Vanderbilt Journal of Transnational Law

Volume 43
Issue 2 *March 2010*

Article 2

2010

Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings

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ABSTRACT

This Article examines the notion of superior responsibility of civilians for international crimes committed in civilian settings. The doctrine of superior responsibility grew out of the military doctrine of command responsibility, and its evolution is informed by this origin. Jurisprudence and academic writers emphasize that the doctrine is applicable to civilian superiors of military or paramilitary organizations, but there has never been a detailed analysis of the doctrine's relevance and applicability in civilian settings. The Article argues that the claim that customary international law extends the doctrine of superior responsibility to civilians, let alone in civilian settings, is inaccurate. In judicial practice, including recent rulings, civilians have rarely been convicted under the doctrine even as leaders of military organizations, and when they have, these convictions were generally secondary to their direct responsibility. The Article elaborates various challenges to the application of the doctrine in civilian settings, particularly in the determination of the existence of a superior–subordinate relationship. Despite the difficulties in transposing the doctrine to the civilian sphere, the Article argues that, as a matter of policy, civilians should also be subject to the doctrine. It also contends that the normative distinctions between civilians and military superiors, today entrenched in Article 28 of the International Criminal Court Statute, are neither absolutely necessary nor practicable.

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TABLE OF CONTENTS

I. INTRODUCTION

In 2007, the International Criminal Tribunal for Rwanda (ICTR) Appeals Chamber confirmed the conviction of Ferdinand Nahimana for public and direct incitement to genocide and crimes against humanity, and it sentenced him to thirty years imprisonment.[1] Nahimana, a former university lecturer and former director of the Rwandan Ministry of Information, was the founder and director of RTLM, the only private radio station operating in Rwanda in 1993–1994, which served as a platform for a genocidal media campaign

1. Nahimana v. Prosecutor, Case No. ICTR–99–52–A, Judgment (Nov. 28, 2007) (affirming conviction on some counts and reducing sentence from life imprisonment to thirty years).

against the Tutsi population in Rwanda.[2] Nahimana himself never broadcast on RTLM. He was convicted under the doctrine of superior responsibility for failing to prevent the broadcasters from inciting to genocide in their programs or to punish them for having done so.[3]

The doctrine of superior responsibility, known traditionally as command responsibility,[4] is well established, although its precise nature and content remain controversial.[5] One jurisprudential line has been to treat it as responsibility of the superior for the crimes committed by his subordinates,[6] whereas another has been to treat it as a separate offence of dereliction by the superior of his duty to properly supervise his subordinates.[7] Recent jurisprudence supports the latter interpretation.[8]

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2. Prosecutor v. Nahimana, Case No. ICTR–IT–99–52–T, Judgment, ¶ 5, 486–88 (Dec. 3, 2003); *see also* Prosecutor v. Bikindi, Case No. ICTR–01–72–T, Judgment, ¶ 122 (Dec. 2, 2008) (concluding that RTLM was a vehicle for anti-Tutsi propaganda as of at least the end of 1993).

3. For an overview of aspects of the *Nahimana* Appeal Judgment other than superior responsibility, see Sophia Kagan, *The "Media Case" Before the Rwanda Tribunal: The* Nahimana et al. *Appeal Judgment*, 3 HAGUE JUST. J. 83 (2008), *available at* http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_3(1)/Media_Case_Kagan_EN.pdf (discussing the decision generally); Catharine A. MacKinnon, *International Decisions:* Prosecutor v. Nahimana, Brayagwize, & Ngeze, 103 AM. J. INT'L L. 97, 97–103 (2009) (discussing the appeals court's temporal analysis of the incitement to violence).

4. For discussion see *infra* text accompanying notes 9–14.

5. *See* Beatrice I. Bonafé, *Finding a Proper Role for Command Responsibility*, 5 J. INT'L CRIM. JUST. 599, 604–11 (2007) (discussing the limited application of superior responsibility in practice); Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 458–71 (2001) (discussing the divergence of superior responsibility in international law from similar principles in municipal law); Arthur T. O'Reilly, *Command Responsibility: A Call to Realign the Doctrine with Principles*, 20 AM. U. INT'L L. REV. 71, 99–101 (2004–2005) (arguing that superior responsibility should be applied less broadly).

6. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR–96–4–T, Judgment, ¶ 471 (Sept. 2, 1998) (discussing "the principle of the liability of a commander for the acts of his subordinates"); 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 558–60 (2005); Payam Akhavan, *The Crime of Genocide in the ICTR Jurisprudence*, 3 J. INT'L CRIM. JUST. 989, 993 (2005) ("This doctrine provides that a superior is criminally responsible for the acts committed by his subordinates."); *see also* Kevin Jon Heller, *Rome Statute in Comparative Perspective* 29–30 (Melbourne Law Sch., Legal Studies Research Paper No. 370, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304539 (stating that Article 28 holds superiors responsible for the actual crimes of their subordinates). The generic masculine pronoun will be used here to refer to both genders.

7. Nicholas Tsagourias, *Command Responsibility and the Principle of Individual Criminal Responsibility: A Critical Analysis of International Jurisprudence*, *in* ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE NAVI PILLAY (William Schabas ed., forthcoming Brill 2010) (manuscript at 1–2, on file with the author) (internal citations omitted); *see, e.g.*, Prosecutor v. Hadžihasanović & Kubura, Case No. IT–01–47–T, Judgment, ¶ 75 (Mar. 15, 2006) (treating failure to prevent or punish crimes as a separate offense from the crimes).

8. The two interpretations may be compared to the distinction between vicarious liability and a direct duty of care. Prosecutor v. Orić, Case No. IT–03–68–T,

Four elements must be proven for a person to be held responsible as a superior. In general terms, these are:[9] (1) an international crime has been perpetrated by someone other than the defendant; (2) there existed a superior–subordinate relationship between the defendant and the perpetrator; (3) the defendant as a superior knew or had reason to know that the subordinate was about to commit such crimes or had done so;[10] and (4) the defendant as a superior failed to take the necessary and reasonable measures to prevent such crimes or punish the perpetrator.[11] Under the International Criminal Court (ICC) Statute, there is a further requirement of a causal link between the superior's dereliction of duty and the commission of the crime.[12] The International Criminal Tribunal for the former Yugoslavia (ICTY) and ICTR Statutes do not distinguish between types of superiors, while ICC Statute Article 28 expressly provides for the responsibility of both military commanders (and persons effectively acting as military commanders) and other superiors.[13]

The doctrine of superior responsibility grew out of the military doctrine of command responsibility, and its evolution is informed by this origin.[14] This raises the question on which this Article focuses—whether the doctrine is suited for application in a civilian setting. Part II examines existing jurisprudence and argues that the claim that superior responsibility extends to civilians as a matter of a customary law is inaccurate. Judicial practice demonstrates that civilians have rarely been convicted under the doctrine and that, when they have, these convictions were generally secondary to their

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Judgment, ¶ 293 (June 30, 2006); HÉCTOR OLÁSOLO, THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES 106 (2009); Tsagourias, supra note 7 (manuscript at 12, on file with the author) (describing command liability as a separate type of liability for a failure to act); Chantal Meloni, *Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?*, 5 J. INT'L CRIM. JUST. 619, 633–37 (2007) (discussing the implications of treating superior responsibility as a separate offense). For a nuanced interpretation of ICC Statute Article 28 see Volker Nerlich, *Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?*, 5 J. INT'L CRIM. JUST. 665, 668–71 (2007) (arguing that in most contexts, superiors should only be held accountable for failing to control their subordinates, not for the subordinates' actual crimes).

9. *Orić*, Case No. IT–03–68–T, ¶ 293.

10. This standard of mens rea applies to both the ICTY and ICTR Statutes. The ICC Statute provides different standards, as discussed *infra* Part II.A.

11. *Orić*, Case No. IT–03–68–T, ¶ 293.

12. Prosecutor v. Bemba, Case No. ICC–01/05–01/08, Decision on the Confirmation of Charges, ¶ 423 (June 15, 2009).

13. Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Statute of the International Criminal Tribunal for Rwanda art. 6, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute]; Statute of the International Tribunal for the Former Yugoslavia art. 7, May 25, 1993, 32 I.L.M. 1203 [hereinafter ICTY Statute].

14. Bonafé, *supra* note 5, at 601–02.

direct responsibility. Part III elaborates various challenges to the application of the doctrine in civilian settings, particularly with respect to the determination of the existence of a superior–subordinate relationship. Part IV examines the *Nahimana* case in light of the preceding analysis and conclusions. The analysis gives rise to the question whether the doctrine should be transposed to the civilian sphere. Part V considers superior responsibility in civilian settings *de lege ferenda* and argues that, despite the difficulties that arise, civilians should also be subject to the doctrine. It also argues against the normative distinctions between civilians and military superiors that are entrenched in Article 28 of the ICC Statute.

II. CIVILIAN SUPERIOR RESPONSIBILITY: *LEX LATA*

A. *International Instruments*

Command responsibility is codified in Additional Protocol I to the Geneva Conventions. Article 87(1) provides:[15]

> The High Contracting Parties and 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 and to report to competent authorities breaches of the Conventions and of this Protocol.

The responsibility of "superiors" is triggered, according to Article 86(2),[16] "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." This provision is not limited to military commanders, although it has been interpreted as applying primarily to them.[17] In

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15. Prosecutor v. Delalić (Čelebići Case), Case No. IT–96–21–T, Judgment, ¶ 734 (Nov. 16, 1998) ("The criminal responsibility of commanders for the unlawful conduct of their subordinates is a very well settled norm of customary and conventional international law. It is now a provision of Article 7(3) of the Statute of the International Tribunal and articles 86 and 87 of Additional Protocol I."). For a historical account of the development of command responsibility see William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, (1973).

16. Shany and Michaeli argue that Article 86(2) concerns the responsibility of military commanders for the crimes committed by subordinates under their command *and* control, while Article 87(1) concerns the responsibility of military commanders for dereliction of duty to control persons under their command *or* control. Yuval Shany & Keren R. Michaeli, *The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility*, 34 N.Y.U. J. INT'L L. & POL. 797, 840 (2002).

17. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1011 (1987). For a proposed interpretation of the relationship between art 86(2) and art 87(1), see Shany & Michaeli, *supra* note 16, at 863–64.

Čelebići, the ICTY relied on the International Law Commission (ILC) commentary on the Draft Code of Crimes against Mankind[18] to point out that Articles 86(2) and 87(1) extend to civilian superiors. Yet the ILC had explained that "this principle [of responsibility of superiors] applies *not only to the immediate superior* of a subordinate, but *also to his other superiors* in the military chain of command or the governmental hierarchy if the necessary criteria are met."[19] Thus, the ILC appears to have envisaged civilians only as indirect superiors of military personnel (whose direct superiors are also military personnel). It does not appear to have considered the possibility of a civilian setting where neither superior nor subordinates perform military or paramilitary functions. Furthermore, Additional Protocol I leaves certain issues unresolved. First, it establishes responsibility only for breaches of the Additional Protocol and the Geneva Conventions, namely war crimes.[20] Such crimes are by definition related to armed conflict and are therefore more likely to be committed by military or paramilitary personnel.[21] Second, Additional Protocol I does not establish superior responsibility for crimes against humanity or genocide as such.

ICTR Statute Article 6(3) and ICTY Statute Article 7(3) (hereinafter Article 6/7(3)) contain a provision resembling Article 86(2):

> The fact that any of the acts referred to in . . . the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he 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.

Both tribunals have interpreted their respective statutes as permitting the attachment of responsibility to both military and non-military superiors.[22]

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18. *Delalić*, Case No. IT–96–21–T, ¶ 378.

19. *Commentary on the Articles of the Draft Code of Crimes Against the Peace and Security of Mankind*, [1996] 2 Y.B. INT'L L. COMM'N 25, U.N. Doc. A/CA.4/SER.A/1996/Add.1 (Part 2) (emphasis added).

20. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 87, June 8, 1977, 1125 U.N.T.S. 17512 [hereinafter Protocol I].

21. *Id.* art. 3.

22. For the ICTY, see *Delalić*, Case No. IT–96–21–T, ¶ 363 ("Thus, it must be concluded that the applicability of the principle of superior responsibility in Article 7(3) extends not only to military commanders but also to individuals in non-military positions of superior authority."). For the ICTR, see Prosecutor v. Bagilishema, Case No. ICTR–95–1A–T, Judgment, ¶ 42 (June. 7, 2001) ("There can be no doubt, therefore, that the doctrine of command responsibility extends beyond the responsibility of military commanders to encompass civilian superiors in positions of authority."). For more discussion of cases, see also *infra* Parts II.B.2–3.

Finally, ICC Statute Article 28 expressly provides for the responsibility of both military commanders (and persons effectively acting as military commanders) and other superiors:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and 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:
>
> (i) 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
>
> (ii) 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.
>
> (b) With respect to superior and subordinate relationships 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, where:
>
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[23]

Article 28 distinguishes the responsibility of military commanders and persons effectively acting as military commanders from the responsibility of other superiors in two respects. First, the standard of *mens rea* required for the latter ("knew, or consciously disregarded information which clearly indicated") is higher than that required for the former ("knew or, owing to the circumstances at the time, should have known").[24] Second, a civilian superior's responsibility is expressly limited to crimes that are related to the activities within his effective responsibility and control.[25]

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23. Rome Statute, *supra* note 13, art. 28.
24. *Id.*
25. *Id.*

B. *Jurisprudence on Superior Responsibility of Civilians*

The history of the doctrine of command responsibility dates back to antiquity, but international prosecutions based on the doctrine did not occur until the aftermath of World War II.[26] Post-World War II jurisprudence was overwhelmingly concerned with superiors in the military.[27] The criminal responsibility of civilians only arose in full force in the ICTY and ICTR.[28] In fact, even the leading post-1990 case on the applicability of the doctrine to civilians, the ICTY's *Čelebići*, concerned individuals whose statuses were not entirely clear and who operated in a paramilitary setting.[29]

The ICTY in *Čelebići* and subsequent cases—as well as the ICTR—have posited that the responsibility of civilians for their subordinates' actions is a customary legal principle,[30] reflected in post-World War II jurisprudence.[31] Yet as the analysis below reveals, this jurisprudence does not clearly provide the authority asserted by the ad hoc tribunals. The tribunals themselves have rarely considered the superior responsibility of civilians in purely civilian settings.

1. Jurisprudence in the Aftermath of World War II

Despite the absence of express provisions on superior responsibility in its statute, the International Military Tribunal for

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26. For discussion of pre-World War II practice, see Leslie C. Green *Command Responsibility in International Humanitarian Law,* 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 320–27 (1996).

27. On this jurisprudence, see ELIES VAN SLIEDREGT, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW 119–35 (2003) (discussing post-World War II prosecutions); Matthew Lippman, *The Evolution and Scope of Command Responsibility*, 13 LEIDEN J. INT'L L. 139, 142–52 (2000) (same).

28. In the interim period it arose, in a purely military context, with respect to the responsibility of Captain Medina in the US attack in My Lai. However, Medina was indicted (and acquitted) under domestic US law. Note, *Command Responsibility for War Crimes*, 82 YALE L.J. 1274, 1274 n.3 (1973).

29. *See, e.g.*, Prosecutor v. Delalić, Case No. IT–96–21–T, Judgment, ¶ 610 (Nov. 16, 1998) (defendant was appointed coordinator of defense forces and played a key role in military affairs).

30. *Id.* ¶ 333 ("That military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law."). For further examples see Prosecutor v. Blaškić, Case No. IT–95–14–T, Judgment, ¶ 290 (Mar. 3, 2000); Prosecutor v. Musema, Case No. ICTR–96–13–A, Judgment, ¶¶ 127–28 (Jan. 27, 2000); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR–95–1–T, Judgment, ¶¶ 208–12 (May 21, 1999); *Delalić*, Case No. IT–96–21–T, ¶ 343; HENCKAERTS & DOSWALD-BECK, *supra* note 6, at 561; Shany & Michaeli, *supra* note 16, at 803.

31. *See infra* Part II.B.1 (discussing this jurisprudence).

the Far East (Tokyo Tribunal) convicted a number of individuals—both military personnel and civilians—on that basis.

The indictment in the Tokyo Tribunal contained two separate counts that are relevant for present purposes. Count 54 related to "orders, authorizations and permissions," while Count 55 alleged that the defendants "deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches" of the laws of war.[32] The *Čelebići* Trial Chamber cited four convictions by the Tokyo Tribunal as authorities for civilian superior responsibility, namely those of General Matsui, Prime Minister Tojo, and Foreign Ministers Hirota and Shigemitsu.[33]

General Matsui was, as his title indicates, a military person.[34] He was the commander of the Shanghai Expeditionary Force and Central China Area Army. Hence, his conviction does not constitute a precedent for the principle of superior responsibility of civilians. The tribunal found Prime Minister Tojo guilty of war crimes under Count 54 "for the instruction that prisoners who did not work should not eat,"[35] but made no finding under Count 55. Tojo was found responsible directly rather than for failing to prevent his subordinates from engaging in illegal conduct.[36]

Foreign Ministers Hirota and Shigemitsu were convicted under Count 55 for their failure to adequately act upon reports of war crimes. Hirota received reports of the Nanking atrocities. He took the matter up with the War Ministry and received assurances that the atrocities would be stopped.[37] The tribunal found that, when the atrocities continued, Hirota "was content to rely on assurances which he knew were not being implemented" instead of "insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result."[38] Similarly, during Shigemitsu's term the Allied powers repeatedly protested to the Japanese Foreign Office regarding violations of the laws of armed conflict relating to prisoners-of-war. These protests were met without exception by a denial from the military authorities. The Tribunal held that the circumstances made Shigemitsu suspicious that the treatment of the prisoners was not as it should have been, yet he took no adequate steps to investigate the

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32. 1 THE TOKYO JUDGMENT XV–XVI (B.V.A. Röling & C.F. Rüter eds., 1977).

33. Prosecutor v. Delalić, Case No. IT–96–21–T, Judgment, ¶¶ 357–58 (Nov. 16, 1998).

34. United States v. Araki, Judgment of the International Military Tribunal for the Far East (Nov. 4–12, 1948), *reprinted in* 1 THE TOKYO JUDGMENT, *supra* note 32, at 1, 453.

35. *Id.* at 463.

36. *Id.*

37. *Id.* at 447.

38. *Id.* at 448.

matter.[39] The Tribunal emphasized Shigemitsu's failure to take adequate steps to investigate the matter "although he, as a member of government, bore overhead responsibility for the welfare of prisoners."[40] It held both ministers responsible for failing to induce the government to discharge its obligation to ensure the well-being of prisoners-of-war and civilians under its control.[41] Importantly, neither case involved a claim that the Minister was the direct or indirect superior of the perpetrators or that he could have directly affected their conduct.[42] The ministers' responsibility under Count 55 was based on their dereliction of duty as members of the governmental collective.[43]

Judge Röling, who dissented, would have acquitted both ministers.[44] He had general reservations about reliance on the doctrine and cautioned in particular about holding civilian government officials responsible for the behavior of the army in the field.[45] On the facts, he opined that Hirota did not know of the crimes and that the government was at any rate powerless to act because it "had very little influence with the Services."[46] With respect to Shigemitsu, he pointed out that the minister had no legal obligation to probe and investigate the information he had received,[47] as required by the doctrine of superior responsibility.

In *Čelebići*, the ICTY also relied on two post-World War II cases heard by national military tribunals.[48] One is *Flick*,[49] in which a German industrialist was accused, along with his nephew Weiss, of committing war crimes and crimes against humanity through his industrial enterprises by enslaving and deporting members of the civilian populations of occupied territories, enslaving concentration camp inmates, and using prisoners-of-war in war operations. The U.S. military tribunal emphasized "[t]he active steps taken by Weiss

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39. United States v. Araki, *supra* note 34, at 458.

40. *Id.*

41. *Id.* at 447, 458–59.

42. For critiques of the Ministers' conviction on the basis of superior responsibility, see GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 104–05 (2009); Daniel Watt, *Stepping Forward or Stumbling Back?: Command Responsibility for Failure to Act, Civilian Superiors and the International Criminal Court*, 17 DALHOUSIE J. LEGAL STUD. 141, 163–65 (2008).

43. ILIAS BANTEKAS, PRINCIPLES OF DIRECT AND SUPERIOR RESPONSIBILITY IN INTERNATIONAL HUMANITARIAN LAW 106 (2002).

44. United States v. Araki, *supra* note 34, at 1041, 1127, 1133.

45. *Id.* at 1062, 1127.

46. *Id.* at 1124.

47. *Id.* at 1138.

48. Prosecutor v. Delalić, Case No. IT–96–21–T, Judgment, ¶¶ 359–62 (Nov. 16, 1998).

49. Trial of Friedrich Flick and Five Others, IX L.R.T.W.C. 1, U.S. Mil. Tribunal, (Apr. 20, 1947–Dec. 22, 1947).

with the knowledge and approval of Flick." [50] The UN War Crimes Commission's note, on which the Trial Chamber in *Čelebići* relied,[51] says that

> nothing more than "knowledge and approval" of Weiss's acts on the part of Flick is mentioned in the Judgment, but it seems clear that the decision of the Tribunal to find him guilty was an application of the responsibility of a superior for the acts of his inferiors which he has a duty to prevent.[52]

Why this "seems clear" remains unexplained. The tribunal may well have regarded Flick's approval as a positive contribution to Weiss's conduct through tacit permission, in which case Flick's wrongdoing went further than merely not preventing Weiss's conduct.[53]

Another case cited by the Trial Chamber in *Čelebići* is *Roechling*, in which German industrialists were found responsible for ill treatment of forced laborers.[54] The French military tribunal clarified that the defendants were "not accused of having ordered this horrible treatment, but of having permitted it; and indeed supported it, and in addition, of not having done their utmost to put an end to these abuses."[55] The defendants' responsibility, at the basis of the conviction in *Roechling*, appears to have been based on their direct engagement through the "support" of the crimes.[56] It may have been more appropriate to classify it as "aiding and abetting." The last segment of the charge, the failure to put an end to the abuses, may be a more useful example of the application of the doctrine of superior responsibility. However, as will be explained below, there is some incongruity in holding a person responsible for not putting an end to conduct to which he contributed either actively or tacitly.[57]

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50. *Id.* at 20.

51. *Delalić*, Case No. IT–96–21–T, ¶ 360.

52. Trial of Friedric Flick and Five Others, *supra* note 49, at 54.

53. This is the thin line between indirect responsibility for knowingly failing to prevent, and direct responsibility for assisting by silent acquiescence. Under Count 54 of the Tokyo indictment, permission gave rise to direct responsibility. *Compare* Prosecutor v. Orić, Case No. IT–03–68–T, Judgment, ¶¶ 292–93 (June 30, 2006) ("[F]or finding of . . . aiding and abetting, there ought to be a certain contribution to the commission of the principal crime, superior criminal responsibility is characterised by the mere omission of preventing or punishing crimes committed by (subordinate) others."); Prosecutor v. Mpambara, Case No. ICTR–01–65–T, Judgment, ¶ 23 (Sept. 11, 2006) (discussing aiding and abetting liability), *with* Prosecutor v. Kalimanzira, Case No. ICTR–05–88–T, Judgment, ¶ 20 (June. 22, 2009) (discussing omission liability).

54. Prosecutor v. Delalić, Case No. IT–96–21–T, Judgment, ¶ 361 (Nov. 16, 1998) (citing The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Roechling, Indictment and Judgment of the General Tribunal of the Military Government of the French Zone of Occupation in Germany, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, vol. XIV, app. B, p. 1061).

55. *Id.* at 1072–74.

56. *Id.*

57. *See infra* text accompanying note 106 (discussing this incongruity).

In conclusion, the ICTY's assertion in *Čelebići* that superior responsibility was an established principle of customary international law with respect to civilian superiors, particularly in civilian settings, is at least open to question. The Tokyo judgments, while supporting the notion of civilian superior responsibility (but not in a civilian setting), are fraught with difficulties. The other cases do not clearly address superior responsibility and instead focus on direct responsibility. Be that as it may, the jurisprudence of the ICTY and ICTR in those cases where civilians were indicted under Article 6/7(3) may have created—or at least contributed to the development of—customary international law on the matter.[58] The next subpart examines this jurisprudence.

2. ICTY Case Law

The ICTY case law to date does not contain any instance of an indictment on the basis of superior responsibility in a civilian setting. The existing case law concerns civilians operating in military settings, where their civilian status is sometimes almost accidental. In *Čelebići* and *Aleksovski*, the defendants were the de facto commanders of prison camps where combatants and civilians were detained.[59] They were responsible for conditions in the camps, with de facto authority over the officers, guards, and detainees.[60] In both cases, the defendants were held responsible for failing to repress crimes that their subordinates had committed.[61] They were also held directly responsible for other crimes.[62] In neither case did the ICTY make a clear finding on whether the defendants were civilians.[63]

In a few other cases where civilians were indicted under the principle of superior responsibility, they were all acquitted. Moreover, the settings were not civilian. Dario Kordić was a civilian leading militia forces in the Bosnian–Croat community in Bosnia-

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58. Both international jurisprudence and secondary literature regard international jurisprudence as generating customary international law, while this is a function traditionally reserved to states. The validity of reliance on international jurisprudence to identify customary international law is outside the scope of this article.

59. Prosecutor v. Delalić, Case No. IT–96–21, Indictment, ¶¶ 2–3 (Mar. 21, 1996); Prosecutor v. Aleksovski, Case No. IT–95–14, Indictment, ¶ 26 (Nov. 10, 1995).

60. Prosecutor v. Aleksovski, Case No. IT–95–14/1–T, Judgment, ¶ 27 (June. 25, 1999); Prosecutor v. Delalić, Case No. IT–96–21–T, Judgment, ¶¶ 737, 1240, 1243 (Nov. 16, 1998).

61. *Aleksovski*, Case No. IT–95–14/1–T, ¶ 31; *Delalić*, Case No. IT–96–21–T, ¶ 775 ("Mr. Mucić is accordingly criminally responsible for the acts of the personnel in the Čelebići prison-camp, on the basis of the principle of superior responsibility.").

62. *Aleksovski*, Case No. IT–95–14/1–T, ¶ 378; *Delalić*, Case No. IT–96–21–T, ¶ 1237.

63. Prosecutor v. Aleksovski, Case No. IT–95–14/1–A, Judgment, ¶ 76 (Mar. 24, 2000); *Aleksovski*, Case No. IT–95–14/1–T, ¶ 103; *Delalić*, Case No. IT–96–21–T, ¶ 735.

Herzegovina.[64] He was acquitted of responsibility with respect to crimes committed by the militias because he did not possess the authority to prevent the crimes or punish the perpetrators.[65] Milan Milutinović was the President of Serbia in 1998 and 1999.[66] He was indicted in connection with crimes committed in the first half of 1999 in Kosovo by the military forces of the Federal Republic of Yugoslavia, those of the Republic of Serbia, and the internal security forces governed by the Serb Ministry of Interior. He was acquitted because he did not have direct effective control over the direct perpetrators of the crimes.[67] Ljube Boškoski was Minister of Interior of the Former Yugoslav Republic of Macedonia (FYROM). He was indicted for failure to punish his subordinate members of a police unit for crimes they committed in August 2001, of which he came to know only after their commission. The ICTY Trial Chamber found that Boškoski had the power to control and direct the police[68] but that he had taken appropriate measures to trigger an enforcement mechanism against the perpetrators of the crimes, thus discharging his responsibility for the purposes of Article 7(3) of the Statute.[69]

Another civilian indicted under the doctrine, with respect to military subordinates, was Slobodan Milošević, former and late President of the Federal Republic of Yugoslavia and the Republic of Serbia. He was indicted under the doctrine of superior responsibility for crimes that the Yugoslav army, of which he was commander-in-chief, and the Serb internal security forces committed. He died before the conclusion of proceedings.[70]

Finally, Radovan Karadzic, former President of Republika Srpska in Bosnia and Herzegovina, was indicted in connection with crimes that the Bosnian Serb forces and "Bosnian Serb Political and Governmental Organs" perpetrated.[71] The indictment does not define the latter, but they are presumably civilian organizations. At the time of writing, this case is pending appeal.[72]

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64. Prosecutor v. Kordić, Case No. IT–95–14/2–T, Judgment, ¶ 5 (Feb. 26, 2001).

65. *Id.* ¶¶ 839–41.

66. *Profile: Milan Milutinović*, BBC NEWS, Jan. 27, 2003, http://news.bbc.co.uk/2/hi/europe/1935954.stm.

67. Prosecutor v. Milutinović, Case No. ICTY–05–87–T, Judgment, Vol. 3, ¶¶ 106, 160, 1207 (Feb. 26, 2009).

68. Prosecutor v. Boškoski, Case No. ICTY-04-82-T, Judgment, ¶ 514 (July 19, 2008).

69. At the time of writing, this case is pending appeal.

70. Prosecutor v. Milošević, Case No. IT–02–54, Case Information Sheet, http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan.pdf.

71. Prosecutor v. Karadžić, Case No. IT–95–5/18–PT, Third Amended Indictment, ¶¶ 3, 32–35 (Feb. 27, 2009).

72. Prosecutor v. Karadžić, Case No. IT–95–5/18, Case Information Sheet, http://www.icty.org/x/cases/karadzic/ cis/en/cis_karadzic_en.pdf.

3. ICTR Case Law

Seven civilians were indicted in the ICTR prior to Nahimana. Five of them were government officials, three of whom were acquitted, each for a different reason. Jean Paul Akayesu was bourgmestre of Taba.[73] He was indicted for both direct and superior responsibility for crimes against humanity and war crimes[74] committed by the *Interahamwe*, whom the judgment referred to as "armed local militia."[75] According to the indictment, Akayesu knew that the crimes were being committed, facilitated them, and encouraged them.[76] The ICTR expressed some reservation about relying upon superior responsibility with respect to civilians, in view of Judge Röling's opinion in the Tokyo Trial. The ICTR then said that it should examine each case on its merits.[77] In any event, the ICTR found that "a superior/subordinate relationship existed between the Accused and the *Interahamwe* who were at the bureau communal." The ICTR then puzzlingly noted that there was no allegation in the indictment that the *Interahamwe* were subordinates of the accused, although the indictment relied on Article 6(3).[78] Accordingly, it acquitted Akayesu of responsibility as a superior.[79]

Ignace Bagilishema, bourgmestre of Mabanza, was indicted for genocide and crimes against humanity under ICTR Statute Articles 6(1) and 6(3).[80] The ICTR acquitted him of all charges because the crimes themselves had not been proven beyond a reasonable doubt. In one case, the Trial Chamber found that a criminal act had been committed by subordinates of Bagilishema, but it was not proven that

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73. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 77 (Sept. 2, 1998); Prosecutor v. Akayesu, Case No. ICTR–96–4–I, Amended Indictment, ¶¶ 2–4 (June 17, 1997).

74. These are violations of Article 3 common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol 2.

75. *Akayesu*, Case No. ICTR–96–4–T, ¶ 691. The *Interahamwe* were the youth movement of the MRND. "During the war, the term also covered anyone who had anti-Tutsi tendencies, irrespective of their political background, and who collaborated with the MRND youth." *Id.* ¶ 151.

76. *Akayesu*, Case No. ICTR–96–4–I, ¶¶ 12A, 12B.

77. *Id.* ¶ 491.

78. *Id.* ¶ 691.

79. The Trial Chamber in *Čelebići* held that the "law does not know of a universal superior without a corresponding subordinate." Prosecutor v. Delalić, Case No. IT–96–21–T, Judgment, ¶ 647 (Nov. 16, 1998). However, the statement of the Trial Chamber in *Akayesu* may be related to the procedural defect of the absence *in the indictment* of the claim that Akayesu was the superior of the *Interahamwe* or that they were his subordinates. *Akayesu*, Case No. ICTR–96–4–T, ¶ 471.

80. Prosecutor v. Bagilishema, Case No. ICTR–95–01A–A, Judgment, ¶ 4 (July 3, 2002).

he knew or had reason to know of the crime.[81] Thus, the ICTR could not apply the doctrine on factual grounds.

Juvénal Kajelijeli was bourgmestre of Mukingo and founder and leader of the Mukingo *Interahamwe*.[82] The Trial Chamber convicted him on the basis of both direct and superior responsibility with respect to acts of the *Interahamwe*.[83] However, the Appeals Chamber determined that where convictions are possible under both types of responsibility in relation to the same count based on the same facts, direct responsibility should prevail over superior responsibility to the exclusion of the latter.[84] Accordingly, the ICTR convicted Kajelijeli under Article 6(1) and acquitted him of the charges based on his status as superior.[85]

The ICTR convicted two government officials on the basis of superior responsibility. Jean Kambanda held office as Prime Minister of Rwanda from April 8, 1994, to July 17, 1994. He pled guilty and was convicted of genocide; genocide-related crimes; and crimes against humanity in connection with crimes committed by his subordinate prefects, bourgmestres, other administrative functionaries, and various armed forces and groups.[86]

Clément Kayishema was the prefect of Kibuye.[87] He was convicted of genocide and related crimes, having ordered and orchestrated attacks by both administrative bodies and law enforcement agencies (bourgmestres, communal police, and gendarmerie)[88] against Tutsis. He participated, aided, and abetted in them.[89] The ICTR convicted both Kambanda and Kayishema

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81. *Bagilishema*, Case No. ICTR–95–01A–A, ¶ 30.

82. Kajelijelii v. Prosecutor, Case No. ICTR–98–44A–A, Judgment, ¶ 2 (May 23, 2005).

83. Prosecutor v. Kajelijelii, Case No. ICTR–98–44A–T, Judgment and Sentence, ¶¶ 836–45 (Dec. 1, 2003).

84. See *Kajelijeli*, Case No. ICTR–98–44A–A, ¶ 81, following the approach of the ICTY in both Prosecutor v. Kordić & Cerkez, Case No. IT–95–14/2–A, Judgment, ¶¶ 34–35 (Dec. 17, 2004), and Prosecutor v. Blaškić, Case No. IT–95–14-A, Judgment, ¶¶ 91–92 (July 29, 2004), that where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of direct responsibility only, and consider the accused's superior position as an aggravating factor in sentencing. For expressions of different views in the ICTY on the relationship between 6/7(1) and 6/7(3), see Prosecutor v. Dyilo, Case No. ICC–01/04–01/06, Pre-Trial Chamber I Decision on Confirmation of Charges, ¶ 321 (Jan. 27, 2007) and Prosecutor v. Orić, Case No. IT–03–68–T, Judgment, ¶¶ 341–43 (June 30, 2006).

85. *Kajelijelii*, Case No. ICTR–98–44A–A, ¶ 325.

86. Prosecutor v. Kambanda, Case No. ICTR 97–23–S, Judgment and Sentence, ¶¶ 39–40 (Sept. 4, 1998).

87. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR–95–1–A, Judgment, ¶ 5 (June 1, 2001).

88. *Id.* ¶ 475, Verdict.

89. *Id.* ¶ 473.

concurrently under articles 6(1) and 6(3).[90] These cases concerned both civilian and paramilitary settings.[91]

Two other civilian defendants were Serushago and Musema. Omar Serushago was a de facto leader of the *Interahamwe* in Gisenyi.[92] The ICTR convicted him under both Articles 6(1) and 6(3) of genocide and crimes against humanity for having ordered the *Interahamwe* to execute victims.[93] Alfred Musema was the director of the public Gisovu Tea Factory and a member of various regional government authorities that addressed socioeconomic and developmental matters.[94] According to the indictment, at various locations and times, Musema directed armed individuals to attack Tutsis seeking refuge.[95] He also personally attacked and killed persons seeking refuge; committed acts of rape; and encouraged others to capture, rape, and kill Tutsi women.[96] The ICTR convicted Musema of genocide and crimes against humanity.[97] The Trial Chamber found him responsible under Article 6(1) of the Statute for having ordered and, by his presence and participation, aided and abetted in the crimes.[98] In addition, the Chamber found that Musema incurred superior responsibility under Article 6(3) of the Statute[99] with respect to acts by employees of the Gisovu Tea Factory, whom the Chamber identified as Musema's subordinates.[100]

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90. According to the court, Kambanda admitted:

> that he knew or should have known that persons for whom he was responsible were committing crimes of massacre upon Tutsi and that he failed to prevent them or punish the perpetrators. Jean Kambanda admits that he was an eye witness to the massacres of Tutsi and also had knowledge of them from regular reports of prefets, and cabinet discussions.

Kambanda, Case No. ICTR-97-23-S, ¶¶ 39(xii), 40. The indictment does not support such a conviction under Article 6(3). The allegation in section 3.11 of the indictment does not constitute the facts of any of the counts of which Kambanda was convicted: the allegation in section 3.15, that Kambanda did not respond to the question "how to secure the protection of surviving children," may more appropriately constitute complicity by omission than failure to prevent. *Id.* ¶¶ 39, 40.

91. *Kayishema*, Case No. ICTR-95-1-T, ¶¶ 26-50; *Kambanda*, Case No. ICTR-97-23-S, ¶ 39.

92. Prosecutor v. Serushago, Case No. 98-39-S, Sentence, ¶ 29 (Feb. 5, 1999).

93. *Id.* ¶ 26. Because of the one incident, Serushago was convicted only under Article 6(3). *Serushago*, Case No. ICTR-98-39-S, ¶ 26; Prosecutor v. Serushago, Case No. ICTR-98-39-I, Indictment, ¶ 5.21 (Oct. 8, 1998).

94. Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment, ¶¶ 12-16 (Jan. 27, 2000).

95. Prosecutor v. Musema, Case No. ICTR-96-13-I, Amended Indictment, ¶ 5.

96. *Id.* ¶ 4.

97. *See Musema*, Case No. ICTR-96-13-A, ¶¶ 936 (genocide), 951, 958, 961, 968 (crimes against humanity). Some of the convictions for crimes against humanity were quashed on appeal.

98. *Id.* ¶¶ 891, 897, 903, 908, 912, 917, 922.

99. *Id.* ¶¶ 895, 900, 906, 915, 920, 925.

100. *Id.*

The Tribunal noted that rather than take measures to prevent his subordinates from acting, Musema abetted in the commission of the crimes.[101]

C. *Assessment of the Ad Hoc Tribunals' Case Law*

In the ICTY, there have been few indictments under the principle of superior responsibility of persons who were clearly civilians. This is not surprising, given that the parties to the conflict in the former Yugoslavia were primarily armed groups. Civilian superiors were, for the most part, members of the top political echelons and in charge of military and paramilitary forces.[102] The successful convictions on the basis of superior responsibility of persons who were not clearly part of the military hierarchy were of individuals whose civilian status remained undecided and who operated in a paramilitary setting rather than in a civilian one.[103]

In contrast, in Rwanda the armed conflict was secondary to the genocide, which involved people from all walks of life. Civilians were directly involved at all levels of perpetration. At the same time, all seven superior responsibility indictments of civilians prior to *Nahimana* were concurrent with and secondary to indictments under Article 6(1).[104] Superior responsibility seems to have served, at times, to encompass a variety of relationships that generate responsibility, which could more appropriately have been classified as instances of aiding and abetting or joint criminal enterprise.[105] Indeed, a concurrent conviction under Articles 6(1) and 6(3) makes little sense; to convict a person for failing to prevent a crime that he

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101. *Id.* ¶¶ 894, 905, 914, 919, 924.

102. Prosecutor v. Delacić, Case No. IT–96–21, Indictment, ¶¶ 3–6 (Mar. 19, 1996) (describing the authority of defendants); Prosecutor v. Aleksovski, Case No. IT–95–14, Indictment, ¶¶ 8–21 (Nov. 1995) (same).

103. *Delacić*, Case No. IT–96–21, ¶¶ 3–6 (Mar. 19, 1996).

104. *See infra* text accompanying note 198 (discussing *Serushago*, where the ICTR convicted the defendant under Article 6(3) of its statute for having "played a leading role" in the crime).

105. *See, e.g.*, Prosecutor v. Mpambara, Case No. ICTR–01–65–T, Judgment, ¶¶ 21–27 (Sept. 11, 2006) (distinguishing between three types of omission and then proceeding to confuse them, presenting the ICTY's *Blaškić* as one of superior responsibility based on Article 6/7(1)). On the need to distinguish between the various forms, see generally Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L CRIM. JUST. 159, 162–67 (2007). The Secretary-General in his report on establishing the ICTY also mentions together the responsibility of superiors both for ordering the commission of crimes and for failing to prevent them. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 56, U.N. Doc. S/25704 (May 3, 1993).

ordered and participated in committing borders on the absurd.[106] The few successful convictions on the basis of superior responsibility in the ICTR were all concurrent with convictions under Article 6(1), prior to the Bagilishema Appeal Judgment that changed the practice. These convictions would not have been possible under current practice.

In fact, despite repeated statements to the effect that civilian superior responsibility is an established doctrine in the ad hoc tribunals,[107] the entire jurisprudence of the ICTY and ICTR prior to *Nahimana* offers only two instances of conviction solely on the basis of superior responsibility, both of which concern military or paramilitary persons.[108] *Nahimana* is the first case in which either tribunal convicted a civilian solely (or even properly) on the basis of his superior responsibility in a purely civilian setting.[109] It demonstrates a leveling of the playing field between civilians and military personnel and has been hailed as a "giant leap forward" in the development of the civilian superior responsibility doctrine.[110]

The uniqueness of the *Nahimana* case likely reflects doctrinal and practical challenges to the application of the doctrine of superior responsibility in civilian settings. The following Part examines some of these challenges.

III. CHALLENGES IN APPLYING THE PRINCIPLE OF SUPERIOR RESPONSIBILITY TO CIVILIAN SETTINGS

A. *The Source of the Obligation to Prevent or Punish in a Civilian Setting*

Superior responsibility is based on failure to act. It is thus incurred only where a legal duty exists to prevent the commission of crimes.[111] With respect to persons acting as military commanders,[112]

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106. Guénaël Mettraux, *Current Developments*, 1 INT'L CRIM. L. REV. 261, 272–73 (2001); Alexander Zahar, *Command Responsibility of Civilian Superiors for Genocide*, 14 LEIDEN J. INT'L L. 591, 591–602 (2001).

107. Jamie A. Williamson, *Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda*, 13 CRIM. L.F. 365, 366 (2002).

108. Prosecutor v. Hadžihasanović & Kubura, Case No. IT–01–47–T, Judgment, ¶ 2075 (Mar. 15, 2006).

109. Nahimana v. Prosecutor, Case No. ICTR–99–52–A, Judgment, ¶¶ 1044–52 (Nov. 28, 2007).

110. Gregory S. Gordon, *"A War of Media, Words, Newspapers, and Radio Stations": The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 43 VA. J. INT'L L. 140, 189–91 (2004).

111. Prosecutor v. Orić, Case No. IT–03–68–T, Judgment, ¶ 326 (June 30, 3006); Prosecutor v. Delacić, Case No. IT–96–21–T, Judgment, ¶¶ 333–34 (Nov. 16, 1998); United States v. Araki, *supra* note 34, at 1041, 1063. The present analysis does not address issues concerning the duty to punish, which raises difficulties of its own.

Article 87(1) of Additional Protocol I[113] "provides the basis of, and defines the contours of, the imputed criminal responsibility" under the Statutes of the ad hoc tribunals.[114] The ad hoc tribunals have, at numerous times, noted that superior responsibility is a customary legal principle.[115] This does not automatically expand the scope of Article 87(1) *ratione materiae*. Even with respect to military settings, Article 87(1) or its customary equivalent can only serve as a source of obligation to prevent violations of the Geneva Conventions and Additional Protocol I. It does not provide a duty to prevent crimes against humanity or genocide,[116] nor does it automatically apply during a non-international armed conflict.[117] In *Čelebići*, the ICTY noted that Article 87(1) imposes the duty to prevent the commission of violations of "international humanitarian law."[118] The ICTY's convictions under the doctrine of superior responsibility were, for the most part, limited to violations of the laws or customs of war and to grave breaches of the Fourth Geneva Convention.[119] However, in both tribunals, the prosecution and the judgments themselves relied on the doctrine of superior responsibility also with respect to genocide and crimes against humanity but did not explain the expansion of the doctrine beyond war crimes.[120] As for non-international armed

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112. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 369 (2d ed., 1999). *But see* Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment, ¶ 147 (Jan. 27, 2000) (suggesting that Article 86(2) also applies to civilian superiors).

113. The High Contracting Parties and 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 and to report to competent authorities breaches of the Conventions and of this Protocol.

Protocol I, *supra* note 20, art. 87.

114. *Delacić*, Case No. IT-96-21-T, ¶ 334.

115. Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 73 (July 29, 2004); Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-T, Judgment, ¶ 189 (Mar. 15, 2006); Prosecutor v. Aleksovski, Case No. IT-95-14/I-T, Judgment, ¶ 73 (June 25, 1999).

116. That is the case unless, however, the underlying facts also constitute war crimes.

117. *See* INT'L COMM. OF THE RED CROSS, *supra* note 17, at 561 (speaking in terms of being a Party to a conflict).

118. *Delacić*, Case No. IT-96-21-T, ¶ 334.

119. Prosecutor v. Blaskić, Case No. IT-95-14-T, Judgment, (Mar. 3, 2000); *Aleksovski*, Case No. IT-95-14/1-T, ¶¶ 211-29; *Delacić*, Case No. IT-96-21-T, ¶ 1285.

120. Kordić was indicted for crime against humanity under the doctrine (Count 29) but was acquitted of all charges. Prosecutor v. Prosecutor v. Kordić & Cerkez, Case No. IT-95-14/2-T, ¶¶ 834-35; Kordić & Cerkez, Case No. IT-95-14/2, Amended Indictment, Counts 1, 7, 10, 11, 21 (Sept. 30, 1998). From *Milutinovic*'s indictment it is impossible to know which crimes were alleged to him under the doctrine; he was found not to have been a superior at all, so that the question of responsibility for specific crimes did not reach deliberation. Prosecutor v. Milutinović, Case No. IT-05-87-T,

conflicts, the ICTY has ruled that the doctrine applies in those instances,[121] while the inclusion of the principle in the statute of the ICTR necessarily indicates that it is regarded as applicable in non-international armed conflicts.[122] At any rate, no parallel obligation expressly existed—at least not until the adoption of the ICC Statute—with respect to civilian superiors in a civilian setting. Consequently, both the jurisprudence and scholars have grappled with identifying sources of civilian superiors' duty to control their subordinates.[123]

Prior to the adoption of Additional Protocol Article 87(1), this matter was pertinent also to military commanders.[124] Thus, in *Yamashita*, one of the earliest and most controversial cases in which a person was convicted on the basis of his superior responsibility, the United States Supreme Court relied on a commander's obligation to ensure certain categories of persons' compliance with the laws of war in specific situations in order to establish a general principle of command responsibility in international law.[125] It also relied, however, on the failure to observe positive obligations that were not related to the status of superiority, such as the obligation of commanders of occupied territories to maintain public order in the territory and ensure the welfare of protected persons.[126]

Judgment, Vol. 3, ¶ 283 (Feb. 26, 2009). The ICTR case law is concerned primarily with genocide and crimes against humanity.

121. Prosecutor v. Hadžihasanović, Case No. IT–01–47–AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 31 (July 16, 2003). *See also Milutinović*, Case No. IT–05–87–T, Vol. 1, ¶ 113 (asserting that the principle of superior responsibility international and non-international armed conflicts); Prosecutor v. Strugar, Case No. ICTY–01–42–T, Judgment, ¶ 357 (Jan. 31, 2005) (asserting that the doctrine of superior responsibility is applicable to both international and internal armed conflicts).

122. *See* Sonja Boelaert- Suominen, *Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War*, 41 VA. J. INT'L L. 747, 772–73 (2001).

123. Watt, *supra* note 42, at 159, 171–72.

124. Protocol I, *supra* note 20, art. 87.

125. The Court mentioned Article 19 of the Tenth Hague Convention "relating to bombardment by naval vessels, [which] provides that commanders in chief of the belligerent vessels 'must see that the above Articles are properly carried out,'" and Article 26 of the Geneva Red Cross Convention of 1929, "for the amelioration of the condition of the wounded and sick in armies in the field, makes it 'the duty of the commanders–in–chief of the belligerent armies to provide for the details of execution of the foregoing articles (of the convention) as well as for unforeseen cases.'" Yamashita v. Styer, 327 U.S. 1, 15–16 (1946) (quoting Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention art. 19, Oct. 18, 1907, 36 Stat. 2371; Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field art. 26, July 27, 1929, 47 Stat. 2074).

126. *Id.* at 15–16. For an extensive list of positive obligations, see INT'L COMM. OF THE RED CROSS, *supra* note 17, at 1008–09. Mettraux argues that the responsibility of occupation commanders is an exceptional superior responsibility in that it does not require a chain of command. METTRAUX, *supra* note 42, at 153, 155. Later, however, he rightly argues that the responsibility of an occupation commander may be unrelated to

Yet, it is important to distinguish between an omission which generates direct responsibility and an omission which generates superior responsibility. The former may create an obligation of result, while the latter is an obligation of conduct; the *mens rea* for the former is usually stricter than that of the latter, and only the latter requires establishing a chain of command.[127] The ICTR nonetheless appears to have confused the two. In *Kayishema*, when identifying the source of obligation to control subordinates in the duty to maintain public order, the ICTR said that the question of responsibility arising from a duty to maintain public order "and any corresponding failure to execute such a duty, is a question that is inextricably linked with the issue of command responsibility. This is because under ICTR Statute Article 6(3) a clear duty is imposed upon those in authority, with the requisite means at their disposal, to prevent or punish the commission of a crime."[128] Yet, an obligation to act is not necessarily—let alone inextricably—linked with the issue of command responsibility.[129] An obligation which is not related to the position of superiority should not trigger the application of the superior responsibility doctrine.[130]

The search for a positive obligation to control subordinates also included domestic law.[131] For example, in *Kayishema*, the Trial Chamber was of the opinion that "[i]n light of his [domestic law] duty to maintain public order . . . Kayishema was under a duty to ensure that these subordinates were not attacking those Tutsi seeking refuge

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his superior responsibility. *Id.* at 155. Ratner and Abrams suggested at an earlier stage that spatial factors be used as a means to limit (rather than create) superior responsibility, so as not to set an affirmative duty that is too onerous on the superior. For example, it would be restricted to camps, prisons, police offices or other confined areas under the command of a military or civilian superior. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 129 (1st ed. 1997).

127. *See* METTRAUX, *supra* note 42, at 152 (discussing the establishment of the requisite *mens rea*).

128. Prosecutor v. Kayishema, Case No. ICTR–95–1–T, Judgment, ¶ 202 (May 21, 1999).

129. *Cf.* Prosecutor v. Halilović, Case No. IT–01–48–A, Judgment, ¶ 59 (Oct. 16, 2007) ("[A] police officer may be able to 'prevent and punish' crimes under his jurisdiction, but this would not as such make him a superior (in the sense of Article 7(3) of the Statute) vis–à–vis any perpetrator within that jurisdiction.").

130. METTRAUX, *supra* note 42, at 52; *see also* Prosecutor v. Kalimanzira, Case No. ICTR–05–88–T, Judgment, ¶ 18 (June 22, 2009) ("[S]uperior responsibility under Article 6 (3) . . . does not require proof that an order was given or that authority was exercised to instruct someone to commit a crime, and is aimed at criminalizing an omission to punish or prevent a crime from taking place."). *But see* BANTEKAS, *supra* note 43, at 99–108 (discussing types of command and the extent of liability); Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573, 577 (1999) [hereinafter Bantekas, *Contemporary Law of Superior Responsibility*] ("More specifically, it is a form of complicity through omission.").

131. Nerlich, *supra* note 8, at 671.

in Mubuga Church."[132] Leaving aside the fact that the duty in question was not based on the superior status of the defendant, the reliance on domestic law is problematic. International criminal law is a distinct and separate system from domestic rubrics, and duties from the former to do not simply permeate the latter. It is not that domestic law has no place in the legal analysis. De jure authority, for example, is learned from domestic legal provisions.[133] However, when determining superior status for international criminal purposes, domestic de jure authority should be taken simply as a fact and not as a normative determination that binds the international tribunal.[134] The problem of reliance on domestic law is exacerbated if that law does not provide for criminal responsibility at all.[135] From an international perspective, it would be a disappointing outcome if international criminal responsibility, which aims to remedy the normative flaws and fill the gaps of enforcement in domestic law, were constrained by the very same flaws and gaps.[136] In addition, in

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132. *Kayishema*, Case No. ICTR–95–1–T, ¶ 510; *see also* Prosecutor v. Bagilishema, Case No. ICTR–95–1A–T, Judgment, ¶ 897 (June 7, 2001).

> Had the Accused, as *bourgmestre*, an obligation to maintain order and security in Mabanza *commune*, it would have been a gross breach of this duty for him to have established roadblocks and then failed properly to supervise their operations at a time when there was a high risk that Tutsi civilians would be murdered in connection with them.

Id. The Trial Chamber notes that the prosecution would have to prove "that the Accused was responsible for the administration of those roadblocks because he was involved in their establishment, acquiesced to their continuing existence, or more generally because they came under his control as *bourgmestre*." *Id.* ¶ 1011. *But see* Prosecutor v. Ntagerura, Case No. ICTR–99–46–T, Judgment, ¶ 660 (Feb. 25, 2004) (finding that a domestic obligation to maintain public order could not constitute the source of the obligation because it did not include a criminal sanction).

133. *See, e.g., Kayishema*, Case No. ICTR–95–1–T, ¶¶ 480–83 (analyzing the defendant's *de jure* authority in light of Rwandan domestic law).

134. *See* INT'L COMM. OF THE RED CROSS, *supra* note 17, at 1010 (commenting that "the national law of a State establishes the powers and duties of civilian or military representatives of that State, but international law lays down the way in which they may be exercised").

135. *See, e.g.*, Prosecutor v. Ntagerura, Case No. ICTR–99–46–T, Judgment, ¶ 660 (Feb. 25, 2004) ("[T]he Chamber observes that this legal duty was not mandated by a rule of criminal law. Thus, any omission of this legal duty under Rwandan law, even if proven, does not result in criminal liability under Article 6(1) of the Statute.").

136. In the Tokyo Trial, Judge Röling, in his dissent, relied on domestic law to negate an international legal obligation. He opined that since Japanese law assigned the care of prisoners-of-war exclusively to the war and navy ministries, Foreign Minister Shigemitsu could not be held responsible for failing to discharge this obligation, even though this exclusive assignment was in contravention of the Hague Regulations. United States v. Araki, *supra* note 34, at 1041, 1138 (Röling, J., dissenting). The norm in question did not concern superior responsibility but the government's direct responsibility, although Judge Röling relied on it (more accurately, on its absence) in the context of superior responsibility. 1 THE TOKYO JUDGMENT, *supra* note 32, at XV–XVI.

view of the heterogeneity of domestic criminal laws, application of domestic obligations would result in different treatment of defendants according to the domestic law applicable to their conduct, even if they act similarly and in similar substantive circumstances.[137] This is difficult to reconcile with the right to equality before the law and its institutions.[138]

In the absence of a clear source of obligation, the ad hoc tribunals have in some cases based the obligation to prevent subordinates from committing international crimes simply on the superior status of the defendant or on his effective control over subordinates.[139] However, an obligation based directly on the ability to act effectively creates a Good Samaritan principle as a basis for international criminal responsibility. This problem is not mitigated by the fact that the obligation is limited to superiors since, as discussed in the following subpart, existing jurisprudence often bases superiority itself on the mere ability to influence others.[140] Even if a Good Samaritan doctrine may advance the objective of preventing international crimes,[141] it should be distinguished from superior responsibility.

What was missing from international criminal law until the adoption of the ICC Statute was a doctrine on the civilian superior's obligation to prevent crimes by his subordinates, similar to Additional

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137. BASSIOUNI, *supra* note 112, at 444–45.

138. ICTR Statute, *supra* note 13, art. 20(1); ICTY Statute, *supra* note 13, art. 21(1); International Covenant on Civil and Political Rights art. 14, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); International Convention on the Elimination of All Forms of Racial Discrimination arts. 1, 5, Dec. 21, 1965, 660 U.N.T.S. 195.

139. *See* Prosecutor v. Boškoski, Case No. IT–04–82–T, Judgment, ¶ 407 (July 19, 2008) ("The doctrine of command responsibility is ultimately predicated upon the position of command over and the power to control the acts of subordinates."); Prosecutor v. Halilović, Case No. IT–01–48–T, Judgment, ¶ 38 (Nov. 16, 2005) (noting "this duty to act arises by virtue of a superior's possession of effective control over his subordinates"); Prosecutor v. Strugar, Case No. IT–0–1–42–T, Judgment, ¶ 359 (Jan. 31, 2005) ("It is the position of command over the perpetrator which forms the legal basis for the superior's duty to act . . . ."); Prosecutor v. Delalić, Case No. IT–96–21–T, Judgment, ¶ 377 (Nov. 16, 1998) ("The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates . . . ."). For the ICTR, see Prosecutor v. Kayishema, Case No. ICTR–95–1–T, Judgment, ¶ 202 (May 21, 1999) ("[U]nder Article 6(3) a clear duty is imposed upon those in authority, with the requisite means at their disposal, to prevent or punish the commission of a crime."); Zhu Wenqi, *The Doctrine of Command Responsibility as Applied to Civilian Leaders: The ICTR and the* Kayishema *Case*, *in* INTERNATIONAL LAW IN THE POST-COLD WAR WORLD: ESSAYS IN MEMORY OF LI HAOPEI 373, 377 (Sienho Yee & Tieya Wang eds., 2001) (discussing *Kayishema* and the application of command responsibility to civilian leaders in that case).

140. *See infra* Part III.B (discussing the relationships between influence, effective authority, and de facto authority).

141. BANTEKAS, *supra* note 43, at 88.

Protocol Article 87(1).[142] Even now, for the ad hoc tribunals to rely on such a doctrine it must be established as a matter of customary international law—or at least as a general principle of international law[143]—that the ICTY has determined could be derived from existing national systems of law.[144] The doctrine of superior responsibility is indeed familiar to many legal systems, but it does not always fulfill the explicit requirements of Article 6/7(3). For example, the *mens rea* required under municipal systems is generally more stringent than that specified under Article 6/7(3).[145] Accordingly, identifying the doctrine as a general principle of international law is problematic.

In conclusion, jurisprudence and scholarship have effectively glossed over the source of the obligation to control subordinates, particularly with respect to civilians and even more specifically in civilian settings. Formally, ICC Statute Article 28 resolves this matter by basing it on the superior–subordinate relationship. Therefore, this relationship must be identified even more precisely.

B. *De Facto Authority of Civilian Superiors*

For a person to be regarded as a superior, he must have a position of command (in a military context) or authority (a more general term, applicable in both military and civilian settings).[146] Authority is reflected in a hierarchical relationship, "which distinguishes . . . superiors from mere rabble-rousers or other persons

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142. Bantekas, *Contemporary Law of Superior Responsibility*, *supra* note 130, at 574–75.

143. The restriction of the ICTY's jurisdiction *ratione materiae* to customary law was intended to ensure that the Security Council does not create or purport to legislate the applicable law. The U.N. Secretary–General, in his report on the establishment of the ICTY, mentioned the possibility of recourse to general principles of international law in specific contexts. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, *supra* note 105, ¶¶ 58, 123, 124. If this rationale nonetheless permits reliance on general principles in certain contexts, it can also permit it in other contexts.

144. Prosecutor v. Erdemović, Case No. IT–96–22–A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 56–57 (Oct. 7, 1997).

145. *Cf.* Marko Milanovic, *An Odd Couple, Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1139, 1143 (2007) (discussing the more stringent standards imposed with respect to the superior responsibility of civilian superiors with respect to ICC Article 28).

146. Prosecutor v. Orić, Case No. IT–03–68–T, Judgment, ¶ 310 (June 30, 2006); Prosecutor v. Delalić, Case No. ICTY–96–21–T, Judgment, ¶ 370 (Nov. 16, 1998). On terminology, see *Orić*, Case No. IT–03–68–T, ¶ 310 ("Thus, regardless of which chain of command or position of authority the superior–subordinate relationship may be based, it is immaterial whether the subordination of the perpetrator to the accused as superior is direct or indirect, and formal or factual."). *But see Delalić*, Case No. ICTY–96–21–T, ¶ 348 ("[T]he legal duties of a superior (and therefore the application of the doctrine of command responsibility) do not depend only on *de jure* (formal) authority, but can arise also as a result of *de facto* (informal) command and control, or a combination of both.").

of influence."[147] In addition to authority, "it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences" in a meaningful and effective way.[148]

Authority may be de jure or de facto.[149] De jure authority means that the superior has been officially assigned the position of authority for the purpose of leading the other persons, who thereby are considered his subordinates.[150] De jure authority creates a rebuttable presumption that effective control exists.[151] Authority in a military setting is ordinarily de jure, making military superiors relatively easy to identify.[152] Superior status for the purpose of superior responsibility may also be based on de facto authority. This was recognized in *Čelebići*, where the Appeals Chamber noted that reliance on de facto powers is essential for enforcement of humanitarian law in contemporary conflicts where "there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitaries groups subordinate thereto."[153] The Trial Chamber noted that de facto authority is necessary "in situations such as that of the former Yugoslavia during the period relevant to the present case—situations where previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures, may be ambiguous and ill-defined."[154] Thus, both chambers of the ICTY

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147. Prosecutor v. Bagilishema, Case No. ICTR-95-01A-T, Judgment, ¶¶ 40–43 (June 7, 2002); Zahar, *supra* note 106, at 609, 611.

148. Prosecutor v. Halilović, Case No. IT-01-48-A, Judgment, ¶ 59 (Oct. 16, 2007); Prosecutor v. Kajelijelii, Case No. ICTR-98-4A-A, Judgment, ¶¶ 85–86 (May 23, 2005); *Delalić*, Case No. ICTY-96-21-T, ¶ 378 (Nov. 16, 1998); *see also* Shany & Michaeli, *supra* note 16, at 868–69 (discussing the requirement of effective control); Zahar, *supra* note 106, at 609–10 (discussing the importance of demonstrating effective control).

149. *Orić*, Case No. ICTY-03-68-T, ¶ 696.

150. *Delalić*, Case No. ICTY-96-21-T, ¶ 646; Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Judgment, ¶ 787 (Nov. 28, 2007); METTRAUX, *supra* note 42, at 139.

151. *See* Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment, ¶ 197 (Feb. 20, 2001).

> In general, the possession of de jure power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power prima facie results in effective control unless proof to the contrary is produced.

Id. Prosecutor v. Boškoski, Case No. ICTY-04-82-T, Judgment, ¶ 411 (July. 19, 2008) (discussing that the Prosecution must prove beyond a reasonable doubt that the accused was exercising effective control).

152. See *Orić*, Case No. ICTY-03-68-T, ¶¶ 310–11 for a discussion of some exceptional cases.

153. *Delalić*, Case No. IT-96-21-A, ¶ 193.

154. *Delalić*, Case No. ICTY-96-21-T, ¶ 354.

emphasized de facto authority as characteristic of quasi-state structures.[155]

De facto authority is particularly significant with respect to civilians because in situations of civil structure breakdown, the authority wielded is not embedded in formal legal instruments.[156] The Trial Chamber also ruled that responsibility may be imposed by virtue of a person's de facto position as a superior,[157] provided that "the exercise of *de facto* authority is accompanied by the trappings of the exercise of *de jure* authority."[158] By this, the Trial Chamber meant that "the perpetrator of the underlying offence must be the subordinate of the person of higher rank and under his direct or indirect control."[159] In subsequent cases, however, both the ICTY and the ICTR rejected the requirement of de jure authority "trappings" to establish de facto authority,[160] and the term "*de facto* authority" took on a broader meaning.[161] A comparative analysis of case law is difficult, since references can be found to a variety of different terms that may or may not all amount to superior responsibility, such as effective authority, actual control, de facto control,[162] de jure effective control, de facto effective control,[163] power of control,[164] exercise of control,[165] de facto command, legal command and de facto authority,[166] de jure authority, de jure-like relationships,[167] de facto power,[168] de jure power,[169] and others.

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155. *See* Orić, Case No. ICTY–03–68–T, ¶ 309 (discussing the broadening of liability to include less formal command structures where there may be only de facto superiors). In the *Kordić* case, the authority of the vice president of a de facto separatist political entity within Bosnia–Herzegovina, the Croatian Community of Herceg Bosna, was also at issue. Prosecutor v. Kordić & Cerkez, Case No. IT–95–14/2–T, Judgment, ¶ 402 (Feb. 26, 2001).

156. *See* METTRAUX, *supra* note 42, at 143–44 (defining and discussing the relevance of de facto authority).

157. *Delalić*, Case No. ICTY–96–21–T, ¶ 370.

158. *Id.* ¶ 646.

159. *Id.*

160. Prosecutor v. Orić, Case No. ICTY–03–68–T, Judgment, ¶ 312 (June 30, 2006) ("Nor is it required that the superior generally exercises the trappings of *de jure* authority."); Prosecutor v. Kajelijelii, Case No. ICTR–98–44A–A, Judgment, ¶ 87 (May 23, 2005).

161. *Orić*, Case No. ICTY–03–68–T, ¶¶ 308–09.

162. All three expressions appear within Prosecutor v. Kayishema & Ruzindana, Case No. ICTR–95–1–A, Judgment, ¶ 299 (June 1, 2001). *See also* Prosecutor v. Aleksovski, Case No. ICTY–95–14/1–T, Judgment, ¶ 103 (June 25, 1999) (discussing how both civilians and military police can be held responsible if they exert "effective authority" over the perpetrators of crimes).

163. Prosecutor v. Musema, Case No. ICTR–96–13–A, Judgment and Sentence, ¶ 141 (Jan. 27, 2000).

164. *Id.* ¶ 144.

165. *Id.* ¶ 148.

166. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR–95–1–T, Judgment, ¶ 219 (May 21, 1999).

Subsequent jurisprudence appears to have dropped two elements of the *Čelebići* interpretation. The first is the relevance of de facto authority to quasi-state structure as a substitute for de jure authority in true-state structure.[170] The other is the requirement of hierarchy or rank, discussed below.[171]

The replacement of de facto authority as a characteristic of quasi-state structure by de facto authority as a characteristic of an informal relationship raises the question of the distinction between de facto authority and influence. Mettraux emphasizes that de facto authority is characterized by one party's expectation of obedience to orders and the other party's parallel expectation of subjection.[172] He argues that the sense of obligation to obey distinguishes de facto authority from "an ability to convince, to prompt or to influence."[173] However, this refinement is not enough, since a mutual expectation of obedience can build on powers of influence, if the latter are sufficiently strong. Thus, another element ought to be added to the definition of de facto authority—organizational structure. This requisite reflects the rationale for the doctrine—the existence of a social organization within which authority is legitimately wielded and accepted, thus potentially generating compliance. Nonetheless, the ICTY has on numerous occasions indicated that where the influence reaches the level of "effective control,"[174] it may also fulfill, or replace, the requirement of de facto authority.[175] For example, in *Aleksovski*, the trial chamber said that "[effective] authority can be inferred from

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167. Prosecutor v. Bagilishema, Case No. ICTR–95–01A–T, Judgment, ¶¶ 152, 183 (June 7, 2002).

168. *Musema*, Case No. ICTR–96–13–A, ¶ 894.

169. *Id.* ¶ 881.

170. *See infra* notes 172–73 and accompanying text (discussing the requirement of de facto authority).

171. *See infra* p. 341 (discussing organizational hierarchy).

172. *See* METTRAUX, *supra* note 42, at 144–45 (discussing the degree of authority that a de facto superior must possess).

173. *Id.* at 183.

174. Prosecutor v. Delalić, Case No. IT–96–21–A, Judgment, ¶¶ 265–66 (Feb. 20, 2001); Prosecutor v. Orić, Case No. ICTY–03–68–T, Judgment, ¶ 311 (June 30, 2006); Prosecutor v. Halilović, Case No. IT–01–48–T, Judgment, ¶ 59 (Nov. 16, 2005); Prosecutor v. Kordić, Case No. IT–95–14/2–T, Judgment, ¶ 840 (Feb. 26, 2001). This followed numerous cases in the ICTR where the *Čelebići* Trial Judgment was mistakenly taken as authority for reliance on influence to establish superiority. *See, e.g.*, Prosecutor v. Kayishema, Case No. ICTR–95–1–T, Judgment, ¶ 220 (May 21, 1999) ("[T]he Chamber in Celebici 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.'").

175. *See Delalić*, Case No. IT–96–21–A, ¶ 198 ("As long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control."); *see also infra* notes 176–77 and accompanying text (providing examples of instances in which the ICTY made determinations about effective control).

the accused's ability to give [the direct perpetrators] orders and to punish them in the event of violations."[176] Similarly, in *Musema*, the ICTR held that "a superior's authority may be merely *de facto*, deriving from his influence or his indirect power."[177] It added that "[t]he influence at issue . . . often appears in the form of psychological pressure."[178] In both cases, influence went to the issue of authority rather than to that of effective control.

This Article argues that the requirement of authority, in the sense of organizational hierarchy, must neither be set aside nor replaced by powers of influence. Instead, it must be established independently of, and prior to, the exercise of effective control.[179] In other words, while de jure authority creates a presumption of effective control, effective control (let alone mere influence) should not alone create a presumption of de facto authority. If mere influence, even of the highest degree, is accepted as a basis for superior responsibility, any civilian held in sufficiently high social esteem would automatically be transformed into a superior, increasing the chance that he be tried as a result of the crimes of others.[180] At the same time, the determination of whether de facto authority exists has to be made with flexibility, given that informal structures are central to the question.

Equally important is the need to avoid confusion between authority in one sphere of life and influence in another. This problem is unique to civilian settings because, in the military, subordinates are subject to an internal disciplinary system and may be regarded as on duty twenty-four hours a day.[181] The law thus assumes that the authority and effective control of a military commander cover all activities of the subordinates, so there is only one all-encompassing sphere.[182] In contrast, in a civilian setting, subordinates are normally under the authority and control of superiors only while engaged in work-related activities,[183] and the responsibility attaching

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176. Prosecutor v. Aleksovski, Case No. IT–95–14/1–T, Judgment, ¶ 103 (June 25, 1999).

177. Prosecutor v. Musema, Case No. ICTR–96–13–A, Judgment and Sentence, ¶ 144 (Jan. 27, 2000).

178. *Id.* ¶ 140.

179. *See* INT'L COMM. OF THE RED CROSS, *supra* note 17, at 1013 ("The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.").

180. Provided that other requirements such as mens rea are fulfilled. Zahar, *supra* note 106, at 600.

181. METTRAUX, *supra* note 42, at 32–33; VAN SLIEDREGT, *supra* note 27, at 184.

182. *See* METTRAUX, *supra* note 42, at 32–33 (discussing the broader scope of authority for military superiors).

183. William J. Fenrick, *Article 28 Responsibility of Commanders and Other Superiors*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT—OBSERVERS' NOTES, ARTICLE BY ARTICLE 515, 522 (Otto Triftterer ed., 1st ed.

to superiority is limited to crimes committed in that context.[184] In *Musema*, the ICTR identified the defendant's status as superior on the ground that he could remove or threaten to remove an individual from his position at the tea factory if the latter was identified as a perpetrator of crimes punishable under the Statute[185] as well as to prevent or punish the use of tea factory property in the commission of such crimes. In so doing, the ICTR erroneously linked work-related de jure authority to non-work-related effective control. Once the subordinates terminate their work day, the employer is not accountable for controlling their conduct. Musema's authority did not extend beyond work[186] even if his effective control over his employees persisted because he could use his work-related powers to influence their conduct. Musema's power was not based on legitimate, pertinent organizational hierarchy.[187]

One might imagine that, in a centralized system, the terms of employment grant the employer authority over his employers even outside work, with sanctions available within the work environment. Yet, this was not established in *Musema*, where the Trial Chamber noted expressly that the employees were a priori not under Musema's authority.[188] One may find an indication that the Trial Chamber was uncomfortable with its own conclusion in its mention of the fact that Musema had the authority to punish the use of factory property, implying that the direct perpetrators were committing the crimes in their capacity as employees.[189] However, the acquiescence in employees' use of factory property outside work does not automatically generate responsibility for their actions while using that property. The Trial Chamber surely did not mean that Musema should have disciplined or penalized the employees for massacring and raping because they were doing so while wearing factory uniforms.[190]

In conclusion, in civilian settings there is need for a careful distinction between de facto authority and influence. This requires

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1999). The same would be applicable, *mutatis mutandis*, in superior–subordinate relations in non–work related settings, such as educational and religious organizations.

184. Rome Statute, *supra* note 13, art. 28(b)(ii).

185. Prosecutor v. Musema, Case No. ICTR–96–13–A, Judgment and Sentence, ¶ 880 (Jan. 27, 2000).

186. In the circumstances, Musema was, of course, responsible because of his direct, active involvement.

187. *See* Prosecutor v. Musema, Case No. ICTR–96–13–T, Judgment, ¶ 144 (Jan. 27, 2000) (discussing whether Musema "had power of control over persons who a priori were not under his authority").

188. *Id.*

189. *Id.* ¶ 880.

190. Predicting this conundrum, Fenrick argued in 1999, before the *Musema* Trial Judgment was handed down, that if "the employees of a paint factory engaged in genocidal activities outside of work hours, it is unlikely that the factory manager would be regarded as liable under article 28." Fenrick, *supra* note 183, at 521.

the identification of, among other factors, a pertinent pre-existing organizational structure.

C. *Distinguishing Superior Responsibility from Direct Responsibility*

The absence of a clear hierarchy and the often horizontal division of powers in civilian organizations also makes it difficult to distinguish between direct and superior responsibility in a civilian setting.[191] For a person to be held responsible in connection with a particular crime because he failed to exercise his duty as a superior, the facts underlying the duty must exist prior to the commission of the crime. Accordingly, the superior–subordinate relationship—including authority—must be established independently of the crime and with respect to the time prior to the commission of the crime.[192] In *Blaskić*, the ICTY noted that for superior responsibility to attach, both the hierarchy and the dereliction of duty to prevent the crime must have occurred prior to the commission of the subordinate's crime.[193]

Nonetheless, the ICTR has, in some cases of civilian defendants, deduced the superior–subordinate relationship from the facts that established the crimes themselves rather than from preexisting authority and control. In *Kajelijeli*, for example, the Appeals Chamber confirmed that the defendant held a de facto superior position over the direct offenders (*Interahamwe*) on the basis of evidence that the assailants reported to him daily what had been achieved; he instructed the *Interahamwe* to kill and exterminate Tutsis; he directed the *Interahamwe* to join that attack; he

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191. *See* METTRAUX, *supra* note 42, at 103–05, 107 (describing the lack of clarity in apply superior responsibility to civilians).

192. *See* Prosecutor v. Aleksovski, Case No. IT–95–14/1–A, Judgment, ¶ 76 (Mar. 24, 2000) ("[A] superior must have such powers [to prevent subordinates from committing crimes or to punish them afterwards] prior to his failure to exercise them."); GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 1131–33 (2005) (discussing the establishment of authority for military commanders and civilian superiors). A different reasoning might apply to the obligation to punish, which is not explored in this article in detail. At the same time, in Prosecutor v. Hadžihasanović, Case No. ICTY-01-47-T, Judgment, ¶ 198 (Mar. 15, 2006), it was decided that a position of command undertaken after the fact of the crime does not require taking enforcement measures against the offender. Bonafé, *supra* note 5, at 610. For an example of asserting the superior–subordinate relationship as a basis for the duty, preceding the crime, see Prosecutor v. Milutinović, Case No. IT–05–87–PT, Third Amended Joinder Indictment, ¶¶ 36–38 (June 21, 2006).

193. Prosecutor v. Blaškić, Case No. IT–95–14–A, Judgment, ¶ 664 (July. 29, 2004) ("[I]f the superior's intentional omission to prevent a crime takes place at a time when the crime has already become more concrete or currently occurs, his responsibility would also fall under Article 7(1) of the Statute.").

transported armed assailants; he ordered and supervised attacks; he bought beers for the *Interahamwe* while telling them that he hoped they had not spared anyone; and he "played a vital role in organizing and facilitating the *Interahamwe* in the massacre . . . by procuring weapons, rounding up the *Interahamwe* and facilitating their transportation."[194] As the appeal judgment points out, all these indicators establish that the appellant played a pivotal role in the execution of the crimes. However, contrary to the tribunal's conclusion, these indicators do not prove that the defendant was the superior of the principal offenders prior to the offense, and therefore, they should not have been considered sufficient to generate an obligation upon Kajelijeli to prevent the *Interahamwe* from carrying out the attacks.[195]

Different uses of the concept of "ordering" may explain the reliance on hierarchy during the commission of the crime to establish a superior position. When a person orders another to commit a crime, as did Kajelijeli, his action constitutes the *actus reus* required for attaching direct responsibility under Article 6/7(1) of the ad hoc tribunals' statutes.[196] Ordering may also be an indicator of the effective control required for attaching superior responsibility under Article 6/7(3).[197] The difficulty in distinguishing the two is also demonstrated in *Serushago*, where the ICTR convicted the defendant under Article 6(3) of its statute for having "played a leading role" in the crime.[198] The Trial Chamber mistakenly conceived the superiority in Article 6(3) as a reference to leadership in the commission of the crime rather than to status that generates a responsibility to prevent subordinates from committing crimes.[199] A careful distinction is therefore required between de facto authority preceding the crime (which may generate superior responsibility) and leadership during the commission of the crime (which does not). This argument is distinct from the question whether concurrent convictions for direct and superior responsibility are appropriate. The latter question presumes the status of superiority of the defendant. It is on this preliminary issue that the present discussion

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194. Prosecutor v. Kajelijelii, Case No. ICTR–98–4A–A, Judgment, ¶ 90 (May 23, 2005).

195. If the chain of events is broken up into separate incidents, the defendant's leadership may have created a de facto superiority, which generates responsibility with respect to subsequent acts. The ICTR did not address this issue. As pointed out with respect to *Musema*, the entire discussion of a leading accomplice's failure to prevent what he instigated, aided and abetted, is problematic to say the least.

196. *Kajelijelii*, Case No. ICTR–98–4A–A, ¶ 90.

197. *See id.* at 176–78 (discussing the Trial Chamber's treatment of orders in *Delalić*).

198. Prosecutor v. Serushago, Case No. ICTR–98–39–S, Judgment, ¶ 28 (Feb. 5, 1999).

199. *Id.*

focuses, arguing that superiority cannot be acquired through the commission of a crime. A person who became a superior exclusively by virtue of actively directing the commission of the crime should not be held responsible for not preventing the crime, and his responsibility should be exhausted under Articles 6/7(1).

Mettraux argues that the ability to order may generate an ad hoc superiority and, consequently, superior responsibility "for the purpose of the act which he ordered them to carry out, *and for the purpose of that act only*."[200] In light of the present argument, this approach is unacceptable because it requires leadership in the commission of the crime to generate responsibility for failing to prevent the same crime.

IV. BACK TO NAHIMANA

As highlighted earlier, *Nahimana* is the first conviction by either of the ad hoc tribunals based on the superior responsibility of a civilian operating within a purely civilian setting.[201] Moreover, it is the first case before the ICTR where no concurrent conviction was made on the basis of direct responsibility.[202] As such, *Nahimana* is a useful case for examining the challenges considered in this Article.[203]

Ferdinand Nahimana was born in Rwanda in 1950. From 1977 until 1984, he held various posts at the National University of Rwanda. He was also a member of the Mouvement Révolutionnaire National pour le Développement (MRND) political party. In 1990, he was appointed Director of the Rwandan Office of Information and remained in that post until 1992. He and others then initiated the establishment of the Radio Télévision Libre des Mille Collines (RTLM) radio station, owned largely by members of the MRND party. RTLM started broadcasting in July 1993 and was a popular source of information. Its broadcasts engaged in ethnic stereotyping, branding Tutsis as the enemy and Hutu opposition members as their accomplices.[204] After April 6, 1994, the virulence and the intensity of RTLM broadcasts propagating ethnic hatred and calling for violence

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200. Mettraux, *supra* note 106, at 275.

201. *See supra* Part II.C.

202. *Id.*

203. In the analysis of superior responsibility under Art. 6(3), the Appeals Chamber relied extensively on the factual findings of the Trial Chamber. *See* Nahimana v. Prosecutor, Case No. ICTR–99–52–A, Judgment, ¶¶ 603–36, 777–857 (Nov. 28, 2007). However, in view of significant differences between the judgments in other areas (such as the convictions under Art. 6(1), which were quashed), the present analysis will refer to the Appeal Judgment.

204. Prosecutor v. Nahimana, Case No. ICTR–99–52–T, Judgment, ¶¶ 5, 342, 344–45 (Dec. 3, 2003).

increased, and the ICTR found that certain RTLM broadcasts in that period constituted direct and public incitement to genocide.[205]

The ICTR found that Nahimana had been a superior of the RTLM staff.[206] It also found that Nahimana knew or had reason to know that his subordinates at RTLM were going to engage in incitement to genocide. For these reasons, it convicted him on superior responsibility grounds for not having taken reasonable and necessary steps to prevent the incitement or punish its perpetrators.[207]

A. *Nahimana's Status as Superior*

The ICTR accepted as fact that Nahimana held no official function at RTLM.[208] This led to the question of whether he had exercised de facto authority. The tribunal answered this in the affirmative, relying on several factors.[209] First, the ICTR found that Nahimana was "the brain behind the project" and "the boss who gave orders."[210] This description referred to Nahimana's status in RTLM prior to the commission of the crimes. It expressly noted that Nahimana's membership in the RTLM's Steering Committee had not vested him with de jure authority but did suggest "*de facto* a certain general authority within RTLM."[211] Nahimana had played a role of primary importance in the creation of RTLM in 1993 and had control over RTLM company finances.[212] He and others referred to him as the Director of RTLM.[213] The ICTR found further evidence for Nahimana's authority and control in the facts that he had been "in contact with RTLM and familiar with its future plans"[214] and that his intervention with RTLM journalists had halted attacks against General Dallaire and UNAMIR.[215]

The ICTR found de facto authority on the basis of a preexisting organizational structure and actual functioning. Moreover, Nahimana's de facto authority was largely a substitute for the Steering Committee's de jure authority.[216] Thus, although RTLM was a private organization rather than a state organ, the ICTR could

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205. *Id.* ¶ 758.
206. *Id.* ¶ 822.
207. *Id.* ¶¶ 1044–45.
208. Nahimana v. Prosecutor, Case No. ICTR–99–52–A, Judgment, ¶ 808 (Nov. 28, 2007).
209. *Id.* ¶ 796–800.
210. *Id.* ¶ 808.
211. *Id.* ¶ 804.
212. *Id.* ¶¶ 803, 805.
213. *Id.* ¶ 817.
214. *Nahimana*, Case No. ICTR–99–52–A, ¶¶ 827–28.
215. *Id.* ¶ 833.
216. *Id.* ¶¶ 796–800.

rely on the "trappings" of de jure authority. The circumstances allowed a successful application of the doctrine according to the stricter requirements suggested in this Article. The same is also true in some other respects: the crime was committed within the scope of Nahimana's responsibility as defined by the Trial Chamber, and, exceptionally, this is not a case of complicity in the commission of the crime. Although the Appeals Chamber hinted that Nahimana knew of the crimes,[217] there is no indication that his silence constituted moral or material assistance to the broadcasters.[218] The ICTR's conclusions on Nahimana's superior responsibility are thus straightforward and raise no particular difficulties. This forthright application may explain why, despite the *Nahimana* case's unusual civilian setting, post-2003 literature on superior responsibility makes little reference to it.

B. *The Obligation to Control Subordinates*

The judgment considered at length the internal operation of RTLM.[219] The Appeals Chamber recalled that Nahimana chaired the Technical and Programme Committee of RTLM, which had a delegated responsibility and authority from the station's board of directors "to oversee the programming of RTLM."[220] As Chairman of the Committee, Nahimana had a specific obligation to take action to prevent or punish the criminal broadcasts.[221] Nahimana's obligation was therefore based on an internal procedure. Given the reservations expressed above as to reliance on domestic law to create an obligation to control subordinates for the purpose of international criminal responsibility, reliance on an internal organizational procedure—not even a general norm of law—is problematic.

Furthermore, while Nahimana's obligation to prevent the crimes arose from his status as Chairman of the Technical and Programme Committee, his superior position stemmed from his de facto standing as director.[222] In the specific circumstances, the two converged in one person. Nonetheless, he had an obligation to prevent the crimes in one capacity and the material ability to do so in another.[223] Would a different Committee chairperson not have been held responsible if he had no effective control? Conversely, would a different director not

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217. *Id.* ¶¶ 840-41.

218. His silence also did not amount to commission through others, another possible basis for conviction. OLÁSOLO, *supra* note 8, at 111–16.

219. Prosecutor v. Nahimana, Case No. ICTR–99–52–T, Judgment, ¶¶ 342–619 (Dec. 3, 2003).

220. *Id.* ¶ 556.

221. *Nahimana*, Case No. ICTR–99–52–A, ¶ 807.

222. *Id.* ¶¶ 806, 817.

223. *Id.* ¶¶ 781 n.1819, 806–07, 813–14.

have been held responsible if he had no obligation as chairperson? The ICC Statute provisions would have bridged this gap by deriving Nahimana's obligation to prevent criminal broadcasts directly from his status as the superior of the broadcasters. This may have influenced the ICTR. It is also noteworthy that Nahimana was convicted on the basis of superior responsibility for a genocide-related crime rather than for war crimes.[224] The holding is thus unique in the application of the doctrine.

V. SHOULD THE DOCTRINE OF SUPERIOR RESPONSIBILITY BE EXTENDED TO CIVILIAN SETTINGS?

The above analysis demonstrates that the criteria for superiority are difficult to apply in civilian settings, both normatively and factually. As a result, civilian superior responsibility remains an elusive legal category that is established ex post facto. Nevertheless, the issue of superior responsibility in civilian settings appears to be increasingly pertinent. In *Bikindi*, for example, the prosecution argued that the director of a dance troupe should be regarded as a superior mandated with preventing crimes by members of the troupe.[225] Such developments raise the questions of both whether superior responsibility is indeed appropriate for civilian settings, and if it is, whether it should take the same form as in military settings.[226]

In view of ICC Statute Article 28, the expansion of the superior responsibility doctrine to civilians may appear a foregone conclusion: Article 28(a) covers military commanders and civilians acting as military commanders; conversely, Article 28(b) covers civilians acting in a civilian capacity.[227] However, the *travaux préparatoires* focus on the identity of the superiors, not of the subordinates, and leaves unresolved the question of whether Article 28(b) covers all civilian settings or only civilians leading (but not embedded) in military and paramilitary organizations (such as ministers of defense (leading the military), ministers of interior (leading internal security forces), or militia leaders).[228] As the review of practice above indicates, even to

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224. *Id.* ¶ 1018.

225. Prosecutor v. Bikindi, Case No. ICTR–01–72–T, Judgment, ¶ 412 (Dec. 2, 2008); Prosecutor v. Bikindi, Case No. ICTR–2001–72–I, Amended Indictment, Counts 2, 5 (June 15, 2005).

226. Bonafé argues that the doctrine should be limited to military personnel. Bonafé, *supra* note 5, at 602.

227. Rome Statute, *supra* note 13, art. 28(a)–(b).

228. Mettraux considers the possible criteria for classifying whether a case falls within the ambit of Article 28(a) or 28(b). Both he and Fenrick limit themselves to instances of military or paramilitary subordinates. METTRAUX, *supra* note 42, at 28–29; Fenrick, *supra* note 183, at 517. In Roberta Arnold & Otto Triffterer, *Article 28*, *in*

the extent that superior responsibility of civilians already forms part of customary international law, practice regarding civilian settings is so limited that it is hard to establish that the customary norm already applies to them.

In light of the analysis above, which indicated that the application of the doctrine to civilian settings is fraught with challenges, the first question is whether it is at all advisable to have a superior responsibility doctrine applicable to civilian settings. Superior responsibility builds on the significance of authority and control in affecting the conduct of others.[229] These exist in the pyramid-shaped hierarchy of the military, which permits superiors to affect systematically the conduct of their subordinates and thwart the commission of widespread crimes. Superior responsibility is particularly appropriate in the military where it concerns international crimes, which are, by definition, committed as part of a widespread or systematic attack or as part of a plan or policy or a large-scale commission of crimes.[230]

COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT—OBSERVER'S NOTES, ARTICLE BY ARTICLE, *supra* note 183, at 795, 840, the authors propose that Article 28(b) concerns non-military members of governments, political parties, or business companies.

229. Recent experience indicates that recognized liability for omission could have an important function in the prevention and termination of what is justifiably called 'systemic war criminality.' Acknowledgement of such responsibility would stimulate in marked degree the concern of high military and civilian authorities for the maintaining of the laws of warfare.

1 THE TOKYO JUDGMENT, *supra* note 32, at XVI; *see also* Prosecutor v. Halilović, Case No. IT–01–48–T, Judgment, ¶ 39 (Nov. 16, 2005) (discussing the purpose behind the concept of command responsibility, which is to ensure compliance with the laws of war and international humanitarian law, and protect protected categories of people and objects); Jenny S. Martinez, *Understanding* Mens Rea *in Command Responsibility From Yamashita to Blaškić and Beyond*, 5 J. INT'L CRIM. JUST. 638, 663 (2007) ("In addition to these retributive justice rationales, command responsibility doctrine also reflects a utilitarian understanding of the most effective means of preventing violations of international humanitarian law.").

230. Rome Statute, *supra* note 13, arts. 7(1), 8(1). No similar qualification exists with respect to the crime of genocide. The large-scale element in genocide is implied in the mens rea of the crime. WERLE, *supra* note 192, at 29; Cress Kraus, *The Darfur Report and Genocidal Intent*, 3 J. INT'L CRIM. JUST. 562, 576 (2005). Schabas argues that as a matter of policy, genocide should only be of interest to the international criminal justice system if it is state-sponsored rather than attempted on an individual basis. *See generally* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 447–503 (2d ed. 2009). This would imply a similar qualification that it be large-scale or systematic. *But see* Prosecutor v. Jelisić, Case No. IT–95–10–A, Judgment, ¶ 48 (July 5, 2001).

> The Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or

Civilian superiors do not necessarily benefit from a plurality of subordinates, and where they are not part of a machinery that can generate systemic criminality, there is less reason to impose on them an international obligation to prevent such criminality. The duplication of the doctrine to civilian settings is therefore not self-evident. Nonetheless, there is no reason to exempt civilians from responsibility for controlling their subordinates where they do have the authority and material ability to do so—particularly if effective control is not measured by comparison to military commanders but in light of the specific circumstances of the case. The factual differences between superiors in civilian settings and superiors in military settings are not such that they justify a normative exclusion of the former. Thus, for example, attaching superior responsibility to superiors would seem more justified in the civil service than in other institutions.[231]

An example of an organized, hierarchical civilian setting that was evidently capable of generating international crimes was the Nazi propaganda machine.[232] Moreover, as the ICTY has highlighted, the borderline between civilian and military persons (and, one may add, settings) is fluid.[233] The difficulty of classification is already apparent in the context of state responsibility with regard to the laws of armed conflict;[234] it could equally manifest itself in a

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> may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.

Id.

231. Moreover, if international crimes are defined as perpetrated by the state or by quasi-state actors, potential civilian superiors would only include civil servants and persons holding similar positions, or at most private individuals who are informally, but effectively participating in government. *See* BASSIOUNI, *supra* note 112, at 443–45 (referring to industrialists and businessmen); ROB CRYER, HÅKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 5 (2007) (noting that one would need to be an agent in order to commit a crime under this view). Musema, the only civilian other than Nahimana convicted by the ICTR for his superior responsibility over civilian subordinates, was appointed director of the Gisovu Tea Factory by Rwanda's president. Prosecutor v. Musema, Case No. ICTR–96–13–A, Judgment, ¶ 12 (Jan. 27, 2000).

232. *See* BASSIOUNI, *supra* note 112, at 1–40 (describing the efforts in that arena by the Nazi regime).

233. Prosecutor v. Orić, Case No. IT–03–68–T, Judgment, ¶ 309 (June 30, 2006)

> The second implication is that, in relation to the power of the superior to control, it is immaterial whether that power is based on a *de jure* or a *de facto* position. Although formal appointment within a hierarchical structure of command may still prove to be the best basis for incurring individual criminal responsibility as a superior, the broadening of this liability as described above is supported by the fact that the borderline between military and civil authority can be fluid.

Id.

234. *See generally,* HCJ 769/02 Public Committee against Torture v. Israel [2006] IsrSC 597 (involving the targeted killing of Palestinians by the Israeli Defense

criminal law context.[235] In Rwanda, for example, the status of the *Interahamwe* was ambiguous. On the one hand, they were a youth movement associated with a civilian political party. On the other hand, they featured some of the characteristics of military units that might affect the scope of responsibility attaching to their leaders, principally the engagement in armed force. In conclusion, superior responsibility should extend to civilian settings. Nonetheless, courts and tribunals should examine it with care, given the potential pitfalls on the road to establishing its elements. It is regrettable that ICC Statute Article 28 nevertheless obliges the ICC judges to engage in a delineation of categories.[236]

This leads to the second question—whether different normative standards should apply in civilian settings and in military settings. ICC Statute Article 28(b) distinguishes civilian settings from the military setting described in Article 28(a) in two respects. First, the responsibility of superiors in civilian settings covers only instances where the "crimes concerned activities that were within the effective responsibility and control of the superior."[237] As discussed above,[238] this condition merely reflects the factual difference that, in the military, superiors are held responsible for controlling their subordinates at all times while superiority in civilian settings is temporally limited. The second difference is the required *mens rea.* Superiors in the military are held responsible if they "knew or, owing to the circumstances at the time, should have known" of the crimes. For superiors in civilian settings, the applicable standard is that they "knew, or consciously disregarded information which clearly indicated" the crimes.[239] Opinions on the meanings of these standards and their advisability differ.[240] However, there is no

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Forces). Under the laws of armed conflict the disregard for categories would be more complicated because these categories are fundamental to the whole system and are codified in conventional law.

235. For example, private security companies. *See* Fenrick, *supra* note 183, at 521 (discussing the possibility that private military personnel could be held liable); Chia Lehnardt, *Individual Liability of Private Military Personnel under International Criminal Law*, 19 EUR. J. INT'L L. 1015, 1029 (2008) (discussing the liability of private military personnel).

236. For possible parameters for this deliberation and the associated difficulties, see METTRAUX, *supra* note 42, at 27–30.

237. Vetter argues that if this is the purpose of Art. 28(b)(2), then it is redundant. Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT'L L. 89, 120 (2000) ("[U]nder this interpretation, article 28(2)(b) might be superfluous because the scope of the superior-subordinate relationship is articulated in both article 28(1) and 28(2).").

238. *See supra* Part III (discussing the difference in roles between civilian and military leaders).

239. Rome Statute, *supra* note 13, art. 28(b)(i).

240. Ambos, *supra* note 105, at 863–871; Bantekas, *Contemporary Law of Superior Responsibility*, *supra* note 130, at 587–91; Damaška, *supra* note 5, at 455–56; Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal*

dispute that the standard for responsibility in civilian settings is stricter. It has already had a spillover effect to the ICTR. In *Kayishema*, the Trial Chamber said that "the distinction between military commanders and other superiors embodied in the Rome Statute [is] an instructive one."[241] It then applied the ICC Statute's *mens rea* standard for civilian superiors to Article 6(3), despite the explicitly different wording of the ICTR Statute.[242]

The differentiated *mens rea* requirement was proposed during the negotiations on the Statute by the United States and was adopted enthusiastically by other delegations.[243] Two specific grounds were given for it.[244] Interestingly, although both grounds referred to "military commanders" as opposed to "civilian supervisors," both make more sense if they are taken as justifications for a distinction between military and civilian settings, rather than between military and non-military commanders. At the same time, neither argument is convincing.

One argument was that the lower standard, perceived as negligence, is appropriate in a military context because military commanders are in charge of an inherently lethal force, and therefore it is not appropriate for civilian supervisors and is contrary to the

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Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 CAL. L. REV. 75, 120–22 (2005); Heller, *supra* note 6, at 17–20; Kirsten M.F. Keith, *The* Mens Rea *of Superior Responsibility as Developed by ICTY Jurisprudence*, 14 LEIDEN J. INT'L L. 617, 617 (2001); Major James D. Levine II, *The Doctrine of Command Responsibility and its Application to Superior Civilian Leadership: Does the International Criminal Court Have the Correct Standard?* 193 MIL. L. REV. 52, 71–76 (2007); Martinez, *supra* note 229, at 663; Sherrie L. Russell-Brown, *The Last Line of Defense: The Doctrine of Command Responsibility and Gender Crimes in Armed Conflict*, 22 WIS. INT'L L.J. 125, 137–47 (2004).

241. Prosecutor v. Kayishema, Case No. ICTR–95–1–T, Judgment, ¶¶ 227–28 (May 21, 1999).

242. Moreover, Kayishema was held responsible for failing to prevent crimes committed by *gendarmes*, soldiers, prison wardens, armed civilians, and members of the *Interahamwe*. Prosecutor v. Kayishema, Case No. ICTR–95–1–A, Judgment, ¶ 299 (June 1, 2001). It is not clear that these circumstances fall under the 'civilian' limb of Article 28 rather than the military one.

243. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15–July 17, 1998, *Official Records* 136–38, ¶¶ 67–83, U.N. Doc. A/CONF.183/13 (Vol. II) [hereinafter ICC Conference Official Records]; Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 189, 203–04 (Roy S. Lee ed., 2002).

> [T]he United States raised an important point: whether civilian superiors would normally have the same degree of control as military commanders and should therefore incur the same degree of responsibility . . . . The points made by the United States met with a growing understanding. An idea developed for a new structure for the article that would incorporate different requirements for military and civilian superiors.

244. ICC Conference Official Records, *supra* note 243, at 136–37, ¶¶ 67–68.

usual principles of criminal law responsibility.[245] Indeed, superior responsibility reflects the tremendous power of military commanders, who are ordinarily mandated with responsibilities that have a direct effect on life and death.[246] They are given license to turn ordinary men into lethal, destructive soldiers. They are also entrusted with powers to cause extensive harm. The corollary to these powers is responsibility. When soldiers abuse their power, it is the commanders' failure no less than that of their soldiers.[247]

However, while it is true that criminal responsibility for negligent action is appropriate only for the gravest crimes that involve potentially lethal force, the assumption that the military holds a monopoly on these crimes is misplaced. Indeed, both the notion of civilians involved in international crimes and the existence of non-conflict related international crimes defy this assumption. There is no reason to hold a superior to a lower standard of behavior depending on whether he operates in a civilian setting or in a military setting. What should determine responsibility is his authority and effective control, not the classification of the situation.

Another argument in support of the *mens rea* distinction is that the authority and effective control of military commanders rests on the military discipline system, whereas there is no comparable punishment system for civilians in most countries.[248] It is true that military commanders have a severe disciplinary apparatus at their disposal and that they are, therefore, presumed to possess the means to ensure the compliance of their subordinates with international law.[249] In civilian settings, the effective control of a civilian superior over the conduct of subordinates falls short of that of a military commander,[250] for example, in allowing only limited incursions on fundamental rights and freedoms of subordinates.

However, the relevance of this statement to the matter of *mens rea* is questionable. It merely asserts that because apparent superiors in civilian settings are less likely to be regarded as

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245. *Id.*

246. Fenrick, *supra* note 183, at 516; Martinez, *supra* note 229, at 662.

247. *See* Martinez, *supra* note 229, at 662–63.

> By the internal logic of the laws of war, the soldier is not responsible for his actions, either in the sense of legal liability or in the sense of exercising agency in the moral decision to use lethal force against another human. But this belligerent's privilege is inextricably intertwined with the commander's responsibility for the soldier's actions, and a military commander's duty to control his troops is the necessary corollary of his power.

248. ICC Conference Official Records, *supra* note 243, at 136, ¶ 67.

249. Prosecutor v. Hadžihasanović, Case No. IT–01–47–T, Judgment, ¶ 66 (Mar. 15, 2006).

250. *See* BASSIOUNI, *supra* note 112, at 392 (noting that a civilian hierarchy does not provide for as much control over subordinates as a military hierarchy).

exercising effective control than in military settings, their designation as superiors is less likely in the first place. The likelihood of passing the threshold of effective control for a superior–subordinate relationship, however, is unrelated to the question of *mens rea*, which arises only after a superior–subordinate relationship has been established. If a superior–subordinate relationship is found to exist, there is no reason why the *mens rea* requirement should be altered.[251] However, if a person is found to exercise, in specific circumstances, authority and a level of control that are sufficient to hold him a superior,[252] he should not be tested against a different standard of behavior than a superior in a military setting simply because there might have been even greater control or harsher punishment in the military setting.[253] The ICTY's statement in *Čelebići*—that the doctrine of superior responsibility applies 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"[254]—may have informed the ICC deliberation. However, subsequent jurisprudence interpreted *Čelebići* as setting "effective control" as a minimum threshold for superior responsibility, in either military or civilian settings,[255] and not as a comparative benchmark.

In conclusion, neither of the reasons given during the deliberation on the ICC Statute for the *mens rea* distinction appears convincing. A different justification may be that involvement in international crimes in the context of organizational conduct—which is a condition for superior responsibility—is more likely in military settings than in civilian ones. Civilian organizations are not, by definition, engaged in enterprises that run the risk of international crimes. Superiors in the military should therefore be more alert to the possibility of international crimes being committed, and they may

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251. *See* Andrew D. Mitchell, *Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 SYDNEY L. REV. 381, 405 (2000) (arguing that there is "no real policy reason for regarding the behaviour of civilian leaders as being of less concern than that of military leaders"); Vetter, *supra* note 237, at 94 ("A weaker civilian command responsibility standard is undesirable because it will not deter civilian superiors to the same extent as military commanders.").

252. Timothy Wu & Yong-Sung Kang, *Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT'L. L.J. 272, 291–92 (1997).

253. As pointed out above, the assertion to this effect in Prosecutor v. Delalić, Case No. ICTY–96–21–T, Judgment, ¶ 377–78 (Nov. 16, 1998) was later rejected.

254. Prosecutor v. Delalić, Case No. IT–96–21–A, Judgment, ¶ 197 (Feb. 20, 2001); *Delalić*, Case No. ICTY–96–21–T, ¶ 378.

255. Prosecutor v. Boškoski & Tarčulovski, Case No. IT–04–82–T, Judgment, ¶ 409 (July 10, 2008) ("Civilian superiors incur criminal responsibility pursuant to Article 7(3) of the Statute under the same circumstances as military commanders."); Nahimana v. Prosecutor, Case No. ICTR–99–52–A, Judgment, ¶ 785 (Nov. 28, 2007); Prosecutor v. Kajelijelii, Case No. ICTR–98–44A–A, Judgment, ¶ 87 (May 23, 2005); Prosecutor v. Bagilishema, Case No. ICTR–95–1A–A, Judgment, ¶ 55 (July 3, 2002).

be held to a higher level of responsibility to act positively to acquire knowledge and to prevent the commission of the crimes. Even this, however, is debatable: conduct of subordinates that may involve the commission of international crimes would be easily detectable by the superior because of its exceptionality. Therefore, there is no reason to allow the civilian superior to remain indifferent where a military commander is bound to take investigative measures.

In short, there does not seem to be a strong controlling justification for the distinction between military settings and civilian settings in terms of the *mens rea* requirement. Again, given the fluidity of the border between the two categories, the preferable route would have been for the characteristics of each individual to be examined directly, without attempting to go through a prior civilian/military dichotomous classification. The application of the doctrine would have differed in view of the circumstances of different types of defendants, as a matter of factual—rather than normative—differences.

At the same time, the criticism that the different—and higher—threshold for culpability of superiors in civilian settings effectively results in impunity for political leaders who can feign ignorance[256] is also not entirely justified. First, in light of the analysis proposed here, civilian leaders of military organizations are subject to Article 28(a), in which case they are subject to the lower *mens rea* standard—to the more demanding standard of behavior. Even if civilians heading military forces fall within Article 28(b), the difference between them and military commanders may find expression well before the *mens rea* issue arises, namely at the stage of determining the superior–subordinate relationship, since civilian leaders are often only the indirect superiors of the military forces. Despite rhetoric that superior responsibility may apply to indirect superiors,[257] in practice indirect superiority may be too far removed from the perpetrator for the superior to be regarded as exercising effective control. Therefore, it is not clear that a tribunal applying international law could regard civilian leaders as superiors for the purpose of criminal responsibility.[258] Indeed, the notion of superior

256. James Cockayne, *Foreword*, 5 J. INT'L CRIM. JUST. 1061, 1063 (2007); Vetter, *supra* note 237, at 120.

257. Prosecutor v. Halilović, Case No. IT–01–48–A, Judgment, ¶ 59 (Oct. 16, 2007); Prosecutor v. Kordić, Case No. IT–95–14/2–A, Judgment, ¶ 828 (Dec. 17, 2004); Prosecutor v. Blaskić, Case No. IT–95–14–A, Judgment, ¶ 67 (July 29, 2004); *Delalić*, Case No. IT–96–21–A, Judgment, ¶¶ 251–52, 303; *Nahimana*, Case No. ICTR–99–52–A, ¶ 785.

258. For example, Milutinović was acquitted of responsibility under Art. 7(3) because he was too far removed from the perpetrators to be regarded as in effective control, even though it had been established that he knew of the crimes. Prosecutor v. Milutinović, Case No. IT–05–87–T, Judgment, Vol. 2, ¶ 270 (Feb. 26, 2009). During the negotiations of the ICC Statute, the Jordanian delegate foresaw this difficulty. ICC

responsibility may be more suitable for tactical superiors rather than for strategic superiors.

On the other hand, evasion of superior responsibility does not mean impunity for civilian leaders. They may be held directly responsible for their acts (as those who order, conspire, instigate, and aid and abet) or omissions (e.g., with respect to of obligations towards various categories of population).[259] Indeed, in the cases brought before the ICTR prior to *Nahimana*, superior responsibility always accompanied direct responsibility and was secondary to it.

In conclusion, it is not the limits of superior responsibility that result in impunity of civilian leaders, and lowering the threshold of *mens rea* with respect to civilian superiors would not necessarily contribute towards ending such impunity.

VI. CONCLUSION

The analysis in Part III of this Article indicated that the doctrine of superior responsibility of civilians and in civilian settings may not have been as well grounded in customary international law as the ICTY posited in *Čelebići*. The ICTY and ICTR have contributed to the development of the doctrine, but, as Part IV demonstrates, various challenges that arise in civilian settings have been treated inadequately. Part V argues that the application of the doctrine to civilian settings is nonetheless appropriate as a matter of policy. It

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Conference Official Records, *supra* note 243, at 137, ¶ 72. For a similar concern, albeit based on a different definition of a superior's duty, see Ilias Bantekas, *The Interests of States Versus the Doctrine of Superior Responsibility*, 838 INT'L REV. RED CROSS 391, 391–402 (2000).

259. Consider, for instance, Kambanda, Kalimanzira, and the indictments of Milosević and Karadžić. In the International Military Tribunal for Germany, for example, the Nazi leadership was held directly responsible for its crimes, without need to resort to the principle of superior responsibility. W.J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 103, 112 (1995). An instance, often mentioned in this regard, is the finding, in the Report of the Kahan Commission of Inquiry into the massacre at the refugee camps in Beirut in 1982, on the personal responsibility of then-Minister of Defense of Israel, Ariel Sharon. *Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut*, 22 INT'L LEGAL MATERIALS 473, 473–518 (1983). This case raises issues outside the scope of this article—e.g., troop assignments. It is nonetheless worth noting that the Commission found that Sharon disregarded the danger of acts of vengeance and bloodshed by the Phalangists against the population of the refugee camps when he decided to have the Phalangists enter the camps, and failed to order appropriate measures to prevent or reduce the danger of massacre as a condition for that entry. These blunders constituted "the non-fulfillment of a duty with which the Defense Minister was charged," without clearly relying on the doctrine of superior responsibility. For a discussion of this case in light of the doctrine of superior responsibility, see Shany & Michaeli, *supra* note 16, at 876–86.

further contends that categorical normative distinctions between military and civilian superiors in the ICC statute are unmerited, since they neither serve a justifiable policy objective nor correspond to a clear factual division. It would have been preferable to set the same normative standards to all situations and let the different individual circumstances determine the extent of responsibility on an evidentiary level. At the same time, it is important not to overstate the importance of the doctrine of superior responsibility. Its limitations prevent it from resolving the responsibility of every high-ranking individual, but it is only one of many tools available under international criminal law. It is more important to focus on the practicability of the doctrine with respect to the more numerous, lower- and mid-level superiors who, because they are not the instigators of crimes, can be realistically expected to prevent them.