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Superior Responsibility

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(In conjunction with the New England School of Law)

MEMORANDUM FOR
OFFICE OF THE PROSECUTOR

SUPERIOR RESPONSIBILITY

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21. Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 72, A.J.I.L., Vol. 93 (January 1999).

22. Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 37, A.J.I. L., Vol. 93 (January 1999).

23. Olivia Swaak-Goldman, *Prosecutor v. Delalic No. IT-96-21-T, International Criminal Tribunal for the former Yugoslavia, Nov. 16, 1998*, 516, A.J.I.L., Vol. 93 (April 1999).

24. Major Marsha Mills, *NOTE FROM THE FIELD: My Observations of the Other Tribunal*, 22, Army Law (1997).

25. W.J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 112, Duke J. Comp. & Int'l L., Vol. 6 (Fall 1995).

26. Marlise Simons, *War Crimes Tribunal Sentences Croatian General to 45 Years*, N.Y. Times, March 4, 2000 (page omitted).

27. Timothy Wu & Yong-Sung Kang, *Recent Development: Criminal Liability for the Actions of Subordinates The Doctrine of Command Responsibility and Its Analogues In United States Law*, 273, Harv. Int'l L. J., Vol. 38 (Winter 1997).

28. Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 2, American Journal of International Law, Vol. 93, No. 3, (July 1999).

29. James C. O'brien, *title*, 651, A.J.I.L., Vol. 87 (year).

BOOKS

30. 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 47 (1998).

31. 2 Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda (1998).

32. American Heritage Dictionary, 1085 (3d ed. 1997).

33. Lloyd L. Weinreb, *Criminal Law* (1998).

I. Introduction and Summary of Conclusion

A. ISSUE

This research memorandum examines the following issue:

Superior Responsibility.

B. SCOPE OF THE TRIBUNAL

The International Criminal Tribunal for Rwanda ("ICTR") was established by the United Nations Security Council in response to "genocide and other such violations committed…between 1 January 1994 and 31 December 1994" and the Tribunal is delegated the power to "prosecute persons responsible for [these] violations committed in the territory of Rwanda."[1] Responsibility for the atrocities that occurred in Rwanda should be imputed to and borne by those superior's who failed to take reasonable measures to prevent the commission of the crimes in question as codified by Article 6(3) of the ICTR.

[1] 2 Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda (1998) [reproduced at Tab A]. Statute of the International Tribunal for Rwanda, S/RES/955 (1994)* (Annex), 8 November 1994.

C. SUMMARY OF CONCLUSION

Superiors may be prosecuted for the offenses commissioned by their subordinates under the doctrine of superior responsibility provided that certain preconditions are met. Article 6(3) identifies the duty imposed on superiors and the general legal basis upon which they can be held liable.[2]

Specifically, the Statute creates a duty holding that superiors who knew or should have known that their subordinates were about to or did commit criminal acts were required to take reasonable actions to prevent or punish subordinates. In addition, liability is contingent upon the existence of a legal connection between the superior and the subordinate's offense.[3]

The knowledge requirement can be satisfied in one of three ways. First, by demonstrating that the superior had actual knowledge. Second, by imputing knowledge based on a "presumption of knowledge" standard. Third, by imputing knowledge based on a "should have known standard." The latter has gained greatest favor by the Tribunals in recent years and can be accomplished by accumulating evidence that reports of the acts in question were available to the superior.

Proving the legal connection between the superior and the subordinate (superior-subordinate relationship) is the most problematic element of superior responsibility. A chain of command must have existed in order to make such a connection.[4] However, it could be difficult for prosecutors in many instances to recreate the chain of command

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[2] Statute of the International Tribunal for Rwanda, annexed to S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].
[3] *See* ICTR Statute.

especially where conditions were chaotic in terms of leadership. The challenges faced by prosecutors may be exascerbated by the fact that many of the offenses were committed by paramilitary groups which do not typically operate along hierarchical organization or regular chain of command.[5]

II. Factual Background

On April 6, 1994, Rwandan President, Juvenal Habyarimana, was killed when his plane was struck by a surface-to-air missile.[6] The President's death triggered a massive eradication of Tutsis by Hutu extremists.[7] Between 500,000 to 1 million civilians are estimated dead as a result of the widespread murder.[8] Those responsible for the Rwandan genocide represent a group that transcends every segment of society,[9] including: (1) high level government officials who facilitated the genocide, (2) military superiors who supervised the murders, and the (3) first hand accomplices, typically civilians, who were forced to kill by the other two segments.[10]

On November 8, 1994, the Rwandan Tribunal was established to investigate and prosecute individuals involved in the act of committing genocide.[11] Specifically, the adoption of Resolution 955 (Statute of the International Tribunal for Rwanda) is aimed at

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[4] *See* ICTR Statute.
[5] 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 244 (1998).
[6] *See id.*
[7] *See id.*
[8] *See* 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 47 (1998) [reproduced at Tab B].
[9] *See* 2 Scharf, at 244.
[10] *See* 1 Scharf, at 55-59.

prosecuting persons responsible for either genocide and/or other violations of international humanitarian law committed between January 1, 1994 and December 31, 1994.[12] Since its establishment, the Tribunal has convicted Jean-Paul Akayesu as a superior of subordinates involved in committing genocide.[13]

III. Legal Discussion

A. THE DOCTRINE OF SUPERIOR RESPONSIBILITY

The doctrine of superior responsibility has only recently resurfaced as an effective legal theory for addressing violations of international humanitarian law applicable in times of modern armed conflict.[14] The doctrine was developed in response to a legal need to address those cases lacking any evidence that a superior had in fact ordered,

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[11] *See* 1 Scharf, at 72.
[12] ICTR statute.
[13] Prosecutor v. Ayakesu, Judgment No. ICTR-96-4-T (Sept. 2 1998) (visited March 12, 2000) <http://www.un.org/ictr/english/judgments/akayesu/html> [reproduced at Tab C].
[14] Christopher N. Crowe, *Command Responsibility in the Former Yugoslavia: The Chances For Successful Prosecution*, 194 note 8, U. Rich. L. Rev., Vol. 29 (Winter 1994) [reproduced at Tab D]. "The underlying principles of command responsibility have existed for centuries. For example, in 190 B.C., Roman commander Aemilius Regillus successfully besieged the Greek city, Phocaea. In exchange for guaranteeing the safety of the city, Regillus accepted its surrender. Regilulus's troops, however, despite contrary orders, sacked the city. Upon regaining control of his army, Regillus 'punished those chiefly at fault, restored freedom, lands, and goods of those victims whose lives he had been able to preserve, and offered public atonement for the deeds." *id*.; Marlise Simons, *War Crimes Tribunal Sentences Croatian General to 45 Years,* N.Y. Times, March 4, 2000 (page omitted).

participated, or shared the intent of his or her soldiers or other subordinates who committed crimes.[15]

Superior responsibility is based on the principle that liability for subordinate criminal conduct can exist despite the absence of any direct or affirmative action taken by a superior.[16] Much like those exceptional common law jurisdictions that have established a duty to act in situations that involve certain "legal" relationships, the doctrine of superior responsibility has imposed on the superior a similar duty to act.[17] In general, a duty exists if there is a functional superior-subordinate relationship and the superior knew or had reason to know that his or her subordinate was about to commit or had committed a crime.[18] Specifically, Article 6(3) of the ICTR formulates an express duty for superiors.[19] The duty refers to imputed liability[20] that is triggered if a superior fails to prevent or to take reasonable actions to prevent criminal activity or punish those who committed criminal acts.[21] Therefore, if subordinates commit crimes such as murder as

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[15] *See* Timothy Wu & Yong-Sung Kang, *Recent Development: Criminal Liability for the Actions of Subordinates The Doctrine of Command Responsibility and Its Analogues In United States Law*, 273, Harv. Int'l L. J., Vol. 38 (Winter 1997) [reproduced at Tab E].
[16] *See* 2 Scharf, at 256.
[17] Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 2, American Journal of International Law, Vol. 93, No. 573, (July 1999) <http://www.asil.org/bantekas.htm> [reproduced at Tab F].
[18] *See* 2 Scharf, at 257-258.
[19] ICTR Statute.
[20] James C. O'brien, *The International Tribunal For Violations of International Humanitarian Law in the Former Yugoslavia*, 651, A.J.I.L., Vol. 87 (Oct. 1995) [reproduced at Tab G].
[21] ICTR Statute, Art. 6(3).

referred to under Article 3 of the ICTR, the superior is guilty of the murder under Article 6(3) of the Statute.[22]

However, indirect responsibility necessarily leads to the yet unsettled question concerning the extent, down the chain of command, to which liability can reach. The further away up the chain of command a superior was from the subordinates' criminal acts, the more difficult he or she is to prosecute.[23] In the past, different courts and Tribunals have approached this particular issue by establishing, defining or redefining the "should have known" standard. This standard has been codified by the ICTR and is discussed in greater detail below.

Adding to the complications, many of the atrocities that occurred in Rwanda were perpetrated by paramilitary groups which were lacking centralized organizational frameworks and did not operate under any obvious command hierarchy.[24] This can add to the challenges facing prosecutors by making it difficult to establish a connection between a superior, his or her subordinates, and the criminal conduct. In this respect, the application of superior responsibility is factually dependent.[25] For instance, "evidence of

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[22] W.J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 112, Duke J. Comp. & Int'l L., Vol. 6 (Fall 1995) [reproduced at Tab H].
[23] *See* Kang, at 273.
[24] *See* 2 Scharf, at 59. For the purposes of this brief, a paramilitary group is characterized as non-military individuals that operated outside of the Rwandan military setting, but could have been under the effective or functional control of either civilian or military leaders. Complications can arise in gathering evidence of the superior-subordinate relationship as in the former Yugoslavia in which "the military situation appears (on the basis of information available at the time of writing) to be chaotic, with front-line forces operating under opaque (and perhaps nonexistent) lines of authority, spotty communications and rare direct orders." *See* O'Brien, at 651.
[25] *See* O'brien, at 652.

a pattern (similarity of atrocities, coordination among those who commit them),"[26] decisions made or written orders,[27] and their effective control, can support the inference that persons with functional authority acquiesced in them.

There are three basic factors stemming from the more liberally characterized doctrine of superior responsibility that, combined, have already had a major impact on the traditional notion of command responsibility.[28] First, the doctrine includes criminal liability of civilian as well as military leaders.[29] Second, leaders are liable for their failure to prevent or punish illegal acts committed by subordinates if they knew or reasonably should have known the subordinates were about to commit the acts.[30] And third, the doctrine invokes liability based on effective or actual control.[31]

The doctrine will continue to affect the scope of criminal responsibility in terms of large scale international crimes as the doctrine develops in the Tribunals and within international law. Thus far, the objectives of the doctrine of superior responsibility are congruent with ICTR goals.[32]

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[26] *See id.* at 652-653.
[27] *See generally, The Prosecutor v. Tihomir Blaskic*, (unpublished text read by Judge Jorda 4 March 2000) <http\\:www.un.org/icty/pressreal> (visited March 10, 2000) (providing a recent example upholding superior responsibility) [hereinafter Blaskic case] [rerpoduced at Tab I].
[28] *See* Blaskic case (holding that the Trial Chamber found General Tihomir Blaskic guilty under the doctrine of superior responsibility).
[29] *See* 2 Scharf, note 951, at 261 (citing Claude Pilloud et al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 1010 n.16 (1987) (citation omitted)) [reproduced at Tab J].
[30] ICTR Statute
[31] Bantekas, at 3.
[32] Major Marsha Mills, *NOTE FROM THE FIELD: My Observations of the Other Tribunal*, 22, Army Law (1997) [reproduced at Tab K]. The underlying purpose of the ICTR is to target organizers, leaders, and inciters.

B. DUTY

The duty imposed by the doctrine of superior responsibility and codified by Article 6(3) of the ICTR "now operates under agreed-upon principles."[33] "As the [responsibility] of the superior is derivative of the subordinates' illegal act, a duty must exist if there is to be a legally relevant connection between the subordinate's act, the superior's omission, and the eventual imposition of liability."[34] The duty component of superior responsibility can be divided into two criteria: (a) standards of knowledge holding that a superior is only liable if he or she had either actual knowledge or reason to know of the crimes committed or about to be committed by subordinates (the mens rea requirement);[35] and (b) preventing or punishing the subordinates (the actus reus requirement) holding that a superior must have taken reasonable steps to prevent or punish the illegal activity of his or her subordinates.[36]

Despite the general acceptance of the criteria mentioned above, the standard of knowledge continues to be malleable to a certain extent. This is because the mens rea requirement is open to differing interpretations which has lead to a separation of the knowledge standard into three individual categories: (1) actual knowledge (a subjective test); (2) presumed knowledge (an objective test); and (c) "had reason to know" or

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[33] *See* Kang, at 278. Though perhaps only to the extent that it should include an objective standard but not which objective standard.
[34] *id. at 2*90.
[35] Bantekas, at 4 (citing Report of the Secretary-General Pursuant to paragraph 2 Security Council Resolution 808 (1993), UN Doc. S/25704, para. 56) [reproduced at Tab L].
[36] ICTR Statute

"should have known" (also an objective test).[37] It is generally agreed that actual knowledge is not alone sufficient to constitute the entirety of the mens rea requirement.[38] Limiting the mens rea requirement to actual knowledge would unnecessarily create a standard too high to meet; it would require the proof of awareness.[39] The presumed knowledge standard imputes liability to superiors evidenced by widespread commission and the notoriety of the crimes.[40] The "should have known" standard is similar to the presumption of knowledge standard but is more limited in its scope. The "should have known" standard focuses on the link between the presence of reports of the crimes available to the superior and the superior's affirmative efforts in acquiring the knowledge contained in them. None of the cases that have addressed the mens rea requirement have restricted liability to hold that superiors must share the subordinate's intent. Nor have the cases supported the adoption of a strict liability or "absolute command responsibility."[41]

As reflected by Article 6(1) of the ICTR,[42] the mens rea requirement can impute liability analogous to criminal complicity[43] based on the a presumption of knowledge

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[37] Olivia Swaak-Goldman, *Prosecutor v. Delalic No. IT-96-21-T, International Criminal Tribunal for the former Yugoslavia, Nov. 16, 1998*, 516, A.J.I.L., Vol. 93 (April 1999) [reproduced at Tab M].
[38] *See* Crowe at 226.
[39] *id.*
[40] *id.* (citing the Trial of General Tomoyuki Yamashita) (US Military Commission, Manila (Oct. 8 –Dec. 7, 1945).
[41] Strict liability would have a domino effect that could undermine the doctrine of superior responsibility's underlying purpose (i.e., so overbroad that it would be rejected by the tribunals, therefore rendering the doctrine ineffective as prosecutor's tool, and thereby not having the deterrent effect desired on crimes of war). However, it can be argued that the Yamashita Tribunal implicitly found the General guilty implicitly based on a strict liability because it failed to address whether he did in fact substantiate his ignorance of the crimes committed.
[42] ICTR Statute Article 6(1).
[43] *See* Bantekas, at 4; *also see* Kang, supra note 29, at 278. Command Responsibility norms from Article 6(3) are usually cited in conjunction with the more straightforward

and/or a "reason to know" standard. Complicity, for purposes of superior responsibility is subject to a type of notice that can be established "either from evidence of regular reporting or from the existence of widespread reports that would have been known to a reasonable person."[44] The nexus of superior responsibility as a form of complicity is highly dependent upon the proper application of these mens rea requirements. Therefore, a thorough analysis of duty with respect to superior responsibility should focus on the ambiguity resulting in the application of the presumed knowledge or "should have known" standards.[45]

1. Standards of Knowledge

The presumed knowledge and "should have known" standards have been analyzed by several cases and Tribunals since World War II. For practical purposes, a standard that imposes liability on a superior who did not know or did not have reason to know is too broad and unfair to the accused. Holding an accused responsible because he or she was a superior "by virtue of that fact alone, [and] guilty of every crime committed by every soldier assigned to his command"[46] is overbroad. On the other hand, a rigid standard that is too heavily dependent on proving the accused's actual knowledge or that

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"planned, ordered, instigated or otherwise aided and abetted" (finding that Article 6(1) of the ICTR is a replica of Article 7(1) of the ICTY).

[44] *See* O'brien, at 652. A mens rea requirement similar to the "knowing facilitation" rule of United States accomplice liability. "All 'necessary and reasonable' measures are considered to have been taken when a defendant has taken all measures within his or her physical power."

[45] ICTR Statute. However, this might permit some needed flexibility to incorporate alternative mens rea requirements. Superior duties are embedded in the agreed upon need to deter future crimes and that the positions of authority were taken voluntarily.

can easily be avoided by a claim of ignorance undermines its purpose of deterring international war crimes.

Article 6(3) of the ICTR states that "[t]he fact that any of the acts…was committed by a subordinate does not relieve his or her superior of criminal responsibility if *he or she knew*…that the subordinate was about to commit such acts…or had done so."[47] Actual knowledge can be established through direct or circumstantial evidence.[48] Circumstantial evidence can be based on a variety of facts and activities[49] including "the number, type and scope of illegal acts; the time during which they occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; their widespread occurrence; the tactical tempo of operations; the *modus operandi* of similar illegal acts; the offenders and staff involved and the location of the commander at that time."[50]

Article 6(3) of the ICTR also provides that "[t]he fact that any of the acts…was committed by a subordinate does not relieve his or her superior of criminal responsibility if *he or she…had reason to know* that the subordinate was about to commit such acts or had done so."[51] This particular element creates the two objective tests of the knowledge standards. Because the language can be read to have two meanings, one premised on Article 86 and 87 of Geneva Protocol I (1977) and one based on the Hostage Case

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[46] See Kang, note 17, at 275.
[47] See ICTR Statute (emphasis added).
[48] Bantekas, supra note 153, at page 15 (citing Prosecutor v. Delali, Judgment No. IT-96-21-T (Nov. 16, 1998)) [reproduced at Tab N].
[49] Bantekas, at 15 (citing Prosecutor v. Delali, Judgment No. IT-96-21-T (Nov. 16, 1998).
[50] *See* Bantekas, note 155, at 15-16 (citing Final Report of the Commission of Experts, Established pursuant to Security Council Resolution 780 (1992), UN SCOR, Annex, UN Doc. S/1994/674, para. 58 (May 27, 1994)) [reproduced at Tab O].
[51] ICTR Statute 6(3) (emphasis added).

standard, there currently exists the presumption of knowledge and the "should have known" standards.[52] A brief review of some applicable case law can better illustrate the origin of and the direction in which these two standards are currently heading.

Imputed knowledge can be traced back to the Yamashita Case which, despite a lack of clarity in the commission's approach to arrive at its decision, helped define the modern contours of the superior's duty.[53] The case involved atrocities that were, as Major Kerr argued for the prosecution, "so notorious and so flagrant and so enormous, both as to the scope of their operation and as to the inhumanity, the bestiality involved, that they must have been known to the Accused…"[54]

The prosecution argued that "the violations of the law of war committed by Yamashita's troops were…so extensive in number and dramatic in scope that they must have been willfully permitted by the accused."[55] Testimony from hundreds of eyewitnesses and a number of inferior officers were offered as evidence to link the general to the atrocities.[56] The prosecution alleged that General Tomoyuki Yamashita,

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[52] Crowe, at 226.
[53] *See* Crowe, at 195 (citing Trial of General Tomoyuki Yamashita (US Military Commission, Manila (Oct. 8-Dec. 7, 1945); *See also* In re Yamashita, 327 U.S. 1, 13-18 (1946).
[54] *See* Crowe, at 198 (quoting AG 000.5 (9-24-45) JA Before the Military Commission Convened by the Commanding General United States Army Forces, Western Pacific: Yamashita, Tomoyuki, at 31). "The commission learned: how Japanese soldiers executed priests in their churches…machinegunned [sic] residents in their neighborhoods, and beheaded or burned alive American prisoners of war. It learned of Japanese torture…It learned how one Japanese soldier tossed a baby in the air and impaled it on the ceiling with his bayonet, and how others bayoneted an eleven-year-old girl thirty-eight times. It learned of rape and necrophilia…It also heard testimony that Japanese soldiers were often in intoxicated rages and as a result "men's bodies were hung in the air and mutilated; babies' eyeballs were ripped out and smeared across walls; patients were tied down to their beds and then the hospital burned to the ground." *id.*, note 28.
[55] *See id.* at 200.
[56] *See id*.

then the Japanese Supreme Commander in the Philippines and Commander of the 14th Area Army, was personally responsible, albeit indirectly, for over one hundred of the atrocities.

General Yamashita claimed in his defense ignorance and that the acts were committed contrary to his stated orders.[57] Yamashita made the following arguments to which substantiated that his ignorance was genuine: time constraints to consolidate his command; the inability to make personal inspections; the inability to maintain a command from which to oversee all operations (due to battle conditions); integrated communications collapsed; command had become decentralized on the island; the army was divided into three separate fighting groups in order to avoid complete loss of control of the army; gave subordinate officers autonomy over the separate groups.

The commission found General Yamashita guilty despite his strong argument of genuine ignorance.[58] The commission established that knowledge is presumed if the commission of crimes is so widespread and notorious coupled with the lack of an effective attempt to "discover…the criminal acts."[59] The Commission did not address the issue of ignorance - that the General could have in fact lacked effective control over or even had operational communications with his troops- in making its decision.[60] In imputing knowledge the commission stated:

> It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where a murder and rape and vicious, revengeful actions *are widespread offenses and there is no*

[57] *See id*.
[58] Crowe, at 200.
[59] *id.*

> *effective attempt by a commander to discover and control the criminal acts*, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[61]

The presumption of knowledge standard relies on finding a great number of atrocities, geographically and temporally, in relation to the superior's command. A successful application of this standard would hold that a superior willfully permitted the crimes committed regardless if he or she can make a genuine claim of ignorance. The Yamashita case did not clarify what actions taken by a superior would constitute effective attempts to discover the criminal acts. Nevertheless, the presumption of knowledge standard has been subsequently confirmed in Protocol I of 1977, the International Committee of the Red Cross (ICRC) Commentary, and Article 28(1)(a) of the ICC Statute (1998).[62]

The commission's presumption of knowledge approach in the Yamashita Case was indirectly "reaffirmed by the United States Military Tribunal's Hostage case"[63] which embraced a somewhat altered variation of the standard. The Hostage Tribunal borrowed from the presumption of knowledge standard an imputation of knowledge to

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[60] Kang, at 275.
[61] *See* Crowe, at 203 (citing 4 Law Reports of the Trials of War Criminals, note 25, at 88 (1948)) (emphasis added) [reproduced at Tab P].
[62] Bantekas, at 17 (finding that Article 87 of Protocol I derives its meaning only in conjunction with Article 86 which holds superior's responsible for acts that they "should know are taking place"; ICRC "should be taken into consideration in reaching a presumption that the persons responsible could not be ignorant of them"; and ICC Statute "the circumstances at the time" should have enabled superiors to know of their troops behavior).
[63] *id.* at 16 (citing United States v. List et al., 11 Trials, supra note, at 1281 (1951)) [reproduced at Tab Q].

superior's but in a more limited fashion and established the "should have known" standard. By adopting a standard based on the reports reasonably available to the superior, the Tribunal held that General Field Marshal Wilhelm List "should have known" of the crimes committed. He "should have known," the Tribunal held, because he was informed of the reports by his subordinates.[64] The Tribunal concluded that "a commander is charged with notice of occurrences taking place…[and] [i]f 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 in defense."[65] The Tribunal further stated:

> The reports [filed with headquarters] made to the [Accused] as Wehrmacht Commander Southeast charge him with notice of the unlawful killings of thousands of innocent people in reprisal for acts of unknown members of the population who were not lawfully subject to such punishment.[66]

The emphasis of this standard also imputes knowledge, though not in such a sweeping manner as found in the presumption of knowledge standard. The "should have known" standard focuses on the availability of reports to the superior. "This raises a duty to know, rebuttable only through evidence of due diligence."[67] A successful application of this standard would depend on ample evidence of "reports made to the commander."[68] As in the Hostage Case, the fact that General List was given regular reports at his headquarters of the crimes was sufficient evidence that he had the required "should have known" mens rea to establish guilt.

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[64] Crowe, at 219.
[65] *id.* (citing 4 Law Reports of the Trials of War Criminals, at 71 (1948)) [reproduced at Tab R].
[66] Crowe, at 219.
[67] Bantekas, at 18 (citing Prosecutor v. Delali, Judgment No. IT-96-21-T (Nov. 16, 1998).

The recent Blaskic case appears to uphold the "should have known" standard of superior responsibility in its finding General Tihomir Blaskic guilty for atrocities committed by his subordinates.[69] In this case, the Trial Chamber found "when General Blaskic learned that crimes had been committed [he did] nothing."[70] The Trial Chamber went on to state that:

> There was no serious investigation…And when before this Trial Chamber he accused the military police, the Jokers, in particular, what new information did the accused put forth? He failed to say that the Joker commander, Vladimir Santic, had his office in the Hotel Vitez at his headquarters. He asserted that he called for an investigation…I quote his written order… 'there are open rumors about the events…' The accused then explained…that the report transmitted to him by the Security and Information Service was incomplete.[71]

The Trial Chamber found the general guilty as a superior for, among other charges, failing to "take the necessary and reasonable measures which would have prevented the commission of those crimes or the punishment of the perpetrators thereof."[72] It is clear in this case that the Trial Chamber relied on the abundancy of reports and circumstantial evidence supporting that General Blaskic "should have known" that his subordinate's were committing the crimes in question.

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[68] Crowe, at 226.
[69] *See generally* Blaskic case.
[70] *See* Blaskic case, at 14.
[71] *id.* at 17.
[72] *id.*

The "should have known" standard is established in the case law as the mens rea requirement.[73] However, "the express formulation of Article 28(1)(a) of the ICC statute, the explicit reference in the ICRC Commentary, and the unambiguous post-World War II case law, confirm the existence under international law of a rebuttable presumption of knowledge."[74] The former requires proof of reports directed to a superior's headquarters imputing knowledge if a superior has notice if he or she possesses sufficient information.[75] Whereas, the latter "can be read to permit the introduction of widely published press accounts of the atrocities"[76] and thereby providing a broader method of imputing liability.

2. Reasonable and Necessary Measures

Superior responsibility incorporates an express duty to prevent or punish the subordinates who are about to commit or had committed a crime.[77] Article 6(3) of the ICTR states that "[t]he fact that any of the acts…was committed by a subordinate does not relieve his or her superior of criminal responsibility if…the superior *failed to take the necessary and reasonable measures to prevent such acts or to punish* the perpetrators thereof."[78] Aside from the need to quantify the terms prevent and punish in connection to superior responsibility, there are two other issues that warrant analysis. The first issue entails the implications of timing (i.e., when does the duty commence) and is particular to

[73] Fenrick, at 115.
[74] ICC et al. *reprinted in* Bantekas, at 18.
[75] *id.*
[76] Crowe, at 226.
[77] Swaak-Goldman, at 516.

the duty to prevent.[79] The second issue is the scope of the "necessary and reasonable measures" element as it concerns both of the requirements.

Preventing and punishing offenses, as noted above, necessitates knowledge (including constructive knowledge) that the offense occurred. Beyond the mens rea requirement, the superior has a duty to make an affirmative action based upon the type of knowledge known to him or her. The duty to prevent or punish exists within the confines of whether the superior knew of the criminal acts before or after the fact.

The American Heritage dictionary defines prevent as: to keep from happening; to keep someone from doing something.[80] The act of preventing is anticipatory, as well as reactive, to the targeted conduct. Preventing or intervening can occur at any time during the process of committing the crime (i.e., from the inception of the crime up until its execution). Furthermore, the act to prevent does not operate in terms of degree.[81] Either something is prevented or it is not. Thus, once on notice, the superiors' duty requires taking the necessary and reasonable measures to *completely* prevent the commission of crimes. The duty to prevent directly correlates with the severity of crime committed. Therefore, "preventing" carries far greater implications in relation to a superior's general responsibility to control subordinates and this should be taken into consideration when determining the superior's punishment if found guilty.[82]

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[78] ICTR Statute (emphasis added).
[79] The duty to punish does not present the same concerns of timing because it is based on taking affirmative actions to address culpability after the crimes have been committed.
[80] American Heritage Dictionary, 1085 (3d ed. 1997).
[81] This discussion is drawn from a the construction of commonly accepted conceptual and logical understandings of the term "to prevent."
[82] The rationale that the prevent duty is of greater concern has not been advocated by any of the resources used in this research and is solely an opinion held by the author.

The duty to prevent is initiated at the point in time when the subordinates "are about to" commit such acts.[83] The doctrine of superior responsibility could have been bogged down by the quagmire present in the inherent ambiguity of the "are about to" language. Yet, instead, the limited case law as well as the few governing statutes appear to treat this issue favorably toward the goal of prosecution under the superior responsibility theory. The "are about to" language, is a temporal element that is not simply limited to the actions immediately leading to perpetration of the crime, as might be the case in criminal attempt under U.S. Model Penal Code § 5.01.[84] The duty to prevent applies to the preparation or planning phase of the offense regardless of whether the planners were going to carry out the crimes.[85]

Furthermore, the duty reaches as far as the subordinates' criminal actions are likely foreseeable.[86] Determining foreseeability is measured by taking into account such things as the age, experience, and training of the subordinates.[87] For example, the Kahan Commission found clear indication (common knowledge) that there was a real and foreseeable danger of "revenge and bloodshed by the Phalangists against the population in the refugee camp," and that the routine warnings that were issued by commanders to the Phalangists "could not have had any concrete effect."[88] The Kahan Commission further found that responsibility was imputed to the Minister of Defense, a politician responsible for Israeli's security affairs, for failing to prevent and for disregarding the

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[83] ICTR Statute.
[84] Lloyd L. Weinreb, *Criminal Law*, 635 (1998) (citing the U.S. Model Penal Code § 5.01) [reproduced at Tab S].
[85] Bantekas, at 19.
[86] *id.*
[87] *id.*
[88] Fenrick, at 123.

dangers of acts of vengeance in light of the political, religious and the known state of mind of the Phalangists.[89] The commission stated "it was the duty of the Defense Minister to take into account all the reasonable considerations for and against having the Phalangists enter the camp, and not to disregard entirely the serious consideration mitigating [sic] against such action, namely that the Phalangists were liable to commit atrocities…"[90]

The duty to punish is both reactive and prospective. Punishing subordinates is a response to the crimes committed and is used to deter the commission of future crimes.[91] "[T]he superior who fails to act is in effect condoning the criminal conduct of a subordinate and thereby sending a signal that such crimes can be committed with impunity."[92] Unlike the duty to prevent, the duty to punish operates in terms of degrees. However, due to the paucity of case law and statutory authority on this matter, it is not entirely clear what constitutes a sufficient level of punishment to satisfy that a superior has taken the necessary and reasonable measures to punish subordinates who have engaged in criminal acts. Whether superiors adequately fulfilled their duty to prevent and punish will need to be determined on a case by case basis.[93]

The scope of the duty to prevent and punish, in connection to what constitutes necessary and reasonable measures, is not absolute.[94] In other words, the duty is

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[89] *id.* at 124.
[90] *id.* at 122 (quoting the Final Report of The Commission of Inquiry into the Events at the Refugee Camps in Beirut 1983, 22 I.L.M. 473 (1983)).
[91] 2 Scharf, at 259.
[92] *id.*
[93] *id.*
[94] *id.* at 260.

dependent on the superior's material capability to institute and enforce the punishment.[95] A failure to attempt to prevent or punish is not excusable even if the superior did not have the power to intervene.[96] It is limited by the actual and legal capabilities a superior might have.[97] The issuance of orders to apprehend and detain the subordinates responsible for commissioning the crimes might not be a realistic option. It might not be practical in most circumstances to conduct judicial proceedings. Furthermore, superiors might be unable to physically detain subordinates. In such cases superiors will be required to justify his or her failure to punish those responsible for the offenses. Superiors who fail to make any affirmative actions to prevent or punish will be held liable for the crimes that ensued.[98] Superiors can only successfully discharge the duty to take necessary and reasonable measures if "they employ every means in their power to do so."[99] "[Superiors] should be held to the requirement that they take all actions within their physical power, regardless of legal limitations, to repress or punish violations."[100] To avoid liability a superior will need to demonstrate an attempt to discover the existence of the crimes, document the results of the investigation, and refer the case to competent authority.[101] Not unlike criminal attempt under the Penal Code, the duty to prevent incorporates the rationale of protecting the general welfare of civilians to the extent possible during substantial armed conflict by providing superiors a means to blunt

[95] Bantekas, at 20
[96] Bantekas, at 19.
[97] Bantekas, at 19.
[98] Bantekas, at 20 (citing United States v. Von Leeb, 11 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10, at 1, 462 (1950)) [reproduced at Tab T].
[99] Bantekas, at 19.
[100] O'brien, note 63, at 653 quoting Nicaragua case International Court of Justice.
[101] O'brien page 2 fn59 von Leeb.

criminal acts far enough ahead of time, though to a much greater extent, to effectively impede perpetration of crimes by subordinates.[102]

C. SUPERIOR-SUBORDINATE RELATIONSHIP

The second component of the superior responsibility doctrine consists of the legal connection between the superior's position of authority and the superior's personal liability for his or her subordinate's criminal offenses.[103] The legal connection is accomplished by establishing that a superior-subordinate relationship existed. However, establishing a superior-subordinate relationship (i.e., superior's control) depends upon the prosecutor's ability to identify whether the individual was a corresponding subordinate in relation to the superior in question. The scope of the relationship, and therefore the doctrine itself, is limited to subordinates who are subject to the superior's control which can be determined by examining whether the superior had either de facto command and de jure command.

Superior status is a conceptual classification that, as opposed to the narrow strictures of the traditional command status, is not limited to military leaders responsible for the conduct of their troops.[104] Instead, it applies to any individuals notwithstanding their official capacity, including civilian leaders, who were until recently, more or less

[102] Weinreb, at 628.
[103] Swaak-Goldman, at 516.
[104] Swaak-Goldman, at 516.

protected from criminal liability.[105] Superior responsibility has evolved from this aspect of command responsibility because "there seems…to be no justification for the proposition that a similar duty does not also apply to civilian leaders."[106] The Rome Conference affirmatively adopted the position that command responsibility should be extended to leaders in non-military settings.[107] This model of superior status has been affirmatively treated by international legal interpretation.[108]

Not only does the concept of superior status transcend both military and civilian settings but it permeates official (formal) positions at the highest levels of decision making hierarchies that are commonly found in governing institutions. [109] "The customary international law doctrine of command responsibility as it is reflected in the Tribunal Statute is applicable to military commanders, paramilitary commanders, political leaders, and other leaders who exercise a high degree of control over subordinates."[110] Article 6(2) of the ICTR, states that, "[t]he official position of any accused person, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate

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[105] Fenrick, at 116. "One explanation for this difficulty is that while existing international law, historical tradition, and military reality impose substantial direct responsibility on military commanders to control their troops, political leaders tend to be viewed as distanced from military activity and insulated from personal liability." Bantekas, supra note 38, at 4.
[106] Kang, at 291.
[107] Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 37, A.J.I. L., Vol. 93 (January 1999) [reproduced at Tab U].
[108] *See, e.g.*, Prosecutor v. Delali, Judgment No. IT-96-21-T (Nov. 16, 1998); The Rome Statute of the International Criminal Court, July 17, 1998, Art. 28, UN Doc. A/CONF. 183/9; Prosecutor v. Akayesu, Judgment, No. ICTR-96-4-T (Sept. 2, 1998).
[109] Swaak-Goldman, at 516.
[110] Fenrick, at 123.

punishment."[111] Therefore, in theory, those persons even at the highest levels in the decision making hierarchy whether within a civilian or even a military setting, can be held responsible for acts committed by their subordinates at the lowest levels of the hierarchy.

1. Superior Status

In the context of superior criminal responsibility, the legal connection reflected by a corresponding superior-subordinate relationship, a superior's functional control, can be identified by either: (a) de jure command which is dependent upon a finding of effective or actual control; and (b) de facto command which is subject to proof of corresponding subordinates.[112] In addition, establishing control is dependent upon some form of hierarchical chain of command. However, there are obvious difficulties attributable to application of superior responsibility to paramilitary groups, and especially mob situations, due to the inherent dependency on the presence of a chain of command to establish the legal link between subordinate offenses and the corresponding superior.

A prima facie indication of superior control is de jure command which is assumed "through official delegation [of] command from a pertinent office"[113] and is typically delegated by "formal executive structures, such as state entities [vesting] such authority

[111] ICTR Statute Article 6(2).
[112] Bantekas, at 2; Convictions in the Command case, Hostage case, Ministries case, and the Roechling Enterprises case were based on the rationale that persons in de facto control are responsible for persons under their power, irrespective of whether a military or civilian function was served.
[113] *See id* at 5.

by passing legislative acts."[114] Evidence that an individual has de jure command can be made by "reference of the accused 'in the overall organization, with a view to determining [his/her] institutional functions.'"[115] By this it is meant that the superior, by virtue of his position within a chain of command, possessed the right of authority to control the actions of his or her subordinates.[116]

Possessing the right of authority is not in itself a completely dependable basis upon which to reference actual command responsibility but also must be complimented by effective or actual control because officials can hold important positions within a hierarchy but not fall within the necessary status in the chain of command to establish a superior-subordinate relationship.[117] In the Delali case, the accused was delegated a position of authority within his municipality, his primary duty being to provide logistical support.[118] However, he was not a commander for the purposes of superior responsibility because, although he did have formal authority delegated to him, he did not exert influence over others to the extent that he exercised effective or actual control.[119]

Effective control is the actual functional power based on, but no limited to rank, authority, respect, or fear that a superior wields to force certain conduct. In the Sadaiche Case, it was found that the Commander of the POW camp was acquiesced by his "more

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[114] *See id.*.
[115] *See* i*d*, supra note 50, at 5 (quoting Prosecutor v. Karadi and Mladi, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, No. IT-95-5-R61 and IT-95-18-R61 (July 11, 1996)) [reproduced at Tab V & W].
[116] Kang, at 21.
[117] Swaak-Goldman, at 516.
[118] Bantekas, at 9 (citing Prosecutor v. Delali, Judgment No. IT-96-21-T (Nov. 16, 1998)).
[119] *id.*

powerful adjutant"[120] where "power to force a certain act inevitably involves the power to demand and an actual capacity to impose obeisance."[121] Therefore, a showing of corresponding superior-subordinate relationship is sufficient to create the legal connection between the superior and liability for the subordinate's criminal acts if a superior is delegated the right to command coupled with his or her actual power to manipulate the subordinate to execute requested acts.

The correlation between the superior and liability can also be based on de facto control though it requires proof of a corresponding superior-subordinate relationship.[122] The corresponding relationship may be found "through an analysis of the distribution of tasks" within a given group.[123] The distribution of task "is the cumulative effect of evidence showing both subjugation to orders and respect for the authority of the accused."[124] This appears to be applied loosely because the distribution of task test is not necessarily premised on any type of formal delegation of authority. It has been pointed out by the United States Military Tribunal that "superior means superior in capacity and power to enforce a certain act. It does not mean superiority only in rank [since] it could easily happen in an illegal enterprise that the captain guides the major…"[125] Evidence of a superior-subordinate relationship can be established "only if one exerts influence over others [and] upon whom effective control is also exercised."[126]

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[120] *id.* at 7.
[121] *id.*
[122] *id.*
[123] *id.* at 8.
[124] *id.* at 11.
[125] Bantekas, at note 64, 7.
[126] Bantekas, at note 89, 9.

In addition, a chain of command is essential to determine whether a subordinate falls within the control of a pertinent and corresponding superior. Generally, a chain of command is divisible into policy command, strategic command, operational command and tactical command.[127] The four stages of command provide a starting point from which to determine whether individuals can be identified as subordinate to a superior with de jure command and effective control. This is evidenced by the acceptance of indirect subordination -as opposed to direct subordination of troops assigned to them- over a civilian mob within the territory he or she occupies.[128] Evidence of a chain of command can be demonstrated by communication resources (i.e., radio equipment, operational telephone lines, cellular telephones, transport, etc.,) and orders and reports issued and received.[129]However, the greater the distance between the subordinate and the superior along the chain of command, the greater the difficulty in establishing a corresponding relationship. It appears however, that the chain of command concept is not so limited as to exclude a type of imputed control because superior responsibility can extend to territorial occupation and therefore apply to forces not under the operational or administrative control.[130] The recent Blaskic case established that General Tihomir Blaskic had authority based upon the "effective measures…consisted of setting up a solid chain of command," the many orders produced at the hearings, and a signed orders.[131]

[127] Bantekas, at 6.
[128] Bantekas, at 8.
[129] Blaskic case, at 12.
[130] O'Brien, at 653.
[131] Blaskic, at 10.

Moreover, a standard for satisfactory operation or chain of command might be that the "attacks were organized."[132]

In the Akayesu case, the Trial Chamber found that he had de jure control due to his position as the mayor (burgomaster) placing him as the head of the communal administration and the officier de l'état.[133] The Trial Chamber reasoned that Akayesu had superior control (i.e., right to command and effective control) and therefore was responsible to maintain and restore the peace by controlling his subordinates.[134] "The Prosecutor's assertion that the de facto authority of the burgomaster in Rwanda was significantly greater than the de jure authority. The Chamber concluded that the burgomaster was the "parent" of the people, whose every order, whether legal or illegal, was always obeyed without question."[135] The corresponding superior-subordinate relationship exisits based on a chain of command arising from Akayesu's status with the community at large. In effect, the communities perception of him as a superior was in part determinative for his was conviction of genocide under the doctrine of superior responsibility.[136]

D. CONCLUSION

The crimes committed in furtherance of the Tutsi genocide in Rwanda, between January 1, 1994, and December 31, 1994,[137] were committed by "virtually all segments

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[132] Blaskic case, at 13.
[133] Bantekas, at 7.
[134] *id.*
[135] *id.* at 12.
[136] *id.* at not 51, 5.
[137] ICTR Statute Preamble.

of Rwandan society."[138] Participants include, "private individuals, such as members of the militia, leaders of extremist parties," as well as "Rwandan State authorities and, in particular, senior national figures, such as a number of ministers, various elements of the government security forces such as the Presidential Guard, the Rwandanese Armed Forces and the gendarmerie, and certain local authorities, prefects and mayors."[139] The atrocities of the Rwandan genocide have revealed many criminal acts committed by various groups includingparamilitary groups for which civilian and military leaders are responsible.

Rwandan prosecutors will need to demonstrate that leaders charged with superior responsibility had superior status in the context of a corresponding superior-subordinate relationship coupled with a duty to act as codified by Article 6(3) of the ICTR. This can be accomplished by demonstrating that the accused had either de facto or de jure command and effective control which is measured by the power or capacity to impose his or her will over the respective subordinates. The Trial Chamber in the Akeyasu case has implicitly suggested that corresponding superior-subordinate relationship can be established by relying on the accepted and pervasive perception of the role that certain individuals have within the community as demonstrated, for example, by a burgomaster "parent" capacity. In this respect a community standard in terms of who is held accountable as a leader can alleviate some of the difficulties in establishing concrete chain of command.[140] It is irrelevant under the doctrine of superior responsibility the

[138] 1 Scharf, at 244
[139] *id.* at 245;
[140] Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia,* 72, A.J.I.L., Vol. 93 (January 1999) [reproduced at Tab X].

position held by the accused, though the formal right to command is a preliminary indication of superior status.

Defenses likely to made by the Accused are that superior status cannot apply due to lack of communications, the inability to control troops, poorly trained troops or civilians, and claims of ignorance. These defenses can be overcome by prosecutors by accumulating evidence of regular reports of the offenses and their widespread occurrence, lack of investigation and discovery of the offenses, and the requirement to obtain complete information as proof that the Accused "should have known" and therefore was derelict in his or her duty to prevent or punish. It is not apparent what would satisfy the necessary and reasonable measures aspect of the duty to punish, yet, the duty to prevent is based on a liberal application of foreseeability measured by the characteristics of the subordinates.