

MEMORANDUM

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Re: ICTR: Legal conditions of subordination in criminal law. Requirements to be a subordinate to another person as a superior.

I. Introduction and Summary of Conclusions

Issues Presented

This research memorandum seeks to examine the following issues:

1. When may a person who is in a position of authority and control over other persons, “subordinates,” be held criminally liable for the acts of the subordinates?
2. What elements define a superior-subordinate relationship in international criminal law?
3. When subordinate status is established, what is the subordinate’s culpability for war crimes, crimes against humanity and genocide?

Summary of Conclusions

The doctrine of command responsibility in international criminal law firmly establishes that a superior, whether military or civilian, may be held individually criminally responsible for illegal orders given to subordinates. Additionally, international law imposes criminal responsibility on superiors who have not given illegal orders, but have not attempted to stop blatantly illegal acts of their subordinates. In cases where liability is imposed based on the omissions of the superior, international law requires a tribunal to conduct an intensive fact-sensitive inquiry to determine the scope of the superior's knowledge

The doctrine of command responsibility and the defense of superior orders both depend on the existence of a hierarchical relationship, whether *de jure* or *de facto*. Factors international courts have found important in determining whether a legally significant superior/subordinate relationship exists include: (i) a superior's ability to punish a subordinate; (ii) a superior's ability to issue binding orders to a subordinate; (iii) a superior's ability to prevent a subordinate from performing certain acts; and (iv) other evidence that a subordinate's acts are directed by a military or civilian superior. Additional factors considered by the courts include formal rank or status and level of control. The superior orders defense may not be used to excuse punishment for the commission of illegal acts, but it may act to mitigate punishment.

II. Factual Background

In Rwanda, from late 1990 through 1994, military personnel, members of the government, political leaders, civil servants and others conspired in an extermination plan of the Tutsi population and

those moderate Hutus who did not support the ideology of Hutu Power.¹ The execution of this plan, which intensified after April 6, 1994, when President Habyarimana's plane was shot down, implicated tens of thousands of ordinary Rwandan civilians. The organizers of the genocide mobilized this civilian population through Rwandan existing administrative, political and military structures and hierarchies.² At a minimum, an assessment of criminal liability for the Rwandan genocide requires an understanding of social and political hierarchies which characterized Rwandan society during this period, as well as an understanding of how these hierarchies functioned so effectively in the execution of the genocide.

Rwanda's administrative hierarchy was mobilized to great effect in the execution of the genocide. Administratively, Rwanda is divided into twelve préfectures under the control of an individual Préfet who is appointed by the President of the Republic on the recommendation of the Minister of the Interior.³ The Préfet's authority covers the entire préfecture, and he carries out his duties under the Minister's hierarchical authority.⁴ The Préfet's duties include responsibility for ensuring public safety

¹ *Prosecution vs. Joseph Kanyabashi*, ICTR-96-15-I, Amended Indictment (August 12, 1999), at 12. [*hereinafter* "Kanyabashi Indictment"]. Hutu Power was an ideology emphasizing the intrinsic values of being a Hutu and the complete congruence between demographic majority and democratic rule. (See Tab 31).

² Human Rights Watch, *Leave None to Tell the Story, Genocide in Rwanda*, (March 1999), <<http://www.org/hrw/reports/1999/rwanda>> at 1. [*hereinafter* "Leave None to Tell the Story"] (See Tab 16).

³ Kanyabashi Indictment, *supra* note 1, p.13.

⁴ *Id.*

and security.⁵ Sub-préfets fall under the Prefet's control. Rwanda's twelve Préfectures are subdivided into communes, one hundred and fifty-four in total, each of which fall under the executive power of a Bourgmestre also appointed by the President of the Republic on the recommendation of the Minister of the Interior.⁶ Lastly, another bureaucratic level of governance including counselors and cell heads exists. This level is controlled by the Bourgmestre.

During the execution of the genocide, orders were passed down a chain of authority from politicians at the national level to Préfets who transmitted orders to those below them in the administrative system and supervised the results.⁷ Bourgmestres assisted in transporting civilian killers to massacre sites where military personnel or former soldiers would take control of the operation.⁸ However, the administrative system was also characterized by "flexibility" whereby "sub-préfets could eclipse préfets, as they did in Gikongoro and Gitarama."⁹ Therefore, while the role of the administrative state in the execution of the genocide can be evidenced by clear hierarchical relationships, in some instances a "commitment to the killing more than a formal position in the hierarchy" characterized the

⁵ *Id.*

⁶ *Id.* at 14.

⁷ *Leave None to Tell the Story*, *supra* note 2, at 6.

⁸ *Id.*

⁹ *Id.* at 1.

actual slaughter.¹⁰ This flexibility in the system makes any assessment of effective control of one social actor over another during the genocide a very fact specific inquiry.

Coupled with functional operation of political hierarchies in the Rwandan genocide is the role of formal and semi-formal military hierarchies. Militarily, soldiers in the Presidential Guard, the Forces Armées Rwandaise (FAR), composed of the Armée Rwandaise (AR) and the Gendamerie Nationale (GN), and various Hutu militias, notably the Interahamwe and the Impuzamugambi,¹¹ played an integral role in initiating and directing the slaughter of Tutsis and moderate Hutus.¹² While the FAR did not have a unified command, they came under the direct authority of the Minister of Defense.¹³ The GN, responsible primarily for maintaining public safety, also came under the authority of the Minister of Defense but could also carry out public order at the behest of the Préfect.¹⁴ In this regard, when assessing the GN's specific role in the genocide, it becomes a fact specific analysis, with a particular view to the role of various Préfects as to who had effective authority and control over their actions. The role played by military personnel in the commission of the genocide blurs clear distinctions between administrative and military command structures. Military personnel, including retired servicemen, in some instances, took control in civilian domains. In other instances, civilians including those not vested

¹⁰ *Id.*

¹¹ Kanyabashi Indictment, *supra* note 1, at 14-15.

¹² *Leave None to Tell the Story*, *supra* note 2, at 2.

¹³ *Indictment*, *supra* note 1, at 14.

with legal authority, obtained direct military support for their attacks.¹⁵ Notably however, the “widespread participation” of the military during the genocide indicates that authorities within central command structures at the national level “ordered and approved their role in the slaughter.”¹⁶

The militias, the Interahamwe, in particular, were directed centrally by political leaders.¹⁷ The political leadership of the militias placed these forces at the disposal of the Rwanda military.¹⁸ The militias, which swelled to between twenty and thirty thousand including Hutu refugees who fled from Burundi, “worked” together with formal military and civilian structures identified above in executing the genocide.¹⁹ The militias also carried out the commands of civilian administrators and in some instances, it is alleged, carried out massacres on the direct orders of Préfets and communal councilors.²⁰ While the militias functioned as a political vehicle through which politicians could mobilize civilians in commission of the slaughter, the militias also worked in conjunction with both civilian and military hierarchies during the genocide taking orders and direction from both lines of authority.

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¹⁴ *Id.* at 15.

¹⁵ *Leave None to Tell the Story*, *supra* note 2, at 2.

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 4.

¹⁸ *Leave None to Tell the Story*, *supra* note 2, at 4.

¹⁹ Gérard Prunier, *THE RWANDA CRISIS, A HISTORY OF GENOCIDE*, 1995, at 246. (*See* Tab 22).

²⁰ *Id.* Human Rights Watch reports of witnesses who claim that Préfets and communal councilors gave orders to the Interahamwe during attacks in Kigali in late April 1994.

III. Legal Discussion

A. When may a person who is in a position of authority and control over a subordinate or subordinates be held criminally liable for the acts of the subordinates?

1. Doctrine defined

The doctrine of “command responsibility” established in customary international law invokes the principle that military commanders and other persons²¹ occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates.²² Under the Statutes of the

²¹ The Report of the Secretary-General on the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), concerning the responsibility of both military and civilian superiors outlined the primarily military purpose of the doctrine while also acknowledging past applications to civilian;

The doctrine of command responsibility is directed primarily at military commanders because such persons have a personal obligation to ensure the maintenance of discipline among troops under their command. Most legal cases in which the doctrine of command responsibility has been considered have involved military or paramilitary accused. Political leaders and public officials have also been held liable under this doctrine in certain circumstances.

quoted in, M. Cherif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, 438 (2d ed. 1999). (See Tab 12).

²² The Report of the Secretary-General on the statute of the ICTY stated:

Virtually all of the written comments received by the Secretary-General have suggested that the statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity

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Tribunal of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Tribunal of the International Criminal Tribunal for Rwanda (ICTR), the doctrine of command responsibility contains three parts: (i) the existence of a superior-subordinate relationship; (ii) *mens rea*: the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) *actus reus*: the superior either engaged in a criminal act by giving an illegal order or failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.²³ By creating individual criminal responsibility for superiors, this doctrine allows the prosecutor to bring a charge against a leader who ordered a subordinate to commit an illegal act, despite the superior's lack of direct

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of the accused will not constitute a defence, nor will it mitigate punishment.

Bassiouni, *supra* note 21, at 436-7.

²³ Article 7(3) of the ICTY states:

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

International Criminal Tribunal for Yugoslavia, S. C. Res. 808, U.N. SCOR, 48th Sess. Annex, at 20, U.N. Doc. S/25274 (1993) [*hereinafter*, ICTY Statute]. (See Tab 7).

See Bassiouni, *supra* note 21, at 423 quoting

A person who gives the order to commit a war crime or crime against humanity is equally guilty of the offense with the person actually committing it. This principle, expressed already in the Geneva Conventions of 1949, applies to both the military superiors, whether of regular or irregular armed forces, and to civilian authorities.

action. Under the doctrine of command responsibility,²⁴ “a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate the punishment.”²⁵

The principle of “command responsibility” embraces two concepts of individual criminal culpability for superiors.²⁶ The first is direct responsibility for a commander’s potentially unlawful orders. Under the second, if a commander had actual knowledge or had reason to know (constructive knowledge) of the unlawful acts of a subordinate and did not act to stop or punish them, the commander will be held criminally responsible for such acts.²⁷

²⁴ In this memo, the terms “command responsibility” and “superior responsibility” are used interchangeably.

²⁵ See Bassiouni, *supra* note 24, at 436, quoting Report of the Secretary-General on the statute of the ICTY. However, the report continues,

The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon “general principles” of law recognized by all nations.

²⁶ See generally, Bassiouni, *supra* note 24, at 419-447. See also Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT’L L. 89 (Winter 2000). (See Tab 23). See also L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT’L L. & CONTEMP. PROBS. 319, 336 (Fall, 1995). (See Tab 15).

²⁷ See Vetter, *supra* note 26, at 93. See Bassiouni, *supra* note 21, at 436, quoting The Report of the Secretary-General on the statute of the ICTY:

[The superior] should also be responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet

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A fundamental principle of criminal law is that individuals should be held responsible for their unlawful acts. Further, under international criminal law, the rule has developed that a person who gives an illegal order should be held responsible for that order.²⁸ Establishing criminal responsibility for a failure to act, an omission, as in *de facto* responsibility can be more difficult. Criminal responsibility for an omission is based on the leader's "failure to act in order to (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."²⁹ In referring to the requisite guilty state of mind under the command responsibility doctrine,

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failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.

See also 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, 114-15 (1995). (See Tab 14). Constructive notice may be found where there was: "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."

²⁸ *See* Bassiouni, *supra* note 21, at 421, *quoting* The Report of the Secretary-General of the ICTY, "A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute."

²⁹ *See* Bassiouni, *supra* note 21, at 419, 437-8, *quoting* The Report of the Secretary-General of the ICTY, "Superiors are moreover individually responsible for a war crime or crime against humanity committed by a subordinate if they knew, or had information which should have enabled them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such an act and they did not take all feasible measures within their power to prevent or repress the act."

the Final Report of the Commission of Experts advising the drafters of the Statute of the ICTY stated the following:

It is the view of the Commission that the mental element necessary when the commander has not given the offending order is (a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute willful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offenses charged and acquiesced therein. To determine whether or not a commander must have known about the acts of his subordinates, one might consider a number of indices, including:

- (a) The number of illegal acts;*
- (b) The type of illegal acts;*
- (c) The scope of illegal acts;*
- (d) The time during which the illegal acts occurred;*
- (e) The number and type of troops involved;*
- (f) The logistics involved, if any;*
- (g) The geographical location of the acts;*
- (h) The widespread occurrence of the acts;*
- (i) The tactical tempo of operations;*
- (j) The modus operandi of similar illegal acts;*
- (k) The officers and staff involved;*
- (l) The location of the commander at the time.³⁰*

As the above list evidences, the “must have known” standard involves the most fact-intensive inquiry. Specifically, with respect to military criminal responsibility, difficulties arise in four different areas of omission. Notably, however, as addressed by the Final Report of the Commission of Experts of the ICTY, a military commander is not absolutely responsible for all offenses committed by those under his

³⁰ *Id.* at 438.

command, for there may be acts committed that the commander has no knowledge or control over.³¹

The Commission of Experts, however, noted that a commander does have an affirmative duty to control his troops while taking all measures practicable to ensure their compliance with the law. The Commission further comments:

*The arguments that a commander has a weak personality or that the troops assigned to him are uncontrollable are invalid. In particular, a military commander who is assigned command and control over armed combatant groups who have engaged in war crimes in the past should refrain from employing such groups in combat, until they clearly demonstrate their intention and capability to comply with the law in the future. Thus, a commander has a duty to do everything reasonable and practicable to prevent violations of the law. Failure to carry out such a duty carries with it responsibility. Lastly, a military commander has the duty to punish or discipline those under his command whom he knows or has reasonable grounds to know committed a violation.*³²

A subordinate actor's responsibility for a violative act does not necessarily eliminate command responsibility, because of the inclusion of omissions in the definition of command responsibility.³³

2. *Doctrine as applied*

The notion that a commander is responsible for the acts of his subordinates extends at least as far back as 500 B.C.³⁴ Although the Geneva Conventions of 1949 contained no explicit provision on

³¹ *Id.*

³² *Id.* quoting The Final Report of the Commission of Experts.

³³ *Id.*

³⁴ See Sun Tzu, *The Art of War*, "When troops flee, are insubordinate, distressed, collapse in disorder, or are routed, it is fault of the general. None of these disorders can be attributed to natural causes," quoted in, Bassiouni, *supra* note 21, at 423. After extensive development of the

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command responsibility, the command responsibility doctrine was further developed in international law through the post-World War II prosecutions of German and Japanese war criminals.³⁵ Protocol I of the Geneva Convention of 1949 was the first international treaty to address explicitly the doctrine of command responsibility. Protocol I, Article 86 entitled “Failure to Act” and Article 87, “Duty of Commanders” was one of the first attempts to codify the principle of command responsibility ascribing both an affirmative duty to commanders to prevent their subordinates from committing crimes and liability to commanders in those situations where they fail to act.³⁶

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doctrine in national military conventions, basic principles of command responsibility were incorporated into the Treaty of Versailles . The Treaty provided for the prosecution of those accused of violating the laws of war before an international military tribunal or Allied military tribunal. See Bassiouni, *supra* note 21, at 519.

³⁵ See Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT’LL. 1, 2 (July 1999). (See Tab 11).

³⁶ To Summarize, *Article 86 - Failure to Act*, of Protocol I of the Geneva Conventions of 1949 states:

- 86 (2) assigns responsibility to superiors if a subordinate commits a war crime and if the superior knew, “or had information which should have enabled them to conclude in the circumstances at the time,” that the subordinate was committing or was going to commit the act.
- The superior has the responsibility to “take all feasible measures within their power to prevent or repress” the subordinate’s criminal act.

Article 87 - Duty of commanders:

- 87(1) requires military commanders to prevent, suppress and report any war crimes committed by their subordinates.
- 87(2) requires commanders to ensure that “members of the armed forces under their command are aware of their obligations under the Geneva Conventions and Protocols.” [*hereinafter*, Protocol I]. (See Tab 6).

a. Nuremberg and the Post-Nuremberg Allied Prosecutions

The International Military Tribunal at Nuremberg was established in 1945 to hold Nazi war criminals individually accountable for atrocities committed during World War II.³⁷ The Nuremberg Tribunal was designed to prosecute the leading authors of the Nazi war plan.³⁸ The Nuremberg Tribunal contributed to the preexisting body of international criminal law by establishing the standard for command responsibility still considered authoritative today.³⁹ The Nuremberg Tribunal was conducted pursuant to the Charter of the International Military Tribunal for the Trial of the Major War Criminals, commonly known as the London Charter. Despite the fact that the London Charter did not contain a specific provision dealing with command responsibility, the Nuremberg Tribunal held that a breach of war conventions committed by a subordinate does not absolve his superiors from disciplinary responsibility, if they knew or had information which should have enabled them to conclude, under the circumstances at the time, that the subordinate was committing or was going to commit such a breach and if the superior did not take measures to avoid that breach. The first Nuremberg Trial charged

³⁷ See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 82 U.N.T.S. 280, entered into force Aug. 8, 1945, available at <<http://www1.umn.edu/humanrts/instree/1945a.htm>> (visited June 26, 2000) [*hereinafter* “London Charter”]. (See Tab 1).

³⁸ For a full list of the individual Nuremberg defendants, see <<http://www.courtTV.com/casefiles/nuremberg/defendants.html>> (visited June 22, 2000).

twenty-two high level defendants with war crimes or crimes against humanity and handed down twelve death sentences, seven prison terms (three for life and two for twenty years, one for fifteen years, and one for ten years) and three acquittals.⁴⁰

b. The Tokyo Tribunal

The International Military Tribunal for the Far East, The Tokyo Tribunal. was formally established by proclamation of General Douglas MacArthur on January 19, 1946.⁴¹ Its charter contained substantively the same language as the London Charter that established Nuremberg.⁴²

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³⁹ Mark Martins, *“War Crimes” During Operations Other Than War: Military Doctrine and Law Fifty Years After Nuremberg—And Beyond*, 149 MIL. L. REV. 145, 153 (1995). (See Tab 20).

⁴⁰ Bassiouni, *supra* note 21, 528-529. See also Matthew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 DICK. J. INT’LL. 1, 19 (Fall 1996). (See Tab 19).

The political leaders Goering and Ribbentrop were found guilty of “war crimes or crimes against humanity based on participation in conferences at which policies of slave labour, persecution, or extermination were agreed upon.” See Green, *supra* note 26 at 330.

Various military leaders were held responsible under command responsibility doctrine: Keitel, who issued directive; Kaltenbrunner, who had authority to relieve occupants of concentration camps, was aware of conditions, and ordered executions of inmates; Rosenberg, the Reich Minister who directed that Hague Rules of Land Warfare were not applicable in occupied territories; Frank, the Governor-General of occupied Poland, who ordered complete destruction of Poland and many executions; and Frick, the Minister of Interior, Reich Protector, who signed order giving Himmler protection of concentration camps and knew of Himmler’s methods. See *Id.*

⁴¹ See Bassiouni, *supra* note 21, at 3-4.

⁴² See Vetter, *supra* note 26, at 105.

General Yomoyuki Yamashita, commander of the Japanese forces in the Philippines, was charged with having "...unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes" against the allies and dependencies, particularly the Philippines.⁴³ No direct link was established during the trial between Yamashita and the unlawful acts of murder, mistreatment of over 32,000 Filipino civilians and captured Americans, the rape of hundreds of Filipino women and the arbitrary and unwarranted destruction of private property.⁴⁴ However, the Military Commission heard extensive reports of the atrocities committed by Japanese soldiers during the war. These crimes included a Japanese soldier throwing a baby in the air and impaling the baby into the ceiling with his bayonet and the rape of a girl by twenty soldiers who then cut her breasts off.⁴⁵ Since General Yamashita had not ordered any of these acts, the prosecution's argument depended on the presumption

⁴³ See Bassiouni, *supra* note 21, at 427, citing *Trial of General Yomoyuki Yamashita*, 4 UNITED NATIONS WAR CRIMES COMMISSION, Law Reports of War Criminals 1 (R. John Pritchard & Sonia Magbanua Zaide eds., 1981). (See Tab 34).

⁴⁴ See *Id.*, citing Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (1982) at 80, 84-6. (See Tab 18). The trial began on October 19, 1945 and ended on December 7, 1945 after the testimony of 286 witnesses and the submission of 423 documents into evidence. It was the desire of the prosecution to demonstrate the "enormity" of the Japanese war crimes and to convict Yamashita of "dereliction of duty." The prosecution presented two witnesses who provided a link between Yamashita and the crimes, but both were former Japanese collaborators who were not terribly credible.

⁴⁵ Bassiouni, *supra* note 21, at 428, citing Lael, *supra* note 44, at 83-4.

that Yamashita “must have known” of the atrocities.⁴⁶ In finding Yamashita guilty, the Tribunal effectively expanded the scope of the command responsibility doctrine to include the “must have known” standard in appropriate instances.

In the *Hirota* case, Japanese Foreign Minister, and therefore a civilian, Koki Hirota was found guilty of dereliction of duty and criminal negligence for his failure to prevent atrocities committed by soldiers during events referred to as the “Rape of Nanking.” The Tribunal used the command responsibility doctrine to impute responsibility for subordinate soldiers’ acts to the civilian leader, even though he was not effectively acting as a military commander and had no direct control over the subordinates’ acts. The Tribunal concluded that he was aware of soldiers’ acts because they were so widespread and because his residence was located next door to the University of Nanking, where many of the atrocities were committed.⁴⁷ Also, the Japanese military established an embassy in Nanking with a line of command leading directly to Hirota.⁴⁸ The Hirota case, coupled with the Yamashita case, expands the doctrine of command responsibility by allowing for criminal liability to be imposed on those leaders, civilian or military, in instances where neither direct orders were given or even where subordinates were under the direct control of the leadership. Such cases represent the broadest application of this doctrine.

⁴⁶ *Id.*

⁴⁷ *See Vetter, supra* note 26, at 125-6.

c. The Kahan Commission

The doctrine of command responsibility was also applied to civilians in the Kahan Commission's holdings. The Kahan Commission was created to investigate the criminal events that occurred at a Palestinian refugee camp after Israel's invasion of Lebanon in June of 1982.⁴⁹ The Israeli Defense Forces occupying Beirut permitted an armed Lebanese Christian militia, under its control, known as the Phalangists, to enter two Palestinian refugee camps.⁵⁰ The Kahan Commission used the term "indirect command responsibility" and held individuals responsible under this doctrine. The Commission applied the doctrine of command responsibility to those in a *de facto*, not *de jure* position of control:

If it indeed becomes clear that *those who decided* on the entry of the Phalangists into the camps *should have foreseen* - from the *information at their disposal and from things which were common knowledge* - that there was danger of a massacre, and no steps were taken which might have prevented this danger or at least greatly reduced the possibility that deeds of this type might be done, then those who made the decisions and those who implemented them are indirectly responsible for what ultimately occurred, even if they did not intend this to happen and merely disregarded the anticipated danger.⁵¹

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⁴⁸ *See Id.* at 125.

⁴⁹ Bassiouni, *supra* note 21, at 439. From about 6:00 p.m. September 16, 1982 until 8:00 a.m. September 18, 1982 the force massacred between 700 to 800 unarmed civilians. *See also*, Yitzhak Kahan, Ahron Barak and Yona Efrat, *1983-Final Report of the Commission of Inquiry Into The Events At The Refugee Camps in Beirut*, International Legal Materials of Embassy of Israel, Washington D.C. (1983). (See Tab 17).

⁵⁰ *See* Bassiouni, *supra* note 21, at 440.

⁵¹ Fenrick, *supra* note 27, at 121, *quoting*, Final Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut 1983, 22 I.L.M. 473 (1983) (*emphasis added*).

The findings of the Kahn commission demonstrate the emergence of *de facto* control as a key element in the doctrine of command responsibility, and the report introduces the element of *foreseeability* when looking to the question of whether to hold leadership liable for subordinates' criminal acts.

d. ICTY

The trials in the ICTY represented the first elucidation of the concept of command responsibility by an international judicial body since the Second World War.⁵² Not only military commanders, but also civilians holding positions of authority are encompassed by the doctrine.⁵³

As the ICTY Trial Chamber in *Celebici* found, “the concept of a hierarchy encompassing the concept of control”⁵⁴ is difficult to apply in situations where the traditional formal structures have broken down and where, during the interim period, new structures emerge and are ambiguous and ill-defined. Still, the Trial Chamber in *Celebici* held that both civilian and military individuals in positions of authority may incur criminal liability under the command responsibility doctrine, on the basis of their *de facto* as well as *de jure* positions as superiors. The absence of formal legal authority over the actions of

⁵² See Bassiouni, *supra* note 21, at 420.

⁵³ See Prosecutor v. Delalic, et al. Parts I - VI, available at <<http://www.un.org/icty/celebici/trialc2/jugement/somm.htm>> (visited August 18, 2000), [*hereinafter*, *Celebici Judgment*]. (See Tab 27).

⁵⁴ *Id.* at § 354.

subordinates should not be understood to preclude the imposition of such responsibility.⁵⁵ The Trial Chamber further stated,

In order for the “principle of superior responsibility to be applicable, it is necessary that the superior have *effective control* over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. With the caveat that such authority can have a *de facto* as well as a *de jure* character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to the civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military of commanders.”⁵⁶

One of three defendants charged under the command responsibility doctrine, defendant Zdravko Mucic, an official at the Celebici prison camp, was charged with responsibility as a superior. Despite the absence of official records, the ICTY found that Mucic was at all material times the commander of Celebici, with overall authority over the officers, guards and detainees, and the person to whom the officers and guards were subordinate.⁵⁷ The Trial Chamber concluded that Mucic was responsible for conditions in the Celebici prison camp and that he was the direct superior of co-defendant Delic.⁵⁸ Thus, Mucic was found guilty on eleven counts of war crimes and crimes against humanity under command responsibility doctrine and direct responsibility. He was found guilty under

⁵⁵ *Id.* at § 378.

⁵⁶ *Id.* at 55 (*emphasis added*).

⁵⁷ See Ann B. Ching, *Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia*, 25 N.C. J. INT’L L. & COM. REG. 167, 195 (Fall 1999). (See Tab 13).

⁵⁸ See *Celebici supra* note 53, at Part VI.

command responsibility doctrine for “his failure to prevent or punish the violent acts of his subordinates by which the detainees in the Celebici prison camp were subjected to an atmosphere of terror, [and in] ... wilfully causing great suffering or serious injury to body or health, and cruel treatment.”⁵⁹ The prosecution presented documentary and eyewitness evidence to show that Mucic had *de facto* control over prison guards and *de jure* control per orders of the Bosnian Army. Thus, the tribunal established the existence of a superior relationship, the requisite level of knowledge due to the “frequent and notorious” nature of the crimes committed, and Mucic’s failure to act to prevent harm from occurring.⁶⁰ Mucic was found criminally responsible as a superior under command responsibility doctrine.

The ICTY Trial Chamber, however, did make fact-based distinctions in its application of the doctrine of command responsibility. One of two Celebici prison camp defendants to be found not guilty under command responsibility doctrine, Zejnil Delalic, was charged with committing atrocities at the prison camp because he was commander of military forces in the area, and was thus alleged to have authority over the camp.⁶¹ However, Delalic was a direct participant in only one offense, the illegal confinement of prisoners. Delalic had acted as a coordinator at the camp on occasion, but after

⁵⁹ *Id.*

⁶⁰ Ann B. Ching, *supra* note 57, at 167, 195.

⁶¹ *Id.* at 187.

intensive fact-finding, the Tribunal concluded that Delalic was not part of the military chain of command, and merely transmitted orders to other parties.⁶²

Although the Court in *Celebici* held that the law of *Yamashita* applied, as legal scholar Ann Ching points out, the *Delalic* decision appears to contradict portions of the *Yamashita* decision. General Yamashita, was, like Delalic, the formal military commander of the region in which war crimes occurred. As in *Delalic*, no evidence was presented by the Prosecution in *Yamashita* to show his direct control over the acts of his subordinates. The ICTY declined to find Delalic responsible under the command responsibility doctrine due to the lack of evidentiary support for the existence of a superior-subordinate status, as premised on the superior's ability to control the subordinate, while the Tokyo Tribunal imposed command responsibility on Yamashita. The difference rests in the charges the defendants faced. Delalic was charged with the underlying offenses committed by the guards at Celebici offenses. Yamashita, in contrast, was charged with failure to discharge his duty as a commander by controlling his troops and preventing their atrocities.⁶³

e. ICTR

The ICTR tried and convicted Akayesu, the Bourgemestre of the Taba commune and a local political leader. He was found guilty of crimes against humanity, genocide, and direct and public

⁶² See Ching, *supra* note 57, at 198-205.

⁶³ *Id.* at 203.

incitement to commit genocide for having “ordered, aided and abetted the planning and execution of” various atrocities. He was found not guilty of war crimes and complicity to commit genocide.⁶⁴ The ICTR Trial Chamber found that Akayesu was *de facto* commander over civilian subordinates, concluding that he was “responsible for maintaining law and public order in the commune of Taba and that he had effective authority over the communal police. Moreover, as ‘leader’ of the Taba commune, of which he was one of the most prominent figures, the inhabitants respected him and followed his orders.”⁶⁵ This ruling in the Akayesu case follows the line of reasoning found in the *Celebici* judgment highlighting the significance of *de facto* control when looking at the question of command responsibility.

1. Civilian Application

As stated above, a person in command need not be part of a military or paramilitary organization to be subject to command responsibility.⁶⁶ A person in command of a governmental or police unit may be held criminally responsible for both ordering those under his command to do illegal acts or for failing to intervene. Military and paramilitary personnel are normally subject to military law while nonmilitary personnel are subject to national criminal law.⁶⁷

⁶⁴ See Summary of Judgment in Jean-Paul Akayesu Case, at § 61, available at <http://www.ictr.org/ictr/english/singledocs/jpa_summary.html> (visited June 16, 2000). (See Tab 25).

⁶⁵ *Id.* at § 26.

⁶⁶ See generally Bassiouni, *supra* note 21.

⁶⁷ *Id.* at 420.

a. The Tokyo Tribunal

The Tokyo Tribunal “relied on [the] principle [of civilian command responsibility] in making findings of guilt against a number of civilian political leaders charged with having deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance of the laws and customs of war and to prevent their breach.”⁶⁸ As noted above, despite his status as a civilian, Japanese Foreign Minister, Koki Hirota, was found responsible for the “Rape of Nanking” and the subsequent atrocities, because he knew of them and failed to institute immediate action against them.⁶⁹ Additionally, other Japanese civilian leaders, such as Prime Minister Hideki Tojo were found criminally liable for their failure to prevent or punish the criminal acts of the Japanese troops.⁷⁰

b. The Kahan Commission

In applying the doctrine of indirect command responsibility, the Kahan Commission found that the Minister of Defense of Israel, Ariel Sharon, had a duty to consider possible acts of danger.⁷¹ “Political leaders have specific duties in times of armed conflicts that cannot be evaded even if they are not involved in making and implementing military decisions or may set broad military policy decisions

⁶⁸ *Id.*

⁶⁹ *See generally* Lael, *supra* note 44.

⁷⁰ *Id.*

⁷¹ Fenrick, *supra* at note 27, 121.

and delegate responsibility for decisions of lesser magnitude to military commanders.”⁷² While numerous Israeli leaders were held responsible and disciplinary measures were taken against some Israeli officers, no trials were ever held.⁷³

c. The ICTY

In the *Celebici Judgment*, the Trial Chamber of the ICTY held that the applicability of superior responsibility in Article 7(3) of the ICTY, which is nearly identical to Article 6(3) of the ICTR, extends not only to military commanders but also to individuals in non-military positions of superior authority.⁷⁴ Not only military commanders, but also civilians holding positions of authority, are encompassed by the doctrine.⁷⁵ The *Celebici* court, quoting the Final Report of the Commission of Experts, noted that although “[m]ost legal application of the doctrine of command responsibility has considered military or paramilitary accused, [p]olitical leaders and public officials have also been held liable under this doctrine in certain circumstances.”⁷⁶ In the *Celebici Judgment*, the Trial Chamber stated, “The cases imposing responsibility for failure to act on civilians occupying positions of authority, also indicate that such

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *See Celebici Judgment, supra* note 53.

⁷⁶ *Id.* at § 357.

persons may be held liable for crimes committed by persons over whom their formal authority under national law is limited or non-existent.”⁷⁷

4. *Application of the command responsibility doctrine in Rwanda*

International law requires that military leaders of Rwanda be held criminally responsible for the actions of their soldiers in response to any illegal orders they gave. Additionally, militia leaders, such as the leaders of the Interhamwe, and government officials may be found individually criminally responsible, despite their civilian status, under the doctrine of command responsibility in international law.

These superiors will incur individual criminal responsibility not only when they have personally issued illegal orders, but also when they have failed to take action to prevent the illegal acts of their subordinates under the doctrine. However, superiors will only be held responsible under the failure to act standard if the prosecution demonstrates the leaders had constructive knowledge of the acts of their subordinates based on a number of factors including: “the number, type, and scope of the illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved, the geographical location of the acts; the widespread occurrence of the acts; the tactical tempo

⁷⁷ *Id.* at § 376.

of operations; the *modus operandi* of similar illegal acts; the officers and staff involved; the location of the commander of the time.’⁷⁸

B. What elements define a superior-subordinate relationship in international criminal law?

The existence of a superior-subordinate⁷⁹ relationship may impact the level of individual culpability of virtually every person now indicted by the ICTR. Crimes against humanity and genocide require a plan, an overarching policy. Such plan or policy is usually directed by some individuals and, in some instance, carried out by others, often with significant overlap between the two groups.⁸⁰ War crimes, likewise, can occur at a superior’s direction or due to a superior’s neglect of his duty to control a subordinate’s behavior.

The existence of a superior-subordinate relationship impacts the individual criminal culpability of both parties involved. For the superior, the relationship may impose vicarious culpability for the subordinate’s acts under the command responsibility doctrine. For the subordinate, the relationship may mitigate individual culpability through the superior orders defense.⁸¹ Both these aspects of superior-

⁷⁸ See Bassiouni, *supra* note 21, at 438 *quoting* The Final Report of the Commission of Experts.

⁷⁹ In this memorandum, the term “superior” describes both military and civilian leaders.

⁸⁰ See generally ICTR Statute of the Tribunal for definition of crimes available at <<http://www.ictor.org/statute.html#statute>> (visited August 3, 2000). [*hereinafter*, ICTR Statute]. (See Tab 8).

⁸¹ For a more detailed description of the superior orders defense, see Section C below.

subordinate status have been recognized as important in assigning individual criminal culpability since at least the sixteenth century.⁸² Legal scholar, M. Cherif Bassiouni has called the command responsibility doctrine and the superior orders defense “legal and logical concomitant[s].”⁸³ Both doctrines have been significant in the decisions to date of the ICTY, as well as the ICTR, and promise to generate more discussion in future proceedings.

1. Legal requirements for subordinate status

The essential prong of both command responsibility and the superior orders defense is the existence of a superior-subordinate relationship. The common use of the terms “superior” and “subordinate” can be easily defined through official rank or status, yet a legally significant superior-subordinate relationship requires a more substantive examination. Despite the importance of the superior-subordinate relationship to the doctrines of command responsibility and superior orders defense, its defining factors have not been clearly articulated within international customary or treaty law. The doctrine of command responsibility and the defense of superior orders however do constitute fairly well-developed areas of law from which certain legal principles concerning subordinate status can be extrapolated. Ultimately, the existence of a superior-subordinate relationship will depend on the court’s

⁸² See generally Bassiouni, *supra* note 21. See also Aryeh Neir, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR AND THE STRUGGLE FOR JUSTICE (1998), at 241, citing *Axtel’s Case*, 84 Eng. Rep. 1060 (1660). (See Tab 21). (See also Tab 26).

⁸³ Bassiouni, *supra* note 21, at 420.

discretion and fact-specific evaluation of the nuances and interplay between the superior and the subordinate.

Most importantly, subordinate status within a military or civilian context hinges on the concept of control: the *de facto* ability of a superior to control the acts of another. Control can be established in a variety of ways and becomes largely a factual determination made by the court or tribunal. Factors that may establish subordinate status include: a superior's ability to punish a subordinate; a superior's ability to issue binding orders to a subordinate; a superior's ability to prevent a subordinate from performing certain acts; and other evidence that a subordinate's acts are directed by a military or civilian superior.

Secondly, formal rank or status can be important in the establishment of a superior-subordinate relationship. However, formal superior-subordinate status, or the lack thereof, is not dispositive. The significance of formal status lies in its clear indication of a superior's duty to control the acts of a subordinate. Thus, the weaker the formal hierarchy within a group, the more evidence of *de facto* control will be needed to demonstrate a superior-subordinate relationship; conversely, the more formal the hierarchy, the less additional evidence of control will be needed. Consequently, it is easier to establish the existence of a superior-subordinate relationship within the military context than in a less regimented civilian context. However, the most recent codifications of international criminal law -

namely, the Rome Statute of the International Criminal Court⁸⁴ and the Statutes of the ICTY⁸⁵ and ICTR⁸⁶ - explicitly recognize the legal significance of subordinate status within a civilian context.

Lastly, the circumstances surrounding the commission of the subordinate's criminal act can impact the court's finding of a legally significant superior-subordinate relationship. These circumstances tend to involve the parties' *mens rea*, the nature of the crimes committed, and the personal characteristics of the superior and the subordinate.

2. *Level of control required*

Virtually all formulations of the command responsibility doctrine and superior orders defense include the notion of the superior's control over the subordinate. As articulated most recently in the *Celebici* decision, "the doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of the subordinate."⁸⁷ The superior orders defense represents the inverse of command responsibility. The defense is available in recognition of those instances when the subordinate is unable to avoid the commander's control due to duress or coercion and thus is forced to carry out an illegal order. A court's finding of a superior-subordinate relationship in either context, therefore, hinges on a demonstration of a superior's *de facto* control over a subordinate.

⁸⁴ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), available in Documents at <http://www.un.org/icc> [*hereinafter*, "ICC Statute"]. (See Tab 9).

⁸⁵ See ICTY statute, *supra* note 23..

⁸⁶ See ICTR statute, *supra* note 80.

a. The Nuremberg Tribunal

As stated above, the London Charter contained no command responsibility provision and provided only for limited use of the superior orders defense: “The fact that the Defendant acted pursuant to an order 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.”⁸⁸ Nine out of the twenty-two initial Nuremberg defendants claimed that their subordinate status exculpated them from guilt because they were merely following the orders of a superior commander.⁸⁹ The Nuremberg Tribunal generally rejected the defendants’ use of the superior orders defense and held them responsible for their own acts. The Tribunal’s judgments are pertinent to the development of the legal requirements for superior-subordinate status as they evaluate how the lack of superior control can render a defendant’s formal subordinate status irrelevant.

Fritz Sauckel, a defendant who pleaded superior order defense at the Nuremberg Trial, was appointed by Hitler to the post of “Plenipotentiary General for the Utilisation of Labour” with authority to put under uniform control “the utilisation of all available manpower, including that of workers

(...continued)

⁸⁷ *Celebici Judgment*, *supra* note 53, § 377.

⁸⁸ Article 8 of Annex to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945. [*hereinafter*, London Charter]. (*See* Tab 2).

⁸⁹ *See* Bassiouni, *supra* note 21, at 470, for a list of individual Nuremberg cases where defendants pled obedience to superior orders.

recruited abroad and of prisoners of war.”⁹⁰ As head of the slave labor program in Germany, Sauckel received instructions from Herman Goering and Adolph Hitler “to take all necessary measures” to achieve the overarching labor needs of the Third Reich.⁹¹ Sauckel’s authority derived from formal decrees, which allowed him to direct the governing authorities (called “Commissioners”) in the various occupied territories to enact local decrees concerning forced labor. These local decrees were enforced by the local police forces of the occupied territories, who then seized, and sent to Germany, the so-called “voluntary” laborers needed to support the Reich’s war efforts.⁹²

Sauckel alleged that sole responsibility for the forced labor program lay with his direct superiors, namely Goering and Hitler. The documentary evidence supported Sauckel’s assertions that he received orders from Goering and Hitler and, as an essentially civilian administrative official, was formally subordinate to them.⁹³ However, despite the fact that Sauckel’s authority and general instructions derived from his superiors, the Tribunal found that:

There is no doubt... that Sauckel had over-all responsibility for the slave labour programme. At the time of the events in question he did not fail to assert *control* over the fields which he now claims were the sole responsibility of others... His regulations provided that his Commissioners should have authority for obtaining labour, and he was

⁹⁰ All information regarding the Tribunal’s judgment and evidence presented in the trial of Fritz Sauckel can be found at <<http://www.yale.edu/lawweb/avalon/imt/proc/judsauk.htm>> (visited August 3, 2000) at 1. (*See* Tab 33).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

constantly in the field *supervising* the steps which were being taken. *He was aware of* ruthless methods being taken to obtain labourers, and vigorously supported them on the ground that they were necessary to fill the quotas. Sauckel's regulations also provided that he had responsibility for transporting the labourers to Germany, allocating them to employers and taking care of them, and that the other agencies involved in these processes were subordinate to him. *He was informed* of the bad conditions which existed... The evidence shows that Sauckel was in charge of a programme which involved deportation for slave labour of more than 5,000,000 human beings, many of them under terrible conditions of cruelty and suffering...⁹⁴

The Court's discussion demonstrates how it examined and evaluated the evidence regarding Sauckel's subordinate status. Sauckel's formal subordinate status to Hitler and Goering, seen in the orders passed to him and his official position, was found by the Nuremberg Tribunal to be irrelevant in light of evidence that showed him asserting control in the field. In addition, Sauckel received only general orders from Goering and Hitler, but then elaborated on them considerably as he directed his own subordinates, the local "Commissioners" and police forces who were responsible for the actual enforcement of the labor decrees. These affirmative acts by Sauckel undermined his claim of subordinate status. The Nuremberg Tribunal failed to assign even mitigating effect to Sauckel's technically subordinate status and he was found guilty and sentenced to hang.

⁹⁴ *Id.* (emphasis added).

In contrast, the Nuremberg Tribunal mitigated defendant Walther Funk's sentence from death to life imprisonment due to his subordinate status.⁹⁵ Like Sauckel, Funk was appointed by Hitler to a high-ranking civilian position: Minister of Economics and President of the Reichsbank. In this capacity, Funk entered into an agreement with Heinrich Himmler whereby the Reichsbank received gold, jewels and currency from the Nazi Schutzstaffel, or SS, to store in bank vaults or sell to pawn shops. Pursuant to this agreement, the Reichsbank received the personal belongings stolen from concentration camp victims, including the gold from eyeglasses, gold teeth and fillings. Funk claimed ignorance about the nature and origin of the gold, but the Tribunal found that "Funk either knew what was being received or was deliberately closing his eyes to what was being done."⁹⁶

The Tribunal however accepted Funk's plea of superior orders, finding that while "he occupied important official positions, Funk was never a *dominant* figure in the various programmes in which he participated."⁹⁷ Funk did what he was ordered to do "without asking questions" and apparently without demonstrating any independent initiative in expanding on the orders received from his superiors. Even though Funk was in a position of some formal superior status, the Nuremberg Tribunal concluded that

⁹⁵ All information regarding the Tribunal's judgment and evidence presented in the trial of Walther Funk can be found at <<http://www.yale.edu/lawweb/avalon/imt/proc/judfunk.htm>> (visited August 3, 2000). (See Tab 29).

⁹⁶ *Id.* at 3.

⁹⁷ *Id.* (*emphasis added*).

he did not have the *de facto* power, or apparently the inclination, to step out from under his own superior's direction.⁹⁸

In general, pleas of superior orders by the Nazi defendants were rejected by the Nuremberg Tribunal due to evidence that the defendants were directly and actively involved in the commission of war-time atrocities. Although the defendants were formally subordinate to Hitler and other superior commanders and did receive orders from them, their initiation of crimes went beyond the orders given. In addition, their ability to direct the acts of their own subordinates demonstrated their positions of *de facto* control and own personal culpability. Thus, a legally significant superior-subordinate relationship did not exist.

b. Subsequent Proceedings

Following the first round of trials at Nuremberg, United States Military Tribunals continued to prosecute war criminals in "Subsequent Proceedings" pursuant to Control Council Law No. 10.⁹⁹ These cases, also known as "the High Command" cases, are particularly instructive in assessing the degree of control necessary to establish a legally significant superior-subordinate relationship. Under the command responsibility doctrine, thirteen German officers who held important staff and/or command

⁹⁸ *Id.*

⁹⁹ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes Against Peace and Against Humanity (December 20, 1945), available at

(continued...)

positions within the German military, were prosecuted.¹⁰⁰ In distinguishing between the culpability of staff officers and command superiors for the acts of subordinates, the Tribunal emphasized the ability to issue binding orders as indicative of superior status:

“Since a Chief of Staff does not have command authority in the chain of command, an order over his signature does not have authority for subordinates in the chain of command... In the absence of participation in criminal orders or their execution within a command, a Chief of Staff does not become criminally responsible for criminal acts occurring therein. He has no command authority over subordinate units.”¹⁰¹

Thus, the Tribunal held that an individual who passes an order down to subordinates, but is powerless to change or enforce the order, does not exercise the degree of control over a subordinate necessary to establish a superior-subordinate relationship. It is the ability to control the subordinates’ acts, as evidenced in the High Command Cases by the issuance of binding orders, that defines the superior-subordinate relationship.

The *Pohl*¹⁰² case articulated another aspect of determining superior control over a subordinate: the superior’s ability to prevent the subordinate’s act. *Pohl* involved the prosecution of Karl Mummmenthey, an officer in the SS, and business manager of an industry conglomerate that utilized

(...continued)

<<http://www.yale.edu/lawweb/avalon/imt.imt10.htm>>, (visited August 6, 2000), [*hereinafter*, Control Council Law No. 10] (*See* Tab 3).

¹⁰⁰ Bassiouni, *supra* note 21, at 432.

¹⁰¹ *High Command* case, cited in *Celebici Judgment*, *supra* note 53, at § 367.

¹⁰² *See USA v. Pohl et. al.* available at <<http://www.yale.edu/lawweb/avalon/imt/pohl.htm>> (visited August 3, 2000); also cited in *Celebici Judgment*, *supra* note 53, § 374. (*See* Tab 32).

concentration camp laborers. Mumenthey defended himself by asserting that he had no control over the conditions to which the laborers were exposed because the concentration camp guards responsible for brutal treatment of the laborers were beyond his scope of authority.¹⁰³ The Tribunal rejected this characterization, however, finding instead, “[i]f excesses occurred in the industries under [Mumenthey’s] control, he was in a position not only to know about them, but to do something.”¹⁰⁴ Thus, regardless of an individual’s capacity to prevent subordinates’ offenses in an official capacity, the *de facto* ability to prevent illegal subordinate conduct will help establish a legally significant superior-subordinate relationship.

c. ICTY and The Celebici Case

The ICTY’s discussion in the *Celebici* decision regarding the responsibility of the four defendants is extremely useful for its evaluation of how *de facto* control helps establish the superior-subordinate relationship.

In the case of Zejnil Delalic, charged as a superior who at times acted with command authority within the prison, the Prosecution failed to provide reliable evidence of Delalic’s command authority or superior responsibility over the prison camp at Celebici and its personnel. Despite Delalic’s position as military commander of the region in which the camp was located, the Tribunal found that he did not have

¹⁰³ *Id.*

¹⁰⁴ *Id.*

de facto control over civilians and/or soldiers working in the camp.¹⁰⁵ The ICTY found that Delalic acted merely as a conduit in transmitting orders to Mucic, the Celebici camp commander, from the Bosnian Supreme Command.¹⁰⁶ He also “coordinated” military and civilian groups, but exercised no independent judgment over subordinates, had no command responsibility over civilians or military, and was not part of any military chain of command. Ultimately, the Tribunal was unable to conclude that Delalic had the requisite *de jure* and *de facto* control required to be held liable as a superior with command responsibility.¹⁰⁷

Deputy commander of the camp Hazim Delic¹⁰⁸ was charged with responsibility for crimes committed by subordinates and with direct responsibility for his own acts. The Tribunal found him not guilty under command responsibility doctrine, but guilty for acts in which he participated. Delic’s defense argued that he was higher in rank than other soldiers at the camp, but that he lacked *de facto* control over their acts and was merely a conduit to transfer orders from his commander Mucic. The Tribunal examined extensive evidence and eyewitness accounts and concluded that Delic was in charge of administrative affairs of the camp and assisted with day-to-day activities, but that this “did not indicate that he had actual command authority in the sense that he could issue orders and punish and

¹⁰⁵ See Ching, *supra* note 57, at 200, 201.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See *Celebici Judgment*, *supra* note 53.

prevent the criminal acts of subordinates.”¹⁰⁹ The court thus found that prison guards were not his subordinates, and Delic was not held responsible for their acts. Even though Delalic was formally superior to the camp guards, he lacked the *de facto* control over their actions. Thus, the Trial Chamber found that no legally significant superior-subordinate status existed.

Another defendant Zdravko Mucic¹¹⁰ was charged with eleven counts of war crimes and crimes against humanity under command responsibility doctrine and direct responsibility for his own acts. The Prosecution presented documentary and eyewitness evidence to show that Mucic had *de facto* control over prison guards, officers and detainees at the camp and *de jure* control per orders of the Bosnian Army.¹¹¹ Due to his position as the *de facto* commander of the camp, the ICTY Trial Chamber found him guilty of all counts. Mucic’s control over all of the other camp personnel, as evidenced by his giving orders to those personnel¹¹², established the existence of a legally significant superior-subordinate relationship.

From these cases, it is clear that the ability to exercise *de facto* control over subordinates is an important factor in defining a superior-subordinate relationship.

3. *The Significance of Formal Status*

¹⁰⁹ See Ching, *supra* note 57, at 193, 194.

¹¹⁰ See *Celebici* Judgment, *supra* note 53.

¹¹¹ *Id.*

¹¹² *Id.*

An individual's formal status as a subordinate has also been viewed by courts as effecting the individual's legal position regarding culpability. However, such formal position is not dispositive to a finding of subordinate status. The weight given to an individual's formal status has decreased over time as the realities of modern-day conflict reflect less hierarchical command structures and generally more *ad hoc*, and chaotic, bases of power.¹¹³ ICTY jurisprudence, as well as the statute of the ICC, demonstrates a definite inclination towards viewing formal rank as merely one of the factors to take into account in the evaluation of command responsibility or superior orders.

The enduring significance of formal status in evaluating a superior-subordinate relationship, however, lies in its assignment of duty to the superior. Bassiouni points to a commander's duty to supervise his/her subordinates as representing the linchpin of command responsibility doctrine.¹¹⁴ A military or civilian superior's duty, both to issue legitimate orders and to prevent subordinates' illegal behavior, is clearly indicated by a superior's formal rank.

a. National military law

Domestic military tribunals have long recognized the importance of superior-subordinate relationship in assessing individual culpability. For example, *Axtell's Case* of 1660 represents one of

¹¹³ See generally, Bassiouni, *supra* note 21. See also, Ching, *supra* note 57.

¹¹⁴ Bassiouni, *supra* note 21, at 419-20.

the earliest examples of a subordinate claiming the defense of superior orders.¹¹⁵ Axtell, the soldier accused of murdering King Charles I, asserted that he was obligated to carry out the orders of his commander. The British common law court hearing the case accepted that a superior-subordinate relationship existed, and based this finding almost exclusively on the formal ranking of the soldier and his commander. Ultimately, however, the court refused to accept the soldier's defense. The judges noted that "[E]ven a common soldier must have known that it was an act of treason to participate in the execution of one's king."¹¹⁶

b. Tokyo Tribunal

The significance of the *Yamashita* judgment lies in its assessment of the importance of formal status in establishing the existence of a superior-subordinate relationship. General Yamashita, as the commanding general of the Japanese forces in the Philippines, was charged with having "unlawfully disregarded and failed to discharge his duty to control the operations of the members of his command...".¹¹⁷ Yamashita's defense argued that he did not know of his subordinate's acts and, due to the formalistic structure of the Japanese military and the successful Allied destruction of communication lines, had no *de facto* control over their day-to-day conduct. The Tokyo Tribunal admitted that "taken

¹¹⁵ Neier, *supra* note 82, at 241.

¹¹⁶ *Id.* See generally Bassiouni, *supra* note 21, at 420-435 for a discussion of how this doctrine applies in U.S. and U.K. military law.

¹¹⁷ Green, *supra* note 26, at 336.

at full face value, the testimony indicates that Japanese senior commanders operate in a vacuum, almost in another world with respect to their troops...¹¹⁸. The Tokyo Tribunal focused instead, however, on the widespread and horrific nature of the offenses and on Yamashita's dereliction of duty to investigate, prevent or punish his subordinates' acts. The Tokyo Tribunal stated that when offenses are widespread and "there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them."¹¹⁹ Notably, in finding Yamashita guilty as a commander, the Tokyo Tribunal not only focused on Yamashita's formal status as commanding general of the Japanese forces in the Philippines, but also looked to the widespread nature of the atrocities committed by Japanese forces for which Yamashita was derelict in not preventing.

c. Protocol I

Despite the use of the command responsibility doctrine at Nuremberg and Tokyo, the Geneva Conventions of 1949 contained no explicit provision on superior-subordinate relations and liability.¹²⁰ In addition, the emphasis on *de jure* command and formal status applied at Nuremberg and Tokyo

¹¹⁸ *Id.* at 336, 337.

¹¹⁹ *Id.* at 337.

¹²⁰ *See* Ilias Bantekas, *supra* note 35, at 2.

failed to capture the types of superior-subordinate relationships seen in civil wars, guerrilla warfare and other internal conflict situations that have predominated during the post-World War II era.¹²¹

Protocol I to the Geneva Conventions,¹²² which entered into force in December, 1978, was the first international treaty to explicitly address the significance of a superior-subordinate relationship in assessing individual culpability for international crimes. The use of “superior” in Article 86, juxtaposed against the more specific designation of “military commander” in Article 87, suggests that the legal significance of the superior-subordinate relationship extends into the civilian sphere. This reading is confirmed by the International Committee of the Red Cross Commentary on Protocol I, which interprets Article 87 thus:

The concept of superior is broader [than in the military context] and should be seen in terms of a hierarchy encompassing the concept of control... . A superior may be held liable for the commission of an offense if ... 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.¹²³

By allowing for a notion of civilian command authority, beyond a strict notion of military hierarchy, the doctrine of command authority comes to rely more on a notion of *de facto* rather than *de jure* control. Thus civilian commanders in this context are subjected to the same fact-intensive inquiry as their military

¹²¹ See *Id.* See also Fenrick, *supra* note 27, at 118.

¹²² See generally Protocol I, *supra* note 36.

¹²³ See Fenrick, *supra* note 27, at 120, *citing* Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949, 1005-16.

counterparts when assessing the issue of criminal liability, with the fact-finders investigation focusing directly on the question of whether the civilian commander had actual control over the actions of the subordinate. The development of this doctrine recognizes the changing face of warfare in the late twentieth century.

4. Implication of superior-subordinate relations for the ICTR

Since the existence of a legal significant superior-subordinate relation, as stated above, hinges upon the notion of control, for superiors in Rwanda to be found criminally liable under the doctrine of command responsibility, the prosecution must provide a factual basis for how command authority functioned in Rwanda. Given that the genocide was executed largely outside the parameters of a formal military hierarchy, the evolution of the doctrine of command responsibility from a *de jure* to a *de facto* standard in international law will be helpful to the prosecution when it attempts to hold leaders of the genocide liable for the actions of their subordinates. However, the ICTR should be wary of the precedent set in the *Celebici* decision where the Trial Chamber of ICTY refused to hold Delic liable as a commander. In the case of *Delic*, the Trial Chamber of the ICTY looked to whether he exercised independent judgment in executing his command over subordinates at the prison camp or whether he was merely a conduit in transmitting orders.¹²⁴

¹²⁴ See Ching, *supra* note 57, at 200, 201.

With regard to the superior order defense, the concomitant of command responsible, the ICTR can look to early precedents set at Nuremberg to see how that tribunal was weary of allowing this defense in those instances where subordinates exercised any independent or affirmative will. The extent to which defendants in Rwanda engaged in criminal acts beyond following specific narrow commands will make it very difficult for those subordinates to maintain the defense of superior orders.

C. When subordinate status is established, what is the subordinate’s culpability for war crimes, crimes against humanity and genocide?

1. Superior orders defense defined

Historically, the defense of superior orders has been used by subordinates trying to relieve themselves of criminal liability for acts occurring under a superior’s orders. This defense does not relieve subordinates from liability, but it does allow for mitigation in punishment. As first codified in Article 8 of the London Charter, the doctrine states “[t]he 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 desires.”¹²⁵ This language is replicated in Control Council Law 10 under which the post-Nuremberg Allied prosecutions were

¹²⁵ Bassiouni, *supra* note 21, at 469 *quoting* Article 8 of Annex to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Article 8 (London Charter).

held.¹²⁶ Further, it should be noted that obedience to superior orders is not an absolute mandatory mitigating circumstance, but rather is a discretionary consideration of the court.

In the *Einsatzgruppen* trial, one of the Control Council Law Trials, the Court directly addressed the question of the superior orders defense. In addressing this question, the court stated that,

“[a] soldier is a reasoning agent...It is a fallacy of widespread consumption that a soldier is required to do everything his superior officer orders him to do... The subordinate is bound to obey only the lawful orders of his superior and if he accepts a criminal order and executes it with malice of his own, he may not plead Superior Orders in mitigation of his defense... If one claims duress in the execution of an illegal order, it must be shown that the harm caused by obeying the illegal order is not disproportionately greater than the harm which would result from not obeying the illegal order. It would not be an adequate excuse... if a subordinate, under orders, killed a person known to be innocent, because by not obeying it he himself would risk a few days of confinement.”¹²⁷

Thus, in *Einsatzgruppen*, the court seemed unwilling to even address the question of mitigation if the subordinate, as reasoning agent, had the ability to realize the criminality of the order upon which he based his defense. Further, the reasoning in this case indicates that even while acting under superior orders, if the subordinate acts “with malice of his own” or in disproportion to potential harm he would face by disobeying orders, a court should not consider mitigation in punishment.

2. *ICTY*

¹²⁶ Control Council Law No. 10, *supra* note 96.

¹²⁷ Bassiouni, *supra* note 21, at 473-4, *quoting*, 4 Control Council Law Trials 470 (1947).

Article 7 of the 1998 amended Statute for the ICTY mirrors the earlier superior orders principle announced at Nuremberg. Specifically, Article 7, entitled “Individual criminal responsibility,” states “[t]he fact that an accused person acted pursuant to an order of a Government 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.”¹²⁸

The ICTY had the opportunity to interpret this article in the case of Esad Landzo, a low level guard at the Celebici prison camp located in the Konjic municipality in central Bosnia and Herzegovina.¹²⁹ Landzo was indicted in March 1996. Landzo was charged with direct responsibility for war crimes and crimes against humanity, including willful killing and murder, torture, cruel treatment, and causing great suffering or serious injury.¹³⁰ In his defense, Landzo argued that his subordinate status as a low level prison guard mitigated his culpability because he “committed the offenses established against him under the orders of his superiors.”¹³¹ The ICTY, however, refused to mitigate Landzo’s sentence, stating in its judgment that, “[e]ven were it to be accepted that Mr. Landzo was, on occasion, ordered to kill or mistreat prisoners within the prison camp, the evidence does not indicate that he

¹²⁸ See generally ICTY Statute, *supra* note 23. This language is nearly identical to Article 6 of the ICTR Statute.

¹²⁹ See *Celebici Judgment*, *supra* note 53.

¹³⁰ *Id.*

¹³¹ *Id.* at §1282.

performed these tasks with reluctance.”¹³² To the contrary, the Trial Chamber noted, Landzo appeared to take “some perverse pleasure in the infliction of great pain and humiliation.”¹³³

As in the *Einsatzgruppen* case, when applying the superior orders defense to the question of mitigation, the Court focused upon the agency of the subordinate in question. In the *Landzo* case, the ICTY Trial Chamber specifically highlighted Landzo’s mental state when he was committing the atrocities in question. In looking to Landzo’s motivation, the ICTY Trial Chamber engaged in a fact specific analysis and refused to apply a static understanding of whether Landzo’s actions resulted from following direct superior orders. Rather than addressing the question of whether the subordinate merely acted under orders, the Court engaged in an inquiry into what the subordinate was thinking at the time he committed the atrocities and how he conducted himself at the time while engaging in these atrocities. The inquiry therefore went directly towards the subordinate’s state of mind.

The case of Drazen Erdemovic gives further guidance of how the ITCY has viewed the question of mitigation.¹³⁴ Erdemovic, a “low-ranking” member of the Bosnian Serb Army pleaded guilty to the

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Prosecutor v. Drazen Erdemovic*, IT-96-22-T, 29 November 1996. See Summary of the Judgment Delivered on 29 November 1996 in the Case of Drazen Erdemovic, available at <<http://www.un.org/icty/pressreal/erd-sum961129e.htm>> (visited June 19, 2000). (See Tab 28).

charge of murder with the defense of superior orders seeking mitigation in his sentence.¹³⁵ Erdemovic's military unit was responsible for the execution of 1,200 Muslims following the fall of Srebrenica (of whom Erdemovic was charged with between 10 and 100 murders).¹³⁶ As part of his defense, Erdemovic pleaded "urgent necessity stemming from duress and a superior order."¹³⁷ In considering the probative value of Erdemovic's defense, the court considered the following factors: i) whether or not the accused could have avoided the situation; ii) whether the accused was confronted with an insurmountable order which he had no way of eluding; iii) whether the accused or one of his immediate family members was placed in danger of immediate death or death shortly afterwards; and iv) whether the accused possessed the moral freedom to oppose the orders he had received.¹³⁸

In the sentencing judgment, the Trial Chamber of the ICTY accepted that duress existed in the case, while reiterating that "duress does not afford a complete defense to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings," but may be taken into account only by way of mitigation.¹³⁹ The decision of the Trial Chamber noted testimony of the defendant including the brutal nature of the battle for Srebrenica, the attendant environment of soldiers killing pursuant to superior orders, the accused's vulnerable position as a Bosnian Croat in the Bosnian

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 7.

¹³⁸ *Id.*

Serb Army, and the fact that he had previously refused to comply with orders from his commanding officer.¹⁴⁰ The Chamber in accepting Erdemovic's guilty plea sentenced him to five years imprisonment recognizing various mitigating circumstances including Erdemovic's low military rank, his remorse, his cooperation with the Trial Chamber, his youth, the fact that he did pose a future threat, and duress.¹⁴¹ The court gave no further indication as to the weight these various factors played in arriving at such a light sentence.

3. *International Criminal Court*

Article 33 of the Rome Statute of the International Criminal Court entitled "Superior orders and prescription of law" offers a further elaboration on this defense than previously seen. The text of Article 33 specifically states the following:

"1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful

(...continued)

¹³⁹ *Id.* at 12 .

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 13-14.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.”¹⁴²

As Bassiouni notes, Article 33 retreats from the formulation of the ICTY and ICTR first by emphasizing in paragraph 1(a) the notion of legal obligation to obey superior orders and second by allowing for a defense of ignorance of the “unlawful” nature of the order in 1(b).¹⁴³ Notably however, and of great significance to the work of the ICTR, the formulation offered by the ICC is “the first to exclude ‘orders to commit genocide or crimes against humanity,’ from the required knowledge of the unlawful nature of the order.”¹⁴⁴ Thus, the extent to which the prosecution in the ICTR is able to prove the factual questions that the defendants in question (arguing the defense of superior orders) were following “orders to commit genocide” of the Tusti population, at least based on the ICC formulation, defense of superior orders would not be available.

4. *The Related Concept of Duress*

The general concept of duress in criminal law states that if an actor is under pressure of an unlawful threat from another person to harm that person (or a third person), and that actor commits what would otherwise be a crime, he may be relieved of criminal liability.¹⁴⁵ Unlike the defense of necessity where pressure is brought to bear on an actor because of natural causes, duress or coercion is

¹⁴² See generally ICC Statute, *supra* note 84, at Article 33.

¹⁴³ Bassiouni, *supra* note, at 481.

¹⁴⁴ *Id.*

the product of compulsion brought about by one person against another.¹⁴⁶ While most legal systems recognize the defense of duress, penal codes vary with respect to certain crimes for which the defense will not apply, the nature and type of threats required, the immediacy of the harm likely to occur to the actor, the reasonableness of the belief, and the harm inflicted on others.¹⁴⁷ As Bassiouni notes, for policy reasons, most national laws do not recognize the defense for the serious crimes such as murder.¹⁴⁸

The Rome Statute of the International Criminal Court also addresses the concept of duress. In Article 31(1)(d), entitled “Grounds for excluding criminal responsibility,” the statute states that a person shall not be criminally responsible if, at the time of that person’s conduct:

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid that threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person’s control.¹⁴⁹

The effect the ICC Article 31(d) is to limit the concept of duress to those situations where the criminal act at issue causes less harm than the one sought to be avoided. While this formulation excludes

(...continued)

¹⁴⁵ *American Jurisprudence*, 2nd Edition - Vol. 40 § 115 Duress, Coercion, or Compulsion (1999). (See Tab 10).

¹⁴⁶ Bassiouni, *supra* note 21, at 484.

¹⁴⁷ *Id.* at 486.

¹⁴⁸ *Id.*

decision-makers or others with authority within a chain of command, it still leaves open the possibility that subordinates could utilize this article to claim duress as a defense.¹⁵⁰ However, given this provision's limitation to only exclude from liability those acts which cause the least harm, it seems that such a provision would be inapplicable to charges of genocide and crimes against humanity.

In the notorious post-World War II case of Paul Touvier, the French court considered the defendant's defense of duress. Touvier was an official in the Milice, a special paramilitary force created by the Vichy government that worked in cooperation with the Gestapo to combat the Resistance and other enemies of the Vichy state.¹⁵¹ Touvier was by all accounts "an active and enthusiastic participant in the organizations fighting the French Resistance."¹⁵² Touvier was charged with crimes against humanity and after years of litigation was eventually sentenced to life imprisonment for his participation in a massacre at Rillieux in France in 1944.¹⁵³ After exhausting numerous procedural avenues, Touvier's attorney, in a last ditch effort, pleaded duress claiming that the pressure of the Gestapo on Touvier was so great that his actions were justified exculpating him from criminal liability.¹⁵⁴ The French court

(...continued)

¹⁴⁹ ICC Statute, *supra* note 84, at Article 31(d). *See also*, Bassiouni, *supra* note 21, at 490-1.

¹⁵⁰ Bassiouni, *supra* note 21, at 491.

¹⁵¹ Leila Sadat Wexler, "The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again", 32 COLUM. J. TRANSNAT'L L., 323 (1994). (See Tab 24).

¹⁵² *Id.* at 323.

¹⁵³ *Id.* at 293.

¹⁵⁴ *Id.*

summarily rejected Touvier's duress defense noting that Touvier had joined the Milice of his own free will, knowing that its motto included a promise to struggle "against the Jewish leper and for French purity."¹⁵⁵ Notably, this decision relies upon Touvier's prior agency in joining a paramilitary organization with a violent and racist agenda. Regardless of pressure later exerted on Touvier by the Gestpo, the defense of duress was not available to him because of his willful act of joining the Milice in the first place.

5. *Implications of Superior Orders Doctrine for the ICTR*

The evolution of the superior orders defense demonstrates that only under narrow circumstances will courts consider the defense in the mitigation of punishment. As a baseline, as demonstrated by the Statute of the ICC, courts and tribunals are asked to assess whether the subordinate in question is legally obliged to obey orders and whether those orders are manifestly lawful. In the context of Rwanda, where the killings were often the act of ordinary citizens, albeit acting under "orders" or instructions of superiors, it is difficult to envision how defendants could fashion a defense that they were either 1) legally obliged to follow such orders or 2) that such orders were legal. Past courts and tribunals, most notably the ICTY, when considering the defense have looked specifically to whether the charged defendant was in a position to exercise any independent agency when committing the crimes charged. Both in the cases of *Landzo*, and earlier in the case *Touvier*, the courts rejected

¹⁵⁵ *Id.* at 353.

the defense because of the perceived independent agency of these individuals and the willful manner in which they engaged in atrocities - beyond the mere following of orders. The case of *Erdemovic* is perhaps a more difficult precedent for the ICTR because of the lack of clear guidance given by the ICTY for mitigation of his punishment. In this instance, it seemed that the ICTY Trial Chamber was largely swayed in its sentencing of the defendant by the defendant's degree of remorse and desire to cooperate with the its investigation, coupled with the circumstances of his low-rank and the view that he posed no future threat, when sentencing him to merely five years imprisonment. Accepting factually that Erdemovic engaged in atrocities under conditions of duress was merely one factor the ICTY Trial Chamber considered in his punishment. In summary, to prevail on the superior orders defense a defendant must overcome a threshold inquiry which proves they were in a position of subordination and acted under duress. Beyond that threshold, the ICTR, when considering mitigation of punishment, will need to engage in a very fact specific analysis which balances the various equities discussed herein.

IV. Conclusion

Precedent exists in international law to hold superiors in Rwanda, both military and civilian, criminally liable for the issuance of illegal orders and in those contexts where they failed to take action to prevent the illegal acts of their subordinates. The extent to which such leaders will be held responsible for the criminal actions of their subordinates will depend on the existence of a legally significant superior-subordinate relationship which hinges on the level of control exercised by the superior over those subordinates. As to the issue of whether subordinates in Rwanda can prevail in asserting a claim of

mitigation in punishment, based on the defense of following superior orders, the ITCR is required by international law to examine whether these subordinates exercised any independent agency when committing the crimes in question. Tribunals in the past have looked to a variety of fact specific circumstances, beyond simply the question of subordination, when dealing with mitigation in sentencing.