SUPPLEMENTAL MEMORANDUM OF THE
SHADOW ADVISORY REPORT GROUP OF EXPERTS (SARGE)

July 8, 2020

This memorandum responds to the July 6, 2020 white paper by Professor Schlueter and Dean Schenck. Much of their submission is recycled from material generated years ago in connection with the Response Systems to Adult Sexual Assault Crimes Panel (RSP). This memorandum does not seek to provide a point-by-point rebuttal. Rather, the Group of Experts has focused on a few contentions that are so far wide of the mark as to cast doubt on the white paper as a whole.

A. The doctrine of command responsibility does not require that commanders have the power to decide who is prosecuted

Echoing Prof. Schlueter's submission to the RSP and other writings,[1] the white paper claims (at 9) that a 2012 decision of the International Criminal Tribunal for the Former Yugoslavia "recognized the problem" of applying the law of armed conflict doctrine of command responsibility to commanders who lack the power to prosecute misconduct. If they lose that power, the argument goes, "it could be difficult to hold them personally responsible for the delicts of the service members under their command." The point was not well-taken in 2013 and is not well-taken today. *See* Shadow Advisory Report 11 n.47.

The leading contemporary statement of the doctrine of command responsibility is article 28 of the Rome Statute. It requires that a superior either "take all necessary and reasonable measures within his or her power to prevent or repress" the commission of crimes or "submit the matter to the competent authorities for investigation and prosecution." Far from demanding that States confer upon commanders the power to require that an offender stand trial, the doctrine plainly recognizes that national legislation in some States does not confer that power. Commanders whose power is confined to sending charges to "the competent authority" for prosecution have fulfilled their duty – unless the process administered by that authority was known to be a sham or not properly functioning. *See also Prosecutor v. Boškoski & Tarčulovski*, No. IT-04-82-A (ICTY Appeals Chamber May 19, 2010) (¶¶ 234, 268), *available at* https://www.icty.org/x/cases/boskoski_tarculovski/acjug/en/100519_ajudg.pdf.

In 2016, Trial Chamber III of the International Criminal Court observed in *Prosecutor v. Bemba (Situation in the Central African Republic)*, No. ICC-01/05-01/08 (Trial Chamber III Mar.

[1] *See* David A. Schlueter, A White Paper on the Proposed Amendments to the Uniform Code of Military Justice 4 (Nov. 2013) ("2013 White Paper"), *available at* https://responsesystemspanel.whs.mil/public/docs/Public_Comment_Unrelated/05-Nov-13/WhitePaper_Propposed_Amend_to_UCMJ_DavidSchlueter_201311.pdf. *See also* David A. Schlueter, *American Military Justice: Responding to the Siren Songs for Reform*, 73 A.F. L. REV. 193, 211 (2015) ("Siren Songs"), *available at* https://www.afjag.af.mil/Portals/77/documents/AFD-150827-031.pdf; David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 73 n.304 (2013), *available at* https://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/215-spring-2013.pdf.

21, 2016) (¶ 207), *available at* https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF, that if a commander "does not hold disciplinary power, measures which may, depending upon the circumstances, satisfy the commander's duties include proposing a sanction to a superior who has disciplinary power or remitting the case to the judicial authority with such factual evidence as it was possible to find." Bemba was acquitted by the ICC's Appeals Chamber two years later, https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF, but nothing in that court's much-criticized decision either takes issue with or casts doubt on the language quoted above from the Trial Chamber's ruling or suggests that military commanders must have the power to compel the trial of serious offenses, as the UCMJ currently provides.

Although the United States is not a party to Additional Protocol I of the Geneva Conventions, it is appropriate to consider article 87 which deals with the "Duty of Commanders." Paragraph 3 provides:

> The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

The background is set forth in the authoritative ICRC Commentary. It provides no support for the concern voiced in the white paper:

> The text of paragraph 3 also requires that any commander "where appropriate", will "initiate disciplinary or penal action against violators". Paragraph 1 lays down the obligation for military commanders to prevent breaches "and, where necessary, to suppress and to report [them] to competent authorities". Thus, these two texts again are complementary. During the course of the discussions some delegations expressed the fear that these provisions would result in an unjustified transfer of responsibilities from the level of the government to that of commanders in zones where military operations are taking place. They also feared that inappropriate prosecutions could take place, and that military commanders might encroach on the judgment of the judicial authorities. These fears, which were the reason for the requests for voting by paragraph on this article, do not seem to be justified. It is not a matter of transferring to military commanders the competence and responsibilities which are those of the judicial authorities, even if this is a military court, whether or not it is represented by a military commission constituted in accordance with the law. The object of these texts is to ensure that military commanders at every level exercise the power vested in them, both with regard to the provisions of the Conventions and the Protocol, and with regard to other rules of the army to which they belong. Such powers exist in all armies. *They may concern, at any level,* informing superior officers of what is taking place in the sector, drawing up a report in the case of a breach, or intervening with a view to preventing a breach from being committed, proposing a sanction to a superior who has disciplinary power, or – in the case of someone who holds such power himself – exercising it, within the limits

> of his competence, and finally, *remitting the case to the judicial authority where necessary with such factual evidence as it was possible to find. In this way, for example, a commander of a unit would act like an investigating magistrate.* Indeed, some delegations remarqued that Article 87 contains provisions which are already found in the military codes of all countries. In Article 87 it is merely a question of ensuring that they are explicitly applicable with respect to the provisions of the Conventions and the Protocol. In fact, all this does not prevent commanders from trying to identify any possible gaps in the law of armed conflict or to put forward consistent interpretations on points which have not been clearly regulated.[2]

This part of the present supplemental memorandum is longer and goes more deeply into the weeds than the Group of Experts would have preferred, but the fallacious nature of the white paper's improbable command responsibility claim is so inimical to sound legislative consideration and public understanding that it needs to be laid to rest once and for all.[3]

B. The white paper also presents a misleading account of the Solorio *case*

In an effort to dismiss the experience of allied countries' military justice systems,[4] the white paper asserts (at 19) that "relinquishing jurisdiction to the civilian courts for criminal trials of service members was tried for almost twenty years and failed." This is misleading. The service-connection requirement announced in *O'Callahan v. Parker*, 395 U.S. 258 (1969), was not some kind of experiment; it reflected an understanding by the Supreme Court about the constitutional limits of military jurisdiction. The case did not "relinquish" jurisdiction to state and federal civilian courts; those courts either did or did not have jurisdiction regardless of whether there was *also*

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[2] Int'l Comm. of the Red Cross, Commentary on Additional Protocol I, ¶ 3562, at 1022-23 (1987) (emphasis added, hyperlinks and footnotes omitted), *available at* https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=36FC92EB9E83FBBEC12563CD00437BFB.

[3] Not only is command prosecutorial power unnecessary to satisfy international legal obligations, it can prevent or inhibit compliance with those obligations. It is widely understood that commanders may be slow to fulfill their API article 87 and customary international law obligation to suppress and repress violations of international humanitarian law. Moving prosecutorial discretion to independent prosecutors would therefore likely assist the United States in complying with these obligations, at least if adequate resources are allocated to investigating and prosecuting potential violations. The white paper (at 6) cites a decision of the U.S. Court of Appeals for the District of Columbia Circuit for the proposition that:

> The decision to employ resources in a court-martial proceeding is one particularly within the expertise of the convening authority who, as chief administrator as well as troop commander, can best weigh the benefits to be gained from such a proceeding against those that would accrue if men and supplies were used elsewhere. The balance struck is crucial in times of crisis when prudent management of scarce resources is at a premium.

This states a problem rather than providing a solution. For commanders leading and managing contingency operations, there are numerous potential disincentives to allocating command resources for the investigation and prosecution of international humanitarian law violations. Having independent prosecutors is among the steps that could help address this longstanding problem.

[4] *See also* 2013 White Paper, *supra* note 1, at 7; Siren Songs, *supra* note 1, 73 A.F. L. REV. at 212-14.

concurrent military jurisdiction. The Court simply held that military jurisdiction required a connection to military service beyond mere status.

In *Solorio v. United States*, 483 U.S. 435 (1987), the Court retraced it steps and ruled that the Constitution does not require service-connection in order for a court-martial to exercise subject matter jurisdiction over an offense. The primary basis for that holding was the majority's determination that *O'Callahan* had misinterpreted the historical materials. The Court stressed that it was for Congress, not the courts, to impose such a requirement. To the extent that the majority claimed that *O'Callahan* had led to confusion, the only evidence it cited was the uncertainty the Court of Military Appeals (as it was then called) had exhibited with respect to off-base drug offenses. The shifting rule on that category of cases in large measure reflected the fact that that court had only three judges – so whenever a new one was appointed doctrinal instability could ensue. Congress expanded the court to five in 1989, and the problem of doctrinal instability was significantly reduced.

The *Solorio* majority's claim that *O'Callahan* had led to confusion was unfounded: on most service-connection issues (such as overseas and minor offenses and crimes against military dependents) the jurisprudence had become settled law in the immediate aftermath of *O'Callahan* and with the benefit of clarification only two years later in *Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355 (1971). To the extent that some line-drawing was needed, moreover, "this is not beyond the capacity of the military courts," as Justice Thurgood Marshall noted in dissent. 483 U.S. at 466.

In any event, neither the Military Justice Improvement Act nor § 540F alters current law with respect to service-connection.[5]

C. High acquittal rates are a bug, not a feature

The DAC-IPAD data presented on pages 20-21 of the white paper suggest that the current system leads to the improvident referral of charges. Surprisingly high acquittal rates in sex cases are a sign that such cases are being referred for trial when the evidence needed to convict is lacking. Much of the white paper focuses on sex cases, but the issue of command control goes beyond such cases. How any particular statutory change will affect the court-martial conviction rate is not the issue. "[T]he goal must not be merely to drive up that rate but to foster more consistent disposition decision-making and improved public confidence in the administration of justice." *See* Shadow Advisory Report 7-8.

The Group of Experts appreciates the opportunity to submit these further comments.

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[5] Judge Cox abstains from Point B because he was a Judge of the U.S. Court of Military Appeals when it considered *Solorio*. *See United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986). As a matter of full disclosure, Mr. Fidell represented the American Civil Liberties Union as *amicus curiae* in *Solorio* at the Supreme Court.