

### Command Responsibility of Civilian Superiors for Genocide

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**Abstract.** The article critically examines the use of the doctrine of command responsibility by the UN International Criminal Tribunal for Rwanda in two of its judgments, *Kayishema & Ruzindana* and *Musema*. It argues that in assessing superior-subordinate relationships the ICTR applied the wrong standard in both cases. While there is no doubt that civilian superiors are liable to prosecution for command responsibility, the doctrine will be properly operative only in cases where the superior's control of subordinates strongly resembles that enjoyed by military commanders. The article builds upon the arguments of the ICTY's *Čelebići* judgement on this point, and emphasises the difficulty in holding lower-ranking Rwandan civilians responsible as superiors for genocide committed by supposed subordinates.

#### 1. INTRODUCTION

Under what circumstances may a civilian, who neither directed nor committed nor aided the commission of crimes of genocide, nevertheless be convicted on a count of genocide for those very crimes, because they were committed by persons standing in a legal relationship to him or her? The difficulty presented by this question has two sources: it is a question about command responsibility, but it is restricted to the doctrine's "extension" to civilians; and it concerns a conviction for the most serious of crimes, genocide, for which there have been only a small number of convictions overall, and even fewer on the ground of command responsibility. Since the Genocide Convention of 1948,<sup>1</sup> just two persons – Clément Kayishema<sup>2</sup> and Alfred Musema<sup>3</sup> – have been convicted at trial for command respon-

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1. Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, adopted by the UN General Assembly on 9 December 1948.
2. See *Prosecutor v. Clément Kayishema & Obed Ruzindana*, Judgement, Case No. ICTR-95-1-T, T.Ch. II, 21 May 1999 (hereinafter '*Kayishema & Ruzindana*'). The cases of the two *ad hoc* Tribunals cited in this paper are available at [www.icttr.org](http://www.icttr.org) and [www.un.org/icty](http://www.un.org/icty).
3. See *Prosecutor v. Alfred Musema*, Judgement, Case No. ICTR-96-13-T, T.Ch. I, 27 January 2000 (hereinafter '*Musema*').

sibility for genocide.<sup>4</sup> Both, as it happens, were civilians; and both convictions on this ground, by the UN International Criminal Tribunal for Rwanda ('ICTR'), were, I believe, wrong. It is pertinent to reconsider the legal requirements in this area.<sup>5</sup>

This article essentially is a commentary on the jurisprudence of the UN's two *ad hoc* Tribunals, the ICTR and the International Criminal Tribunal for the former Yugoslavia ('ICTY'). While this focus may seem narrow, it is not really necessary to delve into the more distant past. The case law on genocide is limited to the work of the *ad hoc* Tribunals.<sup>6</sup> Moreover, the judgement of the ICTY in the *Čelebići* case,<sup>7</sup> which predates both *Kayishema & Ruzindana* and *Musema*, contains the first conviction by an *ad hoc* Tribunal pursuant to the doctrine of command responsibility (albeit for war crimes). The Trial Chamber in *Čelebići* reviewed the origins and use of the command responsibility doctrine, as well as its so-called extension to civilians. The Chamber's conviction of the defendant Mucić, who was in charge of the *Čelebići* prison camp in Bosnia-Herzegovina, was recently upheld by the ICTY's Appeals Chamber.<sup>8</sup> Therefore the case must be regarded as the contemporary authority on command responsibility.

The argument in this article will be developed as follows: after setting out the statutory definitions and legal elements of the crime of genocide and of the form of individual criminal liability known as command (or superior) responsibility, I will consider the ICTR's afore-mentioned convictions of Kayishema and Musema, as well as the *obiter dicta* on

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4. Here I am not counting trials for genocide conducted by the national courts of Rwanda (many of which have involved civilians, and some of which, for all I know, may have invoked command responsibility), whose procedural shortcomings are generally known to be so gross that their results cannot yet be turned to for guidance (*see*, for example, M.A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 Colum. Hum. Rts. L. Rev. 545 (1998)). Nor am I counting the guilty-plea convictions (by the UN International Criminal Tribunal for Rwanda) of Jean Kambanda (former Prime Minister) and Omar Serushago (militia leader) for, *inter alia*, command responsibility for genocide; *see* Prosecutor v. Jean Kambanda, Judgement and Sentence, Case No. ICTR-97-23-S, T.Ch. I, 4 September 1998; and Prosecutor v. Omar Serushago, Sentence, Case No. ICTR-98-39-S, T.Ch. I, 5 February 1999.
  5. The opinions expressed in this paper are my own and do not purport to represent the view of any other member of the ICTR or the UN.
  6. Subject to the qualification given in the note above. The ICTY's two contributions to date on the subject of genocide have been its judgement in Prosecutor v. Goran Jelisić, Case No. IT-95-10-T, 14 December 1999 (the accused, who pleaded guilty to killing detainees at a prison camp, was acquitted on the count of genocide), and its judgement in Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, 2 August 2001 (the accused, a General, was found guilty of genocide; while the elements of command responsibility for that crime were also fulfilled, the Trial Chamber declined to enter a conviction to that effect) (hereinafter 'Krstić').
  7. Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Judgement, Case No. IT-96-21-T, T.Ch. II, 16 November 1998 (hereinafter 'Čelebići').
  8. Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Judgement on Appeal, Case No. IT-96-21-A, 20 February 2001 (hereinafter 'Čelebići Appeal').

command responsibility in the earlier *Akayesu* judgement<sup>9</sup> (the ICTR's first judgement). In the process I shall address what I see as the major shortcomings in the ICTR's case law on civilian superior responsibility for genocide, particularly in light of the sibling-Tribunal's discussion of command responsibility in the *Čelebići* case, whose analysis of the superior-subordinate relationship I will attempt to clarify and, to some extent, improve upon. Finally, I shall summarise what I believe to be the correct approach to a finding of culpability in this area.

## 2. STATUTORY PROVISIONS

Articles 2(1) and 4(1) of the ICTR and ICTY Statutes,<sup>10</sup> respectively, provide that the Tribunals have the power to prosecute acts of genocide. Following this clause there appears, in each Statute, a reproduction of the second and third articles of the Genocide Convention. For example, the ICTR Statute reads:

*Article 2. Genocide*

- (1) [...]
- (2) Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
  - (a) Killing members of the group;
  - (b) Causing serious bodily or mental harm to members of the group;
  - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.
- (3) The following acts shall be punishable:
  - (a) Genocide;
  - (b) Conspiracy to commit genocide;
  - (c) Direct and public incitement to commit genocide;
  - (d) Attempt to commit genocide;
  - (e) Complicity in genocide.

The *actus reus* of genocide is realised upon commission of a crime shown at Article 2(2)(a) to 2(2)(e) of the first provision. And the distinguishing mark of genocide, the feature that elevates it above its constituent offences, is the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." This highly specific intent requirement creates a difficulty when command responsibility for genocide is alleged, a point I shall return to at the end.

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9. Prosecutor v. Jean-Paul Akayesu, Judgement, Case No. ICTR-96-4-T, T.Ch. I, 2 September 1998 (hereinafter 'Akayesu').

10. The Statute of the ICTR first appeared annexed to UN Security Council Res. 955, UN Doc. S/RES/955 (8 November 1994); that of the ICTY as part of the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (3 May 1993).

An anomaly present in both Statutes is the overlap between the criminal-liability clauses 2(3)/4(3) relating to genocide (as shown above), on the one hand, and the general provisions on forms of “individual criminal liability” for all offences laid down in the Statutes (including genocide, war crimes, etc.), on the other. The latter provisions are contained in Articles 6 and 7 of the ICTR and ICTY Statutes, respectively, and are, but for insignificant details, identical. Article 6 of the ICTR Statute, for example, reads:

*Article 6. Individual criminal responsibility*

1. 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.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

It is evident that Article 6(1) overlaps with Article 2(3) – and so do the corresponding Articles 7(1) and 4(3) of the ICTY. This is because Articles 2(3)/4(3) specify modes of commission or participation in acts of genocide, and exactly the same is true of Articles 6(1) and 7(1) when applied to genocide Articles 2 and 4, respectively. The overlap leads to problems that are not the concern of this article (clauses 2(3)/4(3) really ought not have been carried over into the Statutes, even if this would have seemed like tampering with the venerable words of the Genocide Convention). Suffice to note that the link between the doctrine of command responsibility and genocide is effected by Article 6(3) (Article 7(3) for the ICTY) and not by anything contained in Articles 2(3)/4(3) of the articles on genocide.

At first glance the provision on the responsibility of superiors at Articles 6(3)/7(3) appears to have an independent existence. It reaches out directly to Articles 2–4 (Articles 2–5 for the ICTY), where the substantial crimes are listed,<sup>11</sup> and does not seem to be in any way controlled by, or secondary to the forms of participation that are the subject matter of Articles

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11. Namely, in order of appearance, genocide, crimes against humanity, and war crimes against non-combatants in non-international armed conflicts, for the ICTR; and grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity, for the ICTY.

6(1)/7(1). I believe that this construction (of treating Articles 6(3)/7(3) as an independent head of liability), which is the common construction, leads to problems – an unnecessary “accumulation of liability,” which I shall discuss below.

The three elements of command responsibility are more or less explicitly set out in Articles 6(3)/7(3) and are not controversial (the difficulty lies in defining them further). First, there must be a superior-subordinate relationship. Second, the defendant must have known or have had reason to know that his or her subordinates partook in relevant criminal activity,<sup>12</sup> or were intending to do so. Third, he or she must have failed to prevent or punish the subordinates’ crimes. Here I will be concerned almost exclusively with the first of these elements.

### 3. CASE LAW OF THE TRIBUNALS

William Schabas, in his recent book on genocide, claims that “[the ICTR’s] decisions on command responsibility in genocide indicate a profound judicial malaise with the entire concept.”<sup>13</sup> I agree with this assessment although not with Schabas’s all-too-brief argument in support of his claim.<sup>14</sup>

#### 3.1. *Prosecutor v. Akayesu*

Akayesu was *bourgmestre* (mayor) of Taba commune from April 1993 until June 1994 (the Rwandan genocide ran from April to July 1994). Prior to that he was a teacher and school inspector.<sup>15</sup> In other words, he was, throughout, a civilian.

The indictment contained the following allegation: “In addition and/or in the alternative to his individual responsibility under Article 6(1) of the Statute of the Tribunal, the accused, is individually responsible under Article 6(3) of the Statute of the Tribunal for the crimes alleged in Counts 13 through 15.”<sup>16</sup> The counts in question were for crimes of sexual violence (rape), categorised as crimes against humanity (two counts) and war crimes (one count); there was no allegation of command responsibility for genocide.

The *Akayesu* Trial Chamber expressed the opinion that Article 6(1) and Article 6(3) address distinct principles of criminal liability, and that it would consider them separately. The latter provision “constitutes some-

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12. *I.e.*, crimes within the jurisdiction of the Tribunals.

13. W.A. Schabas, *Genocide in International Law: The Crimes of Crimes*, at 309 (Cambridge: Cambridge University Press, 2000).

14. *Id.*, at 309–311.

15. *Akayesu*, *supra* note 9, at paras. 51, 54.

16. *Id.*, at para. 6 (which reproduces the indictment).

thing of an exception to the principles articulated in Article 6(1), as it derives from military law” (paragraph 471). Moreover, in the Chamber’s view, the knowledge requirements of the two forms of participation are different: for Article 6(1) knowledge of the principal crime is necessary, but it is only optional for Article 6(3) (paragraphs 477–479). The Chamber made almost no attempt to justify this dubious pronouncement. In fact, the Chamber flatly contradicted itself just a few paragraphs later when it came to discuss the *mens rea* of command responsibility (paragraph 488). The Chamber had this to say (at paragraph 489):

[...] it is necessary to recall that criminal intent is the moral element required for any crime and that, where the objective is to ascertain the individual criminal responsibility of a person accused of crimes falling within the jurisdiction of the Chamber [...] it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent.

The Chamber concluded that this criminal intent is necessary also for command responsibility. But this is misleading. Command responsibility is not itself a crime. It is a form of individual criminal liability, a mode of participation in a crime that does not involve commission, presence, or even support for the crime. The crime is committed by subordinates; the alleged superior becomes associated with it (and responsible for it) if the elements of Articles 6(3)/7(3) are fulfilled, including the knowledge element (but not, as asserted above, “malicious intent” or its equivalent). In any case, it is hard to reconcile the Chamber’s comments on criminal intent with its theory that Article 6(1) and Article 6(3) deal with forms of liability distinguishable on the ground that the latter “does not necessarily require that the superior acted knowingly” (paragraph 479).

Another shortcoming is the Chamber’s claim that “the application of the principle of individual criminal responsibility, enshrined in Article 6(3), to civilians remains contentious” (paragraph 491). This is based on nothing more than the Dissenting Opinion of Judge Röling in the 1948 judgement of the International Military Tribunal for the Far East;<sup>17</sup> he is quoted as saying that “a Tribunal should be very careful in holding civil government officials responsible for the behaviour of the army in the field” (at paragraph 490). These quoted words need not mean, of course, that Judge Röling regarded as contentious the extension of an Article 6(3)-type doctrine to civilians. He may be understood to mean that the element of command in a civilian-military relationship may be harder to prove than in a purely military relationship. But the *Akayesu* Chamber did not consider this possibility, nor did it explain its conclusion. Clearly it ought to have made reference to the more contemporary authority of the International

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17. Reprinted in B.V.A. Röling & C.F. Rüter (Eds.), *The Tokyo Judgment: The International Military Tribunal for the Far East* (Amsterdam: University Press of Amsterdam, 1977).

Law Commission, whose Draft Code of Crimes contained a provision similar to Articles 6(3)/7(3), with the following comment: “The reference to ‘superiors’ is sufficiently broad to cover military commanders or other civilian authorities who are in a similar position of command and exercise a similar degree of control with respect to their subordinates.”<sup>18</sup>

The Chamber acquitted Akayesu on count 15 and other war crimes charges. Its reason was that the Prosecutor failed to prove that the crimes in question were committed in conjunction with the armed conflict in Rwanda (paragraph 643). The Chamber also acquitted the defendant on counts 13 and 14 but in relation only to the command responsibility component of the charge. Its explanation is brief and difficult to understand (at paragraph 691):

Although the evidence supports a finding that a superior/subordinate relationship existed between the Accused and the Interahamwe [...] there is no allegation [...] that the Interahamwe, who are referred to [in the indictment] as ‘armed local militia’, were subordinates of the Accused.

The acquittals render *obiter dicta* everything the Chamber had to say about command responsibility, for they were not based on any part of the Chamber’s explication of the doctrine. I have included this discussion here only as a possible origin of the “malaise” that afflicts the next two cases.

### 3.2. *Prosecutor v. Kayishema & Ruzindana*

More than eight months were to elapse before the ICTR’s second judgement on a tried case. In the meanwhile, the doctrine of command responsibility enjoyed a fine scholarly overview and reassessment in the *Čelebići* judgement of the ICTY. Unfortunately, *Kayishema & Ruzindana*’s attempt to link up with the sibling-Tribunal’s jurisprudence on this point is a dismal failure.

Dr Kayishema was the prefect of Kibuye prefecture (a *préfet* was one rank above a *bourgmestre* in Rwanda’s administrative hierarchy). Prior to his appointment to this position in 1992, Kayishema was a doctor at a hospital in Kibuye town. At all relevant times he was, in other words, a civilian.<sup>19</sup>

Kayishema’s alleged crimes included acts of genocide. Regarding the mode of Kayishema’s participation in the crimes, the Prosecutor “threw the book” at the defendant: “Kayishema is *also or alternatively* individually responsible as a superior for the criminal acts of his subordinates in the [prefectural] administration, the Gendarmerie Nationale, and the

18. *Draft Code of Crimes Against the Peace and Security of Mankind*, International Law Commission Report 1996 (UN Doc. A/51/10) (6 May–26 July 1996), para. 4 of commentary to Art. 6.

19. *Kayishema & Ruzindana*, *supra* note 2, at paras. 7, 9.

communal police with respect to each of the crimes charged, pursuant to Article 6(3).<sup>20</sup> Thus the Prosecutor ensured that the main heads of liability – both Article 6(1) and Article 6(3) – were covered in relation to each count.

This approach by the Prosecutor (which now seems to be the norm at the ICTR) is not just unsubtle, imprecise, and arguably unfair to the defendant, it betrays, in my view, a fundamental misunderstanding of the doctrine of command responsibility. This point would not be worth commenting upon if the misunderstanding was not shared by the Bench. But of course it was, or Kayishema's indictment would not have been approved in this form by the Trial Chamber (*see* paragraph 5 of the judgement). The problem is illustrated in the following excerpt from the indictment:

28. On about 17 April 1994, Clement Kayishema *ordered* members of the Gendarmerie Nationale, communal police of Gitesi commune, members of the Interahamwe and armed civilians to attack the Complex, and *personally participated in the attack*. [...]
29. The attack resulted in thousands of deaths [...]
30. Before the attack on the Complex, Clement Kayishema did not take measures to prevent an attack, and after the attack Clement Kayishema did not punish the perpetrators. (Emphasis added.)

Paragraph 30 obviously has been inserted by the Prosecutor to bring to light the third element required for the Prosecutor's universally laid command responsibility charge, namely breach of the superior's duty by inaction. However, the juxtaposition of Article 6(1) liability (in paragraph 28) with Article 6(3) liability (in paragraph 30) is almost absurd. How *could* Kayishema have taken measures to prevent the attack when he was *the leader of it*? And how could he have later punished the perpetrators, when he was a perpetrator himself? Was he to make an about-turn and punish himself for leading the attack, thereby avoiding Article 6(3) if not Article 6(1) liability? I doubt that the law is being properly interpreted when the reader is led to entertain such bizarre thoughts.<sup>21</sup>

Nevertheless, the Chamber in *Kayishema & Ruzindana* (Sekule, Ostrovsky, Khan JJ.) went along with this thesis. In its commentary on Article 6(3), the Chamber stated (at paragraph 210) that "[t]he finding of responsibility under Article 6(1) of the Statute does not prevent the Chamber from finding responsibility additionally [...] under Article 6(3). The two forms of responsibility are not mutually exclusive." The scale of the confusion perhaps is more evident in the following statement, where Article 6(1) liability and Article 6(3) liability are finally rendered indistinguishable (at paragraph 223): "Where it can be shown that the accused was the *de jure* or *de facto* superior and that *pursuant to his orders* the

20. *Id.*, at para. 5, which reproduces the indictment; the excerpt is from para. 22 of the indictment (emphasis added).

21. *See also, id.*, at paras. 35–37 and 47–49 for repetitions of the same error. Schabas notices the error, *supra* note 13, at 310–311.



atrocities were committed, then the Chamber considers that this must suffice to found command responsibility.” (Emphasis added.)

Turning to another issue, the *Kayishema* Chamber addressed the character of superior-subordinate relationships in the case of civilians.<sup>22</sup> In the process it repeatedly referred to the *Čelebići* case. However, the Chamber erred in its interpretation of *Čelebići*. It appears (the language is not easy to pin down) that the ICTR Chamber was of the view that a civilian who merely had *influence* over others, or who was regarded by sectors of the population as a figure of authority, was *ipso facto* a superior to those under his influence in the eyes of the law. The Chamber then said (paragraph 220):

[That the superior’s power need not be *de jure*] is also congruent with the *Čelebići* case and the authorities cited therein. For example, having examined the *Hostage* and *High Command* cases the Chamber in *Čelebići* concluded that they authoritatively asserted the principle that, ‘*powers of influence* not amounting to formal powers of command provide a sufficient basis for the imposition of command responsibility.’ This Trial Chamber concurs. (Emphasis added.)

In fact, its concurrence was with a proposition that the *Čelebići* Chamber was arguing *against*. The error was detected by the ICTY Appeals Chamber in its recent judgement on the appeals by parties in the *Čelebići* case. Referring to the above passage, which the Prosecutor had sought to rely on, the Appeal Chamber observed:

No weight can be afforded to this statement of the ICTR [...]. The quoted statement was *not* a conclusion of the [*Čelebići*] Trial Chamber, nor its interpretation of the *Hostage* and *High Command* cases, but the ICTR Trial Chamber’s interpretation of the decision of the Tokyo Tribunal in the *Muto* case. The Trial Chamber in *Čelebići* ultimately regarded any ‘influence’ principle which may have been established by *Muto* case as being outweighed by other authorities which suggested that a position of command in the sense of effective control was necessary.<sup>23</sup>

The two errors that I have identified so far (the first being the misperception that Article 6(3) applies where commanders “command” crimes) make a joint appearance in the *Kayishema* Chamber’s assertion that “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.” (Paragraph 492, emphasis added.)

We shall return to the concept of “effective control” articulated in *Čelebići*, that being the correct test for the existence of a superior-subor-

22. Claiming, in contradiction with *Akayesu*, that “the application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one.” *Kayishema & Ruzindana*, *supra* note 2, at para. 213.

23. *Čelebići* Appeal, *supra* note 8, at para. 265.

dinate relationship. At this point we need only note that the Chamber in *Kayishema & Ruzindana* applied the wrong test; and that the obvious problem with its standard of mere influence is that an influential civilian administrator, such as a Rwandan prefect, is thereby transformed into a kind of universal superior – thousands within his sphere of influence become his subordinates in the eyes of the law. The defendant thus becomes hugely vulnerable to being lumped with the crimes of others.

This bold extension of a doctrine whose original use<sup>24</sup> was to estop a military commander from denying responsibility for crimes committed by his or her combat unit without explicit authority, or without evidence of such authority, is, of course, unjustified. The Chamber supposedly found evidence of “the *de facto* control that Kayishema exercised over *all* of the assailants participating in the massacres” (paragraph 501, emphasis in original). In fact, this was a mix of evidence of *de jure* relationships, such as the relationship between prefect and *bourgmestre* (paragraph 481), to which statutory provisions applied, and *de facto* “strong affiliations with assailants” (paragraph 501), including any and all “armed civilians” (paragraph 569), with whom Kayishema, “a well-known, respected, and esteemed figure” (paragraph 499), kept various forms of company.

There is a conflation here (*see, e.g.*, paragraphs 489, 499) of the existence of certain *de jure* or *de facto* relationships of authority between the defendant and others, which render the defendant a “superior” in a managerial or everyday sense, and the kind of control required for superiority in the legal sense of Article 6(3), which is a concept of international humanitarian law. In truth, superiority in its legal sense is a very narrow concept. We shall return to the issue below.

The Chamber convicted Kayishema on four counts of genocide, in each case pursuant to Article 6(1) and Article 6(3) of the Statute (paragraphs 551–571). It appears that the Chamber, which in typical fashion treated Article 6(3) as an independent head of liability, entered the Article 6(3) convictions in order to “adequately reflect [the defendant’s] culpability” (paragraph 516) – implying that Article 6(1) convictions alone would have been inadequate for that. Yet because the Chamber failed properly to account for the conceptual relationship between Article 6(3) liability and the forms of participation at Article 6(1), the legal findings on Article 6(3) in reality neither add nor could have added anything to the Article 6(1) convictions. Consider, for example, the Chamber’s comment on count 1 (at paragraph 555): “Additionally, under Article 6(3) of the Statute, Kayishema is responsible, for genocide, as superior, for the mass killing [...] undertaken by his subordinates [at the Home St. Jean]. [...] The evidence proves that Kayishema was leading and directing the massacre.” If this last sentence is true, Kayishema, in accordance with the general provisions of Article 6(1), is responsible for the massacre at the Complex

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24. *See infra*, Section 4.

*in toto*, and there is no left-over liability to be added to the picture by recourse to the doctrine at Article 6(3).

### 3.3. *Prosecutor v. Musema*

The *Musema* judgement came out at the beginning of 2000. The Chamber was composed as in *Akayesu* (Kama, Pillay, Aspegren JJ.). The defendant was the director of a tea factory in Kibuye prefecture.<sup>25</sup> As a successful businessman he was well connected with the power-brokers of the day, but he was, without doubt, a civilian.

The indictment charged Musema with, *inter alia*, genocide for “[bringing] to the area of Bisesero armed individuals and direct[ing] them to attack the people seeking refuge there. In addition [...] and often in concert with others Alfred Musema personally attacked and killed persons seeking refuge in Bisesero.”<sup>26</sup> The Prosecutor alleged liability “pursuant to Article 6(1) and 6(3)” of the Statute,<sup>27</sup> dropping the “also or alternatively” construction used against Kayishema. How Article 6(3) might be raised against someone who is “directing” and “personally” participating in genocidal acts is, once again, not a question that the Prosecutor stopped to consider; and, as a result, the *Musema* Chamber was led into the same conceptual contortions as *Kayishema & Ruzindana*.

In its discussion of Article 6(3), the *Musema* Chamber replicated almost word for word the discussion in *Akayesu*.<sup>28</sup> It is remarkable, in view of the fact that in the meantime a civilian had been convicted pursuant to Article 7(3) of the ICTY Statute in *Čelebići*, and also that the Statute of the International Criminal Court – clearly providing for civilian superior responsibility – had long been adopted,<sup>29</sup> that the *Akayesu* Chamber’s unsupported pronouncement about the contentiousness of the Article 6(3) doctrine’s “extension” to the civilian sphere should resurface in *Musema*, in the words (of paragraph 135): “it is disputable whether the principle of individual criminal responsibility, articulated in Article 6(3) of the Statute, should be applied to civilians.”

Tacked on to the end of the recycled commentary on Article 6(3) is a brief reference to the *Čelebići* case. As happened in *Kayishema & Ruzindana*, the *Musema* Chamber took away the wrong lesson from *Čelebići*. It noted with approval the Tokyo Tribunal’s decision in *Muto*, where, as the Chamber saw it, “influential power” was held up as a sufficient foothold for superior responsibility (paragraph 139). (Thus the

25. *Musema*, *supra* note 3, at paras. 12–13.

26. *Id.*, Ann. A, at para. 4.6.

27. *Id.*, Ann. A, at para. 5 (emphasis added).

28. *Musema*, *supra* note 3, para. 127 = *Akayesu*, *supra* note 9, para. 487; and, respectively, 129–130 = 488, 131 = 489, 132–134 = 490, and 135 = 491.

29. See ICC Statute, Art. 28 (UN Doc. A/CONF.183/9 (1998), reprinted in 37 ILM 999), originally adopted in July 1998, and therefore available also to the *Akayesu* Chamber.

critique by the Appeals Chamber, reproduced above, applies with equal force to *Musema*.) That *Musema*'s alleged command relationship to others was adjudged on a standard far different (and much lower) than that of "effective control" is evident from the following assertion by the Chamber in that case (paragraph 140):

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. (Emphasis added.)

There follows a somewhat confused discussion in which the terms "influence," "power of control," "authority deriving from influence," and so forth, appear without definition, legal grounding, or cohesion (paragraphs 142–144). But the most surprising feature of this section is the concluding paragraph's unexplained turn-about on the question of the doctrine's "extension": "the Chamber finds that the definition of individual criminal responsibility, as provided under Article 6(3) of the Statute, applies not only to the military but also to persons exercising civilian authority as superiors" (paragraph 148; contradicting paragraph 135, excerpted above). (And note the inexactness of the last phrase: innumerable people exercise "civilian authority" from superior positions without thereby becoming "superiors" in the sense of Article 6(3).)

In the end, the Chamber limited *Musema*'s command responsibility to the actions of his tea-factory workers. The Chamber was not satisfied on the evidence that the defendant had sufficient influence over other sections of the prefecture's population (paragraph 882). So what kind of influence did *Musema* exercise over his workers, such that they became legally his subordinates, within the meaning of international humanitarian law? Here it is necessary to quote the Chamber at length (paragraph 880):

The Chamber 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. The Chamber notes that *Musema* 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. The Chamber also finds that, by virtue of these powers, *Musema* was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes. The Chamber finds that *Musema* exercised de jure power and de facto control over Tea Factory employees and the resources of the Tea Factory.

This reasoning is misguided. It does not distinguish *Musema* from any ordinary factory director. Yet it cannot be that all business managers stand liable to be convicted for international crimes perpetrated by their employees for the reason only that they were linked to them through commonplace ties of labour. The commander envisaged by the Article 6(3)

doctrine, in its classical (martial) form, was connected to his or her troops not by a mere supervisory link; he or she was at the core of a combat unit with powers of life and death over defenceless subjects, whether these were civilians in a combat zone or prisoners of war; and he or she was sworn to abide by the laws of war.

It is arguable, of course, that a manager who learns of crimes committed by employees of his or her organisation is under an obligation to make a report to the competent authorities. This is especially so if the crimes were committed on the premises, or were committed against the organisation itself, or involved the use of organisational resources. To do otherwise would expose the manager to a variety of actions, including, in the extreme case, a charge of aiding and abetting the crimes in question. If the crimes in such a case were to fall within the jurisdiction of the ICTR, the action against the manager for aiding and abetting would be pursuant to Article 6(1). But to assume, as the *Musema* Chamber did, that there is room for the Article 6(3) doctrine in cases of bare managerial responsibility is to beg the question about the proper application of the doctrine to civilian superiors.

As I shall argue in more detail below, the issue is not that Musema could exercise “psychological pressure” on his employees to abstain from crimes against Tutsi; this did not begin to make him their commander. The question rather is whether Musema and his factory colleagues had, in the course of Rwanda’s civil war, reinvented themselves as a militia-like unit, with Musema at its head, such that an international duty fell upon him to control the actions of his subordinates.

The Chamber convicted Musema, *inter alia*, for command responsibility for genocide. As in *Kayishema & Ruzindana*, the Chamber’s method was to fix liability under Article 6(1), then, on the same facts, with no concern for the possibility of tautology, to add a conviction for Article 6(3). Here is an illustration of the method, with its attendant conceptual oddities:<sup>30</sup>

The Chamber finds that Musema incurs individual criminal responsibility for the above-mentioned acts, on the basis of the provisions of Article 6(1) of the Statute, for having ordered and, by his presence and participation, having aided and abetted in the murder of members of the Tutsi ethnic group [...]. (Paragraph 891.)

The Chamber notes that [...] it has been established that employees of the Gisovu Tea Factory were among the attackers. [...] (Paragraph 893.)

The Chamber finds that it has also been established that Musema was the superior of said employees [...]. 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*<sup>31</sup> 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

30. See also, *supra* note 3, paras. 897–900, 902–906, 911–915, 917–919, and 921–925.

31. This modest touch seems particularly out of place here.

reasonable measures to prevent the commission of said acts by his subordinates [...]. (Paragraph 894, emphasis added.)

How to explain this confusion? It is possible that the Chamber mistook the key ingredients of proof of a superior-subordinate relationship (namely, that there should be “ordering,” “leading,” and so on, between the superior and the subordinates, for if there is not it is unlikely that a subordination relationship holds)<sup>32</sup> for the conditions of application of the doctrine itself (so that Article 6(3) comes into play only when such ordering and leading result in the commission of crimes). Yet for the Article 6(3) doctrine to be useful it must cover ground beyond the obvious or easy reach of Article 6(1).<sup>33</sup> It achieves this by casting a long shadow over a commander who ignores subordinates’ crimes, or who pleads lack of evidence as to his or her direct role in the commission of such crimes.

### 3.4. *Prosecutor v. Delalić, Mucić, Delić, Landžo*

In *Čelebići* three of the defendants were charged with command responsibility for crimes committed in a prison camp by camp guards and by others entering the camp. Mucić was “commander” of the camp; Delić was his “deputy” (they held these posts *de facto*, without formal appointment); Delalić, against whom no Article 7(1) allegations were made, held senior positions related to the war effort in an area which included the Čelebići camp (paragraphs 11, 19–20).

Compared with the ICTR indictments referred to above, the indictment in *Čelebići* was different in kind, notably in this respect: the Article 7(3) charges were generally distinguished from those laid under Article 7(1). For example:

Delalic and [...] Mucic, along with [...] Delic [whose alleged Article 7(1) liability was discussed in a separate section of the indictment], are charged under count 38 of the Indictment with wilfully causing great suffering or serious injury, a grave breach punishable under Article 2(c) of the Statute, and under count 39 of the Indictment with cruel treatment, a violation of the laws or customs of war punishable under Article 3 of the Statute, for their alleged acts and omissions *as superiors* with respect to the mistreatment of Nedeljko Draganic, alleged to have been perpetrated by their subordinates. (Paragraph 24, emphasis added.)

The defendants were not additionally exposed to an Article 7(1) charge for mistreating Draganic.<sup>34</sup> In the event, Delalić was acquitted on all counts

32. *See infra*, Section 4.

33. *See* my concluding remarks.

34. However, there are instances even in this indictment where the ICTY Prosecutor (who, by the way, is also the ICTR Prosecutor) cumulatively charged Art. 7(1) and Art. 7(3) liability for the same acts. Indeed, the Chamber noted at one point (para. 778) that the defendant Delić had been charged cumulatively in this fashion for two crimes in which he was *the only participant!* The Chamber dismissed these Art. 7(3) allegations without further comment.

because he was not found to have had, in his various capacities, responsibility for the operation of the Čelebići prison, let alone superior authority over its personnel (paragraphs 686, 698, 721). Delić was convicted pursuant only to Article 7(1) charges; he was not found to have been a superior within the meaning of Article 7(3).

We may briefly consider the Chamber's reasons for this conclusion on Delić's non-liability as superior, for they reveal a careful attempt (in contra-distinction with the above-mentioned judgements of the ICTR) not to allow the ripples of the Article 7(3) doctrine to spread too far. Firstly, the Chamber considered evidence on the defendant's relationship to the guards (paragraphs 798–805). It concluded (at paragraph 806):

[...] this evidence is indicative of a degree of influence Hazim Delic had in the Čelebići prison-camp on some occasions, in the criminal mistreatment of detainees. However, this influence could be attributable to the guards' fear of an intimidating and morally delinquent individual [...] and is not, on the facts before this Trial Chamber, of itself indicative of the superior authority of Mr. Delic sufficient to attribute superior responsibility to him.

It is noteworthy that "influence" – even the considerable degree of influence that Delić exercised within the camp – was not determinative for the Chamber. In fact the Chamber appears to have treated it as a factor that was not even particularly significant, perhaps because it was the wrong *kind* of influence, like that of a bully or a rabble-rouser. (Surely it is true that bullying and rabble-rousing are not part of the job-description of a military commander, nor does his or her authority rest on such characteristics.)

In the second place, the Chamber considered the sense in which Delić was Mucić's "deputy." It found that the evidence indicated that "Delić was tasked with assisting [...] Mucic by organising and arranging for the daily activities in the Čelebići prison-camp. However, it cannot be said to indicate that he had actual command authority in the sense that he could issue orders and punish and prevent the criminal acts of subordinates." (Paragraph 809.) In other words, Delić was not part of the prison's chain of command, whose primary link in fact was that between Mucić and the guards.

Mucić was convicted of command responsibility (he was found guilty also pursuant to Article 7(1), but of one count only, concerning the unlawful confinement of civilians).<sup>35</sup> The Chamber found no evidence against Mucić of active or direct participation in any violence or mistreatment alleged by the Prosecutor.<sup>36</sup> "The criminal liability of Mr. Mucic has arisen entirely from his failure to exercise his superior authority for the beneficial purpose of the detainees" (paragraph 1248). This, and the

35. Čelebići, *supra* note 7, para. 1237.

36. *Id.*, at paras. 1239–1240.

fact that it was the first such conviction of recent times, means that Mucić's case is an important starting point for understanding the law of command responsibility.

One must take note, of course, of the ways in which Mucić's circumstances differ from those of defendants appearing before the ICTR. In the first place, Mucić was not accused of genocide. This should not matter if the Article 6(3)/7(3) doctrine applies in the same way to all crimes. Second, in contrast with the Rwandan accused, Mucić's position and his appointment to it were not *de jure*. The Čelebići prison camp was hurriedly established to accommodate civil-war detainees. Mucić became responsible for its operations but not pursuant to a formal appointment.<sup>37</sup> This, too, should be of no consequence; for the reasons given below, if there is *de facto* control and actual exercise of command, the absence of *de jure* authority is irrelevant.

Third, if Mucić was a civilian, he was, *prima facie*, less of a civilian than a tea-factory director or a prefect. There was evidence that Mucić could use the neighbouring barracks to detain guards for misbehaviour, and that he reported to military headquarters (paragraph 767). Nevertheless, he did not have a military rank and it was not alleged that he took part in military operations in the ordinary sense. He merely administered an operation ancillary to the military campaign. Kayishema, as prefect, had some control over the *gendarmerie*, a military force, but in substance he was a civil administrator, to whom the Article 6(3) doctrine had to be "extended." It seems to me that the same is true of Mucić: in substance he was a civilian caught up in the war effort.

A fourth point is that Mucić operated within the closed environment of a prison, where arguably a presumption operates (as against the superintendent of any prison) that he was under a duty to prevent the abuse of prisoners by guards at pain of being held responsible for any such acts of abuse; arguably, also, it is easier to impute knowledge of criminal activity to a person who is in charge of a prison. Does this fact (if it is a fact) make the "extension" of the doctrine to Mucić appear less pronounced (and its rationale less easy to universalise) than its application to Rwandan civil administrators? I shall argue that the underlying principles are the same in both cases.

#### 4. TRAPPINGS OF AUTHORITY

As I indicated above, the doctrine of command responsibility in its classical form provided a basis for holding military commanders responsible

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37. See *id.*, at paras. 737, 752–753.



for criminal activities of their subordinates.<sup>38</sup> When the doctrine first received judicial recognition in an international jurisdiction, in the aftermath of World War II, it was treated as a law with customary force, albeit a “law of war.” This is evident in the jurisprudence of the Nuremberg Military Tribunals considered in *Čelebići* (see, e.g., the *Medical* case, at paragraph 338). The doctrine became part of conventional international law for the first time in 1977, in the form of Article 86 (“Failure to act”) of Additional Protocol I to the 1949 Geneva Conventions, whose second clause declares:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information 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 feasible measures within their power to prevent or repress the breach.<sup>39</sup>

This formulation uses the neutral “superior” (as opposed to “commander”), although the immediately following provision, Article 87, entitled “Duty of commanders,” makes clear that the context is still a military one: “the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress [...],” etc.<sup>40</sup> Even so, the *Čelebići* Chamber argued that the extension of the Article 7(3) doctrine to non-military superiors was also in accordance with customary law (paragraph 357). In fact the Chamber did not seem to consider it an “extension” at all – at least not one that had not been completed already by 1945 – because its argument that the doctrine applies equally to persons in positions of civilian authority was based on judgements rendered against certain German and Japanese war criminals, such as industrialists Flick and Weiss and Foreign Minister Koki Hirota (paragraphs 357–362). This argument is not particularly convincing given the ambiguities of the World War II judgements on this point and the fact that the law was not always consistently applied by the Military Tribunals.

In my view the better approach to establishing the scope of the doctrine is to describe the essential ingredients of the superior-subordinate relationship, in its classical setting, and then to apply the doctrine wherever these ingredients (and, of course, the other two elements of command liability) are found, irrespective of the military or non-military nature of

38. “The doctrine of command responsibility is clearly articulated and anchored on [*sic*] the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops. It is a species of vicarious responsibility through which military discipline is regulated and ensured.” *Čelebići*, *supra* note 7, at para. 647.

39. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 12 December 1977, 1125 UNTS 3.

40. *Id.*

the case. (This is hardly a novel technique in law, where often the underlying principle is sought.) There is no legal reason why an underlying principle that does not betray the marks of a traditional military setting (and I am assuming at this stage that that is the character of the principle in the present case) should be confined to a setting of that kind.

In the event, the *Čelebići* Chamber effectively adopted this approach when it came to consider “the issue which lies at the very heart” of the doctrine (paragraph 364) – *i.e.*, the character of the superior-subordinate relationship. The Chamber satisfactorily resolved the issue, in my view, if only in broad-brush strokes. I propose in what follows to insert some of the missing detail.

Basing itself on World War II cases, the Chamber concluded that the imposition of command responsibility necessarily was limited to persons in positions of *command* (paragraph 370). (It may be ascertained from the Chamber’s comments that the positions need not have been lawfully created, and that an incumbent need not have been lawfully appointed, whether by official act, instrument, etc.) How are we to conceptualise a position of command? It cannot be the *position* itself that matters because any occupant under any circumstances would then be a commander, even if, in fact, he or she enjoyed no power or control whatsoever. Hence a position of command must be understood as a position from which “powers of command” are exercised (paragraph 368); and “command” is to be analysed into the notion of “control”, *i.e.*, “the actual possession [...] of powers of control” over the actions of others (paragraphs 370, 377).

“Control” calls for further analysis because of the differences to be expected in degree and quality. Again, the control need not have been grounded in law or tradition; *de facto* control will suffice (paragraphs 371–375). The Chamber acknowledged that “there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences” (paragraph 377), and used the term “effective control” to denote the applicable standard. If the threshold is met by demonstration of effective control, international law imposes “an obligation to take action to prevent the commission of war crimes” (paragraph 373), and the defendant is brought within the grasp of the doctrine inhering in Article 7(3).

The *Čelebići* Chamber did not attempt to elaborate, in the abstract, the meaning of “effective control,” other than by stating that the alleged superior must have had “the material ability to prevent and punish the commission of [the alleged subordinates’] offences” (paragraph 378). So, for a better understanding of effective control, it becomes necessary to turn to the Chamber’s decision to attribute command responsibility to Mucić.

On the evidence, the Chamber found that the guards and Delić obeyed and executed Mucić’s orders (paragraph 739); that on a large number of matters having to do with the prison’s operations, the guards sought Mucić’s permission (paragraph 765); that Mucić was in charge of order

in the prison and had the means to enforce it (paragraph 767); that he had the power to discipline the guards by confining them to barracks or by making reports about them to his own superiors (paragraph 767); that he was “in a position to assist those detainees who were mistreated” (paragraph 741); that he was perceived by detainees and by guards as “the embodiment of authority” (paragraphs 743–750); one witness stated that he had “felt the authority of Mr. Mucic when [...] guards stopped mistreating two prisoners when they heard that Mr. Mucic was coming” (paragraph 747); and so on. Mucic was found to have “manifest[ed] all the powers and functions of a formal appointment” (paragraph 750), even though neither his position nor his appointment to it were *de jure*.

If this evidence goes to prove effective control, and so a superior-subordinate relationship between Mucic and the guards, it seems that control is premised on the following essential ingredients: a purposeful organisation of individuals in the form of a hierarchical unit;<sup>41</sup> the existence and general awareness of a chain of command; a generally accepted practice of issuing and obeying orders;<sup>42</sup> the expectation among subordinates that disobedience or insubordination may trigger a disciplinary response; and the means in the superior effectively to suppress or punish unauthorised action.<sup>43</sup> These main ingredients could be reduced, in number, to three:

1. The superior-subordinate relationship must have the appearance of a formal relationship of authority (even if it is not formally constituted), and it must subsist within a goal-directed hierarchical organisation or institution (even if it is *ad hoc* or transitory). *Prima facie* this would not exclude prison camps, local or higher government administrations, tea-factory administrations, political associations or movements, and so forth. But *prima facie* it would exclude, for example, vigilante groups and hooligans.
2. There must be a power in the alleged superior to give orders to the alleged subordinates, such power resting on a mutual expectation (as between the superior and the subordinates) that the superior's orders will be obeyed – something to be distinguished from obedience achieved through bullying, or by submission to “an intimidating and

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41. “The Appeals Chamber understands the necessity to prove that the perpetrator was the ‘subordinate’ of the accused [...] to mean that the relevant accused is, by virtue of his or her position, senior in some sort of formal or informal hierarchy to the perpetrator.” Čelebići Appeal, *supra* note 8, at para. 303.

42. Further on the importance of orders to the constitution of the relationship, see Prosecutor v. Žlatko Aleksovski, Judgement, Case No. IT-95-14/1, 25 June 1999 (hereinafter ‘Aleksovski’), paras. 104, 135.

43. As stated in the World War II Japanese case of Toyoda (referred to in Čelebići, *supra* note 7, para. 373), “The responsibility for discipline in the situation facing the battle commander cannot, in the view of practical military men, be placed in any hands other than his own.”

morally delinquent individual” (the above-cited characterisation of Delić).<sup>44</sup>

3. There must be a known power in the superior to control and discipline the criminal behaviour of subordinates in meaningful and effective ways, such as by intervening to restrain a subordinate or by directly suspending his or her services to the unit, at least until such time as the matter can be reviewed by another (higher) authority. More generally, a superior must be able “to take every appropriate measure to ensure the maintenance of order” in the ranks.<sup>45</sup>

If it is accepted that these requirements underpin superior-subordinate relationships, a critical two-pronged conclusion follows. On the one hand, the requirements do not carry what I referred to above as the marks of a traditional military setting. Nothing limits their application to such a setting. Thus it follows that the Article 6(3)/7(3) doctrine encompasses non-military superiors. But there is another side. Relationships in respect of which the requirements in question are satisfied by definition will *closely resemble* military relationships. This means that the doctrine of command responsibility may only be carried a short distance from its original home. When the relationship between the superior and his or her alleged subordinates is not strongly similar to a relationship of military command, we know that we have crossed the boundary of the doctrine’s sphere of application.

These observations help to clarify, I think, certain pronouncements of the *Čelebići* Chamber that are not fully explained or justified by the Chamber. In the first place, there is the Chamber’s tantalizing claim, at the end of its discussion of Article 7(3) liability, that it “shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is *similar* to that of military commanders.”<sup>46</sup> The Chamber did not explain the sense of “similar” in this context.

There is, moreover, the Chamber’s assertion given in reply to the Prosecutor’s contention that it is sufficient for a finding of responsibility that there exists, on the part of the defendant, a *de facto* exercise of authority even in the absence of *de jure* authority (at paragraph 646):

The Trial Chamber agrees with this view, *provided the exercise of de facto authority is accompanied by the trappings of the exercise of de jure authority*. By this, the Trial Chamber means the perpetrator of the underlying offence must be the subordinate of the person of higher rank and under his direct or indirect control. (Emphasis added.)

44. *Čelebići*, *supra* note 7, at para. 806.

45. *Id.*, at para. 767.

46. *Id.*, at para. 378 (emphasis added). I cited the International Law Commission’s relevant statement in my discussion of the Akayesu case, above.

The Chamber was not explicit about the required “trappings,” merely referring the reader to its concept of the superior-subordinate relationship. It seems to me that the trappings are none other than the “essential ingredients” of that relationship, as I have expressed them in the three points above. They are what makes any such relationship “similar” to the paradigmatic relationship, of an army commander to his or her troops. “Effective control” entails not only a certain *degree* but also a certain *quality* of control (to put it another way: a necessary concomitant of the degree of control envisaged by the *Čelebići* Chamber’s standard is a particular framework of discourse and practice to which the conduct of superior and subordinate is referable). It is one thing to say that a superior holds his or her *position de facto*, suggesting that the position has been assumed, quite another to say that the *character of the authority* exercised from that position itself is purely *de facto*, suggesting that the “authority” is a kind of unstructured brute force or powerful influence. A bona fide Article 7(3) commander may be “*de facto*” in the former sense, but the quality of his or her authority will not be “*de facto*” in the latter sense. The ICTR’s judgements in the cases of *Kayishema & Ruzindana* and *Musema* fail to distinguish these ideas.<sup>47</sup> Though it was insightful of the *Čelebići* Chamber to see that the exercise of *de facto* authority must, for the purposes of Article 7(3), be accompanied by the trappings of the exercise of *de jure* authority, this requirement is, finally, unremarkable, given the need to distinguish Article 7(3) superiors from mere rabble-rousers and other persons holding sway crudely, incompletely, and transiently. To imagine (as the aforementioned ICTR jurisprudence does) that *de facto* influence without the trappings of *de jure* command is sufficient to attract superior responsibility is, in the extreme case, to bring conjugal and parent-offspring relations within reach of the doctrine; this is both the logical consequence of that approach and its *reductio ad absurdum*.

But there is another principle brought to light in the above discussion. Recall the words of Articles 6(3)/7(3): “[...] if he or she knew or had reason to know that the subordinate was about to commit such acts [...]” – such acts being any of the statutory crimes. There is an implication here that commission of proscribed acts cannot be the command unit’s *main purpose*, for if such were its purpose there would be no question about the superior not knowing or not having reason to know that statutory crimes were being committed by his or her subordinates. In other words, application of the doctrine of command responsibility is limited to organised groups *whose aims are prima facie legitimate* and whose members

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47. Note that the ICTR’s latest judgement (which was handed down after submission of this article), *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, 7 June 2001, paras. 49–53, gives a correct account of the thesis in *Čelebići* and briefly refers to the need for *de jure* “trappings.” Bagilishema was acquitted on all counts, mainly due to a paucity of evidence about his alleged commission of crimes and presence at crime scenes. In no instance was the nature of the superior-subordinate relationship a critical issue.

commit crimes exceptionally rather than routinely. Again, the limiting paradigm is a country's armed forces. Even in the course of an illegal war of aggression, military personnel cannot shrug off international duties, for the organisation to which they belong does not, by pursuing that war, thereby become illegal, and its members remain sworn to abide by the laws of war. At some distance from this paradigm, Mafia bosses cannot be regarded as subject to the doctrine of command responsibility, and will not be convicted for stray crimes of their "subordinates," even if their relationship to those persons bears all the characteristics summarised in my three points above. The thought that a member of a group with purely criminal objectives is burdened by an international duty to enforce the law within the group is paradoxical and unsustainable. Therefore, Musema and Kayishema, who were, according to the ICTR Prosecutor, at the head of bands formed for no other purpose than to murder Tutsi civilians, cannot have been acting within the sphere of application of the Article 6(3) doctrine.

The Appeals Chamber upheld the *Čelebići* Trial Chamber's legal and factual findings, and may also be understood as having confirmed, in the following passage, that *de facto* subordination must share much of the character of *de jure* subordination to come within Article 7(3) (paragraph 197):

Mucic's argument that *de facto* status must be equivalent to *de jure* status for the purposes of superior responsibility is misplaced. Although the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield *substantially similar powers* of control over subordinates to be held criminally responsible for their acts. (Emphasis added.)

"Substantially similar" may be understood as a reference to those "essential ingredients" which I isolated above. The Appeals Chamber also decisively rejected the idea that the superior-subordinate relationship could be founded on anything less than "effective control" as conceptualised by the Trial Chamber (paragraph 257):

The Prosecution [...] espouses [...] a theory that in fact 'substantial influence' alone may suffice, in that 'where a person's powers of influence amount to a *sufficient* degree of authority or control in the circumstances to put that person in a position to take preventative action, a failure to do so may result in criminal liability.' This latter standard appears to envisage a lower threshold of control than an effective control threshold; indeed, *it is unclear that in its natural sense the concept of 'substantial influence' entails any necessary notion of control at all.* (Emphasis added.)

The Appeals Chamber continued (paragraph 266):

[C]ustomary 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 the

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

The extent and source of the error in *Kayishema & Ruzindana* and *Musema* should now be clear. Both ICTR Chambers miscalculated the status of the two defendants (Kayishema and Musema) by using the wrong standard. By way of a loose notion of “influence” or “control,” and by failing to see that the Article 6(3) doctrine in consequence of its conceptual underpinnings must be confined to structures strongly resembling relationships of military command, the Trial Chambers did not systematically seek evidence to satisfy the above-mentioned essential ingredients of the superior-subordinate relationship. It would have been of interest to know whether Musema did in fact appropriate a ready-made civil hierarchy of tea-factory workers, twisting it into a private militia. Similarly, it would have been useful to articulate the argument showing that Kayishema transformed ordinary public administration personnel (among others) into a killing machine under his control. There being no proof on these points, neither defendant should have been burdened with the international duty affecting commanders. But in any case, as I suggested above, it is doubtful that the Article 6(3) doctrine has any bearing on members of groups specifically formed or transformed to pursue purely criminal aims, no matter that their original aims (in the case of readapted groups) may have been legitimate.

## 5. CONCLUDING REMARKS

I began this article by asking about the circumstances under which a civilian, who neither directed nor committed nor aided the commission of crimes of genocide, may nevertheless be convicted on a count of genocide for crimes committed by others on the strength of a superior-liability doctrine. The discussion has shown that the jurisprudence on this question, if it is confined to the ICTR cases, is not clear. It would seem that Kayishema and Musema were convicted of command responsibility *because* they directed or committed or aided the commission of the crimes in question. Yet a proper understanding of the Article 6(3) doctrine, for which it is necessary to rely on *Čelebići* and on the judgement on appeal in that case, shows that this provision of the law is meant to target omissions where the duty to act is that highly particular duty which affects commanders.

Of course, omissions are also (if only implicitly) the subject of Article 6(1), and therefore it seems wrong to understand Article 6(3) as an independent head of liability, standing apart from Article 6(1). The *Akayesu* Chamber’s claim that Article 6(3) “constitutes something of an exception to the principles articulated in Article 6(1), as it derives from military law” (cited above under Section 3.1, third paragraph), surely is incorrect. A

commander who knows of imminent or past crimes of his or her subordinates and takes no action to prevent or punish them arguably is guilty of a special form of *complicity*, his or her substantial contribution to those crimes (or to future crimes committed with the spirit of impunity affecting the rank and file) being the breach of a positive duty to exercise given or assumed powers of intervention. Although this is not a matter that can be dealt with adequately here, Articles 6 and 7 are best read holistically, with Articles 6(1)/7(1) understood as the “powerhouse” clauses, the Article 6(3)/7(3) doctrine being a special case of a form of liability already included in Articles 6(1)/7(1).<sup>48</sup> It is for *this* reason that cumulative Article 6(1)/6(3) or Article 7(1)/7(3) convictions for the same acts should not be allowed.

The last issue, which I shall consider only briefly, is the superior’s *mens rea*. The *Akayesu* Chamber maintained, without clear justification, that “it is certainly proper to ensure that there has been malicious intent” in the superior.<sup>49</sup> Could this be true of genocide, even if it is not generally the case, for the reason that the specific intent of genocide has been regarded as the very essence of the crime, meaning that no-one who does not have the *dolus specialis* of genocide should be convicted of the crime?<sup>50</sup> Schabas also has reservations about mixing genocide with command responsibility because of “particular problems with respect to the intent element”:

Unlike many war crimes, genocide requires the prosecution to establish the highest level of specific intent. But command responsibility is an offence of negligence, and exactly how a specific intent offence can be committed by negligence remains a paradox. [...] [I]t must be wrong in law to consider that genocide may be committed by a commander who is merely negligent.<sup>51</sup>

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48. The Appeals Chamber in the *Tadić* case, in obvious reference to the terms of Art. 7(1) (and, inferentially, Art. 6(1)), said that

*all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. [...] [I]t is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there.*

(Prosecutor v. Dužko Tadić, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, para. 190, emphasis added.) “Plan, instigate, order, commit, and aid and abet” are the words of Arts. 6(1)/7(1), which the Appeals Chamber seems prepared to treat as a core from which other forms of liability may be derived, or to which other forms may be added.

49. Cited above under Section 3.1, third paragraph.

50. See, e.g., *Akayesu*, *supra* note 9, at para. 498: “Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged.”

51. Schabas, *supra* note 13, at 305 and 312.



There are two problems here. Schabas implies (“Unlike *many* war crimes [...]”) that there are some war crimes which, like genocide, resist the application of the doctrine of command responsibility. The prospect of picking and choosing, for no compelling reason that I can see, among international crimes to which, according to a criterion presently unarticulated, superior liability applies or does not apply, is not enticing. But I also do not agree with Schabas that command responsibility is an offence of negligence. It is more accurately described as a specialised form of omission liability with a definite mental requirement, namely a knowledge element, which has received extensive consideration in ICTY’s case law.<sup>52</sup> That the Article 6(3)/7(3) doctrine involves the breach of a duty does not, *ipso facto*, make it a negligence offence (and, conversely, negligence offences do not have knowledge elements and do not coincide with the class of omission offences). I think the better position is that if the commander *had* the specific intent of genocide, that is, deliberately breached his or her duty to intervene *intending* by that to assist his or her subordinates to commit genocide (or to cover up genocide), then the commander comes within the easy grasp of Articles 6(1)/7(1) and superior-liability charges are redundant.<sup>53</sup> But for the defendant superior who did not follow up *not* because he or she shared the subordinates’ *dolus specialis* but for one of a myriad other illegitimate reasons, there is no reason that I can see not to convict this person pursuant to Articles 6(3)/7(3) for genocide. Genocide was, after all, the only crime which the defendant superior, by his or her deliberate acts of omission, associated himself or herself with.

If genocide does not seem a likely candidate for an “omission” offence, this may have something to do with the juridical history of genocide, which at this stage lacks any real depth. In the meantime we have learned that genocide is a rather common crime, recurring in many parts of the world, with hundreds, sometimes thousands, of ordinary people participating in killings and other atrocities. The legal process should recognise (and does recognise) a variety of forms of participation in crimes of genocide, with differences in culpability left to be reflected in differences in sentencing.

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52. See, for example, Čelebići, *supra* note 7, at paras. 379–393; Aleksovski, *supra* note 42, at paras. 79–80; and Prosecutor v. Tihomir Blaškić, Judgement, Case No. IT-95-14, 3 March 2000, paras. 304–332.

53. See also the remarks of the ICTY Trial Chamber in Prosecutor v. Dario Kordić & Mario Čerkez, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 371:

The Trial Chamber is of the view that 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). Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under Article 7(1).

See, to the same effect, Krstić, *supra* note 6, at para. 605.

Command responsibility minus the *dolus specialis*, and more traditional varieties of complicity (whose usual *mens rea* is knowledge of the *principal's* intent) are two such forms.

In conclusion, civilian command responsibility for genocide certainly is a demonstrable form of individual criminal liability, even though proof of the superior-subordinate relationship is likely to be difficult unless the defendant was part of a formally legitimate quasi-martial organisation, such as a prison camp, or in control of a militia-like unit with a formally legitimate role, such as a police force. The two existing convictions pursuant to the doctrine would suggest otherwise, but in fact they are deeply flawed.