

[D]EFFECTIVE CONTROL: PROBLEMS ARISING FROM THE APPLICATION OF NON-MILITARY COMMAND RESPONSIBILITY BY THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

INTRODUCTION

This Comment offers an analysis and critique of the concept of command responsibility as it has been applied to non-military superiors—both government officials and civilians—by the International Criminal Tribunal for Rwanda (ICTR). Historically, command responsibility was used to hold a military commander liable for failing to prevent or punish the illegal acts of a subordinate.¹ Current international law provides that liability generally only attaches when the leader had reason to know that an illegal act would or did occur.² While a potentially useful tool in allocating blame for violence and encouraging military leaders to actively control their subordinates, command responsibility becomes problematic when the de jure—or legal—authority of a superior is tenuous, and the de facto—or actual—control of an authority is not factually established. Such a situation is likely to exist when command responsibility is used to try non-military superiors who either lack military authority or do not generally exercise such authority.³

This Comment does not, however, argue that command responsibility may never be effectively applied to non-military superiors; indeed, the realities of modern warfare necessitate its existence. Command responsibility was originally meant to address the need for superior oversight and responsibility within the context of armed conflict.⁴ In the current context of nationless war, insurgent fighting, and large-scale civil skirmishes, this need is no less great.

¹ Prosecutor v. Bagilishema, Case No. ICTR 95-1A-T, Judgement, ¶¶ 39–40 (June 7, 2001).

² See M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 296–97 (2003) (providing a description of the knowledge requirement used in the Nuremberg Trials); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 86(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I].

³ See, e.g., Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 676 (Sept. 2, 1998); Prosecutor v. Musema, Case No. ICTR 96-13-T, Judgement and Sentence, ¶ 880 (Jan. 27, 2000).

⁴ See Avi Singh, *Criminal Responsibility for Non-State Civilian Superiors Lacking De Jure Authority: A Comparative Review of the Doctrine of Superior Responsibility and Parallel Doctrines in National Criminal Law*, 28 HASTINGS INT'L & COMP. L. REV. 267, 269 (2005).

However, as this Comment will argue, if command responsibility is to be used justly, it requires a more robust and better defined test for determining the de facto control of a non-military superior. Too often, de facto control has been assumed from de jure pre-conflict authority and has resulted in the conviction of civilian leaders who may have lacked the power to intervene during or after a violent conflict.⁵

Part I of this Comment provides a brief background of the atrocities committed in Rwanda during the 1994 genocide and reviews the creation and function of the ICTR in its prosecution of the genocide. Part II outlines the historical evolution of command responsibility, starting with the Hague Convention of 1907, moving through the tribunals formed after World War II, and ending with the International Criminal Tribunal for the Former Yugoslavia. Part III analyzes command responsibility's application in recent ICTR cases. In Part IV, this Comment critiques the method by which command responsibility is determined—both by the ICTR and the International Criminal Court (ICC). Finally, the Conclusion suggests revisions to the current application of command responsibility and contemplates the implications of such changes.

I. BACKGROUND ON RWANDA

During the summer of 1994, over 937,000 Rwandans—mostly Tutsi and moderate, Tutsi-friendly Hutu—were killed by the nationalist Hutu majority.⁶ Most of the killing was committed by roving militias and government forces—called the Interahamwe and *gendarmarie* respectively—as well as ordinary Rwandan citizens.⁷ Indeed, it has been noted that the “main agents of the genocide were the ordinary [Hutu] peasants themselves.”⁸ The instruments of death were the tools of rural life—“machetes, spears, swords, bows and arrows.”⁹ Men, women, and children were killed indiscriminately, some pulled from churches and other refuges by their killers.¹⁰ When some

⁵ See, e.g., *Akayesu*, ICTR 96-4-T, Judgement, ¶ 676.

⁶ L.J. VAN DEN HERIK, THE CONTRIBUTIONS OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW 26 (2005).

⁷ HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 156 (1999).

⁸ *Id.* at 165.

⁹ Phillip Verwimp, *Machetes and Firearms: The Organization of Massacres in Rwanda*, 43 J. PEACE RES. 5, 7 (2006).

¹⁰ BALL, *supra* note 7, at 165.

semblance of order was restored late in 1994, nearly half of Rwanda's Tutsi population was dead or in exile.¹¹

Despite the strong peasant involvement in the killings, many political leaders were implicated in the deaths. These political leaders' culpability was generally thought to stem from: (1) their connection to the Interahamwe;¹² (2) their part in inciting violence locally; (3) their direct involvement in the killings; or (4) some combination thereof.¹³ Because of the country's distribution of executive power, Rwandan mayors (bourgmestres) exercised a great deal of power within their territory and were well-situated to aid in the rapid escalation of the killings.¹⁴ The prosecutor in the *Akayesu* trial provided a succinct description of the political makeup of modern Rwanda:

Rwanda is divided into 11 prefectures, each of which is governed by a prefect. The prefectures are further subdivided into communes which are placed under the authority of bourgmestres. The bourgmestre of each commune is appointed by the President of the Republic, upon the recommendation of the Minister of the Interior. In Rwanda, the bourgmestre is the most powerful figure in the commune. His *de facto* authority in the area is significantly greater than that which is conferred upon him *de jure*.¹⁵

The *de jure* powers of the mayor included "sole responsibility and authority over the communal police," the ability to call the "national gendarmerie to restore order," and the powers of a "judicial officer."¹⁶ As representatives of the president away from the capital, mayors were often entrusted with "unofficial powers and duties" and seen as the "central person in the daily life of the ordinary people."¹⁷ Significantly, despite having *de jure* authority over

¹¹ *Id.* at 156.

¹² Though the Interahamwe began as a youth political movement, the group was soon armed and transformed into a roving militia. Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Judgement and Sentence, ¶ 400 (Dec. 1, 2003).

¹³ See, e.g., Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgement, ¶ 490 (May 21, 1999); Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64-T, Judgement, ¶¶ 271–84, 307–33 (June 17, 2004) (holding a mayor personally liable for genocide and crimes against humanity for leading attacks by civilians, police, and militiamen against Tutsi civilians).

¹⁴ See Prosecutor v. Akayesu, Case No. ICTR 96-4-I, Indictment (Feb. 12, 1996) (describing the division of executive power in Rwanda and the manner in which one mayor, Jean-Paul Akayesu, contributed to the killings).

¹⁵ *Id.* ¶ 2. *Akayesu* was the first case tried by the ICTR. In presenting the case against Akayesu, the prosecutor provided the tribunal with information on the historical *de jure* powers associated with various political positions. *Id.* ¶ 2.

¹⁶ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 59 (Sept. 2, 1998).

¹⁷ *Id.*

the police force, mayors were “not its commander[s].”¹⁸ Instead, an internal police commander controlled the police.¹⁹ A mayor’s control might then be likened to the “relationship between a Minister of Defence and the High Command of the armed forces.”²⁰ The prefect ordered the intervention of the *gendarmerie*, and only then could the mayor exercise some level of control over them.²¹

In the aftermath of the 1994 killings, the Rwandan government faced the daunting task of bringing those responsible to justice—ordinary citizens, militiamen, and political leaders alike—and trying to reunite a badly divided country.²² Based on a request by the Rwandan government and the findings of an independent investigatory body, the U.N. Security Council voted to create an ad hoc criminal court.²³ Resolution 955 created the ICTR to prosecute “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.”²⁴ The Resolution gave the ICTR the power to try defendants for three substantive crimes: genocide, crimes against humanity, and war crimes.²⁵

Despite its early support for an international tribunal, the Rwandan government quickly came to oppose the ICTR, going so far as to vote against Resolution 955.²⁶ The Rwandan government cited a lack of staffing and funding, along with issues of timeframe and group liability, as reasons for its opposition.²⁷

By the end of 2008, the ICTR had only sentenced 30 defendants,²⁸ despite the thousands of individuals implicated in the genocide.²⁹ Indeed, it is unlikely

¹⁸ *Id.* ¶ 65.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* ¶ 69.

²² BALL, *supra* note 7, at 156.

²³ See VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 99–107 (1998).

²⁴ S.C. Res. 955, art. 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

²⁵ *Id.*

²⁶ BALL, *supra* note 7, at 171–72.

²⁷ *Id.*

²⁸ Int’l Criminal Tribunal for Rwanda, Status of Cases, <http://69.94.11.53/ENGLISH/cases/status.htm> (last visited June 18, 2009).

²⁹ See BALL, *supra* note 7, at 183–84.

that at its current pace the ICTR will be able to handle the vast number of cases submitted to it for consideration.³⁰ As of 2005, approximately 80,000 people were being held as suspects in the 1994 killings.³¹ Mismanagement and unnecessary bureaucracy have slowed the progress of litigation significantly.³²

Without command responsibility as a means of holding government officials who instigated the violence liable, the ICTR would not have accomplished as much as it has. The logistical quagmire created by attempting to prosecute a genocide with more than 80,000 suspected participants serves as a powerful argument for the use of command responsibility. Nevertheless, without a fair and standardized means of applying command responsibility, its use will be far more of a detriment than an aid to the cause of justice.

II. COMMAND RESPONSIBILITY

Though the term “command responsibility” is absent from Resolution 955, Article 6(3) provides its substantive definition.³³ That provision provides that a superior is liable for any act committed by a subordinate in violation of Articles 2 through 4 of Resolution 955 if the superior “knew or had reason to know” that the subordinate would commit the crime and if the superior “failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”³⁴ If a superior is found liable under the doctrine, it is for the substantive crime committed by the subordinate rather than for some lesser offense; in this way, command responsibility creates individual responsibility in the superior for the crime committed.³⁵ Accordingly, a superior may be liable for a subordinate’s acts when the superior is directly

³⁰ Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT’L L. REV. 301, 398 (2003).

³¹ Mark A. Drubl, Lecture, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV. 41, 44 (2005).

³² Int’l Crisis Group, *The International Criminal Tribunal for Rwanda: Justice Delayed* (June 7, 2001), <http://www.crisisgroup.org/home/index.cfm?id=1878&l=1>.

³³ Article 6(3) states:

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

S.C. Res. 955, *supra* note 24, art. 6(3).

³⁴ *Id.*

³⁵ *Id.* art 6(1).

responsible for giving unlawful orders or indirectly responsible for the unlawful acts of the subordinate.³⁶

In defining command responsibility, Resolution 955 makes no distinction between military and non-military superiors. Either may be convicted under a theory of command responsibility³⁷ if three distinct elements are proven: (1) “the existence of a superior-subordinate relationship with the perpetrator of the substantive crime”; (2) “a *mens rea* element that requires knowledge, often constructive . . . of the subordinate’s *jus cogens* violations”; and (3) “an *actus reus* element that requires that the superior either failed to prevent the abuses, or *post-hoc*, failed to punish the subordinate.”³⁸ Further complicating the matter, Resolution 955’s definition of command responsibility includes a reasonableness standard for determining the appropriateness of a commander’s actions.³⁹ Generally, reasonableness is determined “in light of the existing circumstances, *i.e.*, reasonableness in terms of actual knowledge or knowledge that should have been known.”⁴⁰

While Article 6(3) provides the basic framework for assessing responsibility, Resolution 955 is far from the final arbiter of the doctrine. Through its cases, the ICTR has refined the “concurrent conditions” necessary to hold a superior criminally liable for the acts of a subordinate:

- (i) There existed a superior-subordinate relationship between the person against whom the charge is directed and the perpetrators of the offence;
- (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 exercise effective control to prevent the criminal act or to punish the perpetrators thereof.⁴¹

The relationship condition is met if the accused has *de jure* or *de facto* authority over subordinates or “exercised effective control” at the time the crime was committed.⁴² The ICTR noted that this standard applies to both

³⁶ BASSIOUNI, *supra* note 2, at 290–91. This Comment is exclusively concerned with the latter formulation of liability—indirect responsibility for subordinate acts.

³⁷ Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Judgment and Sentence, ¶ 773 (Dec. 1, 2003).

³⁸ Singh, *supra* note 4, at 269.

³⁹ S.C. Res. 955, *supra* note 24, art. 6(3).

⁴⁰ BASSIOUNI, *supra* note 2, at 294.

⁴¹ Kajelijeli, ICTR 98-44A-T, ¶ 772.

⁴² *Id.* ¶ 773.

military and civilian authorities.⁴³ Limiting the failure to act condition, the ICTR stated that a superior is not strictly liable for acts committed within the superior's geographical sphere of control.⁴⁴ The knowledge condition is met if a superior encouraged or supported the crime; additionally, the superior's position may be a "significant *indicium* that he or she knew or had reason to know" of the acts committed.⁴⁵ The effect of mere presence—as opposed to active encouragement and support—is particularly problematic in light of certain ICTR judgments.⁴⁶

If the ICTR can establish that a superior had the prerequisite knowledge—a relatively easy question given the objective quality of the test—the tougher question is: did the superior have effective control at the time of the criminal act? The ICTR has defined effective control as “the material ability, either *de jure* or *de facto*, to prevent or to punish offences committed by subordinates.”⁴⁷ While this standard may be useful in a military context where a superior's authority is clearly defined, it proves particularly problematic when applied to non-military superiors, whose authority may not be clear in times of peace, much less in the context of a genocide.

Command responsibility's modern development can be traced from the Treaty of Versailles⁴⁸ to the Nuremberg and Tokyo trials to the ICTR's closest progeny, the International Criminal Tribunal for the Former Yugoslavia.⁴⁹ The rest of this section will detail the three historical stages of the development of command responsibility.

A. *Early Military Command Responsibility Jurisprudence*

The definition of command responsibility used in Resolution 955 reflects the concept's long international gestation. In its earliest form, command responsibility was a strictly military affair. The 1907 Hague Convention established a basic rule of war that every army must be “commanded by a

⁴³ *Id.*

⁴⁴ *Id.* ¶ 776.

⁴⁵ *Id.*

⁴⁶ For example, Akayesu was held responsible and convicted of genocidal crimes based on his presence at the time of the crimes. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 193 (Sept. 2, 1998).

⁴⁷ *Kajelijeli*, ICTR 98-44A-T, ¶ 774.

⁴⁸ BASSIOUNI, *supra* note 2, at 296–97.

⁴⁹ *See* Jennifer Lane, Comment, *The Mass Graves at Dasht-e Leili: Assessing U.S. Liability for Human Rights Violations During the War in Afghanistan*, 34 CAL. W. INT'L L.J. 145, 155–57 (2003).

person responsible for his subordinates.”⁵⁰ Later international documents gave further meaning to this responsibility. For instance, Article 26 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 1929—dealing with the treatment of wounded and sick enemy soldiers—made commanders responsible for carrying out the Convention’s articles.⁵¹ Far from the modern conception of command responsibility, this early version of the concept merely created an affirmative duty to control subordinates, but did not create liability for the substantive crime if the commander failed in this duty.⁵²

Following World War I, the Allies formed a commission to assess blame for atrocities committed during the war.⁵³ The commission found that Kaiser Wilhelm and other top German military officials violated international law because they were “cognizant of and could at least have mitigated the barbarities committed during the course of the war.”⁵⁴ However, the commission was ultimately unable to convince the international community to try the German officials for their crimes.⁵⁵ Nevertheless, the theory of liability on which the commission based its findings did not include claims of direct, individual responsibility for the atrocities, but rather a failure to prevent said acts.⁵⁶ As such, the ruling reflects an early, military-focused form of command responsibility.

B. Military Command Responsibility After World War II

The concept of command responsibility gained momentum during the period immediately following World War II, producing somewhat discordant results. In what has become the exemplar of command responsibility, the U.S. Military Commission at Manila (Manila Commission) held General Tomoyuki Yamashita criminally liable for the acts of his subordinates, notwithstanding a

⁵⁰ Convention Respecting the Laws and Customs of War on Land, Annex to the Convention art. 1, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

⁵¹ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field art. 26, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303; *see also* 4 U.N. WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 43 (1948).

⁵² 4 U.N. WAR CRIMES COMM’N, *supra* note 51, at 43.

⁵³ BASSIOUNI, *supra* note 2, at 296–97.

⁵⁴ *Id.* at 297 (quoting Div. of Int’l Law, Carnegie Endowment for Int’l Peace, *Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference* (Pamphlet No. 32, 1919), as reprinted in 14 AM. J. INT’L L. 95, 117 (1920)).

⁵⁵ Singh, *supra* note 4, at 270.

⁵⁶ 4 U.N. WAR CRIMES COMM’N, *supra* note 51, at 108.

lack of evidence linking him to the substantive crime.⁵⁷ The Manila Commission found Yamashita guilty of mistreating prisoners in violation of the laws of war, based solely on the actions of his subordinates.⁵⁸ The Commission held that Yamashita must have either “willfully permitted” his subordinates to rape and murder civilians and soldiers or “secretly ordered” said acts because of the “extensive and widespread” nature of the prisoners’ treatment.⁵⁹ Using an objective analysis, the Commission determined that Yamashita should have known of such widespread abuses and thus held him liable.⁶⁰ The Manila Commission created an affirmative duty for commanders to control their subordinates.⁶¹ Throughout the trial, Yamashita maintained that he had no knowledge of the conditions of civilians and prisoners—he left such procedural issues up to the judgment of his subordinates.⁶² The Commission rejected this defense, stating that if a commander makes “no effective attempt” to “discover and control the criminal acts” of his subordinates, the commander “may be held responsible, even criminally liable.”⁶³

The U.S. Supreme Court also rejected this defense. In *In re Yamashita*, the Court affirmed the Manila Commission’s judgment despite Yamashita’s claim that he lacked the effective ability to control the actions of his subordinates.⁶⁴ The Court looked to the Hague Convention to determine Yamashita’s responsibilities, noting specifically that under the Convention he had “an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.”⁶⁵ However, the Court deliberately did not examine whether Yamashita had actual control over his subordinates or actual knowledge of their actions.⁶⁶ The Court upheld a conviction without a showing of de facto control. Instead, it found Yamashita liable with a showing of mere de jure authority—a move that was and remains quite controversial.⁶⁷

⁵⁷ Arthur Thomas O’Reilly, *Command Responsibility: A Call to Realign Doctrine with Principles*, 20 AM. U. INT’L L. REV. 71, 76–77 (2004).

⁵⁸ 4 U.N. WAR CRIMES COMM’N, *supra* note 51, at 35.

⁵⁹ *Id.* at 34.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *In re Yamashita*, 327 U.S. 1, 25 (1946).

⁶⁵ *Id.* at 16.

⁶⁶ *Id.* at 16–17.

⁶⁷ Singh, *supra* note 4, at 270–71.

Justice Murphy was the first critic of the *Yamashita* decision as a dissenting justice on the case.⁶⁸ While his dissent dealt largely with the particular difficulties of controlling an army under “destructive attack,” he poignantly noted that the Bill of Particulars completely failed to allege that Yamashita “personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of” their commission.⁶⁹ Because of this lack of actual knowledge and direct responsibility for the substantive crimes, along with the complexities of maintaining control of subordinates during a time of intense fighting, Justice Murphy felt compelled to dissent from the majority.⁷⁰

The U.S. Military Tribunal at Nuremberg (Nuremberg Tribunal) applied command responsibility in the trial of Wilhelm von Leeb and 13 other German officers.⁷¹ The Nuremberg Tribunal held that a superior is liable for the acts of a subordinate if the superior failed to “properly supervise” the subordinates.⁷² However, this failure to supervise must rise to the level of “criminal negligence” amounting to “wanton, immoral disregard of the action[s] of” subordinates.⁷³ In contrast to the *Yamashita* Court, the Nuremberg Tribunal refused to assume that the commanders had knowledge of the crimes committed on the basis of their widespread nature alone.⁷⁴ Instead, the Tribunal decided that it must look “to the evidence pertaining to the various defendants to make a determination” as to their individual knowledge.⁷⁵ The Tribunal proved unwilling to apply an objective test to determine the superior’s knowledge, instead requiring proof of actual knowledge.⁷⁶

The Nuremberg Tribunal’s *mens rea* requirement also proved to be more rigorous than that of the *Yamashita* Court. While the *Yamashita* Court did not explicitly state the level of negligence necessary for conviction, it applied something less than the wanton, immoral disregard standard required by the Nuremberg Tribunal. Indeed, the Court found Yamashita responsible for all of

⁶⁸ Justice Murphy was not the only dissenting justice; Justice Rutledge filed a separate dissent. *Yamashita*, 327 U.S. at 41–81 (Rutledge, J., dissenting).

⁶⁹ *Yamashita*, 327 U.S. at 27, 34 (Murphy, J., dissenting).

⁷⁰ *Id.* at 41.

⁷¹ Lane, *supra* note 49, at 154.

⁷² 12 U.N. WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 76 (1949).

⁷³ *Id.* at 76.

⁷⁴ *Id.* at 79.

⁷⁵ *Id.*

⁷⁶ *Id.*

his subordinates' criminal actions without a showing of actual knowledge or acquiescence in the criminal actions.⁷⁷

Geneva Protocol 1 codified command responsibility after much international disagreement.⁷⁸ Article 86(2) lays out this newly-created version of command responsibility:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility . . . if they knew, or had information which should have enabled them to conclude in the circumstances . . . that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.⁷⁹

While this wording is closer to that found in Resolution 955, there are some notable differences. In contrast to the ICTR's *mens rea* requirement allowing for constructive knowledge, the Additional Protocol requires actual knowledge.⁸⁰ According to Article 86(2), a superior must have information that would allow the superior to conclude that a subordinate acted or was going to act.⁸¹ Further, the Additional Protocol clearly states that this standard should be applied in the context in which the superior was operating—again making the analysis subjective rather than objective. As a result of this distinction, the Additional Protocol creates a command responsibility standard that is much harder to prove than its predecessors.

C. *Non-Military Command Responsibility*

Though not clearly differentiated from its military counterpart, non-military command responsibility was applied in a few specific instances in the aftermath of World War II. In the *Roehling* case, a French military tribunal in the French Zone of Occupation in Germany considered the acts of a civilian prison camp leader.⁸² In *Roehling*, a non-military superior factory owner, who utilized and oversaw prison labor in his factory, was charged and convicted with “having tolerated or encouraged punishments meted out in

⁷⁷ 4 U.N. WAR CRIMES COMM'N, *supra* note 51, at 34–35.

⁷⁸ Singh, *supra* note 4, at 272.

⁷⁹ Geneva Protocol 1, *supra* note 2, art. 86(2).

⁸⁰ BASSIOUNI, *supra* note 2, at 294.

⁸¹ Geneva Protocol 1, *supra* note 2, art. 86(2).

⁸² [14 “THE MINISTERIES CASE”] NUERNBERG MILITARY TRIBUNALS, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 1061 (1949).

inhuman fashion”⁸³ against his workers even though the actual crimes were committed by the Gestapo.⁸⁴ Indeed, “on the basis of *de facto* powers of control” the factory owner was convicted for “failing to take action against the abuse of forced labourers committed by the members of the Gestapo.”⁸⁵ Perhaps most shocking, “it [was] nowhere suggested that the accused had any formal authority to issue orders to personnel under Gestapo command.”⁸⁶

The International Military Tribunal for the Far East (Far East Tribunal) heard a similar case. The Far East Tribunal held Koki Hirota, a Japanese diplomat and civilian, guilty of war crimes under a command-responsibility-like theory as a result of the atrocities committed in Nanking, China, during World War II.⁸⁷ This outcome is particularly surprising given that Hirota actually took affirmative steps to stop the atrocities.⁸⁸ In his post as foreign minister, Hirota was in contact with diplomatic officials in the area of Nanking.⁸⁹ Upon request to the Japanese War Ministry, Hirota received false assurances that the atrocities would be curtailed.⁹⁰ The Tribunal used Hirota’s failure to prevent the rapes and killings in Nanking to hold him liable for the crimes.⁹¹ While a clearly defined concept of non-military command responsibility would not be formulated until the creation of the Rome Statute of the International Criminal Court, the *Roehling* and *Hirota* cases show the early application of this principle and highlight the problematic nature of its application.

D. Command Responsibility in the International Criminal Tribunal for the Former Yugoslavia

The U.N. Security Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY) only a year prior to the ICTR.⁹² The ICTY is

⁸³ *Id.* at 1096.

⁸⁴ *Id.* at 1086–87.

⁸⁵ Prosecutor v. Mucić, Case No. IT-96-21-T, Judgement, ¶ 376 (Nov. 16, 1998) (discussing the imposition of command responsibility on non-military individuals in “positions of authority”).

⁸⁶ *Id.*

⁸⁷ 103 THE TOKYO MAJOR WAR CRIMES TRIAL 49788–92 (R. John Pritchard ed., 1998); Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT’L L. 89, 125 (2000).

⁸⁸ See Vetter, *supra* note 87, at 126.

⁸⁹ *Id.* at 125.

⁹⁰ *Id.* at 126.

⁹¹ 103 THE TOKYO MAJOR WAR CRIMES TRIAL, *supra* note 87, at 49791.

⁹² BALL, *supra* note 7, at 171.

the ICTR's closest counterpart and indeed served as its model.⁹³ Like the ICTR, the ICTY's statute holds a superior liable for the acts of a subordinate if the superior "knew or had reason to know" that a subordinate was going to commit a crime and the superior failed to take the "necessary and reasonable measures to prevent such acts";⁹⁴ again, a noticeably different standard than that proclaimed in the Additional Protocol. The ICTY has attempted to reconcile the two standards throughout its history. In *Prosecutor v. Mucić*, the court stated that the "had reason to know" standard is met if the commander had "information" that "would put him on notice of the risk" that a subordinate was going to commit a crime.⁹⁵ The inclusion of the term "information" is clearly a reference to the standard in Geneva Protocol 1. However, the ICTY created a standard that was much easier to prove by allowing for knowledge to be inferred based upon a number of factors:

- (a) The number of illegal acts;
- (b) The type of illegal acts;
- (c) The scope of illegal acts;
- (d) The time during which the illegal acts occurred;
- (e) The number and type of troops involved;
- (f) The logistics involved, if any;
- (g) The geographical location of the acts;
- (h) The widespread occurrence of the acts;
- (i) The tactical tempo of operations;
- (j) The *modus operandi* of similar illegal acts;
- (k) The officers and staff involved;
- (l) The location of the commander at the time.⁹⁶

If the court finds that an accused has such knowledge, it would then need to determine whether a crime was committed.⁹⁷ While closer to the language in the Additional Protocol, the ICTY standard does not require that a superior

⁹³ *Id.*

⁹⁴ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7(3), May 25, 1993, 32 I.L.M. 1159 [hereinafter ICTY Statute].

⁹⁵ *Prosecutor v. Mucić*, Case No. IT-96-21-T, Judgement, ¶ 383 (Nov. 16, 1998). Various courts and sources refer to this case by several different names. For purposes of consistency, this Comment will follow the above format, inserting clarifications where necessary.

⁹⁶ *Id.* ¶ 386 (quoting *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, in Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council, Annex, ¶ 58, U.N. Doc. S/1994/674 (May 27, 1994)).

⁹⁷ *Id.* ¶ 383.

actually have information indicating that a crime is likely to be committed or has been committed.⁹⁸ Instead, the information need only be such that further investigation is necessary.⁹⁹ Because a superior need only know of a risk of a criminal act to be liable for command responsibility, superiors have a much greater affirmative duty to investigate subordinates. A violation of this duty seems less like the “wanton, immoral disregard” required by the Nuremberg Tribunal or the “actual information” requirement of the Additional Protocol, and more like the objective “should have known” test in *Yamashita*.¹⁰⁰

In *Mucić*, the ICTY extended command responsibility’s application to non-military superiors.¹⁰¹ While this standard only applied to superiors with de facto control over a group, the move still marked a major break with earlier command responsibility law.¹⁰² Under this new theory, non-military superiors could be held liable for the crimes of subordinates only “to the extent that they exercise[d] a degree of control over their subordinates which [was] similar to that of military commanders.”¹⁰³ Like military commanders, non-military superiors would still need effective control to be liable under a theory of command responsibility.¹⁰⁴ The ICTY defined effective control as “the material ability to prevent and punish” the crimes of subordinates.¹⁰⁵

In dicta in *Mucić*, the court seemingly broke with the standard created in the *Yamashita* case by explicitly stating that actual knowledge of a crime cannot be proven by simply showing that a subordinate’s crimes were “a matter of public notoriety, [were] numerous, occur[ed] over a prolonged period, or over a wide geographical area.”¹⁰⁶ Instead, such a determination must be decided based on the “evidence pertaining to each individual defendant.”¹⁰⁷ This new formulation of actual knowledge is nothing short of perplexing given that the court’s standard for assessing a commander’s knowledge includes a consideration of the “scope of illegal acts” and the “widespread occurrence of the acts.”¹⁰⁸

⁹⁸ *Id.* ¶ 386.

⁹⁹ *Id.* ¶ 383.

¹⁰⁰ See *supra* notes 58–63 and accompanying text.

¹⁰¹ Singh, *supra* note 4, at 278.

¹⁰² See *supra* Part II.B.

¹⁰³ *Mucić*, IT-96-21-T, ¶ 378.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* ¶ 384.

¹⁰⁷ *Id.* ¶ 385.

¹⁰⁸ *Id.* ¶ 386.

The ICTY's multiple changes to the Additional Protocol's standard effectively set the stage for the ICTR. Like the ICTY, the ICTR broke with the Additional Protocol's command responsibility standard and held military and civilian leaders equally liable. But where the ICTY demanded that civilian superiors exercise control analogous to that of a military leader, the ICTR seems satisfied to apply command responsibility to any person in a position of power who failed to stop the genocide.

III. COMMAND RESPONSIBILITY IN THE ICTR

From the first case, ICTR prosecutors have used command responsibility to hold military officers and government officials responsible for the killings in Rwanda.¹⁰⁹ The ICTR has affirmed that command responsibility can extend to non-military leaders but noted that such decisions should be made on a "case by case basis."¹¹⁰ Even more so than the ICTY, the ICTR has used command responsibility as the driving force of its litigation. The vast majority of the accused are political rather than military officials, many of the latter group having fled the country. Those low-level military officials who were indicted fell under the purview of Rwandan national courts.¹¹¹ As a result of this unusual jurisdictional situation, the ICTR provides a unique opportunity to see command responsibility applied specifically to government officials and civilian leaders. In the following section, this Comment will compare command responsibility's application in several ICTR cases—both convictions and acquittals. In so doing, it will expose some of the problems and inconsistencies engendered by the ICTR's unclear *de facto* control definition and inconsistent application of the "similar to that of military commanders" standard established in *Mucić*.¹¹²

A. *The Jean-Paul Akayesu Trial*

In the first full decision of the ICTR, the tribunal applied command responsibility to find Jean-Paul Akayesu guilty of genocide and crimes against humanity.¹¹³ In reaching its decision, the tribunal reviewed the legal requirements for conviction. By affirming a *mens rea* requirement that

¹⁰⁹ See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 676 (Sept. 2, 1998).

¹¹⁰ *Id.* ¶ 491.

¹¹¹ MORRIS & SCHARF, *supra* note 23, at 50–55.

¹¹² *Mucić*, IT-96-21-T, ¶ 378.

¹¹³ *Akayesu*, ICTR 96-4-T, Judgement, ¶ 676.

seemingly rules out command responsibility, the ICTR made command responsibility the exception to the rule.¹¹⁴ To apply the doctrine, according to *Akayesu*, a superior's negligence must be "tantamount to acquiescence or even malicious intent,"¹¹⁵ which is reminiscent of the Nuremberg Tribunal's standard of "wanton, immoral disregard."¹¹⁶ On its face, this malicious intent standard appears higher than the *Mucić* standard of failing to investigate when given notice of a risk of a crime.¹¹⁷

While expressly articulating a malicious intent standard for command responsibility, in practice, the ICTR appears to apply a lower standard. *Akayesu* was bourgmestre of the Taba commune prior to and during the 1994 killings.¹¹⁸ The actual knowledge element of command responsibility was not at issue as *Akayesu* conceded that he "was told that there were killings everywhere in Taba, and that it was the Tutsi who were being killed."¹¹⁹ Nevertheless, the prosecution saw fit to adopt the problematic reasoning from *Yamashita*, asserting that *Akayesu* "must have known" of the killings because they were "openly committed and so widespread."¹²⁰

According to the actus reus requirement of command responsibility formulated by the ICTR, for *Akayesu* to be guilty of genocide under a theory of command responsibility, he must have failed to take the "necessary and reasonable" steps to prevent the killings.¹²¹ *Akayesu* maintained throughout his trial that he was not in control of his commune at the time of the genocide.¹²² He claimed that he "was denuded of all authority and lacked the means to stop the killings."¹²³ A witness testified that in early April 1994, *Akayesu* took steps to stop the Interahamwe from entering his commune: "Witness W testified that on the order of [*Akayesu*] to the population that they must resist these incursions, members of the Interahamwe were killed."¹²⁴

¹¹⁴ *Id.* ¶ 692 (quoting Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 692 (May 7, 1997)). A defendant must have "knowingly participated in the commission of an offence," and "his participation [must have] directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident." *Id.*

¹¹⁵ *Akayesu*, ICTR 96-4-T, Judgement, ¶ 489.

¹¹⁶ *Supra* note 73 and accompanying text.

¹¹⁷ *Mucić*, IT-96-21-T, ¶ 384-87 (discussing the standard of duty required by command responsibility).

¹¹⁸ *Akayesu*, ICTR 96-4-T, Judgement, ¶ 3.

¹¹⁹ *Id.* ¶ 182.

¹²⁰ *Id.* ¶ 179.

¹²¹ *Id.* ¶ 691 (quoting ICTY Statute, *supra* note 94, art. 6(3)).

¹²² *Id.* ¶ 30.

¹²³ *Id.*

¹²⁴ *Id.* ¶ 184.

The real question, then, is whether Akayesu had effective de facto control over his commune at the time of the killings. The ICTR failed to address fully whether Akayesu was in control of the commune, and if he was not, whether his fleeing was evidence of a failure to take necessary and reasonable steps to prevent the killings. More troubling still, the ICTR accepted as fact that Akayesu made a request to the prime minister to send the *gendarmérie* to maintain order.¹²⁵ The prime minister never provided the requested troops and, in fact, killed one mayor for his complaints.¹²⁶ Witnesses testified that the Interahamwe “threatened to kill the Accused if he did not cooperate with them.”¹²⁷ Akayesu also testified that he was coerced by the Interahamwe.¹²⁸ Another mayor testified that Akayesu would have been killed if he attempted to stop the killings.¹²⁹ After these alleged threats, Akayesu’s actions changed markedly. He was present at killings, and some witnesses testified that he ordered the Interahamwe to kill Tutsis.¹³⁰

While these actions are reprehensible, if true, the ICTR failed to address fully what part, if any, coercion might play in negating command responsibility. Likewise, the ICTR neglected to explain how, and to what extent, Akayesu’s unsuccessful attempts to stop the killings fell short of the “all necessary and reasonable” steps requirement. According to the ICTR, a mayor has the authority to ask for the deployment of the *gendarmérie* from the prefect—which Akayesu did—but not the power to unilaterally deploy them.¹³¹ Nevertheless, the ICTR did not consider whether this negated the actus reus requirement of a failure to take all reasonable steps. Indeed, this omission on the part of the tribunal is indicative of its continual failure to address what constitutes effective control and at what point a loss of control absolves a non-military superior from command responsibility. The ICTR even conceded that “the application of the principle of individual criminal responsibility, enshrined in Article 6(3) [defining command responsibility], to civilians remains contentious.”¹³²

Because the prosecutor failed to assert that Akayesu was a superior of the Interahamwe, the tribunal did not consider Akayesu’s liability for the actions

¹²⁵ *Id.* ¶ 186.

¹²⁶ *Id.*

¹²⁷ *Id.* ¶ 187.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* ¶ 193.

¹³¹ *Id.* ¶ 69–70.

¹³² *Id.* ¶ 491.

of the Interahamwe that amounted to crimes of sexual violence.¹³³ Nevertheless, the ICTR did consider Akayesu's liability for aiding and abetting acts of sexual violence committed in the commune.¹³⁴ The ICTR found

under Article 6(1) of its Statute, that the Accused aided and abetted . . . acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal, while he was present on the premises . . . [and] facilitating the commission of these acts through his words of encouragement in other acts of sexual violence, which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place.¹³⁵

Again, if true, Akayesu's acts are reprehensible, but the ICTR seemed to leap far beyond the facts in assessing Akayesu's power and culpability. One might reasonably argue that Akayesu's presence at the scene of acts of sexual violence, without any clear signs of disapproval, served as an implicit acceptance of the acts. What is far from clear, however, is the ICTR's conclusion that without this acceptance "these acts would not have taken place."¹³⁶ As alleged by both Akayesu and defense witnesses, Akayesu was threatened and coerced by the Interahamwe.¹³⁷ In such a state, Akayesu's tacit approval of the Interahamwe's acts may well have been meaningless. In deciding that Akayesu aided and abetted the acts, the ICTR evinced the same cavalier assessment used in determining effective control under a theory of command responsibility.

B. The Clément Kayishema Trial

In the trial of Clément Kayishema, the ICTR again used command responsibility to convict on a charge of genocide.¹³⁸ Kayishema served as prefect of Kibuye Prefecture before and during the time of the killings.¹³⁹ Though the ICTR conceded that Kayishema's de facto power at the time of the genocide may have been less than his de jure power under Rwandan law, the

¹³³ *Id.* ¶ 691.

¹³⁴ *Id.* ¶ 692.

¹³⁵ *Id.* ¶ 693.

¹³⁶ *Id.*

¹³⁷ *Id.* ¶ 187.

¹³⁸ *See* Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgement (May 21, 1999).

¹³⁹ *Id.* ¶ 20.

tribunal said “his actions point to a man who still held considerable control over his subordinates.”¹⁴⁰ The ICTR based its decision on Kayishema’s failure to “take measures to prevent the attack,” and to “punish the perpetrators.”¹⁴¹

The defense argued that the killings took place in the context of a “society that no longer recognised the rule of law.”¹⁴² An expert witness also described the situation as chaotic: “after the crash of the President’s plane, the situation that occurred was such that a government had to be invented.”¹⁴³ The ICTR found that “*Bourgmeister* Sikubwabo, a number of communal police, and members of the *gendarmierie nationale* were responsible for numerous deaths and injuries inflicted upon innocent Tutsis” in Kayishema’s prefecture.¹⁴⁴ Under Rwandan law, all of these soldiers and officials would have been under Kayishema’s de jure authority as prefect; however, as conceded by the ICTR, this authority “[was] emptied of any real meaning” during the chaos of the genocide.¹⁴⁵

In considering Kayishema’s de facto authority, the ICTR relied upon *Mucić*’s formulation of de facto control.¹⁴⁶ The ICTR held that a de facto civilian authority lacking any de jure authority may be liable “if it can be shown that such influence was used to order the commission of the crime.”¹⁴⁷ Perhaps more problematically, liability may also accrue where a de facto civilian authority “failed to prevent the crime.”¹⁴⁸

The evidence to support a finding of either a direct order by Kayishema or a failure to prevent the attacks is less than definitive. The defense argued that Kayishema “had insufficient means to prevent those assailants, including a few defecting members of the army and *gendarmierie nationale*, from committing the massacres.”¹⁴⁹ Kayishema claimed that he had attempted to prevent the killings by sending “what gendarmes he had at his disposal to the area of Biseseo, but that there was little that could be done.”¹⁵⁰ To rebut the defense’s allegations, the prosecution offered evidence that Kayishema

¹⁴⁰ *Id.* ¶¶ 480–90.

¹⁴¹ *Id.* ¶ 474.

¹⁴² *Id.* ¶ 477.

¹⁴³ *Id.*

¹⁴⁴ *Id.* ¶ 479.

¹⁴⁵ *Id.* ¶ 486.

¹⁴⁶ *Id.* ¶ 490. The *Kayishema* court refers to *Mucić* as *Celebici*. See *supra* note 95.

¹⁴⁷ *Id.* ¶ 492.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* ¶ 495.

¹⁵⁰ *Id.*

exercised great power within his commune in 1992—two years before the genocide.¹⁵¹ From the evidence offered to prove Kayishema's control in a different factual situation, the ICTR made the following inferences:

Firstly, it is indicative of the effect that Kayishema's presence at a scene could have, thus is appurtenant to the responsibility he must bear in aiding and abetting the crimes pursuant to Article 6(1). Secondly, in times of crisis it was ultimately the *Prefect* that was called upon, with all the powers of influence that such a bearer of that title wielded. Finally, it also reflects the *de facto* influence he had and the commensurate *de facto* authority he exercised as *Prefect* in such times. A clear parallel can be drawn with the climate that prevailed in Rwanda in 1994.¹⁵²

Using this as proof of his authority, the prosecution linked Kayishema to the killers by offering eye-witness testimony placing Kayishema at the scenes of some of the massacres in his commune, and even leading Interahamwe members in these attacks.¹⁵³

While it is possible that Kayishema exercised *de facto* control over those responsible for the killings, the ICTR employed the same spurious reasoning from *Yamashita* that was rejected by the ICTY previously.¹⁵⁴ The ICTR held Kayishema liable for commanding those responsible for the killings in his prefecture, despite admitting that his position as prefect “[was] emptied of any real meaning” during the genocide.¹⁵⁵ Making this leap of logic, the ICTR concluded 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.”¹⁵⁶ Just as in *Akayesu*, the ICTR failed to consider what effect, if any, the accused's attempts to mitigate the violence served to meet the *actus reus* requirement of taking reasonable steps to stop the violence.¹⁵⁷ Further, the ICTR applied blame for the substantive crime while dismissing the question of whether Kayishema was liable for a “fail[ure] to punish the perpetrators” as “superfluous.”¹⁵⁸ Because of the chaotic nature of the attacks,

¹⁵¹ *Id.* ¶ 499.

¹⁵² *Id.* ¶ 500.

¹⁵³ *Id.* ¶¶ 499–504.

¹⁵⁴ Just as in *Yamashita*, the ICTR here made a finding of *de jure* authority and used this to extrapolate *de facto* control without factually supporting the finding.

¹⁵⁵ *Kayishema*, ICTR 95-1-T, ¶¶ 480–90.

¹⁵⁶ *Id.*

¹⁵⁷ See *supra* notes 121–24 and accompanying text (discussing Akayesu's attempts to stop the violence in his commune and the Tribunal's treatment of this information).

¹⁵⁸ *Kayishema*, ICTR 95-1-T, ¶ 505.

and because of the lack of evidence clearly showing Kayishema's participation in the killings, a more rigorous investigation was warranted.

C. *The Juvénal Kajelijeli Case*

In *Prosecutor v. Kajelijeli*, in contrast to *Kayishema* and *Akayesu*, the ICTR adjudicated the case of a man directly linked to the Interahamwe. The accused, Juvénal Kajelijeli, was a former mayor of Mukingo commune and was indicted for genocidal acts committed in Mukingo.¹⁵⁹ The ICTR found that Kajelijeli exercised considerable influence in his community, which he used to act “as a bridge between the military and the civilian spheres in an effort to attack and massacre the civilian Tutsi population.”¹⁶⁰ In contrast to *Akayesu*, in which various witnesses testified to the dangers Akayesu faced in confronting the Interahamwe and his resultant lack of effective control,¹⁶¹ the accused in *Kajelijeli* argued that the killings resulted from a “spontaneous reaction”¹⁶² rather than a well-conceived plan, or alternatively, that the charge was part of an elaborate conspiracy to frame him.¹⁶³ The ICTR flatly rejected these arguments in the face of great countervailing eye-witness testimony and an utter lack of evidence of a conspiracy.¹⁶⁴ Based on eye-witness testimony and statements made by the accused, the ICTR concluded that Kajelijeli was intimately involved in arming, training, and overseeing the Interahamwe in Mukingo.¹⁶⁵ As a result of Kajelijeli's influence and connection to the Interahamwe, the ICTR found that he “held and maintained effective control over *Interahamwe* in Mukingo and Nkuli *communes*” during the relevant period of the attacks.¹⁶⁶ *Kajelijeli*—in contrast to *Akayesu* and *Kayishema*—thus provides an example of a situation in which the ICTR definition of command responsibility proves useful, effective, and fair. Here, the evidence proved with specificity the “effective control” of the accused over the perpetrators. Unfortunately, as *Akayesu* and *Kayishema* demonstrate, the ICTR does not always reach the *Kajelijeli* high-water mark in assessing the effective control of non-military superiors.

¹⁵⁹ *Prosecutor v. Kajelijeli*, Case No. ICTR 98-44A-T, Judgment and Sentence, ¶ 6 (Dec. 1, 2003).

¹⁶⁰ *Id.* ¶ 962.

¹⁶¹ *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgement, ¶ 184 (Sept. 2, 1998).

¹⁶² *Kajelijeli*, ICTR 98-44A-T, ¶ 158.

¹⁶³ *Id.* ¶ 84.

¹⁶⁴ *Id.* ¶¶ 96–98, 160–62.

¹⁶⁵ *Id.* ¶¶ 400–04. As one eye-witness stated, the accused “was the one who gave instructions to the young people He supervised [the Interahamwe] and gave them orders.” *Id.* ¶ 404.

¹⁶⁶ *Id.* ¶ 609.

D. *The Alfred Musema Case*

In *Prosecutor v. Musema*, the ICTR was asked to determine the culpability of a tea factory manager for the crimes of his factory workers.¹⁶⁷ In April 1994, many Tutsi were killed in Musema's commune, and "employees of [Musema's factory] were among the attackers."¹⁶⁸ Musema was indicted under both a theory of individual involvement in the acts of genocide and crimes against humanity and a theory of command responsibility.¹⁶⁹ The latter charge was particularly provocative given that Musema lacked even the low-level political power that Akayesu, Kayishema, and Kajelijeli all had.¹⁷⁰ In fact, it was not alleged that Musema had any authority over the Interahamwe or *gendarmarie*.¹⁷¹ Nevertheless, the ICTR applied a theory of command responsibility rooted in Musema's de jure and de facto control over his employees and convicted Musema of genocide and crimes against humanity.¹⁷²

Added to this already atypical fact pattern was the aggravating factor of Musema's direct participation in the attacks.¹⁷³ Indeed, Musema was held personally liable for committing acts of genocide.¹⁷⁴ Yet wholly apart from his personal involvement, the ICTR used Musema's presence at the scene of the crime and his de jure authority over his factory workers to establish command responsibility:

Considering that 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. The Chamber notes that the Accused nevertheless failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.¹⁷⁵

While easy enough to argue that Musema did not disapprove of the actions of the factory workers—given his personal participation in the killings—the ICTR made no attempt to determine whether Musema was actually exercising

¹⁶⁷ *Prosecutor v. Musema*, Case No. ICTR 96-13-T, Judgement and Sentence, ¶ 880 (Jan. 27, 2000).

¹⁶⁸ *Id.* ¶ 893.

¹⁶⁹ *Id.* ¶ 864.

¹⁷⁰ *Id.* ¶ 881.

¹⁷¹ *See Prosecutor v. Musema*, Case No. ICTR 96-13-I, Amended Indictment (Apr. 29, 1999).

¹⁷² *Musema*, ICTR 96-13-T, Judgement and Sentence, ¶¶ 894–95.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

effective control over his workers. As a business owner, Musema certainly possessed authority over his workers relating to the operation of the business. The ICTR notes that “Musema exercised legal and financial control over these employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory.”¹⁷⁶

The ICTR does not, however, differentiate between authority as an employer and authority analogous to military authority as previously required by *Mucić*.¹⁷⁷ The ICTR concluded that it was “established beyond reasonable doubt that Musema exercised *de jure* authority over employees . . . while they were on Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory, even if those duties were performed outside factory premises.”¹⁷⁸ It did not, however, substantiate the underlying assumption that as a factory owner, Musema would have either the *de jure* or *de facto* authority to command his employees to commit, or refrain from committing, acts of genocide. The ICTR claims that Musema committed the *actus reus* of command responsibility—failing to prevent or punish the crime—because he “was in a position, by virtue of [his] powers [as factory owner], to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute.”¹⁷⁹ The issue was further confused when the ICTR stated that Musema had the power “to punish [those who used] Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes.”¹⁸⁰ This authority seems to be the authority to issue punishment for improper use of company materials rather than punishment for genocidal acts—which is ultimately the problem of the ICTR’s reasoning: the 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. Without a further showing, the ICTR failed to meet the requirement in *Mucić* that a non-military superior’s authority be “similar to that of military commanders.”¹⁸¹

¹⁷⁶ *Id.* ¶ 880.

¹⁷⁷ Prosecutor v. Mucić, Case No. IT-96-21-T, Judgement, ¶ 378 (Nov. 16, 1998).

¹⁷⁸ *Musema*, ICTR 96-13-T, Judgement and Sentence, ¶ 880.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Mucić*, IT-96-21-T, ¶ 378.

While Musema and Mucić were both non-military superiors with a superior-subordinate relationship with their employees, the nature of the relationships differed significantly. Most notably, Mucić was in charge of a prison camp.¹⁸² Even though he was not a military officer, his employees were soldiers.¹⁸³ That a guard at a prison camp might treat a prisoner poorly seems foreseeable and within the scope of his employment. In contrast, Musema was in charge of a tea factory and, therefore, was in command of civilians.¹⁸⁴ A tea factory worker intentionally killing fellow civilians is completely outside the realm of employment. Nevertheless, the ICTR used Musema's position of authority over his factory workers as the basis for holding that he possessed both de jure and de facto authority over them.¹⁸⁵

E. The Ignace Bagilishema Case

While the ICTR consistently failed to find effective control of the accused in its convictions, the few acquittals handed down by the ICTR may prove to be even more instructive. In one of the acquittals, Ignace Bagilishema—arguably as liable as Akayesu—escaped punishment. In *Prosecutor v. Bagilishema*, the ICTR again considered the culpability of a non-military superior, but the prosecution unsuccessfully used a theory of command responsibility to try to establish guilt.¹⁸⁶ *Bagilishema* creates difficulties in justifying earlier holdings because of its numerous internal inconsistencies. Bagilishema served as mayor of the Mabanza commune before and during the 1994 genocide.¹⁸⁷ In this capacity, Bagilishema would have held de jure powers consistent with those discussed in *Akayesu* and *Kajelijeli*.¹⁸⁸ The prosecution, as in the *Kayishema* and *Kajelijeli* cases, attempted to link Bagilishema to the Interahamwe.¹⁸⁹ Like Akayesu, Bagilishema took efforts to stop the killing of Tutsi within his commune.¹⁹⁰ One witness testified that Bagilishema made a formal decree to the people in his commune asking for an end to the killings:

¹⁸² *Id.* ¶¶ 1240–41.

¹⁸³ *Id.*

¹⁸⁴ *Musema*, ICTR-96-13-T, Judgement and Sentence, ¶ 880.

¹⁸⁵ *Id.* ¶¶ 894–95. Specifically, the court found that he “failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates.” *Id.* ¶ 894.

¹⁸⁶ *Prosecutor v. Bagilishema*, Case No. ICTR 95-1A-T, Judgement, ¶ 34 (June 7, 2001).

¹⁸⁷ *Id.* ¶ 7.

¹⁸⁸ *See id.* ¶¶ 147–51.

¹⁸⁹ *Id.* ¶ 147.

¹⁹⁰ *Id.* ¶ 327. The court found that “[t]here [was] evidence that the Accused helped many individuals, including Tutsi, during the peak of the massacres.” *Id.*

It was explained to them that the letter came expressly from the burgomaster Bagilishema stating that they should no longer participate in the killings. And there was also the contents of the second letter which said that there should no longer be search[es] for tutsis to be killed and that in the event that such searches did take place, persons responsible would have to answer for their actions.¹⁹¹

Just as Kayishema did, Bagilishema claimed that he sought the deployment of the *gendarmerie* to protect his commune but received far fewer soldiers than he requested.¹⁹² Despite Bagilishema's attempts to stop the killings, many Tutsi were massacred.¹⁹³ The evidence against Bagilishema, while far from conclusive, appeared similar to that offered against Kayishema: Bagilishema's presence at the scene of attacks and his failure to prevent acts suggested liability. Nevertheless, the ICTR found a lack of evidence.¹⁹⁴ While it is not this Comment's intention to argue that either Kayishema or Akayesu were innocent—or that Bagilishema was guilty—it is difficult to reconcile the different results in the three cases. This inconsistent application of the doctrine of command responsibility may prove even more harmful to views of its legitimacy than its previous—perhaps ill-informed—application. These new cases seriously call into question the legal grounds for punishing non-military superiors.

IV. PROPOSED CHANGES TO THE INTERNATIONAL COMMAND RESPONSIBILITY STANDARD AND A REVIEW OF THE INTERNATIONAL CRIMINAL COURT STANDARD

Command responsibility is, and will continue to be, a useful theory of liability on the international level. The question, then, is how best to apply the doctrine. The cases from the ICTR evince the court's continuing struggle to answer this central question. Perhaps even more troubling than the failure of the Tribunal to create a sound and consistent command responsibility jurisprudence is the failure of the ICTR to address the problems of applying command responsibility to non-military superiors. Even the ICTR concedes that the application of command responsibility to non-military superiors "remains contentious."¹⁹⁵ Inconsistencies in ICTR case law are made more

¹⁹¹ *Id.* ¶ 235 (alteration in original).

¹⁹² *Id.* ¶ 175.

¹⁹³ *Id.* ¶¶ 569, 589, 601.

¹⁹⁴ *Id.* ¶ 683.

¹⁹⁵ *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgement, ¶ 491 (Sept. 2, 1998).

problematic by the continuing task of the ICTR to bring those responsible for the 1994 genocide to justice and the informal precedent set by ICTR case law, which will affect other international adjudicatory bodies, whether permanent or ad hoc.¹⁹⁶

In deciding how best to address the ills of the ICTR, a look at the International Criminal Court may prove instructive because the ICC command responsibility standard—while very similar to that of the ICTR—makes a meaningful distinction between military and non-military superiors.¹⁹⁷ The ICC was created with the adoption of the Rome Statute of the International Criminal Court (Rome Statute) in 1998.¹⁹⁸ The ICC's military and non-military superior command responsibility provisions are quite similar to those of the ICTR, with a few notable differences. Article 28 of the Rome Statute defines non-military command responsibility as follows:

- (b) With respect to superior and subordinate relationships . . . a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.¹⁹⁹

While both the ICTR and ICC's conceptions of command responsibility require a superior-subordinate relationship, and both require that the superior have

¹⁹⁶ Similarities in international standards show how tribunals can influence one another—one need look no further than the ICTY's impact on the formation and jurisprudence of the ICTR. *See, e.g., supra* notes 146–48.

¹⁹⁷ *See* Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

¹⁹⁸ Vetter, *supra* note 87, at 90.

¹⁹⁹ Rome Statute, *supra* note 197, art. 28(b).

effective control—defined by the ICTR as “the material ability, either *de jure* or *de facto*, to prevent or to punish offences committed by subordinates”²⁰⁰—Section (b)(ii) of the ICC provision has no analogue in the ICTR Statute. This new provision creates a nexus between a non-military superior’s sphere of authority and the crime committed by the subordinate²⁰¹ and harkens back to *Mucić*’s requirement that a non-military superior’s authority be “similar to that of military commanders.”²⁰²

This nexus provision is particularly notable when considered in the context of the *Musema* case. In *Musema*, the ICTR failed to differentiate between the type of *de jure* and *de facto* authority of a tea factory manager and a military commander.²⁰³ By requiring that criminal acts fall within the purview of a superior’s authority, the ICC provision guards against the bizarre holding reached in *Musema*. Indeed, a superior would need to be involved in a business somehow reasonably related to the resulting criminal acts to meet the ICTY requirement that a civilian superior exercise authority “similar to that of military commanders.” If such a standard were adopted by the ICTR, *Musema* might not have been convicted of command responsibility.²⁰⁴ However, *Mucić*—and other similarly situated civilians—might still have been prosecuted, given the similarity in authority of a military prison camp warden and a military commander. This outcome seems far more just, given that non-military superiors exercising authority directly related to some potential violent crime should reasonably be on notice of the risks associated with such authority, and would therefore be better prepared to prevent and punish violent acts.

Some commentators would limit the nexus doctrine to situations in which “a formal relationship of authority (even if it is not formally constituted)” exists, where the authority is “within a goal-directed hierarchical organisation or institution (even if it is *ad hoc* or transitory).”²⁰⁵ This formulation would equally serve the cause of justice. Regardless of its specific form, the ICTR would do well to accept and use a nexus principle in its future cases. Although

²⁰⁰ Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Judgment and Sentence, ¶ 774 (Dec. 1, 2003).

²⁰¹ Vetter, *supra* note 87, at 113.

²⁰² Prosecutor v. Mucić, Case No. IT-96-21-T, Judgement, ¶ 378 (Nov. 16, 1998).

²⁰³ See *supra* notes 177–81 and accompanying text.

²⁰⁴ However, as mentioned above, *Musema* would still have been liable for acts he personally committed.

See *supra* note 169 and accompanying text.

²⁰⁵ Alexander Zahar, *Command Responsibility of Civilian Superiors for Genocide*, 14 LEIDEN J. INT’L L. 591, 609 (2001).

perhaps not a complete solution, such a change would help to define the somewhat perplexing concept of effective control.

Article 28 of the Rome Statute is also interesting in its mens rea requirement for non-military superior liability. The prosecution must show that a “superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit [a] crime[].”²⁰⁶ The provision, therefore, creates a subjective mens rea test, focused on what the superior “knew, or consciously disregarded.” In contrast, the ICTR applies a much more objective test that considers whether an accused “knew or had reason to know” that a crime was going to be committed.²⁰⁷ By applying a more subjective mens rea test, the Rome Statute protects against the controversial reasoning applied in *Yamashita*, echoed in *Mucić*, and applied throughout the ICTR case law. A move by the ICTR to a more subjective test would likely provide the court with more consistent case law than seen in cases like *Akayesu*, *Musema*, and *Bagilishema*.

CONCLUSION

The case law on command responsibility brings to light a number of troubling inconsistencies in definition and application. These inconsistencies prove particularly vexing given command responsibility’s continuing relevance for the ICTR and future genocide and war crimes trials. The current situations in Darfur and Uganda and the recent violence in the Congo only serve to reinforce this point. While time has proven the usefulness of command responsibility within a military setting—as a means of preventing immunity for commanders, encouraging active control over troops, and punishing those responsible for crimes²⁰⁸—the doctrine’s application has proven far more problematic when used to convict non-military superiors. This is not, however, cause for a rejection of command responsibility’s application to non-military superiors. Indeed, the changed and changing nature of modern warfare and conflict require the pragmatic application of command responsibility as both a deterrent and as a means of distributing justice in the aftermath of chaos. However, the problems with the application of command responsibility serve as a signal that change is needed.

²⁰⁶ Rome Statute, *supra* note 197, art. 28(b)(i).

²⁰⁷ S.C. Res. 955, *supra* note 24, art. 6(3).

²⁰⁸ Singh, *supra* note 4, at 284.

The development of command responsibility for civilians has been marked by subtle and often ill-defined changes. A greater level of clarity is needed in the phrases that give life to command responsibility (namely, de facto authority and effective control) and greater consistency is needed in its application—though the latter will likely be accomplished through the institution of the former. As such, the ICTR should look to the innovations created by the Rome Statute to create a clear differentiation between military and non-military command responsibility, and for the latter, ensure that a nexus is shown between the superior's authority and the crime before establishing effective control. In so doing, the ICTR will more fully and fairly realize its goal of holding perpetrators of the 1994 Rwandan genocide accountable for their atrocities.²⁰⁹

SEAN LIBBY*

²⁰⁹ BALL, *supra* note 7, at 156.

* Executive Notes & Comments Editor, *Emory International Law Review*; J.D., Emory University School of Law (2009); B.A., magna cum laude, University of Georgia (2005). The author would like to thank Professor Paul Zwier and the staff of the *Emory International Law Review* for their guidance and assistance throughout the comment writing process. The author additionally thanks his family for their support.

