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Ford v. Garcia: A Puzzling Fusion of the Command Responsibility Doctrine with the Torture Victim Protection Act

John W. Brooker

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Ford v. Garcia:[1] A Puzzling Fusion of the Command Responsibility Doctrine With the Torture Victim Protection Act

I. Introduction

For thousands of years, people throughout the world have resorted to torturing and murdering innocent victims in order to achieve their goals.[2] A common setting in which torture and murder are currently found is in struggles for political power.[3] In the 1980s and early 1990s, El Salvador, a small Central American nation-state, was entrenched in a bitter civil war in which human rights abuses were common.[4] In December of 1980, Salvadoran National Guard soldiers kidnapped, tortured, and subsequently murdered three nuns and one layperson.[5] The soldiers who perpetrated the crimes were ultimately convicted and sentenced to thirty-year prison terms in El Salvador.[6] General Carlos Eugenio Vides and General Jose Guillermo Garcia, in charge of the Salvadoran National Guard at the time of the murders, were never tried, and subsequently moved to Florida in 1989.[7]

Since military or paramilitary forces carry out many cases of torture and extra-judicial killings, unique issues of who is responsible for these crimes arise. In most criminal and tort law contexts, a failure to act will not subject one to liability absent an

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1 Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002).

2 *See* H.R. REP. NO. 102–367 at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 85 (citing AMNESTY INTERNATIONAL, POLITICAL KILLINGS BY GOVERNMENTS 5 (1983)).

3 *Id.*

4 For a brief yet informative summary of the El Salvadoran civil war, see *Enemies of War: El Salvador: Civil War*, PBS, *at* http://www.pbs.org/itvs/enemiesofwar/elsalvador2.html (last visited Jan. 24, 2003) [hereinafter *Enemies of War*] (on file with the North Carolina Journal of International Law and Commercial Regulation).

5 *Ford*, 289 F.3d at 1286.

6 Karin Meadows, *Generals Cleared: Jury Finds 2 Salvadorans not to Blame for Nuns' Slayings, Rapes*, ABC News, *at* http://abcnews.go.com/sections/us/DailyNews/salvadorangenerals001103.html (Nov. 3, 2000) (on file with the North Carolina Journal of International Law and Commercial Regulation).

7 *Id.*

agency or other statutorily or judicially recognized relationship.[8] Military commanders, however, hold a unique position of power and authority over their soldiers. By law and tradition, soldiers must follow orders issued by officers superior in rank.[9] Logically, if a commander has effective control of his soldiers, he has the ability to prevent or stop any objectionable actions. International law has repeatedly recognized the power of a military commander, and domestic and international tribunals have not hesitated to impose liability on a commander for the actions of his troops through the command responsibility doctrine.[10]

In 1999, the estates of the tortured and murdered victims brought suit in United States federal court against Generals Vides and Garcia.[11] The plaintiffs relied on the Torture Victim Protection Act of 1991 (TVPA) as the statutory basis for their lawsuit.[12] Since there is no question that the defendants did not personally torture or murder the victims, the plaintiffs relied on the command responsibility doctrine[13] to affix liability for damages, albeit vicariously, on the defendants.[14] At trial, the jury found for the defendants.[15] The plaintiffs appealed, challenging the district court's jury instructions and the allocation of the burden of proof.[16]

Since the doctrine of command responsibility and its interplay with the TVPA had yet to be litigated in the federal courts, *Ford v. Garcia* issued the first judicial interpretation of the command

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8 *See, e.g.*, 21 AM. JUR. 2D *Criminal Law* § 191 (1998) ("Merely witnessing a crime, without intervening, does not make one a party to the offense, unless his intervention was a duty . . . .").

9 For example, a United States Army commission requires "other personnel of lesser rank to render such obedience as is due an officer of this grade and position." United States's Army Officer's Commission. For an in-depth discussion of imposing command responsibility for a failure to act, see Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455 (2001).

10 *See infra* Part III.

11 Ford v. Garcia, 289 F.3d 1283, 1286 (11th Cir. 2002).

12 Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2000).

13 *See infra* text accompanying note 60 (explaining the command responsibility doctrine).

14 *Ford*, 289 F.3d at 1286.

15 *Id.* at 1287.

16 *Id.*

responsibility doctrine and its application within the TVPA.[17] This note will explore the facts and holding of *Ford* in Part II. Part III will examine the background law, and Part IV will provide an analysis of the court's opinion. Finally, this note will conclude that *Ford* has not fully comported with Congress's intent in enacting the TVPA.

II. Statement of the Case

A. Facts and Procedural History

The plaintiffs in *Ford* are representatives of the estates of Ita Ford and Mary Clarke, two of the four American women (the "churchwomen") who were raped, tortured, and murdered in December 1980.[18] The plaintiffs sought over $100 million in damages.[19] Reports indicate that Salvadoran soldiers tortured and murdered the churchwomen because the soldiers believed that the churchwomen were leftist-guerrilla sympathizers.[20] The soldiers killed the churchwomen during a time when such torture and murder were commonly committed in El Salvador.[21]

Many issues were not contested at trial. The defendants were undisputedly the *de jure* military commanders of the soldiers that raped, tortured, and murdered Mary Clark, Ita Ford, Dorothy Kazel, and Jean Donovan.[22] The defendants also admitted that they "were aware of a pattern of human rights abuses in El Salvador during their tenures as Minister of Defense and Director of the National Guard."[23] Their only defense, therefore, was that they "did not have the ability to control their troops during this period."[24] As a result, the plaintiffs' ability to prevail depended entirely on how the court analyzed the elements of the command responsibility doctrine and how it allocated the burden of proof in

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17 *Id.* at 1285.

18 *Id.* at 1285–86.

19 Meadows, *supra* note 6.

20 *Id.*

21 *Enemies of War*, *supra* note 4; Meadows, *supra* note 6.

22 *See Ford*, 289 F.3d at 1286 (stating that the defendants were in office when the torture and murder occurred); *infra* note 67 (defining *de jure* authority).

23 *Ford*, 289 F.3d at 1286.

24 *Id.*

such a case.[25] The plaintiffs contended that once they met their burden of proof regarding the command responsibility doctrine, the burden then shifted to the defendants to prove affirmatively that they did not have the ability to control their troops.[26]

The trial court, however, sided with the defendants.[27] The trial court's jury instructions required the plaintiffs to prove: (1) all of the elements of the command responsibility doctrine, and (2) that the torture and murder of the churchwomen was "a direct or a reasonably foreseeable consequence of one or both defendants' failure to fulfill their obligations under the doctrine of command responsibility."[28] In addition to the court's definition of the three elements of the command responsibility doctrine, the trial court required the plaintiffs to prove that the defendants had "effective command" of their troops. The plaintiffs also had to prove that the defendants' omissions caused the churchwomen's death.[29]

The jury believed that the defendants did not have effective control over their troops and as a result, found for the defendants.[30] Even though the plaintiffs offered a substantial amount of circumstantial evidence, the absence of a "smoking gun" prevented the plaintiffs from winning.[31]

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25 *Id.* at 1285, 1287.

26 *Id.* at 1289–90. *See infra* text accompanying note 60 (noting the elements of the command responsibility doctrine).

27 *Ford*, 289 F.3d at 1287.

28 *Id.* at 1287 nn.3–4.

29 *Id. See infra* text accompanying note 60 (noting the elements of the command responsibility doctrine). The trial court varied the "superior-subordinate relationship" element by requiring the plaintiff to prove "[t]hat persons under [the defendant's] effective command had committed, were committing, or were about to commit torture and extrajudicial killing." *Ford*, 289 F.3d at 1287 n.3. The trial court varied the "failure to prevent and punish" element by requiring the plaintiff to prove that "[t]he defendant failed to take all necessary and reasonable measures within his power to prevent or repress the commission of torture and extrajudicial killing or failed to investigate the events in an effort to punish the perpetrators." *Id.*

30 Meadows, *supra* note 6.

31 *Id.*

B. Holding of the Court of Appeals

The Court of Appeals decisively interpreted the TVPA to include "the doctrine of command responsibility."[32] The court, however, did not have post-TVPA United States case law to help it determine "how the doctrine [of command responsibility] should be applied in TVPA cases."[33] Because of the absence of relevant American case law, the court turned to international court decisions to determine whether the burden of proof shifted to the defendant after the plaintiff set forth prima facie evidence of an element of the command responsibility doctrine.[34] Instead of explicitly determining where the burden of proof should rest, the court simply upheld the trial court verdict, stating that it would not overturn "where the district court's instruction mirrored the language of the most recent indicia of customary international law on this point."[35]

The court indicated that its interpretation of customary international law keeps the burden of proving a commander's effective control of his troops on the plaintiff.[36] The court seems to favor making "*effective control*" over troops a "threshold to be reached in establishing a superior-subordinate relationship."[37] In his concurring opinion, Judge Barkett noted that the court failed to address the fact that the district court's "effective command" instruction contradicts international law because it requires a *de facto* military commander to possess "legal authority" over his troops.[38]

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32 *Ford*, 289 F.3d at 1288–89.

33 *Id.* at 1290.

34 *Id.* at 1290–93.

35 *Id.* at 1293.

36 *See id.* at 1292–93 (stating that "nowhere in any international tribunal decision have we found any indication that the ultimate burden of *persuasion* shifts on this issue when the prosecutor—or in TVPA cases, the plaintiff shows that the defendant possessed *de jure* power over the guilty troops").

37 *Id.* at 1290 (quoting Prosecutor v. Delalic (Appeals Chamber ICTY, Feb. 20, 2001) para. 256).

38 *Id.* at 1297 (Barkett, Circuit Judge, concurring). *See infra* note 67 for a definition of *de facto* authority.

III. Background Law

A. In re Yamashita[39] *and the Command Responsibility Doctrine*

The United States Supreme Court first recognized the command responsibility doctrine in the post-World War II case of *In re Yamashita*.[40] Yamashita was the Commanding General of the Japanese Fourteenth Army Group in the Philippines.[41] After surrendering to the United States Army in 1945, he became a prisoner of war and subsequently was convicted of war crimes violations by a military commission.[42] He was sentenced to death by hanging.[43] The military commission convicted General Yamashita of violating the laws of war that forbade the infliction of "violence, cruelty and homicide . . . upon the civilian population and prisoners of war."[44]

General Yamashita did not personally commit the acts of torture and violence; yet, the commission found him responsible.[45] The Court stated that a commander has "an affirmative duty to take such measures as [are] within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."[46] *Yamashita*, however, never addressed the "effective control" issue and simply laid down this blanket duty. Moreover, the court refused to review the sufficiency of any of General Yamashita's defenses and held that such defenses "are within the peculiar competence of the military officers composing the commission."[47]

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39 *In re* Yamashita, 327 U.S. 1 (1946).

40 *Id. Yamashita* entrenched the command responsibility doctrine in American case law. "*Yamashita* was the seminal Supreme Court case recognizing the three elements of the command responsibility doctrine, as well as affirmative defenses under the doctrine." Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 706, 720 (2002).

41 *Yamashita*, 327 U.S. at 5.

42 *Id.*

43 *Id.*

44 *Id.* at 14.

45 *Id.*

46 *Id.* at 16.

47 *Id.* at 17.

Yamashita did not specifically address any burden of proof issues in regard to the command responsibility doctrine.[48] However, the Court did explain that merely charging a commander with breaching "his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities," was sufficient for the commission to "hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt."[49]

B. The TVPA and the Command Responsibility Doctrine

The plaintiffs based their claim on the TVPA.[50] For a defendant to be liable under the TVPA, the factfinder must determine that the defendant subjected the victim to torture or extrajudicial killing.[51] The TVPA clearly codifies the torts of torture and extrajudicial killing.[52] Hence, a plaintiff must prove

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48 *Id.*; Ford v. Garcia, 289 F.3d 1283, 1290 (11th Cir. 2002).

49 *Yamashita*, 327 U.S. at 17.

50 Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2000). Section 2(a) of the TVPA states that:

> [a]n individual who, under actual or apparent authority, or color of law, of any foreign nation – (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Id. § 2(a).

51 *Id.* Section 3 of the TVPA spells out the definition for the term "extrajudicial killing" and sets forth the standard for determining if an act is one of "torture." *Id.* § 3.

52 Section 3(a) of the TVPA defines "extrajudicial killing" as:

> a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

Id. § 3(a). Torture is defined as:

> any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a

that the harm to the victim falls within the scope of the statute.[53] In essence, the TVPA designates torture and extrajudicial killing as violations of international law and provides the definitions for each.[54] Congress indicated its intention that the term "subjects" shall be interpreted broadly by including language imposing liability on "anyone with higher authority who authorized, tolerated, or knowingly ignored those acts."[55]

American law has incorporated the doctrine of command responsibility. The Alien Tort Claim Act (ATCA) affords aliens the ability to use American federal courts to sue the commanders of troops who torture their victims.[56] The TVPA does not limit claims to alien plaintiffs.[57] Instead, the TVPA allows for the estate of any victim of extrajudicial murder, regardless of nationality, to

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third person, or for any reason based on discrimination of any kind . . . .

Id. § 3(b)(1). Section 3(b)(2) describes what acts can cause "mental pain and suffering." *Id.* § 3(b)(2).

53 Since *Ford* is one of the first cases brought under the TVPA, there is not a sufficient body of case law to provide guidelines or definitions for all of the terms in the statute. The House Report, however, does provide some clarity as to the legislative intent behind some of the statute terminology. *See* H.R. REP. NO. 102-367, at 2–5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 85–88. Prior to the passage of the TVPA, torture victims brought claims under the Alien Tort Claim Act (ATCA), which did not enumerate specific harms. H.R. REP. NO. 102-367, at 3. Instead, plaintiffs could claim a violation of the law of nations, the scope of which is necessarily disputed in every case. ATCA, 28 U.S.C. § 1350 (2000); *see* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, Circuit Judge, concurring) (stating that the law of nations and its applicability and definition is an area of law that "cries out for clarification by the Supreme Court").

54 Since torture and extrajudicial killings are arguably *jus cogens* violations, it is clear that torture and extrajudicial killing were actionable under the ATCA prior to the TVPA. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (finding that torture is actionable under the ATCA). *Jus cogens* norms of international law are rules that are "recognized by the international community of states as peremptory, permitting no derogation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. K (1987). The TVPA does not apply to commanders in the United States military. *See* Statement by President George Bush Upon Signing H.R. 2092, 28 WEEKLY COMP. PRES. DOC. 465 (Mar. 16, 1992), *reprinted in* 1992 U.S.C.C.A.N. (106 Stat. 73) 91, 92.

55 *See* Murphy, *supra* note 40 at 720 (quoting S. REP. NO. 102-249, at 9 (1991)).

56 The Alien Tort Claim Act is codified at 28 U.S.C. § 1350 (2000). *See* H.R. REP. NO. 102-367 at 3 (stating that aliens have been able to sue defendants for torture for decades by invoking the ATCA).

57 Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2000). *See* H.R. REP. NO. 102-367 at 3, *reprinted in* 1992 U.S.C.C.A.N. 86.

maintain a suit against a non-American commander.[58]

The TVPA allows for the imposition of civil, not criminal, liability.[59] Hence, the standard of proof is a preponderance of the evidence. The three elements that a plaintiff must prove in order to win under the command responsibility doctrine include:

> 1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime;
>
> 2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and
>
> 3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes.[60]

In *Ford*, the district court required the plaintiffs to prove that the defendants were exercising "effective command" over the troops.[61] The district court determined that a commander exercises "effective command" if "the commander has the legal authority and the practical ability to exert control over his troops. A commander cannot, however, be excused from his duties where his own actions cause or significantly contribute to the lack of effective control."[62]

Although *Ford* did not have any problem finding that American courts may use the command responsibility doctrine to affix responsibility to commanders, it did not definitively determine on whom the burden of proof should fall.[63] In order to analyze the plaintiffs' burden of proof claims, the court looked at how various international criminal tribunals used the command

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58 Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2000). *See* H.R. REP. NO. 102-367 at 4, *reprinted in* 1992 U.S.C.C.A.N. 87.

59 Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2000).

60 Ford v. Garcia, 289 F.3d 1283, 1288 (11th Cir. 2002). Element (1) is hereinafter designated the "superior-subordinate relationship" element. Element (3) is hereinafter designated the "failure to prevent or punish" element.

61 *Id.* at 1287 n.3.

62 *Id.*

63 *See id.* at 1292 (refusing to assign either the plaintiff or defendant the burden of proof).

responsibility doctrine.[64]

C. *International Tribunals*

International tribunals and organizations have used the command responsibility doctrine to impose criminal liability on military commanders. The International Criminal Tribunal for the Former Yugoslavia (ICTY), which was established by the United Nations Security Council in 1993,[65] has repeatedly applied the command responsibility doctrine.[66]

The ICTY has made a distinction between commanders exercising *de jure* power compared to those exercising *de facto* power.[67] Current international law allows for the imposition of responsibility on both *de jure* and *de facto* commanders via the command responsibility doctrine.[68] In *Prosecutor v. Delalic*,[69] the ICTY stated that a court may presume that a commander who possesses *de jure* authority has effective control over his subordinates "unless proof to the contrary is provided."[70] Regardless of whether a commander exercised *de jure* or *de facto* authority, the ICTY has defined "effective control" as "a material ability to prevent or punish criminal conduct, however that control

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64 *Id.* at 1289.

65 S.C. Res. 827, U.N. SCOR, 3217th mtg. (1993).

66 *See, e.g.*, Prosecutor v. Delalic (Appeals Chamber ICTY, Feb. 20, 2001). Article 7(3) of the ICTY Statute empowers the Tribunal to use the command responsibility doctrine to impose criminal liability on commanders of troops who commit the crimes of torture and extrajudicial murder. *See* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Statute, U.N. Doc. S/25704, art. 7(3) (1993) [hereinafter ICTY Statute], http://www.un.org/icty/legaldoc/index.htm (May 25, 1993) (on file with the North Carolina Journal of International Law and Commercial Regulation).

67 *See* Prosecutor v. Delalic (Appeals Chamber ICTY, Feb. 20, 2001). A commander exercises *de jure* authority when he or she acting pursuant to an official appointment. *Id.* para. 186. *De facto authority* results from exercises of command authority outside of "formal legal authority." *Id.* For a more in-depth definition of *de jure* and *de facto* command, see Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573, 578–81 (1999).

68 *See Ford*, 289 F.3d at 1298 (Barkett, Circuit Judge, concurring).

69 Prosecutor v. Delalic (Appeals Chamber ICTY, Feb. 20, 2001).

70 *Id.* para. 197.

is exercised."[71] The ICTY did not explicitly state that the prosecutor bore the burden of proving that the defendant exercised effective control over his troops.[72]

The much-maligned International Criminal Court has also asserted jurisdiction over military commanders via the command responsibility doctrine.[73] The Rome Statute, however, does not assign the burden of proof or burden of production to either the plaintiff or defendant.[74]

IV. Analysis of *Ford v. Garcia*

Despite congressional clarity as to which bodily injuries constitute a violation of the TVPA, the statute is ambiguous as to which actions of indirect actors, such as military commanders, "subjects an individual" to "torture" or "extrajudicial killing."[75] Congress has made it clear that the command responsibility doctrine applies:[76] "[A] higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, . . . anyone with higher authority who authorized, tolerated[,] or knowingly ignored those acts is liable for them."[77] This statement, however, only avails the federal courts to the use of the command responsibility doctrine. It does not answer the questions of (1) who holds sufficient authority to be classified as a "higher official," such as a military commander; (2) what influence and power must a military commander hold in order to be liable under the command responsibility doctrine; and (3) which party is assigned the burden of proving the elements of

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71 *Id.* para. 256.

72 *Id.*; *Ford*, 289 F.3d at 1291–92.

73 Rome Statute of the International Criminal Court, art. 28(a) (1998) [hereinafter Rome Statute]. The Rome Statute established the International Criminal Court. *Id.* at art. 1. The International Criminal Court asserts jurisdiction over "the most serious crimes of concern to the international community as a whole," including "genocide," "crimes against humanity," "war crimes," and "crime[s] of aggression." *Id.* at art. 5(1). The United States, however, has refused to submit to the jurisdiction of the International Criminal Court. *See, e.g.*, Elizabeth Becker, *U.S. Presses for Total Exemption From War Crimes Court*, N.Y. TIMES, Oct. 8, 2002, at A6.

74 *See* Rome Statute, *supra* note 73 (failing to address burden of proof issues).

75 Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note, § 2 (2000).

76 S. REP. NO. 102-249, at 9 (1991).

77 *Id.*

the command responsibility doctrine. Although *Ford* did not definitively answer these questions, the court's analysis and responses to the aforementioned issues will have an immense impact on future litigation brought under the TVPA.

A. Applications of Actual and Apparent Authority

Ford has set the stage for future American courts to implement multiple standards for proving the superior-subordinate element of the command responsibility doctrine.[78] The TVPA states that one who tortures or extrajudicially kills another "under actual or apparent authority" is liable under the TVPA.[79] As discussed above, *de jure* authority is the international law synonym for "actual authority," and *de facto* authority is the synonym for "apparent authority."[80] Logically, if a military commander does not possess either *de jure* or *de facto* control, the commander does not have sufficient actual or apparent authority to be found liable under the TVPA. As a result, one of the first questions that the factfinder in a TVPA case must answer is whether or not the defendant held *de jure* authority over the troops that committed the tort.

Ford's refusal to set forth a definitive standard as to what effect *de jure* authority has on the satisfaction of the superior-subordinate element leaves the question open for various lower court interpretations.[81] Although *Ford* discusses various international tribunal interpretations at great length,[82] it leaves room for three separate avenues of approach that a future district

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78 Element one of the trial court's command responsibility doctrine definition requires the plaintiff to prove "[t]hat persons under defendant's effective command had committed, were committing, or were about to commit torture and extrajudicial killing." *See* Ford v. Garcia, 289 F.3d 1283, 1287 n.3 (11th Cir. 2002).

79 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, § 2(a) (2000).

80 *See* Bantekas, *supra* note 67 at 578–81.

81 The defendants in *Ford* undisputedly held *de jure* authority over the soldiers who tortured and killed the victims. *See Ford*, 289 F.3d at 1286 (explaining that the defendants' only defense was that they did not have "effective control" of their troops). Under *Ford*, if the defendants do not concede that they were the *de jure* commanders at the time of the alleged tort, the plaintiff may bear the burden of proof of showing "effective command." *Id.* at 1286.

82 *See id.* at 1290–93.

judge might take in determining whether a commander with *de jure* authority satisfies the effective command element.

1. De Jure Authority Alone May Satisfy the Superior-Subordinate Relationship Requirement

A district court may determine that all a plaintiff must do to satisfy the superior-subordinate relationship element of the command responsibility doctrine is to establish that the commander had *de jure* authority over the troops committing the tort.[83] Although *Ford* states "effective control" is "an element which must be proved in command responsibility cases," it does not clarify the relationship between the term "effective control" and the "superior-subordinate relationship" or the "failure to prevent or punish" elements of the command responsibility doctrine.[84] As a result, *Ford's* analysis of international law does not comport with its ultimate holding.

Ford initially appears to support the theory that the "failure to prevent or punish" element and "effective control" are synonomous.[85] In its analysis of international cases regarding effective control, *Ford* states that "[t]he consensus is that '[t]he concept of effective *control* over a subordinate in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised[,] is the threshold to be reached in establishing a superior-subordinate relationship."[86] In other words, if a commander cannot either prevent torture or punish troops who

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[83] *See id.* at 1292. Another issue that may arise in future cases is whether or not the government that allegedly granted the commander *de jure* authority actually had the power to do so. For example, the Taliban regime, which controlled Afghanistan from 1996–2001, was only formally recognized by three other nations. *See, e.g.*, John Bowman, *The Taliban: Afghanistan's Fundamentalist Leaders*, CBC News, *at* http://www.cbc.ca/news/indepth/background/taliban.html (May 2001, updated July 2001) (on file with the North Carolina Journal of International Law and Commercial Regulation). It is unclear whether or not commanders in a regime with questionable international legal legitimacy would have the requisite power to confer *de jure* authority. Such a question is not present in *Ford*, however, and accordingly will not be discussed in this note.

[84] *Ford*, 289 F.3d at 1292–93; *see also supra* text accompanying note 60 (explaining the three elements of the command responsibility doctrine).

[85] *See Ford*, 289 F.3d at 1290–93.

[86] *Id.* at 1290 (quoting Prosecutor v. Delalic (Appeals Chamber ICTY, Feb. 20, 2001) para. 256).

torture others, this lack of "effective control" prevents him from being held liable under the "failure to prevent or punish" element, which in turn precludes liability under the "superior-subordinate relationship" element. *Ford*, however, contradicts what it purports to be the international consensus definition of "effective control" by upholding the district court's definition of "effective command."[87]

The district court stated that a commander has "effective command" over his troops when he "has the legal authority and the practical ability to exert control over his troops."[88] One logical way to apply this statement is to assign the clause "has the legal authority" to the superior-subordinate relationship element and the "practical ability to exert control over his troops" clause to the failure to prevent and punish element. If a future court applies the district court's "effective command" instruction in this manner, all that the court needs to satisfy the superior-subordinate element of the command responsibility doctrine is proof that the commander had *de jure* authority over the tortfeasors. In other words, effective control is irrelevant when proving the superior-subordinate relationship element. Since a commander would exercise effective control by preventing the torture or punishing the perpetrators, the effective control issue would be whether or not the commander had the ability to do so.

A simple reading of *In re Yamashita* also leans toward finding that *de jure* authority alone can satisfy the superior-subordinate relationship element.[89] In *Yamashita*, the Supreme Court refused to consider any defenses such as a commander's loss of ability to prevent and punish improper actions by subordinates.[90] Justice Murphy's dissenting opinion in *Yamashita* admitted that General Yamashita *could not* have maintained control of his army.[91]

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87 *Id.* at 1287 n.3.

88 *Id.*

89 *In re* Yamashita, 327 U.S. 1 (1946).

90 *Id.* at 17.

91 In a brilliant yet cynical "rewording" of the United States' charges against Yamashita, Justice Murphy wrote,

> We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you

Hence, the only Supreme Court opinion that addresses liability via command authority holds that *de jure* command authority is sufficient to satisfy the superior-subordinate relationship element. Notice, however, that *Yamashita* eliminates the need to determine effective control for a different reason. Instead of making effective control a requirement of the "failure to prevent or punish" element, it simply holds that *de jure* authority alone is enough to establish "effective control."

Commentators have also stated that *de jure* authority alone may be enough to establish a sufficient superior-subordinate relationship:[92] "[T]he existence of a superior-subordinate relationship can be established in two independent ways, *de jure* and *de facto*. The most obvious means for the assumption of power is through official delegation of command from a pertinent office."[93]

2. The De Jure and De Facto Distinctions are Irrelevant

Another highly plausible interpretation of the TVPA obviates the need for any classification of a commander's source of authority. Under this interpretation of the command responsibility doctrine, the central question that a factfinder must answer is whether the defendant had "effective control" of the tortfeasors. If the factfinder determines that the defendant exercised effective control of the troops, the defendant is subject to liability. Under such an interpretation, the determination of whether or not the defendant held *de jure* authority over the tortfeasors is, at best, only a factor in determining whether the defendant exercised "effective control."[94]

> for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops.

Id. at 34–35 (Murphy, J., dissenting).

92 *See* Bantekas, *supra* note 67, at 578–79 (discussing sources of command authority and *de jure* command).

93 *Id.* at 578.

94 *See* Ford v. Garcia, 289 F.3d 1283, 1290–91 (11th Cir. 2002).

The statements of the law made by *Ford* illustrate why this approach may be attractive to judges when instructing juries in future command responsibility cases. *Ford* states that the consensus definition of "effective control" in international law is the "ability to prevent or punish criminal conduct."[95] Furthermore, *Ford* indicates that "a showing of the defendant's actual ability to control the guilty troops is required as part of the plaintiff's burden under the superior-subordinate prong of command responsibility, whether the plaintiff attempts to assert liability under a theory of *de facto* or *de jure* authority.[96]

The court based these statements of law on ICTY cases, which are based on Article 7(3) of the ICTY statute.[97] In essence, the court is saying that a court may impose liability on a defendant if he exercised "effective control" at the time of the torture or extrajudicial killing.[98]

If a district court were to apply such a principle, there would be no need to distinguish the source of the defendant's authority. In other words, "[i]f liability for the acts of others is established through the element of authority over subordinates, it follows that the mere existence of such authority, whether acquired *de jure* or *de facto*, renders one a superior for the purposes of Article 7(3) of the ICTY Statute."[99] *Ford* stated that the ICTY cases "provide insight into how the doctrine [of command responsibility] should be applied in TVPA cases."[100] Accordingly, a future district or circuit judge may not even concern herself with the distinction between *de jure* and *de facto* authority.[101]

3. De Jure Commanders are Presumed to Have the Requisite Superior-Subordinate Relationship

The third interpretation that a future judge may take when applying the command responsibility doctrine to the TVPA is to

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95 *Id.* at 1290 (quoting Prosecutor v. Delalic (Appeals Chamber ICTY, Feb. 20, 2001) para. 256).

96 *Id.* at 1291 (citing *Delalic*, para. 196).

97 *Id.* at 1290–91; ICTY Statute, *supra* note 66.

98 *See Ford*, 289 F.3d at 1290–91.

99 Bantekas, *supra* note 67, at 579.

100 *Ford*, 289 F.3d at 1290.

101 *See id.*

instruct a jury that finding that the defendant had *de jure* authority "results in only a *presumption* of effective control."[102] The ICTY case of *Prosecutor v. Delalic* took this approach.[103] *Ford* states that *Delalic* indicates that *de jure* authority is "prima facie evidence of effective control, which accordingly can be rebutted only by the defense putting forth evidence to the finder of fact that the defendant lacked this effective control."[104]

Ford, however, simply restated this proposition and applied one aspect of current domestic law, which makes a distinction between the "burden of production" and the "burden of persuasion."[105] Neither the ICTY Statute nor *Delalic* make such an explicit distinction.[106] Since *Delalic* does not distinguish between the burdens of persuasion and production, a future court could follow a different line of domestic authority to place the burden of persuasion on the defendant to prove that he did not have effective control once a plaintiff proves *de jure* authority.[107]

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102 *Id.* at 1291.

103 Prosecutor v. Delalic (Appeals Chamber ICTY, Feb. 20, 2001) para. 197.

104 *Ford*, 298 F.3d at 1291.

105 *Id.*; *see supra* Part IV(B) (discussing burden of proof allocation). *Ford* primarily relies on cases from its own jurisdiction, as well as Black's Law Dictionary, when analyzing the effect of the presumption. *See Ford*, 289 F.3d at 1291-92.

106 *See* ICTY Statute, *supra* note 66, art. 7(3); *see Delalic* para. 197. Since *Delalic* does not directly address the effect of the "*presumption* of effective control," a federal court in the future may not apply domestic law in the same manner as *Ford* when determining where the burden of persuasion falls once the plaintiff proves that the defendant held *de jure* authority.

107 *See Ford*, 289 F.3d at 1291–92. Although *Ford* points out that the ICTY Statute has never shifted the burden of persuasion to the defendant, it chooses not to rule on the issue. *Id.* Interestingly, there is case law from the Eleventh Circuit that would support the defendant holding the burden of persuasion when attempting a lack of effective control defense. In *United States v. Continental Ins. Co.*, the court dealt with another case of first impression regarding the assignment of the burden of proof. 776 F.2d 962 (11th Cir. 1985). When determining where the burden of proof should be placed, the court stated that, "Neither this circuit nor any other circuit that we are aware of has decided which party bears the burden of proof on this issue. [We are a]dhering to the common law guide that the party in the best position to present the requisite evidence should bear the burden of proof ...." *Id.* at 964. Since a TVPA defendant is likely to be in a better position than the plaintiff to prove a lack of effective control, a future court has ample authority to place the burden of persuasion regarding effective control on the defendant once the plaintiff has set forth a prima facie case. *See infra* Part IV(B)(1) and accompanying text (explaining why a defendant is in a better position to prove a lack of effective control).

B. *The Closing and Opening of the Door to Future TVPA Claims*

1. *The Closing of the Door: The Possible Effect of Assigning the Plaintiff the Burden of Proving "Effective Control"*

Ford refused to reverse the trial court's jury instructions that placed the burden of persuasion for all elements of the command responsibility doctrine on the plaintiffs.[108] There was no dispute that the plaintiff had the burden of proving the prima facie elements of the command responsibility doctrine.[109] As discussed above in Part IV(A), however, the court did not answer the question of what the plaintiff must prove in order to satisfy the superior-subordinate relationship element, nor did it clarify the relationship between the term "effective control" and the elements of the command responsibility doctrine.[110] A future court may, in fact, adopt the plaintiffs' position in *Ford.* The plaintiffs contended that once they established their prima facie case, the burden of persuasion shifted to the defendant to produce an affirmative defense.[111]

Ford, however, upheld the trial court's jury instruction that placed the burden of persuasion on the plaintiff[112] to prove that the defendants exerted "effective command."[113] The court set forth the possibility that where *de jure* authority creates a "presumption of effective control," the presumption "shifts the burden of production with respect to the element it concerns, but not the burden of persuasion."[114] Applying this standard to *Ford*, once the

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108 *Id.* at 1292.

109 *See id.* at 1289; *supra* note 60 and accompanying text for the prima facie elements of the command responsibility doctrine.

110 *See supra* Part III(A) and accompanying text.

111 *Ford*, 289 F.3d at 1289.

112 *Id.* at 1292.

113 *Id.* at 1287.

114 *Id.* at 1291. The Eleventh Circuit differentiates a "presumption" from an "inference." *See* Walker v. Mortham, 158 F.3d 1177, 1184-85 (11th Cir. 1998). Whereas a "presumption" never shifts the burden of persuasion to the defendant, an "inference" may only be rebutted with an affirmative defense. *See id.* at 1184 n.10. When offering an affirmative defense, "[t]he defendant would therefore carry the burden of *persuasion* in regard to that explanation." *Id.*

defendants were established to be the *de jure* commanders of the tortfeasors, they had the burden of producing admissible, non-hypothetical evidence to show that they did not have effective control of their troops.[115] Once they introduced such evidence, the presumption dropped, with the plaintiff still holding the burden of persuasion.[116] Therefore, if the only evidence that the *Ford* plaintiffs had to prove in order to satisfy the superior-subordinate element was the fact that the defendants were the tortfeasors' *de jure* commanders, the defendants would have successfully defeated the claim.[117]

Proving that a commander exercised *de jure* authority over troops is unlikely to be difficult to prove in cases where a legitimate and globally recognized government commissioned the defendant.[118] "Formal executive structures, such as state entities, usually vest such authority by passing legislative acts, which provide evidence of de jure command."[119] Thus, in many foreseeable cases, a plaintiff need only provide publicly accessible documents as evidence sufficient to establish a prima facie case against a commander. Even in cases in which the defendants commanded for the military of a developing nation, defendants will likely stipulate that they were the *de jure* commanders of the tortfeasing troops.[120]

If a plaintiff must also affirmatively prove a commander's ability to prevent or punish the illicit activity in order to prove "effective control," the evidence will not be as easy to procure. The ICTY has stated that one way to prove effective control is through a "thorough analysis of the distribution of tasks" within a military unit.[121] In order to determine what was the "distribution of tasks," the plaintiff would likely have to interview former soldiers in the commander's unit. These former soldiers may be dead, may be difficult to find, or may still be loyal to the

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115 *Id.* For a discussion of the difference between "burden of persuasion" and "burden of production", see *Walker*, 158 F.3d at 1184-85.

116 *Ford*, 289 F.3d at 1291-92.

117 *See id.*

118 *But see supra* note 83 (discussing unrecognized and illegitimate governments).

119 Bantekas, *supra* note 67, at 578.

120 Such was the case in *Ford*. *See supra* note 22 and accompanying text.

121 Prosecutor v. Nikolic, 108 I.L.R. 21, 31 (1998).

defendant.[122] The law of the country in which the crimes occurred may not be amenable to the plaintiff's suit.[123] In addition, if the plaintiff decided to proceed to trial, the plaintiff would be required to pay for the costs of obtaining the testimony of the witnesses. Since most foreseeable cases of torture will occur in a foreign land that may still be politically unstable, the costs of such a venture would be enormous, and would almost surely price the plaintiff out of bringing the claim.[124]

Ford illustrates that the defendant is usually in a better position to affirmatively disprove the effectiveness of his *de jure* command than the plaintiff would be in an attempt to prove it. In *Ford*, the defendants successfully called the former U.S. Ambassador to El Salvador to testify on their behalf as a factual and expert witness.[125] In addition, the defendant will undoubtedly know who was in his unit, as well as any specific incidents that would demonstrate lack of effective control at the time of the torture. The defendant, however, would face the same resource issues as the plaintiff if the court placed the burden of persuasion on the defendant.[126] Therefore, if the defendant in a future case is indigent, he may be unable to successfully prove that he truly did not have effective command of the tortfeasors.

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122 For example, the ICTY is based on war crimes in the former Yugoslavia. *See* José E. Alvarez, *Seeking Legal Remedies for War Crimes*, 9 J. INT'L INST. (2002), *available at* http://www.umich.edu/~iinet/journal/vol6no1/alvarez.html (on file with the North Carolina Journal of International Law and Commercial Regulation). The area is still ravaged by the effects of a decade of civil war, and "[g]overnments in the region have not always cooperated with the tribunal." *Id.*

123 The plaintiff will not have the benefits of obtaining evidence under the mandate of the United Nations, as is the case with ICTY and ICTR prosecutors. *See* ICTY Statute, *supra* note 66, art. 29 (requiring the co-operation and judicial assistance of all member states); *see also* Statute of the International Criminal Tribunal for Rwanda, art. 28 (1994) [hereinafter ICTR].

124 The ICTY and ICTR are able to prosecute violations of the law of war because they are funded by the United Nations. The TVPA, however, is a United States federal civil statute. The United States will not fund such claims. *See* H.R. REP. NO. 102-367 at 7 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 89–90 (explaining no federal budgetary impact). Even if a law firm takes the case on a contingent basis, *Ford*'s allocation of the burden of proof makes it unlikely that a firm would take such a costly and risky lawsuit on a contingent fee basis.

125 Ford v. Garcia, 289 F.3d 1283, 1286–87 (11th Cir. 2002).

126 *See supra* note 124 and accompanying text.

2. *The Opening of the Door: The Possible Requirement that Commanders See Into the Future*

The fact that *Ford* did not strike down the trial court's definition of "effective command" may lead a future court to require that commanders never make a mistake in a wartime tactical decision.[127] In other words, a commander who loses control of his troops may be held strictly liable for the subsequent torture committed by his troops, even if he could not have foreseen the loss of control. This proposition was first set forth in Justice Murphy's dissenting opinion in *In re Yamashita*.[128] In short, Yamashita lost all control of his troops not because of his own wanton negligence or criminal conduct, but instead because of American attacks on his command and control center and on his supply lines.[129]

By endorsing incongruous definitions of "effective control" and "effective command," *Ford* presents two differing paths to future courts. On one hand, *Ford* supports a definition of "effective control" as the "material ability to prevent or punish criminal conduct, however that control is exercised."[130] If a future court adopts this definition of effective control, a commander such as General Yamashita, who lost control of his troops because American attacks were breaking his lines of communication, could not be found liable, since he had no ability to prevent or punish the torture or extrajudicial killings. On the other hand, *Ford* upholds the trial court's definition of effective command.[131] It is foreseeable that a future court will simply adopt this definition because it has already withstood an appellate challenge.

If a future court uses the trial court's effective command definition in a case where a commander lost effective control of his troops due to incorrect tactical decisions, the commander could

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127 The U.S. Army Field Manual on Military Leadership states, "[t]actical knowledge is the ability to employ your soldiers and their equipment. Combat arms leaders work directly to gain an advantage over the enemy...." Headquarters, Department of the Army, FIELD MANUAL 22-100: MILITARY LEADERSHIP 41 (1990).

128 *See supra* note 91 and accompanying text.

129 *See supra* note 91 and accompanying text.

130 *Ford*, 289 F.3d at 1290 (quoting Prosecutor v. Delalic (Appeals Chamber ICTY, Feb. 20, 2001) para. 256).

131 *Id.* at 1287, 1292–93.

be held strictly liable for the actions of his troops. The trial court's definition of effective command requires a commander to have "the legal authority and the practical ability to exert control over his troops. A commander cannot, however, be excused from his duties where his own actions cause or significantly contribute to the lack of effective control."[132]

A commander's tactical decisions are unquestionably "his own actions." And even a legal and well-reasoned tactical decision may ultimately lead to a commander's complete and permanent loss of control of his unit.[133] Since the trial court's definition of "effective command" neither clarifies what the term "his own actions" means, nor provides an exemption for a commander's tactical decisions that ultimately sever his effective control, a commander in such a situation will be deemed to have "effective command" over troops that he has no "practical ability" to control.[134]

Not even the "failure to prevent or punish" element will necessarily save a commander who has lost control of his troops due to a flawed tactical decision caused by faulty intelligence, because a commander always has the option of surrender.[135] For example, if General Yamashita had surrendered immediately upon learning that his troops were torturing and extrajudicially killing Filipino citizens, he would have prevented a large number of war crimes committed by his troops.[136] If a future factfinder finds that

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132 *Id.* at 1287 n.3.

133 Since the inception of warfare, commanders at all levels make their tactical decisions based on available intelligence and resources. *See, e.g.*, GEOFFREY REGAN, MILITARY BLUNDERS 89–93 (2000). Some or all of the intelligence on which the commander relies, such as that of enemy strength or likely enemy attack plans, may be faulty. *See id.* As a result, the commander may make a well-reasoned and seemingly informed decision that, in retrospect, exposed his troops to a superior enemy force. *See id.* (explaining tactical decisions based on faulty intelligence).

134 *See supra* note 91 and accompanying text.

135 *See supra* note 60 and accompanying text.

136 Once a commander surrenders, logistical support and supplies will no longer be available to troops, and those committing illegal acts will be forced to cease their activities sooner than if they were to continue receiving supplies. For example, most of the atrocities committed by Yamashita's soldiers occurred in January and February of 1945, but Yamashita did not surrender until September of that year. *In re* Yamashita, 327 U.S. 1, 32 (1946) (Murphy, J., dissenting). Assuming that Yamashita knew of the atrocities when they were occurring, his immediate surrender would have greatly

surrender was a "necessary and reasonable" option to prevent the violence, a commander, such as General Yamashita, could be found liable under the TVPA because he had neither the practical ability to control his troops committing the torture nor the desire to surrender in a war that was not yet over.[137]

V. Conclusion

The Eleventh Circuit Court of Appeals missed an opportunity to ensure that future American courts will be able to implement the TVPA in the manner that Congress and the President intended.[138] Congress explained that the TVPA was needed to "establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act)."[139] It further stated that the TVPA is needed to establish "a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing."[140] This means that Congress wanted to extend to domestic plaintiffs a remedy that existed for years under the ATCA for aliens. After *Ford's* imprecise codification and application of the command responsibility doctrine, American plaintiffs may not have the remedy that Congress intended.

Under both the ATCA and the TVPA, courts will look to international law to formulate a codification of the command responsibility doctrine.[141] *Ford*, however, upheld a trial court jury

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expedited an American victory, which in turn would have prevented a number of atrocities.

137 The "necessary and reasonable" standard was that adopted by the *Ford* trial court. *Ford*, 289 F.3d at 1287. *See also* Damaska, *supra* note 9, at 480–81 ("And even if well-meaning international judges disavow strict liability, the disturbing possibility cannot be ruled out that a helpless commander be convicted as a scapegoat for atrocities committed on the territory formally under his control.").

138 *See* H.R. REP. NO. 102-367 at 3 (1991) *reprinted in* 1991 U.S.C.C.A.N. 84, 86 (explaining Congress's intent in passing the TVPA). *See* Statement by President George Bush Upon Signing H.R. 2092, 28 WEEKLY COMP. PRES. DOC. 465 (Mar. 16, 1992), *reprinted in* 1992 U.S.C.C.A.N. (106 Stat. 73) 91 (stating that a "strong and continuing commitment to advancing respect for a protection of human rights throughout the world" was the reason that he signed the bill into law).

139 *Id.*

140 *Id.*

141 *See* Filartiga v. Pena-Irala, 630 F.2d 876, 880–81 (2d Cir. 1980) (describing the use of international law in ATCA cases).

instruction that differs significantly from what most commentators, and even *Ford* itself, accept as current customary international law.[142] The trial court's "effective command" instruction will allow for multiple interpretations of the command responsibility doctrine.

If future federal courts follow the trial court's definition of the command responsibility doctrine, plaintiffs will be forced to prove that a commander has "effective control."[143] There is an abundance of material, however, to support a court's finding that the "law of nations" only requires a plaintiff to prove that a defendant exercised *de jure* command, or that once a plaintiff proves *de jure* command, the burden of persuasion to disprove a superior-subordinate relationship shifts back to the defendant.[144] This lack of clarity will make it difficult for both plaintiffs and defendants litigating a TVPA claim to know how to address each element of the command responsibility doctrine.

Ford leaves open many questions that only time, torture, and rich plaintiffs will solve.

JOHN W. BROOKER

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142 *See supra* Part III(B)–IV(A).

143 *See supra* note 67 (defining *de facto* command).

144 *See supra* Part IV.