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Superior Responsibility absent the Subordinate being formally charged

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Case Western Reserve University School of Law
International War Crimes Project
Rwanda Genocide Prosecution

(In conjunction with the New England School of Law)

Memorandum For
The Office of the Prosecutor

Superior Responsibility absent the Subordinate being formally charged

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Prepared by Chad Frederick Affsa
April 2001

Table of Contents

Index

Statutes and Treaties

Protocol I 12 August 1949, U.N.T.S. No 17512, vol. 1125, 3. (TAB C)

Rome Statute of the International Criminal Court, art. 126, U.N. Doc. A/CONF.183/9 July (1998), reprinted in 37 I.LM.999 (1998). (visited February 18, 2001) <http://www.un.org/law/icc/statute/romefra.htm>. (TAB E)

Law Review Articles and Memorandums

Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal* Court, 25 Yale J. Int'l. 89 (Winter 2000). (TAB N)

Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, v. 93 American Journal of International Law no.3, July 1999. (visited February 15, 2001) <http://www.asil.org/bantekas.htm>. (TAB Q)

White & Case Memorandum, 30 August 2000. (TAB O)

Cases

In Re Yamashita, , 327 U.S. 1; 66 S.Ct. 340; 1946 U.S. Lexis 3090; 90 L.Ed. 499 (1946). (TAB M)

Prosecutor v. Zejnil Delalic, Case No. IT-96-21-T(1998). (TAB J)

Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, 2 September 1998. (TAB I)

Prosecutor v. Blaskic, Case No. IT-95-14, n.335. (TAB K)

Prosecutor v. Kayishema, Case No. ICTR-95-1-T 21 May 1999. (TAB L)

Prosecutor v. Tadic, Case No.IT-94-1-T 11 November 1999. (visited February 18, 2001) <http://www.un.org/icty/tadic> (TAB H)

Hirota v. MacArthur, General of the Army, Et Al. 338 U.S. 197; 69 S. Ct.197; 1948 U.S. LEXIS 1428; 93 L. Ed. 1902 (TAB Z)

“LET JUSTICE BE DONE”[1]

[1] The Marshalls order’s in the von Hagenbrach Court of 1477. Disscussed in The evolution of Individual criminal responsibility under international law, International Review of the Red Cross No. 835, p. 531-553 (TAB V)

I. Introduction and Summary Conclusion

A. Issue

This memorandum seeks to answer whether a Superior may be charged and convicted for crimes by his subordinates if in fact no subordinate is actually named or convicted of the criminal charge.

B. Summary of Conclusions

The International Criminal Tribunal Rwanda (hereinafter "ICTR") gives the Chamber the authority to hold one responsible for crimes of others so long as certain prerequisites are established.[2] These prerequisites, set forth in Article 6(3) of the ICTR Statue, require that a chain of control be found, that the superior have knowledge of his subordinates' actions and that the superior had failed to prevent the crimes or punish the perpetrator.[3] International Tribunal Chambers and domestic criminal Courts have, in the past, convicted individuals for crimes committed by their subordinates, if and only if the above three preconditions were established. Yet the precedents do not require that the Subordinate be named in the indictment or convicted as a prerequisite to convicting the Superior under the doctrine of command responsibility. Thus, as one can see there should be no problem for the Tribunals to support a finding of guilt for superiors, with out there first being a charge or conviction upon the subordinate.

II. Factual Background

In the wake of the horrific atrocities committed in Rwanda, from late 1990

[2] Statute of the International Tribunal for Rwanda, annexed to S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.M. Doc. S/REE/955 (1994). (TAB A)

through 1994,[4] the International Criminal Tribunal Rwanda was set up to prosecute violations of war crimes.[5] Since the killings were so widespread and overwhelmingly quick and undocumented,[6] the specific individuals who committed these offenses against international law cannot be named in all cases.[7] It is the superiors of these individuals who are charged with individual criminal responsibility under article 6(1) of the ICTR[8] and responsibilities of commanders and other superiors under article 6(3) of the ICTR.[9]

III. Legal Discussion

A. Comparing All Relative International Statutes Which Make Provisions for Superior- Subordinate Culpability

It is important to have a sense of how the ICTR came into being in order to better understand the doctrine of Superior Responsibility. The early Statutes that address this question established the foundation for which the ICTR rests. The statute that is directly at issue and used by the prosecutor in Rwanda is the ICTR Statue. The superior responsibility provision is derived from article 6(3), which states in pertinent part:

> The fact that any of the acts ... committed by a subordinate does not relieve his or her superior of criminal responsibility, if he or she knew or had reason to know that the subordinate was about to commit such acts, or had done so in a superior field to take the necessary and reasonable measures to prevent such acts, or to punish the perpetrators thereof.[10]

This statute is directly derived from article 7(3) of the International Criminal Tribunal for Yugoslavia (hereinafter ICTY Statue). These statutes are aimed at putting an end to such

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[3] *See* Statute of the International Tribunal for Rwanda, *supra* note 2.
[4] *See* Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda (1998).
[5] *See* Statute of the International Tribunal for Rwanda - Preamble. (TAB A)
[6] *See* International Review of the Red Cross #835, 30 September 1999, pages 531-553 cp.1 (visited March 1, 2001) <http://www.icrc.org>. (TAB V)
[7] *See* Resolution 827 (1993) adopted by the Security Counsel at its 3,217th. (visited February 15, 2001) <http://gopher://gopher.undp.org:70/00/undocs/scd/scouncil/s93/28>. (TAB B)
[8] *See* Statute of the International Tribunal for Rwanda, *supra* note 2. (TAB A)
[9] *Id*.

crimes that seriously threaten international peace and security and to take effective measures to bring to justice the persons who are responsible for them.[11]

The ICTR and ICTY statutes are rooted in previous international treaties, which had attempted to address the issue of command responsibility. One of the earliest attempts to punish superiors was the Treaty of Versailles of 28 June 1919, in its articles 228 and 229.[12] The Treaty of Versailles established the right of the allied powers to try and punish individuals responsible for "violations of the laws and customs of war."[13] Additionally, with the Hague Convention IV, of October 18, 1907[14], and the Geneva Red Cross Convention of 1929,[15] the issue of superior responsibility was beginning to take root, but still left the standard somewhat vague.

It was not until the second half of the twentieth century that command responsibility was more clearly defined. One of the first treaties to impose a duty upon commanders was the 1977 Additional Protocol I, to the Geneva Convention of 12 August 1949.[16] Article 87 of this Protocol provides that commanders shall take such steps that are necessary to prevent violations of the Geneva Convention.[17] Also, Article 86 of the Protocol imposes liability on a commander for his failure to act and take measures necessary to suppress breaches of the Geneva Conventions, if such a superior knew or had information which should have enabled them to conclude breaches were being

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[10] Statute of the International Tribunal for Rwanda, *supra* note 2. (TAB A)
[11] *See* Resolution 827, *supra.*
[12] *See* Article 28 &29 of the ICC (TAB F)
[13] International Review of the Red Cross, *supra* at 531-553.
[14] *See* Hague Convention No. IV, 36 Stat. 2277, 2295.
[15] *See* Geneva Convention of 1929, 47 Stat. 2074, 2092. (TAB D)
[16] *See* Protocol I 12 August 1949, U.N.T.S. No 17512, vol. 1125, 3. (TAB C)
[17] Article 87- Duty of Commanders, See Protocol I 12 August 1949 (TAB F)

committed.[18] It is from these early attempts to classify command responsibility that the ICTY and ICTR's language has been drafted in Articles 7(3) and 6(3), respectfully.

Most recently, the 1998 Rome State of the International Criminal Court, building upon the Protocol to the Geneva Conventions and utilizing the success that Tribunals have had with the ICTY and ICTR Statutes, expressly states three elements that would impose liability upon a superior.[19] These three elements are: 1) that a superior-subordinate relationship existed; 2) the required knowledge of the acts was present; and 3) there was a failure to prevent/punish crimes committed by such subordinates.[20]

B. Review of Judgments involving International Statutes

The early cases from former Courts and Tribunals have addressed the Superior Responsibility Doctrine and has not once required a finding of convection on such subordinates before imposing liability upon their superiors. It was from these early cases that the precedent for the ICTR was established.

The first such case that attempted to bring justice against commanders who abused their authority took place in 1474, against Peter Von Hagenbach.[21] Von Hagenbach had permitted and encouraged his soldiers to reduce the population of Breisach (a fortified city on the upper Rhine), to total submission through acts of brutality and terror.[22] Without any mention of specific individuals except Von Hagenbach himself, the Military Court stated that the accused had "trampled under foot, the laws of

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[18] *See* Article 86- Failure to act, See Protocol I 12 August 1949 (TAB F)

[19] *See* Rome Statute of the International Criminal Court, art. 126, U.N. Doc. A/CONF.183/9 July (1998), reprinted in 37 I.LM.999 (1998). (visited February 18, 2001) <http://www.un.org/law/icc/statute/romefra.htm>. (TAB E)

[20] *See id*., Article 28(1) (a) and (b) (TAB E)

[21] *See* International Review of Red Cross, *supra* note 13, at page 1 (TAB V)

[22] *See id*., at page 2

God and man" and found him guilty.[23] He was subsequently executed for committing crimes which he had a "duty to prevent."[24] Nevertheless, it was not until the Nuremberg and Tokyo War Crimes Tribunals following World War II that the international community convicted on the theory of command responsibility.[25] However, these tribunals did not explicitly contain a command responsibility provision.[26] They did, however, establish a foundation for later tribunals and statutes to apply liability upon commanders for the criminal acts committed by their subordinates.[27]

The most cited and discussed post World War II case is that against General Yamashita.[28] This case engages considerable controversy both for procedural issues and for the principle of liability, upon which General Yamashita was convicted, which rested on a theory of command responsibility.[29] The court's major breakthrough in In Re Yamashita[30] was the establishment of the duty to prevent.[31] Yamashita was charged with violating the laws of war, for his failure to "take such appropriate measures as are within his power, to control the troops under his command and for the prevention of acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery; and may be charged with personal responsibility for his failure to take such measures when violations result."[32] The Yamashita court expanded the principals established in the Fourth Hague Convention of 1907, which

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[23] *Id*.
[24] *See id*.
[25] *See* Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal* Court, 25 Yale J. Int'l. 89 at 103 (Winter 2000). (TAB N)
[26] *Id*.
[27] White & Case Memorandum 30 August 2000 at 14, Note 3a. (TAB O)
[28] *See* Vetter, *supra* note 25, at 105.
[29] *Id*.
[30] In Re Yamashita, , 327 U.S. 1; 66 S.Ct. 340; 1946 U.S. Lexis 3090; 90 L.Ed. 499 (1946). (TAB M)
[31] *See* Vetter, *supra* note 25, at 105.

provides that an army must be "commandeered by a person responsible for his subordinates" and such commanders must see that these article are "properly carried out."[33] Even without any subordinate being named on the indictment the court ultimately found General Yamashita guilty for his failure "to provide effective control of ... his troupes, as required by the circumstances."[34] Despite the lack of evidence that General Yamashita had actual knowledge that these crimes were being committed, he alone was held liable on the basis that he should have known the crimes were being committed.[35] The commission further stated, "where murder, rape, vicious, and revengeful actions are widespread offenses, and there is no attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable for the criminal acts of his troops, depending on the nature and circumstances surrounding them."[36] This case was one of the first cases to establish the principle that knowledge can be inferred. "Obviously, charges triable before a military tribunal [for violations of war] need not be stated with the precision of a common law indictment."[37]

Another powerful case occurred in the Tokyo tribunal, wherein Foreign Minister Koki Hirota, was found responsible for the Rape of Nanking, and subsequent atrocities due to his knowledge of same, and his failure to institute immediate actions against them.[38] Hirota subordinates were not subject to judgment for their crimes committed, a fact which did not deter the Court from convicting Hirota of superior responsibility even

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[32] *See* Yamashita, *supra* note 30, at ***2-3 n.3(a). (TAB M)
[33] *See id.*, at ***26.
[34] *See id*., at ***40.
[35] *Id*.
[36] *Id.*
[37] *See id*. at***30.
[38] Hirota v. MacArthur, General of the Army, Et Al. 338 U.S. 197; 69 S. Ct.197; 1948 U.S. LEXIS 1428; 93 L. Ed. 1902; See White, note 27, at 24. (TAB Z)

with out a finding of direct control over the perpetrators of the atrocities.[39] His guilt is derived from the fact that he had the ability and duty to prevent and failed to execute his obligation.[40] The Hirota case, along with Yamashita, expanded the doctrine of command responsibility by allowing for criminal liability to be imposed on those leaders in instances where neither direct orders were given or where the subordinates were not under the direct control of such superior,[41] so long as the superior had the ability to prevent the criminal acts.[42]

The ICTY and ICTR further expanded and defined the principals established in the World War II Tribunals. Ruling on the newly established statutes and recognizing the importance of the command responsibility doctrine, each tribunal has explicitly provided for such liability even without a conviction first being applied to a subordinate.[43] The ICTY in Prosecutor v. Zejnil Delaic, et al., (the Celebici case)[44] held that military commanders and other persons occupying positions of authority may be held criminally responsible for the unlawful conduct of their subordinates.[45] The Tribunal explicitly stated that this liability is a "well-established norm of customary and conventional international law."[46] More recently, Prosecutor v. Akayesu,[47] also held that superiors can and must be convicted of these crimes.[48] These cases established the principle of Superior Responsibility and set forth the elements which impose liability on superiors for

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[39] *See id*. at 17.
[40] *Id*.
[41] *See id*. at 17.
[42] *See* Yamashita, *supra* note 30, at***23. (TAB M)
[43] *See* Vetter, *supra* note 25, at 94-95.
[44] Prosecutor v. Zejnil Delalic, Case No. IT-96-21-T(1998), (herein referred to as Celebici). (TAB J)
[45] *See i*d. at para.333
[46] *Id*.
[47] Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, 2 September 1998. (TAB I)
[48] *See id*. at para. 551

the unlawful acts performed by their subordinates.

C. The elements which make up a Superior-Subordinate relationship as established by statutes, former tribunals and Criminal Courts.

There are three essential elements, which have evolved over time, that are necessary to impose liability on superiors for the criminal acts of their subordinates under the principals of the command/superior-subordinate relationship. These elements are as follows:

(1) The existence of a superior-subordinate relationship;
(2) The superior knew or had reason to know that the criminal act was about to be or had been committed; and
(3) The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[49]

1. The existence of a superior-subordinate relationship

A superior-subordinate relationship should be viewed as a "hierarchy encompassing the concept of control."[50] Although, this type of relationship may be difficult to recognize, it has remained the most important and essential element in finding superiors accountable for acts of their subordinates.[51] The Delalic Chamber found that in order to be considered a commander subjected to liability for the crimes of subordinates, there must be proof that it was within the commanders' powers to prevent and punish the acts of such subordinates.[52] The Chamber in Blaskic has since characterized a superior as a person exercising "effective control" over his subordinates.[53] Furthermore, Article 28 (1) of the ICC Military Command standard states, "a military commander shall be

[49] *See* Celebici, *supra* note 44, para. 346 (TAB J)
[50] Protocol I at note 16. (TAB C)
[51] *See* Celebici, *supra* note44 at para. 354. (TAB J)
[52] *See id*.

criminally responsible for crimes ... committed by forces under his or her effective command or control."[54] It seems important to note that in none of the Statutes or Treaties or holding in any case have there been a need to formally charge or convict a subordinate before liability can be placed upon the superior.

This responsibility is not limited to individuals formally designated as a commander through de jure control, but also includes individuals who have effective de facto control as well.[55] De jure power is that control over a subordinate by means of allocation through official ranks.[56] De Facto control is defined as the actual control one has over another where there is no formal delegation of power.[57] In order to "pierce the veil of formalism," the chamber must be prepared to look further than one's de jure powers and consider the de facto authority one actually exercised.[58] Accordingly, this control can be shown whether the commander had actual de jure control or effective de facto control over the person who in fact committed such acts.[59] Therefore, a superior may incur criminal responsibility for crimes committed by persons who are not formally under his control.[60]

Since the doctrine of command responsibility is ultimately predicated upon the power of the accused (superior) to control his subordinate,[61] there is extra incentive for

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[53] *See* Prosecutor v. Blaskic, Case No. IT-95-14, n.335. (TAB K)
[54] Vetter, *supra* note 25 at 114. (TAB N)
[55] *See* Blaskic, *supra* note 53 at para. 300. (TAB K)
[56] Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, v. 93 American Journal of International Law no.3, July 1999, note 37 at 4. (visited February 15, 2001) <http://www.asil.org/bantekas.htm>. (TAB Q)
[57] *See id*. at para. 370.
[58] Prosecutor v. Kayishema, Case No. ICTR-95-1-T 21 May 1999. n.218 (hereinafter Kayishema) (TAB L)
[59] *See id*. para. 223.
[60] *See id*. para. 301.
[61] *See* Kayishema, *supra* note 58 at para. 92 (TAB L)

the commander to exercise control over his subordinates and to make certain potential crimes in the future do not take place.[62] The chamber in Akayesu held "that it is appropriate to assess on a case by case basis, the power of authority actually devolved upon the accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof."[63] Hence, the doctrine of command responsibility is ultimately predicted upon the power of the superior to control the dealings of his subordinates.[64]

In addition, the authority to prosecute commanders for acts of their subordinates is not limited to the role of military commander alone.[65] This authority also extends to civilian superiors if such crimes committed were actually within the effective responsibility and control of the superior.[66] The chamber in Celebici concluded that civilian superiors are only liable under the doctrine of command responsibility, to the extent that they operate in a military-like degree of control over their subordinates.[67] The Celebici Chamber, using Article 7(2), stated that the doctrine of superior responsibility "extends beyond the responsibility of military and encompasses political leaders and other civilian superiors in positions of authority."[68] This judgment is the first elucidation of the concept of command responsibility by an international judicial body since the cases decided in the wake of the Second World War.[69]

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[62] *See* Vetter, *supra* note 35 at 93 (TAB N)
[63] Akeyesu, *supra* note 47 at para. 491. (TAB I)
[64] *See* Kayishema, *supra* note 58 para. 217. (TAB L)
[65] *See* Vetter, supra note 25 at 114; citing ICC Article 28 (2)(b) (TAB N & E)
[66] *See id.*
[67] *See* Vetter, *supra* note 25 at 116. (TAB N)
[68] Celebici *supra* note 356. (TAB J)
[69] *See* Vetter, *supra* note 25 at 110. (TAB N)

In light of the above, the doctrine of command responsibility encompasses not only military commanders, but also civilians holding positions of authority and, not only persons in de jure positions, but also those in de facto positions.[70] It is therefore sufficient for a chamber to find one having a superior status and thus responsibility, if it can be shown that the accused had either de jure or de facto authority and that the atrocities were committed subsequent to his orders.[71]

2. The superior knew or had reason to know that the criminal act was about to be or had been committed

The Celebici Chamber has defined two theories of knowledge which would give rise to liability for superior responsibility.[72] These theories are known as actual knowledge and implied knowledge.[73] Actual knowledge can be established from direct evidence that a superior ordered or was aware of the crimes being committed by his subordinates.[74] The Celebici Chamber has further held that absent this direct evidence, knowledge can still be established through circumstantial evidence.[75] This form of implied knowledge may not be presumed and may only be established through the evidence pertaining to each individual defendant.[76] The philosophy behind allowing the courts to use circumstantial evidence in order to prove one's knowledge seems to be derived from the principle that "a superior is not permitted to remain willfully blind to the acts of his subordinates."[77]

Many chambers have established guidelines for appropriate circumstantial

[70] *See* Celebici, *supra* note 44. (TAB J)
[71] *See* Kayishema, *supra* note 58 para. 218. (TAB L)
[72] *See* Celebici, *supra* para. 348 (TAB J)
[73] *See id*. at para. 386.
[74] *See id*. at para.386
[75] *See id.*
[76] *See id*. at para. 385

evidence that can be used to infer such knowledge. The Delaic chamber used the final report of the commission of experts for its guideline.[78] A reproduction of this list is as follows:

a) The number of illegal acts;
b) The type of illegal acts;
c) The scope of illegal acts;
d) The time during which the illegal acts occurred;
e) The number and type of troops involved;
f) The logistics involved, if any;
g) The geographical locations of the acts;
h) The widespread occurrence of the acts;
i) The tactical tempo of operations;
j) the modus operandi of similar illegal acts;
k) the officers and staff involved; and
l) the location of the commander at the time.[79]

This is not a form of strict liability, but rather a detailed look at exactly what happened and what the commander did know or should have known from the circumstances to establish guilt under the doctrine of command responsibility.[80]

Moreover, the Kayishema chamber, relying on Article 6(3) of the ICTR Statue, held that when an act was committed by a subordinate, the superior would not be able to relieve himself from such responsibility if in fact he knew or had reason to know that such criminal act(s) was about to be committed or had in fact been committed.[81] Article 6(3) of the ICTR Statue holds a superior responsible "if he knew or had reason to know"

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[77] Celebici, *supra* note 44 at para. 387 (TAB J)
[78] *See id.* at para. 386
[79] *See* Celebici, *supra* para. 386. (TAB J)
[80] *See id.* at note 383.
[81] *See* Kayishema, *supra* note 58 para. 208. (TAB L)

of criminal acts of his subordinates.[82] This form of mens rea is required in every major treaty and statute that addresses the command responsibility doctrine. The ICTR has required this standard as a result of the foundations laid down in the Trials of Nuremberg, Article 28 of the ICC, and Protocol I of the Geneva Convention (Article 87 and Article 86).[83] The language in these statutes allows a sufficient degree of flexibility for courts to find knowledge without directly ruling that a commander actually possessed this knowledge element.[84]

The most notable and often cited case to establish and convict a commander through implied knowledge is the Yamashita case. General Yamashita was the Japanese Commanding General of the Fourteenth Army Group during World War II.[85] While General Yamashita was isolated in a secluded mountainous region and his communications were destroyed by the actions of his enemies,[86] his troops had succeeded in carrying out "brutal atrocities and other high crimes."[87] Despite the fact that the military commission could not find that Yamashita possessed actual knowledge of these crimes, he was still convicted of violating the laws of war.[88] Yamashita was convicted in the absence of de facto control over his troops, who committed such large-scale atrocities because he failed to take reasonable measures to secure such information.[89] His conviction was upheld using the balancing test of knowledge and capacity to act.[90] The court satisfied the knowledge element on the fact that the crimes were so widespread and

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[82] Statute of the International Tribunal for Rwanda, *supra* note 2. (TAB A)
[83] *See* Kayishema, *supra* para. 209. (TAB L)
[84] *See id.* at para. 208.
[85] *See* Yamashita, *supra* note 30, at***1. (TAB M)
[86] *See* Bantekas, *supra* note 56 at. 9. (TAB Q)
[87] Yamashita, *supra* note 30, at***23 (TAB M)
[88] *See id.*
[89] *See* Bantekas, *supra* note 56 at. 9. (TAB Q)

that Yamashita failed to attempt a reasonable discovery of these crimes.[91] General Yamashita's conviction is a perfect example of the idea that a commander may not escape liability through "willful blindness."[92] This presumption of knowledge seems to have been established through statute and case judgments because ignorance and inaction should not relieve a commander of responsibility when it is later impossible to determine who committed the specific crime.[93]

3. Effective control and failure of one's duty

The last element necessary to establish the liability of a superior for crimes committed by his subordinates is inaction. One may not wash his hands of international responsibility by not acting.[94] There are two ways a commander may be tried of the atrocities of his subordinates.[95] The first and most straightforward way is when the superior actually ordered or encouraged the alleged brutality.[96] When it is not clear whether or not there was an order from the accused, the Chamber must turn to the second and more complicated way to prove command responsibility. The second method focuses on the actions the accused took following such atrocities.[97]

This duty on commanders, who possessed knowledge of their subordinates' criminal acts, was instilled into the law of war as it was utilized in the charge and ultimate conviction of General Yamashita.[98] The Yamashita Court exclaimed that the law of war imposes a duty upon an army commander to take all available measures which

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[90] *See id.* at 10
[91] *See id.*
[92] Celebici, *supra* note 44 at para. 387. (TAB J)
[93] *See id.*
[94] *See id*.
[95] *See* Kayishema, *supra* note 58 at para. 223. (TAB L)
[96] *See id*.
[97] *See id.*

are within his power "in order to control the troops under his command for the prevention of acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldierly; and may be charged with personal responsibility for his failure to take such measures when violations result."[99]

This duty to act appears to have found its way into every major treaty and statute regarding command responsibility. The Protocol I of the Geneva Convection deeded Articles 86[100]and 87[101] to this duty. Also, the ICTR has placed this duty in Article 6(3).[102] More notably, this duty is set forth in Article 28(1)(b) of the ICC.[103] As one can perceive, every major statute has set conditions for commanders to be found responsible even when they did not issue an order or participate any way in the crimes by their subordinates.

This past authority suggest that knowledge and intent can be inferred from circumstantial evidence.[104] The Tokyo Tribunal found Foreign Minister Hirota guilty because he "recklessly disregarded his legal duty to take adequate steps to prevent

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[98] *See* Yamashita, *supra* note 30 at 3. (TAB M)

[99] *Id*.

[100] *See* Rome Statute of the International Criminal Court, *supra*, Article 86 - Failure to Act, requires that one take all measures necessary to suppress grave breaches of the Geneva Convention and makes it a crime if the superior did not take all reasonable measure to prevent or repress such a breach. (TAB E)

[101] *See* Rome Statute of the International Criminal Court, *supra*, Article 87 - Duty of Commanders, states that such commanding officer has a duty to control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the convention and of this protocol. (TAB E)

[102] *See* Statute of the International Tribunal for Rwanda, *supra* note 2.; Article 6(3) states, "The fact that any of the acts referred to in articles 2 to 4 of the present statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."(TAB A)

[103] *See* Rome Statute of the International Criminal Court, *supra* note19, Article 28(1)(b) states, it is a crime if a "military commander or person 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." (TAB E)

[104] Prosecutor v. Tadic, Case No.IT-94-1-T 11 November 1999. (visited February 18, 2001) <http://www.un.org/icty/tadic> (TAB H)

breaches of the laws and customs of War."[105] Hirota was responsible for the mayhem known as the "Rape of Nanking," where hundreds of murders, violations of women and other atrocities were committed daily.[106] Foreign Minister Hirota was found to have possessed de jure control over the troops because he had the requisite knowledge of what was occurring and was convicted because he had failed to put a stop to these crimes when it was in his power to do so.[107]

The Hirtota case is one of many cases which have found culpability on a superior culpable because the superior had the power to stop these types of crimes and did not exert it. The Trial of General Tomoyuki Yamashita also imposed on an army commander a duty to control his troops by taking appropriate measures within his power.[108] The Celebici Chamber analyzing the Yamashita case used the ruling that the "widespread nature of the crimes committed was prima facie evidence that [Yamashita] must have failed to fulfill the duty to discover the standard of conduct of his troops" to hand out convictions accordingly.[109]

Perhaps the case most on point for this analysis is that of Tihomir Blaskic who was prosecuted under article 7(1) and 7(3) of the ICTY.[110] The Trial Chamber found that article 7(3) "enshrines" the principle that liability for command responsibility should be found where the accused did not prevent the crimes of his subordinates or if appropriate, to punish them for such crimes and such liability should be construed in the "strictest

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[105] Akayesu, *supra* note 47, para.490 (TAB I)
[106] *See id*.
[107] *See id.*
[108] *See* Celebici, *supra* note 44 at para. 338. (TAB J)
[109] *Id*. at para. 384.
[110] *See* Blaskic, *supra* note 53 at para. 261. (TAB K)

sense."[111] The Chamber found that Blaskic "never took any reasonable measures to prevent the crimes from being committed or to punish those responsibility thereafter."[112] Impressively, the Chamber found Blaskic guilty even though "no soldier has ever been convicted for the specific crimes."[113] The Chamber also expressed its difficulty in believing that the "accused had no forehand knowledge of the attack planned in an area coming within his area of responsibility and only a few kilometers from his headquarters."[114]

Like the pervious elements, failure to act is not viewed as a strict liability offense.[115] A superior can not be required to perform the impossible.[116] He may only be found to be responsible if it was within his powers to control such actions and he was negligent in his duty to bring to a halt the crimes being committed.[117]

There is also a requirement that a commander shall anticipate the actions of his subordinates before any misbehavior occurs, as he shall be found liable if the transgression occurs and such commander in fact failed to perceive such results.[118] A recent finding by the Intentional community deriving guilt through the actions of subordinates conducted as a result of their commanders failure to take the necessary steps to avoid is found in the Kahan Commission.[119] The Kahan Commission ruling over the Israeli massacres at two Palestinians refugee camps in Lebanon rendered the Israeli Chief

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[111] *See id*.
[112] *Id.* at para.495
[113] *Id.* at para.494
[114] *Id.* at para.478.
[115] *See* Celebici, *supra* note 44 at para. 383. (TAB J)
[116] See id. at note 395.
[117] *See id.*
[118] *See* Bantekas, *supra* note 56 at. 14. (TAB Q)
[119] Final Report of the Kahan Commission (authorized English translation), 22 ILM 473 (1983); *See id.* (TAB Q)

of Staff and the Israeli Defense Minister responsible for the wrongdoing that was committed by the Israeli army.[120] The Commission found fault because the superiors failed to take into account such factors as "the age, training, experience or similar elements that point to obvious conclusions that such crimes would almost certainly occur."[121] Even without the direct offenders from the Israeli army named the superiors were found responsible for not anticipating the potential dangers which were well within their powers to prevent.[122] The reason why the superiors were found guilty is not because of troop x's actions but rather because of the non-action of the superiors, this is the bases for liability upon the Israeli Chief of Staff and the Israeli Defense Minister.[123]

Consequently, in order for the theory of superior responsibility to apply, it is absolutely necessary for a Tribunal to find that the accused have "effective control" over his subordinates and their implied duty to act was not fulfilled.[124] Such control can be de jure or de facto.[125]

Causation between the superior's failure to act and the subsequent crimes by their subordinates has been a difficult connection for the Tribunals to apply.[126] However, Tribunals have not required a separate element of causation to support a finding of command responsibility.[127] There is a necessary causal nexus when charging one with superior responsibility for the failure to act.[128] Such a nexus can be shown through

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120 *See id*.
121 *Id*.
122 *See id.*
123 *See id.*
124 *See* White, *supra* note 27, at.20 (TAB O)
125 *See id.* at 39.
126 *See* International Review of the Red Cross, *supra* No. 838, p391-402.
127 *See* Bantekas, *supra* note 56 at. 15. (TAB Q)
128 *See id*.

circumstantial evidence.[129] The Celebici chamber ruled that there is no requirement to prove causation as a separate element for superior responsibility.[130] Reaching this conclusion, the Celebici Chamber considered the "existing body of case law," principles set forth in "existing treaty law" and the "abundant literature on this subject."[131] The Chamber went future and declared "the very existence of the principle of superior responsibility for failure to punish, therefore, recognized under Article 7(3) and customary law, demonstrates the absence of a requirement of causality as a separate element of [this doctrine]."[132]

D. Comparing similar relationships and offences to that of the superior-subordinate relationship.

The question of whether one can be charged with responsibility for the criminal acts of his subordinates, if such subordinates have not been either charged or convicted of the crime, has not been decisively answered. It is helpful to look at similar laws and see how the international community has decided this query.

Article 2 of the ICTR gives the Tribunal for Rwanda the power to prosecute persons committing genocide,[133] this article also allows the prosecution for conspiracy,[134] direct and public incitement,[135] attempt[136] and complicity.[137] Additionally, Article 6(1) makes one criminally responsible if he/she planed, instigated, ordered or aided and

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[129] *See id.*
[130] *See* Celebici, *supra* note 44 at. para.398 (TAB J)
[131] *Id.*
[132] Celebici, *supra*, at para. 400. (TAB J)
[133] *See* Statute of the International Tribunal for Rwanda, *supra* note 2; Article 2 (TAB A)
[134] *See id*. at. 3(b)
[135] *See id.* at. 3(c)
[136] *See id*. at.3(d)
[137] *See id.* at.3(e)

abetted in such crimes.[138]

1. Accomplices Liability

Accomplice liability according to Article 91 of the Rwanda Penal Code allows liability for complicity by aiding and abetting, complicity by incitement, complicity by procuring means and complicity for harboring.[139] Complicity is defined as "participation in wrongdoing."[140] The Delalic Chamber, using language found in Article 4 of the French Ordinance of 28 August 1944, based part of its finding in part on the notion that:

> where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicated as being equally responsible, they shall be considered as accomplices in so far as they have organized or tolerated the criminal acts of their subordinates.[141]

Thus, a commander who does not fulfill his duties, as set out under the doctrine of command responsibility shall be treated as the accomplice of such war criminals.[142]

To find the accused liable as an accomplice, the Chamber shall look to see if the accused had knowledge that the war crime(s) were being committed and the accused had aided and abetted, instigated, or incited one to commit such crime(s) regardless of whether the accused had specific intent to bring about such crime(s).[143] Such knowledge can additionally be inferred from the surrounding circumstances.[144]

2. Aiding and Abetting

In Prosecutor v. Tadic the chamber found that aiding and abetting included "all

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[138] *See id.* at. 6(1)
[139] *See* Akayesu, supra note 47 at 2. (TAB I)
[140] The New Lexicon Websters Dictionary 1992 edition lexicon publications, inc. New York Volume 1 encyclopedic edition.
[141] *See* Celebici, *supra* note 44 at para. 336. (TAB J)
[142] *See id*. at.337.
[143] *See* Akayesu, note 47 at para. 545. (TAB I)
[144] *See id*. para. 548

acts of assistance by words or acts that lend encouragement or support."[145] The Tadic Chamber also found it necessary to find a degree of knowledge and intent.[146] However, such knowledge and intent may be inferred from the circumstances surrounding the act.[147] The Tadic judgment went further to state that "if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have had a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it."[148] Thus one may be found guilty of aiding and abetting for merely being present and not fulfilling his duty to control.

The Akayesu Chamber relying on this past authority stated that aiding and abetting could be found when there is a failure to act.[149] The definition of aiding is the 'giving of assistance to someone.'[150] The Blaskic Chamber found that as long as the accused was "aware" that a crime is likely to be committed and the accused has intended to facilitate its commission, he may be charged with aiding and abetting.[151]

Aiding and Abetting and the theory for why these findings were found is best summed up in the Blaskic judgment which stated, "the international tribunal is not limited to persons who directly committed the crime in question."[152]

3. Incitement to Commit Genocide (Article 2(3)(c) of the ICTR)

The most famous conviction for incitement came against Julisus Streicher by the

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[145] Proscutor v. Dusko Tasko, *supra*. (TAB H)
[146] *See id*. para .675
[147] *Id.* para. 676
[148] *Id*. para. 686.
[149] *See* Akeyson, supra note 47, para. 548. (TAB I)
[150] *See id*. at para.484.
[151] See Blaskic, *supra* note 53 at para. 287. (TAB K)
[152] Blaskic, *supra* at para. 263. (TAB K)

Nuremberg Tribunal.[153] Incitement is defined as encouraging or persuading another to commit an offense,[154] even where such incitement fails to produce results.[155] Streicher published anti-Semitic articles in his weekly newspaper through out WWII.[156] The drafters of the 1948 Convention on Genocide referring to Streicher's case stated, "It is impossible that hundreds of thousands of people should commit so many crimes unless they had been instigated to do so."[157] They asked how in those circumstances, the inciters and organizers of the crime could be allowed to escape punishment when they are the ones, in actuality responsible for the atrocities committed.[158] This seems to be the rational of why allowing liability without naming or convicting the subordinate first is the proper course of action.

The issues presented in the Akayesu indictment posed the question of whether "a person can be tried for complicity even where the perpetrator of the principal offense himself has not been tried."[159] The Akayesu chamber, using Article 89 of the Rwanda Penal Code, answered this question in the affirmative.[160] The accused "may be prosecuted even where the perpetrator may not face prosecution for personal reasons, such as double jeopardy, death, insanity, or non-identification. ... As far as the chamber is aware, all criminal systems provide that an accomplice may be tried, even where the

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[153] *See* Akayesu, *supra* note 47, The Chamber, commenting on the summary records of the meetings of the sixth committee of the General Assembly, 21 September - 10 December 1948, official records of the General Assembly, Statements by Mr. Morozov, p. 241. (TAB I)

[154] Andrew Ashworth, *Principals of Criminal Law*, CLARENDON Press, Oxford (1995) at 462.

[155] *See* Akayesu, *supra* at para. 553. (TAB I)

[156] *See id*.

[157] *Id*.

[158] *See* Akayesu, supra; The Chamber, commenting on the summary records of the meetings of the sixth committee of the General Assembly, 21 September - 10 December 1948, official records of the General Assembly, Statements by Mr. Morozov, p. 241. (TAB I)

[159] Akayesu, *supra* at para. 531. (TAB I)

[160] *See id*.

principal perpetrator of the crime has not been identified."[161] There is no conflicting authority on this subject which suggest otherwise.

The Chamber hearing the case against Jean-Paul Akayesu, found him to have joined a crowd of over 100 people, and seized the opportunity to address the people.[162] The chamber further found that Akayesu urged the population to unite and eliminate the Tutsi population.[163] The chamber found a casual connection between Akayesu's speeches and the ensuing widespread massacres of the Tutsi in Taba.[164] There was no mention of any specific person or accomplices in the chamber's findings, rather language specifying a "crowd, audience and population," using these broad terms the chamber found Akayesu guilty of incitement.[165] "Akayesu had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group,[166] ... [A]ccordingly, the chamber finds that the said acts constitute the crime of direct and public incitement to commit genocide."[167]

By looking at these other forms of criminal responsibility which allow for an accused to be found liable even without a proper connection between the accused perpetrator and the accused, one can infer that the connection with regard to superior subordinate responsibility will not be so tantamount to overcome.

IV. Conclusion

Where no subordinate has been indicted for the specific criminal act and liability based on the doctrine of command responsibility is sought, liability should not be barred.

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[161] *See id.*
[162] *See* Akayesu, *supra* note 47 at para. 673. (TAB I)
[163] *See id.*
[164] *See id.*
[165] *See id.*
[166] *See id.*

After reviewing this doctrine's historical roots and the manner in which it has been applied, there is no benefit for precluding such liability solely because no subordinate has been named or convicted. The Tribunals in the past have inferred some elements through circumstantial evidence to impose liability even where such element had not been overwhelmingly proved.

Since circumstantial evidence has been used in former tribunals and in the current ICTR to prove elements of this liability, circumstantial evidence should be allowed to prove responsibility of a superior, if in fact no subordinate had been named. In sum, so long as the prosecutor can prove that there in fact was a superior-subordinate relationship, the superior had knowledge of or should have known of the criminal acts of their subordinates, and subsequently failed to perform his duty to prevent or punish such subordinate, International War Crimes Tribunals should be able to convict the accused without hesitation.

[167] *Id.*