the prosecution and the defense the ability to try cases in military commissions in a more efficient and fair manner. This is an example of a pragmatic solution to the problem that under the law of war and under international law it is often unclear what the criminal standards are and what criminal elements exist for offenses under the law of war.

One of the most interesting aspects of this codification effort is the MCA's definition of "principals." Along with the traditional definition that most of us are familiar with, section 950q states:

> Any person is punishable as a principal . . . who—(3) is a superior commander who, with regard to acts punishable under this chapter, knew, or had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[13]

Anyone familiar with the Yamashita tribunal, the Nuremberg war Crimes Tribunals, or the Tokyo Trials will certainly recognize that this provision is an attempt to codify the doctrine of command responsibility into the law of principals. By command responsibility, I am referring to that notion of imputed

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3. *See, e.g., id.* at § 950q, r, t, u.
4. *Id.* at § 950v(b)(1).
5. *Id.* at § 950v(b)(15).
6. MCA, *supra* note 1, at § 950v(b)(2).
7. *Id.* at § 950v(b)(4).
8. *Id.* at § 950v(b)(5).
9. *Id.* at § 950v(b)(6).
10. *Id.* at § 950v(b)(7).
11. MCA, *supra* note 1, at § 950v(b)(21).
12. *Id.* at § 950v(b)(22).
13. *Id.* at § 950q(3).

derivative liability, where the superior has a duty to control his forces and prevent them from committing law of war violations.[14] If the superior fails to perform this duty in preventing, stopping or punishing law of war violations, the crimes committed by his subordinates can be imputed to the commander.

This doctrine has existed under international law certainly since the end of WWII, and has been codified in more recent international treaties and statutes including Protocol I to the Geneva Conventions of 1949,[15] Article 7 of the statute on the International Criminal Tribunal for the Former Yugoslavia (ICTY),[16] Article 6 of the statute on the International Criminal Tribunal For Rwanda (ICTR),[17] and Article 28 of the Rome Statute for the International Criminal Court.[18]

An interesting point to note about the codification of the doctrine under the MCA is the MCA's treatment of the *mens rea* of command responsibility. The MCA seems to adopt a hodgepodge of *mens rea* components including actual knowledge, "had reason to know," as well as a "should have known" standard. Clearly this approach is an attempt to extend liability as broadly as possible, short of vicarious or strict liability on the part of the superior commander.

Another interesting point with the MCA's codification of this doctrine is that a superior can be liable as a principal even if his failure was nothing more than a failure to punish past violations committed by forces currently under his command. A situation could arise where a person who was not the superior at the time the offenses were committed can still be liable as if he committed the offenses. Assume a superior takes command of the forces after the war crimes were committed, but before they were discovered. The new commander then ether discovers or fails to discover the crimes, and does not take action to punish his subordinates. That commander can now be punished as if he

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14. I have provided a more complete analysis of the doctrine of command responsibility, its development in international law, and the need for the United States to incorporate this doctrine into domestic law in an article to be published in the forthcoming Volume 42:3 of the Gonzaga Law Review.

15. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 7, 1978, 1125 U.N.T.S. 3, reprinted in 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).

16. S.C. Res. 808, U.N. Doc. S/Res/808 (Feb. 22, 1993), U.N. SCOR, 48th Sess., 3217th mtg., S.C. Res. 827, U.N. Doc. S/Res/827 (May 25, 1993) [hereinafter ICTY] reprinted in 32 I.L.M. 1159 (1993). On the ICTY, *see generally* VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995).

17. The Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

18. United Nations Diplomatic Conference of Plenipoteniaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, art. 28, U.N. Doc. A/COND. 183/9 (July 17,1998), 2187 U.N.T.S. 90 (1998) [hereinafter Rome Statute].

committed the offenses, even though he was not in command at the time the offenses were committed. I would posit that this is quite a broad application of the command responsibility doctrine.

This codification of command responsibility in the MCA is a clear example of how military jurisprudence is both a progressive problem solver and, in some instances, a bastion of conservatism. When one looks at U.S. domestic law reflected in the Uniform Code of Military Justice (UCMJ), there is no comparable codification of the command responsibility doctrine. While we are willing to hold superior commanders of other forces criminally liable for the law of war violations committed by their forces, we are unable, or at least unwilling, to hold our own commanders to a similar standard.

Some have argued that Article 18 of the UCMJ[19] already incorporates the doctrine of command responsibility into the UCMJ because Article 18 grants general courts-martial jurisdiction over any person who by the law of war is subject to trial by military tribunal. However, this argument fails for several reasons. Most significantly, the command responsibility doctrine under the law of war is not sufficiently clear and any attempt to prosecute an American solider under the vague law of war standard is likely to run afoul of fundamental constitutional protections. In addition, it has long been the policy of the United States not to try our own forces for violations of the law of war, but rather to try them for violations of the punitive articles under the UCMJ.[20]

So, this is an example where military jurisprudence has been both a progressive problem solver and a bastion of conservativism. The MCA's codification of offenses triable under military commissions is a positive development. However, this codification should give us some pause to question whether the standards we are codifying, and that we are holding our enemies to, are the same standards of accountability we hold our own forces to. In the case of command responsibility, a double standard exists. I believe that this double standard must be eliminated. While I do not have time to discuss the most effective way to incorporate the doctrine of command responsibility under domestic law in this forum, there are some points to consider.

Command responsibility should not be an expansion of the law of principles as has been done under the MCA. Were the U.S. to take this approach, commanders could potentially be liable for any offense committed by the forces under their command in peace or in war, and liability would not be limited only to law of war violations or similar offenses. I believe that a much more comprehensive amending of the UCMJ is necessary. The

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19. *See* UNIFORM CODE OF MILITARY JUSTICE § 818, art. 18, *reprinted in* MANUAL FOR COURTS-MARTIAL UNITED STATES at A2-6 (2005).

20. *See* Dep't of the Army, FM 27-10 DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE APPENDIX A-120, para. 507(b) (1956).

amendment should clearly set out a commander's special legal relationship and legal duty regarding his obligations to prevent his forces from committing violations of the law of war and similar offenses. I also believe that the *mens rea* of command responsibility should be more clearly and precisely defined than any of the formulations that currently exist under international law and under the MCA. Additionally, I believe that various degrees of punishment should be imposed based on the commander's degree of liability. Only if we are willing to apply the standards we use against other forces to our own forces, will military jurisprudence truly be a progressive innovator and problem solver.