

What is the Scope of Complicity as referred to in Art. 4(3)(e) of the JCTY Statute, and what is the relationship between Art. 7 (individual criminal responsibility) and Art. 4?

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I. Introduction and Summary of Conclusions

The Statute of the International Tribunal¹ grants the tribunal jurisdiction over all natural persons accused of committing acts enumerated within the former Yugoslavia.² Nuremberg was the first international attempt to address violations of conventional and customary international law.³ The crimes against humanity were first recognized in the trial of war criminals following World War II and the rules established by Control Council Law No. 10 set the precedent for the Genocide Convention and ultimately the Statute of the International Tribunal.⁴ Violations of the Geneva Conventions of 1949⁵, the 1907

¹ UN SCOR, UN Doc. S/25704 Annex, *reprinted in* 32 ILM 1192 (1993).

² Kevin R. Chaney, *Pitfall and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 Dick. J. Int'l L. 57, 67 (1995).

³ Upon the conclusion of World War II the Allied powers sought to establish a common system for trials of suspected war criminals to be conducted in their respective "zones" or occupied territories. The Allied control council for Germany, consisting of commanders of the four zones, acting as a legislative body for all of Germany, enacted Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity. Howard S. Levie, *Terrorism in War- The Law of War Crimes* 71 (Oceana Publication, Inc. 1992)

⁴ The Statute of the International Tribunal, sets forth in thirty-four articles the composition, jurisdiction, and function of the International Tribunal.

⁵ The International Tribunal shall have the power to prosecute persons committing , or ordering to be committed, grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) willful killing;
- (b) torture or inhumane treatment, including biological experiments;
- (c) willfully causing great suffering or serious property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

Hague Convention, the 1948 Convention on the Prevention and Punishment of the Crimes of Genocide, and crimes against humanity set forth in the Charter of the Nuremberg Tribunal and Law No. 10 of the Control Council for Germany. The issues to be analyzed in this memoranda are (1) what is the scope of complicity as referred to in Article 4(3)(e) of the Statute, and (2) what is the relationship between Article 7(1) and Article 4?

Persons involved in the commission of genocide under Article 4 can be found individually responsible for any act from direct commission to planning, instigating, ordering or otherwise aiding and abetting in the crime. Article 7 of the Statute of the International Tribunal augments Article 4 which confers jurisdiction over crimes in regard to genocide.⁶ Article 7(2) established that there shall be no head-of-state or other immunity based on accused's position of authority.⁷

(f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilian as hostages

Statute of the International Tribunal, UN SCOR, UN Doc. S/25704 Annex, *reprinted in* 32 ILM 1192 (1993). [hereinafter Statute]

⁶ *Id.* art. 7.

⁷ *Id.* Article 7 of the Statute of the International Tribunal states:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as head of State of Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

One who becomes a party to a conspiracy does not acquire liability for substantive offenses committed prior to his own adherence.⁸ Complicity in genocide is a state of knowingly, voluntarily and with common intent to unite with the principle offenders in the commission of genocide.⁹ Complicity is a form of accomplice liability and may also refer to activities of conspirators.¹⁰ A conspiracy may be a continuing one; actors may drop out, and others drop in; the details of operation may change from time to time; the members need not know each other or the part played by others; a member need not know all the details of the plan or the operations; he must, however, know the purpose of the conspiracy and agree to become a party to a plan to effectuate that purpose.¹¹ The scope of complicity in genocide enumerated in Article 4(3)(e) ensures, through the doctrine of command responsibility and superior orders, that all those in the chain of command who

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

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

⁸ At Nuremberg Sir David Maxwell-Frye expressed the view that it was doubtful under English law whether one who becomes a party to a conspiracy acquires liability for substantive offenses committed prior to his own adherence. See 8 Trial of the Major War Criminals Before the International Military Tribunal 219-220 (1947).

⁹ Black's Law Dictionary 197 (6th ed. 1994)

¹⁰ *Id.*

¹¹ *Id.* at 214.

contribute directly or indirectly to commission of genocide are held to be individually criminally responsible.¹²

II. Genocide

The tribunal shall have jurisdiction over war crimes and crimes against humanity, including genocide, committed as of January 1, 1991, pursuant to Articles 1-5 of the statute.¹³ Although crimes against humanity, including genocide, within Articles 4 and 5 overlap considerably with war crimes, they may reach some acts that are not war crimes,

¹² Statute, *supra* note 5 art.4.

¹³ 1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.

Statute, *supra* note 5, art. 4.

for example, acts by persons not covered by the laws of armed conflict, acts outside an armed conflict and a state's acts against its own civilians.

The Article 4 definition of genocide is a reproduction of Articles 2 and 3 of the Genocide Convention without change. The Genocide Convention became one of the most widely accepted international human rights instruments with 112 ratifications by states parties.¹⁴ The Genocide Convention contemplates judicial enforcement through national courts, international tribunals and competent organs of the United Nations.¹⁵

Most states recognized the punishment of genocide by national courts was an illusion because genocide would be committed mostly by, or with the complicity of, the state's authority as indicated by the report of the ad hoc committee entrusted to draft the Genocide Convention.¹⁶ In the Yugoslav conflict, most of the atrocities have been committed by the members of one ethnic, national, or religious group against the members of another such group within the same former state.¹⁷ Therefore, Article VI of the Genocide Convention provides that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed." Trials by national courts in the territory of the state in which the crime has been committed appears

¹⁴ Akhavan, Payam *"Enforcement of the Genocide Convention: A Challenge to Civilization"* Harvard Human Rights Journal Vol. 8 229 (1994).

¹⁵ *Id.* at 230.

¹⁶ *Report of the Ad Hoc Committee on Genocide*, UN ESCOR, 7th Sess., Supp. No. 6 at 12, UN Doc. E/794 (1948).

¹⁷ *Supra*, note 1.

to be unrealistic since it is usually inconceivable for genocide to be committed without the participation of complicity of the state.¹⁸

III. Scope of Complicity In Genocide

In the Nuremberg trials, the general principles of complicity recognized in national courts were applied to the trial for person for war crimes and other atrocities.¹⁹ The Nuremberg charter contained a general provision confirming the responsibility of persons participating in a conspiracy to commit any of the crimes referred to therein. The Nuremberg Tribunal concluded that this general provision was not sufficient to create a separate and distinct crime with respect to war crimes or crimes against humanity. Therefore, the Nuremberg Tribunal limited its consideration of conspiracy as a separate crime to the charges of conspiracy to commit crimes against peace, the definition of which expressly included conspiracy to commit such crimes.²⁰ The inclusion of the charge of conspiracy or common plan was a novel aspect to the Nuremberg proceedings.²¹ The range of persons who may be held guilty of war crimes or crimes against humanity is not

¹⁸ Akhavan, *supra* note 14.

¹⁹ *Id.*

²⁰ Article 6 of the Nuremberg Charter states that, "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." *Yearbook of the International Law Commission 1950*, vol.II, UN Doc. A/CN.4/SER. A/1950/Add.1, at 374.

²¹ Chaney, *supra* note 2, at 90.

limited to those who physically performed the illegal deed.²² Others may be held to be sufficiently connected with an offense to be held criminally liable.²³ Article 7(1) of the Statute of the Yugoslavia Tribunal defines the ways in which an individual may incur criminal responsibility for direct or indirect participation in the commission of a crime.²⁴ The notion of collective responsibility in terms of participation in a criminal conspiracy is reflected in the definition of the crime of genocide enumerated in Article 4 of the Statute.²⁵ There is no generally applicable provision recognizing conspiracy as a separate and distinct crime.²⁶ Therefore, persons can be found guilty of the crime of conspiracy with respect to genocide only.

Very little definition is provided as to the acts of conspiracy, incitement, attempt and complicity related to the crime of genocide. The negotiating history of the Genocide Convention indicated that the crimes of conspiracy to commit genocide, direct and public incitement to commit genocide and complicity in genocide are based on common law doctrines.²⁷ The elements under American criminal law must be established for the act of conspiracy to commit genocide or complicity in genocide to be punishable.²⁸

²² See 15 United Nations War Crimes Commission, Law Reports of Trials of War Criminals 135 (1949) (summarizing holding of tribunals) [hereinafter Law Reports].

²³ *Id.*

²⁴ Statute, *supra* note 5, art. 7.

²⁵ Statute, *supra* note Art. 4.

²⁶ *Id.*

²⁷ "The notion of using conspiracy liability to reach Nazi war criminals had been the idea of Colonel Murray Bernays, a lawyer for the War Department in 1944. The decision to

The definition of complicity is a state of being an accomplice; participation in guilt. Involvement in crime as principle or as accessory before fact. It also refers to activities of conspirators. An Accomplice is one who knowingly, voluntarily and with common intent unites with the principle offender in the commission of a crime. One who is in some way concerned of associated in commission of crime; partaker of guilt; one who aids or assists, or is an accessory.²⁹

adopt and then emphasize criminal conspiracy was made by Mr. Justice Jackson. Jackson and others felt that the Anglo-American law of conspiracy was the best vehicle to reach the many Nazi political, military, and bureaucratic officials through whose acts the war machine had been built and set in motion. After numerous drafts of the Charter had been circulated, discussed and amended, conspiracy was included in its final form in Article 6a of the Charter." Jonathan A. Bush, Nuremberg: The Modern Law of War and Its Limitations: The Anatomy of the Nuremberg Trials: A Personal Memoir, 93 Colum. L. Rev. 2022, 2043 (1993) (book review).

²⁸ ". . . the Allies reached a joint decision to apply conspiracy liability to crimes against peace, but not to war crime or crimes against humanity, . . . [yet] the indictment specifically charged defendants with conspiracy to commit war crimes and crimes against humanity, . . . and prosecutors argued along these lines throughout the trial". *Id.*

²⁹ Model Penal Code, § 2.06(3).

A person is an accomplice of another person in the commission of an offense if:

- (a) with the purpose of promoting or facilitating the commission of the offense, he
 - (i) solicits such other person to commit it, or
 - (ii) aids or agrees or attempts to aid such other person in planning or committing it, or
 - (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or
- (b) his conduct is expressly declared by law to establish his complicity.

A person is liable as an accomplice to the crime of another if he gave assistance of encouragement or failed to perform a legal duty to prevent it with the intent thereby to promote or facilitate commission of the crime. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.³⁰

The broad scope of complicity includes not only those who have the purpose of promoting or facilitating the commission of genocide, but those who have the legal duty to prevent the commission of genocide and fail to do so, implicating commanders and heads of state. As to liability for complicity in a conspiracy, the Model Code does not make "conspiracy" a basis of complicity in substantive offenses committed in furtherance of its aims. The standard is whether the defendant solicited commission of the particular offense or whether he aided, or agreed or attempted to aid, in its commission.

In the *People v. Luciano*, Luciano and others were convicted of sixty-two counts of compulsory prostitution.³¹ They placed a girl in a house for the purpose of prostitution and received money from the prostitutes earnings. Liability was imposed with respect to

³⁰ Model Penal Code, § 5.03

³¹ 277 N.Y. 348, 14 N.E.2d 433, *cert. denied*, 305 U.S. 620 (1938).

their role in solicitation and aiding in the commission of countless crimes including the ones they were charged with. The question before the court was whether his liability extended to each of the prostitutes for their individual crimes. They have, of course, committed their own crimes; and may have actually assisted in other but they exerted no substantial influence on the behavior the hundreds of people involved.

A court should hold each prostitute as a party to a conspiracy, and liable for the crimes they actually committed. However, "law would lose all sense of just proportion if simply because of the conspiracy itself each [prostitute] were held accountable for thousands of . . . offenses of which [they are] completely unaware and . . . did not influence at all."³² As to the situation in the former Yugoslavia, *Luciano* dictates that although each individual soldier may be part of a conspiracy to commit genocide along with the commanders and heads of state, they could not possibly be held accountable for the thousands of soldiers actions because they exerted no "substantial influence" on their behavior.

Complicity in genocide, following American common law, requires that the actor have the purpose of promoting or facilitating the commission of complicity in genocide. This is not to say that he must know of the criminality of the conduct; there is not more reason here to require knowledge of the criminal law than there is with the principle actor. But he must have the purpose to promote or facilitate the acts of genocide that forms the

³² *Id.*

basis of the charge, and therefore will not be liable for conduct that does not fall with that purpose.

In defining conduct requisite to establish criminal complicity, the Model Penal Code includes not only "one who solicits or aids but also one who agrees to aid or attempts to aid in the planning or commission of [genocide]"³³ It also includes one who has a legal duty to prevent the crime and fails to make the proper effort to do so.

IV. Individual Responsibility

Individual responsibility for unlawful behavior is the essence of criminal law.³⁴ Individuals must be held criminally responsible as the Nuremberg Tribunal concluded: "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."³⁵

³³ Model Penal Code §2.06(3)

³⁴ "If the proposition that aggressive wars or persecution on racial, political or religious grounds in time of war were criminal acts, was not to be confined to the sphere of moral principles, advocated by learned jurists or philosophers or to that of the wishful thinking of politicians, the only way to deal with it was to recognize that individuals upon whose decisions such acts depended, were to be held penally responsible. This could be one only by dismissing the doctrine of immunity of heads of state, on the one hand, and that of the acts of State legalizing deeds of members of Governments and administrators of the other. As a corollary to the theory of national sovereignty, these two denominators served for centuries the purpose of providing a legal cover for a series of acts undertaken by one State against another, or by a Government against its own citizens within the boundaries of a State." *History of the United Nations War Crimes Commission* at 262.

³⁵ See *The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany*, Part 22, at 445, 447 (1950).

Individual criminal responsibility for violations of international law was first advanced in the Treaty of Versailles.³⁶ Prior to this treaty, nations were held solely responsible for violations of international law instead of individual actors. Military personnel under orders to act in violation of international law were given a choice of either punishment by their own country or at the hands of international community. Individual culpability under international law dates back to the Leipzig Trials which followed the First World War.³⁷ This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that their subordinates were going to commit or had committed crimes and yet failed to take necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.³⁸

One of the unique characteristics of crimes under international law is the direct relationship between the rules of international law and the individual. The imposition of criminal responsibility by virtue of international law does not require and cannot be precluded by national law.³⁹ The principle of individual responsibility for violations of international law was confirmed by the Nuremberg Judgment.⁴⁰

³⁶ See Treaty of Versailles, June 28, 1919, S.Doc. 51, 66th Cong., 1st Sess., 2 Bevans 43, at 136-37.

³⁷ *Supra* note 8 at 86-87.

³⁸ UN Doc. S/25704 (1993), *reprinted in* 32 ILM at 1159.

³⁹ The supremacy of international law with respect to the imposition of criminal responsibility in the absence of corresponding national legislation was recognized in Article 6(c) of the Nuremberg Charter in relation to crimes against humanity. The general

The International Tribunal is authorized to determine the criminal responsibility of natural persons as individuals and not as members of a group.⁴¹ Violations of international humanitarian law entail criminal responsibility of those committing or ordering those violations. There are certain resolutions unanimously adopted by the Security Council.⁴² Persons who "planned, instigated, ordered, committed or otherwise aided and abetted in" violations fall within the Tribunal's jurisdiction pursuant to Article 7(1); this article augments Article 4, which (following the Genocide Convention) confers jurisdiction over conspiracy, incitement, attempt and complicity with regard to genocide. Article 7(1)

applicability of this principle is recognized in the Nuremberg Principles formulated by the International Law Commission in 1950, Principle II of which states: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law." The commentary further explained: "Once it is admitted that individual are responsible for crimes under international law, it is obvious that they are not relieved from their international responsibility by the fact that their acts are not held to be crimes under the law of any particular country . . . The principle that a person who has committed an international crime is responsible therefor and liable to punishment under international law, independently of the provisions of internal law, implies what is commonly called 'supremacy' of international law over national law." *Yearbook of the International Law Commission 1950*, vol. II, U.N.Doc. A/CN.4/SER.A/1950/Add.1, at 374.

⁴⁰ "It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized . . . individuals can be punished for violations of international law." *Nuremberg Judgment*, at 52

⁴¹ Compare *Opinion and Judgment of the International Military Tribunal at Nuremberg* 84 (1947). See also *supra* note 1 at 651.

⁴² See SC Res. 794 (3 December 1992).

serves as a basis for proceedings against persons who have provided material or financial support to the violating persons. Article 7(2) established that there shall be no head-of-state of other immunity based on accused's official position.⁴³

The Nuremberg Charter and Judgment recognized for the first time the possibility of individual criminal responsibility under international law based on membership in a criminal group or organization if the person knew of the criminal purpose or acts of the organization and either voluntarily joined the group or was personally implicated in the commission of criminal acts.⁴⁴ This was in response to the facts and circumstances of World War II where groups were created for the purpose of committing international crimes.⁴⁵

A. *Superior Orders*

Those "who violate the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law."⁴⁶ This fundamental principle is reflected in Article 7(2) of the Statute of the International Tribunal. The definition of genocide contained in

⁴³ *Supra* note 1 at 651.

⁴⁴ See *19 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, 14 November 1945 - 1 October 1946 531 (1947) [hereinafter *Nuremberg Judgment*]. The Nuremberg tribunal narrowly interpreted group membership as a crime.

⁴⁵ *Id.* The Statute of the International Tribunal does not have a similar provision for group liability, but it can be established in the context of conspiracy to commit genocide.

⁴⁶ *Id.*

Article 4 of the Statute, which reproduction Articles 2 and 3 of the Genocide Convention without change, requires two essential elements: (1) a prohibited act; and (2) the specific intent to destroy all or part of the members of a national, ethnic, racial or religious group as such.⁴⁷

The idea of individual responsibility is one of the notable contributions the Nuremberg Trials bestowed upon the Yugoslavia War Crimes Tribunal. The doctrines of individual responsibility, non-immunity for heads of state, and the refusal to permit respondeat superior as a defense against convictions are largely held to be customary law.⁴⁸ Article Seven of the Statute of the International Tribunal states that although the principle of respondeat superior may not be invoked as a defense for criminal behavior, it may mitigate punishment and may be used by the Prosecution to attach responsibility to a superior who "knew or had reason to know that their 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 perpetrator thereof."⁴⁹

The principle of individual criminal responsibility are intended to ensure that all those who contribute to the commission of a crime are held accountable.⁵⁰ This is

⁴⁷ *Supra* note 11.

⁴⁸ M. Cherif Bassouani, *Crimes Against Humanity In International Criminal Law 147-91* (1992).

⁴⁹ Statute, *supra* note 11.

⁵⁰ Report of the Secretary-General, UN Doc. S/25704, reprinted in 32 ILM 1163, at 1165.

reflected in the broad scope of Article 7(1) of the Statute which encompasses any "person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" referred to therein. It is also consistent with the decision of the Nuremberg Tribunal which found that persons other than those who actually committed the crimes notably those who gave the orders for such crimes, were also responsible for the crimes based on their complicity in the criminal conduct.⁵¹

The purpose of the principle of individual criminal responsibility relating to "official position", "command responsibility" and "superior orders" is to ensure the criminal responsibility of all persons throughout the chain of command who contribute directly or indirectly to the commission of war crimes or crimes against humanity. This would include the senior government official who formulated the policies that provided the basis for criminal activity (such as ethnic cleansing or unrestricted warfare), the superior who ordered his subordinate to commit the atrocities or looked the other way knowing that such thing were taking place, as well as the subordinate who actually committed the heinous act. This is consistent with general principles of criminal law which recognize that individuals may participate in and contribute to the commission of a crime in various ways and thereby incur a degree of responsibility for the crime, for example, as a perpetrator, an accomplice or a coconspirator.

A superior who learns of a subordinate that has committed a crime and fails to take measures to punish the perpetrator is not only condoning the crime but also sending a

⁵¹ *Id.*

signal that such crime will go unpunished, thereby encouraging not deterring crimes in the future. Regarding the situation in the former Yugoslavia, the Commission of Experts concluded that the command and control structure was so loose "that unlawful orders could have been disobeyed without individuals risking personal harm... Indeed, some did. A moral choice existed."⁵² The tribunal is aimed at bad soldiers (and those who are supposed to control them), not bad states or groups.

B. Command Responsibility

The principle of command responsibility was recognized as early as 1907 in the Hague Convention. The Post-World War II case law gives rise to a set of guidelines to address individual criminal responsibility for persons proven to be in a position of political or military authority over forces that commit atrocities.⁵³ Justice requires the individuals be prosecuted only for acts that they knew or should have known about. For those in command positions, notice may be imputed to from either evidence of regular reporting⁵⁴ or from the existence of widespread reports that would have been known to a reasonable

⁵² *Final Report of the Commission*, at 72

⁵³ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter Protocol], and Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter Protocol II], opened for signature Dec. 12 1977, 1125 UNTS 3, 606, *reprinted in* ILM 1391, 1442 (1977).

⁵⁴ *United States v. von Leeb*, 11 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Law No. 10, at 954 (1951).

person.⁵⁵ Only when a defendant has taken all measures within his or her physical power can "all necessary and reasonable" measures are considered to have been taken; pointing to limitations on operational or administrative authority or limits imposed by breakdowns in communication is probably not enough.⁵⁶ It is difficult for any person to plead ignorance in the former Yugoslavia due to the extensive media, UN and governmental reporting of atrocities. Therefore each defendant will be required to justify and detail their steps to prevent, repress or punish those responsible for violations of international humanitarian law.⁵⁷ It is difficult to determine a chain of political or military authority in the former Yugoslavia because much of the fighting is done by small paramilitary bands.⁵⁸

The Nuremberg Charter rejected the notion that a subordinate who committed a crime could be relieved of responsibility by demonstrating that he acted pursuant to the orders of a superior. The Charter did, in fact, recognize that superior orders could constitute a mitigating factor when determining the punishment to be imposed when justice so required.⁵⁹ The Charter did not provide for the criminal responsibility of a

⁵⁵ See 15 United Nations War Crimes Commission, Law Reports of Trials of War Criminals 135 (1949) (Summarizing holdings of tribunals)[hereinafter Law Reports]

⁵⁶ See William H. Parks, *Command Responsibility for War Crimes*, Mil. L. Rev., Fall 1973, at 1, 84.

⁵⁷ *Supra* note 1 at 652.

⁵⁸ *Id.*

⁵⁹ Article 8 of the Nuremberg Charter provides as follows: "The fact that the Defendant acted pursuant to orders of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires." [emphasis added]

superior for a subordinate's unlawful acts which the superior neither ordered nor committed. This was true even for acts which the superior failed to prevent, notwithstanding a duty and opportunity to do so. Unlawful act or omission may constitute a serious violation of the Geneva Convention,⁶⁰ but only persons committing or ordering the commission of a grave breach would be subject to criminal prosecution and punishment under the terms of those conventions.⁶¹ The Security Council repeatedly reaffirmed in its resolutions the criminal responsibility of those who order the commission of a crime. The principle of individual criminal responsibility notwithstanding superior orders, as recognized in the Nuremberg Charter and as applied by the Nuremberg Tribunal, is reflected in Article 7(4) of the Statute of the International Tribunal.

The principle of command responsibility is reflected in Article 7(3) of the Statute of International Tribunal. Article 7(3) provides that a commander is not "relieved" of his individual responsibility if he or she did not prevent or punish violations of which he or she knew or had reason to know. A superior incurs criminal responsibility for a crime committed by one of his subordinates when two criteria are met.⁶² The superior must first

⁶⁰ Article 13 of the Geneva Convention III expressly provides that "Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the present Convention."

⁶¹ See Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; and Geneva Convention IV, Art. 146.

⁶² The notion of command responsibility is concerned with only the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the subordinate is under his control. This notion also extends beyond the commander under whose direct orders the subordinate is placed and should be seen in terms of hierarchy

have known or had reason to know that his subordinate was about to commit or had committed a crime. Secondly, the superior must have failed:(1) to take the necessary and reasonable measures available at the time to prevent the subordinate from committing the crime, (2) to stop the subordinate engaged in criminal activity, or (3) to punish the subordinate for the crime and thus deter other criminal activity.⁶³

Command responsibility unquestionably reaches both political and military commanders. Defendants at Nuremberg and Tokyo occupied positions of political authority.⁶⁴ Prosecution of political and military leaders will rest on the doctrine of command responsibility if orders or other direct involvement cannot be found. The doctrine of command responsibility requires commanders to repress or punish violations of international humanitarian law by their subordinates. Article 7(3) does not indicate the source of the commander's "responsibility", the Secretary-General says that the responsibility is to be defined in accordance with well-established international law.⁶⁵

encompassing the concept of control. See James O'Brien, *The International Tribunal* 652-653 (1993).

⁶³ *Id.*

⁶⁴ See *The Hirota Case*, 3 *Judgments of the International Military Tribunal for the Far East* 1, 160-61 (1948) (Japanese Prime Minister guilty of war crimes committed in Nanking because he failed to take steps to stop atrocities).

⁶⁵ *Supra* note 1 at 651.