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COMMAND RESPONSIBILITY IN THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Since the inception of the International Criminal Tribunal for Rwanda (ICTR), the Prosecutor, through a strategy akin to that of the International Tribunal for the Former Yugoslavia (ICTY), has given priority to investigating and prosecuting individuals who held important responsibilities during the massacres which occurred in Rwanda in 1994.[1] As a result, many of the supposed leaders at the time of the events, including ministers of the 1994 interim government, senior military commanders, high ranking central and regional government officials, prominent businessmen, church leaders, intellectuals and other influential figures, are to be tried by the ICTR. Although most of these individuals are accused of having directly participated in the events,[2] by virtue of their positions of authority within the Rwandan hierarchy, they are also charged as superiors pursuant to article 6(3) of ICTR Statute. It provides that superiors have a duty to prevent and punish the criminal acts of their subordinates:

> 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.[3]

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[1] First Annual Report of the 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 and 31 December 1994, U.N. Doc. A/51/399-S/1996/778, 24 September 1996, para. 42.

[2] Article 6(1) of the ICTR Statute reads: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime."

[3] In effect, article 6(3) introduces a form of liability by way of omission.

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Despite superior responsibility[4] being a well-established norm of conventional and customary law, the judgments of the ICTR reveal that its application in practice can still give rise to a number of difficulties. This article, by way of review of selected cases, will discuss how the ICTR has dealt with the issue of superior responsibility, in particular in the case of civilians, and with the specific requirements of article 6(3) which must be met for such responsibility to be imposed, namely, (i) that there existed a superior-subordinate relationship between the accused and the perpetrator of the crime; (ii) that the accused knew or had reason to know that the crime was about to be, was being, or had been committed by subordinates; and , (iii) that the accused failed to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrators thereof.

COMMAND RESPONSIBILITY OF CIVILIANS

Initially, the doctrine of command responsibility was applied only in a military context.[5] Recent jurisprudence of both the ICTR and the (ICTY) has recognised that civilians can also incur responsibility as superiors. Despite finally endorsing this principle, the ICTR was initially cautious in applying command responsibility to civilians, and preferred a pragmatic approach to blanket acceptance.

This concern was clearly stated in *Akayesu* where the Trial Chamber, after reference to the dissenting opinion of Judge Röling in *Hirota* before the Tokyo Tribunal, held:

> The Chamber therefore finds that in the case of civilians, the application of the principle of individual criminal responsibility, enshrined in article 6(3), to civilians remains contentious. Against this background, the Chamber holds that it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.[6]

Similarly, in *Musema*, the Chamber remarked that "in view of such disparate legal interpretations, it is disputable whether the principle of individual criminal responsibility, articulated in article 6(3) of the Statute,

[4] The terms command responsibility and superior responsibility are used interchangeably throughout.

[5] See V. Morris & M.P. Scharf, I THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 249–262 (1998).

[6] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 491.

should be applied to civilians".[7] Again, as in *Akayesu*, the Chamber favoured a case-by-case approach: "Accordingly, the Chamber reiterates its reasoning [. . .] that it is appropriate to assess on a case-by-case basis the power of authority actually devolved on an accused to determine whether or not he possessed the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish their perpetration."[8]

Despite this apparent reticence to extend the principle of superior responsibility beyond military commanders, the view now prevailing at the ICTR is that civilians can be held responsible under article 6(3). Indeed, in *Kayishema & Ruzindana*, the Trial Chamber found that "the application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one".[9] This opinion was echoed in *Bagilishema* where it was stated that "there can be no doubt [. . .] that the doctrine of command responsibility extends beyond the responsibility of military commanders to encompass civilian superiors in positions of authority".[10] These precedents indeed reflect the current position of the law, inspired from post World War II jurisprudence, to recent rulings from the ICTY, that the doctrine of superior responsibility extends to civilians.[11]

Consequently, whether a person can be held responsible as a superior under article 6(3) of the Statute depends not on any particular military or civilian status, but rather on the degree and nature of authority and control wielded by the individual.[12] In sum, "the superior's actual or formal power

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[7] *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 135.

[8] *Ibid*.

[9] *Prosecutor* v. *Kayishema & Ruzindana* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 213.

[10] *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 42.

[11] See for instance *Prosecutor* v. *Delalic* et al. (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 363: "[I]t must be concluded that the applicability of the principle of superior responsibility extends not only to military commanders but also to individuals in non military positions of superior responsibility." *Germany* v. *Roechling* et al., Indictment and Judgment of the General Tribunal of the Military Government of the French Zone of Occupation in Germany, 14 T.W.C., Appendix B; *United States* v. *Flick* et al., 6 T.W.C. 1. Likewise, article 28 of the Rome Statute makes provision for civilians to be held responsible as superiors.

[12] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, para. 216. See also *Prosecutor* v. *Aleksovski* (Case No. IT-95-14/1), Judgment, 25 June 1999, para. 76: "Any person acting *de facto* as a superior may be held responsible under article 7(3). The decisive criterion in determining who is a superior according to customary international law is not only the accused's formal legal status but also his ability, as demonstrated by his duties and competence, to exercise control."

of control over his subordinates remains a determining factor in charging civilians with superior responsibility."[13]

EXISTENCE OF A SUPERIOR-SUBORDINATE RELATIONSHIP

Central to the doctrine of superior responsibility is the existence of a superior-subordinate relationship and of a chain of command. However, unlike situations involving military commanders, in a civilian context, obvious chains of command with strict hierarchical requirements can often be difficult to identify. Consequently, in situations of civilian superiors, a position of command cannot be determined by reference to formal status alone.[14] Instead, an assessment must be made of both the *de jure* and *de facto* authority of an individual before the imposition of command responsibility.[15] Ultimately therefore, command responsibility is "predicated upon the power of the superior to control the acts of his subordinates".[16]

This approach is particularly relevant in a context such as that which prevailed in Rwanda in 1994, where individuals who possessed formal authority prior to the massacres found themselves devoid of any power when the killings started, and vice versa.[17] For the Chambers therefore, "the power of the superior to control the acts of his subordinates"[18] and "the nature of the authority exercised by an individual"[19] were deemed crucial in establishing whether an accused exercised superior responsi-

[13] *Prosecutor* v. *Musema, supra* note 7, para. 135. See also *Prosecutor* v. *Kayishema & Ruzindana* (Case No. ICTR-95-1-A), Judgment, 1 June 2001, para. 294: "Il s'agit de rechercher si le supérieur hiérarchique exerçait un contrôle effectif sur les auteurs des crimes allégués. L'existence d'un contrôle effectif peut être liée à la question de savoir si l'accusé avait une autorité *de jure* mais sans nécessairement en dépendre. Un tel contrôle ou une telle autorité peut revêtir un caractère *de facto* ou *de jure*."

[14] *Prosecutor* v. *Delalic*, *supra* note 11, para. 370.

[15] To date all the accused judged by the Rwanda Tribunal under article 6(3) of the Statute have been civilians: Ignace Bagilishema held the post of mayor (*bourgmestre*) of Mabanza commune in Kibuye prefecture of which Clément Kayishema was the prefect. Alfred Musema was the director of Gisovu tea factory also in Kibuye prefecture.

[16] *Prosecutor* v. *Delalic*, *supra* note 11, para. 376.

[17] See also M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 368–369 (1996): ". . . thus, a commander in chief despite the title, may fail to exercise the full powers of the office. Conversely, a civilian who occupies a position of military command and control actually may make decision on strategic or tactical matters or both."

[18] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, para. 217.

[19] *Prosecutor* v. *Musema*, *supra* note 7, para. 866.

bility over individuals said to have committed acts covered by articles 2, 3 and 4 of the Statute.[20]

In effect, although a formal position could be indicative of authority, for the purposes of findings pursuant to article 6(3), especially in situations involving civilian superiors, it is necessary to assess the actual or real powers of the accused, within the context of the events.[21] Ultimately, whether authority stems from *de facto* or *de jure* powers, the decisive criterion in determining a position of command is that of "effective control."[22] That an individual exercises the necessary control to be imposed superior responsibility is an evidentiary question.

Although the Chambers have consistently accepted the "effective control" standard, there exists some divergence within the jurisprudence as to whether *de facto* powers alone are sufficient to establish a position of command or whether there is also a requirement of *de jure* authority. It appeared initially that authority could stem from either of the two powers. In *Kayishema & Ruzindana*, following reference to the Rome Statute, the Chamber was of the opinion that it had to be established that superiors simply exercised "effective control" over subordinates, whether *de jure* or *de facto*.[23] After having found that *Kayishema* "exercised *de jure* authority over [the] assailants", the Chamber specified that:

[20] This approach was expounded in *Prosecutor* v. *Delalic*, *supra* note 11, para. 370: "While the matter is, thus, not undisputed, it is the Trial Chamber's opinion that a position of command is indeed a necessary precondition for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position cannot be determined by reference to formal status alone. Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates."

[21] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, para. 218. "Therefore, in view of the chaotic situation that which prevailed in Rwanda in these pivotal months of 1994, the Chamber must be free to consider whether Kayishema had the requisite control over those committing the atrocities to establish individual criminal liability under article 6(3), whether by *de jure* or *de facto* command." See also *Prosecutor* v. *Delalic*, *supra* note 11, para 377, where the Chamber explained: "[We] must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts."

[22] *Prosecutor* v. *Bagilishema*, *supra* note 10, para. 39. See also Rome Statute of the International Criminal Court, article 28(b): "With respect to superior and subordinate relationship not described in paragraph (a), 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 [. . .]"

[23] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, paras. 221–222. Confirmed on appeal, *supra* note 13, para. 294.

> . . . even where a clear hierarchy based upon *de jure* authority is not present, this does not prevent the finding of command responsibility. Equally, [. . .] the mere existence of *de jure* power does not always necessitate the imposition of command responsibility.[24]

For the Chamber, to establish a position of command, it was enough to show that the accused exercised influence over subordinates:

> The Trial Chamber has found that acts or omissions of a *de facto* superior can give rise to individual criminal responsibility pursuant to article 6(3) of the Statute. Thus 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 or that, despite such *de facto* influence, the accused failed to prevent the crime.[25]

It would seem from the findings in *Kayishema & Ruzindana* that a mere showing of "strong affiliations" is sufficient to establish effective control.[26] In theory therefore, following this reasoning, superior responsibility could be imposed on the basis of *de facto* powers alone, without *de jure* requirements. This conclusion however has not been followed in all subsequent judgments.

In *Musema*, the Chamber stipulated that "a civilian superior may be charged with superior responsibility only where he has effective control, be it *de jure* or merely *de facto*, over the persons committing violations of international humanitarian law".[27] The Chamber added that, although a superior's authority may be only *de facto*, derived from influence or indirect power, the determining question was the extent of the "power of control over persons who *a priori* were not under his authority".[28] The Chamber suggested that the existence of such control would undoubtedly be linked to influence of the accused in the context of the events:

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[24] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, para. 491.

[25] *Ibid*. para. 492

[26] *Ibid*. para. 501: "The facts of the case also reflect the *de facto* control that Kayishema exercised over *all* of the assailants participating in the massacres. Kayishema was often identified transporting or leading many of the assailants to the massacre sites. He was regularly identified, for example, in the company of members of the *Interahamwe* – transporting them, instructing them, rewarding them, as well as directing and leading their attacks. The Trial Chamber, therefore, is satisfied that Kayishema had strong affiliations with these assailants, and his command over them at each massacre site, as with the other assailants, was clearly established by witness testimony."

[27] *Prosecutor* v. *Musema, supra* note 7, para. 141. See also para. 864: ". . . the authority, whether *de facto* or *de jure*, or the effective control, exercised by Alfred Musema in the context of the events alleged, may provide the basis for such individual criminal responsibility".

[28] *Ibid*., para. 144. Superior responsibility in these circumstances would be through indirect subordination.

The influence at issue in a superior – subordinate command relationship often appears in the form of psychological pressure. This is particularly relevant to the case at bar, insofar as Alfred Musema was a socially and politically prominent person in Gisovu Commune.[29]

The Trial Chamber in *Musema*, after having examined all the pertinent evidence, found that the accused had "legal and financial control over [his] employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory",[30] and that he "was in a position, by virtue of these powers, 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".[31] It concluded that there therefore existed a *de jure* superior – subordinate relationship between Alfred Musema and the employees of the Gisovu Tea Factory.[32]

However, the Chamber was not satisfied that there existed a superior – subordinate relationship between the accused and members of the population of Kibuye prefecture and *thé villageois* plantation workers, despite being satisfied that that these individuals perceived the accused "as a figure of authority and as someone who wielded considerable power in the region",[33] and noting that:

Many of the witnesses testified that Musema was perceived as a figure of authority and considerable influence in the Gisovu region. Witness H stated that Musema was "very well respected" in the locality. Witness W testified that Musema "occupied an important position in Rwanda", and that he occupied a place higher in the regime than others of equivalent or higher age or qualifications. Witness E stated that Musema was considered to have the same powers as a Préfet.[34]

Although the Chamber in *Musema* premised that effective control could be both *de facto* and *de jure*, the findings of the Chamber suggest, unlike the *Kayishema & Ruzindana* precedent, that the existence of substantial *de facto* authority and influence is insufficient alone to satisfy the requirements of article 6(3).[35] Rather, it appears from *Musema*, although not conclusively, that an individual will be labelled a superior only where it

[29] *Ibid*., para. 140.
[30] *Ibid*., para. 880.
[31] *Ibid*.
[32] *Ibid*., para. 882.
[33] *Ibid*., para. 881.
[34] *Ibid.*, para. 868.
[35] See also *Prosecutor* v. *Delalic* et al. (Case No. IT-96-21-A), Judgment, 20 February 2001, para. 266 where it was held that "customary law has specified a standard of *effective* control, although it does not define precisely the means by which the control must be exercised. It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires

can be shown that there prevails some form of *de jure* authority, which includes legal or financial power.

A more restrictive approach is to be found in *Bagilishema*, where the Chamber, concurring with *Delalic* (or "Celebici"), held that the doctrine of command 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*" (emphasis added).[36] It explained:

> 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.[37]

For the Chamber in *Bagilishema*, these trappings included factors such as a chain of command, the issuing and obeying of orders, and disciplinary action for insubordination.[38] It then introduced a two-pronged test for determining whether a civilian superior exercises effective control over his or her subordinates. First, it must be established that the trappings of *de jure* authority exist. Thereafter and where necessary, the extent of *de facto* control is to be assessed on a case-by-case basis.[39] The Chamber held that without real or contrived *de jure* authority comparable to that found in a military context, no individual could be considered a superior.[40] As such, by contrast to *Musema*, a bare legal relationship between an accused and his or her staff would not satisfy the requirements of article 6(3). In applying this test in its findings on communal employees being subordinates of the accused, the Chamber held that:

> Both in law and in practice, therefore, the Accused's formal relationship with his administrative and technical staff, at least until April 1994, appears to have been equivalent to that of a general manager of a public agency focused essentially on social development. This model implies that the Accused's *de jure* authority over lower-level staff was altogether different from that of a military commander over subordinates.[41]

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the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions."

36 *Prosecutor* v. *Bagilishema*, *supra* note 10, para. 42.

37 *Ibid*., para. 43.

38 *Ibid*. The Chamber added: "It is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other persons of influence."

39 *Ibid*., para. 152.

40 That being said, the Chamber did recognise elsewhere in the judgment, at para. 39, that "ultimately it is the actual relationship of command (whether *de jure* or *de facto*) that is required for command responsibiity".

41 *Ibid.*, para. 163.

However, the Appeals Chamber in *Bagilishema* recently ruled that the Trial Chamber's approach to the principle of 'effective control', namely that the control exervised by a civilian superior must be of the same nature as that exercised by a military commander, was erroneous. For the Appeals Chamber, it suffices that the accused exercises the required "degree" of control over his subordinates, namely, that of effective control. It reiterated that the test in all cases is whether the accused exercises effective control over his or her subordinates, and not just whether he or she had *de jure* authority.[42]

As can be seen, the jurisprudence of the ICTR has consistently accepted that the level of *de jure* and *de facto* authority is crucial in assessing whether there exists a superior subordinate relationship. The judgments have been pragmatic, and were initially content to assess the authority of a superior within the realities of the given circumstances. That which mattered was the position of the superior *in casu*. Although it is now established that superior responsibility may be applied to civilian commanders, the juris prudence reflects the concern that "great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote".[43]

THE "KNOWLEDGE" REQUIREMENT

In conformity with article 6(3) of the Statute, if a superior is to be held responsible for criminal conduct of subordinates, it must be established that he or she possessed the requisite *mens rea*, namely that he or she knew or had reason to know of such conduct. It is generally agreed that both direct and circumstantial evidence can be relied upon to prove the "knowledge" of a superior,[44] yet difficulties arise as to the requisite level of proof needed to show that a superior "had reason to know". In addition, it remains unclear whether the ICTR considers the standard applicable to military and civilian superiors to be one and the same.

Distinction between Civilian and Military Superiors

In the two cases that have dealt with the existence of a different *mens rea* for civilian and military superiors, divergences in the reasoning are apparent. It would appear as though different conclusions have been

[42] *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-A), Appeal Judgement, 13 December 2002, paras 55 and 62.

[43] *Prosecutor* v. *Delalic*, *supra* note 11, para. 377.

[44] *Prosecutor* v. *Bagilishema*, *supra* note 10, para. 46.

reached depending on the source of law relied upon in the case. In *Musema*, the Chamber recognised that article 6(3) "closely resembles in spirit and form" article 86(2) of the 1977 Additional Protocol I to the Geneva Conventions of 1949.[45] According to article 86(2),

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

Although noting that the drafters of this article had been of the opinion that a "should have known" standard "was too broad and would subject the commander, a posteriori, to arbitrary judgments", the Chamber offered little guidance as to its understanding of "had reason to know" in the case.[46] That being said, the Chamber considered that the applicable standard for criminal responsibility under article 86(2) does not distinguish between military and civilian superiors.[47]

By contrast, in *Kayishema & Ruzindana*, the Chamber, basing its findings in part on article 28 of the Rome Statute,[48] held that:

> [. . .] the distinction between military commanders and other superiors embodied in the Rome Statute [is] an instructive one. In the case of the former it imposes a more active duty

[45] *Prosecutor* v. *Musema*, *supra* note 7, para. 146.

[46] *Ibid*.

[47] *Ibid*., para. 147.

[48] "Responsibility of commanders and other superiors. In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: 1. A military commander or person effectively acting as a military commander shall be criminally responsible for control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (b) That military commander or person 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. 2. With respect to superior and subordinate relationships not described in paragraph 1, 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: (a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and (c) 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."

upon the superior to inform himself of the activities of his subordinates when he, "knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes." This is juxtaposed with the *mens rea* element demanded of all other superiors who must have, "[known], or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes".[49]

For the Chamber, as stipulated in the Rome Statute, civilian leaders unlike military leaders should not have imposed "a *prima facie* duty" to be seised of every activity of their subordinates.[50]

Although the two judgments advance little on whether a distinction is to be drawn between the nature of the duty to inquire of civilian and military leaders, they reflect the fact that the question is still open to debate. This can also be seen in recent ICTY findings. Indeed, in the *Delalic* appeal, it was noted that: "civilian superiors undoubtedly bear responsibility for subordinate offences under certain conditions, but whether their responsibility contains identical elements to that of military commanders is not clear in customary law".[51] By contrast, in a subsequent judgment, *Krnojelac*, an ICTY Trial Chamber was of the opinion that the knowledge requirement had been applied uniformly in cases before the ICTY to both civilian and military commanders and accordingly that "the same state of knowledge is required for both civilian and military commanders".[52]

Had Reason to Know

A superior is under a duty to act where he or she "had reason to know" subordinates were about to commit or had committed offences covered by articles 2, 3 and 4 of the Statute. The ambiguity of this terminology makes it unclear whether, for the purposes of article 6(3), "had reason to know" means only that a superior had information yet failed to act on it or whether it also imposes a positive duty upon the superior to inform himself or herself.

The early ICTR judgments offer little reasoning as to why one standard rather than another was adopted. In *Kayishema & Ruzindana*, the Trial Chamber simply referred to the positions in *Delalic* and article 28 of the Rome Statute[53] before coming to the conclusion that a superior would have

[49] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, para. 227.

[50] *Ibid*., para. 228.

[51] *Prosecutor* v. *Delalic* et al., *supra* note 35, para. 240. The Chamber declined to rule on the question of law given that the Trial Chamber had made a factual determination that the accused was not in a position of superior authority in any capacity.

[52] *Prosecutor* v. *Krnojelac* (Case No. IT-97-25), Judgment, 15 March 2002, para. 94.

[53] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, paras. 226–228. The Chamber noted that *Delalic* did not follow an expansive reasoning and that "it preferred it be proven

"had reason to know" where he or she "consciously disregarded information which put him on notice that his subordinates had committed, or were about to commit acts in breach" of the Statute.[54] For the Chamber, Kayishema knew or had reason to know that large scale attacks were imminent at Mubuga church:

> First, the Tutsis were the subject of attacks throughout Rwanda by the date of the attack at Mubuga Church, and Kayishema was privy to this information. Second, following Kayishema's conversation with the Hutu priest, witnessed by a number of Tutsis at the Church, the priest refused the Tutsis access to water and informed them that they were about to die. Finally, the attackers included soldiers, gendarmes, and the members of the *Interahamwe*, all of whom he exercised either *de jure* or *de facto* control over.[55]

The Chamber ultimately found that Kayishema was present during the attacks.[56] It may therefore seem to be a redundant exercise for the purposes of the findings on superior responsibility to establish whether he knew or had reason to know that the attacks were imminent.[57] Nevertheless, had Kayishema's presence not been demonstrated, it is arguable whether knowledge of massacres elsewhere in Rwanda and of subordinates being amongst the attackers can be said to have put Kayishema on notice of the killings at the church.[58]

In *Musema*, again no clear position is set out by the Chamber as to its understanding of "had reason to know" save to note that a "should

that some information be available that would put the accused on notice of an offence and require further investigation by him". Then, regarding article 28 of the Rome Statute, the Trial Chamber agreed with the distinction made between military and on-military superiors inasmuch as there is no "*prima facie* duty upon a non-military commander to be seized of every activity of all persons under his or her control".

[54] *Ibid.*, para. 228.

[55] *Ibid.*, para. 509.

[56] *Ibid.*, para. 404.

[57] Kayishema had not been accused of being present during the attacks, which thereby justifies the charge of command responsibility.

[58] For instance, at para. 400: "Each one of these eyewitnesses, with the exception of PP, placed Kayishema at the site on at least one day either shortly before or during the attacks of 15 and 16 April." The Chamber also concluded, in para. 400: "It is clear from the evidence presented to the Trial Chamber that of the thousands of Tutsis gathered at Mubuga Church, only a few survived this weekend massacre. The Trial Chamber is satisfied, beyond a reasonable doubt, that Kayishema and his subordinates, including local authorities, the gendarmes, the communal police and the members of the *Interahamwe* were present and participated at the attacks at Mubuga Church between 14 and 16 April. As aforementioned, Kayishema, is not charged with having been present during the attacks under paragraph 41 of the Indictment. In light of the testimony of the five witnesses the Chamber nevertheless finds that Kayishema was present during the actual attacks. We further find that his presence and the presence and the participation of other local authorities, encouraged the killings of the Tutsis who had assembled to seek refuge there."

have known" standard may be too broad.[59] For the Chamber to have said so little may seem as an inadvertent *lapsus* on its part. However, given that Musema's superior responsibility was largely incurred through his actual presence and activity in the build up and during the various attacks involving his subordinates, it appears to have been self-evident for the Chamber to determine that he was fully and directly knowledgeable in the circumstances of their acts.[60] Consequently, the Chamber may not have deemed it necessary to develop the issue of him having or not "had reason to know".[61]

By contrast, *Bagilishema* offers more insight into the *mens rea* required under article 6(3) of the ICTR Statute. As a preliminary remark, it is recalled in the judgment that although an individual's command position may be a significant indicator of knowledge, such knowledge cannot be presumed on the basis of position alone.[62] The Chamber then proceeded to explain in which conditions "a superior possesses or will be imputed the *mens rea* required to incur criminal liability", namely:

> 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 offences by indicating the need for additional investigation in order to ascertain whether such offences were about to be committed, were being committed, or had been committed, by subordinates; or,
>
> the absence of knowledge is the result of negligence in the discharge of the superior's duties; that is, where the superior failed to exercise the means available to him or her to learn of the offences, and under the circumstances he or she *should* have known.[63]

Thus, the third possibility envisaged by the Chamber introduces a "duty to know" on the part of the superior. Responsibility will be imposed upon the superior where he or she "should have known" of the offences, or, in other words, where he or she was negligent in his or her duty and with the means available to obtain information relevant to the offences.

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59 *Prosecutor* v. *Musema*, *supra* note 7, para. 146.

60 *Ibid.*, paras. 894, 899, 905, 914, 919, 924, 945 and 950.

61 If presence and active participation is established, a charge based on superior responsibility may seem unnecessary. See for instance *Prosecutor* v. *Kordic & Cerkez* (Case No. IT-95-14/2), Judgment, 26 February 2001, para. 371: "... in cases where the evidence presented demonstrates that a superior would not only have been informed of subordinates' crimes committed under his authority, but also exercised his powers to plan, instigate or otherwise aid and abet in the planning, preparation or execution of these crimes, the type of criminal responsibility incurred may be better characterised by article 7(1)."

62 *Prosecutor* v. *Bagilishema*, *supra* note 10, para. 45.

63 *Ibid.*, para. 46.

Accordingly, if a superior is diligent in his or her duty yet remains ignorant of crimes committed or to be committed by subordinates, he or she may not necessarily incur responsibility. The Chamber adopted this *mens rea* standard basing itself on conclusions of the ICTY Trial Chambers in *Aleksovski*[64] and *Blaskic*.[65] This standard is stricter than that proposed in article 28 of Rome Statute for civilian superiors, and reflects instead the one applicable to military superiors. Indeed, in the case of civilian superiors before the International Criminal Court, responsibility will be incurred only if the superior "either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes". By contrast, in the case of military superiors it only needs to be shown that the superior "either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes".

Similarly, the "should have known" standard suggested in *Bagilishema* may be difficult to reconcile with the *Delalic* appeal judgment, whereby "a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates",[66] and with the recent ICTY judgment in *Krnojelac*, which held that "it must be proved that [the superior] had in his possession information which would at least

[64] *Prosecutor* v. *Aleksovski*, *supra* note 12, para. 80: "Admittedly, as regards 'indirect' responsibility, the Trial Chamber is reluctant to consider that a 'presumption' of knowledge about a superior exists which would somehow automatically entail his guilt whenever a crime was allegedly committed. The Trial Chamber deems however that an individual's superior position *per se* is a significant indicium that he had knowledge of the crimes committed by his subordinates. The weight to be given to that indicium however depends *inter alia* on the geographical and temporal circumstances." Zlatko Aleksovski was a superior of prison guards for all matters relating to their duties in connection with the organisation and functioning of Kaonik prison

[65] *Prosecutor* v. *Blaskic* (Case No. IT-95-14), Judgment, 3 March 2000, para. 332: "In conclusion, the Trial Chamber finds that if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute." Tihomir Blaskic was the commander of the Croatian Defence Council armed forces (HVO) in central Bosnia.

[66] *Prosecutor* v. *Delalic* et al., *supra* note 35, para. 241. In other words the superior is not permitted to remain wilfully blind to the acts of subordinates. Although the Appeals Chamber limited its pronouncement to the customary law standard of *mens rea* as existing at the time of the offences charged in the indictment, it is submitted that this finding is still relevant to date.

put him on notice of the risk of such offences, such information alerting him to the need for additional investigation to determine whether such crimes were or were about to be committed by his subordinates".[67]

Although in *Bagilishema* the Chamber advanced a possible "should have known" standard as a basis for superior responsibility, its findings in relation to the superior responsibility of the accused seem to be based solely on the stricter standard of whether he had information which put him or her on notice of the risk of offences being committed.[68] This reflects the position of the Appeals Chamber in *Delalic*, whereby "the relevant information only needs to have been provided or available to the superior, or in the Trial Chamber's words, 'in the possession of'. It is not required that he actually acquainted himself with the information."[69] In effect, knowledge is to be presumed only if the superior had the means to obtain it and deliberately refrained from doing so, rather than if he or she fails in his or her duty to obtain the relevant information.[70]

Of course, as noted in *Bagilishema*, a superior is unlikely to admit being in possession of relevant information if in so doing it would mean incriminating himself or herself. In such situations, and where there is no direct evidence of the superior's knowledge, this may be established by way of circumstantial evidence.[71] To this end, according to *Bagilishema*, a number of indicia may determine whether a superior possessed the requisite knowledge:

(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;

67 *Prosecutor* v. *Krnojelac*, *supra* note 51, para. 94.

68 The Chamber subsequently reviewed the responsibility of the accused on the basis of negligence for having established or permitted the establishment of a system of roadblocks without adequately supervising its operations. In this section of the judgment, the Chamber dealt not only with the issue of establishing a dangerous system, but also with questions of whether it was foreseeable that an inadequately supervised roadblock might result in deaths (para. 1020) and of whether the accused showed "wanton disregard for high-risk activities at roadblocks" (para. 1021). Findings on these questions are relevant to establishing knowledge on a "should have known" basis. Arguably, given that killings were committed at the roadblocks by at least one true subordinate of the accused (para. 973), this section may be perceived as also relating to the superior responsibility of the accused.

69 *Prosecutor* v. *Delalic* et al., *supra* note 35, para. 241.

70 *Ibid*., para. 226.

71 *Prosecutor* v. *Bagilishema*, *supra* note 10, para. 967.

(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.[72]

After reviewing the evidence, the Chamber concluded:

> In summary, the indicium of the Accused's contemporaneous presence in the vicinity of the crime in the case of Judith, together with the indicia of geographical location, time and *modus operandi* in relation to the killings of both Bigirimana and Judith, combined with the fact that no more than two people were killed in a period when attacks on civilians were alleged to be common – telling though these indicia may seem when taken in combination – are in the Chamber's assessment nevertheless not sufficient to prove that the Accused had the requisite *mens rea*. The findings in *Celebici* and *Aleksovski* were made on a much firmer foundation.[73]

As can be seen therefore, the jurisprudence of the ICTR on the *mens rea* requirements for superiors to incur responsibility is still evolving. Although it appears clear that circumstantial evidence may be used to establish knowledge, the question of whether a "should have known" standard is acceptable under article 6(3) is yet to be satisfactorily resolved.

FAILURE TO PREVENT OR PUNISH

Where it is shown that an individual is a superior for the purposes of article 6(3) of the Statute, subject to the requisite knowledge being established, he or she is then under an obligation "to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof". In other words, a superior has a positive duty to act, in such circumstances where he or she is able to exercise effective control over subordinates and has the material ability to prevent and punish their crimes.[74]

Kayishema was found to have exercised *de facto* control over all of the assailants participating to the massacres and was in a position of command "over them at each massacre".[75] It was also held that Kayishema played a pivotal role in the massacres and that "the perpetrators committed

[72] *Ibid.*, para. 968. Citing *Prosecutor* v. *Delalic* et al., *supra* note 11, para. 386.
[73] *Ibid*., para. 988.
[74] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, paras. 229 & 230.
[75] *Ibid*., para. 501. The assailants included armed civilians and militia, *gendarmes*, and soldiers.

the crimes pursuant to [his] orders".[76] Consequently, given the position of authority of the accused, he was duty bound to take preventive and repressive action, and would incur superior responsibility where he failed in this duty: "In light of this uncontestable control that Kayishema enjoyed, and his overarching duty as *Prefect* to maintain public order, the Trial Chamber is of the opinion that a positive duty upon Kayishema existed to prevent the commission of the massacres."[77]

A superior may be held responsible for failing to take "only such measures that were within his or her powers".[78] Whether the superior possessed such material ability is not an abstract question but is "inherently linked with the given factual situation".[79] It is clear that the impossible cannot be demanded of the superior.[80]

To date, no blanket description is to be found in the ICTR judgments as to what constitutes "necessary and reasonable measures". Instead, the Chambers have adopted a pragmatic approach, evaluating, on the basis of the available evidence, the extent of the control of the superior, and whether he or she could, in fact, have taken such measures as to prevent and punish subordinates. It follows that the extent of the measures to which a superior has recourse depends essentially on his or her position and status within the given circumstances of the case.[81]

In *Musema*, where the accused was the director of a tea factory, these measures were said to include the threat of or actual disciplinary action over tea factory employees, and restricting the use of certain resources. Indeed, for the Chamber, by virtue of his *de jure* power and *de facto* control over the employees of the tea factory, measures at Musema's disposal included "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" and "attempti[ng] to prevent or

[76] *Ibid*., paras. 504 & 505.

[77] *Ibid*., para. 513.

[78] *Prosecutor* v. *Bagilishema*, *supra* note 10, para. 48. Regarding the meaning of "necessary" and "reasonable", the Chamber stated, at para. 47, that it "understands 'necessary' to be those measures required to discharge the obligation to prevent or punish in the circumstances prevailing at the time; and, 'reasonable' to be those measures which the commander was in a position to take in the circumstances".

[79] *Ibid*., para. 48 and *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, para. 231.

[80] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, para. 511.

[81] See also INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF ARMED CONFLICTS para. 3548 (1987), where it is explained that it is matter of common sense that the measures described in relation as feasible measures which the superiors are expected to take under article 86 of Protocol I those "within the powers and only those".

to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes".[82] In certain circumstances, as noted in *Bagilishema*, evidence of actions such as the holding of meetings to restore security and ethnic harmony, the issuing of fake identity cards, falsifying resident registers and attempting generally to restore law and order may support a finding that a superior took necessary and reasonable measures to prevent and punish offences.[83]

Of course, where an accused is found to have actively directed and ordered subordinates to commit acts prohibited by the Statute, then it would be difficult to plead inability to prevent or punish them. Effectively, active participation negates any defence of powerlessness.[84] This was alluded to in *Kayishema & Ruzindana* where, in addition to it being established that the accused had a positive duty to act by virtue of his or her position of authority, it was stated that where the crimes were committed pursuant to the orders of the accused, "it is self-evident [. . .] that he failed to take reasonable measure to prevent them".[85] Similarly, in *Musema* it was found that, rather than taking the necessary and reasonable measures to prevent the perpetration of acts by his subordinates, by his presence and personal participation at the attack sites, he in effect abetted his subordinates in the commission of those acts.[86]

Conceivably, a superior could contend that despite not being in a position to prevent his or her subordinates from committing offences at the time

[82] *Prosecutor* v. *Musema*, *supra* note 7, para. 880. It should be noted that it is unclear from the findings whether the accused would also have been found responsible under article 6(3) had he not been present at the scene of the attacks whilst his subordinates committed crimes. For instance, had the accused come to know of his or her subordinates being involved in massacres, would dismissal or suspension from office be considered as a measure sufficient to exonerate him or her under article 6(3)? It could be contended that the accused had the duty as *de jure* superior to take the matter further by, for instance, reporting the offender to the police and judicial authorities.

[83] *Prosecutor* v. *Bagilishema*, *supra* note 10, paras. 226–303.

[84] As noted elsewhere in the article, article 6(1) charges may be more appropriate than superior responsibility in situations of active participation and presence of the accused during the events.

[85] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, para. 505.

[86] *Prosecutor* v. *Musema*, *supra* note 7, para. 894: "The Chamber finds that it has also been established that Musema was the superior of said employees and that he held not only *de jure* power over them, but also *de facto* power. 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." See also paras. 905, 914, 919, and 924.

of the events, he or she nevertheless intended to take repressive action at a later date. Such an argument might be raised in circumstances where, had the superior spoken out in the "midst of battle" to prevent subordinates, there might have been a real risk that he or she would be perceived as a traitor and thereby endanger his or her life. According to *Bagilishema*, such a position is untenable:

> [T]he obligation to prevent or punish does not provide the Accused with alternative options. For example, where the Accused knew or had reason to know that his or her subordinates were about to commit crimes and failed to prevent them, the Accused cannot make up for the failure to act by punishing the subordinates afterwards.[87]

Moreover, where a superior creates an environment of impunity, thereby condoning and encouraging culpable actions by subordinates, he or she may incur criminal responsibility. Thus, a regime implemented by a superior must be such as to effectively deter subordinates from committing offences.

> [I]n the case of failure to punish, a superior's responsibility may arise from his or her failure to create or sustain among the persons under his or her control, an environment of discipline and respect for the law. . . . It follows 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.[88]

The issue of failing to prevent or punish remains contentious. Indeed, *post facto* assessments of events within a judicial context rarely allow for a full understanding of past chaotic realities. Likewise it remains difficult to truly comprehend the extent to which a superior could have acted in the given circumstances.[89]

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[87] *Prosecutor* v. *Bagilishema*, *supra* note 10, para. 49, with reference to *Prosecutor* v. *Blaskic*, *supra* note 64, para. 336.

[88] *Prosecutor* v. *Bagilishema*, *supra* note 10, para. 50.

[89] See in this regard *Prosecutor* v. *Blaskic*, *supra* note 64, para 335 where it was held that "it is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator. As stated above in the discussion of the definition of 'superior', this implies that, under some circumstances, a commander may discharge his obligation to prevent or punish by reporting the matter to the competent authorities." There is of course the risk that such an assessment as to whether a superior could have done more may err into the domain of speculation.

CONCLUSION

The application of the doctrine of command responsibility, in particular to civilian authorities, gives rise to a number of complex issues. The ICTR, through its early judgments, has endeavoured to address these to the extent possible, and, despite a case by case approach being favoured, a consistent body of law is slowly being developed. Although initial dicta suggested that the imposition of superior responsibility upon civilians was contentious, it is clear that any individual who possesses the necessary authority and effective control can theoretically be held liable for the acts of subordinates. However, it still remains to be seen whether civilians bear the same standard of responsibility as military commanders. Hopefully, this may be resolved when the ICTR rules in the military cases before it.[90]

[90] The joint "military" trial of of Théoneste Bagasora (Director of Cabinet, Ministry of Defence), Anatole Nsengiyumva (Lieutenant-Colonel), Gratien Kabiligi (Brigadier-General in FAR) and Aloys Ntabakuze (Commander of Battalion in FAR) commenced on 2 April 2002. The second "military trial", which is yet to open, involves Innocent Sagahutu (second-in-command of the Renaissance Battalion), François-Xavier Nzuwonemeye (Commander of the 42nd Battalion) and Augustin Ndindiliyimana (Chief of Staff of Gendarmerie Nationale).