

**NEW ENGLAND SCHOOL OF LAW
INTERNATIONAL WARCRIMES PROJECT
RWANDA GENOCIDE PROSECUTION**

**MEMORANDUM FOR THE UNITED NATIONS
OFFICE OF
THE PROSECUTOR**

**ISSUE # 10: DEFINING WHO IS A SUBORDINATE,
UNDER THE INTERNATIONAL DOCTRINE OF COMMAND
RESPONSIBILITY.**

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Topic:

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

Issue:

This memorandum examines who is considered a subordinate under the international doctrine of command responsibility.

Summary of Conclusion:

The ICTR may rely on international as well domestic law in its ongoing attempt to bring all those who participated in the genocide in Rwanda to justice. It will be the ICTR's burden to prove the necessary elements required to establish a superior-subordinate relationship, as well as establishing the superior's level of control over the subordinate. Based on international and domestic precedent, both military and civilian superiors may be criminally responsible for the unlawful acts of their subordinates. The final report of the commission of experts on Rwanda concluded that the "duty of a superior to ensure the lawful conduct of subordinates is explicitly addressed in Protocol I, which governs international armed conflict."¹ Given the commission's application of the Protocol, as well as the precedent the tribunal has established in the prosecution of both military and civilian superiors, it would appear that all those responsible for the atrocities which occurred in Rwanda will not be able to shield themselves from being brought to justice, regardless of whether they participated in the genocide through a superior or

¹ See VIRGINIA MORRIS AND MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR Rwanda 261(1998). [Reproduced in the accompanying notebook at Tab 1]

subordinate capacity. The level of control over an individual is the essential requirement that establishes a superior-subordinate relationship.

The focus of this memorandum is to determine who is a subordinate under the doctrine of command responsibility. The elements of establishing the superior-subordinate relationship will be discussed throughout the memorandum as well as an analysis of the decisions of the national court's and of the various tribunal decisions that have applied the doctrine of command responsibility and subsequently defined who is considered a subordinate within the context of the doctrine.

Factual Background:

There are three categories of individuals who participated in varying degrees in the Rwandan Genocide. The first group consisted of the planners, who were high-level government officials and other influential individuals that planned and ordered the implementation of the genocidal policies.² The second group consisted of the “military” superiors and their subordinates, including members of the militia, the Rwandan Armed Forces and the Presidential Guard, who supervised and carried out the actual killings.³ Local officials were also responsible for the success of the genocidal killings because of their participation in the distribution of weapons to the population; local officials also allowed the curfew to be ignored by the killers and called meetings in which they encouraged the Hutus to kill the Tutsis.⁴ The third group of individuals who participated in the genocidal killings were the unwilling accomplices who were forced to kill their

² *Id.* 55. [Reproduced in the accompanying notebook at Tab 1].

³ *Id.* at 57. [Reproduced in the accompanying notebook at Tab 1].

⁴ *Id.* [Reproduced in the accompanying notebook at Tab 1].

neighbors, family and friends. This third category of individuals was forced to participate in the killings by the first two groups of individuals.⁵

The militias were tightly organized throughout Rwanda, inciting civilians to participate in the massacres.⁶ In many instances the Hutu civilians were forced to kill or be killed. The organizers of the massacre wanted to create a new Rwanda free of the Tutsi population and attempted to do so through their shared responsibility in the elimination of the Tutsi race.⁷ It was the goal of the Hutu extremists to have all of the Hutus play a part in the murders, encouraging them to kill in a collective commode that claimed the lives of men, women and children alike.⁸ Within a period of three months over 800,000 Tutsis and between 10,000 and 30,000 Hutu were killed.⁹

Command Responsibility Defined:

The doctrine of command responsibility is based on a commander's responsibility for the unlawful acts of his/her subordinate. The doctrine now clearly exists in conventional and customary international law.¹⁰ It is a principle that is now at least five centuries old.¹¹ The doctrine and the defense of superior orders is based on the establishment of a *de facto* or *de jure*, hierarchical relationship. The *de jure* and *de facto* factors are important to the courts in establishing whether the superior occupies a military

⁵ *Id.* at 58. [Reproduced in the accompanying notebook at Tab 1].

⁶ *Id.* [Reproduced in the accompanying notebook at Tab 1].

⁷ PAUL J MAGNARELLA, JUSTICE IN AFRICA, RWANDA'S GENOCIDE, ITS COURTS, AND THE UN CRIMINAL TRIBUNAL, 20. [Reproduced in the accompanying notebook at Tab 2].

⁸ *Id.* [Reproduced in the accompanying notebook at Tab 2].

⁹ *Id.* 21. [Reproduced in the accompanying notebook at Tab 2].

¹⁰ M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law (1992) 389 [Reproduced in the accompanying notebook at Tab 3].

¹¹ Francisco Forrest Martin & Richard J. Wilson, The Rights International Companion to Criminal Law & Procedure, An International Human Rights and Humanitarian Law Supplement 75. [Reproduced in the accompanying notebook at Tab 5]

or civilian position of authority over the subordinate as well as determining the level of control the commander retains over the subordinate. This concept of control is essential to establishing that a superior-subordinate relationship exists.

Developments such as the Nuremberg Tribunal, the Tokyo Tribunal, the 1977 additional Protocol, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda have provided guidance on just how far reaching command responsibility extends and further reinforces its status as a general principle of International humanitarian law as well as human rights law.¹² Customary international law recognizes the principle that if a superior officer ordered a subordinate to commit a violation of international human rights or humanitarian law or knew of the commission of a violation by his subordinate and failed to prevent its commission, the superior officer is individually criminally responsible.¹³ This principle also requires that upon learning of the illegal act committed by the subordinate the superior must take action to punish him/her for the criminal activity.

The doctrine of command responsibility consists of three parts:

First, the existence of a superior-subordinate relationship; second, the *mens rea* which establishes criminal intent through the superiors knowledge (the knew or should have known element) that the criminal act was about to be committed or had been committed; and lastly, the *actus reus* which establishes that the superior engaged in the criminal act

¹² *Id.* 75 [Reproduced in the accompanying notebook at Tab 5].

¹³ *Id.* 75 – 76. [Reproduced in the accompanying notebook at Tab 5].

by giving the illegal order or that the superior failed to prevent the criminal act or take the appropriate action to punish the perpetrator.¹⁴

Establishing criminal responsibility for a commander's failure to act is based on the commander's failure to act; (a) in order to prevent the unlawful conduct, (b) provide for general measures likely to deter the unlawful conduct; (c) investigate allegations of unlawful conduct; and (d) prosecuting and punishing the perpetrator of the unlawful behavior.¹⁵

The UN War Crimes Commission for the former Yugoslavia in its final report provided a guide to establish criminal intent for political or military leaders that had not directly ordered the unlawful acts committed by their subordinates.¹⁶ The commission developed a list of elements the court may consider when determining whether a commander must have known about the acts of his subordinates; they are:

- a) The number of illegal acts.
- b) The types of illegal acts.
- c) The scope of illegal acts.
- d) The time during which 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.¹⁷

¹⁴ Statute of the International Tribunal for Rwanda, Art. 6(3), S/RES/955, (Annex), 8 November 1994, cited in John J. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* 476-503 (1999) [hereinafter ICTR Statute]. [Reproduced in the accompanying notebook at Tab 6].

¹⁵ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 437-8 (2^d ed. 1999), [Reproduced in the accompanying notebook at Tab 7].

¹⁶ ARYEH NEIER, *PUTTING CRIMINALS IN THE DOCK*, 237 (1998), [Reproduced in the accompanying notebook at Tab 8].

¹⁷ *Id.* at 237. [Reproduced in the accompanying notebook at Tab 8].

Under the Rwanda Tribunal Statute a superior may be criminally responsible for the failure to act in relation to a crime committed by a subordinate under Article 6(3).¹⁸ “The negligence of the superior must rise to such a level that it can be equated with the criminal intent or *mens rea*, which is an essential requirement for the prosecution and punishment of the perpetrators of grave breaches under the Geneva Conventions.”¹⁹ The subordinate remains individually responsible for his/her criminal behavior under Article 6(1) of the ICTR statute.

In reaction to the mistreatment of prisoners of war during World War II, a number of national and international laws were enacted establishing command responsibility.²⁰ The Nuremberg and the Tokyo International Military Tribunals were precedent in the application of the doctrine in that they also tried and convicted superiors based on the crimes of their subordinates, laying the foundation for the law of the Yugoslavia and Rwanda Tribunals.²¹

Legal Discussion:

It is appropriate to begin the discussion of determining who is a subordinate under the doctrine of command responsibility within the realm of international criminal law by reviewing the provisions governing the subject within the various international treaties and statutes. The general principle of law, that commanders are individually criminally responsible for the violations committed by their subordinates, had its

¹⁸ See 1 Morris and Scharf, *supra* note 1, 256. [Reproduced in the accompanying notebook at Tab 1].

¹⁹ *Id.* at 257. [Reproduced in the accompanying notebook at Tab 1].

²⁰ See Martin and Wilson, *supra* note 11, at 73. [Reproduced in the accompanying notebook at Tab 5].

²¹ TIMOTHY L.H. McCORMACK, FROM SUN TZU TO THE SIXTH COMM.: THE EVOLUTION OF AN INTERNATIONAL LAW REGIME, THE LAW OF WAR CRIMES, NATIONAL AND INTERNATIONAL APPROACHES (1997), citing William Parks 77. [Reproduced in the accompanying notebook at Tab 9]

beginnings in as early as 1474 when Peter von Hagenbach was convicted and executed for atrocities committed under his command in Breisach, Austria.²²

The actual principle of command responsibility was recognized as early as 1907 in the Hague Convention.²³ Article IV of The Hague Convention of 1907 states that “The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following condition: (1) To be commanded by a person responsible for his subordinates. . . .”²⁴ The adoption of the Hague convention of 1899 and 1907 regulating the conduct of war established the first binding international laws governing the actions of states during times of war.²⁵

It is believed that the doctrine of command responsibility for control of military troops in armed conflict was recognized in the United States in 1775.²⁶ Language establishing the doctrine in 1775 existed in Article 11 and 12 of the Massachusetts Articles of War, and was adopted by the Provisional Congress of Massachusetts Bay.²⁷ The doctrine of military command responsibility was applied in several cases by the

²² *Id.* [Reproduced in the accompanying notebook at Tab 9].

²³ VIRGINIA MORRIS AND MICHAEL SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA : A DOCUMENTARY HISTORY & ANALYSIS 98 [Reproduced in the accompanying notebook at Tab 10].

²⁴ *See* 1 Morris and Scharf *supra* note 1, at 248, [Reproduced in the accompanying notebook at Tab 1].

²⁵ *See* McCormack *supra* note 21, at 40. [Reproduced in the accompanying notebook at Tab 9].

²⁶ *Id.* [Reproduced in the accompanying notebook at Tab 9].

²⁷ *Id.* at 40. Citing Parks, Reproducing Article 11 of the Massachusetts Articles of war: Every Officer commanding, in quarters, or on a march, shall keep good order, and to the utmost of his power, redress all such abuses or disorders which may be committed by any Officer or Soldier under his command; if upon complaint made to him of Officers or Soldiers beating or otherwise ill-treating any person, or committing any kind of riots to the disquieting of the inhabitants of this continent, he, the said commander, who shall refuse or omit to see Justice done to this offender or offenders, and reparation made to the party or parties injured, as soon as the offender’s wages shall enable him or them, upon due proof thereof, be punished, as ordered by General Court-Martial, in such manner as if he himself had committed the crimes or disorders complained of. [Reproduced in the accompanying notebook at Tab 9].

United States domestic and military courts throughout the Nineteenth Century.²⁸ Article 12 was first applied in the 1865 United States trial of Captain Henry Wirz in response to his ordering the torture, maltreatment and execution of war prisoners in his custody while he was acting commandant of a prisoner of war camp.²⁹ The conviction of Captain Wirz is consistent with the conviction by the ICTY in the *Celebici* judgment discussed later in the memorandum. Captain Wirz was found to have exercised the required military control over his troops to support the existence of a superior-subordinate relationship.

In 1851 the United States Supreme Court upheld the lower court's decision to hold a military commander civilly responsible for an unlawful act despite the commanders claim that he received illegal orders from his superiors and passed the orders on to his subordinates.³⁰ Under international law this type of military hierarchy of control demonstrated that a superior-subordinate relationship was in place at the time the illegal orders were acted upon based upon the internationally recognized notion that military troops are subordinate through their position, to their military commanders.

The Treaty of Versailles was the first international instrument to articulate in express terms the legal requirement of prosecuting commanders for the illegal acts of his subordinates.³¹ Articles 227 and 228 of the Treaty of Versailles envisioned the creation of a tribunal to prosecute high ranking German official for violations of the laws

²⁸ *Id.* [Reproduced in the accompanying notebook at Tab 9].

²⁹ See Martin and Wilson *supra* note 11 at 72, citing William Parks, 62 Mil. L. Rev. 1, 5 (1973).

[Reproduced in the accompanying notebook at Tab 5]

³⁰ See McCormack *supra* note 21 at 40, citing William Parks, citing Mitchell v Harmony, [Reproduced in the accompanying notebook at Tab 9].

³¹ See Martin and Wilson *supra* note 11, at 72. [Reproduced in the accompanying notebook at Tab 5].

and customs of war during World War I.³² “The possibility of imposing criminal responsibility on persons in positions of authority who tolerated or failed to prevent violations of the laws or customs of war committed during the First World War was recognized by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.”³³ Consistent with the United Nations Human Rights Commission’s report, the Military Tribunal, while prosecuting major war criminals in the war crimes trials following the Second World War, asserted that a commander may be held responsible for failing to prevent crimes committed by their subordinates.³⁴

On December 9, 1948 the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter the Genocide Convention). Article III of the convention defines genocide as;

any of the following acts committed with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such, a) Killing members of the group; b) causing serious bodily or mental harm to the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group.³⁵

Article IV of the Genocide Convention applies allocated criminal responsibility to individuals who participate in the illegal acts of article III.³⁶ Article IV of the

³² *Id.* 72 – 73.

³³ *See* Morris & Scharf, *supra* note 23, at 98. [Reproduced in the accompanying notebook at Tab 10]

³⁴ *Id.* [Reproduced in the accompanying notebook at Tab 10].

³⁵ Convention of the Prevention and Punishment of the Crime of Genocide. Adopted by the U.N. General assembly (9 December 1948), available at www.yale.edu/cgp/dccam/genocide (visited 2/11/01) [Reproduced in the accompanying notebook at Tab 11]

³⁶ Article III of the Genocide Convention states that “ The following acts shall be punished: a) genocide; b) Conspiracy to commit genocide; c) Direct and public incitement to commit genocide; d) Attempt to commit genocide; e) Complicity in genocide.” Article IV states that “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”Convention on the Prevention and Punishment of the Crime of

Convention clearly establishes that persons committing genocide will be punished, regardless of their political position.³⁷ Rwanda was among the nations that ratified the convention following the genocide of 1994.

The 1949 Geneva Conventions and the 1977 Additional Protocols to the Convention has a similar clause which states that a commander, who has authority over his troops, is ultimately responsible for the unlawful acts they commit.³⁸ The Protocol also states that if the military commander contributes directly or indirectly to the unlawful conduct of his subordinates, then he may be individually criminally responsible for the unlawful act along with the subordinate.³⁹ Once again it is emphasized that the concept of authoritative control over military troops is what establishes the superior-subordinate relationship.

“The principle of command responsibility was recognized for the first time in an international instrument with the adoption of Protocol 1 to the Geneva Convention in 1977 – more than three decades after World War II.”⁴⁰ This international instrument was instrumental to the development of the law of command responsibility in two ways: First, the duty of a commander to prevent, suppress and to punish violations committed by subordinates is set forth in Article 87 of the Protocol. Second, the responsibility of a

Genocide, 78 U.N.T.S.277, available at www.Yale.edu/cgp/dccam/genocide.htm (visited 02/11/01).[Reproduced in the accompanying notebook at Tab 11].

³⁷ *Id.* Article IV, Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.[Reproduced in the accompanying notebook at Tab 11].

³⁸ See 1 Morris and Scharf, *supra* note 1, at 250, citing, Claude Pilloud et al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949, at 1018, reproduced in *Id* 250. [Reproduced in the accompanying notebook at Tab 1].

⁴⁰ *Id.* 255. [Reproduced in the accompanying notebook at Tab 1].

superior for the failure to prevent or to repress such violations is provided for in article 86(2) of the Protocol, which states that:

The fact that a breach of the Convention or of this Protocol was Committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.⁴¹

International Military Tribunal – Nuremberg:

The London Agreement of August 8, 1945 established the International Military Tribunal.⁴² After World War II, the allies conducted trials in Germany and Japan which convicted officer's engaged in the war under the doctrine of command responsibility.⁴³

The *High Command Case* before the Control Council Law #10 at Nuremberg defined the standard by which command responsibility should be found:

For a defendant to be held criminally responsible there must be a breach Of some moral obligation fixed in international law. The Tribunal specified That for an order to be inherently criminal it must be one that is criminal on its face, or which the commander is shown to have known was criminal.⁴⁴

The Principles of the Nuremberg Tribunal, were developed by the U.N. to codify the Nuremberg precedent. The Nuremberg Principles state that any person committing an

⁴¹ *Id.* citing Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of the International Armed Conflicts, 8 June 1977, arts 86 and 87. 1125 U.N.T.S. 3. As indicated in the commentary to article 86, the term "superior" is intended to cover all persons in the hierarchy who exercise the necessary degree of control over a subordinate. [Reproduced in the accompanying notebook at Tab 1].

⁴² M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: the Need to establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J 11, 25. [Reproduced in the accompanying notebook at Tab 12]

⁴³ See Martin and Wilson *supra* note 11, at 74. [Reproduced in the accompanying notebook at Tab 5].

⁴⁴ See Bassiouni *supra* note 15, at 510 citing XI trials of War Criminal. [Reproduced in the accompanying notebook at Tab 7].

act which constitutes a crime under international law is responsible and subject to the appropriate judicial punishment.⁴⁵

This concept of liability is relevant to the Rwanda genocide because it would allow the tribunal to prosecute many of the individual commanders who issued illegal orders to subordinates with the knowledge that such orders were to commit criminal acts. Acts of genocide are criminal under international law, and the Tribunal would be justified in prosecuting such commanders if there is evidence to support a criminal act has occurred, as well as sufficient evidence to establish that a superior-subordinate relationship exists.

The International Military Tribunal for the Far East -Tokyo Tribunal

In the International Japanese War Crimes trial before the International Military Tribunal for the Far East (hereafter IMTFE), twenty two former Japanese leaders were charged with crimes against the peace, murder, conspiracy to commit murder, war crimes, and crimes against humanity during World War II.⁴⁶ The Tribunal tried them on the basis of command responsibility. The Tribunal defined command responsibility as:

The Principle of command responsibility to be that If this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates ...of the atrocities...or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue he has failed in his performance of his duty as a commander, and must be punished.⁴⁷

⁴⁵ See Principles of the Nuremberg Tribunal 1950, available at www.deoxy.org/wc/wc-nurem (visited 02/11/01) [Reproduced in the accompanying notebook at Tab 13]

⁴⁶ See Martin and Wilson, *supra* note 11 at 74 [Reproduced in the accompanying notebook at Tab 5]

The case of Koki Hirota is one of the most prevalent to be prosecuted by the IMTFE. Hirota was convicted for war crimes under a provision which simulates the doctrine of command responsibility. While Hirota was Foreign Minister of Japan, Japan's army invaded China and committed war crimes for a seven week period. Hirota had received reports of the atrocities committed by the Japanese army and did nothing to prevent any future criminal activity by the troops or punish the troops that engaged in the criminal conduct. When the Japanese took control of the city of Nanking they simultaneously established an embassy with a line of authority traced to Hirota.⁴⁸

The IMTFE found Hirota's behavior to be a dereliction of duty and criminal negligence. Hirota was also found guilty of conspiring to commit aggression and waging a war of aggression against China. He was ultimately sentenced to death for his role in the war crimes committed by the Japanese army.

Hirota by his political position was liable for the criminal activity of the Japanese army. He demonstrated the necessary authority which is necessary to establish a superior-subordinate relationship. The Rwanda Foreign Minister and other government officials who participated in the Genocide by issuing illegal orders to police, soldiers, militia members ect...are likely to be liable for the crimes committed by these groups based on the establishment of the superior-subordinate relationship which applied to Hirota.

⁴⁷ *Id.* 74, citing William H. Parks, Command Responsibility 62 *MIL. L. Rev.* 1, 72 (1973) who cites *United States v. Soemu Toyoda* 19.[Reproduced in the accompanying notebook at Tab 5].

⁴⁸ Gregg Vetter, Command Responsibility of Non-Military Superiors in The International Criminal Court (ICC), 25 *YALE J. INT'L* 125(Winter 2000). [Reproduced in the accompanying note book at Tab 14].

The Yamishita Case

General Tomoyoki Yamashita was the last Japanese commander in the Philippines before the allied forces landed. The Japanese troops assigned to Yamishita committed rape, murder, mass executions, as well as destruction of property. The troops under Yamishita's command were said to be relentless in their efforts to terrorize the civilian population in the Philippines. He was tried in the Philippines by a United States Military Commission that found General Yamashita individually criminally responsible for the atrocities committed by his troops that were under his command during World War II in the Philippines.⁴⁹ Yamishita was convicted under the doctrine of command responsibility and sentenced to death. The commission concluded:

That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your [i.e. Yamishita's] command....that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers and that during the period in question you failed to provide effective control of your troops as was required by the circumstances.⁵⁰

Yamishita appealed the commission's decision to the United States Supreme Court where the Court's majority held General Yamishita was indeed responsible for the war crimes committed by his subordinates. The court found that under international law there exists a duty of a military commander to "take such appropriate measures as are within his power to control the troops under his command for the prevention of criminal

⁴⁹ See *In re Yamishita*, 327 U.S. 1, 15 (1946). [Reproduced in the accompanying notebook at Tab 23].

⁵⁰ See Bassiouni *supra* note 15 at 429. [Reproduced in the accompanying notebook at Tab 7].

acts.⁵¹ The court also noted that this duty does not just extend to prisoners of war, but to civilian populations as well.⁵²

The Military Commission found that the troops under General Yamishita's authority were his subordinates based on their military position, and that Yamishita was liable for the criminal acts which they engaged in while they served under his command. The conviction of General Yamishita is based on a similar theory of liability as the conviction of Akayesu by the ICTR (discussed later in this memorandum). The difference between the judgements was that the prosecution in *Yamishita* failed to show that General Yamishita had direct control over the acts of his subordinates:

General Yamishita was found to be criminally liable for atrocities committed by the Japanese forces under his command, not on the ground that he knew or had reason to know of these acts, but on the ground that he condoned a general atmosphere of lawlessness and pervaded the troops under his command.⁵³

The court in *Akayesu* came to the conclusion that, unlike Yamishita, Akayesu had directly ordered the Hutu communal police to kill Tutsis. He also was found by the ICTR to have incited civilians through his authoritative position to commit genocide. A criminal act in and of itself for which the ICTR convicted him. The ICTR established that Akayesu had the required element of control over the civilians he incited to commit genocide to establish a superior-subordinate relationship.

Canada and Command Responsibility

Almost at the same time as the Yamishita trial, the Canadian Military Court in Germany was hearing the case of *Brigadefuhrer Kurt Meyer*.⁵⁴ The trial was conducted

⁵¹ *In re Yamishita*, 327 U.S. 1, 15 (1946)[Reproduced in the accompanying notebook at Tab 23].

⁵² *Id.* 16. [Reproduced in the accompanying notebook at Tab 23].

under the Canadian War Crimes Regulations Article 10 Section 5. These regulations governed the courts decision and state:

Where there is evidence that a war crime has been committed by members of a formation, unit, body or group and that an officer or non-commissioned officer was present at or immediately before the time when such crime was committed, the court may receive that evidence as *prima face* evidence of the responsibility of such officer or non-commissioned officer, and of the commander of such formation, unit, body or group, for that crime.⁵⁵

Meyer was found responsible for inciting and counseling his men to commit war crimes which included murder. This case reaffirmed that a military commander and the troops which he has command control over constitute a superior-subordinate relationship and will support prosecution of Rwandan criminal who engaged in similar criminal activity.

Israel and Command Responsibility

In January of 1988, Col. Yehuda Meir ordered troops under his command to “round up twenty Palestinian men...bind them in handcuffs and blindfolds, and break their bones.”⁵⁶ The Israeli Defense Minister, Yitzak Rabin had publicly spoken of the need to “break the bones of Intifada rioters,” and Meir argued that he was merely carrying out the orders of his superior.⁵⁷ The unit commander reporting to Meir passed on the order to his troops but then told them he did not require them to comply. Some of the

⁵³ MICHAEL P. SCHARF, BALKAN JUSTICE (1997) 59, [Reproduced in the accompanying notebook at Tab 16].

⁵⁴ See Bassiouni, *supra* note 10 at 431.[Reproduced in the accompanying notebook at Tab 7].

⁵⁵ *Id.* 431 –32. [Reproduced in the accompanying notebook at Tab 7].

⁵⁶ NOMI BAR-YAACOV, CRIMES OF WAR, WHAT THE PUBLIC SHOULD KNOW, COMMAND RESPONSIBILITY (1999). [Reproduced in the accompanying notebook at Tab 15].

⁵⁷ *Id.* [Reproduced in the accompanying notebook at Tab 15].

soldiers refrained from the action while others zealously carried out Meir's orders.⁵⁸ The subordinates to Meir were tried and convicted for war crimes by a military court and served time in prison.

Although Meir was not present during the incident, the Israeli High Court of Justice agreed that Meir should be tried in a special military tribunal for crimes ranging from torture, intentionally causing bodily harm, to grievous assault. The court stated that, "if the order is given by the senior officer, that officer must be aware that that the morality of the Israel defense forces forbids such behavior."⁵⁹ There were two international humanitarian law issues in the *Meir* case that the tribunal addressed. The first was whether following superior orders could be a defense against allegations of war crimes? The tribunal rejected Meir's argument that he was merely following superior orders because of the "undeniable illegality of the order." The tribunal also considered the lack of duress to Meir in carrying out the order. The second issue addressed in *Meir* was how high up the chain of command responsibility may extend for ordering a war crime?

Article 86 of Additional Protocol I to the 1949 Geneva Convention states in general that a commanding officer is responsible when his subordinate is in breach of the Convention. Under the Convention it must be proven that the superior knew or could have known about the potential breach and failed to take the necessary action to suppress the breaching behavior.⁶⁰ The rule applies to officers, and, therefore, command

⁵⁸ *Id.* [Reproduced in the accompanying notebook at Tab 15].

⁵⁹ *Id.* [Reproduced in the accompanying notebook at Tab 15].

⁶⁰ *Id.* Quoting Protocol I of the 1949 Geneva Convention. [Reproduced in the accompanying notebook at Tab 15].

responsibility extends as high as any officer in the chain of command who knows or has reason to know that his subordinates are committing war crimes and has failed to act to stop them.⁶¹ Although Israel has not ratified the Additional Protocol I, the Israeli Supreme Court in application of domestic law has embraced the internationally recognized doctrine of command responsibility.

Once again it is undisputed that a military commander and the troops he commands establish a superior-subordinate relationship. The troops are subordinate to the military commanders based on the nature of their position and under international law the military commander is liable for any criminal acts committed by his/her troops that the commander knew or should have known the subordinate was committing.

The International Tribunal for the Former Yugoslavia

The Genocide which occurred in Rwanda was of a catastrophic degree and mirrored the human rights violations which occurred in the former Yugoslavia prior to 1991. The term “ethnic cleansing” was used to describe the genocide which occurred in the former Yugoslavia prior to 1991. In response to the human rights violations which engulfed the former Yugoslavia, the Security Council acting under Chapter VII of the Charter of the United Nations established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (hereafter ICTY) since 1991. Article 2 of the ICTY Statute is entitled Grave breaches of the Geneva Conventions of 1949, and states that the ICTY shall have the authority to prosecute persons committing

⁶¹ *Id.* [Reproduced in the accompanying notebook at Tab 15].

or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949.⁶² The following acts against persons or property are listed under article 2 of the

ICTY:

- (a) willful killing;
- (b) torture or inhumane treatment, including biological experiments;
- (c) willfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) willfully depriving a prisoner of war or a civilian of the rights of a fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Article 7 of The ICTY governs the issue of command responsibility with regards to military as well as civilian commanders. The Statute states that:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of the accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of these acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁶³

⁶² See SCHARF *supra* note 50 at 243 –245. [Reproduced in the accompanying notebook at Tab 16].

⁶³ See Article 7 of the International Criminal Tribunal for the former Yugoslavia cited in *Id.* at 246. [Reproduced in the accompanying notebook at Tab 16]

Article 7 of the ICTY was developed to apply the doctrine of command responsibility in the former Yugoslavia to those accused of, indirectly or directly, participating in crimes against humanity within that territory.

The doctrine of command responsibility originated in national military law and gradually became a basis of international criminal responsibility. In response to the “ethnic cleansing” which occurred in the former Yugoslavia, the ICTY began the lengthy and odious process of bringing those individuals who participated in human rights violations throughout that territory to justice. The element of control had to be established for the ICTY to determine that a superior-subordinate relationship existed.

Celebici Detention Case

The ICTY ruled in the *Celebici* judgement that in order to establish that a superior-subordinate relationship exists, it is necessary to establish a showing of effective control by a superior over a subordinate.⁶⁴ The trial chamber decided in *Celebici* that both military and civilian individuals in a position of authority, based either on their *de facto* or *de jure* positions, may be held criminally liable under the doctrine of command responsibility.⁶⁵ The court stated that:

In order for the principle of superior responsibility to be applicable, It is necessary that the superior have effective control over the Underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offenses. 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

⁶⁴ See Prosecutor v. Delalic, et al. Part IV available at www.un.org/icty/celebici/appeal/judgement/cel (visited 03/12/01), [Reproduced in the accompanying notebook at Tab 17]

⁶⁵ *Id.* [Reproduced in the accompanying notebook at Tab 17].

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 commanders.⁶⁶

Zdravko Mucic was an official at the Celebici prison camp and was subsequently convicted by the ICTY under the doctrine of command responsibility. The ICTY held that Mucic was commander of the prison camp with authority over other officer, guards and detainees. Mucic was found guilty of eleven counts of war crimes and crimes against humanity under the command responsibility doctrine. The ICTY held that he was guilty of such crimes due to his “failure to prevent or punish the violent acts of his subordinates.”⁶⁷

The decision of the Trial chamber is important because it broadly construed the superior-subordinate relationship to include criminal liability of civilian leaders that exercised the necessary degree of effective control in such a relationship. In relationship to the Rwanda genocide the Tribunal can apply the precedent of the *Mucic* decision in an effort to prosecute civilian leaders who participated in the genocide by ordering subordinates to commit illegal acts. However, it is necessary to establish that effective control existed by the civilian leader over the subordinate to allow for criminal liability of the civilian leader for the illegal acts of his/her subordinate.

International law allows for the doctrine of command responsibility to apply to civilian superiors when actual control over subordinates can be established. It is clear under international law that military commanders are subject to prosecution under the doctrine, but many national courts have differing views on how and whether the doctrine

⁶⁶ *Id.* at 55 [Reproduced in the accompanying notebook at Tab 17].

applies to civilian leaders. The ICTY established in *Celebici* that civilian leaders are responsible under the doctrine, and the ICTR followed that precedent in the *Bagassora* case discussed below.

The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (hereafter ICTR) was established under chapter VII of the United Nations Charter at the request of the Government of Rwanda in an effort to bring those responsible for the widespread genocide to justice. The ICTR adopted the rules of evidence and procedure used by the ICTY in an effort to expedite the judicial process, as well as alleviating the substantial cost of developing a separate system. There was also the fear that allowing separate tribunals would risk inconsistent judgments which would have a despairing effect on the credibility of the tribunals and its objectives, as well as the possibility of weakening the international standards with regards to human rights violations.⁶⁸ The ICTR and the ICTY represent the first attempt by the international community to create international judicial organs to enforce the Geneva Convention and laws proscribing crimes against humanity.⁶⁹

Prosecution of Responsible Individuals Under the International Criminal Tribunal for Rwanda:

The International Committee of the Red Cross claimed that by August 1996, Rwanda had about 80,000 Hutu awaiting formal charges. The Hutu were being detained

⁶⁷ See Bassiouni, *supra* note 10 at 354. [Reproduced in the accompanying notebook at Tab 3].

⁶⁸ See United States Institute of Peace Conference, available at www.ustp.org/oc/st/rwanda1.htm (visited 02/03/01)[Reproduced in the accompanying notebook at Tab 18].

⁶⁹ See, Magnarella, *supra* note 18 at 55, [Reproduced in the accompanying notebook at Tab 2]

in over-crowded prisons amidst deplorable conditions. Most of the 80,00 being held were followers within the hierarchy of the Hutu extremists.⁷⁰

One year after the genocide the ICTR had compiled a list of four hundred suspects. Most of those included on the list were officials and military leaders of the former Hutu-dominated regime who had fled to other countries once the genocide was over.⁷¹ As of May 9, 2001, 45 detainees were being held in connection with the Rwanda genocide. The majority of the 45 had held positions of responsibility in Rwanda. They had allegedly incited or directed others to take part in the genocide of the Tutsis and the moderate Hutu. The 45 included seven foreign ministers, eight senior civil servants, six military officers, four political leaders, three militia leaders, three senior figures in the “Media of Hate”, two businessmen, a priest, and a doctor.⁷²

Trial of Theoneste Bagosora:

Colonel Theoneste Bagosora has often been referred to as the mastermind of the Rwandan genocide. It was established that he assumed *defacto* control of military and political affairs in Rwanda after the death of President Habyarimana.⁷³ Bagosora was connected to the 1994 murder of 10 Belgium UN peacekeepers. The Belgium peacekeepers were believed to have been murdered as a scare tactic, in the hopes that other nations with UN peacekeepers stationed in Rwanda would withdraw their troops, allowing the Hutu killers free range to terrorize the Tutsi and moderate Hutu population. Bagosora was turned over to the ICTR along with three other suspects: Andre` Ntagerura,

⁷⁰ *Id.* 71. [Reproduced in the accompanying notebook at Tab 2].

⁷¹ *Id.* 50. [Reproduced in the accompanying notebook at Tab 2].

⁷² *Id.* 52. [Reproduced in the accompanying notebook at Tab 2].

⁷³ *Id.* 53. [Reproduced in the accompanying notebook at Tab 2].

Minister of Transportation and Communication, Colonel Anatole Nsengiyumva, a former military intelligence chief and alleged death squad member, and Ferinand Nahimana, a founder of the radio television Milles collines, which had been used to incite Hutus to commit genocide.⁷⁴ Chief prosecutor Louise Arbour stated that the four were the first indictees taken into custody by the ICTR who were extremely influential or who had held positions of national authority during the 1994 genocide.⁷⁵

One of the important issues the ICTR had to address in the prosecution of those indirectly or directly responsible for the genocide was whether the doctrine of command responsibility applied to political and civilian superiors. Whereas, the International Law Commission allowed the application of the doctrine to both military and civilian superiors.⁷⁶ In regards to the criminal responsibility of government officials in Rwanda, it is an accepted principle in international law that, “ government officials may not exercise the same degree of control over their subordinates as military officials but there remains a duty in the governmental, and military hierarchy, to ensure the lawful conduct of their subordinates in relation to their official functions.”⁷⁷

The Case of Jean-Paul Akayesu:

The first trial to be completed was that of Jean-Paul Akayesu, former bourgmestre (mayor) of Taba. The ICTR found Akayesu guilty of genocide and crimes against humanity.⁷⁸ The trial of Akayesu was historic because it was the first conviction for

⁷⁴ *Id.* 53-54. [Reproduced in the accompanying notebook at Tab 2].

⁷⁵ *See* Magnella, *supra* note 7 at 54. [Reproduced in the accompanying notebook at Tab 2].

⁷⁶ *See* 1 Morris and Scharf, *supra* note 1 at 259 [Reproduced in the accompanying notebook at Tab 1].

⁷⁷ *Id.* citing Claude Philloud ET AL., Commentary on the Additional Protocols of 8 June 1977, to the Geneva Convention of 12 August 1949 at 259. [Reproduced in the accompanying notebook at Tab 1].

⁷⁸ *See* Magnella, *supra* note 7 at 54. [Reproduced in the accompanying notebook at Tab 2].

genocide by the ICTR and the first time a court had treated a rape as a crime against humanity as well as genocide.⁷⁹ In *Akayesu*, the trial chamber also examined the *mens rea* requirement for command responsibility.⁸⁰ The court held that “in cases where the commander failed to stop (as opposed to ordered) his/her troops from committing humanitarian law violations, there must be malicious intent, or at least, . . . negligence so serious as to be tantamount to acquiescence or even malicious intent.”⁸¹

The ICTR discussed command responsibility in the *Akayesu* judgment and hesitated to apply the military standard of command responsibility to civilians.⁸² Based on the *Akayesu* judgement the ICTR construed the standard of command responsibility for civilians differently than the ICTY did in the *Celebici* decision of the ICTY.⁸³ The record reveals that *Akayesu* advanced from minimal participation in the war crimes of Rwanda, to actively participating in the genocide. Before *Akayesu* became the mayor of Tabu he was a school teacher and a school inspector. It was revealed through the courts that *Akayesu* opposed the killings and attempted to prevent them prior to April 1994. Following the death of President Habyarimana, *Akayesu* began ordering the killing of certain Tutsis. Several factors aided the court in its decision that *Akayesu* was guilty under the doctrine of command responsibility. During his time as mayor, *Akayesu* was responsible for maintaining law and public order over the bureau communal, which was

⁷⁹ *Id.* 54.[Reproduced in the accompanying notebook at Tab 2]

⁸⁰ *See* Martin and Wilson, *supra* note 11, at 79[Reproduced in the accompanying notebook at Tab 5].

⁸¹ *Id.*[Reproduced in the accompanying notebook at Tab 5].

⁸² *See* Vetter, *supra* note 55 at 132.[Reproduced in the accompanying notebook at Tab 14].

⁸³ *Id.* 112, The judgement date of *Akayesu* is more than two months prior to that of *Celebici*. The court in *Celebici* cited *Akayesu* in several places in its discussion of rape. However the *Celebici* court did not cite *Akayesu* in its discussion of command responsibility. [Reproduced in the accompanying notebook at Tab 14].

under his control. Hundreds of Rwandan civilians sought refuge at the bureau communal where they ultimately suffered great physical and mental abuse.⁸⁴

The ICTR also charged Akayesu with rape as a crime against humanity, reasoning that rape, “like torture is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.”⁸⁵ The tribunal found that beyond a reasonable doubt, Akayesu knew or had reason to know that sexual violence was being inflicted upon the women being kept at the communal Bureau where Akayesu maintained his headquarters.⁸⁶ The tribunal found no evidence that Akayesu tried to prevent the sexual violence being committed by the troops under his control and that he also failed to punish the perpetrators.⁸⁷ The evidence showed that Akayesu actually ordered, instigated, aided and abetted the sexual violence being committed by those under his command.⁸⁸

In the ICTR judgment it was established that Akayesu had authority over the communal police and often endorsed or even ordered them to cause bodily and mental harm as well as endorsing and ordering them to kill certain Tutsi civilians.⁸⁹ This judgment by the ICTR established a superior-subordinate relationship between Akayesu, a civilian leader, and the individuals who committed the illegal acts of genocide based on Akayesu’s orders. The ICTR found that Akayesu was “individually responsible for having ordered, committed, or otherwise aided and abetted in the preparation or

⁸⁴ *Id.* 134. [Reproduced in the accompanying notebook at Tab 14].

⁸⁵ *See* Magnarella, *supra* note 7 [Reproduced in the accompanying notebook at Tab 2].

⁸⁶ *Id.* at 102. [Reproduced in the accompanying notebook at Tab 2].

⁸⁷ *Id.* [Reproduced in the accompanying notebook at Tab 2].

⁸⁸ *Id.* [Reproduced in the accompanying notebook at Tab 2].

execution of the killing and serious bodily as well as mental harm to members of the Tutsi group.”⁹⁰ The ICTR also found Akayesu guilty of direct and public incitement to commit genocide based on a speech addressed to the Hutu population urging them to unite in order to eliminate their sole enemy (the Tutsi).⁹¹ The court found that Akayesu knew of the impact his speech had on the population and ultimately was calling on them to kill the Tutsi population in general.⁹² Akayesu was found by the ICTR to have exercised *de facto* control over the communal police as well as the Hutu civilians he incited to commit genocide.

The ICTR Case of Jean Kambanda:

The ICTR convicted Jean Kambanda, former Prime Minister of Rwanda, for crimes against humanity for the active role he took in the Rwandan genocide. Kambanda admitted his command responsibility as head of Government and his decision to commit massacres of the Tutsi.⁹³ The tribunal found that Kambanda committed these crimes when he was Prime Minister while he and his government were responsible for the maintenance of peace and security.⁹⁴ The tribunal found that Kambanda abused his authority by his personal participation in the war crimes, and by his failure to take the

⁸⁹ See Akayesu Judgement, reproduced in The Rights International Companion to Criminal Law and Procedure at 140 *supra* note 11 [Reproduced in the accompanying notebook at Tab 5]

⁹⁰ *Id.* [Reproduced in the accompanying notebook at Tab 14].

⁹¹ *Id.* In the early hours of 19 April 1994, Akayesu joined a gathering in Gishyeshye, and took this opportunity to address the public; he led the meeting and conducted the proceedings. He then called on the population to unite in order to eliminate what he referred to as the sole enemy; the accomplices of the Inkotanyi; and the population understood that he was thus urging them to kill the Tutsi... The statements thus made by Akayesu at that gathering immediately led to widespread killings of Tutsi in Taba.

⁹² *Id.* [Reproduced in the accompanying notebook at Tab 14].

⁹³ See Press Release: Rwanda Tribunal Hands down Life Sentence for Crimes of Genocide Committed By Former Rwandan Prime Minister, AFR/95, L/2898, available at www.ictor.org (visited 03/24/01) [Reproduced in the accompanying notebook at Tab 19].

⁹⁴ *Id.* [Reproduced in the accompanying notebook at Tab 19]

“necessary and reasonable measures to prevent his subordinates from committing crimes against the population.”⁹⁵ Kambanda admitted in his guilty plea that as Prime Minister he “gave clear support to the Radio Television Libre des Mille Collines, with the knowledge that the radio broadcasters were inciting the Hutu to kill the Tutsi” and moderate Hutu, as well as broadcasting where the killers could find the victims.⁹⁶

The United Nations has been the subject of criticism for its failure to act during the 4 months of Genocide in Rwanda. It may be argued that in response to the Rwanda Genocide, the United Nations has passed several Resolutions stressing the importance of respecting human rights worldwide, as well as reiterating that those who engage in human rights violations will be held criminally responsible under international law.

Article 10 of the Declaration on the Right and Responsibility of Individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms, States that:

“No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so.”⁹⁷

The General Assembly of the United Nations adopted Resolution 53/144 on March 8, 1999 and stressed that all states of all nation should adopt the resolution in an effort to alleviate Human Rights violations throughout the world. The General Assembly also stresses in the resolution that all members of the international community shall fulfil, jointly and separately, their sincere obligation to promote and encourage respect for human rights and fundamental freedoms for all people without regards to race, religion, gender, language or ethnicity.⁹⁸

⁹⁵ *Id.* [Reproduced in the accompanying notebook at Tab 19].

⁹⁶ *See* Magnarella, *supra* note 18, 89, [Reproduced in the accompanying notebook at Tab 3].

⁹⁷ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, General Assembly

The Indictment of Charles Sikubwabo

There are many pending indictments of individuals who were instrumental in carrying out the genocide in Rwanda. In the indictment of Charles Sikubwabo the prosecution has alleged that through his capacity as Burgomaster, he is individually responsible for the genocidal acts of his subordinates.⁹⁹ Based on the facts presented in the indictment Sikubwabo knew or had reason to know that his subordinates, including members of the National Genarmerie and the communal police that were under Sikubwabo's control participated in acts of genocide.¹⁰⁰ The indictment also notes that Sikubwabo did not punish the perpetrators for the criminal acts.

The three elements required to establish a superior-subordinate relationship appear to be present in Sikubwabo's case. The first; that the superior (Sikubwabo) had either *de facto* or *de jure* control over his/her troop appears to be satisfied because the troops followed Sikubwabo's orders to commit the criminal acts. The second requirement to establish a superior-subordinate relationship is; the superior knew or had reason to know of the perpetrators criminal acts and the third requirement; the superior (Sikubwabo) failed to punish the perpetrators. The facts of the indictment specify that Sikubwabo satisfied the requirement to support a finding by the Tribunal that the National Genarmerie and the communal police were subordinate to Sikubwabo.

resolution 53/144, available at [www.unnccn.cn.nundocda.nst\(symbol\)/A.RES.53.144.Eh/opendocument](http://www.unnccn.cn.nundocda.nst(symbol)/A.RES.53.144.Eh/opendocument), (visited 04/01/01), [Reproduced in the accompanying notebook at Tab 20].

⁹⁸ *Id.*

⁹⁹ *Prosecutor v. Charles Sikubwabo*, Case No: ICTR-96-10-1, Indictment, [Reproduced in the accompanying notebook at Tab 21].

¹⁰⁰ *Id.* [Reproduced in the accompanying notebook at Tab 21].

International Criminal Court

Canada has been the driving force behind the creation of the The International Criminal Court (hereafter ICC).¹⁰¹ The ICC will hear the most serious cases of human rights violations and it is believed that the ICC will act to deter future human rights violators. The ICC is designed to complement, not replace, existing national courts. Article 33 of the ICC statute addresses liability of individuals who commit war crimes.

Article 33 states that:

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 of a superior, whether military or civilian, shall not relieve that person of 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 the order was unlawful; and
- c. The order was not manifestly unlawful.¹⁰²

Under this Article of the statute of the ICC prosecution of civilian superiors in Rwanda for their participation either directly or indirectly will be attainable with little deterrence providing all the criteria for prosecution are met. This would include the radio broadcasters who aggressively campaigned their unlawful cause over the airways, inciting Hutu civilians to do their patriotic duty and slaughter all members of the Tutsi and moderate Hutu population. It will be necessary for the ICTR to prove that the radio broadcasters exercised authoritative control over the Hutu civilians and based on this

¹⁰¹ See Canada and The International Criminal Court, available at www.canada.justice.bc.ca/en/news/nt/1999/doc-24328.htm (visited 03/04/01). [Reproduced in the accompanying notebook at Tab 4]

¹⁰² See International Society for Military Law and the Law of War, War Crimes Law and The Statue of Rome: Some Afterthoughts? 22 October 1999, 5 available at www.soc.mn-law.org/GpNaUNL99 ,(visited 03/04/01),[Reproduced in the accompanying notebook at Tab 22].

control the Hutu civilians committed acts of genocide. It may be difficult for the prosecution to establish that the Hutu civilians were subordinate to the radio broadcasters because inciting the civilians to commit genocide is not enough to establish that a superior-subordinate relationship existed under international law.

Article 28 of the ICC statute bases liability of a military superior for the criminal acts of his/her subordinate on the existence of authoritative control of the superior over his/her subordinate. The ICC has followed the precedent of past tribunals by requiring that effective military command and control be present to create a superior-subordinate relationship.¹⁰³ However, under the current statute prosecution of civilian leaders will be much more difficult to prove and would therefore hinder the efforts of the international community to hold such civilian leaders criminally liable when a superior-subordinate relationship can be proven.¹⁰⁴

¹⁰³ *Id.* at 3 [Reproduced in the accompanying notebook at Tab 22].

¹⁰⁴ *Id.* at 4 [Reproduced in the accompanying notebook at Tab 22].

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