
**CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT**

**MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR**

**ISSUE 19: RESPONSIBILITY OF MILITARY COMMANDERS TO
PROTECT CIVILIANS FROM ATTACKS BY OTHER
CIVILIANS AND THE STATE WITHIN COMMANDER'S
AREA OF CONTROL**

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I. Introduction and Summary of Conclusions*

“Any system of jurisprudence, if it is to be effective, must be given an opportunity to grow and expand to meet changed conditions. The codification of principles is a helpful means of simplification, but it must not be treated as adding rigidity where resiliency is essential.”¹

A. Issues

It is the purpose of this memorandum to analyze the doctrines of command responsibility and the responsibility of military officers for crimes committed by their subordinates. Specifically, this paper argues that a military commander, acting as the *de facto* policing authority in an occupied area can and should be held responsible not only for the actions of his or her troops, but also for the actions of the civilians inhabiting his or her area of control and for the actions of the state, which the military commander represents. This should be especially true in an internal conflict, such as the conflict that arose in Rwanda in 1994 where the distinctions between the military and the civilian population were blurred. Through an extensive analysis of the doctrines of command responsibility and superior responsibility, it will become apparent that such an extension of command responsibility is justified by the jurisprudence in these fields.

The first part of this memorandum tracks the evolution of the doctrine of command responsibility by assessing the major post-WWII cases dealing with the doctrine, including *In Re Yamashita*, the *High Command Case*, and the *Hostage Case*.

* Issue 19: Research and analyze the extent to which a military officer is under a duty, pursuant to Common Article 3 of the Geneva Conventions and Additional Protocol II, to prevent massacres against civilian population, either by other civilians or by the State.

¹ United States v. Wilhelm List [hereinafter *Hostage case*], 1948, *reprinted in* Volume XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, at 1233 (United States Government Printing Office 1950). [Reproduced in accompanying notebook at Tab 6.]

The second part of this memorandum examines the extension of that doctrine to civilian “superiors” by noting the modern codification of the doctrines of superior and command responsibility in Articles 86 and 87 of Additional Protocol I and by examining at length the decision of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) in the *Celbici* case.

The third part of this memorandum will be a brief explanation of how the notions of command responsibility and superior responsibility, codified for armed conflicts of an international character, can be applied to internal conflicts such as the 1994 conflict in Rwanda. The fourth part of this memorandum will be an extensive review of the modern jurisprudence dealing with superior responsibility generated by the International Criminal Tribunal for Rwanda (“ICTR”). Finally, this memorandum will provide an analysis of the sum of this case law.

In evaluating the evolution of the command responsibility doctrine through the law established by post-WWII tribunals and the tribunals of the ICTY and ICTR, it will be important to keep in mind what duties are defined as being part of a military commander’s responsibility when occupying a territory and also which standard is being applied to military commanders and superiors in order to establish their culpability.

B. Summary of Conclusions

It is the conclusion of this memorandum that military commanders can be, and should be held responsible for war crimes committed by states or civilians within the commander’s area of control if the commander knew or should have known that the atrocities were committed or were going to be committed and the commander failed to punish or to prevent these atrocities. This conclusion is consistent with post-WWII

jurisprudence regarding command responsibility, statutes governing the doctrine, and modern jurisprudence concerning the doctrine generated by the ICTY and ICTR. Furthermore, these principles apply to conflicts of an international character as well as to conflicts of an internal character.

II. Factual Background of Events in Rwanda

Before colonization, present-day Rwanda enjoyed a peaceful existence. During the pre-colonial period, no segregation among Hutus and Tutsis was in place.² These groups mostly saw themselves as members of distinct clans, and not as members of distinct ethnicities.³ This changed upon the arrival of the first European travelers who began to classify the two clans as distinct “ethnic groups.”⁴ In 1916, Belgium occupied Ruanda-Urundi (present-day Rwanda).⁵ The Tutsi were depended on by the Belgian to help them rule Rwanda.⁶

During de-colonization, and under United Nations pressure, the Belgians began to offer more opportunities to the Hutu.⁷ The Tutsi elite resented this, and began to push hard for independence from Belgian rule.⁸ In 1959, incidents of violence began to break out between Tutsi and Hutu parties.⁹ As a result, many Tutsis fled Rwanda into

² Volume 1A GLOBAL WAR CRIMES TRIBUNAL COLLECTION, at 25 (J. Oppenheim & W. van der Wolf eds., 2000). [Reproduced in accompanying notebook at Tab 18.]

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 28. Belgium was mandated to administer Rwanda by the League of Nations and in 1946 Rwanda became a Belgian trust territory under the United Nations.

⁶ Prosecutor v. Jean Paul Akayesu, ICTR-96-4 (1998), at ¶ 82. [Reproduced in accompanying notebook at Tab 19.] The Belgians felt that the Tutsi were more intelligent and better equipped to rule based on their looks.

⁷ *Id.* at ¶ 86.

⁸ *Id.*

⁹ *Id.* at ¶ 89.

neighboring countries. Tutsis regularly conducted incursions into Rwanda in which they engaged in violence against Hutus.¹⁰

In April 1994, while returning from a meeting with other heads of state in order to discuss the implementation of the peace accords, Rwandan President Habyarimana's aircraft was shot down.¹¹ He was killed. This provided for a large-scale unification of Hutus against the Tutsi, whom the Hutu leaders claimed wanted to reinstate the former feudal monarchy.¹² In April of 1994, Hutu forces began slaughtering Tutsis. This slaughter continued up until July 1994. The estimated total number of murder victims resulting from this violence varies from 500,000 to 1,000,000 people.¹³

During the slaughter, all remnants of law and order broke down. Those entrusted with the governmental responsibility to maintain law and order, such as Bourgemastres, Prefects other social elite failed punish or prevent atrocities from occurring in their areas of control, and sometimes directly participated in these atrocities.

III. Legal Discussion

Many scholars believe that the doctrine of command responsibility was created after the Second World War. However, this is not the case. The international community recognized the principle of command responsibility as early as 1474 with the trial of Peter Von Hagenbach.¹⁴ In the early 1900s, Brigadier General Jacob H. Smith, an American Officer, was tried and convicted at a court-martial for, among other things,

¹⁰ *Id.*

¹¹ *Id.* at ¶ 106.

¹² *Id.* at ¶ 110.

¹³ *Id.* at ¶ 111.

¹⁴ William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973). [Reproduced in accompanying notebook at Tab 28.]

permitting subordinates to commit war crimes.¹⁵ Although the doctrine clearly existed prior to the Second World War, it was the cases brought against military commanders after the war that refined the doctrine of command responsibility and firmly established the concept in customary international law.

1. The Yamashita Precedent

In early October 1944, Japanese leadership appointed General Tomoyuki Yamashita as commanding officer of the Fourteenth Area Army then occupying the Philippines.¹⁶ In preparation of an impending American attack, Yamashita ordered the withdrawal of his troops from Manila.¹⁷ Despite large-scale troop withdrawals from Manila, some small residual army elements remained in the city, composed mostly of Japanese naval soldiers, not under the direct command of Yamashita.¹⁸ Yamashita retreated to the mountains, a move, which severely hampered his communication with battle groups under his command.

While Yamashita waited in the mountains for his inevitable defeat and capture, Japanese troops remaining in Manila committed widespread atrocities against the Philippine civilian population. As a result, over thirty-two thousand Philippine civilians were killed.¹⁹ Japanese troops committed acts of torture, including the burning of feet

¹⁵ Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 170 (2000). [Reproduced in accompanying notebook at Tab 30.]

¹⁶ RICHARD L. LAEL, *THE YAMASHITA PRECEDENT*, 7 (Scholarly Resources, Inc. 1982). [Reproduced in accompanying notebook at Tab 20.]

¹⁷ A. FRANK REEL, *THE CASE OF GENERAL YAMASHITA*, 153 (The University of Chicago Press 1949). [Reproduced in accompanying notebook at Tab 21.] A. Frank Reel served as Defense Counsel for General Yamashita during his trials before the American Military Commission in Manila and the Supreme Court. His work provides a rare and excellent incite into the Yamashita trials.

¹⁸ Lael, *supra* note 24, at 25.

¹⁹ *Id.* at 83.

and the removal of fingers.²⁰ The Japanese troops also engaged in an episode of widespread rape, in which Japanese soldiers imprisoned 476 Philippine women in two Manila hotels and repeatedly raped those women over an eight-day period.²¹

Upon his capture by American forces, an American Military Tribunal put Yamashita on trial for the atrocities committed by Japanese troops under his formal command. It was charged that Yamashita “unlawfully disregarded and failed to discharge his duty as commander to control the operations of members of his command, permitting them to commit brutal atrocities...against people of the United States and of its allies and dependencies.”²² The American military was trying Yamashita not for crimes committed by him, but for crimes committed by his troops. This was a fairly novel charge and can be seen as the genesis of the modern doctrine of command responsibility.

Yamashita’s defense team argued that he faced a chaotic situation when he assumed command of the Philippines. His Army was running short of supplies, the Americans were approaching, and Yamashita had no time to do anything but prepare a military strategy. The defense stated, “Can it seriously be contended that a commander, beset and harassed by the enemy...in the period of a handful of weeks gather in all the strings of administration?”²³ The defense painted a picture of a General who had in the past subjected his subordinates to punishment for the mistreatment of Philippine citizens and a General who promoted cooperation between his troops and the civilian

²⁰ *Id.*

²¹ *Id.* at 84.

²² Charge against General Yamashita before the Military Commission Convened by the Commanding General United States Army Forces, Western Pacific, *reprinted* in Lael, *supra* note 16, at 80. [Reproduced in accompanying notebook at Tab 20.]

²³ Reel, *supra* note 17, at 155.

population.²⁴ The prosecution on the other hand, painted a picture of a General who disregarded his duties to maintain peace and ensure the dignity of the inhabitants of his occupied territory, despite acknowledging that practically all the atrocities committed by Japanese troops occurred while communication on such matters was almost impossible.²⁵

On the anniversary of the bombing of Pearl Harbor, the American Military Commission sentenced General Yamashita to death by hanging. The Commission stated, “Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility.”²⁶ The Commission called the notion that a commander could be considered a rapist or murderer because one of his soldiers commits a murder or rape absurd.²⁷ However, the Commission stated:

“Nonetheless, where murder and rape and vicious, revengeful actions are widespread offenses 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...”²⁸

Therefore, despite the fact that the prosecution could not prove that Yamashita actually knew of any of the atrocities committed by his troops, the military commission found that Yamashita’s guilt was indicated by the widespread nature of the offenses.²⁹ The committee found that “the crimes were so extensive and widespread...that they must either have been willfully permitted by the accused, or secretly ordered by the accused.”³⁰

Upon appeal to the U.S. Supreme Court, Yamashita argued that he did not directly commit any atrocities against the Philippine population and that he, therefore,

²⁴ *Id.* at 155-56.

²⁵ *Id.* at 160.

²⁶ *Id.* at 171.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Major Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293, 296 (1995). [Reproduced in accompanying notebook at Tab 26.]

³⁰ *Id.*

could not be tried for these crimes.³¹ The Supreme Court disagreed, stating, “the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander...result in violations which it is the purpose of the law of war to prevent.”³² The Supreme Court found support for this proposition in the Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war on land and Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels. The Annex to the Fourth Hague Convention of 1907 states that in order for an armed force to be accorded the status of lawful belligerents, it must be “commanded by a person responsible for his subordinates.”³³ Indeed, “one of the command responsibilities designated by the Hague Convention IV is insuring “public order and safety” in areas occupied by military troops.”³⁴ Article 19 of the Tenth Hague Convention provides that commanders of belligerent vessels “must see that the above Articles are properly carried out.”³⁵

The precedent that the Yamashita case stands for has been the subject of much debate among legal scholars. Some argue that Yamashita was found guilty under a theory of absolute liability. To support this, they argue that because the evidence of Yamashita’s knowledge of atrocities committed by his troops was so weak, the

³¹ Application of Yamashita v. Styer, 327 U.S. 1, 14 (1946). [Reproduced in the accompanying notebook at Tab 7.]

³² *Id.* at 15

³³ Annex to the Convention, Hague Convention No. IV, Respecting the Laws and Customs of War on Land, October 18, 1907, art. 1, 36 Stat. 2277. [Reproduced in accompanying notebook at Tab 1.]

³⁴ Anne 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. & COM. REG. 167, 177 (1999). [Reproduced in accompanying notebook at Tab 24.]

³⁵ Tenth Hague Convention of 1907, Relating to the Bombardment of Naval Vessels, July 6, 1906, art. 19, 36 Stat. 2389. [Reproduced in accompanying notebook at Tab 2.]

commission accepted his claim of ignorance and found him guilty anyway.³⁶ Opponents of this view cite to a number of passages in the commission's decision, which suggest that the members of the commission simply did not believe Yamashita's claims of ignorance.³⁷

In any event, it is apparent that Yamashita stands for the principle that a military commander has a broad and heavy responsibility to maintain peace and order in his or her area of control. In the case of Yamashita, Japanese naval soldiers, not formally under his command, committed many of the alleged atrocities against the Philippine population. This fact was irrelevant to the Commission. From Yamashita, it can, therefore, be concluded that the duty of a military commander to maintain peace and order and protect the inhabitants of an occupied territory is paramount and that the responsibility of a military commander can be extended to those not formally under his or her control.

2. The High Command Case

In 1947, fourteen high-ranking German officials were tried for waging an aggressive war and for the ill treatment and murder of thousands of civilians.³⁸ Wilhelm von Leeb was among the accused. Von Leeb was accused of implementing an illegal order given by Hitler for German troops to execute Bolshevik Commissars and the Communist Intelligencia upon capture.³⁹

In his defense, von Leeb asserted that he could not be held responsible for the atrocities committed in his jurisdiction, because they were committed by "agencies of the state with which he was not connected and over whom he exercised no supervision or

³⁶ Christopher N. Crowe, *Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution*, 29 U. RICH. L. REV. 191, 205 (1994). [Reproduced in accompanying notebook at Tab 25.]

³⁷ *Id.* at 206.

³⁸ *Id.*

³⁹ *Id.* at 210.

control.”⁴⁰ The prosecution argued that a military commander of an occupied territory is *per se* responsible for atrocities committed in his area of control, “regardless of the fact that the crimes committed therein were due to the action of the state or superior military authorities which he did not initiate or in which he did not participate.”⁴¹

In response to these arguments, the tribunal felt that the prosecution’s argument concerning the duties of an occupying general was most persuasive. Regarding a military commander of an occupying army, the tribunal stated, “It is the opinion of this tribunal that...under international law and accepted usages of civilized nations that he has certain responsibilities which he cannot set aside or ignore by reason of activities of his own state within his area.”⁴² The tribunal continued, stating in its judgment of von Leeb that a military commander is “the instrument by which the occupancy exists,” and that it is “his army which holds the area in subjection.”⁴³ From these facts, the court concluded that it couldn’t be argued that a military commander “exercises the power by which a civilian population is subject to...while at the same time the state which he represents may come into the area which he holds and subject the population to murder...and other inhumane treatments.”⁴⁴ Clearly, the court in *von Leeb* stood for the proposition that a military commander of an occupying army has the affirmative duty to prevent atrocities committed by the state which he represents, or face criminal liability for failure to do so.

Notwithstanding this, Wilhelm von Leeb was ultimately found not guilty of atrocities committed by his army under the doctrine of command responsibility. Several

⁴⁰ United States v. Wilhelm von Leeb [hereinafter the *High Command* case], 1948, *reprinted in* Volume XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, 542 (United States Government Printing Office 1950). [Reproduced in accompanying notebook at Tab 8.]

⁴¹ *Id.* at 544.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

factors contributed to this finding. First, von Leeb had voiced his opinion that this order was illegal, and upon hearing of these actions being perpetrated by his troops, he took corrective measures to prevent them in future engagements.⁴⁵ In dicta, the tribunal addressed the standard, which should be used in determining command responsibility. In doing so, the court moved away from the standard set forth in *Yamashita*. The tribunal asserted that commanders could only be found responsible where the acts of subordinates were “traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part.”⁴⁶ The tribunal also asserted that the neglect must be personal and constitute immoral disregard of the action of his subordinates.⁴⁷ The tribunal rejected a strict liability or “should have known” standard and instead required acquiescence.⁴⁸ The prosecution had not proven that von Leeb was aware of the sum of the atrocities committed in his area of control.

Although the tribunal in *von Leeb* seemed to narrow the circumstances in which military commanders could be held liable for actions of their subordinates to instances in which they had actual knowledge of the atrocities, it also expanded the duties of commanders. They could no longer claim that they are not responsible for preventing atrocities committed in their zone of control by the state, which they represent.

3. The Hostage Case

In marked contrast to the language of the *High Command Case*, the language contained in the tribunal’s decision in the *Hostage Case* seemed to clearly move the international community toward a “known or should have known” standard with respect

⁴⁵ Crowe, *supra* note 36, at 213. [Reproduced in accompanying notebook at Tab 25.]

⁴⁶ *Id.* at 214.

⁴⁷ *Id.*

⁴⁸ *Id.*

to command responsibility and asserted the proposition that a commander has a broad responsibility to ensure that the Geneva Conventions are complied with in his or her occupied territory.

During the Second World War, it was the practice of the German Army to take civilian hostages of occupied territories to insure against attacks against German troops by those civilian populations.⁴⁹ The Southeast Army was ordered to execute fifty to one hundred civilian hostages for every German soldier killed or captured by civilian militia forces.⁵⁰ Accordingly, hundreds of thousands of civilians of Albania, Norway, Yugoslavia, and Greece were enslaved or murdered during the occupation of the Southeast German Army in these territories.⁵¹

A U.S. Military Tribunal prosecuted German Field Marshal Wilhem List for these war crimes in the *Hostage Case*. Like Yamashita and von Leeb before him, List contended that he was ignorant of the murder of civilians in the territories occupied by his troops.⁵² However, in the town of Topola more than 2,000 villagers suspected of being Jews or communists were executed at once in retaliation for twenty-two German soldiers being killed.⁵³ There was evidence to suggest that List was made aware of the killings and that he failed to take any measures to discipline those responsible or to ensure that future crimes of this nature would not be committed.⁵⁴

Ultimately, the tribunal rejected List's claims of ignorance and stated that a military commander "is charged with notice of occurrences taking place within that

⁴⁹ *Id.* at 216.

⁵⁰ *Hostage case, supra* note 1 at 1233. [Reproduced in accompanying notebook at Tab 6.]

⁵¹ Crowe, *supra* note 36, at 216

⁵² *Id.* at 218.

⁵³ *Id.*

⁵⁴ *Id.*

territory...if he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense.”⁵⁵ In other words, the tribunal held that a commander has an affirmative duty to gain knowledge of actions of his troops in an occupied territory. If a commander fails in this duty, liability can ensue and a commander will be unable to plead ignorance of the actions of his troops.

List also claimed that the military units, which committed the atrocities against Greek and Yugoslavian populations were not under his direct command, and were in fact under the command of other officials in the German military hierarchy.⁵⁶ In response to this claim, the court answered that “the commanding general of an occupied territory, having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself was responsible for the crime and that he is thereby absolved from responsibility.”⁵⁷ This is an early recognition of the principle of indirect subordination; the notion that a military commander can be held responsible for actions of those not under his direct command because it is the duty of a military commander to maintain peace and order in an area occupied by his or her army.

Expounding on the notion of indirect subordination, the tribunal made it clear that subordination is a non-issue when the responsibilities of a commanding general have not been met. It stated “as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime and protecting lives and property,

⁵⁵ *Id.* at 219.

⁵⁶ *Hostage* case, *supra* note 1 at 1254-1256.

⁵⁷ *Id.* at 1256.

issues of subordination are relatively unimportant.”⁵⁸ The court enunciated that the duties of a commanding general in occupied territory are not limited to supervision of troops or military units under his or her control. On the contrary, the Tribunal in *List* clearly felt that the duties of a military commander in an occupied territory are duties of a general policing nature to control the actions of military and civilians alike.

In order to support this notion, the tribunal delineated the legal obligations, which a military commander has when commanding an occupying army. The tribunal stated that it is the “duty of the commanding general in occupied territory to maintain peace and order, punish crime and protect lives and property. This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well.”⁵⁹ The tribunal further stated, “The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general.”⁶⁰ In the accomplishment of these purposes, the tribunal felt that it is implied that it is the duty of a commanding general of an occupied territory to control the actions of the inhabitants as well as to control the actions of “other lawless persons or groups.”⁶¹

Because the tribunal saw it as the primary duty of a commanding general in an occupied territory to control the actions of the inhabitants as well as his military troops and “other lawless groups,” it can be inferred that a commanding general does have an affirmative duty to protect civilians from attacks by other civilians and that his or her

⁵⁸ *Id.* at 1260.

⁵⁹ Crowe, *supra* note 36, at 218. [Reproduced in accompanying notebook at Tab 25.]

⁶⁰ *Hostage case*, *supra* note 1, at 1256. [Reproduced in accompanying notebook at Tab 6.]

⁶¹ *Id.* at 1272.

failure to do so should result in criminal liability under the doctrine command responsibility.⁶²

B. Codification of Doctrines of Command and Superior Responsibility

This paper argues that military commanders can be held criminally liable for war crimes committed by civilians and states within their area of control. When analyzed, the following international statutory provisions help to support this conclusion.

1. Article 86 of Additional Protocol I

As noted above, the U.S. Supreme Court in *Yamashita* argued that the principle of command responsibility could be derived from certain provisions of the Hague Conventions. However, the notion of command responsibility and superior responsibility were explicitly codified in the “Protocol Additional to the Geneva Conventions of 12 August 1949.” In pertinent part, Article 86 (entitled “Failure to Act”) of Additional Protocol I to the Geneva Conventions reads:

2. The fact that a breach of the Conventions 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.⁶³

⁶² This notion was novel. The Tribunal in the *Hostage* case broadened a commander’s responsibilities in times of war. See Timothy Wu, *Criminal Liability for the Actions of Subordinates-The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HVILJ 272 (1997). [Reproduced in accompanying notebook at Tab 33.] Wu asserts that the first condition for a finding of control is a formal authority over a subordinate. Wu cites the *High Command* case for this proposition. However, Wu ignores the statements by the Tribunal in the *Hostage* case. It cannot be said that authority over a subordinate is the first condition for a finding of command responsibility. Indeed, the Tribunal in the *Hostage* case rejects this logic when it acknowledges that military commanders in control of an occupied zone have a responsibility to maintain peace and order and the responsibility to punish troops and civilians alike for criminal activity.

⁶³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), December 7, 1979, art. 86. [Reproduced in accompanying notebook at Tab 3.]

Article 86 makes no mention of “military commanders.” Rather, it states that any person who may be considered a “superior” will be held responsible for the criminal actions of subordinates.” This implies that Article 86 applies exclusively to civilians. This is further supported by the fact that Article 87 of Protocol I, entitled “Duty of Commanders,” explicitly addresses the traditional notion of command responsibility as it applies in a military context.⁶⁴

2. Article 87 of Additional Protocol I

In pertinent part, Article 87 of Additional Protocol I provides:

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates *or other persons under his control* are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.⁶⁵

Article 87 of Additional Protocol I clearly stands for the notion that military commanders can be, and should be, held responsible for the actions of people other than “subordinates” under their control. In passing Article 87 as part of Additional Protocol I, the international community clearly has recognized the principle that military commanders have responsibilities in their occupied zones, which extend far beyond control of their own troops. Indeed, as the Tribunal explained in the *High Command Case*, and *Hostage Case*, commanders are under a duty to keep the peace in their areas of control. This responsibility must extend to control over troops, civilians, and other

⁶⁴ Scott Starr, *Can Civilian “Superior” be Held Criminally Responsible for the Actions of Their Subordinates*, 7 (1997) at www.nesl.edu/center/wcmemos/1997/starr.pdf. [Reproduced in accompanying notebook at Tab 31.]

⁶⁵ *Supra* note 63, art. 87. [Reproduced in accompanying notebook at Tab 3.]

groups within a commander's control in order to ensure that the laws of war are complied with to the fullest level.

C. **The International Criminal Tribunal for the Former Yugoslavia**

1. **Article 7 of the ICTY Statute**

Security Council Resolution 808 created the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in order to create a body with the jurisdiction to prosecute war crimes committed in the former Yugoslavia.⁶⁶ Article 7 of the ICTY Statute, with regard to the crimes outlined in Articles 2 and 5 of the statute states:

3. The fact that any of the acts... was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary reasonable measures to prevent such acts or to punish the perpetrators thereof.⁶⁷

This language is almost identical to that of Article 86 of Additional Protocol I. Therefore, the statute creates criminal liability based on the theory of "superior-subordinate" responsibility. Article 7 of the ICTY Statute most closely resembles Article 86 of Additional Protocol I, making no mention of military commanders. However, as we will see from ICTY case law, military commanders are included under the ambit of Article 7 of the statute. The following section will examine the prosecution of Zejnil Delalic, Zdravko Mucic, and Hazim Delic by the ICTY in the *Celebici Case*.

⁶⁶ Statute of the International Criminal Tribunal for the Former Yugoslavia, *adopted by S/RES/808* (1993), *reprinted in* VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 14 (Transnational Publishers, Inc. 1995). [Reproduced in accompanying notebook at Tab 4.]

⁶⁷ICTY Statute, art. 7.

2. The Celebici Decision

In 1992, Bosnian Muslim and Bosnian Croat forces took control of certain villages within the municipality of Konjic, located in central Bosnia and Herzegovina.⁶⁸ In Konjic, members of the local civilian population were detained in the Celebici camp, operated by the former Yugoslav People's Army or ("JNA").⁶⁹ The ICTY found that the detainees being held in the Celebici camp were subjected to cruel and inhumane treatment, including beatings, murders, sexually assault, and torture.⁷⁰

The relation of each of the accused to the Celebici camp was unique. Mucic was the commander of the Celebici Camp.⁷¹ Delic was the deputy commander of the camp.⁷² Delalic's connection to the camp was more removed. Delalic served, in various forms, as the coordinator of Bosnian Muslim and Bosnian Croat forces in the Konjic area during the time of the operation of the camp.

Before discussing the criminal liability of each defendant, the tribunal first examined the doctrines of command and superior responsibility. First, the tribunal stated that the fact that military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful actions of their subordinates is a well-established "norm of customary and conventional international law."⁷³ The court then addressed Article 7(3) of the ICTY statute. The court agreed with the prosecution that the finding of liability according to the doctrine of superior

⁶⁸Prosecutor v. Zejnir Delalic [hereinafter the *Celebici* case], Case No. IT-96-21-I, 16 November 1998, NEED PARAGRAPH [Reproduced in accompanying notebook at Tab 9.]

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

responsibility rested on three necessary elements, derived from Article 7(3).⁷⁴ The three part test lists the following elements as the essential elements of command responsibility: (i) the existence of a superior-subordinate relationship, (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed and (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.⁷⁵

The court then proceeded to address the nature of the requisite superior-subordinate relationship needed to find liability under Article 7(3). The prosecution argued “that the essential requirement of the doctrine of command responsibility is proof of the superior’s control over his subordinates and his ability to prevent them from committing violations or punish them for such violations.”⁷⁶ The prosecution’s argument rested on the assumption that the application of the command responsibility doctrine does not depend on an officially designated rank, or *de jure* (formal) authority, but also arises from *de facto* (informal) command or control.⁷⁷ The prosecution also argued that the type of control needed for the doctrine of command responsibility to apply to a given situation can vary, taking on forms including operational control, tactical control, administrative control, and executive control in territories.⁷⁸ “By including those who exercised *de facto* control over the Celebici camp, which allows even informal commanders to fall within the doctrine, the prosecution desired an expanded definition of “superior.”⁷⁹

⁷⁴ *Id.* at ¶ 344.

⁷⁵ *Id.*

⁷⁶ *Id.* at ¶ 348.

⁷⁷ *Id.*

⁷⁸ *Id.* at ¶ 349.

⁷⁹ Ching, *supra* note 42, at 188. [Reproduced in accompanying notebook at Tab 24.]

The defense countered the prosecution's argument, contending that the application of command responsibility to a particular situation depends upon the *de jure* authority of the commander.⁸⁰ In other words, the defense argued that in order to find liability under the doctrine of command or superior responsibility, an accused must have the lawful authority to issue binding orders in his or her name.⁸¹

In its findings, the tribunal found the prosecution's argument to be more persuasive. Hence, the tribunal stated, "the Trial Chamber accepts the Prosecution's proposition that individuals in positions of authority, whether civilian or within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as their *de jure* positions as superiors."⁸² Acknowledging that commanders or superiors alike can be held liable for failure to act in accordance with their *de facto* power, the tribunal then turned its attention to the nature of the superior-subordinate relationship.

In analyzing prior case law, the ICTY felt that a position of command of subordinates is a necessary pre-requisite to a finding of command responsibility.⁸³ However, in accordance with the prosecution's argument, the tribunal conceded that this position of command could not be determined by a classic rank structure alone, but by an analysis of the commander/superior's "actual possession, or non-possession of powers of control over the actions of subordinates."⁸⁴ Therefore, the tribunal voiced its opinion that a superior-subordinate relationship depends more on the power to control the actions of "subordinates" than on formal rank or military structure. This view is in keeping with

⁸⁰ See *Celebici* case, at ¶ 351.

⁸¹ *Id.* at ¶ 352.

⁸² *Id.* at ¶ 354.

⁸³ *Id.* at ¶ 370.

⁸⁴ *Id.* at ¶ 371.

Article 87 of Additional Protocol I (outlined above), which establishes the duty of a military commander to prevent the commission of violations of the Geneva Conventions by his troops, but also by “other persons not under his control.”

To shed light on this notion, the tribunal analogized its position to the notion of “indirect subordination.” For an example of indirect subordination, the tribunal quoted relevant language from the Commentary to the Additional Protocols. This language provides that:

If the civilian population in its own territory is hostile to prisoners of war and threatens them with ill-treatment, the military commander who is responsible for these prisoners has an obligation to intervene and to take the necessary measures, even though this population is not officially under his authority.⁸⁵

In likening its position to that of the Commentary to Protocol I, the ICTY directly acknowledged that a commander could be held responsible for atrocities committed by persons not directly under his or her control. The tribunal noted “[a] survey of the existing judicial precedents demonstrates that commanders in regular armed forces have, on occasion, been held criminally responsible for their failure to prevent or punish criminal acts committed by persons *not formally under their authority in the chain of command*.”⁸⁶ The tribunal explicitly recognized the rules of law set down by the *High Command Case* and the *Hostage Case* that commanders of an occupied area “may be held responsible for war crimes committed against civilians and prisoners of war in that area by troops not under their command.”^{87 88}

⁸⁵ Commentary to the Additional Protocols

⁸⁶ *Id.* at ¶ 372.

⁸⁷ *Id.*

⁸⁸ Some commentators take the position that the ICTY applied a broad version of the command responsibility doctrine in *Celebici*. See Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT’L L. 89 (2000). [Reproduced in accompanying notebook at Tab 32.]

(i) The Prosecution of Hazim Delic

After a careful examination of the evidence, the tribunal concluded that Delic could not be held liable through superior responsibility because the prosecution had failed to show that he was in fact a superior with the power to punish acts of his subordinates or with the power to prevent acts of his subordinates.⁸⁹

With regard to Delic's superior responsibility, the defense argued that Delic could not be held liable for superior responsibility unless it was shown that he was in a position of command.⁹⁰ More specifically, the defense argued Delic was merely acting as a conduit to transfer orders from the commander to individuals of lower rank than himself and that consequently, Delic lacked any true superior responsibility.⁹¹

In its analysis, the ICTY tribunal rejected this argument and proceeded under the "de facto" command doctrine and focused on whether the prosecution had met its burden of proving that Delic exercised command authority (*de jure* or *de facto*) over prison guards at Celebici.⁹² The tribunal ultimately ruled that the prosecution's evidence, which consisted of eyewitness testimony that Delic appeared to be in charge of the prison guards and that Delic gave orders and exercised influence over the prison guards was inadequate to prove superior responsibility.⁹³

(ii) The Prosecution of Zdravko Mucic

Unlike Delic, Mucic was alleged to have been the actual commander of the Celebici prison camp.⁹⁴ In evaluating Mucic's case, the tribunal again stressed that the

⁸⁹ Ching, *supra* note 42, at 195. [Reproduced in accompanying notebook at Tab 24.]

⁹⁰ *Id.* at 193.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 194

⁹⁴ *Id.* at 195

essence of command or superior responsibility is the actual exercise of authority. Ultimately, from a lengthy analysis of the evidence, the tribunal found that Mucic did indeed have *de facto* command authority at the Celebici camp.⁹⁵ Upon an evaluation of Mucic's knowledge of the incidents, the tribunal imputed knowledge to Mucic because of the widespread nature of the atrocities committed at Celebici.⁹⁶

(iii) Prosecution of Zejnil Delalic

The ICTY found that Delalic could not be held responsible for the atrocities committed at Celebici. The tribunal's analysis begins by stating, "The view of the Prosecution that a person may, in the absence of a subordinate unit through which the authority is exercised, incur responsibility for the exercise of superior authority seems to the Trial Chamber a novel proposition clearly at variance with the principle of command responsibility."⁹⁷ The tribunal stated this, despite having acknowledged previously in the Judgment that military commanders can be, and have been held responsible for atrocities committed by persons not under their formal command.

The tribunal then reiterates its support for the doctrine of *de facto* or actual authority, while stating at the same time, "The Trial Chamber is unable to agree with the submission of the Prosecution that a chain of command is not a necessary requirement in the exercise of superior authority."⁹⁸ The tribunal seemed unable to reconcile the notions of *de facto* and *de jure* authority. A formal chain of command is not a necessary requisite for the finding of *de facto* authority. According to previous judicial precedent, and the

⁹⁵ *Id.* at 197.

⁹⁶ *Id.*

⁹⁷ See *Celebici* case, at ¶ 647. [Reproduced in accompanying notebook at Tab 9.]

⁹⁸ *Id.*

Trial Chamber's own statements in previous portions of the *Celebici* judgment, *de facto* authority is based on a finding of actual authority, not a formal chain of command.

The ICTY's decision became clearer when it directly addressed the fact that Delalic merely acted as Commander of Tactical Group 1, and not as a commander of a "geographical area."⁹⁹ The tribunal's assertion that commanders of tactical military units are not in command of a geographical region and, therefore, are not subject to criminal liability resulting from atrocities committed in the area by persons other than their subordinate troops is consistent with previous international jurisprudence.¹⁰⁰ In distinguishing between tactical and regional commanders, the ICTY acknowledges that regional commanders may be held liable for atrocities committed in their area of control by persons other than their troops.¹⁰¹

(iv) The Appeal

The Appeals Chamber's decision on Mucic's appeal from the Trial Chambers finding of guilt based on command responsibility provides a consistent and clear analysis of the doctrines of command and superior responsibility.

In its analysis, the Appeals Chamber began by citing Article 87(3) of Additional Protocol I. The Chamber recognized that Article 87(3) requires a commander who is "aware that subordinates or *other persons under his control* are going to commit or have committed a breach of the Conventions" is under a duty to prevent or punish such acts.¹⁰²

The Chamber then cites the *Blaskic* case, stating that "Additional Protocol I construed

⁹⁹ *Id.* at ¶¶ 693-95.

¹⁰⁰ See *Hostage* case, *supra* note 1. [Reproduced in accompanying notebook at Tab 6.]

¹⁰¹ See *Celebici* case. [Reproduced in accompanying notebook at Tab 9.]

¹⁰² Mucic Appeals Judgment [hereinafter *Mucic Appeal*], IT-96-21(1998), ¶ 189 (regarding Zdravko Mucic's Ninth Ground of Appeal Concerning Command Responsibility), *reprinted in* Volume 2L GLOBAL WAR CRIMES TRIBUNAL COLLECTION, at 54 (S. De Harardt & W. Van Der Wolf eds. 2001). [Reprinted in accompanying notebook at Tab 10.]

control in terms of the material ability of a commander to punish” perpetrators of war crimes.¹⁰³ The Chamber thus clearly asserts that under Additional Protocol I and Article 7(3) of the ICTY Statute that, “a commander or superior is thus the one who possesses the power or authority in either a *de jure* or *de facto* form to prevent a subordinate’s crime or to punish the perpetrators of the crime after the crime is committed.”¹⁰⁴

In contrast to the Trial Chamber’s decision in *Celebici*, the Appeals Chamber makes no mention of formal rank or command structure. Instead, the analysis clearly focuses on actual or formal power to punish or prevent the commission of war crimes.

The Chamber proclaimed:

In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organized hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but also of their commanders or other superiors who were, based on evidence, in control of them, without, however, a formal commission or appointment.¹⁰⁵

To establish a clear standard for use in command and superior responsibility cases, the Appeals Chamber reiterates the notion of “effective control,” which it stated has been accepted as a standard to be used to determine superior and command responsibility.¹⁰⁶ Thus in determining questions of liability, the Chamber felt it was necessary to look to the effective exercise of control or power and not to formal rank or formal title within a chain of command.¹⁰⁷

¹⁰³ *Id.* at ¶ 190.

¹⁰⁴ *Id.* at ¶ 193.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at ¶ 196.

¹⁰⁷ For more analysis on effective control, see also Prosecutor v. Milomir Staki, *Decision on Rule 98 Bis Motion for Judgment of Acquittal*, IT-97-24-T., 31 October 2002. [Reproduced in accompanying notebook at Tab 11.]

The jurisprudence of the ICTY complies with the notions of command responsibility set forth in the post-WWII jurisprudence. It also is in accordance with Articles 86 and 87 of Additional Protocol I. Although the ICTY (even the Appeals Chamber), seems more concerned with a “formal” chain of command, its recognition that a military commander can be and has been found liable for actions of persons other than those under his command preserves the notion that military commanders of an occupying army, as general peacekeepers, are obliged to punish those responsible for war crimes and to prevent war crimes from occurring in their area of control.

IV. Imposing Individual Criminal Liability for Command and Superior Responsibility in Internal Armed Conflicts

Although the notions of command responsibility and superior responsibility are firmly rooted in international law, there is some question as to their applicability to armed conflicts of an internal character, i.e. civil wars. Additional Protocol I, examined above, as an annex to the original Geneva Conventions of 1949, clearly applies only to international armed conflicts. The only provision of the Geneva Conventions that directly applies to internal conflicts is Common Article 3, and its supplement, Additional Protocol II. Neither of these instruments provides for individual criminal liability, under the doctrine of superior responsibility.¹⁰⁸

The ICTY addressed this question in *Prosecutor v. Tadic*. In *Tadic*, the Appeals Chamber concluded that criminal liability attaches to breaches of the Geneva Conventions, “regardless of whether they are committed in internal or international

¹⁰⁸ *Supra* note 63, art. 3. [Reproduced in accompanying notebook at Tab 3.]

conflicts.”¹⁰⁹ The Chamber also stated that according to conventions of treaty interpretation set down by the International Military Tribunal at Nuremberg, the finding of individual criminal responsibility is not precluded by an absence of treaty provisions explicitly providing for criminal responsibility.¹¹⁰

The ICTY Appeals Chamber addressed this question again in its *Celebici* decision. Following its decision in *Tadic*, the Appeals Chamber upheld its ruling that individual criminal liability can be imposed under Common Article 3, even though no provision outlining individual liability is present in Common Article 3. “The fact that Common Article 3 does not contain an explicit reference to individual criminal liability does not necessarily bear the consequence that there is no possibility to sanction criminally a violation of this rule.”¹¹¹

In further interpreting the Geneva Conventions, the Appeals Chamber in *Celebici* felt that the provisions of Common Article 3 were clearly intended to be criminalized.¹¹² This refutes much commentary by scholars asserting that penal sanctions were intended to reach international conflicts only.¹¹³ The conclusion of the Appeals Chamber makes sense. International law, created by treaties would be without force if enforcement provisions were not provided for. Common Article 1 to the Geneva Conventions imposes upon States the affirmative duty to implement the provisions of Common Article 3 in

¹⁰⁹ See *Mucic Appeal*, citing Prosecutor v. Tadic, at ¶ 129. [Reproduced in accompanying notebook at Tab 10.]

¹¹⁰ *Id.*

¹¹¹ See *Mucic Appeal*, at ¶ 162, discussing whether Common Article 3 imposes individual criminal responsibility. [Reproduced in accompanying notebook at Tab 10.]

¹¹² *Id.*, at ¶ 163.

¹¹³ See Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916 (1994). [Reproduced in accompanying notebook at Tab 27.] Lopez concludes that Common Article 3 does not imply penal sanctions for non-compliance with its provisions.

their respective domestic legislation.¹¹⁴ This duty included the duty to implement the provisions of Common Article 3 and directly reinforces the notion that criminal liability is implied for breaches of Common Article 3.

International law expert Michael P. Scharf supports the contention of the ICTY Appeals chamber that individual criminal liability applies to internal armed conflicts.¹¹⁵ Scharf writes, “there now exists substantial support for the principle of individual criminal responsibility for violations of international humanitarian law applicable to internal armed conflicts as a matter of customary international law.”¹¹⁶ Scharf, citing reaffirmations by the UN Security Council, General Assembly, and the Commission on Human Rights asserts, “the international community has affirmed the principle of individual criminal responsibility for violations of international humanitarian law applicable to internal armed conflicts as a matter of customary international law.”¹¹⁷

Therefore, with the adoption of Common Article 3 and Protocol II, combatants engaged in internal conflicts within nation states are bound to respect the basic standards of humanity.¹¹⁸ The provisions of these instruments are meant to protect combatants and non-combatants alike in internal conflicts from war crimes and other atrocities. Indeed, grave breaches of the Geneva Conventions are subject to mandatory universal jurisdiction, whether they are committed during international or internal armed conflicts.¹¹⁹ Driving this idea home, the Appeals Chamber in its *Celebici* decision

¹¹⁴ See *Delalic Appeal*, at ¶ 163.

¹¹⁵ Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, available at www.law.duke.edu/journals/64LCP/Scharf. [Reproduced in accompanying notebook at Tab 30.]

¹¹⁶ *Id.* at 26.

¹¹⁷ *Id.* at 27.

¹¹⁸ Michael Bothe, *Article 3 and Protocol II: Case Studies of Nigeria and El Salvador*, 31 AM. U. L. REV. 899 (1982). [Reproduced in accompanying notebook at Tab 23.]

¹¹⁹ See *Mucic Appeal*, at ¶ 176 (citing the *Tadic* trial court's opinion on the matter).

recognized that most conflicts in the world today are internal in nature, and that a lack of power to punish war crimes committed in these internal conflicts would go against the main purpose of the Geneva Conventions; to protect the rights and dignity of all people.¹²⁰ The doctrines of command responsibility and superior responsibility insofar as they provide for individual criminal liability, are directly applicable to internal conflicts under Common Article 3 and Additional Protocol II.

V. The International Criminal Tribunal for Rwanda

This section analyzes case law concerning command and superior responsibility with an analysis of the jurisprudence on these subjects created by the International Criminal Tribunal for Rwanda. Specifically, an analysis of three cases will follow: *Prosecutor v. Jean Paul Akayesu*, *Prosecutor v. Clement Kayishema and Obed Ruzindana*, and finally *Prosecutor v. Alfred Musema*.

In order to punish those responsible for atrocities committed in Rwanda from April to July of 1994, the International Criminal Tribunal for Rwanda (“ICTR”) was created pursuant to Security Council of the United Nations Resolution 955 of November 8, 1994.¹²¹ Article 6(3) of the ICTR Statute imposes criminal liability on “superiors” for war crimes committed by their subordinates. Indeed, the language of Article 6(3) of the ICTR Statute is identical to the language of Article 7(3) of the ICTY Statute.¹²²

¹²⁰ *Id.* at ¶ 172.

¹²¹ *Supra* note 2 at 167.

¹²² Statute of the International Criminal Tribunal for Rwanda, *adopted by S/RES/955* (1994). [Reproduced in accompanying notebook at Tab 5.] Article 6(3) states: “The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

A. Jean Paul Akeyasu

Jean Paul Akeyasu (“Akeyasu”) served as Bourgmestre of the Taba commune in Rwanda from April 1993 to June 1994, the period in which the violence committed by Hutu militia groups against Tutsis was at its peak.¹²³ It is estimated that, during this time, between 2,000 and 7,000 Tutsis were slaughtered in Taba.

The Prosecution indicted Akayesu on counts of multiple war crimes, including genocide, complicity in genocide, and other crimes against humanity including rape and torture.¹²⁴ Akayesu was charged under the doctrine of superior responsibility (Article 6(3) of ICTR Statute) for counts 13 through 15, including rape, inhumane acts, and outrages upon personal dignity.¹²⁵ It was the theory of the Prosecution that Akayesu had the *de facto* authority to prevent or punish the perpetrators of the atrocities committed within Taba, and that his failure to do so resulted in criminal liability under Article 6(3) of the statute.¹²⁶ Before applying Article 6(3) to Akayesu, the tribunal briefly addressed the doctrines of command and superior responsibility.

From the outset, it was apparent that the ICTR was cautious and reluctant to find criminal liability based on the doctrine of superior responsibility. The Chamber engaged in a brief analysis of superior responsibility, and concluded from the trial of Former Minister of Japan Hirota that, “the application of the principle of individual criminal

¹²³ Prosecutor v. Jean Paul Akeyasu [hereinafter *Akayesu* case], Case No. ICTR-96-4-I, 2 September 1998, at ¶ 12, reprinted in Volume 1B GLOBAL WAR CRIMES TRIBUNAL COLLECTION, (J. Oppenheim & W. Van Der Wolf eds. 2000). [Reproduced in the accompanying notebook at Tab 13.]

¹²⁴ See Indictment, Prosecutor v. Jean Paul Akeyasu, Case No. ICTR-96-4-I. [Reproduced in the accompanying notebook at Tab 12.]

¹²⁵ *Id.*

¹²⁶ ICTR Statute, art. 6(3). [Reproduced in accompanying notebook at Tab 5.]

responsibility to civilians remains contentious.”¹²⁷ The Chamber acknowledged that in determining whether an accused had the power to take all necessary measures to prevent or punish war crimes should be a case-by-case determination.¹²⁸

The ICTR, in one paragraph, decided whether Akayesu could be found criminally liable for counts 13-15 of the indictment under the doctrine of superior responsibility. It stated, “Although the evidence supports a finding that superior/subordinate relationship existed... the Tribunal notes that there is no allegation in the Indictment that the... armed local militia, were subordinates of the accused.”¹²⁹ The Chamber did not address Akayesu’s apparent *de facto* power to prevent atrocities and punish those committing atrocities in Taba. It is a power that Akayesu possessed by nature of his authority as the Bourgmestre and failed to use. Indeed, the duties of a Bourgmestre are diverse, and Akayesu was basically in charge of the “total life of the commune in terms of the economy, infrastructure, markets, medical care and the overall social life.”¹³⁰ The position of the Bourgmestre could be likened to the representative of the President of Rwanda within the commune.¹³¹ Basically, the Bourgmestre can be seen as the executive authority within the commune, with responsibility to make sure that the laws are enforced and executed, representing the “communal authority.”¹³²

B. Clement Kayishema

The ICTR substantially clarified its position concerning the application of superior responsibility in the case of *Prosecutor v. Kayishema & Ruzindana*. It is

¹²⁷ See *Akayesu* case, at ¶ 490. [Reproduced in accompanying notebook at Tab 13.]

¹²⁸ *Id.* at ¶ 491.

¹²⁹ *Id.* at ¶ 691.

¹³⁰ *Id.* at ¶ 54.

¹³¹ *Id.*

¹³² *Id.* at ¶¶ 56, 61.

important to note that the decision in *Kayishema* immediately followed the ICTY's decision in *Celebici*.

Dr. Kayishema was the Prefect of the Kibuye prefecture in the territory of Rwanda.¹³³ As such, he was the governmental executive authority in Kibuye, one of eleven prefectures existing in the Republic of Rwanda in 1994. Kayishema's alleged crimes included genocide. Specifically, it was alleged by the Prosecutor that Kayishema ordered and participated in four massacres, in which Tutsis were rounded up and slaughtered by Hutu militia groups.¹³⁴ Seeking criminal liability based on superior responsibility, the Prosecution charged, with respect to each massacre, that Kayishema "did not take measures to prevent an attack, and after the attack Clement Kayishema did not punish the perpetrators."¹³⁵

In its analysis of superior responsibility, the ICTR Trial Chamber relied heavily on the principles set forth in the ICTY's decision in *Celebici*. Indeed, the ICTR in *Kayishema* reaffirmed the ICTY's analysis of superior responsibility. In doing so, the Chamber recognized that superior responsibility "is ultimately predicated upon the power of the superior to control the acts of his subordinates."¹³⁶ The Chamber explicitly aligned

¹³³ Indictment, Prosecutor v. Clement Kayishema and Obed Ruzindana, Case No. ICTR-95-I-T, 11 April 1997, at ¶ 23, *reprinted in* Volume IC GLOBAL WAR CRIMES TRIBUNAL COLLECTION (P. Van Althuis & W. Van Der Wolf eds. 2000). [Reproduced in accompanying notebook at Tab 14.]

¹³⁴ *Id.* at ¶¶ 1.1-1.4.

¹³⁵ *Id.* at ¶¶ 30, 37, 43, 49. [It is interesting to note that the Prosecution also alleged that Kayishema directly participated in and ordered the rounding up of Tutsis and the four massacres, which ensued. There was some evidence to suggest that Kayishema actually told Tutsis seeking refuge to go to these sites, where he ultimately gave the order for Hutu militia groups to murder Tutsis in mass. This raises interesting questions concerning the application of command responsibility, which is a form of vicarious liability, in a situation where it is alleged that a commander actually ordered and participated in the war crimes. For commentary on this issue see Alexander Zahar, *Command Responsibility for Civilian Superiors for Genocide*, 14 LEIDEN JOURNAL OF INTERNATIONAL LAW 591 (2001). [Reproduced in accompanying notebook at Tab 34.]

¹³⁶ Prosecutor v. Clement Kayishema and Obed Ruzindana, Case No. ICTR-95-I-T, 21 May 1999, at ¶ 217, *reprinted in* Volume IC GLOBAL WAR CRIMES TRIBUNAL COLLECTION (P. Van Althuis & W. Van Der Wolf eds. 2000). [Reproduced in accompanying notebook at Tab 15.]

itself with the decision of the ICTY in *Celebici*, and with the decisions in the *High Command Case* and *Hostage Case*, reasserting the principle that “influential powers not amounting to formal powers of command ‘provide a sufficient basis for the imposition of command responsibility.’”¹³⁷ In reaffirming these principles, the ICTR recognized that formal rank and command structure are unnecessary in finding liability under command and superior responsibility. Although the Chamber stated that the superior-subordinate relationship is central to a finding of liability under command responsibility, it also acknowledged that this relationship is predicated on the actual power, be it informal or formal, to influence or punish conduct.

In applying these principles to Kayishema’s case, the Chamber found that it was indisputable that Kayishema, as Prefect of Kibuye, exercised *de jure* control over the perpetrators of the massacres.¹³⁸ Noting that the finding of *de jure* authority does not automatically impute liability through command responsibility, the Chamber then addressed Kayishema’s *de facto* authority. The Chamber stated, “Thus, *no legal or formal position of authority need exist* between the accused and the perpetrators of the crimes.”¹³⁹ The Chamber was ultimately satisfied that the prosecution had established the *de facto* authority of Kayishema and that he knew or had reason to know of the war crimes and failed to prevent them. Kayishema was accordingly found criminally liable under Article 6(3) of the ICTR Statute.

¹³⁷ *Id.* at ¶ 220.

¹³⁸ *Id.* at ¶¶ 479-483.

¹³⁹ *Id.* at ¶ 492.

C. Alfred Musema

During the explosion of violence in Rwanda in 1994, Alfred Musema was the Director of the Gisovu Tea Factory in the Kibuye Prefecture.¹⁴⁰ The Prosecution alleged that Musema was guilty of crimes including genocide and other crimes against humanity both for directly committing these crimes and for failure to prevent subordinates from committing these crimes.¹⁴¹

In assessing Musema's liability under Article 6(3) of the ICTR Statute, the Trial Chamber noted that the "superior-subordinate command relationship often appears in the form of psychological pressure."¹⁴² The Chamber reasserted its support for the doctrine of *de facto* command and also explicitly recognized the notion of indirect subordination. The Chamber noted that "power of control, even if it is merely *de facto*, generally implies indirect subordination, which...extends beyond the commander's duty to his direct subordinates to 'other persons under his responsibility,' to prevent violations of the Geneva Conventions."¹⁴³

The Chamber found that the prosecution had established that employees of the Gisovu Tea Factory were among the perpetrators of the war crimes Musema was charged with.¹⁴⁴ It also found that Musema, as their employer, was the superior of these perpetrators, holding *de jure* and *de facto* power over them.¹⁴⁵ Finally, the Chamber found that Musema knew of the atrocities committed by his employees or

¹⁴⁰ Indictment, Prosecutor v. Alfred Musema, Case No. ICTR-96-13-I, 1999, *reprinted in* Volume ID GLOBAL WAR CRIMES TRIBUNAL COLLECTION (P. Van Althuis & W. Van Der Wolf eds. 2001). [Reproduced in accompanying notebook at Tab 16.]

¹⁴¹ *Id.*

¹⁴² Prosecutor v. Musema, Case No. ICTR-96-13-I, 27 January 2000, at ¶ 140. [Reproduced in accompanying notebook at Tab 17.]

¹⁴³ *Id.* at ¶ 143.

¹⁴⁴ *Id.* at ¶ 898.

¹⁴⁵ *Id.* at ¶ 899.

subordinates.¹⁴⁶ Consequently Alfred Musema was found guilty of genocide and other crimes against humanity based on his superior responsibility for the actions of his employees.

VI. Final Analysis

After reviewing the case law, including post-WWII jurisprudence and the jurisprudence of the ICTY and ICTR, a final analysis of the sum of this jurisprudence is necessary in order to explain how this law supports the thesis of this memorandum; that military commanders, as part of their duty in ensuring that the Geneva Conventions are complied with (whether the conflict involved is international or internal), are responsible for actions of persons under their effective control including persons other than their troops.

The sum of the post-WWII jurisprudence, from *Yamashita* to the *Hostage Case*, clearly impose upon military commanders broad duties in maintaining peace and order in their respective areas of control. In the case of General Yamashita, the Commission trying him acknowledged that Japanese naval troops, not under the direct command of Yamashita, committed most of the atrocities in Manila.¹⁴⁷ Yet, Yamashita was held responsible by the Commission, which asserted the proposition that, with command of military troops, comes broad and heavy responsibilities.¹⁴⁸

It was acknowledged in the cases against German Field Marshalls Wilhelm von Leeb and Wilhelm List that these broad responsibilities include a duty to prevent or punish crimes committed in a military commander's area of control even if these actions

¹⁴⁶ *Id.*

¹⁴⁷ Reel, *supra* note 25, at 153. [Reproduced in accompanying notebook at Tab 21.]

¹⁴⁸ *Id.* at 172.

were committed or are going to be committed by persons not under the commander's direct command.¹⁴⁹ The tribunal in the *High Command* case specifically asserted that a military commander must prevent a state or other lawless groups from committing crimes in an occupied area because it is the "power of the commander's occupying army, which holds the area in subjection." In similar fashion, the American Military Tribunal in the *Hostage Case* imputed to military commanders the duty of maintaining the peace and order within an occupied area and extended this duty to controlling the actions of military and civilians alike.

The ideas espoused in the post-WWII cases were explicitly codified for the first time in Articles 86 and 87 of Additional Protocol I. Article 87 explicitly requires that military commanders prevent or punish war crimes committed by subordinates or "other persons under his control."¹⁵⁰ "Other persons" in this context must be read to include civilians, or other lawless groups committing crimes within a military commander's area of control. Indeed, a military commander occupying a territory is an executive authority with the duty to maintain law and order. With this duty, comes the power to punish, including the responsibility to punish perpetrators of war crimes. This is the logic on which Article 87 is predicated. This notion is supported by the Commentary to the Additional Protocols, which states that if a civilian population threatens the well-being of prisoners of war, it is the duty of a military commander to prevent or punish the actions of the civilians. It would be consistent to deduce from this that a military commander also has the affirmative duty to protect civilians from other civilians.

¹⁴⁹ *Hostage case*, *supra* note 1, at 1260. [Reproduced in accompanying notebook at Tab 6.]

¹⁵⁰ Additional Protocol I, art. 87. [Reproduced in accompanying notebook at Tab 3.]

Many international law commentators support this point. Ilias Bantekas, writing for the American Journal of International Law states, “[E]xecutive commanders...are accountable within the territory they occupy to assure that the rights of civilians and POWs therein are fully protected. In the case of executive commanders, subordination is unimportant, their responsibility is co-extensive with their appointed command structure.”¹⁵¹ Accordingly, military commanders have a duty to prevent and punish crimes committed by allied forces or auxiliary forces stationed within their area of control.¹⁵² Military commanders must also punish civilians who commit war crimes due to inter-communal rivalry.¹⁵³

The jurisprudence created by the ICTY and ICTR concerning superior responsibility are also consistent with the notion that commanders are responsible for atrocities committed by persons other than their troops or formal subordinates. At the center of the ICTY’s decision in the *Celebici* case is the proposition that a superior-subordinate relationship is to be judged by not only *de jure* or formal powers, but by *de facto* or actual powers. The tribunal explicitly recognized the doctrine of indirect subordination, or the notion that military commanders could be, and have been found criminally liable for actions of persons other than those under their control. This is justified because a military commander has the *de facto* power to punish perpetrators of crimes within their area of control.

¹⁵¹ Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, AMERICAN JOURNAL OF INTERNATIONAL LAW, VOLUME 93, ISSUE 3 at 586 (1999). Available at <http://links.jstor.org/sici=0002-9300%2819907%2993%3A3%3C573%ATCLOSR%3E2.0.CO%3B2-N>. [Reproduced in accompanying notebook at Tab 22.]

¹⁵² *Id.*

¹⁵³ *Id.*

Similarly, the ICTR has recognized that the superior-subordinate relationship is based on the actual power, formal or informal, to influence or punish conduct. The ICTR has acknowledged that legal or formal positions of authority are unnecessary in the finding of command or superior responsibility. Military commanders certainly have the power to influence or punish the conduct of civilians within their area of control, and therefore, can be held criminally liable for their failure to do so.

VII. Conclusion

The above analysis compels the conclusion that military commanders may be held criminally liable for war crimes committed by civilians or states in their respective areas of control if the commander knew or should have known of the atrocities and fails to prevent or punish the atrocities. Again, it is the power of the commander's army that controls an occupied territory. A commander may not allow a state to commit atrocities and then defend his non-action by claiming he or she had no power to prevent the atrocities. With regard to civilians, military commanders have *de facto* authority over inhabitants of occupied territories. With this authority, comes the ability to punish crimes committed and influence over civilian action. This implies a duty to prevent war crimes committed by civilians.

This conclusion is necessary if customary international law is to survive and have any force in modern conflicts. As the ICTR recognized, most modern conflicts are internal in character. Armies in these conflicts are largely informal and exist by a *de facto* command structure. Those with the *de facto* power to ensure that the Geneva

Conventions are complied with, namely, military or superior commanders, must be threatened with criminal liability for failure to enforce these conventions.

If no criminal liability could be imposed on commanders, victims of war crimes will be left with no justice. Common troops will be able to blend back into the population and victims will not be redressed for their suffering. Commanders and other higher profile combatants must be punished.

Common Article 3 to the Geneva Conventions was implemented by states to ensure that basic standards of humanity are respected during armed conflict.¹⁵⁴ This goal can only be attained through the threat of penal sanctions imposed by the international community. “If the international community seriously intends to combat gross human rights violations it has to do so irrespective of particular states interests in order to attain the interests of the broader international society.”¹⁵⁵ In order to strengthen this interest of the international community, individual criminal responsibility for violations of customary international law must be applied uniformly regardless of the nature of the conflict or the region or state involved.¹⁵⁶

International authorities, including international prosecutors should not hesitate to indict persons (including military commanders) who, while in positions of authority and with knowledge (be it actual or constructive), negligently fail to punish or prevent persons who have committed or are about to commit war crimes.

¹⁵⁴ Bothe, *supra*, note 125. [Reproduced in accompanying notebook at Tab 23.]

¹⁵⁵ Bantekas, *supra* note 155, at 594. [Reproduced in accompanying notebook at Tab 22.]

¹⁵⁶ *Id.*

