

New England School of Law  
Rwanda Genocide Prosecution Project

Can Civilian "Superior" Be Held Criminally Responsible  
For The Actions Of Their Subordinates

Prepared by Scott Starr  
For One Credit and UCWR  
December 9, 1997

## TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY OF CONCLUSIONS .....	1
II.	FACTUAL BACKGROUND .....	2
III.	ANALYSIS .....	2
	A.    THE DOCTRINE OF COMMAND RESPONSIBILITY .....	2
	B.    SUPERIOR RESPONSIBILITY .....	4
	1.    Conventions .....	5
	2.    Statutes .....	9
	3.    Case Law .....	11
	C.    ELEMENTS NEEDED TO BE A "SUPERIOR" AND THE REQUISITE AMOUNT OF KNOWLEDGE NEEDED TO BE HELD LIABLE FOR THE ACTS OF SUBORDINATES ...	16
	1.    Duty .....	16
	2.    Control .....	17
	3.    Amount of Knowledge Required .....	19
	4.    Conclusion .....	20
	D.    ACTING "UNDER COLOR OF LAW" AND AS A "STATE ACTOR" CREATES CIVILIAN "SUPERIORS" .....	22
IV.	CONCLUSION .....	28

## INDEX TO AUTHORITIES

M. Cherif Bassiouni, Crimes Against Humanity In International Criminal Law, 368 (1992).....	1
W.J. Fenrick, Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia, 6 DUKE J. COMP. & INT'L L. 103.....	2
Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951.....	3
International Military Tribunal for the Far East, The Tokyo War Crimes Trial (Nov. 1948), reprinted in II THE LAW OF WAR: A DOCUMENTARY HISTORY 1029 (Leon Friedman ed. 1972).....	4
Matthew Lippman, Conundrums Of Armed Conflict: Criminal Defenses To Violations Of The Humanitarian Law Of War, 15 DICK. J. INT'L L. 1.....	5
U.S. v. Carl Krauch, VIII Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No. 10., 1081 (1951). [the Farben Case].....	6
Leslie C. Green, War Crimes, Crimes against Humanity, and Command Responsibility.....	7
Timothy Wu and Yong-Sung (Jonathan) Sang, Recent Development: Criminal Liability for the Actions of Subordinates -- The Doctrine of Command Responsibility and Its Analgues in United States Law, 38 HARV. INT'L L. J. 272.....	8
American "under color of law" statute 42 U.S.C.A. S 1983.....	9
Kadic v. Karadzic, 70 F.3d 232, 64 USLW 2231 (2nd Cir.(N.Y.) Oct 13, 1995) (NO. 94-9069, 1544, 94-9035, 1541).....	10
Louise MUSHIKIWABO v. Jean Bosco BARAYAGWIZA, No. 94 CIV. 3627 (JSM). United States District Court, S.D. New York. April 9, 1996.....	11
L.C. Green, Symposium: International Criminal Law Command Responsibility In International Humanitarian Law, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319 Fall, 1995.....	12

## I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This memorandum will analyze the question of whether international law would allow for the prosecution of civilians, as superiors, for the acts of subordinates. In regards to any imputed criminal liability, emphasis will be placed on whether the civilian superior can be held liable for not preventing crimes committed by subordinates or not punishing those subordinates who commit crimes. The general theory of this imputed liability is based on the doctrine of Command Responsibility. It is from this doctrine that the elements and standards of holding a superior responsible for acts or omissions pertaining to any authoritative position will be extracted.

The first part of this memorandum is a brief discussion of the doctrine of Command responsibility: its source, current application in international law. It is then suggested that due to the ever changing circumstances of modern conflicts and atrocities there is a need to expand the doctrine's theme into a broader non-military use and that a distinction be made between "Command" and "Superior" responsibility.

This memorandum then considers the idea put forth in the first part by extracting the elements needed to attach responsibility to a person who can be defined as a "superior". The second portion begins this analysis by examining applicable Conventions, Statutes and case law. This analysis reveals that none of the instruments of international law, pertaining to imputed superior responsibility, exclude civilians from their implementation. Furthermore, it is shown that the term "superior" is indeed recognized as being separate from the notion of "commander".

The third section discusses the elements needed to be a "superior". Once these elements have been fulfilled, a responsibility for the prevention or punishment of crimes can be attached to the "superior". Whether the "superior" can be held liable for the acts of subordinates turns upon whether he had knowledge of the crimes that were committed or were to be committed in the future. Here there is a discussion of the standard of what

type of knowledge is needed to impute liability onto the "superior". Once a person is found to have a responsibility to prevent crimes and has knowledge of crimes that are to be or have been committed, he may be held liable for the actions of his subordinates.

The final section of this memorandum proposes a theory of how a civilian can be deemed a "superior" It proposes that one who acts "under color of law" and assumes an authoritative position is deemed to be a "state actor". This is relevant in that the elements referred to in section three are more easily applied to one who is acting with the authority of the state.

## II. FACTUAL BACKGROUND

On April 6th, 1994, a plane carrying President Juvenal Habyarimana was shot down. The president's death was the catalyst for Hutu extremists to begin their campaign of genocide against the Tutsi and members of the opposition. Many local officials participated in the genocide. Ways in which these local officials participated consist of actual killing to distributing weapons to militias and not enforcing curfews against those who were killing.

## III. ANALYSIS

### A. THE DOCTRINE OF COMMAND RESPONSIBILITY

The doctrine of "Command Responsibility" came out of the law of armed conflicts and referred specifically to the military where there was an easily identifiable command structure. It stemmed from the need to inhibit criminal actions of soldiers and it provided a means to hold a military commander liable in varying degrees for either his direct orders or for his failure to prevent or punish crimes committed by subordinates.

The goal of this doctrine was to force a commander to be proactively responsible for the actions of his subordinates by implementing procedures to prevent illegal activity and by staying informed of the actions of subordinates so that measures could be taken to halt any illegal activity that did occur.

The doctrine of "Command Responsibility" as it presently exists in international law consists of two concepts of criminal responsibility. First, a commander is directly liable for any illegal order he gives a subordinate which is carried out. Second, a commander may also be liable for illegal conduct committed by subordinates, even though it was not the result of a direct order, through the commanders failure to act to prevent illegal behavior. A commander fails to act when he does not: "1) prevent a specific unlawful conduct; 2) provide for general measures likely to prevent or deter unlawful conduct; 3) investigate allegations of unlawful conduct; and, 4) prosecute, and upon conviction, punish the author of the unlawful conduct."<sup>1</sup> The doctrine of "Command Responsibility" has been used in many cases within the military. This is due to the military's hierarchical command structure. In the military it is relatively easy to identify those persons who hold a position of command. However, the use of the doctrine has not been limited to the military setting. In some cases the doctrine of "Command Responsibility" has been applied to situations where some form of command structure existed, although not as distinct as the military's such as those found in a business or political setting. It is from this extension of the use of the doctrine of "Command Responsibility", and the fact that today's armed conflicts are vastly different from those which occurred in the past, that some have suggested that a separate doctrine should arise to reach those who assume leadership positions outside of the military. One such suggestion came from W.J. Fenrick, who acted as a Senior Legal Advisor for the

---

<sup>1</sup>M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 368 (1992) [hereinafter Bassiouni].

Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia (ICTY). Mr. Fenrick wrote that "[t]he doctrine of command responsibility is normally viewed in the literature as essentially applicable to military commanders and as primarily concerned with responsibility for failure to act. Colloquially...however, command responsibility is regarded as a wider concept encompassing, for example, the criminal liability assigned to major German leaders by the tribunal at Nuremberg.<sup>2</sup> It is possible that a new term of art such as superior responsibility should be developed."<sup>3</sup> For the purposes of this memorandum the term "command responsibility" will refer to its historical use in which it has been understood to apply only in a military setting, whereas the term "superior responsibility" will stand for the broader notion that anyone in a leadership position may be held responsible for the actions of subordinates.

#### B. SUPERIOR RESPONSIBILITY

The idea of differentiating between command responsibility, as a doctrine only applicable to military leadership, and superior responsibility, as a doctrine applicable to all other forms of leadership, is not only a logical progression in light of today's armed conflicts (which are sometimes perpetrated solely by civilians) but is also recognized within international law.

There are three basic mechanisms used as a means of enforcing international law: Conventions, Statutes and Precedent. An analysis of the three reveals that there is nothing prohibiting civilian leaders from being held responsible for actions of

---

<sup>2</sup>W.J. Fenrick, Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia, 6 DUKE J. COMP. & INT'L L. 103, 110 [hereinafter Fenrick].

<sup>3</sup>Id. at 110 n.21.

subordinates and in fact some have actually been applied in imputing criminal responsibility upon civilian leaders.

### 1. Conventions

The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity specifically applies to 'crimes against humanity' and imposes command responsibility on perpetrators of such crimes. This Convention helps in illuminating the notion that civilians may be liable for the criminal actions of others. The Convention establishes that private individuals who have a connection with the criminal activity of others, as principals or by inciting the activity itself, may be held liable for such crimes. However, private individuals, who may have knowledge about the commission of crimes but, who have no connection to the crimes, cannot be held accountable for failing to prevent the criminal actions of others. Only persons who are representatives of the State can be held accountable for failing to act upon the commission of crimes committed by others. Article II provides:

If any of the crimes mentioned in article I is committed [i.e., 'war crimes' and 'crimes against humanity'], the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission."<sup>4</sup>

In 1977, Protocols to the Geneva Conventions of 1949 were adopted. The reason for adopting additional Protocols was a belief that it was necessary "to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement

---

<sup>4</sup>See Bassiouni, *supra* note 1, at 388.

measures intended to reinforce their application."<sup>5</sup> In regards to their application it is stated that "the provisions of the Geneva Convention of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict."<sup>6</sup>

Protocol I, articles 86 and 87, specifically establish the concept of superior responsibility and distinguish it from the doctrine of command responsibility. Article 86 is the best example of the notion of "superior responsibility". The gist of the Article is that any person who is considered a "superior" may be held liable for the crimes committed by his subordinate if he knew that crimes were being committed and did not take steps to prevent the commission of such crimes. Article 86 entitled "Failure to act" states:

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superior from the penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstance 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.<sup>7</sup>

---

<sup>5</sup> Protocol Additional to the Geneva Conventions of 12 August of 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Preamble, reprinted in Department of the Army Pamphlet 27-1-1.

<sup>6</sup>Id. at Preamble.

<sup>7</sup>Id. at Article 86.

Conversely, Article 87, separate from the notion of "superior responsibility", directly establishes the doctrine of "command responsibility" for it is only applicable to persons considered to be "commanders" within the military setting. Article 87 entitled "Duty of commanders" states:

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and the Parties to the conflict shall require any commander who is aware that subordinates or other person under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or of this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.<sup>8</sup>

These articles differentiate between the terms "superior" and "command".

"Article 86 imposes obligations...on 'superiors', while Article 87 imposes duties on 'military commanders'. The approach taken is that non-military persons may be superiors within the meaning of Article 86..."<sup>9</sup> This contention is further evidenced by a statement made in the Commentary on the Additional Protocols. At the core of the statement is the position that any person may be deemed a "superior" if that person has a duty to act and

---

<sup>8</sup>Id. at Article 87.

<sup>9</sup>See Fenrick, *supra* note 2, at 119.

some form of control over others. The statement reads:

a) The qualification of superior

This is not a purely theoretical concept covering any superior in a line of command, but we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control. The direct link that must exist between the superior and the subordinate clearly follows from the duty to the act laid down in paragraph 1. Furthermore, only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach. However, it should be concluded from this that this provision only concerns the commander under whose direct orders the subordinate is placed. The role of commanders as such is dealt with in Article 87 (Duty of Commanders). *The concept of superior is broader and should be seen in terms of a hierarchy encompassing the concept of control* (emphasis added).<sup>10</sup>

In 1951 the Genocide Convention was ratified. The Convention established that certain acts committed,<sup>11</sup> "whether committed in time of peace or in time of war,"<sup>12</sup> would constitute the crime of Genocide which "is a crime under international law which they [the contracting parties] undertake to prevent and to punish."<sup>13</sup> Although there are no provisions in the Convention which expressly establish a doctrine of superior responsibility, Article 4 states that "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally

---

<sup>10</sup>Id. at 120, quoted from Commentary on the Additional Protocols of June 8 1977 to the Geneva Convention of 12 August 1949 1013 (Yves Sandoz et al. eds., 1987).

<sup>11</sup>Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951, Article 2.

<sup>12</sup>Id at Article 1.

<sup>13</sup>Id.

responsible rulers, public officials or private individuals."<sup>14</sup> Complicity in genocide is also a chargeable offense under Article 3,<sup>15</sup> much like the failure to act is an offense in Protocol I. Under Article 4 a private individual shall be punished for committing acts enumerated in Article 3. Reading articles 3 and 4 together would suggest that a civilian could be held liable for his failure to act or complicity in the commission of genocide.

## 2. Statutes

Since the end of World War II statutes have been promulgated to prosecute those individuals who have committed crimes against international law. Many of these statutes have recognized the need to hold persons in leadership positions responsible for their own actions as well as the actions of their subordinates. An excellent example of this is Article 6 of the Nuremberg Charter which states:

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the forgoing crimes [including crimes against humanity Art.6(c)] are responsible for all acts performed by any persons in execution of such plan.<sup>16</sup>

After World War II, many high ranking officials both military and civilian, were prosecuted for their involvement in particular crimes.<sup>17</sup> Many of these individuals were

---

<sup>14</sup>Id. at Article 4.

<sup>15</sup>Id. at Article 3(e).

<sup>16</sup>See Fenrick, *supra* note 2, at 112, quoted from *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents* 826 (D. Schindler & J. Toman eds., 2d. ed. 1981).

<sup>17</sup>See International Military Tribunal for the Far East, *The Tokyo War Crimes Trial* (Nov. 1948), reprinted in *II THE LAW OF WAR: A DOCUMENTARY HISTORY* 1029 (Leon Friedman ed. 1972) [hereinafter *Tokyo Trial*].

brought to trial under Allied Control Law No. 10.<sup>18</sup> Article II of this statute states:

2. Any person without regard to the nationality or the capacity in which he acted, is deemed to have committed a crime...if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission...."

Although not directly stated in terms of superior responsibility, it is easily deduced that the term "ordered" refers to one with authority over others and the phrase "took a consenting part" is readily likened to a failure to act. Indeed this statute was used in prosecuting superiors for the acts of their subordinates.<sup>19</sup>

A more recent statute directly creates the responsibility charged to a superior. Article 12 of the Draft Articles on the Draft Code of Crimes Against the Peace and Security of Mankind states:

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit and if they did not take all feasible measures within their power to prevent or repress the crime.<sup>20</sup>

Most recently, the widespread acceptance of a robust theory of command responsibility led to the creation of the statute which is the basis for current war crimes

---

<sup>18</sup>Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No. 10.

<sup>19</sup>Id.

<sup>20</sup>See Bassiouni, *supra* note 1, at 388 quoted from Draft Articles on the Draft Code of Crimes Against the Peace and Security of Mankind, U.N. GAOR, 46th Sess., Supp. No. 10, at 238 U.N. Doc. A/46/10 (1991), reprinted in 30 I.L.M. 1584 (1991).

prosecutions in the former Yugoslavia. Article 7 of the Yugoslavia Tribunal Statute states:

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 responsible measures to prevent such acts or to punish the perpetrators thereof.<sup>21</sup>

Nowhere in these statutes is it implied that only a military leader can be held responsible. The statutes use terms such as "leader", "organizer" and "superior". This leaves the leadership terms to be defined within what ever circumstances the statutes are being applied.

The fact that the term superior is so widely used, and that the term commander is either omitted or distinguished from the term superior, suggests that a superior neither need not be in a defined hierarchical organization nor have a specific title or position. These mechanisms of international law clearly establish what elements are needed for a person to be considered a superior and thus potentially liable for acts of subordinates.

### 3. Case Law

Case law, as well as conventions and statutes, has also created a broad definition of who may be a superior. The cases that have applied these Conventions and statutes have not limited them to military commanders. In at least three cases, the notion of command responsibility was either directly or indirectly applied to political or civilian leaders.

---

<sup>21</sup>See Fenrick, *supra* note 2, at 110, quoted from Statute of the International Tribunal, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., Annex, art.1, U.N. Doc. S/25704 (1993).

In 1948 the International Military Tribunal at Tokyo used the doctrine of command responsibility against political and civilian superiors who were responsible for the guardianship of prisoners of war.<sup>22</sup> These superiors were held criminally liable in those circumstances in which they were aware or should have been aware of criminal conduct towards the prisoners under their charge and failed to take preventive or punitive action.<sup>23</sup> The required criminal intent was established when a person occupying an authoritative position had actual or constructive knowledge of crimes being committed and failed to prevent the crimes' continuance.<sup>24</sup> In its decision, the tribunal stated that civilian officials who had control over prisoners would be held responsible for the well being of such prisoners as well as liable for any failure to act in regards to their responsibility.<sup>25</sup>

---

<sup>22</sup>See Tokyo Trial, supra note 17.

<sup>23</sup>Matthew Lippman, Conundrums Of Armed Conflict: Criminal Defenses To Violations Of The Humanitarian Law Of War, 15 DICK. J. INT'L L. 1, 76 [hereinafter Lippman].

<sup>24</sup>Id.

<sup>25</sup>Tokyo Trial, supra note 19, at 1038. In general the responsibility for prisoners held by Japan may be stated to have rested upon :

- (1) Members of the Government;
- (2) Military or Naval Officers in command of formations having prisoners in their possession;
- (3) Officials in those departments which were concerned with the well being of prisoners;
- (4) Officials, whether *civilian*, military, or naval, having direct and immediate control of prisoners.

It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill-treatment of prisoners if :

- (1) They fail to establish such a system.
- (2) If having established such a system, they fail to secure its continued and efficient working.

Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be

Similarly, under Article II of Control Council Law No. 10, the principal of superior responsibility was applied to civilian businessmen who supplied the means of committing crimes against humanity and directly profited from the effects of these crimes.<sup>26</sup> In the "Farben case", defendants who were board members of the company which supplied poisonous gas to German concentration camps and acquired property owned by Jews during World War II were held legally subject to the principle of superior responsibility.<sup>27</sup> The defendants were accused of being criminally liable because "they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups, including Farben, which were connected with the commission of said crimes."<sup>28</sup> Although the court upheld the concept of criminal liability based on superior responsibility,<sup>29</sup> it ultimately ruled that the facts proved did not make out such liability.<sup>30</sup>

---

committed unless :

- (1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or
- (2) They are at fault in having failed to acquire such knowledge.

<sup>26</sup>U.S. v. Carl Krauch, VIII Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No. 10., 1081 (1951). [hereinafter Farben Case]  
<sup>27</sup>Id.

<sup>28</sup>Id. at 1096.

<sup>29</sup>Id. at 1137. The notion of superior responsibility is easily extracted from paragraph 146 under Count Five of the indictment. It charges that :  
All the defendants, acting through the instrumentality of Farben and otherwise...participated as *leaders*, organizers, instigators, and accomplices in the formulation and execution of a common plan or conspiracy to commit, or which involved the commission of crimes against peace, (including the acts constituting war crimes and *crimes against humanity*, which were committed as an integral part of such crimes against peace) as defined by Control Council Law No. 10, and are individually responsible for their own acts and for all acts committed by any person in the execution of such common plan or conspiracy.

The court decided that the majority of the defendants did not possess the requisite knowledge about the crimes being committed and therefore could not hold them liable.<sup>31</sup>

The court rejected both the arguments that liability could not be extended to private persons in governmental bodies and that it not be extended vicariously. Replying to the contention that civilians cannot be held criminally liable under international law the court stated that "[i]t can no longer be questioned that the criminal sanctions of international law are applicable to private individuals."<sup>32</sup> The court then quoted from United States v. Flick which held that "[a]cts adjudged criminal when done by an officer of the government are criminal also when done by a private individual."<sup>33</sup>

In handing down its decisions, the court made it clear that a corporate officer who authorizes criminal conduct and who knows that such conduct is being carried out, may be liable for the acts of subordinates. The court stated:

As we have heretofore indicated, a defendant can be held guilty only if the evidence clearly establishes some positive conduct on his part which constitutes ordering, approving, authorizing, or joining in the execution of a policy or act which is criminal in character. It is essential, in keeping with the concept of personal and individual criminal responsibility, that, when seeking to attach criminality to acts not personally carried out, the action of a corporate officer in authorizing illegal action be done with adequate knowledge of those essential elements of the authorized act which give it its criminal character.<sup>34</sup>

---

<sup>30</sup>Id. at 1153.

<sup>31</sup>Id. at 1153-1196.

<sup>32</sup>Id. at 1136.

<sup>33</sup>Id.

<sup>34</sup>Id. at 1157.

Most recently, the "superior responsibility" concept was utilized in the Federal Republic of Germany (FRG). The FRG brought Erich Honecker, the former head of state of the German Democratic Republic, East Germany, to trial.<sup>35</sup> He was alleged to be criminally responsible for giving orders that resulted in the deaths and injuries of East Germans attempting to escape East Germany by way of the Wall.<sup>36</sup> These orders were thought to be crimes against humanity.<sup>37</sup> Due to his health, the FRG dropped the charges and allowed him to leave the country.<sup>38</sup> However, the FRG did convict officials of the former Democratic Republic such as Heinz Kessler, who had been defense minister, and other members of the East German Defense Council for role in framing the shoot-to-kill policy enforced at the Wall.<sup>39</sup> These convictions show that "the German federal courts are prepared to consider the East German policy of killing defectors seeking to cross the Wall a crime against humanity and to impose personal responsibility on superiors--even those who were only "very small cogs" in the chain of command."<sup>40</sup>

---

<sup>35</sup>Leslie C. Green, *War Crimes, Crimes against Humanity, and Command Responsibility*. Found at: <http://www.usnwc.edu/nwc/art2sp97.htm>

<sup>36</sup>Id.

<sup>37</sup>Id.

<sup>38</sup>Id.

<sup>39</sup>Id.

<sup>40</sup>Id.

C. ELEMENTS NEEDED TO BE A "SUPERIOR" AND THE REQUISITE AMOUNT OF KNOWLEDGE NEEDED TO BE HELD LIABLE FOR THE ACTS OF SUBORDINATES

These Conventions, statutes and cases suggest the elements needed to classify one as a "superior" and the elements required in order to impose liability on a "superior".

To be considered a superior one must be under a duty of some sort and have a certain amount of control over others. A strict hierarchical command structure is not necessary to show the requisite amount of control, although it does make attribution of both duty and control easier.

1. Duty

It would be intrinsically unjust to hold a person criminally liable for the crimes committed by another if that person were under no legal duty to prevent such crimes. This is why it is absolutely necessary for someone who is to be considered a superior to be under some sort of a legal duty to prevent or punish criminal activity. "Liability through the command [or superior] responsibility doctrine depends on an affirmative duty on the part of the superior, whereby an omission may constitute the actus reus of the crime. As the liability of the superior is derivative of the subordinates' illegal act, a duty must exist if there is to be a legally relevant connection between the subordinates' act, the superiors' omission, and the eventual imposition of liability."<sup>41</sup> It has been suggested that "[a] mitigating consideration, however, is that because military and civilian leaders are in

---

<sup>41</sup>Timothy Wu and Yong-Sung (Jonathan) Sang, Recent Development: Criminal Liability for the Actions of Subordinates -- The Doctrine of Command Responsibility and Its Analogues in United States Law, 38 HARV. INT'L L. J. 272, 290.

a position of great public trust and responsibility, it is not unreasonable to impose some kind of legal duty on those who are in the position to prevent atrocities. In this regard it should be remembered that military and civilian leaders voluntarily assume their positions and may therefore be presumed to have knowingly acquiesced to the duties under international law that are a corollary to such positions. From a regulatory standpoint, it is often a military or civilian leader who is the only, or at least best-situated, person to prevent the commission of atrocities...the burden of the duty must be placed where it will make a difference."<sup>42</sup>

## 2. Control

As it would be unjust to hold a person liable for the criminal actions of another if that person had no duty to prevent such criminal activity, so would it be unjust to hold that person liable if he had no control over those committing the criminal activity. If a person is to be considered a superior, then that person must have the authority to prevent or punish crimes. "No one can be deterred from conduct beyond the control of the person whose responsibility may be called into question. To hold a superior accountable on the basis of omission for the conduct of a subordinate, therefore, requires intent or knowledge that the omission can actually or reasonably and foreseeably lead to a violative act and that the superior is in a position or has the ability to act in the prevention of the violative act."<sup>43</sup> The question of whether such authority must be actual or whether it can be apparent is of note. There are many foreseeable circumstances where a person places themselves in an authoritative position where there is no actual

---

<sup>42</sup>Id.

<sup>43</sup>See Bassiouni, *supra* note 1, at 372.

authority, but that others perceive there to be the authority to prevent or punish and thus apparent authority is created.

The above cases provide evidence of what type of duty and control suffice for the application of a superior responsibility doctrine. One commentator has suggested that "the Tokyo decision can be used as a guide for establishing that civilian leaders can be held culpable for certain acts of subordinates. The Tokyo decision provides support for the following propositions: (1) once the veil of statehood is pierced, international law may impose obligations on political and bureaucratic leaders in the same way that it imposes obligations on military leaders; (2) political and bureaucratic leaders may be held responsible for the acts of subordinates when they have ordered the commission of these acts; (3) political and bureaucratic leaders may be held responsible for the acts of subordinates when the leaders have a relationship with the subordinates similar to those of a military commander and they fail to act to prevent or punish; and (4) political and bureaucratic leaders may be held responsible for the acts of subordinates when the leaders have a duty established either directly by international law or indirectly by domestic law or practice to ensure that their subordinates comply with the law and the leaders fail to fulfill that duty."<sup>44</sup>

When a duty can be attached to a person and that person has some form of control over others then that person is held to have a responsibility to prevent the criminal activity of those over whom he has control. In short, a legal duty plus control of others equals a responsibility to prevent crimes. When a superior fails in his responsibility he has become legally derelict in his duty and has misused his control over others. A case example helps illuminate this notion.

---

<sup>44</sup>See Fenrick, *supra* note 2, at 118.

In September of 1982 Israel allowed a Lebanese Phalangist militia force to enter refugee camps near Beirut. While in the camps, the Phalangists militia, which were trained, paid, equipped by and under some control of Israel, massacred hundreds of Palestinian refugees.<sup>45</sup> As a result, Israel established the Kahan commission to investigate to what extent Israeli commanders and political leaders were responsible.<sup>46</sup> Although the commission did not hold anyone directly responsible the Kahan commission did state the following in its report:

"Responsibility is to be imputed to the Minister of Defense [a civilian position] for having disregarded the danger of acts of vengeance and bloodshed by the Phalangists against the population of the refugee camps, and having failed to take this danger into account when he decided to have the Phalangists enter the camps. In addition, responsibility is to be imputed to the Minister of Defense for not ordering appropriate measures for preventing or reducing the danger of massacre as a condition of the Phalangists' entry into the camps. These blunders constitute the non-fulfillment of a duty with which the Defense Minister was charged."<sup>47</sup>

### 3. Amount of Knowledge Required

All of the applicable cases and statutes require that a superior have had some amount of knowledge that the crimes were about to be or had been committed in order to impose liability for the actions of subordinates. Knowledge then becomes the key requisite in imputing a superior with the criminal acts of his subordinates. The question of whether the superior must have actual knowledge or whether constructive knowledge is sufficient is mute, for the standard of what type of knowledge is required is codified in

---

<sup>45</sup>Id. at 120.

<sup>46</sup>Id.

<sup>47</sup>Id. at 123, quoted from Final Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut 1983, 22 I.L.M. 472, 502-03 (1983).

Article 6 of the tribunal statute for Rwanda. The statute states that in regards to the criminal acts of subordinates, if a superior "knew or had reason to know" about the criminal actions, the superior is not absolved of liability. The Commentary on the Additional Protocols indicates three conditions that must be met for a superior to be held liable for the failure to act:

- a) the superior concerned must be the superior of the subordinate...;
- b) he knew, or had information which should have enabled him to conclude that a breach was being committed or was going to be committed;
- c) he did not take the measures within his power to prevent it.<sup>48</sup>

#### 4. Conclusion

If a person has a legal duty, such as the custodianship of prisoners, and a sufficient amount of control over others, for example the ability to punish prison guards, this person may be deemed a "superior". A "superior" has a responsibility to prevent those under his control from committing crimes against those whom he owes a duty. One who is a "superior" must undertake certain tasks to fulfill his responsibility. He must execute measures to prevent crimes from occurring, create means of communication which keep him informed of the effectiveness of his measures as well as the conduct of his subordinates and he must punish those who commit any crimes. A "superior" who neglects his responsibility may be held criminally liable as a result of a failure to act if: (1) a crime is committed by a person under the control of the "superior"; (2) the "superior" had notice, actual or constructive, of the commission of the crime; (3) the

---

<sup>48</sup>Id. at 120, quoted from Commentary on the Additional Protocols of June 8 1977 to the Geneva Convention of 12 August 1949 1012 (Yves Sandoz et al. eds., 1987).

"superior" failed to implement measures to prevent such a crime and; (4) the "superior" failed to punish the perpetrator.<sup>49</sup>

---

<sup>49</sup>Id. at 123-125: "The customary international law doctrine of command responsibility as it is reflected in the Tribunal Statute is applicable to military commanders, paramilitary commanders, political leaders, and other leaders who exercise a high degree of control over subordinates. The concept of command responsibility imposes personal criminal responsibility on a superior for international crimes committed by persons under his or her command or control. The superior may be held responsible for the acts of subordinates: (1) if the superior planned, instigated, ordered, committed or otherwise aided and abetted in the commission of a crime, or (2) if the superior failed to prevent or punish the perpetration of crimes by persons under his or her command or control.

A superior may be held liable for the commission of an offense as a result of a failure to act if the following elements are established:

1. An offense was committed;
  2. Either
    - 2.1: the persons committing the offense were under the command of the accused, that is, the accused had the authority to issue orders to them not to commit illegal acts and the authority to see that offenders were punished; or
    - 2.2: the persons committing the offense were under the control of the accused, that is, the accused had a duty to ensure that they complied with the law, the ability to prevent them from committing illegal acts and the ability to see that the offenders were punished;
  3. Either
    - 3.1: the accused had notice of commission of the offense.  
The notice may be either:
      - 3.1.1: Actual, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter; or
      - 3.1.2: Constructive. That is, the commission of such a great number of offenses within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of the existence of an understood and acknowledged routine for their commission; or
    - 3.2: the accused should have known of the commission of the offense but has displayed such serious personal dereliction as to constitute willful and wanton disregard of the possible consequences;
  4. The accused has failed to take such appropriate measures as are within his power to direct the persons under his command or his control and to prevent the commission of offenses; and
  5. The accused has failed to take appropriate measures to punish the perpetrators.
- In order to assess the potential culpability of individual superiors it is necessary to collect evidence on the following points, among others:
- 1) the commission of the offense;
  - 2) the nature of the superior - subordinate relationship between the accused and the perpetrators (military, paramilitary, other), (direct superior in chain of command,

D. ACTING "UNDER COLOR OF LAW" AND AS A "STATE ACTOR"  
CREATES CIVILIAN "SUPERIORS"

A civilian may thus be found to be a "superior", and thus potentially criminally liable, for a failure to act against crimes committed by those considered his subordinates. To be a "superior" one must have a legal duty and a sufficient amount of control over others. It is in the attachment of a legal duty to a civilian and the assessment of the degree of control such a civilian has over others, that the most difficult problems arise.

In terms of the "command responsibility" doctrine, attaching a legal duty and evaluating the amount of control over others is straight forward. A "commander" has the duty to adhere to international law and the direct control over soldiers under his

---

superior in rank only), (executive authority, staff officer);

3) the means available to the accused to exercise control over the perpetrators (authority to issue binding orders, authority to take or recommend disciplinary measures, types of disciplinary measures available);

4) the state of knowledge of the accused before, while, and after offenses were committed;

5) the routine or extraordinary systems available to provide information to accused, effectiveness of systems and relevant information provided;

6) the notice of alleged offenses provided to accused by external sources -- NGO's, U.N., press, other;

7) the measures taken by accused to prevent commission of offense or to punish those responsible; and

8) the extent of accused's participation in the commission of the offense. Did he or she plan, instigate, order, commit or otherwise aid and abet in the planning, preparation or execution of the offense?

It is clear that, under the existing international law doctrine of command responsibility, as reflected in the Tribunal Statute, political, paramilitary and bureaucratic superiors may be held liable for a failure to control their subordinates as well as for acts they have themselves committed. After the World War II cases involving the doctrine of military command responsibility, it was possible to develop a relatively precise word picture of the doctrine as it applied to military operations. It is not unreasonable to hope that proceedings before the Tribunal will add flesh to the skeleton of the doctrine of command responsibility as it applies to political and other leaders."

command. There is also an easily identifiable command structure. However, in terms of a "superior responsibility" doctrine, attaching a legal duty and assessing the degree of control over others is not as easily done. There is also no easily identifiable command structure.

Given the circumstances in Rwanda, there is a particular American legal doctrine that may facilitate the attaching of a legal duty to a civilian and also make determining the degree of control the civilian exerted easier. The doctrine is known by the phrase "under color of law" and is most often applied in the enforcement of civil rights.<sup>50</sup> Under United States law, civil rights violations can be criminal as well as civil. It is used when an the element of "official/state action or policy" is required in obtaining jurisdiction or imputing liability. A person who acts "under color of law" may be deemed a "State actor". A "State actor" is viewed as a person who implements official state policy, thus acting "under color of law". The commission of crimes, such as those that occurred in Rwanda, "against a large number of persons (i.e. 'extermination', 'persecution') cannot take place without pre-existing 'state action or policy' requiring reliance on the powers of the State in order to be carried out."<sup>51</sup>

---

<sup>50</sup>42 U.S.C.A. S 1983.

<sup>51</sup>See Bassiouni, *supra* note 1, at 248-9: "[T]he agency relationship between the individual and the state must also be found in accordance with the norms and standards of imputability. As a consequence of such 'state action or policy,' individuals who take part in the policy-making decision can be charged with the common law crime of conspiracy, or its equivalent in other legal systems, while those who also implement the policy can be additionally charged with the specific crime they commit (e.g., murder).

The rationale for this requisite of 'state action or policy' is that 'crimes against humanity', like other international crimes such as genocide and apartheid, cannot be committed without it because of the nature and scale of the crime. Thus, this element is not due to any exigency pertaining to each of the specific crimes (e.g. murder) contained within the meaning of this criminal category, but because the commission of such specific crimes against a large number of persons (i.e. 'extermination', 'persecution') cannot take place without pre-existing 'state action or policy' requiring reliance on the powers of the State in order to be carried out."

The suggestion is that it may be easier to attach an affirmative duty to a person who, as a "state actor", is found to be implementing official state policy than on an ordinary citizen.<sup>52</sup> Furthermore, it may be easier to form a hierarchical command system, one that, although it may not be an official state entity, is acting in furtherance of state policy. For example, a hierarchical command structure could be found where a civilian forms a militia whose purpose is to effectuate state policy and there is a system of command within the militia.

The circumstances in Rwanda lend themselves to the application of this doctrine because "[c]rimes against humanity" by virtue of their nature and scale require the use of governmental institutions, structures, resources and personnel acting in

---

<sup>52</sup>See Bassiouni, *supra* note 1, at 255: "The Acts are Committed by State Officials or Their Agents in Furtherance of the State's Discriminatory-Persecutional Action or Policy.

This characteristic requires that the acts committed in furtherance of the discriminatory-persecutional 'state action or policy' would otherwise be deemed criminal if it were not for the revocation, waiver or unenforced criminal laws making such acts a common crime, must be performed by agents of the State.

This is the position taken by the Torture Convention which criminalizes, under international law, the conduct of public officials or their agents. These agents may be military, para-military, police personnel, other public officials or private individuals acting under the orders of or at the behest of responsible public officials. In this respect, principals of agency relationship would apply in the same way as they do for purposes of imputability or attributability of an individual's conduct to the state for purposes of state responsibility, as discussed above. Consequently, this element excludes private conduct which is not commanded, aided, abetted, or condoned by public officials in furtherance of the 'state action or policy', irrespective of the number of individuals involved in the commission of any of the specific crimes contained in Article 6(c). Thus, spontaneous or private action is excluded unless it is supported or encouraged by the State or by any official in an agency entrusted with the prevention of such action. This problem arose in Turkey between 1915-1919 with respect to popular action by private Turkish citizens acting as mobs, or organized groups, which resulted in the random killing of Armenians. In this situation, Turkish public officials at times only supported, encouraged, or condoned such action, or failed to prevent the violations, but that conduct was deemed attributable to them."

reliance upon arbitrary power uncontrolled by law."<sup>53</sup> Furthermore, "such 'state action or policy' is not the exclusive province of the military. In fact, the military may only be a part of it, and in some cases it does not involve the military."<sup>54</sup> The Commission of Experts on Rwanda stated that the crimes committed in Rwanda were "crimes against humanity" and were "committed by persons demonstrably linked to a party to the conflict [the state], as part of an official policy..."<sup>55</sup>

One acting as a "State actor" would be bound to customary international law rather than solely being individually liable under national laws.<sup>56</sup> This would enable the use of such customary international law doctrines as "command responsibility" or the

---

<sup>53</sup>Id. at 241.

<sup>54</sup>Id. at 394.

<sup>55</sup>L.C. Green, Symposium: International Criminal Law - Command Responsibility In International Humanitarian Law, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319 Fall, 1995: "118. The Commission of Experts on Rwanda considers that 'crimes against humanity' are gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim...".

The Commission has determined that there exists ample grounds to conclude that "crimes against humanity were committed in Rwanda...", quoted from Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994), para 118, U.N. Doc. S/1994/1125 (1994).

<sup>56</sup>See Bassiouni, *supra* note 1, at 394: "This is particularly significant with respect to 'crimes against humanity', which are...the product of 'state action or policy'. And such 'state action or policy' is not the exclusive province of the military. In fact, the military may only be a part of it, and in some cases it does not involve the military. Thus, the international and national norms and standards of military 'command responsibility' would not be applicable to some or all of those who were part of the process leading to the decision and/or to its implementation of 'state action or policy' leading to the commission of 'crimes against humanity'. Such non-military perpetrators would be judged in accordance with national norms and standards of civilian criminal laws, and that, of course, does not provide a uniform international legal basis of accountability."

implementation of the notion of "superior responsibility". Furthermore, a "state actor" who has placed himself in a leadership position would be bound to the duty of ensuring compliance with customary international law and therefore, under the notion of "superior responsibility," may be held liable for failing to prevent "crimes against humanity."

Two American cases have recently held civilian leaders liable, in civil actions (not criminally), for crimes committed by subordinates. The courts held that, although it was not necessary for the defendants to have acted "under color of law", to provide jurisdiction for a claim under the particular civil statutes,<sup>57</sup> the defendants actions were in furtherance of state policy and thus were actions taken "under color of law".

In Kadic v. Karadzic, 70 F.3d 232, 64 USLW 2231 (2nd Cir.(N.Y.) Oct 13, 1995) (NO. 94-9069, 1544, 94-9035, 1541) the court discusses in detail topics of international law,<sup>58</sup> genocide,<sup>59</sup> and the doctrines of "acting under color of law"<sup>60</sup> and "command

---

<sup>57</sup>18 U.S.C.A. S 1091; 28 U.S.C.A. S 1350.

<sup>58</sup>Kadic v. Karadzic, 70 F.3d 232, 64 USLW 2231 (2nd Cir.(N.Y.) Oct 13, 1995) (NO. 94-9069, 1544, 94-9035, 1541) at 243 states: Torture Victim Act codifies universally accepted norm of international law prohibiting official torture and extends it to cover summary execution; however, torture and summary execution, when not perpetrated in course of genocide or war crimes, are proscribed only when committed by state officials or under color of law. Torture Victim Protection Act of 1991, SS 2(a), 3(a), 28 U.S.C.A. S 1350 note.

<sup>59</sup>Id. at 241 states: Acts of genocide violate law of nations, or customary international law, regardless of whether offenders acted as individuals or as members of organizations. 18 U.S.C.A. S 1091.

<sup>60</sup>Id. at 245 states: "Color of law" jurisprudence of sec.1983 is a relevant guide to whether defendant has engaged in international law violations requiring "official action" for purposes of jurisdiction under Alien Tort Claims Act. 28 U.S.C.A. S 1350; 42 U.S.C.A. S 1983. Private individual acts under "color of law," within meaning of S 1983, when he acts together with state officials or with significant state aid. 42 U.S.C.A. S 1983. In construing terms "actual or apparent authority" and "color of law" under Torture Victim Protection Act, courts are to look to principles of agency law and to jurisprudence under 42 U.S.C.A. S 1983, respectively. Torture Victim Protection Act of 1991, S 1 et seq., 28 U.S.C.A. S 1350 note; 42 U.S.C.A. S 1983.

responsibility",<sup>61</sup> as they pertain to the civilian leader, Karadzic, of "Srpska", an unrecognized state. In regards to whether the defendant could be held liable for the crimes committed under his authority the court stated:

Claims that self-proclaimed leader of unrecognized Bosnian-Serb entity [Karadzic] personally planned and ordered campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats clearly stated violation of international law norm proscribing genocide, regardless of whether [Karadzic] acted under color of law or as a private individual, for purposes of action brought under Alien Tort Claims Act. 18 U.S.C.A. S 1091; 28 U.S.C.A. S 1350.<sup>62</sup>

The second case, Louise MUSHIKIWABO v. Jean Bosco BARAYAGWIZA, No. 94 CIV. 3627 (JSM). United States District Court, S.D. New York. April 9, 1996, is of particular relevance because it applies directly to the situation in Rwanda. The court considered the civilian defendant a leader who was responsible for the actions of his subordinates. "Although not himself a government official, Barayagwiza [the defendant] was a leader of the Rwandan Hutu political party known as the Coalition pour la Defense de la Republique (the "CDR"). The CDR had its own militia which operated in conjunction with Rwandan government forces in carrying out a plan aimed at the extermination of Rwanda's Tutsi population."<sup>63</sup> The court held that the defendant acted "under color of law" and was thus liable for civil damages.<sup>64</sup> In its finding that the

---

<sup>61</sup>Id. at 242 states: International law of war imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for prevention of war crimes.

<sup>62</sup>Id.

<sup>63</sup>Louise MUSHIKIWABO v. Jean Bosco BARAYAGWIZA, No. 94 CIV. 3627 (JSM). United States District Court, S.D. New York. April 9, 1996.

<sup>64</sup>Id.

defendant was liable for the crimes committed the court stated:

Although the court in Kadic held that "torture and summary execution -- when not perpetrated in the course of genocide or war crimes -- are proscribed by international law only when committed by state officials or under color of law," *id.* at 243, the affidavits submitted here clearly establish that the defendant's actions were part of a coordinated, genocidal effort with officials of the Rwandan government and thus defendant both acted in pursuit of genocide and under color of law. See *id.* at 245 (under S 1983 standards applicable to state action requirement of Alien Tort Act, "[a] private individual acts under color of law within the meaning of section S 1983 when he acts together with state officials or with significant state aid"). Since defendant and his coconspirators acted under color of law, their conduct is also actionable under the Torture Victim Protection Act (the "TVPA") *Id.* at 245 ("By its plain language, the [TVPA] renders liable those individuals who have committed torture or extrajudicial killing 'under actual or apparent authority, or color of law, of any foreign nation'").

#### IV. CONCLUSION

Whether a civilian can be held criminally liable for the actions of subordinates is not dependent upon that civilian's title or position, nor is it dependent on that civilian's membership within some formal system of hierarchical command. Through an analysis of the doctrine of "command responsibility", Conventions, statutes and case law it is revealed that a civilian may be deemed to be a superior who is responsible for the actions of others under the his leadership. For a civilian to be held as a responsible superior he must have some form of a legal duty, some degree of control over others and actual or constructive knowledge that crimes are being committed by those the he has control over. If there is sufficient evidence to show that a civilian had a legal duty, had control over others and had the requisite knowledge, there should be no reason why such a civilian should not be criminally liable for the actions of his subordinates.