ARTICLE

Special Operations Forces and Responsibility for Surrogates' War Crimes

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For U.S. Armed Forces, the concept of conducting operations "through, with, or by" indigenous populations is not new, and its ad hoc use can be traced from the Revolutionary War.[1] During World War II, the Office of Strategic Services ("OSS") employed this strategy with spectacular results against German forces in occupied France and against Japanese forces in Burma. As a result, the U.S. Army formally established Special Forces in 1952 with a principle purpose of developing and maintaining a U.S. military capability to conduct operations in this manner—Unconventional Warfare or Foreign Internal Defense.[2] Today, U.S. Special Operations Forces ("SOF") develop and maintain this capability as a core mission and conduct such operations, when directed, in the defense of and to achieve United States national security interests and objectives.[3] The most recent high profile examples of such operations were SOF operations with Northern Alliance surrogates against the Taliban and

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[1] Richard D. Newton, *The Seeds of Surrogate Warfare*, *in* CONTEMPORARY SECURITY CHALLENGES: IRREGULAR WARFARE AND INDIRECT APPROACHES 1, 2 (Joint Special Operations Univ. Report 09-3, Feb. 2009) [hereinafter CONTEMPORARY SECURITY CHALLENGES].

[2] *See generally* AARON BANK, FROM OSS TO GREEN BERET (THE BIRTH OF SPECIAL FORCES) (1986).

[3] 10 U.S.C. § 167 (2011); JOINT PUBLICATION 3-05, JOINT DOCTRINE FOR SPECIAL OPERATIONS; JOINT PUBLICATION 3-07.1, JOINT DOCTRINE FOR FOREIGN INTERNAL DEFENSE; The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1208.

al Qaeda in Afghanistan and with the Kurdish militia against Iraq's armed forces in northern Iraq.[4]

Unconventional Warfare operations include tasks to train, equip, and advise friendly foreign indigenous forces—surrogates.[5] For the purposes of this Article, a surrogate is defined as "an entity outside of the Department of Defense . . . that performs specific functions that assist in the accomplishment of U.S. military objectives by taking the place of capabilities that the U.S. military either does not have or does not desire to employ."[6] Unconventional Warfare includes the use of surrogate forces in military operations.[7] SOF select and support a surrogate force based upon shared interests—an understanding that the surrogates will pursue the same military objectives desired by SOF.[8] Further, SOF are required to conduct all operations, to pursue all military objectives, in accordance with the law of war. U.S. law and policy requires SOF to comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.[9] If any U.S. service members—not just those from SOF—violate the law during the conduct of military operations, U.S. military authorities investigate the incident and prosecute the violators under the Uniform Code of Military Justice.[10]

But what if the surrogates are the violators? Many authors have noted the inherent risks of SOF operations that involve the use of surrogates because of the possibility of unintended consequences.[11] The surrogates may not respect human rights or may use their newly found military capacity toward other ends that have no relation to U.S. military objectives.[12] What are SOF's responsibilities in conducting Unconventional

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[4] Isaac Peltier, *Surrogate Warfare: The Role of U.S. Army SF*, *in* CONTEMPORARY SECURITY CHALLENGES, *supra* note 1, at 55, 56.
[5] Department of the Army, FM 3-05.130, Army Special Operations Forces Unconventional Warfare, 5-1 (2008).
[6] Kelly Smith, *Surrogate Warfare for the 21st Century*, *in* CONTEMPORARY SECURITY CHALLENGES, *supra* note 1, at 39, 41.
[7] *Id.*
[8] *Id.* at 45.
[9] U.S. DEP'T. OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM ¶ 4 (May 2006) [hereinafter DODD 2311.01E]; Carr Center for Human Rights Policy, *Ethical Dilemmas for Special Forces*, John F. Kennedy School of Government, Harvard University (June 2003).
[10] *See, e.g.*, United States v. Calley, 48 C.M.R. 19, 25–29 (C.M.A. 1973).
[11] Travis L. Homiak, *Expanding the American Way of War: Working "Through, With, or By" Non-U.S. Actors*, *in* CONTEMPORARY SECURITY CHALLENGES, *supra* note 1, at 19, 32.
[12] D. Jonathan White, *Legitimacy and Surrogate Warfare*, CONTEMPORARY SECURITY CHALLENGES, *supra* note 1, at 85, 90.

Warfare when the surrogates are suspected of or have committed war crimes? Some scholars indicate that SOF might be criminally liable for surrogates' war crimes under command responsibility theory.[13] One specifically reviewed a SOF team's 2001 operations with Northern Alliance surrogates against the Taliban and al Qaeda in Afghanistan.[14] There were news reports that some Northern Alliance groups had mistreated and even caused the deaths of numerous Taliban and al Qaeda prisoners. The author opined that a SOF team in the vicinity had a general legal duty under command responsibility theory to investigate any rumors of Northern Alliance war crimes and to intervene to prevent such crimes.[15]

This Article considers this specific issue: whether SOF teams have duties under the law of war—as interpreted by war crimes jurisprudence—to investigate and to attempt to prevent war crimes by surrogate forces. It does not address duties imposed by domestic statutes or regulations. Also, given the breadth of this topic, the Article focuses on the duties of SOF teams in the field—their tactical actions—and not those of higher, strategic, or policy-level decisionmakers. For example, consider the following scenario that might arise during an Unconventional Warfare mission. A SOF team deploys into a foreign country in either a permissive or non-permissive environment with the mission to accomplish U.S. military objectives through, with, or by surrogates—to train, equip, advise and assist, and even lead, in varying degrees, surrogate forces in combat. Before deploying, the team knows of general rumors that some of the surrogate groups may have committed acts that would constitute serious violations of the law of war. While deployed and providing military assistance, the team hears specific rumors that the surrogates with whom they are working might be committing war crimes. No SOF members directly participate in any war crimes. Within the context of law of war jurisprudence, what are SOF's responsibilities with respect to suspected or confirmed war crimes being committed by surrogate forces?

This Article first analyzes SOF's criminal liability and duties under command responsibility theory—specifically, whether a SOF team's ability to influence surrogates would amount to "effective control" so as to render

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[13] Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 A.J.I.L. 573, 573 (1999); Francis Boyle, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 A.J.I.L. 86, 89–90 (1987).

[14] *See generally* Jennifer Lane, *The Mass Graves at Dasht-e Leili: Assessing U.S. Liability for Human Rights Violations During the War in Afghanistan*, 34 CAL. W. INT'L L.J. 145 (2003).

[15] *Id.* at 166.

the team responsible for the surrogates' criminal acts. Then, the Article considers SOF's potential criminal liability under theories that do not require effective control. Finally, the Article discusses the implications of these theories on a SOF's duties to investigate, report, intervene, or detach from surrogates who are suspected or confirmed of committing war crimes. Recognizing the developmental link between international and domestic cases concerning war crimes, it draws examples and theories from recent decisions of U.S. courts, the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the International Criminal Court ("ICC"). An analysis of these sources confirms that SOF generally have no legal duty under the law of war to investigate rumors of past war crimes committed by surrogates or to intervene to stop future ones. The Article concludes, however, that SOF have strong moral, ethical, and even practical motives to take some action, including to maintain the legitimacy of the U.S. military operation to the rest of the U.S. Government and the American population. Accordingly, the Article provides limited practical advice for SOF to consider when confronting a situation where surrogates may have or did commit war crimes.

I. Command Responsibility Theory and Surrogate War Crimes

For over fifty years, U.S. courts and international tribunals have applied command responsibility theory to hold commanders responsible for crimes committed by soldiers or others under their control. The modern doctrine dates from the Nuremburg and Tokyo war crimes trials after World War II,[16] and the most recent and comprehensive consideration of the theory occurred in the ICTY's *Celebici Judgment*, which concerned atrocities committed by Bosnian Muslim and Croat forces against Bosnian Serbs in a prisoner camp.[17] Regardless of the forum, the fundamental questions for command responsibility are the same: where a crime is committed by a subordinate, who is the superior, and under what circumstances is he or she liable? To answer these questions, court decisions have closely examined the relationships between the superior and the subordinate—between the defendant and the perpetrator of the crime.

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[16] *See generally, e.g.*, In re: Yamashita, 327 U.S. 1 (1946); United States v. Rockwood, 52 M.J. 98 (C.A.A.F. 1999); Beth Van Schaack, *Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia*, 36 U.C. DAVIS L. REV. 1213 (2003); Michal Stryszak, *Command Responsibility: How Much Should a Commander be Expected to Know?*, 11 U.S.A.F.A. J. LEG. STUD. 27 (2000).

[17] Andrew D. Mitchell, *Failure to Halt, Prevent, or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 SYDNEY L.R. 381, 400 (2000).

They have also distinguished situations in which effective control existed from those in which the defendant merely had an ability to influence the perpetrator's conduct.

A. Command Responsibility Theory's Dominant First Element: Whether a Defendant Had "Effective Control" Over the Perpetrators of the War Crimes

Command responsibility theory has a common formulation that requires three elements: (1) a superior/subordinate relationship; (2) knowledge, actual or constructive, by the superior of the crimes committed by the subordinate; and (3) failure by the superior to halt, prevent, or punish the subordinate.[18] Moreover, it creates liability for two types of conduct: positive acts and omissions where there exists a legal duty to act.[19] In applying the theory, a court must first determine whether the evidence satisfies the superior/subordinate relationship element, and this element will effectively drive a court's consideration of the second and third elements.[20] In other words, the existence or nature of an alleged superior/subordinate relationship will determine if an individual had the requisite mental state under command responsibility theory—what he or she knew or "should have known." Furthermore, it will determine the existence and scope of that person's duty to prevent a war crime.

The dependency of the second two elements on the first was exemplified in the ICTY case *The Prosecutor v. Blaskic*.[21] Tihomir Blaskic was a general in the Croatian Defence Council ("HVO"). Several Croatian police and paramilitary units in General Blaskic's area of responsibility had committed atrocities against Bosnian Muslim civilians and property. General Blaskic was charged with these war crimes based on command responsibility under the ICTY Statute, Article 7(3).

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[18] RODNEY DIXON AND KARIM KHAN, ARCHBOLD INTERNATIONAL CRIMINAL COURTS, PRACTICE, PROCEDURE, & EVIDENCE 293 (2003).

[19] Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶¶ 333–34, 341–42, 395–98, 1222 (Int'l Trib. for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Nov. 16, 1998), *aff'd*, Feb. 20, 2001.

[20] *Id.* ¶¶ 364–78, 734.

[21] Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment (Int'l Trib. for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Mar. 3, 2000), *aff'd*, July 29, 2004.

The Trial Chamber considered General Blaskic's mental state entirely within the context of its analysis of his command relationship to the police and paramilitary forces that committed the crimes. It noted that Article 7(3) had a *mens rea* element that required proof that General Blaskic had either actual knowledge or had reason to know of crimes being committed by troops under his control.[22] For actual knowledge, the Trial Chamber stated that "an individual's command position *per se* is a significant indicium that he knew about the crimes committed by his subordinates."[23] For constructive knowledge, the Trial Chamber opined that General Blaskic's duty to know their crimes stemmed directly from his superior/subordinate relationship to the troops. It quoted the *Celebici* Trial Chamber:

> A superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences, *committed by his subordinates*. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the *superior* was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed *by his subordinates*.[24]

Because the *Blaskic* Trial Chamber concluded that General Blaskic was a regional commander with some authority over the paramilitary and police forces in his geographic area of responsibility, it held that he had a duty to know—indeed, that he should have known—about their crimes.

The Trial Chamber also considered the third element of command responsibility theory—whether General Blaskic took necessary and reasonable measures to prevent or punish the war crimes—entirely within the context of its examination of the superior/subordinate relationship.[25] The Chamber opined that "it is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the

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[22] *Id.* ¶¶ 307–10.
[23] *Id.*
[24] *Id.* ¶ 310 (quoting *Delalic*, IT-96-21-T, ¶ 393) (emphasis added).
[25] *Id.* ¶¶ 333–36.

crime or to punish the perpetrator."[26] Again, the Trial Chamber focused on the facts of General Blaskic's relationship to the paramilitary and police forces that committed the crimes. He claimed that those forces reported to a higher authority in the hierarchy and therefore that he did not directly control them and could not take any measures to prevent their crimes. However, the Trial Chamber ruled that General Blaskic was still the superior of those forces within a hierarchy and therefore had a duty to report their atrocities.

Thus, the existence of a superior/subordinate relationship is a prerequisite to liability under command responsibility theory. It defines the scope and nature of a defendant's imputed knowledge and duty to intervene. A defendant may have knowledge of war crimes being committed by others and fail to act to prevent them, but without a superior/subordinate relationship between the defendant and the others, he will not be liable for the others' war crimes under this theory. Recalling the example in this Article's introduction (about SOF and surrogates rumored to have committed war crimes), the dispositive issue for a SOF team's liability for the surrogates' war crimes under command responsibility theory would be whether the team had a superior/subordinate relationship with the surrogates.

B. The Superior/Subordinate Standard Requires Effective Control, Not Merely the Ability to Influence

The standard for a superior/subordinate relationship is "effective command and control," which means that an individual has the material ability to prevent and punish the commission of the alleged offenses.[27] Significantly, the relationship can exist either *de jure* or *de facto*. An individual's title, or lack thereof, as commander is not dispositive. Article 28 of the ICC summarizes the terms of command responsibility theory developed in international war crimes jurisprudence:

> A military commander or a person effectively acting as a military commander shall be held criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result

[26] *Id*. ¶ 335 (citing *Delalic*, IT-96-21-T, ¶ 395).
[27] *Delalic*, IT-96-21-T, ¶¶ 378, 393; *Blaskic*, IT-95-14-A, ¶ 67.

> of his or her failure to exercise control proper over such forces. . . .[28]

The ICTY cases concerning command responsibility offer the most recent and comprehensive analyses of this standard.

In the *Celebici Judgment*, the ICTY considered whether three individuals—Zcravko Mucic, Hazim Delic, and Zejnil Delalic—had effective control over prison guards who committed numerous atrocities in 1992 against Serbians held at the Celebici prison camp.[29] Mucic was the commander of the camp, and Delic was the deputy commander. Delalic was the commander of military forces in Konjic, Bosnia, where the camp was located. The Trial Chamber first considered whether each had *de jure* authority over the guards. It examined legislation, laws, written policies, and written orders for definitions of their authority and of a hierarchy that included the defendants and the guards. Then, the Trial Chamber analyzed whether a *de facto* relationship existed between the Celebici defendants and the prison guards—whether they had effective control over the guards. The Trial Chamber considered a variety of factors: the distribution of tasks within the unit; the capacity to issue orders; any previous exercise of disciplinary measures by the defendants; and, lastly, the defendant's powers of influence. Significantly, it distinguished between influence and effective control, indicating that influence alone does not establish a superior/subordinate relationship. Individuals are criminally liable under command responsibility theory only to the extent that they fail to exert proper influence over others upon whom effective control already exists.[30]

In Mucic's case, the Trial Chamber ruled that he exercised *de facto* control over the individuals who committed the crimes but failed to exert proper influence to prevent war crimes. The evidence included Bosnian Army documents indicating that Mucic was the camp commander. Former

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[28] The Rome Statute for an International Criminal Court, U.N. GAOR, 53rd Sess., U.N. Doc. A/Conf. 183/9, art. 28(a); DIXON & KHAN, *supra* note 18, at 293. Of note, the United States is not and does not intend to become a party to the Rome Statute. U.S. Department of State Press Statement, *International Criminal Court: Letter to UN Secretary General Kofi Annan* (May 6, 2002), http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm [http://perma.cc/D2RQ-TP63].

[29] *Delalic*, IT-96-21-T, ¶¶ 378, 644–721, 733–775, 795–810; Ann B. Ching, *Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia*, 25 N.C. J. INT'L L. & COM. REG. 167, 187–203 (1999).

[30] Bantekas, *supra* note 13, at 576.

prisoners also testified that Mucic was recognized as the camp commander by the prisoners and the camp guards. Mucic argued that there were no official records showing his appointment as the camp commander and that numerous outside groups had access to the prisoners to abuse them. He also argued that he had tried unsuccessfully to prevent the abuse of the prisoners. The Trial Chamber rejected Mucic's arguments, declaring: "[w]here there is *de facto* control and actual exercise of command, the absence of a *de jure* authority is irrelevant to the question of the superior's criminal responsibility for the criminal acts of his subordinates."[31] Accordingly, the Trial Chamber held that Mucic's poor attempts to protect the prisoners demonstrated that he had some control over the prison guards.

In contrast, the Trial Chamber also found that Delic lacked effective control over the prison guards even though he was the deputy commander of the camp.[32] It distinguished between influence and effective control. Several witnesses testified that Delic appeared to be the guards' "boss" because he gave them orders and had an apparent strong intimidating and coercive influence on them. Nevertheless, the Trial Chamber held that Delic's influence was merely the result of his forceful personality, which intimidated the guards and caused them to follow his orders. Hence, it concluded that such influence did not establish that Delic had *de facto* effective control over the Celebici camp.

The Trial Chamber also ruled that Delalic was not a *de facto* superior of the prison guards at Celebici and distinguished between influence and effective control. It focused on Delalic's functions and activities as the regional coordinator for forces in Konjic area and as the appointed commander of Tactical Group I.[33] The Chamber found that as a coordinator, Delalic's duties consisted of "mediation and conciliation" and that he had "his functions prescribed."[34] It noted that the position of coordinator was not recognized in the Bosnian Army and that it did not place Delalic in a military chain of command. Rather, he acted as a mediator between military and civilian groups in the Bosnian government, facilitated the distribution of supplies, and exercised no independent judgment. Accordingly, the Trial Chamber held that Delalic's job as a coordinator did not make him a superior of the prison guards. Concerning his post as the commander of Tactical Group I, the Chamber noted that the

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[31] *Delalic*, IT-96-21-T, ¶ 736.
[32] *Id*. ¶¶ 795–810.
[33] *Id*. ¶ 700; Ching, *supra* note 29, at 196.
[34] *Delalic*, IT-96-21-T, ¶ 660.

unit was a temporary combat unit that did not include non-combat institutions such as prisons.[35] It rejected any inference of a superior/subordinate relationship from an order that Delalic transmitted from higher authority to the Celebici camp commander to appoint a commission to interrogate prisoners. The Trial Chamber emphasized that the tactical group existed only to carry out specific combat missions and was merely a conduit in transmitting the order. The Trial Chamber therefore concluded that Delalic did not have effective control over the Celebici camp.

C. The SOF–Surrogate Relationship: Influence versus Effective Control

The *Celebici Judgment* provides a useful framework to apply the effective control standard and assess SOF potential liabilities and responsibilities for surrogates' war crimes. Logically, a SOF team has some leverage to attempt to influence surrogates' behavior beyond their performance in combat. The team provides military assistance to the surrogates and can therefore attempt to influence the surrogates' conduct by threatening to withdraw its assistance. In the context of the *Celebici Judgment* analysis, does the team's ability to influence the surrogates amount to a superior/subordinate relationship from which duties of knowledge and prevention flow under command responsibility theory?

First, as with all three of the *Celebici* defendants, a court would be unlikely to rule that a SOF team exercised *de jure* effective control over the surrogates. There is no domestic or foreign legislation that makes surrogates part of U.S. forces. Such a relationship might stem from an international agreement that places a SOF team and the surrogates under a combined commander or within the same military hierarchy, but this is an unlikely scenario, especially since surrogates are typically not fighting on behalf of any recognized government.

Accordingly, a SOF team's liability will likely depend on whether a court determines that the team had *de facto* effective control over the surrogates. As in *Celebici*, it is necessary to examine the following factors to determine whether a SOF team's functions include the material ability to punish or to prevent the surrogates from committing war crimes: the distribution of tasks; the capacity to issue orders; any previous exercise of

[35] *Id.* ¶¶ 708–14.

disciplinary measures by the defendants; and, lastly, the SOF team's powers of influence.

With regard to tasks, SOF generally serve primarily as advisors and trainers when conducting missions "through, with, or by" surrogates.[36] After all, the premise underlying surrogate warfare is that the surrogates are assisting "in the accomplishment of U.S. military objectives by taking the place of capabilities that the U.S. military either does not have or does not desire to employ."[37] Consequently, SOF also coordinate the delivery of military supplies requested by the surrogates. In this regard, a SOF team's tasks seem analogous to those in *Delalic*, where one of the primary tasks was coordination of supplies and where the court found that he lacked effective control based on such activities. It may be argued that a SOF team does more than coordinate supplies and has the ability to direct close air support from U.S. aircraft against targets designated by the team and in support of the surrogates. In this manner, SOF and the surrogates act in concert. But such a use of force only involves SOF directing U.S. military power within a U.S.-only chain of command and not a combined chain of command for SOF and the surrogates. Finally, a SOF team may exercise *ad hoc*, limited tactical control over movements by the surrogates for purposes of maneuver and deconflicting fires. However, this task seems more analogous to the limited occasional control exercised by Delalic and Delic than to the extensive, prolonged control exercised by Mucic. Thus, based on a task analysis, a court would seem likely to rule, as the ICTY did with Delalic and Delic, that a SOF team lacks effective control over the perpetrators of the war crimes.

A SOF team also lacks material methods to issue orders or to exercise discipline over the surrogates. The SOF–surrogates relationship is a voluntary one, where the surrogates agree to work with a SOF team as long as the surrogates' leader considers the situation to be beneficial. Accordingly, the surrogates may follow *ad hoc* tactical orders, but only as allowed by the surrogates' leader. A SOF team does not function as a regional commander like defendant did in *Blaskic* where the ICTY found effective control to exist. Furthermore, the surrogates are not subject to a SOF team's military justice mechanisms for enforcing discipline. Rather, they follow the discipline of their own leaders. In this regard, a SOF team is

[36] JOINT PUBLICATION 3-05, *supra* note 3; Carr Center for Human Rights Policy, *supra* note 9; Homiak, *supra* note 11, at 21.
[37] Smith, *supra* note 6, at 41.

entirely dependent on the surrogates' leader to enforce discipline over his troops.

SOF's ability to issue orders and impose discipline is therefore one of influence alone through force of personality—as in *Delalic*, where the ICTY found a lack of effective control. The team's authority over the surrogates seems unlike the actual control that the ICTY assessed in *Mucic*. Furthermore, the team's actual powers of influence do not indicate a material capacity to punish or to prevent war crimes. A SOF team generally consists of only a few individuals compared to the large numbers of surrogates that are being assisted, and in a physical battle to prevent a war crime, the team would be dramatically outnumbered. Certainly, the team can draw upon U.S. close air support. However, air power is not a realistic mechanism to prevent individual war crimes or a lawful means to punish surrogates for their violations of the law of war. Rather, the team's primary leverage with the surrogates consists of threatening to withdraw U.S. military aid if the surrogates commit war crimes. By doctrine, SOF teams are trained to make this point as a matter of standard operating procedure immediately upon first meeting with the surrogates.[38] As already discussed and as the ICTY held in *Delalic*, however, the ability to coordinate supplies—and to withhold them—does not necessarily mean that a SOF team has effective control over the surrogates.

Thus, in conducting Unconventional Warfare, SOF do not have a superior/subordinate relationship with the surrogates and arguably would not be criminally liable for the surrogates' war crimes under command responsibility theory. As discussed below, this theory is therefore not a potential source of legal duties for SOF with respect to military operations that involve surrogates.

II. Criminal Responsibility Theories without Effective Control

Although a SOF team is unlikely to be liable under command responsibility theory, it could be liable under several theories which do not contain the requirement of a superior/subordinate relationship between the team and the surrogates. These include aiding and abetting, joint criminal enterprise, conspiracy, and contribution. Like command responsibility theory, these theories exist on the international level in the ICC Statute and the ICTY Statute and domestically in the Uniform Code of Military Justice ("UCMJ").

[38] Smith, *supra* note 6, at 41.

Significantly, none requires proof of effective control as an element to impose criminal liability, but all require proof of a higher mental element than command responsibility theory's mental element.[39] All necessitate proof that the defendant had actual knowledge of the subordinates' criminal conduct. In contrast, command responsibility theory only requires proof that defendant knew or should have known—had constructive knowledge—about such conduct. For aiding and abetting, the ICTY opined that under Article 7(1) of the statute "[t]he aider and abettor of persecution, as a 'special intent' crime, must not only have knowledge of the crime he is assisting or facilitating. He must also be aware that the crimes being assisted or supported are committed with discriminatory intent."[40] For joint criminal enterprise theory, the ICTY considered that only three possible scenarios exist to impose criminal liability:

> 1) those where all participants act pursuant to a common design and possess the same criminal intent; 2) those where the accused have personal knowledge of a system of ill-treatment and an intent to further the common system of ill-treatment; and 3) those where there is a common design to pursue a course of conduct but an act is committed outside the common design which is nonetheless a natural and foreseeable consequence of the common purpose.[41]

Significantly, all scenarios require proof of the defendant's actual knowledge of the subordinates' criminal purpose and varying degrees of intentional *mens rea*. Lastly, conspiracy theory also has a higher *mens rea* requirement than "should have known." There must be an agreement to commit a crime coupled with an overt act in furtherance thereof.[42]

Domestically, the UCMJ also provides for criminal liability in the absence of effective control but only if actual knowledge is proved. Under the UCMJ, there are two general theories for vicarious or imputed criminal

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[39] Prosecutor v. Kvocka, IT-98-30/1-T, Judgment, ¶ 262 (Int'l Trib. for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Nov. 2, 2001), *aff'd*, Feb. 28, 2005. Prosecutor v. Tadić, IT-94-1-A, Judgment, ¶¶ 227–29 (Int'l Trib. for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Nov. 2, 2001), *aff'd*, July 15, 1999.

[40] *Id.*

[41] *Id.* ¶ 267.

[42] Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy in International Tribunals*, 88 MINN. L. REV. 30, 57–59 (2003).

liability: principals and co-conspirators.[43] Under the law of principals, an accused may be convicted of a substantive offense committed by the actual perpetrator if he "aided, abetted, counseled, commanded, or procured the commission of the offense . . . or caused an illegal act to be done."[44] Under the law of conspiracy, an accused may be similarly convicted if crimes were done in furtherance of a conspiracy while the accused was a member of it. For a conviction, both require an accused to have actual knowledge of the actual perpetrator's criminal mental state or purpose. The accused need not share the same criminal intent of the perpetrator under these theories, but he must intend that some criminal or unlawful goal would be achieved by his aiding and abetting or participating in the conspiracy.

In *The Prosecutor v. Kvocka*, the ICTY analyzed several aiding and abetting type theories (non-effective control theories) in charges against several civilians, police officers, and minor administrators who worked at the Omarska, Keraterm, and Trnopolje Camps, where numerous atrocities were committed against Bosnian Muslims and Croats in 1992. None of the defendants were instrumental in establishing the camps or determining the official policies used on the detainees. All denied any criminal intent to commit the atrocities and claimed that others were the actual perpetrators. Yet, all were charged with individual criminal responsibility for the atrocities under Article 7(1) of the ICTY statute. The prosecution's theories were aiding and abetting and joint criminal enterprise. The Trial Chamber opined:

> [W]hen a detention facility is operated in a manner which makes the discriminatory and persecutory intent of the operation patently clear, anyone who knowingly participates in any significant way in the operation of the facility or assists or facilitates its activity, incurs individual criminal responsibility for the participation in the criminal enterprise, either as a co-perpetrator or an aider and abettor. . . .[45]

The Trial Chamber continued that presence alone at the scene of a crime is not conclusive of aiding and abetting but that silence could be interpreted as tacit approval when it is coupled with some authority. Concerning the degree of assistance, the Chamber ruled:

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[43] MILITARY JUDGES' BENCHBOOK, DA PAM 27-9, ¶¶ 7-1–7-1-3 (Sept. 15, 2002).
[44] *Id.* ¶ 7-1.
[45] *Kvocka*, IT-98-30/1-T, ¶ 306.

> The assistance or facilitation provided by the aider or abettor must of course have a substantial effect on the crime committed by a co-perpetrator. The precise threshold of participation in joint criminal enterprise has not been settled, but the participation must be "in some way . . . directed to the furthering of the common plan or purpose.[46]

The Trial Chamber held that the defendants had actual knowledge of the atrocities being committed by others at the camp and that through their continued participation in the camp's operation, they incurred individual criminal responsibility for the crimes.[47] In other words, it inferred that the defendants had the required criminal mental state based on their actual knowledge of the perpetrator's crimes and their ongoing assistance.

Applying these theories to an Unconventional Warfare mission, SOF might be criminally responsible for surrogates' war crimes if the team had actual knowledge of the surrogates' criminal purpose and intent and provided military assistance that assisted the surrogates in committing the crimes. For example, if the surrogates were shooting prisoners and civilians and were using ammunition supplied by SOF, the team might be liable if it had actual knowledge of the executions and yet continued supplying the ammunition. It might be argued that by doctrine and training, the team did not have any criminal intent or mental state or even the criminal purpose of the surrogates when it provided the assistance. But as in *Kvocka*, a court might infer that the team had some criminal intent by its actual knowledge of the surrogates' crimes coupled with the team's ongoing participation through military assistance. Moreover, the team need not know all of the particulars of the surrogates' intended crimes. Rather, under an aiding and abetting theory, a SOF team must simply be aware that their contribution will assist or facilitate the surrogates' crimes or that surrogates' crimes in general are a reasonably foreseeable consequence of their assistance.[48]

The SOF team's defense might fairly argue that they lacked actual knowledge of the surrogates' crimes and distinguish the lesser "should have known" mental state required under command responsibility theory, but the team's actual knowledge of the surrogates' criminal purpose might be established from circumstantial evidence of past crimes. The circumstantial evidence of the crimes must be strong enough that actual knowledge of the

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[46] *Id*. ¶ 289.
[47] *Id*. ¶¶ 257, 328.
[48] *See, e.g.*, *id.* ¶ 262.

surrogates' intentions can be imputed to the SOF team. For example, in *Kvocka*, the Trial Chamber stated:

> Even if the accused were not eye-witnesses to crimes committed in Omarska camp, evidence of abuses could be seen by observing the bloodied, bruised, and injured bodies of detainees, by observing heaps of dead bodies lying in piles around the camp, and noticing the emaciated and poor condition of the detainees, as well as by observing the cramped facilities or the bloodstained walls.[49]

Accordingly, under an aiding and abetting theory, rumors of surrogates' war crimes would probably not suffice by themselves to establish circumstantial evidence of a SOF team's actual knowledge. Because the standard is knowledge and not "should have known," aiding and abetting theory does not lead to a general duty for a SOF team to investigate the rumors. However, a team's willful ignorance is a perilous path toward criminal responsibility because persistent rumors and other circumstantial evidence could be collectively strong enough to establish the team's actual knowledge.[50]

III. Implications of These Criminal Responsibility Theories to SOF Duties

Potential criminal liability for SOF is therefore unlikely under command responsibility theory but very possible under aiding and abetting and similar theories that do not require effective control but require a team to have actual knowledge of the surrogates' criminal purpose and intent. Certainly, the timing of a SOF team's knowledge is an important aspect of this potential liability. Under aiding and abetting-type theories, liability will attach only if the teams have the above actual knowledge *before* providing or continuing to provide military aid. With this caveat in mind, the different results in applying these theories lead to several important implications for a SOF team's general legal duties in their interaction with the surrogates in the context of this article's factual scenario.

A. Duty to Investigate Surrogates' War Crimes

First, without "effective control," a SOF team has no general standing legal duty to investigate rumors of past war crimes committed by

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[49] *Id*. ¶ 324.

[50] *See* MILITARY JUDGES BENCHBOOK, DA PAM 27-9, *supra* note 43, ¶ 7-2. *See generally* United States v. Lyons, 33 M.J. 88 (1991).

surrogates. As previously discussed, a SOF team must have actual knowledge of the surrogates' past crimes for criminal liability to attach. The "should have known" standard applies only within command responsibility theory, not within the aiding and abetting type theories. Failure to investigate is therefore not a war crime in the context of this article's factual scenario. It would be unwise, however, for a team to ignore rumors that could constitute circumstantial evidence of actual knowledge, which if linked to continuing military aid could lead to criminal liability under aiding and abetting type theories.

B. Duty to Report Surrogates' War Crimes

Next, a SOF team has no general standing legal duty under the law of war to report rumors of surrogates' past war crimes. There are two possible avenues for a team to make such reports: (1) to higher authority within the U.S. Armed Forces and (2) to the surrogates' leadership. Concerning the first, all U.S. military personnel are required by regulation to report any suspected instances of violations of the law of war.[51] This regulatory requirement is typically incorporated into all SOF operational orders. Accordingly, failure to report surrogates' war crimes might lead to criminal liability under Article 92 of the UCMJ: "Violation of an Order or Regulation."[52] However, failure to report is not a war crime under the law of war. It is not among the war crimes in the ICC or the ICTY statutes. Rather, this type of crime is a domestic military criminal offense.

Concerning the second avenue of reporting (to the surrogates' leadership), the duty to make this report is not required by any U.S. regulation. Rather, it would derive from the third element of command responsibility theory, which creates a duty for a superior to prevent or punish war crimes. However, as stated, a SOF team is unlikely to be liable under this theory because it does not effectively control the surrogates. Further, under aiding and abetting type theories, there is no element that directly requires reports of crimes, but the existence or lack of such reports are certainly probative evidence about whether a team shared the surrogates' criminal purpose and intent. So, from a criminal litigation perspective, it would be unwise for a team not to report the crimes.

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[51] DoDD 2311.01E, *supra* note 9, ¶ 4.4; Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 5810.01B, *Implementation of the DOD Law of War Program* (Mar. 28, 2002); Carr Center for Human Rights Policy, *supra* note 9, at 29.

[52] 10 U.S.C. § 892 (2000).

C. Duty to Intervene to Prevent Surrogates' War Crimes

Similar to the duty to report, a SOF team has no general legal duty under the law of war to intervene to prevent the surrogates' war crimes if they acquire knowledge of the surrogates' criminal purpose and intent after delivering the military aid. Such a general duty would need to derive from command responsibility theory. As stated, however, without effective control, a SOF team will not likely be liable under that theory. Furthermore, the duty to intervene is not part of the aiding and abetting-type theories for war crime culpability. None includes a failure to meet this duty as an affirmative element to support a charge. Rather, the duty to intervene would only arise in a trial in the context of a defense strategy that attempts to negate charges of aiding and abetting or to prove that the defendants broke off from a conspiracy before the crime occurred.

This does not mean to imply that a SOF team should intervene because of the potential need to disprove an aiding and abetting, joint criminal enterprise, or conspiracy charge. After all, a team's safety and survival could be threatened or in peril by physical intervention against the surrogates. Self-defense and reality might dictate that the prudent military option is to detach and withdraw from the surrogates. Of note, criminal responsibility for war crimes generally excludes reasonable self-defense.[53]

Furthermore, a SOF team's mission might not include intervention. The U.S. Court of Appeals for the Armed Forces considered this issue in the context of non-SOF, or conventional soldiers, in *United States v. Rockwood*.[54] Captain Rockwood was a counterintelligence officer on the staff of Joint Task Force ("JTF") 190 during the U.S. operations in Haiti in 1994. On September 30, 1994, he left his place of duty at the Light Industrial Complex in Port-au-Prince, Haiti, and went to the National Penitentiary to conduct an inspection and to intervene to protect prisoners. He had heard rumors that the local Haitian soldiers and police were abusing, torturing, and killing prisoners there. Captain Rockwood was charged with several violations of the UCMJ, including leaving his place of duty. In his defense, he argued justification—that his command was criminally negligent by not protecting Haitian prisoners from alleged human rights abuses and that he would have been criminally responsible for war crimes if

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[53] *See, e.g.*, The Rome Statute, *supra* note 28, at art. 31(1)(c).

[54] *Rockwood*, 52 M.J. 98. *See* Major Edward J. O'Brien, *The Nuremburg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 MIL. L. REV. 275 (1995).

he had failed to intervene. The U.S. Court of Appeals for the Armed Forces rejected his argument:

> Appellant cites us to no legal authority – international or domestic, military or civil – that suggests he had a "duty" to abandon his post in counterintelligence and strike out on his own to "inspect" the penitentiary. Neither does he suggest any provision of any treaty, charter, or resolution as authority for the proposition. . . . In this circumstance, we conclude that the military judge did not err in declining to provide a justification instruction.[55]

The court noted that the alleged abuses were done by Haitian soldiers, not American soldiers under the command of JTF 190. It further opined that the United States was not an occupying power of Haiti with any regional duty to control Haitian forces. Finally, the court considered that the JTF 190 staff had no actual knowledge of atrocities and that Captain Rockwood's investigation and intervention placed him in personal danger because of the unstable security situation in Port-au-Prince. Accordingly, the court concluded that Captain Rockwood had no general legal duty to investigate rumors of atrocities by Haitian forces or to intervene to prevent any because there was no potential threat of a war crimes conviction. It upheld Captain Rockwood's conviction, ruling that his investigation and intervention concerning rumored atrocities were not part of his assigned mission in Haiti.

Rockwood indicates that from a U.S. court's perspective, a SOF team should intervene to prevent surrogates' war crimes only as directed by higher military authority or within the parameters of its assigned mission. The decision to do so raises strategic military issues outside of any general legal duty implicit in a potential war crimes prosecution. Intervention might be a departure from the team's assigned mission and could therefore have larger strategic implications. As stated, it might also cause team members to be injured or killed. This might also affect the larger strategic purpose of the team's presence.

Although a SOF team has no general legal duty to intervene, they are required by training and operational orders to always attempt to use less than physical means to influence the surrogates not to commit war crimes. SOF teams must state clearly to the surrogates at their first meeting that all

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[55] *Rockwood*, 52 M.J. at 112.

U.S. military support will be withdrawn if the surrogates commit war crimes. This scenario is a key part of "Robin Sage" training, the live scenario training that all SOF candidates undergo. In these scenarios, SOF candidates work through scenarios in the field where SOF instructors and actors play the parts of surrogates that challenge the SOF candidates' ethics by vaguely indicating intentions to commit atrocities. The training poses the dilemma as to how the threat of withdrawing military aid is communicated. After all, it can be done absolutely or with intonations of willful ignorance. For example, one could say, "we cannot know of any war crimes or the United States will withdraw military aid." Robin Sage training is designed to test the personal honor and integrity of SOF candidates to ensure that the threat of withdrawal is properly communicated. In any event, as already discussed, a SOF team may not be violating a general legal duty under the law of war by improperly communicating the threat of withdrawal of aid. A court might infer, however, that a SOF team had actual knowledge of the surrogates' war crimes and even shared their criminal purpose from a team's willful ignorance if the circumstantial evidence of such crimes is self-evident.

D. Duty to Detach and Withdraw Military Aid

A SOF team does have a general legal duty to detach and withdraw further military aid from surrogates if the team has actual knowledge that the surrogates have a criminal purpose to commit war crimes. If it does not do so, then a team might be held criminally liable under aiding and abetting type theories for any war crimes later committed by the surrogates. As in *Kvocka*, a court might infer that a team shared in the surrogates' criminal purpose and intent based on its continued assistance to them.

This duty might be modified if a SOF team acquires actual knowledge of past surrogates' war crimes and has bona fide assurances from the surrogates that they are prosecuting the perpetrator and will not commit future ones. In such a scenario, it seems unlikely that a court would infer that a team shared in the surrogates' criminal purpose if the surrogates later committed crimes.[56]

Conclusion

In the context of this Article's factual scenario, SOF have no general legal duty under the law of war to investigate the surrogates' past war

[56] *See, e.g.*, *Blaskic*, IT-95-14-A, ¶¶ 72, 78, 86–93.

crimes or to intervene to stop their future ones. They might have strong moral, ethical, and even practical motives to do so. Higher military authority might even order them to do so. Their failure to act on these motives does not, however, turn SOF team members into war criminals. Nevertheless, a SOF team does have a general legal duty to detach from and not to aid surrogates in the commission of future war crimes. This depends upon actual knowledge of the surrogates' criminal purpose and intent. A team could be held criminally responsible for the surrogates' war crimes if it breaches this duty.

Certainly, the real life scenarios that SOF teams encounter during operations will likely vary from the academic hypothetical examples posed in this Article. The personalities of surrogate forces and the nature of missions might also affect the degree that SOF can influence or affect the surrogates' actions. Further, depending on the role of the United States as an occupying power or not, a team may even reach the point of "effective control" over some surrogates depending on assigned mission and other facts. The goal of this article was merely to analyze one of the more common scenarios.

Given the myriad other possible scenarios, it is therefore imperative that commanders and legal advisors for SOF provide appropriate policy and legal guidance that addresses the legal issues discussed in this article. Such guidance should provide SOF team members with clear courses of action if they suspect that surrogates committed war crimes and will continue to do so. Furthermore, it should include all legal and regulatory duties without disturbing a military commander's discretion over purely strategic and tactical issues. Based on the conclusions of this Article, such guidance might consist of the following:

1. Report all information to higher authority;

2. Attempt to influence or intervene to prevent the war crime, but only as practicable within the limits of the mission and your own safety;

3. If unsuccessful, separate, detach, and disengage from the surrogates and from providing any further military assistance; and

4. Await further guidance from higher authority.

The above guidance is suggested merely as an appropriate starting point with respect to surrogate war crimes. For SOF, it is the author's experience that this guidance has traditionally been provided in all deployments, typically by the staff judge advocate, but it could be applied regardless of the level of authority over an operation.

Of note, two of the four guidance items point to higher level authority. This Article has not discussed the obligations of policy-level leaders, although it is a worthy topic for analysis. Reports of surrogates' war crimes to policy-level leaders could implicate the same law of war obligations that apply to SOF teams in the field—certainly if the reports establish the surrogates' criminal purpose and intent. Similar to SOF teams' actions, policy leaders also risk becoming liable for surrogates' war crimes if they indulge in wilful blindness or deception concerning their actual knowledge of surrogates' conduct. Accordingly, just as SOF teams are well-advised to report surrogates crimes, policy leaders are well-advised to read closely and react quickly to such reports or to similar reports from other sources. SOF and policy leaders may lack direct means to intervene or prevent the surrogates from committing war crimes, but such reports constitute at least some effort within their power and ability to produce action or accountability consistent with the law of war.

Above all other considerations, SOF have three general obligations under U.S. law and policy with respect to the law of war: (1) train to understand it, (2) comply, and (3) report violations.[57] Given the operational exigencies of conducting Unconventional Warfare in hostile surroundings, if nothing else is possible, it would be entirely reasonable and prudent for SOF at least, as practicable, to report surrogate war crimes to higher authority in the chain of command and to separate from further activities with the surrogates. Such actions maintain the "clean hands" of SOF—their legitimacy—notwithstanding the surrogates' crimes.

Legitimacy in the eyes of the public and the larger government is a critical aspect of all military operations and especially Unconventional Warfare.[58] It generally refers to the recognized right to exercise authority. Both the American people and the larger U.S. Government expect that SOF will conduct military operations in accordance with the law. Furthermore, the affected population where the surrogates operate reasonably should have similar expectations. Without legitimacy, SOF risks losing essential support

[57] DoDD 2311.01E, *supra* note 9.
[58] White, *supra* note 12.

from the American public and from the U.S. Congress and, therefore, losing the ability to accomplish their mission—to protect the United States and its national security interests. So, regardless of the theoretical or real criminal liability for SOF, SOF have important moral and practical reasons to do something consequential in reaction to surrogate war crimes. At the end of the day, the success of a particular operation or the future of Unconventional Warfare as a core SOF mission may depend upon it.