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Challenging Impunity? The Failure of the International Criminal Tribunal for Rwanda to Prosecute Paul Kagame

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CHALLENGING IMPUNITY? THE FAILURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA TO PROSECUTE PAUL KAGAME

INTRODUCTION

A genocide begins. A rebel group, organized and efficient, sweeps in to save a country from the atrocity but commits crimes themselves. The rebel leadership takes over and the commanders stay in control. All too familiar is the scenario in which those who purport to bring justice to post-conflict countries enjoy impunity by remaining in power. The doctrine of command responsibility in international criminal law[1] states that criminal liability may be imposed upon a military commander or civilian leader who has either participated in the commission of a crime or failed to prevent or punish criminal subordinates.[2] This theory has been incorporated into the Statute of the International Criminal Tribunal for Rwanda ("ICTR"),[3] established to prosecute those responsible for genocide and other serious violations of international humanitarian law during the 1994 massacres.[4] Under Article 6.3 of the Statute, a supe-

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1. International criminal law is generally described as a "body of law that assigns individual criminal responsibility for breaches of public international law" and derives from treaties, international customs, and general principles. RONALD C. SLYE & BETH VAN SCHAACK, INTERNATIONAL CRIMINAL LAW: THE ESSENTIALS 3–4 (Vicki Been et al. eds., 2009).

2. GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 5 (Oxford Univ. Press 2009).

3. Statute of the International Criminal Tribunal for Rwanda, pmbl., Nov. 8, 1994, 33 I.L.M. 1589 [hereinafter ICTR Statute].

> International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

Id.

4. The Security Council of the United Nations adopted Resolution 955 establishing the Court after it found that violations of international humanitarian law constituted a genocide and a threat "to international peace and security" within Chapter VII of the UN Charter. *Id.*; Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 502 (1996). The ICTR is located in Arusha, Tanzania. INT'L CRIMINAL TRIBUNAL FOR RWANDA, http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx (last visited May 18, 2012). The Tribunal consists of: the Chambers and the Appeals Chamber; the Office of the Prosecutor, in charge of investigations and prosecutions; and the Registry, responsible for providing overall judicial and administrative support. *Id.* There are cur-

rior is not exempt from criminal responsibility for crimes committed by their subordinates.[5] Furthermore, criminal responsibility is not relieved by the official position, such as head of state, of an accused under Article 6.2.[6] Nevertheless, Paul Kagame,[7] former leader of the Rwandan Patriotic Front ("RPF," later the Rwandan Patriotic Army ("RPA"))[8] and current President of the Republic of Rwanda, has not been prosecuted despite evidence that soldiers under his command committed crimes against humanity.[9]

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rently ten cases in progress, one awaiting trial, sixty-five completed cases (nineteen pending appeal and eight acquitted), and nine accuseds are still at large. *Id.*

5. ICTR Statute, *supra* note 3, art. 6.3.

> The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Id.

6. ICTR Statute, *supra* note 3, art. 6.2 ("The 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 punishment.").

7. The current President of Rwanda, Paul Kagame, led the Rwandan Patriotic Front ("RPF") in 1994 when they entered Rwanda and ended the genocide. *See generally* COLIN M. WAUGH, PAUL KAGAME AND RWANDA: POWER, GENOCIDE AND THE RWANDAN PATRIOTIC FRONT (2004).

8. The RPF (later the Rwandan Patriotic Army ("RPA")) was a rebel group formed of mostly exiled Tutsi in Uganda following a wave of emigration in the 1960s after a tumultuous transition to Rwandan independence. The RPF's goal was to repatriate and it attempted an attack on the Hutu dominated Rwanda in 1990 in which most of the RPF leadership was killed. *See* Cyrus Reed, *Exile, Reform, and the Rise of the Rwandan Patriotic Front*, 34 J. MOD. AFR. STUD. 479 (1996).

9. Under Article 3 of the ICTR Statute on Crimes Against Humanity, the Tribunal has power to:

> prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.

ICTR Statute, *supra* note 3, art. 3. To establish that crimes against humanity have occurred, the prosecution must prove "there was a widespread or systematic attack against the civilian population on national, political, ethnic, racial, or religious grounds." Prosecutor v. Théonest Bagosora et al., Case No. ICTR 98-41-T, Judgment, ¶ 2165 (Dec. 18, 2008). Evidence that the RPF committed crimes falling within this category are found in the "smoking gun" known as the Gersony Report, presented to the UNCHR on October 11, 1994 and subsequently suppressed by the U.N. *Summary of UNHCR Presentation*

This Note explores the failure of the ICTR to indict Kagame despite its willingness to utilize command responsibility to prosecute criminals.[10] Prosecuting Kagame is a step toward challenging impunity that the ICTR must take before the end of its mandate.[11] Failure to do so will impede the growth of criminal responsibility in international law while simultaneously allowing commanders, who, able to retain power in post-conflict governments, walk free despite having committed or failed to prevent the commission of some atrocious crimes. The evidence to support indicting Kagame is now stronger thanks to the accessibility of a previously suppressed report[12] that documented the crimes of the RPF as well as a recently released United Nations ("UN") report evincing crimes committed by the RPF in surrounding territories.[13] With the vested use of command

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before Commission of Experts: Prospects for Early Repatriation of Rwandan Refugees currently in Burundi, Tanzania and Zaire, RWANDINFO (Oct. 10, 1994), http://rwandinfo.com/documents/Gersony_Report.pdf [hereinafter Gersony Report]. The report cites "systematic murders and persecution of the Hutu population." Carla De Ycaza, *Victor's Justice in War Crimes Tribunals: A Study of the International Criminal Tribunal in Rwanda*, 23 N.Y. INT'L L. REV. 53, 57 (2010); *see* ALISON DES FORGES ET AL., LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 692–735 (Human Rights Watch, 2d ed. 1999).

10. Bakone Justice Moloto, *Command Responsibility in International Criminal Tribunals*, 3 BERKLEY J. INT'L L. PUBLICIST 12 (2009).

11. The ICTR is striving to complete its mission by 2013. Judge Dennis Byron, Pres., ICTR, Address to the United Nations Security Council: Six-monthly Report on the Completion Strategy of the ICTR (Dec. 6, 2010), *available at* http://www.unictr.org/Portals/0/.ictr.un.org/tabid/155/Default.aspx?id=1180.

12. Gersony Report, *supra* note 9. The report was initially suppressed and its existence denied. DES FORGES ET AL., *supra* note 9, at 728–31. A UN cable to then Secretary-General Kofi Annan addresses the controversy surrounding rumours of Gersony's report and stating that Gersony had concluded that the massacres "could only have been part of a plan implemented as a policy from the highest echelons of the government" and that he had "staked his 25 year reputation on his conclusions." U.N. Assistance Mission for Rwanda, Cable dated Oct. 14, 1994 from the Head of the Missions, Shaharyar Khan, to the U.N. Secretary-General (Oct. 14, 1994), *available at* http://webpages.charter.net/jabdmb/Gersony1.PDF. Additionally it expressed that Kagame was "furious with the accusations" and that the report had been made public without authorization. *Id.*

13. The report was the result of a mapping exercise conducted by the UN after mass graves were discovered in the Congo in 2005. Off. of the High Comm'r for Human Rights [OHCHR], DRC: Mapping Human Rights Violations 1993-2003 (2009) [hereinafter DRC Mapping Report], *available at* http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/RDCProjetMapping.aspx. One of the objectives was to map the human rights atrocities that occurred from March 1993 to June 2003. *Id.* The result was a 550-page report after over 1,500 documents were gathered relating to human rights violations and over 1,200 witnesses were interviewed. *Id.* With regard to its implications for the case at hand, the ICTR's temporal restrictions con-

responsibility, this evidence has created the perfect opportunity not only for the Tribunal to prosecute crimes against humanity that have been neglected but also to demonstrate how a comprehensive application of command responsibility can be utilized effectively against a leader.[14]

Part I of this Note will provide a background of the 1994 Rwandan genocide and the role of the RFP. Part II will explore the theory of command responsibility and its elements in international criminal law[15] and how command liability[16] has been utilized and defined vis-à-vis ICTR jurisprudence.[17] With the aforementioned evidence, Part III will show how the doctrine of command responsibility can be an effective tool for prosecuting leaders via an application to Kagame. Failing to pursue the case would be an impediment to the growth of command responsibility for future criminal prosecution, as well as a failure to act in accordance with international criminal law and with the principles set forth in establishing the ICTR.[18]

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fine the relevance of the report to those crimes occurring in the year 1994 but does provide jurisdiction over crimes committed in the neighboring States. ICTR Statute, *supra* note 3, pmbl.

14. Sean Libby, *[D]effective Control: Problems Arising from the Application of Non-Military Command Responsibility by the International Criminal Tribunal for Rwanda*, 23 EMORY INT'L L. REV. 201, 205 (2009).

15. Additionally, the contribution of the International Criminal Tribunal of Yugoslavia ("ICTY"), established to prosecute those responsible for war crimes committed in the Balkans in the 1990s and the International Criminal Court ("ICC"), are mentioned. *About the ICTY*, ICTY-TIPY, http://www.icty.org/sections/AbouttheICTY (last visited Mar. 1, 2012); *About the Court*, INT'L CRIM. CT., http://www.icc-cpi.int/Menus/ICC/About+the+Court (last visited Mar. 1, 2012) [hereinafter INT'L CRIM. CT.]. The ICC is the first permanent court of its kind. *About the Court*, *supra.* Established under the Rome Statute of 1998, it was set up to prosecute the most serious violations of international law of threat to the international community. *Id.*

16. Command responsibility and command liability are used interchangeably.

17. International criminal law has evolved "primarily though the decisions and judgments of courts of law," and the development of command responsibility is one such example of how principles in international humanitarian law develop through international institutions. METTRAUX, *supra* note 2, at 8–9.

18. Resolution 955 expressed the desire to put an

> end to . . . crimes and to take effective measures to bring to justice the persons who are responsible for them, [*c*]*onvinced* that . . . the prosecution of persons responsible for serious violations of international humanitarian law . . . would contribute to the process of national reconciliation and to the restoration and maintenance of peace" after its determination that the situation in Rwanda constituted a "threat to international peace and security.

ICTR Statute, *supra* note 3, ¶¶ 5–7.

I. GENOCIDE AND THE RWANDAN PATRIOTIC FRONT

A. Historical Context

Rwanda's political history is tumultuous and the events leading up to the genocide of 1994 are complex.[19] Misconceptions and theories abound as to the exact reasons why relations between Tutsi and Hutu, the two main ethnic groups within Rwanda, resulted in genocide beyond comprehension. The result was not only the murder of 800,000 over the course of one hundred days but subsequent killings of perpetrators and victors alike.[20]

The Rwandan Patriotic Front grew out of a turbulent history of ethnic tension and colonial persecution.[21] Rwandans who fled the country in the early to mid-1900s to escape ethnic violence[22] grew tired of persecution from hosting governments and started to organize.[23] Two such Rwandans and members of the Rwandan Alliance for National Unity ("RANU"),[24] Fred Rwigyema and Paul Kagame, founded a guerrilla group called the National Resistance Movement ("NRM").[25] Kagame became the head of military intelligence of the National Resistance Army ("NRA"), the mili-

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19. Given the complex nature of the history and events that led up to the 1994 genocide, this Note is not intended to provide a comprehensive overview but rather strives to provide the reader with a generalized background before delving into the more pressing issue of establishing the crimes of the RPF and the doctrine of command responsibility.

20. Crystal Faggart, *U.N. Peacekeeping After Rwanda: Lessons Learned or Mistakes Forgotten?*, 27 PENN ST. INT'L L. REV. 495, 496 (2008).

21. *See* DES FORGES ET AL., *supra* note 9, at 31–64.

22. From the 1920s to the 1960s, the Belgian colonialists began to implement Tutsi in positions of power, aggravating already tense ethnic relations between Hutu and Tutsi and setting the scene for the future conflict. Independence from Belgium, gained in 1960, brought in a dominant Hutu party (the *Parti du mouvement de l'émancipation Hutu* or Paramehutu) leaving the Tutsi monarchy to flee from the "Hutu Revolution." The number of those in exile in the countries surrounding Rwanda continued to grow and by the time the RPF was formed in the 1980s there were approximately 500,000 in exile. Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials,* 29 COLUM. HUM. RTS. L. REV. 545, 555–57 (1998); *see also* Chi Mgbako, *Ingando Solidarity Camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda*, 18 HARV. HUM. RTS. J. 201, 204 (2005); DES FORGES ET AL., *supra* note 9, at 36–40.

23. Drumbl, *supra* note 22, at 557.

24. RANU was organized by those in exile in repose to the Rwandan monarchy and stood for the creation of a socialist state in Rwanda. Due to its leftist and controversial ideology, the leaders of the RANU movement took it underground. Reed, *supra* note 8, at 484.

25. The guerrilla group was founded in part against the Ugandan regime of Obote, who accused Rwandans of supporting Amin's rule in Uganda and attempted to increase anti-Rwandan sentiment to garner more support for himself. *Id*. at 483.

tary wing of the NRM.[26] As the guerilla movement grew the name was changed to the Rwandan Patriotic Front in an effort to consolidate the mission of its members.[27] The underlying aspiration was to eventually secure a return to Rwanda.[28]

The RPF's first opportunity to attack Rwandan President Habyarimana, by whose hands many Tutsi had suffered discrimination, came in October 1990.[29] The attack failed, and the resultant death of Rwigyema propelled Kagame into the leadership position of the RPF.[30] In retaliation, Habyarimana violently persecuted thousands of Tutsi still living in Rwanda.[31] The RPF continued an active resistance[32] until the Arusha Peace Accords in 1993 attempted to bring about a power-share between the RPF and Habyarimana's government.[33] Tenuous at best, Habyarimana perceived the peace agreement as more of a threat than a movement toward reconciliation and began to increase his military and train the youth wing of his political MRND ("Mouvement Révolutionnaire National pour le Développement") party, forming the *Interahamwe* (meaning "those who attack/work together").[34] The underlying tensions broke when, on April 6, 1994, a plane carrying Habyarimana was shot down, killing the President and all on board.[35] What ensued within hours

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26. *Id.* at 485.

27. *Id.*

28. *Id.*

29. Drumbl, *supra* note 22, at 558.

30. Reed, *supra* note 8, at 489. At the time Kagame had been studying military command at Fort Leavenworth in the United States. *See* WAUGH, *supra* note 7, at 47–49. Having suffered defeat, Kagame went about "reorganizing, retraining and recruiting his army, which he was rapidly to transform into a formidable fighting force." *Id*. at 52.

31. Drumbl, *supra* note 22, at 558–59; DES FORGES ET AL., *supra* note 9, at 49; WAUGH, *supra* note 7, at 53.

32. Habyarimana's regime was assisted by troops sent by the French. DES FORGES ET AL., *supra* note 9, at 118.

33. Mgbako, *supra* note 22, at 204.

34. DES FORGES ET AL., *supra* note 9, at 4; KINGSLEY CHIEDU MOGHALU, RWANDA'S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE 26 (2005). The RPF likewise did not believe the Arusha Accords would prove successful and so continued to enlist and train soldiers. DES FORGES ET AL., *supra* note 9, at 129.

35. Speculations abound as to Kagame's and the RPF's involvement in the crash of Habyarimana's plane. *See* Peter Robinson, *Can Rwandan President Kagame be Held Responsible at the ICTR for the Killing of President Habyarimana?*, 6 J. INT'L CRIM. JUST. 981, 982–83 (2008). It is not the intention of this Note to imply that this charge be added to the allegations of crimes committed by the RPF under Kagame. Moreover, a French court recently overturned a previous ruling, appearing to now exonerate Kagame from involvement in the downing of the plane. John Irish, *French Probe Exonerates Rwanda Leader in Genocide*, REUTERS (Jan. 10, 2012),

and for the next one hundred days was the systematic slaughter of hundreds of thousands of Tutsi and moderate Hutu.[36]

B. The Crimes of the RPF

Upon the death of President Habyarimana, the careful planning of those opposed to the Arusha Peace Accords began to unfold in a horrifying genocide.[37] The army, newly trained *Interahamwe*, and ordinary neighbors began to turn on the Tutsi and moderate Hutu while the rest of the world and the UN peacekeeping forces[38] in Rwanda stood by and watched.[39] Presented not only with the murder of thousands of fellow Rwandans but a political opportunity, the RPF entered Rwanda and advanced towards Kigali.[40] For fifteen weeks as the genocide unfolded at an alarming rate, the RPF moved into the country, gaining control of Kigali in mid-July.[41] The RPF quickly established a coalition government and appointed their commander, Kagame, as the Minister of Defense and Vice-President.[42] By gaining control of Kigali and soon thereafter the remainder of Rwanda, the RPF ended the genocide.[43] Thousands, fearing retaliatory killings with the RPF in power, fled into the surrounding countries.[44]

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http://www.reuters.com/article/2012/01/11/rwanda-genocide-report-idINDEE80A00J20120111

36. *See* DES FORGES ET AL., *supra* note 9, at 180–221.

37. Reed, *supra* note 8, at 496.

38. The UN initially deployed about 1,300 peacekeepers after the Arusha Accords. UNAMIR (United Nations Assistance Mission for Rwanda) was to monitor observance of the ceasefire and was under the command of Lt. Gen. Roméo Dallaire, who fought unsuccessfully for additional UN troops to be sent Rwanda as the genocide began and the international community deserted the country. MOGHALU, *supra* note 34, at 18; *see* ROMÉO DALLAIRE, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA 289 (2003).

39. Reed, *supra* note 8, at 496–97.

40. *Id.* at 497.

41. Drumbl, *supra* note 22, at 563; WAUGH, *supra* note 7, at 67–74.

42. Reed, *supra* note 8, at 497; WAUGH, *supra* note 7, at 76.

43. DES FORGES ET AL., *supra* note 9, at 13.

44. Most fled to Zaire (now Democratic Republic of the Congo). The Security Council approved Operation Turquoise to deploy French Troops into Rwanda as the RPF advanced. It was estimated that as the RPF continued its attacks the number of internally replaced persons in the designated "safe zone" in Rwanda grew from 500,000 to over one million in a matter of days. Once victory was declared it was estimated that over 2.5 million refugees had fled the country, mostly into Zaire. Jason A. Dzubow, *The International Response to the Civil War in Rwanda*, 8 GEO. IMMIGR. L.J. 513, 516 (1994). The UN Mapping Report on the Congo puts the number of refugees that entered the Congo at 1.2 million following the genocide. DRC Mapping Report, *supra* note 13, ¶ 131, at 50.

Evidence that crimes were committed by the RPF during their sweep into Rwanda and the subsequent weeks as they took control was first exposed in a report submitted by Robert Gersony[45] to the United Nations High Commissioner for Refugees ("UNHCR") on October 10, 1994.[46] Gersony headed a mission that was conducted over five weeks from August to September of 1994 and consisted of over two hundred interviews in nine UNHCR refugee camps and at ninety-one locations within the country.[47] The report cited evidence of "systematic and sustained killing and persecution of . . . civilian Hutu populations by the [RPF]."[48] The killings were described as "indiscriminate killings against men, women, children, including the sick and the elderly" occurring at meetings held under the pretext of peace[49] as well as during the pursuit of hidden populations and asylum seekers.[50] There was an "unmistakable pattern of systematic [RPF] conduct"[51] that resulted in "more than 5,000 but perhaps as many as 10,000 [deaths] per month."[52] Furthermore, the report cites evidence that in the Gisenyi prefecture[53] there was a "systematic pattern of arbitrary arrests and the disappearances of adult males [and] . . . the execution of at least dozens of those arrested was credibly reported."[54] The mission was short and only three prefectures were visited – but the evidence it accumulated strongly supports a case for crimes against hu-

45. Robert Gersony was sent by the UN Human Rights Commission to conduct an investigation into repatriation of refugees but he became increasingly convinced of RPF crimes and began to gather data that was then submitted in a report. DES FORGES ET AL., *supra* note 9, at 726. This report was then suppressed and its existence denied until recently being leaked in September 2010. *Id.*; *see* Gersony Report, *supra* note 9.

46. According to DES FORGES ET AL., the report submitted by Gersony concluded "the RPF had engaged in widespread and systematic slaughter of unarmed civilians. In September 1994, the UN, in agreement with the U.S. . . .agreed to suppress the report but demanded that the RPF halt the killings." DES FORGES ET AL., *supra* note 9, at 14.

47. Gersony Report, *supra* note 9, at 1.

48. *Id.* at 4.

49. Des Forges states that RPF solders were responsible for massacring unarmed civilians, many of them women and children, including those who assembled for a meeting at the request of the RPF. DES FORGES ET AL., *supra* note 9, at 692–735. The people were told to come receive food or to be given instructions. *Id.*

50. Gersony Report, *supra* note 9, at 4–5.

51. *Id.* at 6.

52. *Id.* at 8.

53. Of the eleven prefectures in Rwanda, Giseney is located in the far west of Rwanda bordering the Democratic Republic of the Congo (then Zaire) above Lake Kivu. *Map of Rwanda*, INT'L CRIM. TRIBUNAL FOR RWANDA, http://www.unictr.org/AboutICTR/MapofRwanda/tabid/125/Default.aspx (last visited Mar. 1, 2012).

54. Gersony Report, *supra* note 9, at 11.

manity.[55] Reporting that RPF soldiers "killed dozens of political and military leaders . . . family members, including women, and children in a number of these cases" in the early raids against Kigali,[56] the report likewise included in its list of violence mass killings at meetings, door-to-door killings, killing of asylum seekers, and killing of those who had begun to return.[57] Amnesty International reported that "many of the killings took place in a series of arbitrary reprisals mainly against groups of Hutu civilians."[58] Other documents likewise acknowledged the reprisal killings, going so far as to posit that crimes against humanity were taking place.[59] The conclusion of the Gersony Report is unequivocal: "an unmistakable pattern of systematic RPA conduct of such actions is the unavoidable conclusion of the team's interviews."[60]

II. COMMAND RESPONSIBILITY: ELEMENTS AND APPLICATION

In order to effectively utilize command responsibility as a way of imposing liability upon Kagame for crimes committed by the RPF, it is necessary to understand the history and how individual elements of the doctrine have been interpreted and employed. Underlying the doctrine is an understanding that the laws of war sanction what would otherwise be murder and that subordinates, acting under the command of a superior, are freed from liability in the commission of such acts.[61] The command-

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55. Ycaza, *supra* note 9, at 58–59 states "[t]he numbers and hard evidence prove conclusively and decidedly favor prosecution of the RPF for these widespread and systematic killings. However, the discrepancies in opinions about the magnitude of the crimes have made it difficult to move forward with prosecution of RPF members for the crimes they committed." (citing Okechuckwu Oko, *The Challenges of International Criminal Prosecutions in Africa*, 31 FORDHAM INT'L L.J. 343, 384–85 (2008)).

56. DES FORGES ET AL., *supra* note 9, at 14.

57. Gersony Report, *supra* note 9, at 4–6.

58. Amnesty Int'l, *Rwanda: Reports of Killings and Abductions by the Rwandese Patriotic Army*, AI Index AFR 47/016/94 (Oct. 14, 1994), *available at* http://www.amnesty.org/en/library/info/AFR47/016/1994. The DRC Mapping report cites that the forces crossed the border to chase Hutu refugees. DRC Mapping Report, *supra* note 13, ¶ 193.

59. *See* Special Rapporteur of the Comm'n on Human Rights, *Report on the situation of human rights in Rwanda*, ¶¶ 22, 54, U.N. Econ. & Soc. Council, U.N. Doc. E/CN.4/1995/7 (June 28, 1994) (by R. Degni-Ségui) stating not only that the RPF had been guilty of "summary executions" but that "the assassinations and other inhuman acts committed against the civilian population, like the acts of persecution for political motives combined with the war crimes, constitute crimes against humanity."

60. Gersony Report, *supra* note 9, at 6.

61. Jenny S. Martinez, *Understanding* Mens Rea *in Command Responsibility*, 5 J. INT'L CRIM. JUST. 638, 661–62 (2007).

er's responsibility to lead—and, when crimes beyond those sanctioned by the laws of war are committed, prosecute—is intertwined with the subordinates' privileged position.[62] Thus, the responsibility to control subordinates and liability for failure to punish for crimes committed by them is justifiably placed upon the commander.[63]

The emergence of modern-day command responsibility is customarily dated back to the U.S. Military Commission decision in the trial of General Tomoyuki Yamashita in 1945,[64] which, while not the first to address the responsibility of commanders, remains a controversial decision in its utilization of the theory.[65] Despite the contentious nature of the decision, it set precedent by recognizing that commanders had an affirmative duty to make sure that subordinates abided by the law and that failure to ensure such obedience could result in the commander being convicted.[66] From this controversial "beginning" through the Nuremburg Tribunals, set up to prosecute the senior German commanders post-WWII,[67] and the Tokyo Tribunals, prosecuting the crimes of Japanese leaders during the

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62. *Id.* at 662.

63. *Id.*; HÉCTOR OLÁSOLO, THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES 89–90 (Michael Bohlander et al. eds., 2009).

64. Yamashita's conviction appeared to be based on a mere unawareness that his troops in the Philippines were committing crimes and the military commission that was trying him famously said,

> 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 murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless actions of his troops, depending upon their nature and the circumstances surrounding them.

4 U.N. War Crimes Comm'n, *Law Reports of Trials of War Criminals* 35 (1948). The U.S. Supreme Court is considered to have then adopted this form of liability by denying Yamashita remedy after a *habeas* petition was brought. *See* Yamashita v. Styer, 327 U.S. 1 (1946).

65. The idea of commanders being held criminally responsible for the actions of his soldiers dates back to the times of Sun Tzu. James D. Levine II, *The Doctrine of Command Responsibility and its Application to Superior Civilian Leadership: Does the International Criminal Court have the Correct Standard*, 193 MIL. L. REV. 52, 54–58 (2007); METTRAUX, *supra* note 2, at 5–8; Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 22 (1973); Beatrice I. Bonafé, *Finding a Proper Role for Command Responsibility*, 5 J. INT'L CRIM. JUST. 599, 601 (2007).

66. Levine, *supra* note 65, at 59.

67. *Id.* at 60.

war,[68] the growth of the doctrine stagnated until the creation of the *ad hoc* Tribunals, the International Criminal Tribunal for the Former Yugoslavia ("ICTY")[69] and the ICTR, by the UN.[70] This lull in development is largely attributed to the failure of the Geneva Conventions of 1949,[71] which, while codifying a majority of the international humanitarian laws, failed to comment on the doctrine, a misstep that delayed the doctrine's wider acceptance.[72] This error was later amended in Additional Protocol I of 1977 to the Geneva Convention, allowing the doctrine to be codified in part in the international law regime.[73]

Established to bring post-conflict justice in their respective regions, the *ad hoc* Tribunals actively added to the development of command liability in their early years.[74] Due to this initial enthusiasm, the Tribunals can now lay claim to the modern day interpretation and understanding of command responsibility.[75] Both statutes of the ICTY and the ICTR address and create criminal liability for commanders who failed to either prevent or punish perpetrators under their command.[76] In Article 7.3 and Article 6.3, the respective statutes of the ICTY and ICTR lay out command responsibility in identical phrasing that a criminal act:

> committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the

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68. The International Military Tribunal for the Far East ("Tokyo Tribunal") was established mostly to address the mistreatment and security of prisoners of war. Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 8 TULSA J. COMP. & INT'L L. 1, 17–18 (2001).

69. The ICTY was established to prosecute those responsible for war crimes committed in the Balkans in the 1990s. It began in 1993 to deal with crimes against humanity, genocide, and war crimes. *About the ICTY*, *supra* note 15.

70. Daniel Watt, *Stepping Forward or Stumbling Back? Command Responsibility for Failure to Act, Civilian Superiors and the International Criminal Court*, 17 DALHOUSIE J. LEGAL STUD. 141, 158 (2008).

71. The Geneva Conventions of 1949 set forth the core rules that form international humanitarian law, regulating conduct in war and specifically protecting those outside armed conflict. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

72. Levine, *supra* note 65, at 65.

73. *Id.* at 65, 68; Additional Protocol I laid forth that "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information." Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 86.2, Dec. 12, 1977, 1125 U.N.T.S. 3.

74. *See* METTRAUX, *supra* note 2, at 12.

75. Bonafé, *supra* note 65, at 601.

76. Levine, *supra* note 65, at 72.

> subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[77]

In short, any "person exercising effective control over a number of subordinates is criminally liable under international law if he fails to prevent or punish their crimes as long as the superior knew or had reason to know about such crimes."[78] The Tribunals have recognized three elements necessary to establish liability:

> i) the existence of a *de jure* or *de facto* superior—subordinate relationship of effective control;
>
> ii) the superior knew or had reason to know that the criminal act was about to be or had been committed;
>
> iii) the superior failed to take the necessary steps to prevent or punish the offences.[79]

While straightforward in theory, numerous issues arise in the practical application of each doctrinal element.[80] Consistent application was further complicated at the ICTR due to an early decision that "the Chamber finds it appropriate to assess [the doctrine] on a case by case basis."[81] Understanding how each element has come to be interpreted and applied at the ICTR and more generally in international criminal law will inform the manner in which the doctrine can be effectively used to prosecute Kagame.

A. Establishing the Superior-Subordinate Relationship

The key element fundamental to any attempt to establish liability under command responsibility is the link between the perpetrator and the superior. Without the existence of a superior-subordinate relationship the the-

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77. ICTR Statute, *supra* note 3, art. 6.3; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7.3, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

78. Ilias Bantekas, *On Stretching the Boundaries of Responsible Command*, 7 J. INT'L CRIM. JUST. 1197, 1197 (2009).

79. Bonafé, *supra* note 65, at 605; Martinez, *supra* note 61, at 642; Moloto, *supra* note 10, at 15–16.

80. Jamie A. Williamson, *Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda,* 13 CRIM. L.F. 365, 366 (2003).

81. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 491 (Sept. 2, 1998). This approach made sense given the undeveloped state of the doctrine and the approach was reaffirmed in the case of *Prosecutor v. Musema* Case No. ICTR 96-13-T, Judgment, ¶ 135 (Jan. 27, 2000).

ory of command responsibility cannot be used.[82] Within the classical military structure, the relationship is clearly drawn. Complications arise when charges are brought against citizens, political leaders, and, more recently, the possible extension to guerrilla and terrorist leaders.[83] Where military commanders oversaw or ordered the execution of illegal actions, accountability is easily justified due to their position of authority and clear delineation of control over their subordinates.[84] Indirect command responsibility proves more ambiguous[85] and it appears accepted that the designation of command does not have to be strictly formal in the military sense, but is rather broken into individual elements of de jure[86] and de facto[87] control.[88] Where the authority of nonmilitary leaders mimics a military-like structure, actions are easily placed within the scope of command responsibility; growth of the doctrine has now incorporated political and civilian leaders as well.[89]

What is crucial to the application of command responsibility to the nonmilitary context—where the militaristic structure is not clearly mimicked—is the degree of authority that these citizens are found to have exercised over those who commissioned the crime.[90] The Tribunals now apply the "effective control" test to see whether superiors had the "material ability to prevent and punish"[91] crimes committed.[92] If this standard is not found, a superior will not incur liability under the theory of command responsibility.[93] Because of the degree of difficulty in identifying the duties of civilian leaders, command responsibility is less frequently applied where other preferable forms of liability, such as joint criminal enterprise, are available and easier to establish.[94]

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82. How the relationship has come to be defined has grown but still at the core is necessity of some kind of relationship. Moloto, *supra* note 10, at 15–16.

83. Williamson, *supra* note 80, at 368; Levine, *supra* note 65, at 80–82; *see also* Watt, *supra* note 70; Moloto, *supra* note 10, at 15–16.

84. Bonafé, *supra* note 65, at 603–04.

85. Martinez, *supra* note 61, at 639–40.

86. De jure meaning: "[e]xisting by right or according to law." BLACK'S LAW DICTIONARY 194 (3d Pocket ed. 2006).

87. De facto is defined as: "[a]ctual, existing in fact; having effect even though not formally or legally recognized." *Id.* at 187–88.

88. Levine, *supra* note 65, at 74; METTRAUX, *supra* note 2, at 138–39.

89. Moloto, *supra* note 10, at 16–17; Bonafé, *supra* note 65, at 604; METTRAUX, *supra* note 2, at 102.

90. METTRAUX, *supra* note 2, at 102.

91. Prosecutor v. Delalic, Mucic, Delic, Landzo, Case No. IT-96-21-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

92. Moloto, *supra* note 10, at 17.

93. *Id.*

94. METTRAUX, *supra* note 2, at 107; OLÁSOLO, *supra* note 63, at 262.

The trial of *The Prosecutor v. Kayishema* illustrates how the ICTR has developed the de facto and de jure elements of the superior-subordinate relationship.[95] As the acting prefect[96] of Kibuye prefecture[97] during the 1994 genocide, Kayishema was considered the "highest local representative of the government," but effectively remained a citizen.[98] On trial for genocide stemming from massacres that occurred in local churches, a stadium, and the surrounding areas, the Tribunal sought to establish Kayishema's liability for initiating attacks and failing to subsequently prevent or punish the crimes of others.[99] In order to establish the superior-subordinate relationship the ICTR found that, while the conflict at the time created a lawless state, within the prefecture, Kayishema had de jure control over the soldiers and officials responsible for the deaths and crimes committed during the genocide.[100] Indeed, as a result of his respective position, the Tribunal stated "[t]he Trial Chamber finds that it is beyond question that the *prefect* exercised de jure authority over these assailants."[101] The Chamber thus established a direct link by virtue of this position of the Accused over the *bourgmestre*[102] (mayor) and the gendarmerie within the prefecture.[103]

Finding evidence of the Accused's de jure control, the ICTR proceeded to follow the steps of the ICTY's *Prosecutor v. Delalic* ("*Celebici*") and assess the existence of de facto control.[104] The *Celebici* case concerned

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95. *Prosecutor v. Kayishema*, Case No. ICTR 95-1-T, Judgment, ¶ 7 (May 21, 1999).

96. A mayoral-type position.

97. Kibuye is the most mid-western of Rwanda's eleven prefectures. *See* Map of Rwanda, *supra* note 53.

98. *Kayishema*, Case No. ICTR 95-1-T, ¶ 7. Clement Kayishema became the Prefect of Kibuye commune on July 3, 1992. Counts 1–6 in the indictment lay out the grounds for Kayishema's responsibility in genocide when Tutsis, seeking refuge in the Catholic Church in Kibuye were surrounded and massacred, resulting in the deaths of thousands. He was furthermore charged with initiating an attack against refugees hiding in the Kibuye stadium. *Id.* ¶¶ 23, 25–37.

99. *Id.* ¶¶ 25–44.

100. *Id.* ¶ 479.

101. *Id.* ¶ 480.

102. Within the eleven *Prefectures* of Rwanda there are communes, led by the *bourgmestre* (effectively a mayor). The *bourgmestres* are appointed by the President and are in charge of the governmental functions within their respective communes. Alongside the *Prefect* (who is the highest local representative of the government in the *Prefecture)* the *bourgmestres* hold authority over the members of the army and *Gendarmerie Nationale* in their commune. The *Gendarmerie Nationale* is the armed forces lead by the Minister of Defense. *Id.* ¶¶ 7–11.

103. *Id.* ¶¶ 41–54.

104. Alexander Zahar, *Command Responsibility of Civilian Superiors for Genocide*, 14 LEIDEN J. INT'L L. 591, 603–04 (2001). In the Celebici case, a commander, his deputy, and a senior officer were charged with "willfully causing great suffering and serious inju-

three prison guards being prosecuted for crimes committed within a prison camp while they stood watch.[105] The ICTY had posited a strict standard in which liability would be extended in cases where control mimicked that held by military commanders.[106] However, in the case of *Kayishema* at the ICTR, the Chamber used a less stringent analysis and found that de facto liability could be imposed upon civilians as:

> no legal or formal position of authority need exist between the accused and the perpetrators of the crimes. Rather, the *influence that an individual exercises* over the perpetrators of the crime may provide sufficient grounds for the imposition of command responsibility if it can be shown that such influence was used to order the commission of the crime.[107]

However, in continuing its breakdown of de facto control, the ICTR then went on to posit that:

> [t]he mere existence of *de jure* power does not always necessitate the imposition of command responsibility. The culpability that this doctrine gives rise to must ultimately be predicated upon the power that the superior exercises over his subordinates in a given situation.[108]

Thus the Chamber seems to suggest that while de jure alone cannot impute responsibility, de facto control could.[109] The Tribunal found Kayishema held control through a determination that, while his de facto au-

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ry . . . for their alleged acts and omissions as superiors." Prosecutor v. Delalic, Mucic, Delic, Landzo, Case No. IT 96-21-T, Judgment, ch. II, ¶ 25 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)).

105. Prosecutor v. Delalic, Mucic, Delic, Landzo, Case No. IT 96-21-A, Judgment, ¶ 1 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

106.

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

Id. ¶ 378 (emphasis added).

107. *Kayishema*, Case No. ICTR 95-1-T, ¶ 492 (emphasis added).

108. *Id.* ¶ 491.

109. *Id.*; Jamie A. Williamson, *Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda,* 13 CRIM. L.F. 365, 369 (2003).

thority was less than his de jure control as the prefect during the genocide, both branches of control still existed.[110]

The question regarding the relationship between the superior and subordinate relies upon the degree of influence or control that the superior exercises.[111] The "effective control" test[112] appears in the case of *The Prosecutor v. Kajelijeli*, who was accused of genocide for acts committed in Mukingo commune of which he was the *bourgmestre*.[113] Kajelijeli was convicted of direct and public incitement of genocide due to his presence at various mob sites and his participation in transporting members of the *Interahamwe*.[114] The Tribunal declared that there was enough evidence to establish that the Accused, who was likewise involved in the training and ordering of the *Interahamwe*, "held and maintained effective control" and was therefore liable under the theory of command responsibility.[115]

Authority in the case of *Kajelijeli*, who was a *bourgmestre* and had exercised his control over the military, was clearly delineated in comparison to the case of *Prosecutor v. Musema*.[116] Addressing one of the biggest contentions in command responsibility, the extension of the doctrine to civilians, the ICTR found that Musema, as the manager of a tea factory, exercised both de jure and de facto control over the tea workers by virtue of his control over the finances and his ability to hire and fire the

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110. *Kayishema*, Case No. ICTR 95-1-T, ¶ 25–44; Libby, *supra* note 14, at 218–19.

111. Williamson, *supra* note 80, at 370.

112. *See supra* pp. 697–98.

113. "The Appellant was *bourgmestre* of Mukingo Commune . . . As *bourgmestre*, he exercised important responsibilities at the commune level: he represented executive power, had authority over civil servants, and could request intervention by commune police forces." *Prosecutor v. Kajelijeli*, Case No. ICTR 98-44A-A, Judgment, ¶ 2 (May 23, 2005); Libby, *supra* note 14, at 221.

114. *Kajelijeli*, Case No. ICTR 98-44A-A, ¶¶ 3–4. The *Interahamwe* were the youth group of the National Revolutionary Movement for Development (Mouvement Revolutionnaire National pour le Developpement, "MRND"). Beginning in 1992 the MRND began to provide them with military training and they were used extensively during the 1994 massacres. *See* DES FORGES ET AL., *supra* note 9, at 4; *see also supra* pp. 689–91.

115. *Kajelijeli*, Case No. ICTR 98-44A-A, ¶ 609. The Accused was the *bourgmestre* of Mukingo Commune from 1988 to 1993 and then reappointed in June of 1994. As the *bourgmestre* he was found to have control over the locals and was thus accused of ordering, instigating, and aiding and abetting genocide and crimes against humanity. *Id.* ¶¶ 2–3.

116. *Prosecutor v. Musema,* Case No. ICTR 96-13-T, Judgment, ¶ 141 (Jan. 27, 2000). Alfred Musema was appointed the director of Gisovu Tea Factory in 1984. While the head office of the factory was in Kibuye, the Accused was responsible for both the Kibuye and Gokongoro *prefectures*. *Id.* ¶¶ 12–16. He was charged and then convicted for genocide.

workers at the factory.[117] As his employees, their involvement in crimes relating to the genocide implicated Musema and made him liable under command responsibility for the commission of genocide.[118] The Chamber held that liability may be imposed, "be it *de jure* or merely *de facto*" control.[119] This application of command responsibility has been criticized as lacking the necessary similarity to military authority in relying merely on the legal and financial power of a manager and is illustrative of the vacillating application of the doctrine.[120]

The case of *Prosecutor v. Bagilishema* exhibited a return to the military-structure requirement advocated by the ICTY's *Celebici* case and initially referred to at the ICTR in *Kayishema*.[121] The Chamber stated that the doctrine would extend "to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders."[122] The case set forth a two-pronged test, incorporating both "effective" control and the "material ability" to prevent and punish, to determine whether or not a civilian could be considered a superior.[123] Ultimately, the analysis of the Trial Chamber held that any de facto authority had to be accompanied by some evidence of de jure authority.[124] Chain of command, issuing orders, and

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117. *Musema*, Case No. ICTR 96-13-T, ¶ 881.

118. *Id.* ¶ 893.

119. *Id.* at 7.

120. "[T]he ICTR conflated the ability to punish people for failing in their duties as employees with the power to punish someone for violent acts. It is unclear that Musema's power to fire or reprimand his employees could reasonably be equated to the power to deter genocidal acts." Libby, *supra* note 14, at 223; Williamson, *supra* note 80, at 372.

121. *Prosecutor v. Bagilishema,* Case No. ICTR 95-1A-T, Judgment, ¶ 42 (June 7, 2001); *Prosecutor v. Delalic*, *et al.*, Case No. ICTY 96-21-T (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); *Prosecutor v. Kayishema*, Case No. ICTR 95-1-T, Judgment, ¶ 493 (May 21, 1999).

122. *Bagilishema*, Case No. ICTR 95-1A-T, ¶ 42 (citing *Delalic, et al.*, Case No. ICTY 96-21-T); Williamson, *supra* note 80, at 372.

123. Williamson, *supra* note 80, at 372.

124. *Bagilishema*, Case No. ICTR 95-1A-T, ¶ 43.

> According to the Trial Chamber in *Celebici,* for a civilian superior's degree of control to be 'similar to' that of a military commander, the control over subordinates must be 'effective,' and the superior must have the "'material ability' to prevent and punish any offences. Furthermore, the exercise of *de facto* authority must be accompanied by 'the trappings of the exercise of *de jure* authority.' The present Chamber concurs. The Chamber is of the view that these trappings of authority include, for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action. It is by these trappings that the

being accustomed to a following would all be used to evidence authoritativeness that went beyond mere local popularity and followings.[125] Without any de jure authority similar to that found in the military, a civilian would not be found liable.[126] This more restrictive view was partially relaxed by the Appeals Chamber, which held that control is more than the mere existence of de jure authority.[127]

The ICTR's decision to tackle liability under command responsibility on a case-by-case basis has resulted in numerous interpretation discrepancies of the elements. The extension of the doctrine beyond the military context further complicated its application, though for the most part the Tribunal has successfully employed its two-step test to determine the superior-subordinate relationship.[128] What remains at the core for the principal element of command responsibility is a consideration dependent not upon military status but upon "the degree and nature of authority and control wielded by the individual."[129]

B. The Requirement of Knowledge

At what point should a commander have had reason to know his subordinates committed a crime in order to meet the requisite second element of command responsibility—knowledge?[130] The ICTY has recognized that when arguing that a superior "had reason to know," evidence must be given showing that there was specific information available to whomever was in charge.[131] At the ICTR, the element has been incon-

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> law distinguishes civilian superiors from mere rabble-rousers or other persons of influence.

Id. ¶ 43.

125. *Id.*

126. Williamson, *supra* note 80, at 372.

127. *Prosecutor v. Bagilishema*, Case No. ICTR 95-1A-A, ¶¶ 55, 62 (July 3, 2002). The Appeals Chamber held that the Trial Chamber had failed to appropriately consider de facto analysis and that control could not be limited to de jure. *Id.* ¶ 61; Williamson, *supra* note 80, at 373.

128. Libby, *supra* note 14, at 228; Williamson, *supra* note 81, at 372–73; Bonafé, *supra* note 65, at 609.

129. Williamson, *supra* note 80, at 367 (citing *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR 95-1-T, Judgment, ¶ 216 (May 21, 1999)).

130. Levine, *supra* note 65, at 82.

131. JOHN E. ACKERMAN & EUGENE O'SULLIVAN, PRACTICE AND PROCEDURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 87 (2000) ("[A] superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordi-

sistently applied despite initially appearing in the Tribunal as a straightforward standard.[132] Generally, the *mens rea* element[133] does not result in strict liability.[134] Circumstantial evidence of the crimes is an acceptable method to establish the requisite knowledge at the ICTR, including but not limited to: the number and type of acts, the troops involved, and the location of those accused at the time of commission.[135]

Where a commander failed to obtain available information on an alleged crime, the question becomes whether this failure in and of itself should result in liability.[136] Knowledge will not be presumed and thus any prosecution must provide evidence that the commander had access to evidence of his subordinates' plans or acts and failed to take any action.[137] Accordingly, the element of knowledge in command responsibility falls somewhere between strict liability and negligence all the while creating liability for omission as well.[138] It appears that despite the initial proposition of a strict standard, the actual application at the ICTR displays more flexibility.[139]

The standard of "knew or had reason to know" under Article 6.3 of the ICTR was equated in *Prosecutor v. Akayesu* to "acquiescence or even malicious intent."[140] This initial high standard of knowledge has not been

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nates.") (citing *Prosecutor v. Delalic, Mucic, Delic, Landzo*, Case No. IT 96-21-T, Judgment, Ch. II, ¶ 393 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

132. *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 489 (Sept. 2, 1998); Libby, *supra* note 14, at 215–16.

133. A concept taken from domestic criminal law meaning the mental state of a criminal.

134. *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Appeal Judgment, ¶ 44 (Dec. 13, 2002).

135. Libby, *supra* note 14, at 213; Moloto, *supra* note 10, at 17–18.

136. Moloto, *supra* note 10, at 17–18; Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 472 (2001) ("[N]egligent disregard of information suffices for responsibility, major criminals can still be brought to justice: although their knowing participation in the wrongdoing cannot be proven, they can still be held on negligence grounds.").

137. Levine, *supra* note 65, at 74.

138. *Id.* at 83. This remains true for the ICTY and the ICTR but here the ICC seems to show some development to the doctrine. The ICC statute differs from the Tribunal by broadening the knowledge requirement to "should have known" for military commanders, which would effectively make the evidentiary chain of liability easier to build. Rome Statute of the International Criminal Court, art. 28(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

139. Williamson, *supra* note 80, at 379.

140. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 489 (Sept. 2, 1998). Jean-Paul Akayesu was the *bourgmestre* of the Taba commune and was charged with genocide, crimes against humanity, and violating Common Article 3 of the Geneva Conventions. *Id.* ¶ 1.2; Libby, *supra* note 14, at 216.

consistently applied in practice.[141] In most instances the *mens rea* element must be established[142] and underlying this is a debate as to whether the knowledge standard places a positive duty upon superiors to inform themselves of potential crimes or if it is sufficient that based on the context of the relationship and crimes, knowledge can be imputed.[143] The case of *Prosecutor v. Bagilishema* offers a detailed analysis of the requisite *mens rea.*[144] The Chamber set forth that a superior

> possesses or will be imputed the *mens rea* required to incur criminal liability where: he or she had *actual knowledge*, established through direct or circumstantial evidence, that his or her subordinates were about to commit, were committing, or had committed a crime under the Statutes; or, he or she had information which put him or her *on notice of the risk* of such offenses by indicating the need for additional investigation in order to ascertain whether such offenses were about to be committed.[145]

The decision goes on to add that where the lack of knowledge is "the result of negligence in the discharge of the superior's duties" criminal liability will be imposed as the superior *should* have known, echoing the "notice of the risk" seen above.[146] This decision appears to significantly expand the "malicious intent" comparison that had come in *Akayesu*[147] and it is important to note that only one year prior, in *Musema*, the Chamber noted that the idea of "should have known" appeared too broad.[148]

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141. Libby, *supra* note 14, at 216.

142. Occasionally an undertaking is not even necessary to establish knowledge, as in *Akayesu*, where the defendant admitted to knowing that killings were taking place. *Akayesu*, Case No. ICTR 96-4-T, ¶ 182.

143. Williamson, *supra* note 80, at 365 (citing *Prosecutor v. Bagilishema,* Case No. ICTR 95-IA-T, Judgment, ¶ 46 (June 7, 2001)).

144. *Bagilishema*, Case No. ICTR 95-1A-T, ¶ 46; Williamson, *supra* note 80, at 377. Ignace Bagilishema was the *Bourgmestre* of Mabanza commune in Rwanda. The decision in *Bagilishema* is unfortunately an example of the difficulty in the application of the doctrine as despite allegations of his involvement and presence at the site of killings he was acquitted on the basis that the prosecutor lacked enough evidence to establish command responsibility. Libby, *supra* note 14, at 224.

145. *Bagilishema*, Case No. ICTR 95-1A-T, ¶ 46 (emphasis added).

146. *Id.*

147. *See supra* p. 702–03.

148. The discussion was in the context of the adoption of Article 86.2 of Additional Protocol I to the Geneva Conventions, which holds commanders liable. *Prosecutor v. Musema*, Case No. ICTR 96-13-T, Judgment, ¶ 146 (Jan. 27, 2000); Williamson, *supra* note 80, at 376–77. Alfred Musema, the director of a tea factory in Kibuye prefecture, was held accountable for the actions of his tea factory workers and accused of genocide and crimes against humanity. The Chamber found him guilty under command responsi-

The "should have known" standard relies upon the position of the superior for consideration of the knowledge requirement.[149] Therefore where the superior had the means to obtain knowledge and failed, the fact that the superior was negligent in his duty could potentially impose liability by virtue of his position. This is far closer to an imposition of an affirmative duty upon the superior than before.[150] However, despite the proposition of a broader *mens rea* standard, it appears that the ICTR tends to more closely follow the standard set forth by the ICTY where the superior will incur liability only if he or she were put on notice or if there was a deliberate refusal on the part of the superior to obtain more information.[151]

C. The Failure to Prevent or Prosecute

The third element of the doctrine imposes upon commanders a responsibility to pursue and prosecute offenders once a crime has been committed and the offenses are known.[152] This last element is made up of two distinct parts, either of which could arguably create liability; the first is the duty to prevent a crime if the superior is suspicious or aware that such crime could occur, and the second is the requirement to punish those who have committed a crime.[153] The first measure entails a duty to investigate reported crimes and establish their veracity.[154] If crimes are established, liability will be imposed, but only insofar as the commander

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bility and herein lies the discrepancy between *Musema* and *Bagilishema* as the Court found that as Musema was "personally present at the attack sites, [the Chamber] is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so." *Musema*, Case No. ICTR 96-13-T, ¶ 894.

149. Libby, *supra* note 14, at 207.

150. Williamson, *supra* note 80, at 377.

151. *Id.* at 379 (citing *Prosecutor v. Delalic et al*., Case No. IT-96-21-A, Judgment, ¶ 226 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001). Criminal liability

> exists on the part of a commander if the latter is seriously negligent in his duty to obtain the relevant information. The point here should not be that knowledge may be presumed if a person fails in his *duty* to obtain the relevant information of a crime, but that it may be presumed if he had the *means* to obtain the knowledge but deliberately refrained from doing so.

Id.; see also, METTRAUX, *supra* note 2.

152. OLÁSOLO, *supra* note 63, at 97–99; Levine, *supra* note 65, at 75; Williamson, *supra* note 80, at 380.

153. Moloto, *supra* note 10, at 19; OLÁSOLO, *supra* note 63, at 97–99. METTRAUX states that the duty to prevent or punish are "two distinct obligations and two alternative bases for liability, so that the violation of either of these duties to prevent and to punish crimes could engage the criminal liability of a superior." METTRAUX, *supra* note 2, at 230.

154. Moloto, *supra* note 10, at 20.

had the material ability to prosecute.[155] The threshold test of materiality is whether or not the superior attempted to take "necessary and reasonable measures," a test dependent upon procurement of evidence.[156] Despite theoretically having a standard from which to start, case law at the ICTR has not yet defined what "necessary and reasonable" entails.[157] A mixture of the superior's control and whether that control would have allowed the superior to prevent or punish the perpetration of the crime are elemental considerations.[158]

One application of this third element at the ICTR is found in the case of *Kayishema*, where the Chamber held that:

> where the perpetrators of the massacres were found to be under the *de jure* or *de facto* control of Kayishema, and where the perpetrators committed the crimes pursuant to Kayishema's orders, the Trial Chamber is of the opinion that it is *self-evident* that the accused *knew or had reason* to know that the attacks were imminent and that he failed to take reasonable measures to prevent them. In such a case, the Trial Chamber need not examine further whether the accused failed to punish the perpetrators.[159]

The ICTR dismissed any investigation into the Accused's actions to mitigate violence based on allegations of his involvement in the perpetration of the crimes, thus setting a less-than-critical standard for the examination of a defendant's actions in stopping or prosecuting crimes.[160] Similarly, in the *Musema* case, the Tribunal found that as the manager of the tea factory—not only knowing about but also having participated in the attacks himself—the Accused failed to take the necessary and reasonable steps to prevent or subsequently punish the crimes.[161] By the ICTR's reasoning, since the Accused had the ability to fire or hire employees, he also could have prevented or punished those committing the crime of genocide.[162] This rationale has drawn the criticism that it equates the

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155. OLÁSOLO, *supra* note 63, at 97–99.

156. Moloto, *supra* note 10, at 20.

157. Williamson, *supra* note 80, at 381; Moloto, *supra* note 10, at 19–20. "Necessary" is generally viewed in the context what laws were applicable to the accused at the time "for instance, a superior is required by domestic law to report allegations of crimes or where he is expected to request the professional assistance of a particular body." Under international law "reasonable" generally refers to measures that are "legal; feasible; proportionate; and timely." METTRAUX*, supra* note 2, at 238–41.

158. Williamson, *supra* note 80, at 381.

159. *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment, ¶ 505 (May 21, 1999) (emphasis added).

160. *Id.*; Libby, *supra* note 14, at 220.

161. *Prosecutor v. Musema*, Case No. ICTR 96-13-T, Judgment, ¶ 894 (Jan. 27, 2000).

162. *Id.* ¶ 895;Watt, *supra* note 70, at 165–66.

ability to fire someone with the ability to deter genocide.[163] Nevertheless, the Chamber's reasoning in holding *Musema* liable under command responsibility was ultimately strengthened by evidence showing not only that the Accused had participated, but that he also acted as a leader during the attacks.[164]

Despite similar evidence to *Musema*, in the later *Bagilishema* case the Tribunal found that it was still insufficient to establish that presence at the scene of attacks was enough to incur liability.[165] This finding could conceivably complicate the earlier analysis. However, it appears from the Judgment that the Tribunal took into consideration evidence that the Accused attempted to take some protective measures but lacked the resources to deter attacks.[166] The "Accused attempted to prevent Hutu from attacking Tutsi . . . the Chamber notes that . . . the Accused felt that he had insufficient resources."[167] The Chamber then weighed the lack of sufficient evidence of the Accused at the attacks against his attempted preventative actions, leaning in favor of no liability under the doctrine.[168] Alternatively, the Chamber may have found that issuing fake identity cards, falsifying resident registers and other acts on the part of the Accused may have been sufficient to satisfy the "reasonable and necessary" standard for preventing the commission of crimes.[169]

Another aspect to consider for the failure to prevent or punish was also set forth in *Bagilishema*, where the Chamber found that where a superior "creates an environment of impunity," criminal responsibility may be incurred.[170] Following from *Prosecutor v. Blaskic* at the ICTY,[171] the ICTR held that command responsibility for failure to punish "may be triggered by a broadly based pattern of conduct by a superior, which in effect encourages the commission of atrocities by his or her subordinates."[172] Responsibility "may arise from . . . failure to create or sus-

163. Libby, *supra* note 14, at 223; Zahar, *supra* note 103, at 602–03.

164. *Musema*, Case No. ICTR 96-13-T, ¶ 902.

165. Libby, *supra* note 14, at 225.

166. The accused submitted letters that described his attempts to procure soldiers from the Prefect to restore security and an additional letter to the Prefect on January 7, 1993 in which he had attempted to prevent Hutu from attacking but had insufficient resources. *Prosecutor v. Bagilishema,* Case No. ICTR 95-1A-T, Judgment, ¶¶ 125, 128 (June 7, 2001).

167. *Bagilishema,* Case No. ICTR 95-1A-T, ¶ 128.

168. Williamson, *supra* note 80, at 382.

169. *Id.*

170. *Id.* at 383.

171. *Prosecutor v. Blaskic*, Case No. ICTY 95-14-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

172. *Bagilishema*, Case No. ICTR 95-1A-T, ¶ 50.

tain . . . an environment of discipline and respect for the law."[173] By allowing subordinates the leeway to disrespect the law, the superior fails in the prevention of crimes and thereby can incur liability under command responsibility.[174] This goes to the heart of Article 6.3, which the Chamber stated is "not that the crimes of subordinates should be punished but that superiors should ensure that the crimes *do not occur*."[175] Any analysis with regard to this extension would still be susceptible to evidence showing that it may have been outside the superior's material control to take the necessary steps to control the subordinates, thus avoiding liability. Nevertheless, it still demands that the superior create an environment in which subordinates are aware that crimes committed will not go unpunished while similarly creating an incentive for superiors to maintain control and keep themselves informed of any potential violations.[176] The last element of command responsibility thus requires of the superior a positive duty to act, either in preventing a perpetrator or pursuing and punishing those who have committed the crime.[177]

Despite the difficulties presented by each element of command responsibility, the ICTR has helped create and undoubtedly strengthened a doctrine whereby a superior, whether in a position of power in the military, political, or social context, can be held criminally responsible for crimes committed by subordinates. Applying this doctrine on a case-by-case basis has resulted in a doctrine that, while at times inconsistent, has established a foundation that can provide guidance for future prosecutions. Consequently, those found in a superior-subordinate relationship, who have knowledge or are in a position that requires their awareness of actions by subordinates, and who fail to take reasonable and necessary steps to prevent or punish, will incur liability at the hands of the Tribunal. So why did the ICTR fail to prosecute Paul Kagame?

III. APPLICATION OF COMMAND RESPONSIBILITY TO THE CASE OF KAGAME

In order to establish that Kagame was responsible for the crimes committed by the RPF as their commander, the three requisite elements of command responsibility must be established. One must first prove the existence of his de jure or de facto relationship over members of the RPF; second, that he knew or had reason to know that the crimes were

173. *Id.*

174. Williamson, *supra* note 80, at 383 (citing *Bagilishema*, Case No. ICTR 95-1A-T, ¶ 50).

175. *Bagilishema*, Case No. ICTR 95-1A-T, ¶ 50 n.55 (emphasis added).

176. Williamson, *supra* note 80, at 383; Zahar, *supra* note 103, at 604.

177. Williamson, *supra* note 80, at 380.

committed; and lastly that he failed to take the necessary steps to prevent or punish the offenses.[178] The ICTR's case law has developed each of these elements sufficiently that when applying them together, the doctrine can be successfully applied in the case of Kagame.

It would not be a hard stretch to find that Kagame, the highest-ranking military commander in the RPF, had de jure and de facto control over the members of the RPF. The standard set forth in the *Kayishema* case held that a civilian prefect had influence by virtue of his position over soldiers and officials in his prefecture.[179] Likewise, the *Kajelijeli* case held that where the Accused had trained and commanded the *Interahamwe*, there was sufficient evidence establishing his effective control over the subordinates.[180] The purported return to the military structure requirement of responsibility in *Bagilishema* set forth the analysis wherein "effective control" and "material ability" to prevent and punish must be established in order for liability to be incurred.[181] Therefore, to satisfy the requisite key element of a superior-subordinate relationship for liability under command responsibility, it must be established that the RPF was a military-like structure and that Kagame, as the leader, held effective control with the material ability to prevent and or punish the crimes allegedly committed by the RPF.

Kagame was the military leader of the RPF during the 1994 operation in Rwanda.[182] The RPF, while a guerrilla group, closely mimicked a military structure as evidenced by their command structure and militaristic organization, military success in taking over Rwanda, and subsequent transition to power in the post-genocide days.[183] The RPF was "acknowledged by military experts to be a highly disciplined force, with clear lines of command and adequate communication."[184] They had extensive communication "up and down the hierarchy" implying that the "commander of [the] army must have known of and at least tolerated these practices."[185] Kagame, militarily-trained after his post as the head of

178. *See supra* pp. 690–91.

179. *Prosecutor v. Kayishema*, Case No. ICTR 95-1-T, Judgment, ¶ 480 (May 21, 1999).

180. Libby, *supra* note 14, at 221.

181. *See supra* pp. 696–98.

182. MOGHALU, *supra* note 34, at 13.

183. Reed, *supra* note 8, at 498. The attack of the RPF into Rwanda in April of 1994 was a well-established offensive. It involved "three main thrusts across an 80-kilometer front, breaking out from position in the northern demilitarized zone." WAUGH, *supra* note 7, at 67–68. One branch came down the east, with units joining later, while a western flank took over Byumba and Ruhengeri dividing the FAR in the west and northwest. *Id.*

184. DES FORGES ET AL., *supra* note 9, at 14.

185. *Id.* at 734–35.

military intelligence in Uganda, had organized the RPF into an efficient force, as demonstrated by their quick attacks and organization while entering Rwanda in 1994.[186] With the well-documented evidence of Kagame as leader of the RPF and his command over the forces, there is certainly enough evidence to establish that a superior-subordinate relationship existed between Kagame and the RPF troops to satisfy the first element of command liability.

The second consideration of command responsibility is the requirement of knowledge—that Kagame had knowledge that members of the RPF were committing crimes against humanity. During the genocide and in the months following, imputing knowledge of the crimes committed by RPF troops upon Kagame poses a challenge given the general disarray of the country.[187] Nevertheless, to address this element of knowledge, the requisite "knew or had reason to know" standard under Article 6.3 can be established, as seen in the case of *Bagilishema*, through either direct or circumstantial evidence.[188] In addition to the determination that Kagame was the leader of the RPF, the ICTR has shown itself willing to entertain circumstantial evidence that will infer knowledge.[189] A superior will incur liability in situations where he or she was put on notice[190] or where there was a deliberate refusal to obtain more information and the ICTR has purported to impose an affirmative duty upon those who would obtain information by virtue of their position alone.[191]

It may be hard to concretely ascribe that Kagame had personal knowledge that the crimes were occurring. However, evidence exists that high-ranking officials within the RPF were aware.[192] Seth Sendashonga, former RPF Minister of the Interior, has been quoted as saying that there was "an attempt at 'social engineering on a vast, murderous scale'"[193] and estimated that tens of thousands of people were killed by the RPF.[194] Reports that "the crimes committed by RPF soldiers were so systematic and widespread and took place over so long a period of time" allow the inference that "commanding officers must have been aware of them."[195]

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186. WAUGH, *supra* note 7, at 40, 46; DES FORGES ET AL., *supra* note 9, at 692.

187. DES FORGES ET AL., *supra* note 9, at 692.

188. *See supra* p. 701–02.

189. Williamson, *supra* note 80, at 377 (quoting *Prosecutor v. Bagilishema*, Case No. ICTR 95-IA-T, Judgment, ¶ 46 (June 7, 2001)).

190. *Bagilishema*, Case No. ICTR 95-IA-T, ¶ 46.

191. *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 479 (Sept. 2, 1998); Williamson, *supra* note 80, at 377.

192. Ycaza, *supra* note 9, at 60.

193. *Id.*

194. DES FORGES ET AL., *supra* note 9, at 16.

195. *Id.*

Indeed, "the RPF itself . . . acknowledged these killings by Rwandan Patriotic Army ('RPA') soldiers, although it described them as 'isolated incidents.'"[196] The data collected by Human Rights Watch in the aftermath of the genocide led it to conclude that "RPF abuses occurred so often and in such similar ways that they must have been directed by officers at a high level of responsibility. It is likely that these patterns of abuses were known to and tolerated by the highest levels of command of the RPF forces."[197] It was also reported that Kagame had at the very least been informed about killings in the Byumba prefecture but did not intervene.[198] It is thus unlikely that Kagame, in light of his position, had no knowledge that *any* of these crimes were occurring.[199] With the requisite standards in mind, it appears that there is enough evidence to sufficiently impart knowledge to Kagame, and while perhaps the ICTR would require further investigation to disallow any questionability, by virtue of the standard set forth in the *Bagilishema* case, what has been demonstrated may suffice.

Having established the requisite superior-subordinate relationship and the *mens rea* of command responsibility, the duty to prevent or punish is the last element necessary for imposing liability. This duty poses an interesting question. It is easy to see that during the calamity and chaos of the genocide, Kagame may not have been in a position to prevent the reprisal killings by his soldiers. But even if the duty to prevent goes unmet, the duty to punish remains. Therefore, though encompassing two elements, failure in one element may still result in liability.[200] The ICTR has taken a "necessary and reasonable" standard to begin any such determination of liability and while no clear definition has been established, considerations of the superior's control and the extent of that control are brought into play both for prevention and for the material ability to punish.[201] Additionally, as in *Bagilishema*, liability may follow where there is evidence that an "environment of impunity" was created.[202] Therefore, even though the RPF commanders may not have specifically given the orders, the evidence suggests that in most cases they did not halt the kill-

196. MOGHALU, *supra* note 34, at 27.

197. DES FORGES ET AL., *supra* note 9, at 692.

198. *Id.* at 735.

199. WAUGH, *supra* note 7, at 151 stated that Kagame acknowledged his forces committed atrocities though he emphasized that there was a "low number" of victims.

200. *See supra* pp. 701–02.

201. Williamson, *supra* note 80, at 381.

202. *Id.* at 383.

ings or punish those responsible, thus creating a sense that the reprisal killings were acceptable.[203]

The RPF was able to take Kigali and Kagame acquired an official position of power very quickly.[204] As the Vice President and Minister of Defense, Kagame hardly lacked the authority to prosecute, even less so as President of the Republic. Numerous promises to punish have been issued by the Rwandan government, but little if any progress has been made.[205] Despite several arrests and convictions of corporals and soldiers in connection with the RPF crimes,[206] the small number of prosecutions suggests that a culture of impunity for the RPF victors was and has been established. For a time, this was attributable to the "non-existence of a genuine administrative structure" as one UN report stated.[207] Nevertheless, it is now sixteen years later and there is little to show. With that reality at hand, the third and last element of failing to prevent or punish in establishing command responsibility is satisfied.

CONCLUSION

The doctrine of command responsibility is a critical prosecutorial tool in international criminal law. The combination of the doctrine of command responsibility and the evidence of RPF crimes committed under the leadership of Paul Kagame creates an opportunity to establish a clear and comprehensive precedent for this doctrine. Where before evidence was lacking and the doctrine was less cohesive, there is now a chance to pursue justice. There is likewise a sense of urgency as the ICTR nears the end of its mandate and the window of opportunity begins to close. Prosecuting Kagame is important not only as a step to challenging impunity as the ICTR purports to do, but also to show how command responsibility can be an effective tool against future leaders who retain power. The necessary elements of the doctrine provide enough safeguards that those who may lack some elements of power and control will not get caught up in overzealous prosecution. Simultaneously, the doctrine ensures that those in command who commit or oversee the commission of crimes will not gain impunity by maintaining the position that gave them such capabilities in the first place.

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203. DES FORGES ET AL., *supra* note 9, at 714.

204. Reed, *supra* note 8, at 497.

205. Ycaza, *supra* note 9, at 70.

206. DES FORGES ET AL., *supra* note 9, at 732–33.

207. Special Rapporteur of the Comm'n on Human Rights, *Report on the Situation of Human Rights in Rwanda*, ¶ 6, U.N. Econ. & Soc. Council, U.N. Doc. E/CN.4/1995/12 (Aug. 12, 1994) (by R. Degni-Ségui).

Despite enough evidence and a doctrine by which liability can be imposed, there is an unfortunate reality that must be addressed in any attempt to prosecute Kagame. He is, after all, the current President of Rwanda and responsible for having led an army that ended a horrendous genocide.[208] The stability of the African Great Lakes region post-genocide is often attributed to Kagame's quick establishment of a government and order.[209] Prosecuting a head of state poses its own challenges and undeniably bringing a case against Kagame has the additional hurdle of international guilt when it comes to Rwanda.[210] Though the ICTR has prosecutorial discretion, thus far RPF members have not been brought before the Tribunal.[211] Criticism that the ICTR is merely pursuing victor's justice seems warranted when considering that, despite evidence of crimes, members of the RPF are not being held accountable.[212] This would mean prosecuting some of the highest leaders in the current government, a situation clearly unfavorable to the Rwandan government and the international community.[213] Arguments about regional stability, while persuasive, should not allow those who commit crimes to walk free, because "feeding the culture of impunity cannot foster peace and reconciliation."[214] This is especially true when it comes to those in positions of power. Deference to a commander who was able to put an end to an atrocious genocide is commendable but not where it undermines the integrity of the international criminal justice system.

Foregoing justice for those who fell victim to the actions of the RPF under Kagame's command is too high a price and, despite his past commendable acts, Kagame should be tried before the ICTR under command responsibility for crimes against humanity. Only then will justice be served. Likewise, in creating a stronger doctrine, future commanders who maintain positions of power in post-conflict situations will be put on notice. These future leaders will be subject to higher levels of scrutiny and increased likelihood of accountability for crimes committed under

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208. Robinson, *supra* note 35, at 982.

209. Ycaza, *supra* note 9, at 72. *See generally* Drumbl, *supra* note 22, at 564; WAUGH, *supra* note 7, at 85.

210. MOGHALU, *supra* note 182, at 18. The international community was more interested in extracting their own citizens than coming to the rescue of a small country somewhere in Africa. There are numerous books and articles written on the failure of the United Nations to assist despite being warned and having the capabilities. *See, e.g.*, DALLAIRE, *supra* note 38, at 476–79; DES FORGES ET AL., *supra* note 9, at 595; SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 329–89 (2002).

211. *See* Ycaza, *supra* note 9.

212. *Id.* at 80.

213. *Id.* at 71.

214. *Id.* at 81.

their watch. With the perfect storm of evidence and doctrinal analysis, the ICTR has an opportunity to forcefully impact command responsibility in international criminal law that will endure beyond its mandate.

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