2001

Proving The Nexus Between A Criminal Defendant And The Criminal Conducts Of Subordinates And Associates In War Crimes Charges Pursuant To Article 4 Of The ICTR

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

ISSUE:

PROVING THE NEXUS BETWEEN A CRIMINAL DEFENDANT AND THE CRIMINAL CONDUCTS OF SUBORDINATES AND ASSOCIATES IN WAR CRIMES CHARGES PURSUANT TO ARTICLE 4 OF THE ICTR

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May 2001

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This memorandum examines how the features of the legal relationship between civilian superiors and their subordinates can make the superior criminally responsible for war crimes. Superiors are made criminally liable for the conduct of their subordinates by the doctrine of command responsibility. The doctrine is codified in Article 6 (3) of the statute of the International Tribunal for Rwanda ("ICTR Statute").[1] Article 6 (3) holds superiors criminally responsible for failing to take necessary and reasonable measures to prevent, halt, or punish acts they knew or had reason to know had been, or were about to be committed by subordinates.[2] This memorandum focuses on the civilian superior-subordinate relationship because civilian leaders were instrumental in the genocide in Rwanda.[3] In this context, it is important to examine how the superior-subordinate relationship, the "knew or had reason to know" standard, and the "failure to take necessary and reasonable measures to prevent or punish" have been interpreted by courts after World War II, and by the Tribunals for the Former Yugoslavia and Rwanda.

This memorandum concludes:

(1) Proving the nexus between a civilian superior and the criminal conducts of their subordinates depends significantly on the prosecution's ability to prove how the superior exercised *de facto* command over the subordinates.[4]

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[1] Statute of the International Tribunal for Rwanda, Art. 6 (3), S/RES/955 (1994) (Annex), 8 November 1994, *cited in* 2 Virginia Morris and Michael P. Scharf, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 5 (1998) [hereinafter ICTR Statute]. [Reproduced in the accompanying notebook at Tab 1.]

[2] *Id.*

[3] *Prosecutor v. Kayishema*, No. ICTR-95-1-T (ICTR May 21, 1999) at para 501 [Reproduced in the accompanying notebook at Tab 8.]

[4] *Id.* at para 354

The goal of such an inquiry is to discover the degree of *effective* control the superior possessed over the subordinates.[5] In order to prove the superior-subordinate relationship it is therefore necessary to consider the de jure *and* de facto aspects of an individual's authority.[6]

(2) The "knew or had reason to know" standard is invoked if the superior has been put *on notice* that offenses have occurred, or are about to take place.[7] An example of the type of notice sufficient would be the receipt of reports that crimes had been committed. The knew or had reason to know standard arises from the duty of a superior to be aware of the actions of his or her subordinates. [8]

(3) Assuming the first two elements have been proven, if the superior has failed to prevent or punish the acts of subordinates, the superior's inaction will be understood to be an element in their criminal culpability. Defendants who have been charged under the doctrine of command responsibility have argued that they were coerced by their own superiors, or that they were powerless because of a chaotic political environment.[9] Such arguments are used as a defense for the failure to take necessary and reasonable measures to prevent or punish the acts of their subordinates.[10] Courts have recognized that while

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5 Prosecutor v. Delalic (hereinafter *Celebici*), No. IT-96-21-T (ICTY Nov. 16, 1998) [Reproduced in the accompanying notebook at Tab 10.]

[6] *Kayishema, supra* at para. 351 [Reproduced in the accompanying notebook at Tab 8]

[7] *Celebici, supra* at para 380 [Reproduced in the accompanying notebook at Tab 10]

[8] Timothy Wu and Yong-Sun (Jonathan) Kang, *Criminal Liability for the Actions of Subordinates-the Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARVARD INTERNATIONAL LAW JOURNAL 272, (1997) at 273 [Reproduced in the accompanying notebook at Tab 19]

[9] *Prosecutor v. Akayesu*, Case No.ICTR-96-4-T(ICTR Sept. 2, 1998) at para 187 [Reproduced in the accompanying notebook at Tab 7]

[10] *Id.* at para 187

superiors cannot be expected to single-handedly overcome an unfolding genocide, they are the representatives of public trust and responsibility,[11] and have duties under international law to take measures "within material possibility" to uphold such duties. [12]

II. FACTUAL BACKGROUND

Between April and June of 1994, members of the Hutu tribe in Rwanda engaged in the open and systematic killing of members of the Tutsi tribe.[13] Many people who held positions of authority and influence in civilian society participated in the killing, and encouraged others to kill.[14] The system of civil administration in Rwanda is based on that of Civil Law countries.[15] Many individuals who held positions of authority within the system of civil administration were involved in the genocide. Clement Kayishema, a Prefect, Alfred Musema, a Factory Director, and Jean-Paul Akayesu, a bourgmestre, were charged under the doctrine of command responsibility.

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[11] Timothy Wu and Yong-Sun (Jonathan) Kang, *supra* at 290 [Reproduced in the accompanying notebook at Tab 19]

[12] *Celebici*, *supra* note 4 at para 390 [Reproduced in the accompanying notebook at Tab 10]

[13] Virginia Morris and Michael P. Scharf, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998) at 54 [Reproduced in the accompanying notebook at Tab 23]

[14] *Id.* at 53

[15] *Prosecutor v. Akayesu*, *supra* note 9 at para 62 [Reproduced in the accompanying notebook at Tab 7]

III. LEGAL DISCUSSION

A. ESTABLISHING THE SUPERIOR-SUBORDINATE RELATIONSHIP

The ICTR statute was created by the United Nations Security Council as a response to the events in Rwanda.[16] Under the statute, the criminal responsibility of a superior arises from proof of the following elements:

(i) the existence of a superior-subordinate relationship

(ii) the superior knew or had reason to know the criminal act had been committed or was about to be committed

(iii) the superior failed to take necessary and reasonable measures to prevent or punish[17]

The trial of Zdravko Mucic and his associates by the Tribunal for the Former Yugoslavia was the first time since World War II that an international tribunal had convicted a superior under command responsibility.[18] Known as the *Celebici* case, this decision is an important precedent for the Rwanda Tribunal because it deals comprehensively with the legal duties of civilian superiors acting in improvised command structures. [19] The Celebici prison camp was used by Croat forces to house

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[16] Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MILITARY LAW REVIEW 155 (2000) at 206 [Reproduced in the accompanying notebook at Tab 16.]

[17] Celebici, *supra* note 4 at para 346 [Reproduced in the accompanying notebook at Tab 10]

[18] 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 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION 167, (1999) at 186 [Reproduced in the accompanying notebook at Tab 12]

[19] *Id.* at 195-198

Serb prisoners. [20] Camp Commander Zdravko Mucic was convicted under command responsibility. [21] The court held that the doctrine applied because he was the de facto commander of the Celebici prison camp, and he exercised de facto authority over the camp. [22] The Trial Chamber found that the use of the generic term "superior" in Article 7(3) of the ICTY, identical to Article 6(3) of the ICTR, indicates that it's applicability extends beyond military commanders, to include civilian authorities. [23] The Court defined "superior" not as a formal designation, but as "the *actual* possession, or non-possession of powers of control over the actions of subordinates." [24] The Court defined actual control as a material ability to prevent and punish the actions of subordinates, and forms of influence that did not include such a material ability were insufficient to implicate command responsibility. [25] The degree of control civilian superiors possess must in this sense be similar to that of military commanders.[26] The ability to prevent and punish the

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[20] *Id.* at 187

[21] Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 YALE JOURNAL OF INTERNATIONAL LAW 89 (2000) note 149 at 113 [Reproduced in the accompanying notebook at Tab 18]

[22] *Id.* at 113 n.150

[23] The Chamber noted that this interpretation was supported by the explanation of the vote made by the representative of the United States after the adoption of Security Council Resolution 827 on the establishment of the International Tribunal for Yugoslavia, that individual criminal responsibility arises where the failure of a superior, whether political or military to take reasonable steps to prevent or punish crimes by persons under his authority. This speech is reproduced in Virginia Morris and Michael P. Scharf, AN INSIDERS GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUANL FOR THE FORMER YUGOSLAVIA VOL. 2 (1995) [Reproduced in the accompanying notebook at Tab 24]

[24] *Celebici*, *supra* note 4 at para 370 [Reproduced in the accompanying notebook at Tab 10]

[25] Greg R. Vetter, *supra*, note 21 at 117 [Reproduced in the accompanying notebook at Tab 18]

[26] *Id.* at 117 n.167

acts of subordinates is a hallmark of the authority of military commanders.

The case against Deputy Commander Hazim Delic [27] illustrates how the genuine ability of an individual to prevent and punish distinguishes their authority from other forms of influence. Several former Celebici prisoners testified that they saw Delic give orders, and exercise apparent influence over the guards, in the form of personal intimidation and bullying, [28] but the Tribunal found the evidence tended to show only that he helped organize day-to-day activities, and did not clearly show that "he could issue orders and punish and prevent the criminal acts of subordinates." [29] It is not sufficient to produce evidence that indicates a vague or general superiority, especially lower down the hierarchy of civilian authority.[30] There is a difference between having the latitude and opportunity to influence subordinates, and having the authority to prevent or punish the acts of subordinates. The latter is an actual authority that can be equated with de jure power.[31]

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[27] The Appeals Chamber made a distinction between two aspects of his authority, citing the *Roechling* case. The accused was the President of the Directorate and works manager of steel plants. He was Herman Roechling's son-in-law. The Appeals Chamber disagreed with the Prosecution that "sufficient authority" for command responsibility can be engendered by "powers of persuasion" alone. (*Celebici* Appeal at para 262) His de facto control over workers, and contacts with the Gestapo, as a civilian industrial leader, was seen by the Appeals Chamber as the accurate method of establishing superior responsibility. (*Celebici* appeal at para 263)
The Appeals Chamber agreed with the Trial Chamber's definition of superior-subordinate relationship for the purposes of de facto command, explicitly "effective control" (at para 197) The Appeals Chamber noted although de facto and de jure command can take different forms, "a de facto superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts." (at para 197) On the issue of what kind of influence establishes the effective control necessary to the superior-subordinate relationship, the Appeals Chamber concluded that forms of influence "in any sense" falling short of effective control would not suffice. (at para 266) See The Roechling Case, 14 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10 at 1061 [Reproduced in the accompanying notebook at Tab 5]

[28] Ann B. Ching, *supra* note 18 at 202 [Reproduced in the accompanying notebook at Tab 12]

[29] *Id.* at 194

[30] *Id*. at 202

[31] *Id*. at 202

An example of how the Rwanda Tribunal has weighed the value of de jure and de facto powers can be found in the case of Jean-Paul Akayesu. He was prosecuted under Article 6 (3) of the ICTR statute.[32] He was the bourgmestre of the Taba commune from April 1993 until June 1994. [33] The bourgmestre is the chief administrator of the commune . [34] As an elected official, he was in charge of the economy, markets, and the social life of the commune .[35] The de jure powers of a bourgmestre are similar to the maire in France or bourgmestre in Belgium.[36] He can hire and fire communal employees,[37] he has disciplinary and organizational authority over communal (civilian) police [38] and he can request the Gendarmerie Nationale to maintain public order in times of crisis.[39] The bourgmestre is the most powerful figure in the commune, [40] and his de facto powers are appreciable.[41] The Tribunal found that his de facto authority was significantly greater than his de jure authority.[42]

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[32] Prosecutor v. *Akayesu*, *supra* note 9 Count 12 [Reproduced in the accompanying notebook at Tab 7]

[33] *Id.* at para 48

[34] *Id.* at para 54

[35] *Id.* at para 54

[36] *Id.* at para 61

[37] *Id.* at para 62

[38] *Id.* at para 63

[39] *Id.* at para 68

[40] *Id.* at para 77

[41] *Id.* at para 77

[42] *Id.* at para 77

On the question of whether individual criminal responsibility under Article 6(3) applied to people with civilian authority, the *Akayesu* Chamber noted Judge Rolings dissent in the case of the former Foreign Minister of Japan, Koki Hirota, who was found criminally responsible by the International Military Tribunal for the Far East (Tokyo Tribunal) for the "Rape of Nanking":

> Generally speaking, a Tribunal should be very careful in holding civil government officials responsible for the behavior of the army in the field…considerations of both law and policy, of both justice and expediency, indicate that this responsibility should only be recognized in a very restricted sense.[43]

The Chamber concluded that the application of individual criminal responsibility to civilians "remains contentious." [44] The Chamber held that it had to be shown that Akayesu was helping the Government in its war against the RPF,[45] and that the evidence of the assistance he gave the military did not establish that he actively participated in the war effort.[46] For this reason, he did not incur individual criminal responsibility under Article 6(3).[47]

The emphasis the Trial Chamber placed on Judge Rolings' dissent in *Hirota* was misplaced. It is clear that Hirota was found guilty of war crimes for being derelict in his duty to attempt to stop the starvation, torture and murder of thousands of the inhabitants of Nanking, not for his nominal status within the Japanese government. His guilt lay not

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[43] *Id.* at para 490

[44] *Id.* at para 490

[45] *Id.* at para 642. The RPF is an acronym for the Rwandan Patriotic Front, the Tutsi army. See VOL.1 Virginia Morris and Michael P. Scharf, *supra* note 13 at 50-51 [Reproduced in the accompanying notebook at Tab 23]

[46] *Id.* at para 642

[47] *Id.* at para 644

in his mere status, but in his failure to stop behavior that was obviously wrong. The *Akayesu* Chamber examined the same body of customary and statutory law as the Yugoslavia Trial Chamber had in *Celebici*, but decided that despite Akayesu's authority and control within the Taba commune, his status as a civilian was not sufficiently analogous to the Celebici Camp Commander, Mucic, who could more readily be viewed as a military commander.[48] The *Akayesu* Chamber concluded that evidence of his formal relationship with the Government's war objectives was more important than evidence of his relationship with his subordinates. Yet the actions of his subordinates in carrying out genocide materially furthered the Government's war objectives.[49] The *Celebici* approach makes more sense because a superior's relationship with his subordinates is more relevant to the proof of command responsibility than the superior's nominal status within a military or para-military command structure. This is an example of the importance of giving the appropriate weight to the *de facto* authority of a superior. When Akayesu used his *de facto* authority to encourage his subordinates to kill members of the Tutsi tribe he made himself responsible for the consequences. This is more logically probative of his guilt than mere indicia (such as a badge or a uniform) of his cooperation with the Rwandan Government. Chamber I held that there was insufficient evidence that the Interahamwe [50] were subordinate to Akayesu, yet the Chamber found that he was frequently seen with Silas Kubwimana, the head of the Interahamwe.[51] The Chamber also

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[48] Greg R. Vetter, *supra* note 21 at 134 n.259 [Reproduced in the accompanying notebook at Tab 18]

[49] *Prosecutor v. Akayesu*, *supra* note 9 at paras 187 and 643 [Reproduced in the accompanying notebook at Tab 17]

[50] Hutu militia

[51] *Prosecutor v. Akayesu*, *supra* note 9 at para 187 [Reproduced in the accompanying notebook at Tab 7]

acknowledged a specific example of his authority. He ordered the Interahamwe to make a female undress in public, and the Chamber found him guilty under Article 6(1) of the Statute for this conduct.[52]

A theme of the cases in Rwanda is that those charged under Article 6(3) already had a high profile in the Commune, that attached to the regular administration of day-to-day life.[53] From April to June 1994, their influence in the community was transferred to the purposes of genocide. They used the power they possessed in the regular scheme of social, economic and political relationships to encourage the eradication of the Tutsi tribe. An example of how a defendant's position and influence could be used to control events during the genocide can be found in the case of Alfred Musema. He was the Director of the Tea Factory in Gisovu, in the Prefecture of Kibuye.[54] The Director's power stemmed from their control of economic resources.[55] He employed many people,[56] and provided social services such as clinics and schools.[57] His power was magnified by the poverty of the region.[58] Factory Directors possessed more than economic power. They also possessed social and political control of their employees.[59]

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[52] Greg R. Vetter, *supra* note 21 at 135 n.275 [Reproduced in the accompanying notebook at Tab 18]

[53] *Prosecutor v. Musema*, No. ICTR-96-13-I (ICTR January 27, 2000)
Many witnesses testified Alfred Musema was a figure of authority and influence, at para 868.
To hold a position controlling the distribution of resources included holding management positions in parastatal organizations like the OCIR-the', at para 872. Tea Factory Directors, through their concurrent position in the OCIR-the' were appointed by the President, and reported to the Managing Director of the OCIR-the', who in turn reported to the Ministry of Agriculture, at para 876.
[Reproduced in the accompanying notebook at Tab 9]

[54] *Id.* at para 870

[55] *Id.* at para 869

[56] *Id.* at para 870

[57] *Id.* at para 870

[58] *Id.* at para 873

[59] *Id.* at para 873

The Trial Chamber in *Musema* followed *Celebici* on the application of the superior-subordinate relationship to people in non-military positions of authority, stating that the principle of command responsibility encompasses political leaders and other civilian superiors.[60] The Chamber found that Musema exercised de jure power and de facto control over his Tea Factory employees, but was not satisfied beyond a reasonable doubt that he had de jure or de facto control over the Kibuye Prefecture, OCIR the', or the 'villageois' plantation workers.[61]

The Trial Chamber applied Article 6(3) by inquiring where and when Tea Factory employees committed acts described in Articles 2-4 of the ICTR.[62] Musema incurred individual criminal responsibility for the attack on Gitwa Hill because Tea Factory Employees carried out atrocities there.[63] He arrived at Rwirambo Hill in a red Pajero, followed by four Daihatsu pickups from the Gisovu Tea Factory.[64] As a consequence of the attack he was found criminally responsible for their actions.[65] Employees of the Tea Factory were among the attackers on.Muyira Hill, and Musema was found guilty under Article 6(3).[66] During the attack on Muriya Hill, the evidence showed he raped a teacher named Nyiramusugi.[67] She was held down by four others while he committed this

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[60] *Id*. at para 136 [Reproduced in the accompanying notebook at Tab 9]

[61] *Id.* at para 880

[62] *Id.* at para 892

[63] *Id*. at para 895

[64] *Id*. at para 896

[65] *Id*. at para 900

[66] *Id*. at para 915

[67] *Id*. at para 907

crime.[68] While he was found guilty under 6(1), he did not incur criminal responsibility for this crime under 6(3), because none of the individuals who restrained her were Tea Factory employees.[69] This illustrates the distinction between having an opportunity to influence individuals at a certain moment, and having actual authority to prevent or punish the conduct of subordinates.

The leading regional civilian authority in the Rwandan system of social and political organization is the Prefect. The Prefects are the premier administrative officials of the Prefectures.[70] They have hierarchical authority over bourgmestres, and Prefects can requisition the Gendarmerie Nationale.[71] Clement Kayishema was the Prefect of the Kibuye Prefecture, and he was charged with war crimes under the ICTR.[72]

Addressing the requirements of Article 6(3), the Trial Chamber asked (a) to what degree was Kayishema's power de jure or de facto (b) who were his subordinates (c) what was his degree of knowledge of their acts, and (d) did he fail to prevent or punish those acts? [73] Bourgmestres, gendarmes, soldiers, communal police, prison wardens, members of the Interahamwe, and armed civilians all committed criminal acts in Rwanda, and all of these individuals were under the de jure or de facto control of the Prefect.[74]

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[68] *Id*. at para 907[Reproduced in the accompanying notebook at Tab 9]

[69] *Id*. at para 909

[70] *Prosecutor v. Kayishema*, No. ICTR-95-1-T (May 21, 1999) at para 479 [Reproduced in the accompanying notebook at Tab 8]

[71] *Id*. at para 479

[72] *Id*. at para 212

[73] *Id*. at para 212

[74] *Id*. at para 212

The Defense argued that because of the chaos in Rwanda, the rule of law didn't exist, canceling out the Prefects *de jure* authority.[75] Additionally, the expert witness for the Defense, Professor Guibal, testified that the Prefect's powers were emptied of real meaning because the Ministers, the Prefects' hierarchical superiors, were from a different political party than the Prefect.[76] The Trial Chamber rejected this argument, observing that administrative bodies, law enforcement agencies, and civilians were working within a common genocidal plan, and political rivalries were secondary.[77]

The Trial Chamber then addressed the argument that formal structures of authority had broken down, dissolving the de jure power of the Accused, allegedly destroying the superior-subordinate relationship.[78] The Chamber held that military and civilian leaders can be criminally responsible under the doctrine of command responsibility on the basis of de facto, as well as de jure authority.[79] The Chamber concluded that persons "effectively in command of such more informal structures" may be held responsible.[80]

Kayishema testified that in August 1992 he had been telephoned by the Bourgmestre of the Gishyita Commune, who reported that houses were being burned down and chaos reigned.[81] The bourgmestre said " I just want your presence here on the

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[75] *Id*. at para 487 [Reproduced in the accompanying notebook at Tab 8]

[76] *Id*. at para 486

[77] *Id*. at para 487

[78] *Id*. at para 354

[79] *Id*. at para 354

[80] *Id*. at para 354

[81] *Id*. at para 499

spot."[82] This was construed as evidence of Kayishema's de facto authority.[83] The Chamber decided he had de facto control over all of the assailants, and that he was instrumental in transporting, orchestrating, instructing, and rewarding them for their actions.[84] Even if the Defense's argument were accepted, the "mere absence" of legal authority would not preclude the imposition of responsibility.[85]

It is clear that a breakdown in formal command structures does not reduce the possibility that a de facto superior can be liable for the actions of subordinates. The Tribunal for the Former Yugoslavia stated that because of the breakdown, it looked more to the ability of a superior to in-fact control the actions of subordinates rather than formal status to determine the existence of the superior-subordinate relationship, as long as the control exercised is similar to that of military commanders.[86] Defendants may be inclined to use chaos as an excuse for their role in crimes against humanity. One of the tasks involved in prosecuting defendants under the doctrine of command responsibility is to prove that a given defendant used de jure or de facto authority to *exploit* the circumstances, rather than allowing the defendant to create an impression that his or her power was dissolved by the circumstances.

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[82] *Id*. at note 17 para 499 [Reproduced in the accompanying notebook at Tab 8]

[83] *Id*. at para 500

[84] *Id*. at para 501

[85] *Id*. at para 490

[86] *Celebici*, *supra* at para. 365-370 [Reproduced in the accompanying notebook at Tab 10]

B. INTERPRETATIONS OF "KNEW OR HAD REASON TO KNOW".

The "knew or had reason to know" standard emerged from the trials of German and Japanese commanders and civilian superiors after World War II. It has been a contentious element of the doctrine of command responsibility.

The "duty to know" standard in customary law can be traced to the *Yamashita* case.[87] General Yamashita was the commander of the Japanese 14th Army Group in the Philippines between October 9, 1944 and September 3,1945.[88] Abuse and murder of civilians and prisoners-of-war took place on a large scale.[89] Yamashita argued that American forces had disrupted his command and control, so he had no knowledge of the crimes committed by his soldiers.[90] There was no direct link between Yamashita and the atrocities.[91] The Prosecution based their arguments on the premise that he "must have known" of their occurrence, because they were so widespread.[92] The finding of guilt was based on "all the facts and circumstances of the record." [93]

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[87] L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS 319 (1995) at 336 n.59 [Reproduced in the accompanying notebook at Tab15]

[88] Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MILITARY LAW REVIEW 155 (2000) at 178 [Reproduced in the accompanying notebook at Tab 16]

[89] *Id*. at 178

[90] *Id*. at 178 n.101

[91] M. Cherif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (1992) at 427 [Reproduced in the accompanying notebook at Tab 20]

[92] *Id*. at 428

[93] *Id*. at 429

Yamashita is one of the precedents for the proposition that if the crimes are frequent and notorious in nature, it increases the likelihood that the commander knew or should have known about them.[94] For example, the Appeals Chamber in *Celebici*, in affirming the decision of the Trial Chamber, observed that the widespread occurrence of offenses, combined with the length of time over which they occurred, should have put Mucic on notice about the atrocities.[95]

Whereas *Yamashita* used a "must have known" standard, the Nuremberg Tribunal in the *The High Command Case* employed a "should have known" standard.[96] Thirteen high ranking German officials were charged with crimes against peace, crimes against humanity, and conspiracy to commit those crimes.[97] The court stated that:

> [The commander's] criminal responsibility is *personal.* The act or neglect to act must be voluntary and criminal …There must be a personal dereliction that can occur *only where the act is directly traceable to him* or where his failure to properly supervise his subordinates constitutes criminal negligence on his part.[98]

And further:

> …the occupying commander *must have knowledge* of these offenses and acquiesce or participate or criminally neglect to interfere in their commission…[99]

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[94] Ann B. Ching, *supra* note 18 at 197 [Reproduced in the accompanying notebook at Tab 12]

[95] *Celebici Appeal*, *supra* note 4 at para 228[Reproduced in the accompanying notebook at Tab 10]

[96] *United States v. Von Leeb (High Command Case)*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 at 462 (1951) [Reproduced in the accompanying notebook at Tab 2]

[97] Major Michael L. Smidt, *supra* note 88 at 182 [Reproduced in the accompanying notebook at Tab 16]

[98] M. Cherif Bassiouni, *supra* at 433 emphasis added [Reproduced in the accompanying notebook at Tab 20]

[99] Christopher Crowe, *Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution*, 29 UNIVERSITY OF RICHMOND LAW REVIEW 191 (1994) at 215 [Reproduced in the accompanying notebook at Tab 13]

The language used, "personal dereliction" and "acquiescence", indicates that the court took the view that the superior must have *actual* knowledge of the criminal acts of subordinates.[100]

This may be compared with *The Hostage Case*. General Field Marshall Wilhelm List, commander of the German Army during the invasion and occupation of the Balkan peninsula, was given "entire executive power" in Serbia by Hitler, and was charged with the killing of large numbers of civilians, carried out as reprisals for insurgent activity.[101] The court found liability based on the reports List had received from subordinates of murders by units in the field.[102] The court found that the commander had been given notice when he "fail(ed) to require and obtain complete information."[103] This was held to be a dereliction of duty, and he could not plead his own dereliction as a defense.[104] The Court recognized that knowledge is imputed *by the reports*.[105] This is a precedent for the view of the *Celebici* court, when it stated that the information a superior receives needn't "compel a conclusion" that the crimes are being, or will be carried out, it need only indicate that further inquiry is necessary by the superior.[106] *The Hostage Case* states

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[100] Major Michael L. Smidt, *supra* note 88 at 187 [Reproduced in the accompanying notebook at Tab 16]

[101] *United States v. List (Hostage Case),* 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 at 757 (1951) [Reproduced in the accompanying notebook at Tab 3]

[102] *id* at 757

[103] *id* at 757

[104] *id* at 757

[105] *Id*. at 219

[106] Greg R. Vetter, *supra* note 21 at 121 n.186 [Reproduced in the accompanying notebook at Tab 18]

that knowledge of crimes committed by subordinates may be constructive. Knowledge may be presumed where reports of criminal activity are received at a commander's headquarters.[107]

The archetype of a civilian administrator who incurs command responsibility can be found in the *Eichmann* case.[108] He did not personally commit any war crimes. The charges against him were brought because of his position as head of the Gestapo department in Berlin responsible for the final solution.[109] The Supreme Court of Israel observed that:

> he ordered and commanded…without orders from his superiors in the hierarchy of the service…planning, enthusiasm of the appellant and those who did his bidding…we are concerned with the appellant's individual guilt, and it has been proved he took his place not only among those who were active in, but those who activated the implementation of the final solution. [He] took a leading part and had a central and decisive role.[110]

The knowledge a superior possesses or the knowledge that is expected of a superior depends on the circumstances of each case. A lot of fact-finding is necessary in order to discover what a particular superior knew or should have known. When the accumulation of facts plays such an important role, it is not useful to create a legal rule which is too restrictive. A flexible interpretation of the mens rea element of command responsibility is desirable because it accommodates a case-by-case approach.

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[107] Major Michael L. Smidt, *supra* note 88 at 184 n.122 [Reproduced in the accompanying notebook at Tab 16]

[108] L.C. Green, *supra* note 87 at 356 n.117 [Reproduced in the accompanying notebook at Tab 15]

[109] *Id*. at 357

[110] *Id*. at 358 n.125

(i) Expressions of the mens rea element in the codification of command responsibility

The first codification of the doctrine of command responsibility appeared in the 1977 Additional Protocol I to the 1949 Geneva Conventions.[111] Article 86, Paragraph 2 states:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[112]

Protocol I provided a model for the ICTY and ICTR Statutes.[113]

What sources of knowledge are suggested by the phrase "had information which should have enabled them to conclude in the circumstances at the time…"? The Tribunal for the Former Yugoslavia stated that superiors possess the mens rea for command responsibility where they have actual knowledge, and the burden is on Prosecution to show it by direct or circumstantial evidence.[114] The court then listed a series of indicia of actual knowledge. They include: the number and type of illegal acts, the scope of the acts, the time when they occurred, the number and type of troops, logistics, geographic location, widespread occurrence, tactical tempo, methods used in similar illegal acts, the staff involved, and the location of commander.[115] The *Celebici*

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[111] Major Michael L. Smidt, *Id.*at 202
The first treaty that included a provision for the liability of superior authority for breaches of humanitarian law was the Hague Convention of 1907 " A belligerent party …shall be responsible for all acts committed by persons forming part of its armed forces." See L.C. Green, *supra* note 87 at 325 n.22 [Reproduced in the accompanying notebook at Tab 15, and in isolation at Tab 25]

[112] Greg R. Vetter, *supra* note 21 at 109 n.125 [Reproduced in the accompanying notebook at Tab 18]

[113] Ann B. Ching, supra at 183 The wording of Article 7(3) of the ICTY and Article 6(30 of the ICTR is identical. Reproduced in the accompanying notebook at Tab 12]

[114] *Celebici*, *supra* note 4 at 386 n.413 [Reproduced in the accompanying notebook at Tab 10]

[115] *Id*. at 386

court concluded that a superior can be held criminally responsible only if information was available to him which would provide notice of offenses committed by subordinates, which did not necessarily have to mean information of the crimes themselves, but information sufficient to warrant further inquiry.[116] The Appeals Chamber reiterated the Trial Chamber's reasoning, when it concluded that "knew or had reason to know" means information of a general nature was available, which would put the superior on notice of offenses.[117]

Command responsibility is also codified in Article 28 of the International Criminal Court Statute, also known as the Rome Statute.[118]

Command responsibility for non-military superiors is covered separately from military commanders. Article 28(2)(a) states:

> [a superior is criminally responsible where]…the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.[119]

This differs from the standard for military commanders, which retains the "knew, or should have known standard."[120] This may be an acknowledgement that military commanders, because of their command duties, are ordinarily more likely to be in a position where they "should have known"of the activities of their subordinates, but the non-military superior standard in the Rome Statute still recognizes that civilian superiors

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[116] Greg R. Vetter, *supra* note 21 at 121 n.186 [Reproduced in the accompanying notebook at Tab 18]

[117] *Celebici*, *supra* note 4 at para 241 [Reproduced in the accompanying notebook at Tab 10]

[118] *Reprinted in* William A. Schabas, Genocide in International Law (2000)[Reproduced in the accompanying notebook at Tab 22, and in isolation at Tab 27]

[119] M.Cherif Bassiouni, *supra* note 91 at 443 [Reproduced in the accompanying notebook at Tab 20]

[120] *Id*. at 443

can be put on notice that will lead to criminal responsibility.[121]

(ii) The Approach of the ICTY and ICTR to the mens rea of command responsibility

It has regularly been stated that the mens rea of command responsibility has not been clearly defined. It is also stated with regularity that the characteristics of command responsibility involve accommodating each case on it's own particular facts. A certain degree of flexibility in the mens rea requirement is therefore reasonable, and it should not be deemed essential to establish a narrowly focused mens rea requirement – in other words, "the fact that the exact mens rea requirement is ambiguous is not necessarily troubling."[122]

The report of the Commission of Experts on the Former Yugoslavia endorsed a flexible approach to the mens rea of command responsibility:

> It is the view of the Commission that the mental element necessary … is (a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute willful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offenses charged and acquiesced therein.[123]

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[121] Article 28 (2) Rome Statute:
With respect to superior and subordinate relationships not described in paragraph 1 (military commanders), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates where:
(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and
(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. *Reprinted in* William A. Schabas, GENOCIDE IN INTERNATIONAL LAW (2000) at 306 [Reproduced in the accompanying notebook at Tab 22, and in isolation at Tab 27]

[122] Timothy Wu and Yong-Sun (Jonathan) Kang, *supra* note 7 at 286 [Reproduced in the accompanying notebook at Tab 19]

[123] *Id*. at 286 n.68

There must be specific information in fact available to him, but willful blindness is no excuse, (distinguished from ignorance caused by a failure to supervise, which would not easily result in criminal responsibility.)[124] These words from *The Hostage Case* illustrate willful blindness:

> If [the commander] fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense.[125]

The superior is deemed to be "at fault in having failed to acquire such knowledge."[126] An example can be found in the behavior of Mucic, the Celebici camp commander, who by removing himself from the premises of the camp, willfully sought to *avoid* knowledge.[127]

The Tribunal for Rwanda has endorsed the approach of the Tribunal for the Former Yugoslavia, particularly the approach taken in the *Celebici* case. Despite the fact that Chamber I did not find Jean-Paul Akayesu criminally responsible under the count of command responsibility, they stated that it is "proper to ensure there has been malicious intent, or at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent"[128] Likewise, the Chamber in the *Musema* case found that the mens rea for a superior is malicious intent, or at least negligence so serious as to be tantamount to acquiescence.[129] The Trial Chamber in *Kayishema* followed the

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[124] Ann B. Ching, *supra* note 18 at 190 [Reproduced in the accompanying notebook at Tab 12]

[125] *Celebici*, *supra* note 4 at para 389 [Reproduced in the accompanying notebook at Tab 10]

[136] *Id*. at para 388

[127] Olivia Swaak-Goldman, *Prosecutor v. Delalic*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 514, (1999) at 519 n.37 [Reproduced in the accompanying notebook at Tab 17]

[128] *Prosecutor v. Akayesu*, *supra* note 9 at para 489 [Reproduced in the accompanying notebook at Tab 7]

[129] *Prosecutor v. Musema*, *supra* note 53 at para 131 [Reproduced in the accompanying notebook at Tab 9]

guidelines of the Rome Statute for the mens rea of civilian superiors.[130] They must have "[known] or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes." 28(2)(a) Rome Statute.[131] The Chamber said the Prosecution must prove that the accused either knew, or consciously disregarded information which clearly indicated or put him on notice that his subordinates had committed, or were about to commit acts in breach of Articles 2 to 4 of this Tribunal's Statute.[132]

The Chamber applied the civilian standard for command responsibility from the Rome Statute, and found the Accused guilty under that standard. Kayishema was personally involved to a heavy degree in the massacres at the Stadium in Kibuye Town, the Catholic Church and Home St. Jean and Complex, and in the Bisesero area.[133] While he was present at the Mubuga Church, the evidence didn't show he specifically ordered the attacks that took place there.[134] The civilian "knowledge" standard contained in the Rome Statute was still sufficient for a finding of guilt.[135] The court reasoned that the Tutsis were being attacked throughout Rwanda at that time, and Kayishema, by virtue of his position as Prefect of Kiuye, was privy to this information.[136]

The Rwanda Tribunals interpretation of the mens rea requirement of command responsibility is similar to the approach taken by the Yugoslavia Tribunal. Proceeding on

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[130] *Prosecutor v. Kayishema*, *supra* note70 at para 227[Reproduced in the accompanying notebook at Tab 8]

[131] *Id*. at para 227

[132] *Id*. at para 228

[133] *Id*. at para 508

[134] *Id*. at para 508

[135] *Id*. at para 508

[136] *Id*. at para 509

the circumstances of each case, if the superior either knew or consciously avoided knowledge of the criminal acts of subordinates, the mens rea requirement will be satisfied.

(iii) The mens rea element of command responsibility in *United States v. Medina.*

Another example of the application of the doctrine of command responsibility may be found in a case which arose out of the war in Vietnam, *United States v. Medina*.[137] At issue was the standard of knowledge that should be applied to Captain Ernst Medina, whose Company slaughtered between 150 and 400 hundred unarmed civilians in the hamlet of My Lai in Vietnam.[138]

Captain Medina was the superior of William L. Calley, Jr., who was charged with ordering his men to kill civilians, and participating in the killings at My Lai.[139] Captain Medina's headquarters was 150 meters from the village.[140] He was charged with manslaughter under Article 119(b) of the Uniform Code of Military Justice.[141] Under U.S. policy, he was not charged with violations of the law of war, but under the Code.[142] He argued that he was unaware of the commission of the crimes until it was too late.[143]

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[137] Major Michael L. Smidt, *supra* note 88 at 211 n.222 [Reproduced in the accompanying notebook at Tab 16]

[138] *Id*. at 212

[139] M. Cherif Bassiouni, *supra* note 91 at 434 n.179 [Reproduced in the accompanying notebook at Tab 20]

[140] Major Michael L. Smidt, *supra* note 88 at 190 [Reproduced in the accompanying notebook at Tab 16]

[141] *Id*. at 193

[142] *Id*. at 194

[143] Cristopher Crowe, *supra* note 99 at 222 [Reproduced in the accompanying notebook at Tab 13]

A strict standard of actual knowledge was espoused by military Judge Colonel Kenneth Howard. He gave an instruction to the jury stating that a commander is responsible under the doctrine of command responsibility if he has actual knowledge, and he has wrongfully failed to act.[144] He told the jury it is essential that a commander know his subordinates are committing, or are about to commit atrocities.[145] Captain Medina was found not guilty. However, the Army Field Manual describes a "knew or *should have known*"standard:

> [Command] responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.[146]

The language of the Army Field Manual clearly includes a "should have known" element, allowing for constructive knowledge, rather than the strict standard applied in *Medina*. The actual knowledge standard employed was similar to that used in *The High Command Case*, rather than the imputed knowledge standard used in *The Hostage Case*[147] or the "must have known" standard in *Yamashita.* The approach of Judge Howard in *Medina* was influenced by the *United States Manual for Courts-Martial* which states that merely witnessing a crime without intervention does not impose criminal culpability on a commander. Inaction can only lead to culpability if the commander's failure to act is

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[144] *Id*. at 223 n.136

[145] M. Cherif Bassiouni, *supra* note 91 at 434 n.180 [Reproduced in the accompanying notebook at Tab 20]

[146] Cristopher Crowe, supra note 99 at 223 n.137 [Reproduced in the accompanying notebook at Tab 13]

[147] *Id*. at 224

intended to encourage the subordinates. This approach fails to account for the dereliction of duty that occurs when a commander is present during the commission of atrocities by his subordinates. The *Medina* case illustrates that a flexible approach to the mens rea requirement of command responsibility also gives leeway to interpret the requirement in a restrictive way. There exists an unresolved tension between cases which allow constructive knowledge (eg *The Hostage Case*) and those which interpret the knowledge element strictly (*Medina*).

C. THE FAILURE TO TAKE NECESSARY AND REASONABLE MEASURES TO PREVENT OR PUNISH.

Witness testimony showed that Jean-Paul Akayesu ordered and participated in, and failed to prevent the killing in the Taba Commune.[148] He argued at his trial that he was powerless to stop the atrocities from being committed.[149] There was evidence that before April 18 1994, he had attempted to prevent violence from taking place.[150]

However, there was a change in his behavior after that date, following a meeting of bourgmestres, including the Prime Minister, who read a prepared policy speech and threatened bourgmestres with dismissal or violent reprisals if they did not cooperate with the genocide.[151] Akayesu argued that after this occasion, he was overwhelmed, and witnesses for the Defense testified the Interahamwe threatened to kill him if he did not

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[148] *Prosecutor v. Akayesu*, *supra* note 9 at para 182 [Reproduced in the accompanying notebook at Tab 7]

[149] *Id*. at para 183

[150] *Id*. at para 184

[151] *Id*. at para 186

cooperate with them.[152] There was substantial evidence that after April 18 he collaborated with them, particularly Silus Kubwimana, head of the Interahamwe.[153] The Chamber found beyond a reasonable doubt that he chose to collaborate with the Interahamwe.[154]

The failure to take reasonable and necessary measures to prevent or punish the acts of subordinates is the element which is at the moral core of the doctrine of command responsibility. When individuals accept social, political, economic, or military power, there is an assumption that they will *not* fail to accept the responsibilities of the position they occupy.

There are compelling policy reasons for the superior's duty. Military and civilian leaders are in a position of great public trust and responsibility, and they voluntarily assume their positions. They may be presumed to have knowingly agreed to the duties under international law that go along with such positions,[155] and they are the people best situated to prevent atrocities.[156]

The ability to prevent or punish the actions of subordinates is linked to the individual facts of each case, but it is not sufficient to argue that an attempt to do something would have been futile. This is a humanitarian concern.

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[152] *Id*. at para 187 [Reproduced in the accompanying notebook at Tab 7]

[153] *Id*. at para 187

[154] *Id*. at para 193

[155] Timothy Wu and Yong-Sun (Jonathan) Kang, *supra* note 7 at 290 [Reproduced in the accompanying notebook at Tab 19]

[156] *Id*. at 290

In the *Hostage Case*, it was stated that:

> an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility. [157]

The *Celebici* court cited the example of the Rape of Nanking.[158] The Tokyo Tribunal placed criminal responsibility on Japanese Foreign Minister Hirota, finding that "he received reports of atrocities immediately after the entry of the Japanese forces into Nanking"[159] The Tokyo Tribunal found Hirota "derelict in his duty in not insisting …that immediate action be taken to put an end to the atrocities…His inaction amounted to criminal negligence."[160]

What should be the practical response, when a defendant proposes the argument offered by Jean-Paul Akayesu? The court in *Celebici* declined to announce a general standard regarding the failure to take reasonable and necessary measures to prevent or punish, but did state that the superior is responsible for failing to take such measures that are "within material possibility".[161] Article 86(2) of the Rome Statute uses the language "all feasible measures".[162]

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[157] *Prosecutor v. Kayishema*, *supra* note 70 at para 513 n.18 [Reproduced in the accompanying notebook at Tab 8]

[158] *Celebici*, *supra* note 4 at para 357 n.378 [Reproduced in the accompanying notebook at Tab 10]

[159] *Id*.

[160] *Id*.

[161] *Id*. at para 395

[162] M.Cherif Bassiouni, *supra* note 91 at 435 [Reproduced in the accompanying notebook at Tab 20]

When a superior is faced with the dilemma of being coerced, or receiving orders that conflict with their legal duty, the *High Command Case* advocates the following choices: (1) issue an order countermanding the order (2) resign (3) sabotage the enforcement of the order even if it this can only be done within a limited sphere.[163] The "failure to prevent or punish" element of the doctrine of command responsibility is based in the moral responsibilities which accompany positions of military and civilian power. The grant of power to an individual includes a duty to promote humanitarian principles, especially in times of crisis and chaos.

If a war crimes have been committed by individuals who were under the effective control of a civilian superior, who knew or had reason to know of the criminal acts, and who failed to prevent, halt, or punish those acts, the civilian superior may be found to be criminally liable under the doctrine of command responsibility.

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[163] *Id*. at 442 n.195