Peter James Niven

NATO and International Crimes in the Kosovo Campaign – can Bill Clinton and Tony Blair be held Criminally Liable?

Submitted for the LLB (Honours) Degree at Victoria University of Wellington

3 September 2001

Picture from International Action Committee Website
<http://www.iacenter.org/warcrime/indictmt.htm>

NATO AND INTERNATIONAL CRIMES IN THE KOSOVO CAMPAIGN – CAN BILL CLINTON AND TONY BLAIR BE HELD CRIMINALLY LIABLE?

Table of Contents

I INTRODUCTION

1. The formation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)[1] has led to the first international judicial proceedings against perpetrators of serious international crimes since the end of the Second World War. Since their formation there has been further progress at the international level aimed at ending impunity for international criminals. These include the agreement to form an International Criminal Court

[1] The International Criminal Tribunal for the Former Yugoslavia <http://www.un.org/icty/index.html> (last accessed 20 July 2001) [ICTY]; International Criminal Tribunal for Rwanda <http://www.ictr.org/> (last accessed 10 June 2001) [ICTR]. The ICTY was created pursuant to the Security Council Resolution 827 of 25 May 1993 <http://www.un.org/icty/basic/statut/S-RES-827_93.htm> (last accessed 12 August 2001); the ICTR was created by the Security Council Resolution 955 of 8 November 1994 <http://www.ictr.org/ENGLISH/Resolutions/955e.htm> (last

(ICC),[2] and the formation of other tribunals for trying offenders in Sierra Leone and Cambodia.[3]

2. This renewed international effort to bring the perpetrators of serious international crimes to justice is the concern of all States. The ICTY and ICTR were established under Chapter VII of the UN Charter, so all states are under an international obligation to cooperate with them. States-parties to the ICC will be under international obligations, defined in the ICC Statute, to cooperate with that court once it is established. Under some international treaties and conventions, including the ICC Statute, States-parties are required to establish domestic jurisdiction over offenders.[4] These developments are positive steps towards ending impunity for serious international criminals.

3. It is in this context that this paper will examine the implications of a Belgrade Court issuing international arrest warrants for Bill Clinton and Tony Blair for alleged crimes during the Kosovo campaign. The Belgrade court issued international arrest warrants against all of the civilian leaders of the NATO countries which had participated in the bombing campaign. The warrants alleged criminal responsibility for the commission of serious international crimes, including genocide, crimes against humanity, and war crimes. The international developments in this area make it a useful exercise to consider whether Tony Blair and Bill Clinton could be held criminally liable for any international crimes that may have been committed by NATO during Operation Allied Force.

4. The issues of international law that this scenario raises revolve principally around two international law doctrines: the doctrine of command responsibility and

---

accessed 12 August 2001). Both tribunals were established under Chapter VII of the UN Charter <http://www.unhcr.ch/html/menu3/b/ch-cont.htm> (last accessed 12 August 2001).

[2] The ratification status of the Statute of the International Criminal Court as at 28 June 2001 is 139 signatures and 36 parties (including New Zealand) <http://www.un.org/law/icc/statute/status.htm> (last accessed 20 July 2001). The Statute requires 60 ratifications before entry into force: Rome Statute of the International Criminal Court, 17 July 1998 (1998) 37 ILM 998, Article 126 [ICC Statute].

[3] Penny Gleeson "Report of the Secretary-General on the establishment of a Special Court For Sierra Leone: Summary" Australian Red Cross <http://www.redcross.org.au/ihl/special_documentation/sierra_leone_1200.htm> (last accessed 10 August 2001); Michael P Scharf "The Special Court for Sierra Leone" (October 2001) ASIL Insights <http://www.asil.org/insights/insigh53.htm> (last accessed 10 August 2001); UN News Service "UN to review draft law on special court to try Khmer Rouge leaders" 10 August 2001 <http://www.un.org/News/dh/latest/page2.html#9> (last accessed 11 August 2001).

[4] For example: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85 Article 5 [Torture Convention 1984]; Convention on

the doctrine of sovereign immunity. This is due to the fact that, with the possible exception of the crime of aggression, neither Clinton nor Blair could have been the actual perpetrators of any offence. Neither leader actually dropped any bombs or launched any missiles that caused civilian deaths. Any criminal liability that the two may be exposed to will be via the doctrine of command responsibility, for either directly ordering or planning acts that were international crimes, or through an omission-based liability for failing to prevent or punish any crimes committed by subordinates under their effective control. Even if criminal liability is established via command responsibility both men enjoy immunity by virtue of the doctrine of sovereign immunity, and it will need to be established how this doctrine interrelates to the notion of individual criminal responsibility at international law.

5. This paper will first determine the content of the doctrine of command responsibility at customary international law, and how it pertains to civilian leaders. The doctrine can then be applied to Clinton and Blair, with respect to some of the alleged criminal incidents from the Kosovo campaign. Finally the impact of the doctrine of sovereign immunity on their potential criminal liability under the doctrine of command responsibility will be considered.

6. This paper will not examine the issue of whether NATO, and the NATO leaders who made the decision to use force, may have committed the crime of aggression. It is worth noting that the content and scope of the crime of aggression is the subject of some controversy in the international community,[5] and that politicians and international lawyers alike dispute the legality of NATO's intervention in Kosovo.[6] The Federal Republic of Yugoslavia (FRY) has brought cases before the International

---

the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277, Article 5 [Genocide Convention 1948].

[5] The signatories of the Rome Statute of the International Criminal Court were unable to agree on the definition of the crime of aggression and its inclusion in the Statute, with the result that it was excluded until a review of the Statute seven years after entry into force: ICC Statute, above n2, Articles 5(2), 121 and 123.

[6] For example: Sergey Egorov, Professor of International Law at the Diplomatic Academy of the Ministry of Foreign Affairs in Moscow, rejects any right of humanitarian intervention without authorisation by the Security Council under Chapter VII of the Charter, Sergey Alexeyevich Egorov "The Kosovo Crisis and the Law of Armed Conflicts" (31 March 2000) International Review of the Red Cross No 837, 183 <http://www.icrc.org/icrceng.nsf/4dc394db5b54f3fa4125673900241f2f/002b6188e758f33b412568d40028cf8d?OpenDocument> (last accessed 20 July 2001); *Law and Right: When They Don't Fit Together* ECONOMIST April 3 1999, 19 – 20.

Court of Justice (ICJ) against the participating NATO countries.[7] If the ICJ makes a decision on the merits of these cases that may provide some needed clarification of where international law stands on the use of force for humanitarian intervention.

II INTERNATIONAL CRIMES AND NATO: GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY?

7. There have been allegations from a variety of sources that NATO committed a number of war crimes, genocide and crimes against humanity during the Kosovo war.[8] Amnesty International produced a report,[9] based on the work done by Human Rights Watch[10] and allegations by the FRY authorities, which alleged war crimes relating to a number of specific attacks on civilians. In response to these allegations the Office of the Tribunal Prosecutor (OTP) at the ICTY conducted an investigation into the allegations and produced a report that found insufficient evidence of any war crimes to justify proceeding with further investigation.[11] The report considers general accusations in relation to over 24 incidents, and then considers five particular incidents that "were the most problematic."[12] This paper will consider the possible liability for Clinton and Blair via the doctrine of command responsibility for three of these "problematic" incidents.

8. The OTP Final Report only considered allegations of war crimes against NATO. Wider allegations have been advanced against NATO, including allegations of genocide and crimes against humanity. Neither of these allegations can be sustained, as the threshold requirements for these offences are not met.

---

[7] *Legality of Use of Force (Yugoslavia v. Belgium) (Yugoslavia v. Canada) (Yugoslavia v. France) (Yugoslavia v. Germany) (Yugoslavia v. Italy) (Yugoslavia v. Netherlands) (Yugoslavia v. Portugal) (Yugoslavia v. United Kingdom).* Any substantive judgement on the merits of the case is a long way off, with the ICJ recently extending the time limit for parties memorials and counter-memorials on a preliminary objection to jurisdiction by the eight defendant States until 5 April 2002, ICJ Press Release 2001/05 23 February 2001 <http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-05_yugo_20010223.htm> (last accessed 16 July 2001).

[8] For example, Tania Voon "Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict (2001) 16 Am U Int'l Rev 1083; see also the "indictment" drawn up by the former US Attorney General Ramsey Clark, naming both Clinton and Blair along with numerous others, charging them with various crimes on behalf of the International Action Centre (IAC) <http://www.iacenter.org/warcrime/indictmt.htm> (last accessed 21 August 2001).

[9] NATO/Federal Republic of Yugoslavia: "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force (EUR 70/018/2000) [Amnesty Report] <http://web.amnesty.org/ai.nsf/Index/EUR700182000> (last accessed on 1 July 2001).

[10] Civilian Deaths in the NATO Air Campaign, February 2000 <http://www.hrw.org/reports/2000/nato/index.htm> (last accessed on 1 July 2001).

[11] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para 90 [OTP Final Report] <http://www.un.org/icty/pressreal/nato061300.htm> (last accessed on 1 July 2001).

9. Genocide involves specified acts "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group".[13] There is no evidence to suggest that NATO had any such intent, in fact the evidence is that they acted to prevent what they believed to be such acts on the part of the FRY.

10. The ICTY has conducted the first prosecutions for crimes against humanity by an international tribunal since the proceedings at the end of the Second World War. Crimes against humanity are included in the ICTY Statute at Article 5.[14] The ICTY in the *Tadic* Case[15] has interpreted Article 5 of its Statute so that in order to constitute a crime against humanity acts must occur within the context of an armed conflict; be linked geographically or temporally with that conflict; the act must not be unrelated to the conflict, such as for personal motives; and the act must occur as part of a widespread or systematic attack on a civilian population.[16] The Trial Chamber was of the opinion that the requirement for an armed conflict in the ICTY Statute narrowed the customary international law position,[17] as consideration of other international instruments and jurisprudence illustrates that in customary law there is no requirement for "an armed conflict."

11. In the ICC Statute crimes against humanity must be committed in the context of a "wide-spread or systematic attack directed against any civilian population, with knowledge of the attack,"[18] though the attack does not have to be military in nature, and therefore presumably there is no need for an armed conflict as a contextual requirement.[19] The ICTR Statute does not have a requirement in its Article 3 for the existence of an armed conflict.[20] The International Law Commission's (ILC)[21] Draft

---

[12] OTP Final Report, above n11, para 57.
[13] Genocide Convention 1948, above n2, Article 2.
[14] Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended 30 November 2000 by Resolution 1329 [ICTY Statute] <http://www.un.org/icty/basic/statut/stat2000_con.htm> (last accessed 16 August 2001).
[15] *Prosecutor v Dusko Tadic a.k.a "Dule"* Trial Chamber Judgement IT-94-1 (ICTY, 7 May 1997) [*Tadic* Case] <http://www.un.org/icty/tadic/trialc2/judgement/index.htm> (last accessed 8 July 2001).
[16] *Tadic* Case, above n15, paras 618 – 659.
[17] *Tadic* Case, above n15, para 627.
[18] ICC Statute, above n2, Article 7.
[19] Report of the Preparatory Commission for the International Criminal Court, Addendum Part II, Finalized draft text of the Elements of Crimes (2 November 2000) PCNICC/2000/1/Add.2, 9 [ICC Draft Elements of Crimes] <http://www.un.org/law/icc/statute/elements/english/1_add2e.pdf#pagemode=bookmarks> (last accessed 15 August 2001).
[20] "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds…" Statute of the International

Code of Crimes Against the Peace and Security of Mankind (ILC Draft Code) outlines the contextual requirements for crimes against humanity in Article 18, as "committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organisation or group."[22] The ILC in its commentary rejects the requirement for a connection to an armed conflict or war crimes for the proscribed acts to constitute crimes against humanity.[23] Having regard to the jurisprudence of the ICTY,[24] the ICTR, and the various international instruments discussed above, the contextual requirements for crimes against humanity are that the act was part of a widespread and systematic attack on a civilian population, and that the perpetrator knew that the act was part of that attack.

12. The evidence of the nature and intent of NATO operations does not support any claim that they constituted a systematic or widespread attack on a civilian population. As the OTP Final Report notes, out of some 10,484 strike sorties by NATO aircraft, releasing 23,614 air munitions, only around 90 incidents have been documented that involved civilian deaths (0.9% of all strikes missions).[25] The first alternative requirement, a systematic attack, means attacks "pursuant to a preconceived plan or policy."[26] The contextual requirement of an "attack on a civilian population" is understood as attacks as part of a State or organisational *policy* of attack on that civilian population.[27] There is no evidence that NATO had a policy or plan to target civilians. In fact all the evidence, including the statistics quoted above, tend to establish that NATO policy and planning was predicated on *avoiding* civilian casualties as far as was possible. The individual incidents alleged by the FRY to

---

Criminal Tribunal for Rwanda, Article 3 [ICTR Statute] <http://www.ictr.org/ENGLISH/basicdocs/statute.html> (last accessed 10 August 2001).

[21] The International Law Commission was established by the General Assembly in 1947 to promote the progressive development of international law and its codification (Article 13(1) of the Charter of the United Nations) <http://www.un.org/law/ilc/introfra.htm> (last accessed 9 August 2001).

[22] Draft Code of Crimes against the Peace and Security of Mankind 1996 Art 18 [ILC Draft Code] <http://www.un.org/law/ilc/texts/dcodefra.htm> (last accessed 1 April 2001). The Draft Code was provisionally adopted in 1988: *Regina v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; Regina v Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] UKHL 17, paras 83 - 84 per Lord Goff [*Pinochet*].

[23] Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996) General Assembly Official Records - Fifty-first Session Supplement No. 10 (A/51/10), Chapter II, commentary on Art 18, para 6 [ILC Report 1996] <http://www.un.org/law/ilc/reports/1996/96repfra.htm> (last accessed 15 August 2001).

[24] Which acknowledges that its requirement for an "armed conflict", dictated by the wording of its Statute, narrows the customary international law position, above n17.

[25] OTP Final Report, above n11, para 54.

[26] ILC Report 1996, above n23, commentary on Article 18 para 3.

[27] ICC Draft Elements of Crimes, above n19, 9.

constitute crimes against humanity do not occur in the necessary context, and therefore do not meet the threshold requirement.

13. The last category that the incidents may fall under is that of war crimes, violations by NATO of the laws and customs of war. These are codified to a certain extent in international treaties and instruments such as the Geneva Conventions, and their protocols, and the Hague Conventions. The laws and customs of war also form part of international customary law. In the context of NATO's attack on the FRY the threshold requirement of an international conflict is met for the full application of all of the laws and customs of war.

14. As the focus of this essay is on the liability of Clinton and Blair via the doctrine of command responsibility, this paper will not examine the lawfulness of the various incidents alleged to be violations of the laws and customs of law. Instead three specific incidents will be assumed to be *prima facie* war crimes for the purposes of the discussion of command responsibility and sovereign immunity:[28]

(a) The attack on a civilian passenger train at the Grdelica Gorge on 12 April 1999.[29] A NATO aircraft fired two missiles at a bridge, hitting a train and killing as many as 12 civilians. The second missile was fired after the train had been hit and identified by the pilot, aimed at a different part of the smoke-obscured bridge. The train had slid forward and was hit again. This will be assumed to be a grave breach of the First Protocol, Article 85(3)(b),[30] characterised as an "indiscriminate" attack. [31]

---

[28] Despite the OTP findings that there was insufficient evidence to warrant further investigation over these incidents there is still opinion that these incidents did in fact constitute breaches of the laws of war. For example see Voon, above n8; A "tribunal" convened by the IAC, see above n8, found NATO "guilty" of a number of war crimes at a mock trial held in New York on 10 June 2000, IAC "War Crimes Tribunal Finds US and NATO Guilty" (6 December 2000) <http://www.iacenter.org/warcrime/wct2000.htm> (last accessed 21 August 2001). <http://www.iacenter.org/index.htm> (last accessed 21 August 2001).

[29] OTP Final Report, above n11, paras 58 - 62; Amnesty Report, above n9, section 5.1.

[30] "(3) The following acts shall be regarded as grave breaches, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death...(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects..." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (June 8 1977) 1125 UNTS 3 Article 85 [First Protocol].

[31] First Protocol, above n30, Article 51(4) - 51(5) defines an "indiscriminate" attack. Arguably these attacks, in failing to comply with the precautionary measures mandated under Article 57, may have shaded into indiscriminate attacks either in terms of Article 51(4)(a) or 51(4)(c).

(b) The second incident is the attack on the convoys at Djakovica on 14 April 1999.[32] NATO aircraft bombed two separate columns of refugees after they misidentified them as military convoys. As many as 70 civilians may have been killed and over 100 wounded. This will be assumed to be a grave breach of the First Protocol, Article 85(3)(b), characterised as an "indiscriminate" attack.[33]

(c) The last incident is the attack on Serbian State Television and Radio (RTS) on 23 April 1999.[34] At least 16 civilians were killed and another 16 wounded in this attack. This could be a violation of either the First Protocol, Article 85(3)(a),[35] making the civilian population the object of attack, if RTS was not a military objective;[36] or the First Protocol, Article 85(3)(b), if the attack was characterised as an "indiscriminate" attack.

III THE DOCTRINE OF COMMAND RESPONSIBILITY

15. Assuming that the three incidents outlined above are *prima facie* war crimes can criminal liability be attributed to Clinton and Blair? In each instance the actual attack was conducted by unidentified coalition aircraft, operating under orders from their immediate commanders, orders passed through the chain of command from NATO command. As a former Head of State and a current Head of Government respectively, the question is whether they can be held criminally liable through the doctrine of command responsibility for these incidents.

16. The first formal recognition of a duty for military commanders to prevent and punish violations of the laws of war by their subordinates is arguably in the 1907 Hague Conventions.[37] The idea that military commanders, and even civilian leaders,

---

[32] OTP Final Report, above n11, paras 63 - 70; Amnesty Report, above n9, section 5.2.
[33] Above, n31.
[34] OTP Final Report, above n11, paras 71 - 79; Amnesty Report, above n9, section 5.3.
[35] "85… (3) the following acts shall be regarded as grave breaches, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death…(a) making the civilian population or individual civilians the object of attack," First Protocol, above n30, Article 85.
[36] Military Objects are defined in the First Protocol, above n30, Article 52(2).
[37] "Undoubtedly… the Hague Conventions IV (1907) 5 and X (1907) 6 created affirmative command duties in relation to the conduct of subordinate persons, establishing the doctrine of 'command responsibility'" Ilias Bantekas "The Contemporary Law of Superior Responsibility" 93 AJIL 573, 573; Andrew D Mitchell "Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes" 22 Sydney L Rev 381, 383 – 384.

might be held criminally liable for violations of the laws and customs of war by their subordinates was canvassed as early as the close of World War One:[38]

> There remain, however, a number of charges... against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war...

The recommended "high tribunal" for the trial of these and other charges[39] did not eventuate. It was not until the trials of war criminals following the Second World War that this doctrine of command responsibility was applied. The Charter of the Nürnberg Tribunal did not fully incorporate the doctrine of command responsibility,[40] and proceeded only on the basis of direct liability for the highest Nazi officials. It was the Tokyo Tribunal, in the Yamashita case,[41] that first convicted a superior for his responsibility in failing to prevent or punish crimes of his subordinates. Subsequent proceedings in Europe against German commanders and officials also proceeded on the basis of this indirect liability.[42] Following the trials in Nürnberg and Tokyo it was not immediately clear to contemporaries what the full scope of the doctrine was in terms of responsibility for failure by superiors to prevent or punish war crimes.[43] The introduction into the 1977 First Protocol to the Geneva Conventions of duties on commanders were not only "...uncontested during the deliberations for the adoption

---

[38] Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (1920) 14 AJIL 95, 121 [Commission on Responsibility Report].

[39] Commission on Responsibility Report, above n38, 122 – 123.

[40] Article 6 of the Charter provides that "Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945 [Nürnberg Charter] <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/59e5a3f396d98cc3c125641e00405ea7?OpenDocument> (last accessed 9 August 2001). This incorporates the first limb of command responsibility as discussed below, liability for positive acts, but makes no mention of liability for omission to prevent or punish, or indirect liability.

[41] *Yamashita* Vol IV Law Reports, 1.

[42] Bantekas, above n37, 573 – 574; Greg R Vetter "Command Responsibility of Non-Military Superiors in the International Criminal Court" (2000) 25 Yale J Int'l L 89, 95.

[43] "No clear rule has emerged as to the extent to which a civil or military superior can be convicted of failing to prevent crimes committed by persons under his authority", G Brand "War Crimes Trials and the Laws of War" (1949) 26 BYIL 414, 424.

of Geneva Protocol I, but both Articles 86 and 87 were held to be in conformity with pre-existing law."[44]

17. The establishment of the International Criminal Tribunal for Yugoslavia (ICTY) in 1992 was the first opportunity since the post-World War Two trials for an international tribunal to examine the doctrine of command responsibility. International law had developed since the Nürnberg and Tokyo trials, with the entry into force of the various Geneva Conventions and Protocols, and the development of international humanitarian law. The doctrine of command responsibility, as regards indirect responsibility,[45] is articulated at Article 7(3) of the ICTY Statute:[46]

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

In interpreting Article 7(3) the ICTY had to have regard to the international customary law existing at the time of the offences, to avoid compromising the *nullum crimen sine lege* principle.[47] The Tribunal considers its interpretation of Article 7(3) to be consistent with the position in customary international law *at the time the offences were committed*,[48] having regard to the WWII jurisprudence from the Nürnberg and Tokyo trials,[49] the relevant articles from the First Protocol,[50] the Rome Statute of the

---

[44] Bantekas, above n37, 576 – 577.

[45] Direct liability is captured under Article 7(1): "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present statute, shall be individually responsible for the crime."

[46] ICTY Statute, above n14, Article 7(3); Note the ICTR has an identical provision, ICTR Statute, above n20, Article 6(3).

[47] "The implication of these explanations is that the Security Council, not being a legislative body, cannot create offences. It therefore vests in the Tribunal the exercise of jurisdiction in respect of offences already recognised in international humanitarian law. The Statute does not create substantive law, but provides a forum and framework for the enforcement of existing international humanitarian law" *Prosecutor v Zejnil Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic and Esad Landžo (aka "Zenga") (" Celebici"* Case) Judgement IT-96-21 (ICTY, 16 November 1998) para 417 [*Celebici* Case Trial Judgement] <http://www.un.org/icty/celebici/trialc2/judgement/index.htm> (last accessed 3 July 2001); this principle is enshrined in the ICC Statute, above n2, Article 22.

[48] The ICTY has jurisdiction over offences committed within the territories of the Former Yugoslavia from 1 January 1991, ICTY Statute, above n14, Article 1. The ICTY's consideration of international law is grounded in this time period, and subsequent developments, such as the emergence of the ICC, may effect changes on the content of customary international law in the future. See below para 31.

[49] Some of the main cases are: *Yamashita*, above n41; *United States v Karl Brandt et al* Vol IV Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No 10 (US Govt Printing Office: Washington 1950) (hereafter "TWC"); *United States v Wilhelm List et al* Vol XI TWC; *United States v Wilhelm Von Leeb et al* Vol XI TWC; *United States v Soemu Toyoda* Official

ICC[51] and the ILC Draft Code.[52] As a result its jurisprudence is of significance for other international tribunals or courts (the ICTR, and the ICC once it is established) and also for domestic courts dealing with offences under domestic jurisdiction.[53]

18. The ICTY considered the doctrine of command responsibility in a number of cases, in particular in the *Celebici* Case Judgements by Trial Chamber II and the Appeals Chamber.[54] In this case four men were charged with various crimes committed in the Celebici prison camp, located in central Bosnia. Of the four Zdravko Mucic and Zejnil Delalic were charged with criminal liability as superiors for failing to prevent or punish the crimes of their subordinates, pursuant to Article 7(3) of the ICTY Statute. Delalic was acquitted on this count, but Mucic was found guilty. This case was the first international judgement since World War II holding a superior liable for the crimes of his subordinates.[55] After the ICTY formulated the doctrine in the *Celebici* case it has gone on to apply it in a number of other cases.[56]

Transcript of Record of Trial [*Toyoda*]; *Trial of Friederich Flick et al* Vol VI TWC [*Flick*]; *Government Commissioner v Roechling* 14 TWC [*Roechling*].

[50] First Protocol, above n30, Articles 86 and 87.

[51] ICC Statute, above n2, Article 28.

[52] ILC Draft Code, above n22, Article 6.

[53] The Prosecutor of the ICTY has allowed some cases within the jurisdiction of the Tribunal to proceed in domestic courts, Sean D Murphy "Developments in International Criminal Law: Progress and Jurisprudence of the International Tribunal for the Former Yugoslavia" (1999) 93 AJIL 57, 64 – 65. On a more general note the development of jurisprudence in the area of war crimes and crimes against humanity by the International Tribunals will hopefully help domestic courts avoid the sort of mistaken jurisprudence exemplified by *R v Finta* [1994] 1 SCR 701. The Canadian Supreme Court read in to the *actus* reus and *mens* rea requirements for Canada's domestic war crimes legislation a number of extra elements not founded in International custom that will make prosecution in most cases virtually impossible: Irwin Cotter "Regina v Finta, Canadian Supreme Court War Crimes Decision" 90 AJIL 461.

[54] *Celebici* Case Trial Judgement, above n47, paras 330 - 400; *Prosecutor v Zejnil Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic and Esad Landžo (aka "Zenga") (" Celebici"* Case) Judgement IT-96-21 (ICTY, 20 February 2001) paras 182 - 314 [*Celebici* Case Appeal Judgement] <http://www.un.org/icty/celebici/appeal/judgement/index.htm> (last accessed 3 July 2001); Vetter is of the opinion that "...it is likely that the best evidence of customary international law for command responsibility is the Celebici case because of its thorough treatment of the doctrine", Vetter, above n42, 111. The *Celebici* Case formulation of the doctrine of command responsibility has not gone un-criticised. Ching is of the opinion that the Celebici formulation is not perfect as "...it has the potential danger of creating extensive liability for an especially poor or dull commander, Ann B. Ching "COMMENT: Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia" 25 NCJ Int'l Law & Com Reg 167, 204. On the other hand Bantekas is of the opinion that the doctrine as elucidated in the *Celebici* case is too stringent in its requirements for prosecution, so that some offenders will potentially escape liability, Bantekas, above n37, 142 - 143.

[55] Ching, above n54, 185.

[56] *Prosecutor v Zlatko Aleksovski* Judgement IT-95-14/1 (ICTY, 25 June 1999) [*Aleksovski*] <http://www.un.org/icty/aleksovski/trialc/judgement/index.htm> (last accessed 3 July 2001); *The Prosecutor v Thomir Blaskic* Judgement IT-95-14 (ICTY, 3 March 2000) [*Blaskic*] <http://www.un.org/icty/blaskic/trialc1/judgement/index.htm> (last accessed 12 August 2001); *Prosecutor v Radislav Kristic* Judgement IT-98-33 (ICTY, 2 August 2001) paras 647 - 651 [*Kristic*]

19. Command responsibility has two aspects: responsibility for positive acts (e.g. ordering, instigating, planning) and responsibility for culpable omissions, such as the failure to prevent or punish war crimes of subordinates.[57] The latter omission-based (or "indirect") responsibility is based on the existence of a legal duty to act to prevent or punish crimes of subordinates.[58] The trial court broke down the elements in command responsibility for failure to act as follows:[59]

(a) the existence of a superior-subordinate relationship;

(b) the superior knew or had reason to know that the criminal act was about to be or had been committed; and

(c) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

20. The superior-subordinate relationship can be either *de facto* or *de jure*, and individuals can be criminally liable under the command responsibility doctrine when in non-military positions of superior authority. The relationship must be characterised by the superior having:[60]

> ...effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences... such authority can have a *de jure* or a *de facto* character.

21. This element was considered on appeal by the Appeals Chamber, which upheld the Trial Chamber's analysis of customary law, rejecting the prosecution's proposition that influence or powers of persuasion *alone* could found command responsibility.[61] The Appeals Chamber held that the Trials Chamber had applied the correct test of "effective control."[62] It was also noted that the *de facto* control element of the test allows for command responsibility to arise where the superior-subordinate relationship

---

<http://www.un.org/icty/krstic/TrialC1/judgement/index.htm> (last accessed 15 August 2001). In the last case as the court made a finding of criminal liability for *Kristic* under Article 7(1), direct command responsibility, it did not enter a conviction under Article 7(3) even though the tests were met for liability under that article, *Kristic* para 651.

[57] *Celebici* Case Trial Judgement, above n47, para 333 – 334.

[58] For example, First Protocol, above n30, Article 86 and 87; Bantekas, above n37, 592 - 594.

[59] *Celebici* Case Trial Judgement, above n47, para 346.

[60] *Celebici* Case Trial Judgement, above n47, para 378.

[61] *Celebici* Case Appeal Judgement, above n54, paras 248 - 268. For a criticism of this finding see Bantekas, above n37, 581 – 582.

[62] *Celebici* Case Appeal Judgement, above n54, paras 266 - 267.

is indirect in character, as opposed to a direct relationship in a military chain of command, and that the control itself could be of an indirect character.[63]

22. The *mens rea* element at paragraph 16(b) can be satisfied by either actual knowledge or by possession of information sufficient to put the superior on notice of the risk of such offences having occurred or occurring.[64] The prosecutor must establish actual knowledge through direct or circumstantial evidence. There is no *presumption* of knowledge merely because offences may have been widespread, numerous, publicly notorious, committed over wide areas or prolonged periods.[65] However these factors may allow an inference to arise that he must have possessed that knowledge.[66]

23. The second limb, "had reason to know" is consistent in meaning with the First Protocol Article 86(2) reference to "...had information which should have enabled them to conclude..." A commander therefore needs to be in possession of some information sufficient to put him on notice that crimes had been, or were going to be, committed.[67] The types of information that can put a commander "on notice" vary, including oral and written reports, knowledge of levels of training and the character of his men; and for the information to be "in his possession" it is sufficient that it was available or provided to the superior, even if he did not acquaint himself with it.[68] The Appeals Chamber rejected the prosecution's assertion that customary international law established a "duty to know" for military and civilian superiors.[69] Such a duty would have the effect of making criminal liability under the doctrine of command responsibility a form of strict liability. As such it is necessary to establish *particular* information a superior had "in his possession" which was sufficient to put him on notice.

---

[63] *Celebici* Case Appeal Judgement, above n54, paras 251 - 252.
[64] *Celebici* Case Trial Judgement, above n47, para 383.
[65] Bantekas argues that post World War II jurisprudence does establish a rebuttable presumption of actual knowledge where crimes were widespread and notorious, and that the ICTY's refusal to accept this presumption was "despite the weight of that precedent." Bantekas, above n37, 588 – 590.
[66] *Celebici* Case Trial Judgement, above n47, paras 228 - 230.
[67] *Celebici* Case Trial Judgement, above n47, para 387 - 393; *Celebici* Case Appeal Judgement, above n54, paras 231 - 236.
[68] *Celebici* Case Appeal Judgement, above n54, paras 238 - 239.
[69] *Celebici* Case Appeal Judgement, above n54, paras 248 - 268.

24. The third overall requirement is failure to take necessary and reasonable measures in accordance with their legal duty.[70] A superior can only reasonably be expected to take such measures as are within their power to take, expressed by the trial court as "such measures that are within his material possibility." It also notes that the "lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior".[71] The court noted that it is impossible to lay down strict guidelines on what might constitute necessary and reasonable measures outside of the context of the facts of a particular case.[72]

25. Given that there is an "effective control" test to found a superior-subordinate relationship, the nature of that control on the facts of a given case will affect what might constitute necessary and reasonable measures. Under some circumstances reporting the matter to "the competent authorities" may be sufficient to discharge this obligation.[73] The factual framework of the superior-subordinate relationship, both *de facto* and *de jure*, the degree of control asserted, and the measures reasonably open to a superior in a given situation, to name just a few possible factors, will determine in a given fact situation what would have constituted necessary and reasonable measures.

IV CIVILIAN SUPERIORS AND COMMAND RESPONSIBILITY

26. Of particular concern in the scenario under consideration here is the applicability of the doctrine of command responsibility to civilian superiors. Several civilian superiors were tried following the Second World War.[74] The ICTY's elucidation of customary international law includes the possibility of civilian superiors being found criminally liable under the doctrine of command responsibility.[75] In 1998 the Prime Minister of Rwanda, Jean Kambanda pleaded guilty to various crimes before the ICTR, including counts under the ICTR's command responsibility

---

[70] "It has also been suggested that the concept of reasonableness is difficult to apply in this context since it requires a balancing of social costs and benefits when there are no accepted norms regarding the relative value of such things as war crimes prevention and military success." Mitchell, above n37, 409.

[71] *Celebici* Case Trial Judgement, above n47, para 395.

[72] *Celebici* Case Trial Judgement, above n47, paras 394 - 395.

[73] *Blaskic*, above n56, para 336.

[74] For example *Flick*, above n49; *Roechling*, above n49; *Toyoda*, above n49.

[75] *Celebici* Case Trial Judgement, above n47, para 355 - 363. The Trial Chamber considered the trial of some civilian leaders under the doctrine by the Tokyo Tribunal, as well as the *Flick* case, above n49, and the *Roechling,* above n49, case from Germany.

provision.[76] This was the first conviction of a Head of State by an international tribunal. The Indictments of Radovan Karadzic[77] and Slobodan Milosevic,[78] the former Bosnian Serb Head of State for the Bosnian Serb Republic and the former Head of State of the FRY, include criminal liability on this basis.

27. The elements required for a civilian leader under the doctrine of command responsibility are the same three discussed above for military commanders, with the exception of the definition of the superior-subordinate relationship. The ICTY's *Aleksovski* judgement[79] considered that a civilian's position as a superior needed to be analogous to a military commanders, but that the civilian's "sanctioning power must be interpreted broadly." A civilian in most cases will not have the same extent of *de jure* powers a military commander has, for instance to arrest and charge an offender through the military discipline system. A civilian superior's ability *de jure* or *de facto* to impose sanctions is not essential to liability; the possibility of transmitting reports to the appropriate authorities may be enough to found liability.[80] These qualifications may mitigate the restrictiveness of the *Celebici* case conclusion 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."[81]

28. This broader interpretation of the sanctioning power of a civilian superior, in order to satisfy the "effective control" test, impacts on the third requirement for failure to take necessary and reasonable measures. As noted above the interpretation of what necessary and reasonable measures are in a given case has to be determined within the context of the facts of the case. It follows from the effective control test, and the requirement to take measures within the superior's "material responsibility", that the nature of the control will be determinative of what constitutes necessary and reasonable measures. The civilian superior's lack of the coercive *de jure* authority

---

[76] *Prosecutor v Jean Kambanda* ICTR-97-23-S (ICTR September 4, 1998) <http://www.un.org/ictr/english/judgements/kambanda.html> (last accessed 15 August 2001). Kambanda plead guilty to counts under Article 6(3) of the ICTR Statute, above n20.
[77] Indictment *Prosecutor v Radovan Karadzic and Ratko Mladic* (ICTY, July 1995) <http://www.un.org/icty/indictment/english/kar-ii950724e.htm> (last accessed 12 July 2001)
[78] Amended Indictment *Prosecutor v Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub, Vlajko Stojilkovic* IT-99-37-I (ICTY, 29 June 2001) <http://www.un.org/icty/indictment/english/mil-ai010629e.htm> (last accessed 12 July 2001).
[79] *Aleksovski*, above n56.
[80] *Aleksovski*, above n56, para 78.
[81] *Celebici* Case Trial Judgement, above n47, para 378.

vested in military commanders will necessarily dictate a different set of requirements to be discharged to meet their duty to take necessary and reasonable measures to prevent or punish.

29. The ICC Statute's provision for non-military command responsibility departs from the ICTY formulation. The ICC Statute structures its provisions on the doctrine of command responsibility in two parts, Article 28(a) covering a military commander or person effectively acting as a military commander, and Article 28(b) covering any other superior-subordinate relationship. The *mens rea* requirement for non-military indirect command responsibility in Article 28(b) is narrower than that determined in the *Celebici* Case, requiring "the superior either knew, or *consciously disregarded information which clearly indicated* that the subordinates were committing or about to commit such crimes"[82] [emphasis added].

30. In addition to the *Celebici* Case elements, the ICC Statute requires that in the case of non-military superiors the crimes concerned are *activities* within the effective authority and control of the superior.[83] The meaning of this extra element is unclear.[84] Vetter notes that "...it is difficult to assess whether the ICC civilian standard is a departure from prior customary international law for civilian command responsibility for two reasons: (1) The holdings of the handful of civilian cases tried after World War II are subject to various interpretations, and (2) the source of a civilian superior's duty may be difficult to determine and may be less onerous than a military commander's duty."[85]

31. The ICC formulation of the doctrine of command responsibility with respect to non-military superiors is arguably not international custom yet. The *Celebici* Case is currently the most authoritative statement of the content of international custom,[86] while only 36 States have ratified the ICC Statute.[87] If all the 139 signatories ratify the

---

[82] ICC Statute, above n2, Article 28(b)(i). Contrasted with "Knew or had reason to know" in the ICTY Statute, above n14, Article 7(3).
[83] ICC Statute, above n2, Article 28(b)(ii).
[84] Vetter, above n42, 119 - 120.
[85] Vetter, above n42, 110.
[86] Vetter, above n42, 111.
[87] Above, n2.

ICC Statute then this may lead to some change in the customary position, though with some uncertainty as regards some of the persistent objectors.[88]

32. It is also necessary to note the ICTR case of *The Prosecutor v Jean-Paul Akayesu*.[89] In conflict with the findings of the ICTY in the *Celebici* Case, and other subsequent cases, the ICTR declined to assert that the doctrine of command responsibility applies to civilians as a general rule. Its ruling considerably narrowed the scope of the doctrine as it applies to civilians. A comparison of the judgements and their reasoning favours the *Celebici* Case as a better analysis and summary of the customary international law position.[90]

33. The current international customary law doctrine of command responsibility, as regards civilian superiors, seems therefore to consist of:

(a) The existence of a superior-subordinate relationship characterised by the superior having effective control over the subordinate.[91] The control has to be analogous to that of military commander, but the civilian superior's sanctioning powers must be interpreted broadly.[92]

(b) The superior knew or had reason to know that the criminal act was about to be or had been committed. This is either actual knowledge, which can be inferred from the circumstances and evidence,[93] or the commander must have been in possession of some information sufficient to put them on notice.[94]

---

[88] For the persistent objector rule see *Anglo-Norwegian Fisheries Case* (1951) ICJ Rep 116. In this instance there were a small number of States that participated at the Rome Conference who did not sign the ICC Statute, the most significant was the United States.

[89] *The Prosecutor v Jean-Paul Akayesu* Judgement ICTR-96-4-T (ICTR, 4 September 1998) <http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm> (last accessed 12 August 2001).

[90] "Reading the opinions side by side, on the civilian command responsibility issue the Celebici Case seems better reasoned because it draws on a more balanced set of sources to evidence international customary law; whereas the ICTR court reasons from on judge's dissent in a post-World War II case." Vetter, above n42, 132 - 134.

[91] *Celebici* Case Trial Judgement, above n47, para 378.

[92] *Aleksovski*, above n56, para 78.

[93] *Celebici* Case Trial Judgement, above n47, paras 228 - 230.

[94] *Celebici* Case Trial Judgement, above n47, para 387 - 393; *Celebici* Case Appeal Judgement, above n54, paras 231 - 236.

(c) The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof. Such measures must be within the material possibility for the superior.[95]

34. With these qualifications in mind, are the three necessary elements made out for Clinton and Blair, with respect to the three incidents this paper is assuming are *prima facie* war crimes?

V THE DOCTRINE OF COMMAND RESPONSIBILITY AND BLAIR/CLINTON

A The Existence of a Superior – Subordinate Relationship

35. Both Clinton and Blair were clearly in a position of direct superior authority *vis-à-vis* their own forces in the NATO coalition. Over their own forces both men, as Head of State and Head of Government respectively, had sufficient authority both *de jure* and *de facto* to order measures to prevent offences or punish offenders. Clinton, as President of the United States, is constitutionally the Commander in Chief of the United States Armed Forces. Blair, as Prime Minister, is in a position of constitutional responsibility for the activities of the Executive Branch of Government. Both men would also meet the additional requirement from the ICC Statute for the activities concerned to be within their effective control, if that requirement was part of customary law.

B Direct Liability

36. Clinton and Blair could be held criminally liable if they ordered, instigated or planned any of the attacks that constituted a war crime. The only incident for which they could be fixed with this direct liability is the attack on RTS. The other two incidents related to the *manner* of attack, decided by the pilot working within their rules of engagement after the target had been selected. This direct liability would accrue if RTS were a civilian rather than a military object, turning the attack into a direct attack on the civilian population causing death in violation of Article 85(3)(a) of the First Protocol. The OTP concluded, on the evidence, that "insofar as the attack actually was aimed at disrupting the communications network, it was legally

---

[95] *Celebici* Case Trial Judgement, above n47, para 395.

acceptable."[96] The qualification in the finding was because NATO justified the attack on two grounds: that RTS was a command, control and communications centre;[97] and on the grounds that it was used for a propaganda purpose.[98] If NATO had based the attack purely on the latter ground the attack would have probably been illegal.[99]

37. The other criticisms of the attack, on the basis that it was a military target, revolve around allegations that it violated other principles of the laws and customs of war requiring proportionality[100] and adequate warning.[101] Clinton and Blair's direct involvement would most likely have been at the highest strategic level, the decision to attack. The timing and means of attack were operational and tactical decisions taken by their subordinates. Liability for violating these principles, arguably thereby causing the attack to become "indiscriminate", would be for indirect command responsibility.

C Indirect Liability

38. For each of the incidents both men could potentially be held liable through the doctrine of command responsibility if they failed to prevent or punish war crimes. As discussed above, once the superior-subordinate relationship has been established liability for the crimes of subordinates will be founded if it is established that:

(a) The superior knew or had reason to know that an offence was about to be committed, or had been committed; and

(b) The superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

1 Mens rea – knew or had reason to know

39. There is little difficulty in satisfying the *mens rea* requirement for both Clinton and Blair. The international media broadcast the facts of each of the attacks globally, while the campaign was still underway.[102] NATO press briefings revealed the relevant

---

[96] OTP Final Report, above n11, para 75.
[97] OTP Final Report, above n11, paras 72 - 73.
[98] OTP Final Report, above n11, para 74.
[99] The OTP are less direct, finding that "…its legality might well be questioned by some experts in the field of humanitarian law" OTP Final Report, above n11, para 76.
[100] OTP Final Report, above n11, paras 48 – 52; First Protocol, above n30, Article 57(2)(a)(iii).
[101] First Protocol, above n30, Article 57(2)(c).
[102] For example the attack on the refugee convoys at Djakovica: BBC News Online "NATO: We may have Killed Refugees" (19 April 1999) <http://news.bbc.co.uk/hi/english/world/europe/newsid_323000/323248.stm> (last accessed 21 August 2001).

facts of each of the incidents, in a matter of days.[103] Given the sensitivity of any civilian casualties, and the potential to undermine support for NATO's actions, it is also likely that Clinton and Blair were receiving detailed briefings from their Defence Staff and NATO.

40. From the scrutiny and exposure by the international media, as well as statements made by Clinton and Blair, it would be possible to infer actual knowledge of the circumstances of the attacks giving rise to questions of their legality. Even if there were insufficient evidence to infer actual knowledge, the "had reason to know" test would be met. Both Clinton and Blair would have been in possession of sufficient information to put them on notice that war crimes may have been committed.[104]

41. The discussion so far has focused on a failure to punish after the alleged offence was committed. If either man knew that such offences were likely to occur then they would be liable for failure to prevent them. Each of the alleged offences arises from tactical decisions of the pilots in the developing situation of the attack, or in the case of RTS an operational decision by NATO Command on the time and manner of attack. It would be difficult to argue Clinton and Blair could have foreseen the situations and acted to prevent. The only basis would be that the requirement to operate above 15,000 feet made lawful application of the laws of war "virtually impossible", and therefore there was a requirement to take action to prevent, by reducing this limit.[105] However the evidence does not bear out this claim, as the statistics above at paragraph 12 show. If operating above 15,000 feet made operating lawfully "virtually impossible" then one would expect more than 0.9% of sorties leading to civilian deaths. It seems therefore that there is an insufficient basis to allege a failure to prevent.

2 Failure to Take Necessary and Reasonable Measures

42. The last element required for omission-based command responsibility is the failure to take necessary and reasonable measures to either prevent the commission of

---

[103] For the Grdelica attack, Press Conference NATO HQ Brussels (13 April 1999) <http://www.nato.int/kosovo/press/p990413a.htm> (last accessed 21 August 2001); for the Djakovica attack, Press Conference NATO HQ Brussels (15 April 1999) <http://www.nato.int/kosovo/press/p990415a.htm> (accessed 21 August 2001); for the attack on RTS, Press Conference NATO HQ Brussels (23 April 1999) <http://www.nato.int/kosovo/press/p990423l.htm> (accessed 21 August 2001).

[104] *Celebici* Case Trial Judgement, above n47, paras 387 - 393.

[105] Amnesty Report, above n9, section 4.

crimes, or to punish the offenders if they are committed. The discussion so far has concluded that both Clinton and Blair are superiors, both *de jure* and *de facto*, and that they knew or had reason to know that these three attacks may have constituted war crimes. Proceeding on the assumption that they are in fact *prima facie* war crimes, if the two leaders failed to take reasonable and necessary measures to punish the perpetrators they will be personally liable for the crimes.

43. NATO claimed to have initiated investigations into some of the incidents that are alleged to have comprised war crimes. However, the only incident that has given rise to any form of disciplinary proceedings is the bombing of the Chinese Embassy in Belgrade. The United States admitted responsibility, paid compensation to the families and the Chinese Government, a number of CIA officers were reprimanded and one was dismissed. No criminal proceedings have been undertaken.[106]

44. The main difficulty in this area is the lack of evidence of what, if any, measures NATO took following these incidents. Were internal investigations undertaken? Was the fact that such investigations were undertaken, and the results of those investigations, made known to Clinton and Blair? All of the participating NATO countries have Legal Departments in their armed forces and these may have carried out investigations of the lawfulness of questionable incidents. Most military organisations would carry out an investigation as a matter of course after an attack had gone wrong, but the internal military investigation is generally focused on the military effectiveness of operations. The investigation is to ensure future mistakes are avoided, to optimise operational effectiveness, rather than an inquiry into the legality of the incident. Of course where an incident is plainly criminal then a criminal investigation will be undertaken.

45. Are internal investigations by NATO, or by one of the member States, sufficient to satisfy the "necessary and reasonable measures" requirement imposed by the doctrine of command responsibility? Without access to the investigation terms of reference and findings there is no way to know if these investigations were conducted in a manner that would render them such. The debate over the lawfulness of these incidents illustrates that they are not clear violations of the laws and customs of war. It could well be open for a properly conducted investigation to find that no violation

---

[106] OTP Final Report, above n11, para 84.

occurred. However, it would be for the court or tribunal to assess whether the investigation and its findings were reasonable, and whether it was reasonable for the superior to rely on the findings. Otherwise superiors could escape criminal liability by relying on sham investigations, and turning their mind from considering the merits of the investigation.

D Liability for Omission to Act and the RTS Strike: Command Responsibility and Multinational Coalitions, a Diffusion of Responsibility?

46. Operation Allied Force was an example of a multinational coalition force in action. Western armies accept that the formation of coalitions will be the normal way of reacting to and meeting threats in the future.[107] This has been seen in recent military operations under the UN aegis,[108] and regionally based operations.[109] The command and control of multinational coalitions is a complex web of military and political constraints, and the force commander will in many cases not have full and unrestricted command of all the various national elements in the coalition. Individual national contingents will often relay orders back to their nations for military and political decision-makers to consider whether they are compatible with national objectives and restrictions.

47. What are the implications of coalition operations for the doctrine of command responsibility? Amnesty International claims that:

> Operation Allied Force was fought by a coalition of NATO member states in the name of the alliance as a whole... at no point during the air campaign did any alliance member publicly repudiate any of the attacks carried out by NATO forces. Therefore each NATO member may incur responsibility for the military actions carried out under the NATO aegis.[110]

48. This proposition has two aspects, *State* responsibility for each and every war crime committed by NATO, and individual criminal responsibility through the doctrine of command responsibility. The first aspect is not within the scope of this discussion. In terms of individual criminal responsibility is this Amnesty International

---

[107] For example Major General Robert H Scales writes: "For the foreseeable future the United States will remain reluctant to intervene unilaterally in most crises; as a consequence, the need for coalition partners will shape American strategy." Robert H Scales "Future Warfare Anthology" (US Army War College, Carlisle Barracks, Pennsylvania, April 1999).

[108] The Gulf War 1990, Somalia (UNOSOM), Bosnia (UNPROFOR), East Timor (UNTAET).

[109] The intervention by ECOMOG in Sierra Leone and Liberia, NATO actions in Bosnia (IFOR then SFOR) and Kosovo (Operation Just Cause and then KFOR).

proposition supportable? As noted above the idea that command responsibility is a strict liability offence must be rejected.[111] So there cannot be individual liability predicated merely on the fact a military or civilian superior is a member of NATO, and failed to repudiate attacks that were of questionable legality. Any liability would have to be predicated on satisfaction of the legal tests discussed above for the doctrine of command responsibility. What the Amnesty proposition does highlight is the potential difficulties that complex multi-national coalitions with complex, and blurred, command and control relationships pose to the doctrine of command responsibility.

49. The strike on RTS provides an example of this. Amnesty alleges that there was disagreement among the NATO partners as to the legality of the strike on RTS. As a result one nation, reportedly the United States, went ahead with the attack despite the objections of the other NATO partners.[112] If that strike did, in the event, constitute a war crime could criminal liability be attributed to the superiors of the other, objecting, NATO partners?

50. The difficulty for analysis is in determining whether the military and relevant political superiors had the necessary control over the United States to prevent the bombing. Given that the relationship is a complex, and to some extent indeterminate mix, of military and political influence a court might have some difficulty in determining if there was the requisite control. Also the degree of control will vary with each nation; so Spain's influence with the United States may be less than the United Kingdom's. The national element that conducted the strike may have done so without the command approval of NATO command. What then is the position of the various commanders' in the NATO hierarchy? It is important to note that the test of effective control, and the fact that such control can be indirect and *de facto*, means that more than one superior may be held responsible for a crime committed by a subordinate.[113] So where the relevant tests set out for the doctrine of command responsibility are met liability could extend *across* a coalition, and not just directly up the chain of command.

51. What constitute necessary and reasonable measures in the context of a complex coalition? Assume that NATO's humanitarian intervention was lawful. What

---

[110] Amnesty Report, above n9, section 2.4.
[111] Above, para 23.
[112] Amnesty Report, above n9, section 5.3, citing press reports.

constitutes necessary and reasonable measures given the political necessity to hold together a complex multinational coalition to achieve a lawful objective? This is a difficult question. It is not within the scope of this paper to address these complex issues. Suffice to say that they are real and important issues, given the shift that most developed nations are making to the concept of the multinational coalition as the standard force structure to confront the security challenges of the 21st Century.

52. These difficulties do present a major challenge for any prosecution of Clinton and Blair. The identity of the aircraft and pilots involved in the incidents is not certain. If they were U.S. aircraft does Blair escape the possibility of liability? Conversely, if the aircraft were from the U.K. does Clinton escape liability? Or do both men escape liability because their national forces were detached from national command and operating under NATO leadership? Problems of proof were identified as one of the factors in the OTP decision that no further investigation was warranted.[114] The only incident where this may not impede prosecution is direct command responsibility for ordering the attack on RTS, if it was a civilian object and not a military target, as liability is incurred for giving the orders and the identity of the attacking aircraft is irrelevant.

E Conclusions on Clinton and Blair's Liability

53. Assuming that the three incidents were *prima facie* war crimes both Clinton and Blair clearly satisfy the first two requirements for indirect command responsibility, the existence of a superior-subordinate relationship and actual or constructive knowledge. The difficulty arises with the third requirement, the failure to take necessary and reasonable measures to prevent or punish. In this instance it would be the failure to punish that would be needed to found liability. Because the lawfulness of the incidents are not clear cut both men would be able to rely on internal investigations, if their findings of fact and conclusions were reasonable, to show that necessary and reasonable measures had been taken.

54. The direct liability for ordering the attack on RTS would require proof that they did in fact order the strike, and that RTS could not be classified as a military target. On the evidence it seems that RTS was able to be classified as a military target, and

---

[113] *Blaskic*, above n56, para 303;

unless they were involved in the operational and tactical planning of the strike, they cannot be fixed with liability via the direct responsibility limb of command responsibility.

55. However, given the assumption that the three incidents are *prima facie* war crimes, and the fact that the pilots involved have not been punished, the burden must be on Clinton and Blair to lead some evidence that necessary and reasonable measures were taken. Then the burden will shift back to those alleging criminal responsibility to prove beyond reasonable doubt that the measures taken do not satisfy their legal duty.

VI SOVEREIGN IMMUNITY, WAR CRIMES AND CRIMES AGAINST HUMANITY

56. Assuming that criminal liability could be founded through the doctrine of command responsibility, what protection do Clinton and Blair receive from their positions as a current former Head of State and Head of Government a under international law? Traditional Head of State Immunity, as a norm of customary international law, was an aspect of Sovereign Immunity. This is a principle that acts to prevent the courts of one State sitting in judgement on the acts of another State.[115] This principle has its roots in the equality of States at the international level.[116] The extension of sovereign immunity to the Head of State was based in the idea of the Head of State, the sovereign, as the personification of the state. In their domestic law States base Head of State immunity on such grounds as sovereign immunity, diplomatic immunity and the Act of State doctrine.[117]

57. The initial restrictions on the doctrine of Head of State Immunity came within the field of civil law, drawing a distinction between private acts and official acts, particularly in the case of commercial transactions,[118] though the recognition of these exceptions is not universal.[119] The immunity of Heads of State belongs to the State, and not the person, so that the State may waive its immunity for a Head of State or

---

[114] "In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences." OTP Final Report, above n11, para 90.
[115] Gilbert Sison "Recent Development: a King no More: the Impact of the Pinochet Decision on the Doctrine of Head of State Immunity" (2000) 78 Wash ULQ 1583, 1584 – 1587.
[116] This principle is reflected in the UN Charter at Art 2(1).
[117] Sison, above n115, 1584 – 1585.
[118] *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426, 428 per Cooke P (CA).
[119] For example Russia adheres to a view of absolute immunity, Sison, above n115, 1587.

diplomat.[120] The analysis of sovereign immunity in the *Pinochet*[121] decision drew a distinction between the immunity enjoyed by a sitting Head of State and that enjoyed by a former Head of State. A current Head of State's immunity attaches to their person (*ratione personae*) and is an absolute procedural immunity, while a former Head of State's immunity attaches only to official acts performed in their official capacity (*ratione materiae*).[122]

58. However, since WWII, with respect to serious international crimes, international custom has restricted the application of this doctrine.[123] The Nürnberg Tribunal in Article 7 of its charter excluded any immunity based on official status, including that of Head of State or Head of Government.[124] This provision was included in the Tokyo Charter at Article 6, the ICTY Statute at Article 7(2), [125] the ICTR Statute at Article 6,[126] the ICC Statute at Article 27,[127] and was recognised by the ILC in the Nürnberg principles at Principle III,[128] and the ILC Draft Code at Article 7.[129] This principle of individual criminal responsibility denies substantive immunity to international criminals, though their sovereign immunity may still provide procedural immunity before domestic courts and even international tribunals.[130] The effect of the *Pinochet* decision[131] is to deny that international crimes can be "official acts" carried out in the public capacity of the individual, and therefore protected by immunity *ratione materiae.*[132]

59. How far do these various instruments reflect the state of international customary law? The ICTY considers its Statute to be reflective of customary international law,

---

[120] Ruth Wedgwood "40th Anniversary Perspective: International Criminal Law and Augusto Pinochet" (Spring, 2000) 40 Va J Int'l L 829, 838.
[121] Above n22.
[122] Sison, above n115, 1588.
[123] Though the possibility of its individual criminal liability overcoming sovereign immunity was mooted after the First World War, see the Commission of Responsibility Report, above n38.
[124] Nürnberg Charter, above n40, Article 7.
[125] ICTY Statute, above n14, Article 7(2).
[126] ICTR Statute, above n20, Article 6.
[127] ICC Statute, above n2, Article 27.
[128] Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal, Yearbook of the International Law Commission, 1950, Vol III. <http://www.un.org/law/ilc/texts/nurnfra.htm> (last accessed 4 July 2001)
[129] ILC Draft Code, above n22.
[130] "Princeton Principles" on Universal Jurisdiction (2001, Princeton University) [Princeton Principles] <http://www.princeton.edu/~lapa/unive_jur.pdf> (last accessed 29 August 2001).
[131] Above n22.
[132] Andrea Bianchi "Immunity versus Human Rights: The *Pinochet* Case" EJIL On-line Section 2D <http://www.ejil.org/journal/Vol10/No2/art1-02.html#TopOfPage> (last accessed 19 August 2001).

and it is interpreted to be consistent with custom as at the time of the offences.[133] The quality of the jurisprudence of the Tribunal lends some support to its claims. The ILC also considers that this principle of individual accountability even for Heads of State or Government is reflective of custom, as developed after World War II and reflected in the various international instruments cited above.[134]

60. State practice in many cases may seem to belie this principle. Many States harbour former Heads of State from justice: Idi Amin harboured in Saudi Arabia, Mengistu Haile Mariam in Zimbabwe, Jean Claude (Baby Doc) Duvalier in France, to name a few.[135] However the fact that some states deviate from an otherwise accepted norm does not prevent that norm hardening into a rule of customary international law.[136] The State practice evidenced by the Tribunals following the Second World War, the attitude of States to the formation of the ICTY and ICTR under Chapter VII of the Charter,[137] and the wide consensus on the Statute of the ICC,[138] all constitute evidence of *opinio juris* and state practice.

61. The *Pinochet* decision also seems to have stimulated efforts elsewhere in the world to bring former Heads of State to account. Chile proceeded with prosecution of Pinochet after his return from the United Kingdom, though this prosecution has been discontinued due to Pinochet's poor health.[139] The former dictator of Chad, Hissène Habré, was arrested in Senegal and indicted on torture charges. Senegal's supreme

---

[133] Above para 17.
[134] ILC Report 1996, above n23, commentary on Article 7.
[135] Mary Margaret Penrose "It's Good to be the King!: Prosecuting Heads of State and Former Heads of State Under International Law" 39 Colum J Transnat'l L 193, 196.
[136] State practice must be consistent, not rigidly uniform, *Military and Paramilitary Activities in and against Nicaragua* (Merits) [1986] ICJ Reports 14, 99 – 100 [*Nicaragua Case*].
[137] The Security Resolution itself is not evidence of state practice, but the attitudes of States to the resolution, and to the formation and conduct of the Tribunals is. Significantly for the ICTY the States most concerned with the institution have recently cooperated with the ICTY in extraditing some of their indicted nationals. For Croatia see BBC News Online "Croatia's War Crimes Legacy" (16 July 2001) <http://news.bbc.co.uk/hi/english/world/europe/newsid_1441000/1441771.stm> (last accessed 12 August 2001); for Serbia see BBC News Online "Serbs hand over war crimes suspect" (23 March 2001) <http://news.bbc.co.uk/hi/english/world/europe/newsid_1238000/1238793.stm> (last accessed 12 August 2001), and also the transfer of Milosevic to the ICTY, CNN "Lawyer says Milosevic to accept help" (4 July 2001) <http://www.cnn.com/2001/WORLD/europe/07/03/milosevic.court/index.html> (last accessed 12 August 2001); for Bosnia see BBC News Online "More Bosnia Arrests Urged" (3 August 2001) <http://news.bbc.co.uk/hi/english/world/europe/newsid_1471000/1471954.stm> (last accessed 12 August 2001).
[138] 139 signatories and 36 ratifications to the ICC Statute, above n2, as at 4 July 2001. To put this in perspective there are currently 189 member States of the United Nations.
[139] "Chilean Court Rules Pinochet Unfit to Stand Trial" (9 July 2001) <http://www.cnn.com/2001/WORLD/americas/07/09/pinochet/index.html> (last accessed 9 August 2001).

court was not prepared to assert jurisdiction as Senegal had not enacted legislation to implement the torture convention, but the UN Committee against torture has called on Senegal to hold Habré for extradition by a state that is prepared to exercise jurisdiction.[140] On 4 July 2001 the former president of FRY, Milosevic, appeared at the ICTY for trial.[141] As noted above the Prime Minister of Rwanda has already been convicted by the ICTR.[142]

62. This conflict between the principle of individual criminal responsibility for international crimes, regardless of any official capacity, and the doctrine of sovereign immunity is still not fully resolved. The position at customary law seems to be that the principle of individual criminal responsibility will fix criminal liability upon those protected by sovereign immunity. Their immunity becomes a *procedural* immunity, rather than a substantive immunity, for such time as that immunity persists. Those persons enjoying immunity *ratione personae* founded on an official position, such as a diplomat or Head of State, enjoy an absolute procedural immunity as long as they hold that official position.[143] Once they leave office their protection is reduced to *ratione materiae*, immunity only for official acts.[144] At that time they are vulnerable to prosecution on the lines of the *Pinochet* case. This position may be shifting, as the conviction of the Prime Minister of Rwanda and indictment of Milosevic while he was still Head of State illustrate.[145] A duly constituted international tribunal, through Chapter VII of the United Nations or by treaty, might be able to defeat even immunity *ratione personae*, but this has not been tested.

63. The real difficulty in this issue is in determining the scope of the principle of individual criminal responsibility as it relates to the jurisdiction of *domestic* courts, as

---

[140] Human Rights Watch Press Release, April 23 2001 <http://www.hrw.org/press/2001/habrecat0423.htm> (last accessed 27 June 2001). Under the Torture Convention 1984 Senegal has an obligation *aut dedere aut judicare* (to extradite or prosecute), Torture Convention 1984, above n4, Articles 5(2), 6(1), 7(1) and 8. Senegal cannot plead deficiencies of its domestic law to avoid international obligations under the Convention, Vienna Convention on the Law of Treaties 1969 Article 27 <http://www.un.org/law/ilc/texts/treatfra.htm> (last accessed 4 July 2001).

[141] CNN "Lawyer says Milosevic to accept help" above n135; Ruth Wedgewood "Former Yugoslav President Slobodan Milosevic To Be Tried in The Hague for Crimes Against Humanity and War Crimes Allegedly Committed in Kosovo" ASIL Insights July 2001 <http://www.asil.org/insights/insigh76.htm> (last accessed 20 July 2001).

[142] Above para 26.

[143] Princeton Principles, above n130, 48 – 51.

[144] The *Pinochet* decision, above n22, formulated sovereign immunity for ex-Heads of State in this manner, though it must be noted they were construing s20 of the UK's State Immunity Act. The House of Lords construed s20 in light of international law so the decision is still of use in examining the state of International Law, Bianchi, above n132, section 2D.

[145] Princeton Principles, above n130, 51.

opposed to international tribunals. International tribunals are reliant on States to arrest offenders and transfer them to the tribunal, so if offenders have immunity in domestic proceedings this may effectively deny an international tribunal any possibility of exercising its jurisdiction. The commentary on the ILC Draft Code refers to the scope of this principle as referring to "appropriate proceedings":[146]

> ...the author of a crime under international law cannot invoke his official position to escape punishment in *appropriate proceedings*. The absence of any *procedural* immunity with respect to prosecution or punishment in *appropriate judicial proceedings* is an essential corollary of the absence of any substantive immunity or defence. [emphasis added]

64. For immunity *ratione materiae* this is not necessarily a difficulty, as the *Pinochet* decision illustrates. Protection in this instance only attaches to official acts and the customary international law is sufficiently developed for war crimes to found a basis for universal jurisdiction and for the principle of individual responsibility to override the official status of the acts in question.[147] War crimes are therefore incapable of characterisation as "official acts", using the *Pinochet* approach, and immunity *ratione materiae* cannot attach to those acts.

65. The difficulty arises in the context of immunity *ratione personae*. Here the international custom seems to deny that the principle of individual criminal responsibility can trump immunity *ratione personae* in a domestic court. This is an important issue for International Tribunals as the arrest of an offender by a State, and their transfer to the tribunal, will be barred by immunity *ratione personae*. The ICTY, for one, seems to have considered that they had jurisdiction to prosecute a sitting Head of State, as their indictment of Milosevic showed. Whether this is due to the status of customary international law or due to the tribunal's status under Chapter VII of the Charter is less clear, though some of these issues may be clarified with respect to a former Head of State during the upcoming trial. The point here is that while the ICTY asserted jurisdiction over Milosevic they are reliant on a State to arrest and transfer him into ICTY custody to exercise that jurisdiction. Milosevic's *ratione personae* would have acted as an absolute obstacle to the necessary proceedings by a State to arrest and transfer him to the ICTY, rendering any jurisdiction the ICTY might have redundant.

---

[146] ILC Report 1996, above n23, commentary on Article 7, para 6.

66. At the level of international law there is certainly an argument that the domestic courts of a State might be considered "appropriate judicial proceedings," in the context of certain international crimes. The prohibitions against conduct amounting to war crimes, genocide, crimes against humanity and torture have the character of peremptory norms of international law, rules of *jus cogens*. In the *Pinochet* case it was noted that breaches of *jus cogens* rules may be punished by any State because the offenders are the common enemies of all mankind, and therefore all States have an equal interest in their prosecution.[148] States are not natural persons that can act for themselves, they act through organs and agents. This is the principle underlying the attribution of individual criminal responsibility for serious international crimes, and is of significance for State action in response to a breach of a *jus cogens* rule.

67. If a State is entitled to act to punish the perpetrator of an act breaching a *jus cogens* rule, on the basis that the perpetrator is an enemy of all mankind; and it is recognised that for the act in question official capacity is no defence and no bar to proceedings at an *international* level, what basis is there to object to that State taking appropriate action through one of its organs? Just as the executive could take diplomatic action against another State in the case of State responsibility for an international wrong, the courts take action against the individual in the case of individual responsibility for an international crime. In the former instance this is the State acting at an international level through one of its organs, in the latter it is arguable that this is also the State acting at the international level through an organ – its courts. The crime is international in basis, the jurisdiction is founded in international law, the derogation from the doctrine of sovereign immunity is founded in international custom, and the State is entitled under international custom to prosecute. The domestic courts of a State, as an organ of that State, are the most appropriate organ to deal with the breach of a *jus cogens* rule that has given rise to individual criminal responsibility, as is that State's right under customary international law. Where there is an international tribunal or court that can exercise jurisdiction, it may well be more appropriate to hand the offender over for prosecution

---

[147] Above, paras 58 - 59. Bianchi, above n132, section 4.
[148] *Pinochet*, above n22, paras 40 – 41 per Lord Brown-Wilkinson.

in an international court. But where that is not possible it must be possible for a State to take appropriate action in response to a violation of a *jus cogens* rule.[149]

VII CONCLUSIONS: CRIMINAL LIABILITY UNDER INTERNATIONAL LAW?

68. The Prosecutor's Office at the ICTY has concluded that legally and evidentially there are insufficient grounds for further investigation into allegations of War Crimes by NATO during Operation Allied Force. Despite that finding there is continued debate over the lawfulness of some of the incidents in which civilians were killed, with some commentators concluding that there were violations of the laws and customs of war. If any of these incidents were war crimes then the doctrine of command responsibility will extend criminal liability to superiors who have failed in their duty to prevent or punish. This liability could extend all the way up the chain of command to the Head of State.

69. Any prosecution against Bill Clinton and Tony Blair for NATO war crimes would face two obstacles: satisfying the legal tests for command responsibility, and overcoming their sovereign immunity. Both men satisfy the first two tests under the doctrine of command responsibility, the existence of the superior-subordinate relationship and the requisite knowledge requirement. It is in establishing the last element, the failure to take necessary and reasonable measures to prevent or punish offences, that any prosecution would encounter difficulties. One problem is the complexities that a multinational coalition brings to both the definition of the superior-subordinate relationship and the quantification of necessary and reasonable measures. These difficulties have been adverted to in this paper but not resolved. The second problem is one of proof. There is very little evidence on what internal NATO investigations were conducted, and what, if any, national investigations were conducted into these incidents. Both the United States and United Kingdom have well organised legal services within their defence forces, and it is likely that if well conducted investigations concluded on reasonable grounds that the incidents were

---

[149] Bianchi, above n132, section 3.

lawful, then that would be sufficient to satisfy necessary and reasonable measures *in this instance*.[150]

70. The second obstacle, the doctrine of sovereign immunity, is the more formidable. This doctrine has been eroded over the course of the last hundred years, but it is in the last decade that we have seen the international community challenge it in its unqualified form. The conviction of the Prime Minister of Rwanda, the proceedings against Pinochet, the arrest and impending trial of Milosevic are important instances of moves to end impunity. The *Pinochet* analysis draws a distinction between acting and former Heads of State, and the implication of that analysis is that a former Head of State's substantive or procedural immunity *ratione materiae* will not protect them from individual criminal liability for international crimes. For current Heads of State the international custom is still unsatisfactory. Their *ratione personae* still acts as an absolute bar to proceedings by domestic courts, though the principle of individual responsibility defeats their substantive immunity. The position may be different for an international tribunal; there the immunity *ratione personae* may not bar proceedings, though this is still untested. This position is unsatisfactory as it is an encouragement for these leaders to cling to power by any and all means, as their immunity is lost once they lose power.

71. And what of Bill Clinton and Tony Blair? It is a timely reminder to all superiors, civilian and military, that they bear a positive duty to prevent and punish war crimes. If they do not do so they can be, and judging by recent developments may well be, held criminally liable. Some of the incidents in the NATO campaign are of questionable legality, but on the current evidence it seems unlikely that Clinton or Blair could be held criminally liable.

---

[150] As noted above the fact that the lawfulness is ambiguous, and the different legal analyses of the OTP and other legal commentators reaching contrary conclusions, suggests that these offences are borderline cases. Where the offences were clearly unlawful a superior would not be able to rely on a sham investigation to deflect criminal liability.

BILBLIOGRAPHY

Amnesty International "NATO/Federal Republic of Yugoslavia: 'Collateral Damage' or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force" (EUR 70/018/2000)

Bantekas, Ilias "The Contemporary Law of Superior Responsibility" 93 AJIL 573

Bianchi, Andrea "Immunity versus Human Rights: The *Pinochet* Case" EJIL On-line <http://www.ejil.org/journal/Vol10/No2/art1-02.html#TopOfPage> (last accessed 19 August 2001)

Brand, G "War Crimes Trials and the Laws of War" (1949) 26 BYIL 414

Ching, Ann B "COMMENT: Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia" 25 NCJ Int'l Law & Com Reg 167

Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (1920) 14 AJIL 95, 121

Cotter, Irwin "Regina v Finta, Canadian Supreme Court War Crimes Decision" 90 AJIL 461

Egorov, Sergey Alexeyevich "The Kosovo Crisis and the Law of Armed Conflicts" (31 March 2000) 837 International Review of the Red Cross, 183

Human Rights Watch "Civilian Deaths in the NATO Air Campaign" (February 2000) Volume 12 Number 1(D)

Mitchell, Andrew D "Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes" 22 Sydney L Rev 381

Murphy, Sean D "Developments in International Criminal Law: Progress and Jurisprudence of the International Tribunal for the Former Yugoslavia" (1999) 93 AJIL 57

Penrose, Mary Margaret "It's Good to be the King!: Prosecuting Heads of State and Former Heads of State Under International Law" 39 Colum J Transnat'l L 193

"Princeton Principles" on Universal Jurisdiction (2001, Princeton University)

Scales, Robert H "Future Warfare Anthology" (US Army War College, Carlisle Barracks, Pennsylvania, April 1999)

Sison, Gilbert "Recent Development: a King no More: the Impact of the Pinochet Decision on the Doctrine of Head of State Immunity" (Winter, 2000) 78 Wash ULQ 1583

Vetter, Greg R "Command Responsibility of Non-Military Superiors in the International Criminal Court" (2000) 25 Yale J Int'l L 89

Voon, Tania "Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict (2001) 16 Am U Int'l Rev 1083

Wedgwood, Ruth "40th Anniversary Perspective: International Criminal Law and Augusto Pinochet" (Spring, 2000) 40 Va J Int'l L 829

TABLE OF CASES

International Cases

Domestic Cases

TABLE OF TREATIES AND INTERNATIONAL MATERIALS

Draft Code of Crimes against the Peace and Security of Mankind 1996 <http://www.un.org/law/ilc/texts/dcodefra.htm>

Indictment *Prosecutor v Radovan Karadzic and Ratko Mladic* (ICTY, July 1995)

Office of the Tribunal Prosecutor, International Criminal Tribunal for the Former Yugoslavia "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia"

Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal, Yearbook of the International Law Commission, 1950, Vol III

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (June 8 1977) 1125 UNTS 3 Article 85

Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996) General Assembly Official Records - Fifty-first Session Supplement No. 10 (A/51/10), Chapter II

Report of the Preparatory Commission for the International Criminal Court, Addendum Part II, Finalized draft text of the Elements of Crimes (2 November 2000) PCNICC/2000/1/Add.2

Rome Statute of the International Criminal Court, 17 July 1998 (1998) 37 ILM 998

Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended 30 November 2000 by Resolution 1329 <http://www.un.org/icty/basic/statut/stat2000_con.htm> (last accessed 16 August 2001)

Statute of the International Criminal Tribunal for Rwanda <http://www.ictr.org/ENGLISH/basicdocs/statute.html> (last accessed 10 August 2001)