THE APPLICATION OF COMMAND RESPONSIBILITY IN INFORMAL CIVILIAN RELATIONSHIPS FOR INTERNATIONAL CRIMES – LESSONS FROM THE ICTR

SUBMITTED IN FULFILMENT OF THE REQUIREMENTS OF THE LL.M. DEGREE

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DECLARATION

I, TAPIWA AGRIPA MHURU, hereby declare that this dissertation for Master's of Law at the University of Venda hereby submitted by me, has not been submitted previously for a degree at this or any other University and that it is my own work in design and execution, and that all reference material contained therein has been duly acknowledged.

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Dedication

To God be the Glory Forever Amen!!

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List of Acronyms and Abbreviations

CAR	Central African Republic
CDR	*Coalition pour la défense de la République*
CRAP	*Commando de Recherche et d'Action en Profondeur*
ECC	Extraordinary Chambers for Cambodia
ESM	*École Supérieure Militaire*
ESO	*École des Sous Officers*
ETO	*École Technique Officielle*
IAMSEA	*L'Institut Africain et Mauricien de Statistiques et d'Economie*
ICC	International Criminal Court
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal of the Former Yugoslavia
ILC	International Law Commission
IMTFE	International Military Tribunal for Far East
IMT	International Military Tribunal
MDR-PARMEHUTU	*Mouvement Démocratique Républicain - Parti du Mouvement d'Emancipation Hutu*
MLC	*Mouvement de libération du Congo*
NPFL	National Patriotic Front of Liberia
RDR	Refugees and Democracy to Rwanda
RPF	Rwandan Patriotic Front
RTLM	*Radio Télévision Libre des Mille Collines*, S.A
RUF	Revolutionary United Front
SS	*Schutzstaffel*
SA	*Sturmabteilung*
UN	United Nations
UNAMIR	United Nations Mission in Rwanda
UNAMSIL	United Nations Mission in Sierra Leone
US	United States
USA	United States of America

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Abstract

Since the birth of international criminal justice, the imposition of individual criminal responsibility has been expanded as evidenced by the instruments establishing the institutional mechanisms, at least, from Nuremberg to the Rome Statute of the International Criminal Court. The prescriptions of the imposition of criminal responsibility in international criminal law take cognizance of the fact that both top civilian and military personnel commit heinous crimes. However, until the establishment of the International Criminal Tribunal of Rwanda (ICTR), such prescriptions covering individuals who find themselves within informal civilian relationships had not earned much focus, be it at the identification of responsible individuals to their prosecution and conviction. Events in Rwanda during the 1994 genocide that led to the establishment of the ICTR revealed the involvement of this category of individuals. While their involvement took diverse forms, at different times, only some of them were identified and successfully prosecuted and convicted for the offences over which the ICTR has jurisdiction. This category of individuals (those falling under the rubric of informal civilian relationships) has not been addressed by scholarship on international crimes. This dissertation identifies such individuals, examines the allegations against them, the factual findings of the different Trial Chambers and develops a set of rules as well as lessons to be learnt from the trial and appellate proceedings

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Chapter One

INTRODUCTION

1.1 Background

The International Military Tribunal (IMT), Nuremberg,[1] despite its numerous flaws, has been described as mankind's response to its 'worst excesses'.[2] In responding to the horrors of the European Axis Powers, the Charter of the IMT, Nuremberg, evolved to the status of being the reference point of many concepts: firstly, it created and defined what constitutes serious crimes in international law.[3] The IMT Nuremburg criminalised the instigation of wars of aggression or wars that were in violation of international treaties a crime its Charter defined as the crime against peace.[4] The IMT Nuremberg also reprobated and made punishable the violations of the laws or customs of war, such violations encompassed *inter alia* the following: murder, killing of hostages, deportation to slave labour and wanton destruction of cities, towns and villages. Such crimes were termed war crimes under the charter.[5] Secondly, it stipulated the imposition of criminal responsibility.[6] Thirdly, it rendered irrelevant some traditional defences that were used as shields against incurring criminal liability in domestic legal systems;[7] the official position of a defendant could no longer serve as a defence against incurring criminal liability nor would it be considered as a mitigating factor.[8]

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[1] London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1943 to which was annexed the Charter of the IMT, Nuremberg.

[2] D W Cassel, 'Judgment at Nuremberg: A Half Century Appraisal' (1995) vol. 112 No. 35 *The Christian Century*. In naming the flaws of the tribunal Cassel cites how it is peculiar that from the face of the indictments and convictions of the Nuremburg Tribunal only the European Axis Powers (Germany and Italy) were the perpetrators of war crimes a notion he deems to be implausible. For a synoptic discussion of the controversies surrounding the conduct of the Nuremberg Trials, see Makau Mutua, 'From Nuremberg to the Rwanda Tribunal: Justice or Retribution?' (2000) Vol.6 *Buffalo Human Rights Law Review*, 77. Mutau describes Nuremburg as "a patchwork of political convenience" which was designed to imprint upon the Nazi leadership that the allied powers were the victors, and simultaneously discrediting the individuals and their ideal of racial supremacy.

[3] Charter of the IMT, Nuremberg Article 6.

[4] Charter of the IMT, Nuremberg Article 6(a).

[5] Charter of the IMT, Nuremberg Article 6(b)

[6] Charter of the IMT, Nuremberg Article 6(c).

[7] Charter of the IMT, Nuremberg Articles 7 and 8.

[8] *Ibid.*

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Furthermore the fact that a defendant was acting unlawfully pursuant to the orders of a superior was also ousted as a defence against incurring criminal liability.[9]

Since the Charter of the IMT, Nuremberg, numerous instruments on international criminal justice have expanded on these concepts.[10] For example, different definitions of the crime of crimes against humanity were formulated by the International Law Commission (ILC),[11] the United Nations War Crimes Commission,[12] and the United Nations Security Council when it established the first *ad hoc* international criminal tribunal, the International Criminal Tribunal of the former Yugoslavia.[13] Despite these vacillations, the definition contained in the Statute of the second UN Security Council

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[9] *Ibid.*

[10] See for example the Charter of the International Military Tribunal for the Far East (hereinafter referred to as the IMTFE or the Tokyo Tribunal), Article 5(c) which defined crimes against humanity and the underlying proviso which stipulate the imposition of individual criminal responsibility as well as eradicate obedience to superior authorities as a defence to any of the crimes for which an accused would be charged; the Statute of the International Criminal Tribunal for the former Yugoslavia (hereinafter referred to as the ICTY), Article 5 (the definition of crimes against humanity); Article 7 (the imposition of individual criminal responsibility); the Statute of the International Criminal Tribunal for Rwanda (hereinafter referred to as the ICTR), Article 3 (definition of crimes against humanity); Article 6 (imposition of individual criminal responsibility); the Rome Statute of the International Criminal Court (hereinafter referred to as the Rome Statute of the ICC), Article 7 (definition of crimes against humanity) and Article 25 (imposition of criminal responsibility for the crimes over which the Court has jurisdiction). Other relevant instruments include the Statute of the Special Court for Sierra Leone. The ICTY in Article 4 introduced the crime of Genocide as an additional crime under the jurisdictions of international tribunals. The two previous international tribunals – TMT Nuremberg and IMTFE – did not contain this crime as it was only birthed in 1948 by the UN Convention on the Prevention and Punishment of the Crime of Genocide. It however only became legally binding in 1951 after the requisite number of states needed in order for this international instrument to be binding, were attained in that year.

[11]Establishment of the International Law Commission, annexed to the United Nations General Assembly Resolution 174 **(II),** U.N Doc. G.A/Res/174 (II) (1947) of November 1947. Its primary purposes are to study the progressive evolution of international law and make recommendations thereon. Some of the instruments developed by the ILC in which the crime of crimes against humanity was defined include the 1951 Draft Code on Offences against the Security and Peace of Mankind in Article 2 (10) and (11); and the 1996 Draft Code of Offences against the Peace and Security of Mankind in Article 18.

[12] It was initially called the United Nations Commission for the Investigation of War Crimes, and its establishment preceded the United Nations. It was mandated with the investigation of war crimes committed by the Nazi Germany and its allies of World War II.

[13] Statute of the International Criminal Tribunal for the former Yugoslavia, annexed to United Nations Security Council Resolution 827, U.N SCOR, 3217th meeting, U.N. Doc. S/RES/827 (1993) of May 1993.

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ad hoc International Criminal Tribunal of Rwanda, the ICTR,[14] became generally acceptable given the introduction of distinguishing definitional elements;[15] the crimes listed in Article 3 of the ICTR, namely: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, should form part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. Previously the need for the attacks to be committed in the context of a widespread and systematic attack against a civilian population was not present in the definition of crimes against humanity by international tribunals.[16]

Added to the introduction of definitions of crimes against humanity is the imposition of individual criminal responsibility for serious crimes in international law.[17] Between 1945 and 1998, different instruments have, in their stipulations, expanded the imposition of criminal responsibility. The Charter of the IMT, Nuremberg, stipulates as follows:

> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [Crimes against peace, war crimes and crimes against humanity] are responsible for all acts performed by any persons in execution of such plan.[18]

The Charter of the International Military Tribunal of the Far East, Tokyo (IMTFE, Tokyo), repeated these same words in its imposition of individual criminal responsibility.[19] The stipulation of criminal responsibility was also expanded by the United Nations' Security Council when it created its first *ad hoc* international criminal tribunal, the ICTY, the Statute stipulates the imposition of criminal responsibility as follows:

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[14] Statute of the ICTR annexed to United Nations Security Council Resolution 955, U.N. Doc. S/RES/955 (1994) of 8 November 1994.

[15] Statute of the ICTR, Article 3.

[16] For an understanding of, and discussion on the evolution of, and formulations on crimes against humanity, see the Charter of the IMT, Nuremberg, Article 6(c); Charter of the IMTFE, Tokyo, Article 5(c); Statute of the ICTY, Article 4; Statute of the ICTR, Article 3; Rome Statute of the ICC, Article 7.

[17] More specifically (and as discussed in succeeding paragraphs), the Charter of the IMT, Nuremberg, Article 6(c); Charter of the IMTFE, Tokyo, Article 5(c); Statute of the ICTY, Article 7; Statute of the ICTR, Article 6; and the Rome Statute of the ICC, Article 25.

[18] Charter of the IMT, Nuremberg, Article 6(c).

[19] Charter of the IMTFE, Tokyo, Article 5(c).

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> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 [Grave breaches of the Geneva Conventions of 1949, Violations of the laws and customs of war, genocide and crimes against humanity] of the present statute, shall be individually liable for the crime.[20]

About two years later, the same institution (the UN Security Council), regurgitated the wording of Article 7(1) of the Statute of the ICTY when it created its second *ad hoc* international criminal tribunal, the ICTR.[21]

The identification, prosecution and conviction of numerous individuals in the different tribunals reveal that military and civilian personnel were held responsible for the different serious crimes in international law. At Nuremberg, the key actors in the Nazi Regime (that is, the top ranks of the Nazi Party, the Gestapo, the *SS*,[22] and the *SA*[23]) were held responsible for the crimes over which the IMT, Nuremberg, had jurisdiction.[24]

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[20]Statute of the ICTY, Article 7(1).

[21] Statute of the ICTR, Article 6(1).

[22]The *SS*, short form for the *Schutzstaffel* (Protection squadron/Defence Corps) was a major paramilitary organization under Adolf Hitler and the Nazi party, which comprised of volunteers of the Nazi party that were tasked with the duty of providing security for the Nazi Regime. *Trial of the Major War Criminals before the International Military Tribunal Nuremberg, Nuremberg 14 November 1945 – 1 October 1946* (1947) Published at Nuremberg Germany, 81.

[23]The *SA*, short form for the *Sturmabteilung* (storm detachment or assault group) was the original paramilitary wing of the Nazi Party that was instrumental to Adolf Hitler's rise to power. The *SA* protected the Nazi rallies and assemblies and disrupted the meetings of opposing parties. *Trial of the Major War Criminals before the International Military Tribunal Nuremberg, Nuremberg 14 November 1945 – 1 October 1946* (1947) Published at Nuremberg Germany, 31.

[24] Hermann Göering, Rudolf Hess, Joachim von Ribbentrop (Hitler's Foreign Minister), Robert Ley (Leader of the German Labour Front), Field Marshal Wilhelm Keitel (Chief, of Hitler's Military Staff), Julius Streicher (who was the Nazi leader in Franconia, and also the editor and publisher of the distasteful anti-Semitic newspaper *Der Stürmer*); Ernst Kaltenbrunner (following Heinrich Himmler's suicide, he was the senior surviving official of the SS and Gestapo); Alfred Rosenberg (Minister of German-occupied eastern territories and official ideologist of the Nazi Regime); Hans Frank (who was the Civilian Governor-General of occupied Poland), Wilhelm Frick (the Minister of the Interior and subsequently appointed the Protector of Bohemia and Moravia). The selection of the first ten names was based on the wide publicity they had in almost every household in Europe. Except for Julius Streicher, these individuals were state actors who had occupied influential posts of responsibility in the Nazi Regime. Then, the list was extended to include leaders of criminal groups or organizations, which included officials like Adolf Hitler, the *Fuhrer* (at the time of commencing the trials, his death had not been officially confirmed but would be added if there was any information to the contrary); Hjalmar H. G. Schacht, who, prior to the war, was head of Reichsbank and Minister of Economics, did handle the financing necessary to expand war production); Arthur Seyss-

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In Tokyo, the US Supreme Commander identified the key personnel within civilian and military leadership and held them responsible for the crimes over which the IMTFE had jurisdiction.[25] The Office of the Prosecutor at both the ICTY and ICTR did not deviate from this practice. The ICTY has indicted a total of 161 persons. To date 132 cases have been completed and out of these cases only two civilians have been convicted under command responsibility and both by way of guilty pleas. The two persons are Stevan Todorović,[26] (He was the Chief of police in Bosanski Šamacand a member of the Serb Crisis Staff) and Biljana Plavšić[27] (A political leader that *inter alia* held the position of member of the three-member Presidency of Serbia). Though not much in terms of legal principles can be learnt from these two cases what can be noted is that this is a confirmation of the application of command responsibility to civilian superiors. In terms of the doctrine's application in the military parameters the tribunal significantly contributed to the jurisprudence and development of command responsibility through its judgments against accused persons such as Tihomir Blaškić[28] (a Colonel in the HVO who was later promoted to the rank of General in 1995); and Sefer Halilović[29] (a professional military officer). The ICTR on the other hand, has had more cases involving civilians.[30]

Inquart, an Austrian Nazi who later became Commander-in-Chief of the German Navy from 1943-1945, and was named in Hitler's will as President and Supreme Commander in the Reich; Walter Funk who succeeded Schacht as head of the Reichsbank and Minister of Economics; Albert Speer, who was Hitler's favourite architect and later became Minister of Armament and Munitions; Grand-Admiral Karl Doenitz, Gustav Krupp, Fritz Sauckel, who was the primary figure in the foreign forced labour program, Alfred Jodl, who was Chief of Operations on Hitler's Military Staff, Franz von Papen, who was the Reich Chancellor in 1932, Vice Chancellor in the Hitler Cabinet from 1933-1934 and subsequently Ambassador to Austria and Turkey, Constantin von Neurath, who was Ribbentrop's predecessor as Former Minister, and later Reich Protector of Bohemia and Moravia, Hans Fritzsche, who was the highest subordinate of Goebbels at the Propaganda Ministry, Grand Admiral Erich Raeder, who was the Commander in Chief of the German Navy until his retirement in 1943, and Baldur von Schirach, the Nazi Youth Leader who was added because of his 'vicious indoctrination' of the youths. *Trial of the Major War Criminals before the International Military Tribunal Nuremberg, Nuremberg 14 November 1945 – 1 October 1946* (1947) Published at Nuremberg Germany.

[25] For further information on the persons tried and their judgments, see generally R Cryer and N Boister, *The International Military Tribunal for the Far East: An Appraisal* (2008) Oxford University Press.

[26] See generally *Prosecutor v Stevan Todorović* case No IT-95-9/1-S.

[27] See generally *Prosecutor v Biljana Plavšić* case No IT-00-39&40/1-S.

[28] See generally *Prosecutor v Tihomir Blaškić* case No IT-95-14-T.

[29] See generally *Prosecutor v Sefer Halilović* case No IT-01-48-T.

[30] An example of these are: *Prosecutor v Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze*, ICTR Trial Chamber, case No ICTR-99-52-T 3 December 2003; *Prosecutor v Simon Bikindi*, ICTR Trial Chamber case No ICTR-01-72-T 2 December 2008; *Prosecutor v Clément Kayishema*, ICTR Appeal

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It must however be noted that in the identification, prosecution and conviction of these top civilian and military personnel, criminal responsibility was imposed on some persons who were neither part of the top civilian nor military personnel. Especially with the ICTR, these are individuals who, by some acts or omission, contributed to the planning, preparation or commission of any of the crimes over which the Tribunal has jurisdiction. Unlike in the cases of civilian and military personnel where rules on command responsibility have been established, this category of individuals – individuals who take part either in the planning, preparation or commission of a serious international crime but are neither part of the civilian nor military structure/hierarchy – remains a big challenge. This is because of the fact that in the planning, preparation or commission of serious international crimes, these individuals are not part of any formally recognised structure. In addition, it becomes more complicated due to the fact that they wield some amount of influence or control over others (especially those who would perpetrate the material elements – *actus reus* – of the crimes). A probable reason for this is the complete absence of any set of codified rules and principles developed to address such complex relationships.

There is sufficient literature on the imposition of responsibility in cases of a formally recognised civilian and a military relationship. However, in cases of unrecognised civilian relationships that result in the planning, preparation or commission of any serious crime in international law, the jurisprudence is still under-developed. The cases that have been tried reveal significant variation: each Tribunal considered the role played by the accused individual and assessed his contribution to the planning, preparation or commission of the crimes committed. Examples of this abound: during the Nazi Regime, Julius Streicher, the owner of *Der Stürmer*, published anti-Semitic papers which contributed in inflating negative sentiments towards the Jews in Germany.[31] In Rwanda, many individuals, who were neither affiliated to the civilian nor military authorities, were held responsible for the crimes committed in that country,

Chamber, case No ICTR-95-1-A and *Prosecutor v Alfred Musema*, ICTR Appeal Chamber, case No ICTR-96-13-A 20 January 2000

[31] *Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg, 30th September and 1st October, 1946, London*: HMSO, Cmd. 6964, Reprinted 1966, pp. 100-102.

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some example include, Hassan Ngeze,[32] Jean-Bosco Barayagwiza[33] and Simon Bikindi.[34]

These individuals form the basis of this study as they are individuals who operated within an informal structure that was neither officially established nor recognised by the Government. However, they operated within some structure, with individuals beneath them who took instructions, orders, and weapons from them, leading to the planning, preparation or commission of serious international crimes.

Although a formally recognised relationship between such individuals and the perpetrators they controlled or influenced was absent, it is certain that these perpetrators were influenced or controlled by these individuals. Consequently, numerous questions spring up: first, who actually wields command? Is this determinable by simple *de facto* or *de jure* command questions? Secondly, what are the precise contours of this command relationship? Unlike military and civilian spheres where the precise borders are established by the laws and practices, how can such be determined in such informal relationships/structures?

In answering these questions, the focus of this study shall be on atrocities committed in Rwanda and the criminal tribunal that was created as a means of delivering justice to the perpetrators of the heinous acts. First, the study examines the cases of the ICTR and identifies individuals who fall within the category of formal command and informal command. Secondly, it looks at the imposition of criminal responsibility on these individuals – what they did that led to the planning, preparation or commission of these serious crimes in international law. Thirdly, the study examines the link between these individuals and the persons under their command, and fourthly, it considers the

[32] See *The Prosecutor v Ferdinand Nahimana et al* (*supra* note 30), 2, par, 6. Jean-Bosco Barayagwiza was born in 1950 in Mutura commune, Gisenyi préfecture, Rwanda; he trained as a lawyer and co-founded the CDR party which was formed in 1992. He was also a member of the comité d'initiati, which organized the founding of the *Radio Télévision Libre des Mille Collines*, S.A (RTLM). He concurrently held the position of director of Political Affairs in the Ministry of Foreign Affairs.

[33] *Ibid.* Hassan Ngeze was born in 1957 in Rubavu commune, Gisenyi prefecture, Rwanda. From 1978, he worked as a journalist. In 1990, he founded the newspaper Kangura and was Editor-in-Chief. Prior to this, he was the distributor of the *Kanguka* newspaper in Gisenyi. He was also a founding member of the *Coalition pour la Défense de la République* (CDR) party

[34] See *Prosecutor v Simon Bikindi*, (*supra* note 21) 44. Simon Bikindi was a popular musician who through the composition of his music participated in genocide. His music exalted Hutu solidarity and encouraged ethnic hatred which ultimately led to the attacks and killings of the Tutsi.

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judgments of the Trial and Appeal Chambers of the ICTR to develop a list of parameters that can be used in future international prosecutions in cases of such informal civilian relationships.

With this background, it is important to consider the meaning of some key concepts/words that would be of recurrent usage in this dissertation.

1.2 Definition of concepts

In exploring the jurisprudence on command responsibility in informal civilian relationships for international crimes, some words and phrases merit definition. These words and phrases are command responsibility, *de facto* command, *de jure* command, serious crimes in international law, informal civilian relationships/structure and the imposition of criminal responsibility in international law.

1.2.1 Command responsibility

Command responsibility, synonymous with superior responsibility, in jurisprudential parlance, is a compendious description of the responsibility incurred by superiors for the unlawful acts or omissions of their subordinates (or persons under their command). The jurisprudence of international criminal tribunals as well as the publications of legal experts dictate that there are three ingredients for the establishment of command responsibility: first, the superior must be aware, or had reason to be aware, of the unlawful act or omission of the subordinate; secondly, the superior must have been unwilling or unable to do anything to stop or prevent the subordinate from planning, preparing, or committing the unlawful act or omission; and third, the superior must have failed to subject the subordinate to some judicial or administrative procedure, resulting in either prosecution or some form of reproach or punishment. [35]

Proof of the existence of a command relationship is not complex. Legal jurisprudence has developed two kinds of command: *de facto* command and *de jure* command.[36]

[35] *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landzo*, case No IT-96-21-T, 122, par.333. (the Čelebići case)

[36] See *Prosecutor v Zejnil Delalić et al* (*supra* note 35), 131, par.354.

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1.2.1.1 De facto command

De facto command refers to a relationship in which the superior without formal powers of command has acquired enough authority over one or more people to prevent them from committing crimes or to punish them when they have done so.[37]

1.2.1.2 De jure command

This refers to the form of control that is derived from the official appointment to a position of leadership over subordinates in a hierarchical structure. For the purpose of the doctrine of superior responsibility, this means that the superior has been appointed, elected or otherwise assigned to a position of authority for the purpose of commanding or leading other persons who are, legally considered to be his subordinates. It creates a rebuttable presumption that effective control exists.[38]

1.2.2 Informal civilian structures/relationships

This phrase is used to describe relationships built by civilians, within which there is no *de jure* establishment of command responsibility recognized by the government. An example being that of Simon Bikindi who was a famous musician commanding much influence over the audience who heard his music that exalted Hutu solidarity and encouraged the Tutsi killings. Given the lack of such formal structure that would convey a *de jure* existence of command responsibility, there is much inference of some *de facto* command that is in existence. Throughout this dissertation, this phrase would be used as descriptive of such informal relationships between civilians wherein some civilians exercise *de facto* command responsibility over other civilians.

1.2.3 Serious crimes in International Law

Prior to 1945, there existed crimes in international law, for which the concept of universal jurisdiction was developed.[39] However, with the birth of international criminal justice in 1945, numerous concepts were born. One of such concepts is the classification of serious crimes in international law, which, over the decades, has witnessed some modifications both in terms of content and substantive definition.

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[37] *Prosecutor v Zejnil Delalic, Zdravko Mucić, Hazim Delic and Esad Landzo*, ICTY Trial Chamber, case No IT-96-21-T, 16 November 1998, 364-378.

[38] Y. Ronen 'Superior Responsibility of Civilians for International Crimes committed in Civilian settings' (2012) vol.43 *Vanderbilt Journal of Transnational Law, 337.*

[39] Examples of this include slavery and slave trade, piracy, hijacking and terrorism.

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The Charter of the IMT, Nuremberg, contained three serious crimes in international law, which stipulated definitions: crimes against peace,[40] war crimes,[41] and crimes against humanity.[42] The Charter of the IMTFE, Tokyo, bears a similar definition.[43] The Convention on the Prevention and Punishment of the Crime of Genocide adopted by the UN General Assembly on December 9, 1948, created the crime of genocide and elevated it to an international crime. The Convention also stipulated other acts of genocide that would be punishable.[44]

The concept, international crime, has over the years undergone tremendous variation in content. A substantive discussion of nature, evolution and definitions of international crimes will be undertaken later in this study.

1.2.4 Criminal Responsibility in International Law

In jurisprudential terminology, the doctrine of 'criminal responsibility' is simply a succinct way of saying that a person, by his act or omission, may be held legally responsible for the unlawful act in question.[45] Subsumed under the concept of responsibility are elements such as *actus reus*, *mens rea*, causation, youthfulness/age

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[40] The Charter of the IMT, Nuremberg, Article 6(a), defines crimes against peace as follows: '[c]rimes against peace, namely; planning, preparation, initiation or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or a participation in a common plan or conspiracy for the accomplishment of any of the foregoing...'

[41] The Charter of the IMT, Nuremberg, Article 6(b) defined war crimes as follows: '[w]ar crimes, namely; violations of the laws or customs of war. Such violations including, though not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity...'

[42] The Charter of the IMT, Nuremberg, Article 6(c), defines crimes against humanity as follows: 'murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in the execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.'

[43] The Charter of the IMTFE, Tokyo, contained similar crimes whose definitions were worded similarly. See the Charter of the IMTFE, Tokyo, Article 5(a) – (c).

[44] The UN Convention on the Prevention and Punishment of the Crime of Genocide, United Nations General Assembly Resolution 260(III), UN. GAOR, 3rd Session, 179th meeting, U.N. Doc. A/RES/260A (1948) of 9 December 1948 (hereinafter referred to as the Genocide Convention), Article 2 (for definition of the crime of genocide) and Article 3(a) – (e) for punishable acts of genocide.

[45] G. Kemp *et al Criminal law in South Africa* (2015) Oxford University Press, 24-25.

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of the actor, mental illness, voluntariness of conduct and so on.[46] The basic inquiry here is the fairness of holding a particular actor to be answerable in law for a wrongful act or omission in question.

1.3 Aim and objectives of the study

As discussed earlier, international criminal law instruments recognise the existence of command responsibility in both military and civilian relationships. While the focus is on the latter (civilian relationships), a key and distinguishing feature here is that they are formal in character. Examples of this include the hierarchical structure of power such as Presidents, Prime Ministers, Ministers, Governors, Mayors and other top civilian personnel. These individuals exercise authority over their subordinates because the law has prescribed such. There is a clear existence of a *de jure* command responsibility. In this category of individuals who wield *de jure* command responsibility, the instruments, jurisprudence and writings of legal scholars are very clear.

However, it is a bit problematic when dealing with individuals who do not operate within a formal structure, and yet have command over other individuals. There is the existence of a *de facto* command responsibility. Such informal structures vary, ranging from popular journalists, musicians, to basic relationships that are commonly established for a specific purpose.

While international instruments are clear on the imposition of criminal responsibility, jurisprudence on such informal civilian leaders has not been developed extensively. It is therefore important to consider what some Trial Chambers have done in this regard in order to guide and influence the evolution of legal principles when it comes to addressing the criminal responsibility of these kind of persons.

Thus the aim of this study is to:

I. Elicit from the cases that have come before the ICTR, the principles that govern the existence of informal command responsibility for serious international crimes.

This dissertation therefore, fulfilled the following objectives:

i. To trace the history and the evolution of command responsibility.

[46] *Ibid.*

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ii. To examine how the ICTR dealt with cases of formal command responsibility

iii. To interrogate how the ICTR dealt with command responsibility in informal settings and examine some rules that are reflected in the judgments of the Trial and Appeal Chambers, and see how they can be used by other mechanisms in international criminal justice when similar cases are tried.

With these objectives, it is imperative that specific research questions that have to be answered be articulated.

1.4 Research Questions

In order to meet the objectives discussed above, there are some specific questions that have to be answered:

I. Firstly, where does the doctrine of command responsibility emanate from and how has the doctrine evolved since its inception in international criminal law?

II. Secondly, how did the ICTR establish the requisite elements of the doctrine in cases of formal command responsibility?

III. Thirdly, how did the ICTR establish the requisite elements of the doctrine in cases of informal command responsibility and what lessons can be learnt from the cases that have been tried by the Trial Chambers of the ICTR?

1.5 Literature Review

Scholars in the field of international criminal justice have delineated the sphere of command responsibility as it exists within formal civilian and military administration but they have largely ignored what transpires in informal settings. Not surprising, one notices that any discussion on command responsibility focuses on the top-notch military and civilian personnel not on the other significant players; as a result, very little has been written on command responsibility operating in the contours of informal civilian relationships.

Danner *et al* engage in a broad discussion of the concept of command responsibility, starting from the history, to the rationale and finally the evolution of the doctrine.[47] In articulating the developments, the authors note how in the early cases, a clear formulation of the legal standards applied in the determination of *mens rea* and proof

[47] A M. Danner and J S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,' (2005) vol.93 *California Law Review.* 75.

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of effective control was absent and that this factor resulted in much controversy and simultaneously generated sentiments that early convictions were based on a form of liability that resembled or equated to that of strict liability.[48] However, the authors commend the jurisprudence of the ICTY and ICTR for their clinical articulation of these discrepancies in the doctrine.[49] In their earliest cases, the two *ad hoc* tribunals rejected the standards of strict liability and negligence as the basis of imputing criminal liability.[50] In a nutshell, the authors limited much of their discussion of the doctrine to an analysis of the *mens rea* requirement and the superior-subordinate relationship, both of which are necessary aspects in the quest for a successful conviction under this doctrine. However, there is no mention of the fact that there have been perpetrators convicted by international tribunals who do not fall under the contemplated formal civilian and military personnel.

Ronen engages in the debate of the applicability of command responsibility in civilian settings. The author discredits the notion that customary international law extends the doctrine of command responsibility to civilians, and in particular, the notion that this application extends to the parameters of civilian settings.[51] Ronen's work highlights the challenges of applying the doctrine in civilian settings, one of them being the determination of the existence of a superior-subordinate relationship, [52] and concludes by conceding that civilians should, as a matter of policy, be subject to the doctrine. While the work deems the distinction in the *mens rea* standard, applicable between civilian and military superiors to be impracticable and unnecessary,[53] it does not focus

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[48] See Danner (*supra* note 47) 123 – 124.

[49] See Danner (*supra* note 47) 125.

[50] The authors highlight that in *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR Trial Chamber, case No. ICTR-96-4-T (Sept. 2, 1998) Para. 489 (Akayesu case) emphasis was lead on the fact that command responsibility derives from the principle of individual criminal responsibility and that such responsibility should be based on malicious intent or at least negligence "so serious as to be tantamount to acquiescence or even malicious intent." And a few weeks later in *Prosecutor v. Zdravko Mucić et al,* Judgment, ICTY Trial Chamber, Case No IT-96-21-T, ICTY, (18 November 1998) Para.386-387 (*Čelebići* case) rejected the negligence standard and held that the requisite knowledge necessary for the imputation of liability could be depicted from direct evidence or established by circumstantial evidence.

[51] Y. Ronen 'Superior Responsibility of Civilians for International Crimes committed in Civilian settings' (2012) vol.43 *Vanderbilt Journal of Transnational Law 313-334.*

[52] See Ronen (*supra* note 51) 330 – 341.

[53]The Rome Statute of the ICC Article 28 makes a distinction in the knowledge requirement for non-military superior as opposed to military superior.

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on the complexities involved in apportioning criminal responsibility to civilians that do not fall under a formal civilian structure.[54]

Levine discusses whether the ICC's approach in differentiating the *mens rea* requirement in Article 28(b) is detrimental to the doctrine's application and whether this approach undercuts the very essence of the doctrine's aims upon establishment.[55] After giving a comprehensive overview of the history of the doctrine, the author examines civilian liability under Article 28 of the Rome Statute of the ICC, and utilises few hypothetical scenarios in order to postulate the outcomes when viewed in light of Article 28. The hypotheticals establish that there is no focus on the informal command relationships that this paper intends to discuss.

Bonafe examines the current law of command responsibility in the jurisprudence of the ICTY and the ICTR, and notes how, despite the fact that its conceptualisation was broad, in practice, the successful conviction of accused persons is rare.[56] This problem has further been compounded by the fact that these *ad hoc* tribunals have adopted more rigorous legal requirements of command responsibility as establishing criminal liability of superiors who have not directly participated in the commission of international crimes.[57] In conclusion, Bonafe notes that there seems to be a confinement of the application of the doctrine to military settings.[58] This dissertation portrays existing gaps in articulating the complete reach of the doctrine with extensive use of case-law.[59]

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[54] In discussing the challenges of transposing the doctrine to civilian settings, Ronen limits his critic to the following; the source of the obligation to prevent or punish in a civilian setting, *de facto* authority of civilian superiors and finally distinguishing superior responsibility from direct responsibility. See (*supra* note 51), 330 – 341.

[55] J.D. Levine 'The Doctrine of Command Responsibility and its Application to Superior Civilian Leadership: Does the International Criminal Court have the Correct Standard?' (2007) vol.193 *Military Law Review 52-96.*

[56] B.I Bonafe 'Finding a proper role for command responsibility' (2007) vol.5 *Journal of International Criminal Justice* 599 – 618.

[57] See Bonafe (*supra* note 56) 604 – 611.

[58] See Bonafe (*supra* note 56) 618.

[59] As stated in the background there have been convictions of perpetrators who do not fall in the category of the typical military or civilian personal as envisaged by the international tribunals and there is a need to clearly articulate the legal standards applicable in identifying such people.

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While re-evaluating cases tried on the basis of Article 28(2) of the ICC Statute, Vetter delves into the implications of the new civilian standard of the superior responsibility doctrine. [60] The author concludes by noting that under the Rome Statute of the ICC, civilian superiors effectively acting as military commanders may use the above-mentioned provision as a veil to exclude the application of the stricter *mens rea* standard embodied in Article 28(1) of the Rome Statute of the ICC. Vetter further notes that the extent to which the lesser knowledge element of the statute lowers the criminal requirement of the duty to keep informed will determine how useful it will be for civilian defendants operating as military commanders to plead that they are civilians and consequently the less strict standard of command responsibility should be applied.[61]

Sliedgret's publication on the imposition of individual criminal responsibility in international law dedicates a chapter to the doctrine of command responsibility. The chapter briefly introduces the concept and touches upon the following six elements in relation to the doctrine: Developments of the doctrine, the ambiguous nature of superior responsibility, the doctrine in national law, the multi-layered concept of the doctrine and the doctrine of parallel liability.[62] In further discussing the developments in the doctrine, Sliedgret discusses the three elements that ought to be present before liability under the doctrine is imputed on an individual: first, the existence of a superior-subordinate relationship; secondly, proof that the superior knew or had reason to know of the crime and, thirdly, proof that the superior failed to take the reasonable and necessary steps to prevent or punish the perpetrator who committed the crime.[63] These three elements, established by the landmark ICTY *Čelebići Case*, must be present before liability is imposed on a superior for the acts of the subordinate.[64] Sliedgret also ventures into the discussion of successor superior responsibility by analysing the *Hadžihasanović* Case.[65] Sliedgret's chapter, although detailed in its analysis, fails to address the application of command responsibility in informal relationships.

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[60] G.R Vetter 'Command Responsibility of Non-Military Superiors in the International Criminal Court' (2007) vol. 25 *The Yale Journal of International Law*, 90 – 143.

[61] "Consciously disregarded".

[62] E van Sliedgret *Individual criminal responsibility* (2012) Oxford University Press, 206.

[63] See Vetter (*supra* note 60) 184 – 208.

[64] *Prosecutor v. Mucić et al*, case No IT-96-21-T, ICTY, 18 November 1998.

[65] *Prosecutor v. Hadžihasanović and Amir Kubura*, case No. IT-01-47-AR72, ICTY, 16 July 2003 (*Hadžihasanović* case)

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Ambos delves into the basics of command responsibility and highlights the three requirements that must be present before liability under the doctrine is apportioned namely: the existence of a superior-subordinate relationship; secondly, proof that the superior knew or had reason to know of the crime and, thirdly, proof that the superior failed to take the reasonable and necessary steps to prevent or punish the perpetrator who committed the crime. In analysing the doctrinal considerations of command responsibility, the author notes that liability under this doctrine is meant to curtail the neglect of supervisory duties of the superiors over their subordinates and that these duties ensue from Article 87 of the Additional Protocol I to the Geneva Conventions of 1977 in relation with Article 43(1) of Additional Protocol I. The author further distinguishes between command responsibility and joint criminal enterprise before embarking on a discussion of the theory of control/domination of the act by virtue of a hierarchical organization (*organisationsherrscharft*).[66] While extensively covering the ways of attributing international crimes to the most responsible, Ambos' work does not address the applicability of command responsibility in informal relationships.

Nybondas-Maarschalkerweerd's study of applying command responsibility to civilians notes how Article 28 of the Rome Statute of the ICC is the first provision that specifically provides for civilians incurring liability under command responsibility.[67]. This puts to rest the debate whether the international tribunals' extension of the doctrine's application to civilian superiors was correct.[68] The study however notes that unlike the *ad hoc* tribunals, the ICC will be faced with the challenge of having to first determine whether a superior is civilian before turning to the evidence on the elements. In analysing some of the ICTR's jurisprudence, the author's main focus is on discovering the basis for convictions and acquittals. The analysis is done in consideration of Article 28 of the Rome Statute of the ICC. This highlights a key distinction from this dissertation which focuses on the application of the doctrine in informal relationships.

In all, little focus has been given to the application of the doctrine of command responsibility to informal relationships. Consequently, this dissertation analyses the instruments that shape the doctrine of command responsibility and its application to

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[66] Hereinafter referred to as JCE.

[67] M.L. Nybondas-Maarschalkerweerd *'The command responsibility doctrine in international criminal law and its applicability to civilian superiors'* PhD thesis, University of Amsterdam 2009 available at http://dare.uva.nl/document/161593(accessed 22 September 2016).

[68]See Nybondas-Maarschalkerweerd (*supra* note 52) 89.

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the cases tried by a tribunal (the ICTR) established by one of the instruments, the Statute of the ICTR.

1.6 Methodology

This study employs an extensive case law study and analysis. It identifies and analyses relevant international instruments and literature. This approach involves a type of methodology that is categorized as doctrinal legal research or the Black Letter Law approach.[69] In defining the concept of "Doctrinal Research" Duncan traces the meaning of the approach to the Latin word '*doctrina*' meaning instruction, knowledge or learning.[70] The author alludes that the doctrine in question encompasses concepts and various principles, which include cases, statutes and rules.[71] It justifies and makes coherent a segment of the law that is part of a larger system. It is through the aid of this methodology that this dissertation identifies the principles that govern the imposition of criminal liability upon informal civilian leaders for serious international crimes from the cases that have come before the ICTR.

Having outlined the relevant methodology, it is necessary to identify the potential limitations of the study. To every study there are certain limitations that may hamper the outcome of an effective study, and for the purposes of fully informing the reader it is necessary to highlight such shortcomings.

1.7 Limitations of the study

This dissertation is limited to cases of informal command structure where command responsibility exists; yet its borders are not properly defined. To overcome this, the dissertation employs a case-by-case study review of the tribunal's jurisprudence dealing with informal civilian relationships in order to come up with a formulation of the parameters used to apportion criminal responsibility. It must also be noted that not all judgments and indictments can be accessed on the ICTR website, hence, the dissertation relies on most recent CD/DVD combo from the ICTR as it contains the documents they have.

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[69] W.T Murphy & S Roberts 'Introduction to the Special Issue of Legal Scholarship' (1987) Vol. 50 No. 6 *Modern Law Review*, 677.

[70] N. Duncan 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) Vol. 17 No. 1 *Deakin Law Review*, 84.

[71] See Duncan (*supra* note 70) 84.

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1.8 Structure

This dissertation is structured into five chapters. The paragraphs below are a compendious narrative of what themes and sub-themes that will be discussed in the different chapters.

CHAPTER ONE: INTRODUCTION

This is the introductory chapter which highlights the complexities of the application of the doctrine of command responsibility in informal civilian structures. Among others, it focuses on the evolution of criminal responsibility per international instruments and the jurisprudence of the different tribunals.

CHAPTER TWO: THE DOCTRINE OF COMMAND RESPONSIBILITY

This chapter examines the evolution of the concept of serious crimes in international law and the doctrine of command responsibility with focus on its evolution and application by international tribunals and courts. It states the evolution of the doctrine of criminal responsibility as the primary mechanism for holding accountable the military and civilian superiors of a state who commit serious crimes in international law and how international tribunals have applied to convict individuals who did not form part of the above-mentioned categories. This chapter gives a historical background of the doctrine dating back as far as the pre-1945 and up to the Rome Statute of the ICC. It also provides a synoptic discussion of the various international criminal tribunals, special courts and extraordinary Chambers wherein their Charters and Statutes will be analysed. It also addresses summarily the cases tried by these tribunals.

CHAPTER THREE: COMMAND RESPONSIBILITY WITHIN THE STATUTE OF THE ICTR

This chapter gives an overview of Rwandan history and examines the doctrine of command responsibility as stipulated in the Statute of the ICTR. This is followed by an overview of the establishment of the Tribunal, and finally a discussion of the principles underlying formal command responsibility cases tried by the Trial Chambers

CHAPTER FOUR: ICTR CASES OF INFORMAL CIVILIAN STRUCTURES AND THE LESSONS FROM THESE CASES

In this chapter, cases belonging to informal civilian structures are examined. An analysis of the judgments rendered by both the Trial and Appeal Chambers is undertaken so as to identify parameters that could have been developed in the

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imposition of criminal responsibility based on the existence of a *de facto* command responsibility. An exposition of the considerations the different Trial Chambers had when tackling the issue of command responsibility within informal relationships is undertaken in an attempt to answer the research questions that triggered this study.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

The chapter profiles the relevance of these parameters for future use by other international courts. More importantly, it situates the doctrine of command responsibility for such informal civilian relationships within the Rome Statute of the ICC, and postulates that such situations can be resolved by reference to the parameters and cases already decided by the ICTR.

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Chapter Two

2 THE DOCTRINE OF COMMAND RESPONSIBILITY

2.1 Introduction

With an introduction of the study having being given in the previous chapter, this chapter looks at the evolution of the concept of international crimes and ultimately outlines the crimes encompassed in the term serious crimes in international law. The chapter gives a substantive history of the concept of the command responsibility doctrine dating back to the pre-1945 era before the establishment any international tribunal. In doing so, the Chapter looks at the international tribunals that have been formed and offer a synoptic discussion of each tribunal.

2.2 The Evolution of Crimes in International Law

The early existence of International crimes is a subject of no contention as has been established by the celebrated work of Wolfgang Friedmann.[72] According to the author the crimes which constituted international crimes, included piracy *jure gentium*, and war crimes. The book, War Crimes in Internal Armed Conflicts, by Eve La Haye notes the crime of slavery[73] as one of the crimes that have long been subject to universal jurisdiction.

Piracy is described as robbery that is committed upon vessels on high seas or any place outside the states jurisdiction. [74] Piracy is considered to constitute the foundations of universal criminal jurisdiction for *jus cogens* in international crimes.[75] Viewed as a threat to the interests of the international community, piracy constitutes an impediment to the security of commerce on the high seas, the principle of freedom of maritime communication and the principle of freedom of the high seas.[76]

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[72] W. Friedmann, *The Changing Structure of International Law*, (1964) New York, Columbia University Press. In this book, Friedmann acknowledged that, "despite its modest and ill-defined proportions," international criminal law had always existed.

[73] E. La Haye, *War Crimes in Internal Armed Conflicts,* (2008) USA, Cambridge University Press, 219.

[74] *Ibid.*

[75] C.M Bassiouni 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) Vol.42:1, *Virginia Journal of International Law*

[76] *ibid.*

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Slavery on the other hand is defined as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.[77] Slave trade has existed since time immemorial and the first instance of its international condemnation was through the 1815 Declaration Relative to the Universal Abolition of the Slave Trade.[78]

The laws of war and international humanitarian law, were uncodified prior to the mid nineteenth century. The existence of these laws was thus rooted in the national laws, military manuals and religious teachings.[79] The first attempts to remedy the absence of a written code governing international humanitarian law were seen in the second half of the nineteenth century, a period marked by the 1856 Paris Declaration on Maritime Law,[80] the 1864 Geneva Conventions on Wounded soldiers,[81] and the 1868 Petersburg Declaration.[82] However significant strides in shaping the modern law of war and war crimes is attributed to the 1899 and 1907 Hague conventions which basically concise regulations were relating to laws and customs of war on land that the

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[77] Article 1 of the League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253, Registered No. 1414, available at: http://www.refworld.org/docid/3ae6b36fb.html [accessed 21 January 2015].

[78] Declaration Relative to the Universal Abolition of the Slave Trade, 8 February 1815, *Consolidated Treaty Series,* vol.63, No.473.

[79] T. Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals' (2006) vol. 100 *The American Journal of International Law*, 553.

[80] This declaration was signed upon the conclusion of the Paris treaty of 30 March 1856, which ended the Crimean war. The parties to the declaration concurred upon the following points: that privateering remained abolished; that seizure of enemy goods on neutral vessels nor the seizure of neutral goods on enemy vessels was prohibited and finally that blockades must be effective in order to be binding, in other words, blockades must be maintained by a force sufficient to prevent access to the enemy coast.

[81] This convention was held over a period of two weeks from August 8 – 22 and upon its conclusion, the 16 states present agreed on the following: that the wounded in battle will be granted relief without distinction to nationality, that medical personal and medical establishments and units should not be violated as they are neutral and finally a red flag on white ground was deemed to the identifying marker of medical personal and establishments enjoying neutrality.

[82] Constituting the first formal agreement prohibiting the use of certain weapons in war, the declaration was necessitated by the Russian's invention of a bullet initially designed to explode when in contact with a hard substance. The primary objective of this bullet was to blow up ammunition wagons however its projectiles were modified such that it would explode when in contact with a soft substance. Consequently the use of this bullet would have been inhumane. With the Russians reluctance to use this bullet nor have any other nation use this bullet, Russia led the call for the prohibition of this bullet by an international agreement.

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contracting parties bound themselves to observe. Failure to observe these regulations constituted war crimes.

During World War I various execrable deeds were committed and these clearly contravened the ethos of the Hague conventions.[83] Consequently there was a wide call from the allied nations for justice to be imputed upon the perpetrators of such deplorable behaviour hence the London agreement of 1945.[84] Attempts were made to hold individuals identified as perpetrators of inhumane acts accountable at a national level in the countries of these individuals.[85] However, the efficacy of emitting justice on the perpetrators was mediocre. Consequently, during the course of World War II there was a repetition of gross violations of human rights and humanitarian law. It was clear that a firm deterrent message had to be sent to all the perpetrators who contravened international humanitarian law. As a result, there was a call for the establishment of an international tribunal that would punish such offenders.[86]

The International Military Tribunal of Nuremberg was created for the above-mentioned purpose. Its creation is celebrated for progressively developing the law of armed conflict and giving birth to individual criminal responsibility.[87] The Charter of the IMT

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[83] The defendants who stood trial before the IMT Nuremburg were accused of, participating as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit the following crimes: Crimes against Peace, War Crimes, and Crimes against Humanity, as defined in the Charter of IMT Nuremberg. The defendants engaged in the initiation, and wagging wars of aggression, in violation of international treaties, agreements, or assurances (Crimes against Peace). In pursuit of this plan they embarked in the commission of War Crimes as they carried out, ruthless wars against countries and populations wherein the following crimes were committed: murder, ill-treatment, deportation for slave labour and for other purposes of civilian populations of occupied territories, murder and ill-treatment of prisoners of war and of persons on the high seas, the taking and killing of hostages, the plunder of public and private property, the indiscriminate destruction of cities, towns, and villages, and devastation not justified by military necessity. Their acts also encompassed Crimes against Humanity, both within Germany and within occupied territories, in that the defendants carried out murder, extermination, enslavement, deportation, and other inhumane acts against civilian populations before and during the war, and persecutions on political, racial, or religious grounds. See *Trial of the Major War Criminals before the International Military Tribunal Nuremberg, Nuremberg 14 November 1945 – 1 October 1946* Published at Nuremberg Germany 1947, 29.

[84] London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1943 to which was annexed the Charter of the IMT, Nuremberg.

[85] See generally C.M Bassiouni 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) Vol.10, *Harvard Human Rights Journal,* 15-21.

[86] *Ibid.*

[87] See generally C.M Bassiouni (*supra* note 85), 28.

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Nuremberg listed and defined the crimes that the Tribunal would have jurisdiction over; namely crimes against peace, war crimes and crimes against humanity. Considering that the purpose of the Tribunal was to bring to justice those individuals responsible for heinous acts that violated humanitarian law, it is submitted that the formulation of these crimes marked what constituted serious crimes in international law.

More recent international tribunals have confirmed these crimes, with the exception of crimes against peace;[88] the ICTY and the ICTR also introduced the crime of genocide. However, the Rome Statute for the ICC reintroduced crimes against peace through its listing and defining of the crime of aggression. It is thus submitted that the crimes reflected in the establishing charters of various international tribunals are a true reflection of serious crimes in international law as confirmed by the Rome statute of the ICC.

With the evolution of crimes in international law having been discussed, an outline of the history of the doctrine of command responsibility shall be given.

2.3 The Command Responsibility Doctrine outside ICTR Jurisprudence

> The king orders that each captain or lieutenant be held responsible for the abuses, ills and offenses committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have.

The quotation above contains the wording of an ordinance issued by King Charles VII of France in 1439 at Orleans.[89] Clearly the rationale and principles underlining the modern day doctrine of command responsibility are encompassed in this ordinance,

[88] Both the ICTY and the ICTR exercised jurisdiction over war crimes and crimes against humanity.

[89] Smidt M.L 'Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations' (2000) vol.164 *Military Law Review.*

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and thus refuting the misconception that the command responsibility doctrine originated post World War II. The international recognition of the doctrine is however traced back as far as 1474 with trial of Peter von Hagenbach who was tried by an international tribunal of twenty-eight judges from states within the Holy Empire.[90] Charged with murder, rape, perjury and other crimes against "the laws of God and man" Hagenbach was convicted and stripped of his knighthood title and executed for failing to carry out his duties. It must be noted that the crimes levelled against him equate to the modern day crimes against humanity.[91]

Even during the seventeenth century, facets of the command responsibility doctrine were evident. In 1621 King Gustavus Adolphus of Sweden promulgated his "Articles of Military Laws to be Observed in the Wars". Article 46, in part provided: "No Colonel or Captain shall command his soldiers to do any unlawful thing." A contravention of this article constituted an offence punishable according to the discretion of the judges.[92] In 1689, the exiled James II strongly condemned and relieved Count Rosen of all military duties due to the atrocious siege method he had implemented in the unsuccessful siege of Calvinist Londonderry.[93] Clearly, a burden was placed on superiors to ensure that subordinates were adhering to the required moral standard during times of war.

In America, a model form of the notion of holding a superior accountable for the acts of a subordinate were promulgated by the adoption of the Massachusetts Articles on war, namely article 11 which reads:

> Every Officer commanding, in quarters, or on a march, shall keep good order, and to the utmost of his power, redress all such abuses or disorders which may be committed by any officer or Soldier under his command; if upon complaint made to him of Officers or Soldiers beating or otherwise ill-treating any person, or committing any kind of riots to the disquieting of the inhabitants of this Continent, he, the said commander, who shall refuse or omit to see Justice done to this offender or offenders, and

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[90] Parks W.H 'Command Responsibility For War Crimes, (1973) 62 Military Law Review, 4. The Holy Empire was a union of smaller kingdoms, which held power in western and central Europe between A.D 962 and 1806; ruled by a Holy Roman Emperor who oversaw local regions controlled by kings and dukes. It was an attempt to resurrect the Western empire of Rome.

[91] *Ibid.*

[92] See Parks (*supra* note 90), 5.

[93] *Ibid.*

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> reparation made to the party or parties injured, as soon as the offender's wages shall enable him or them, upon due proof thereof, be punished, as ordered by General Court-Martial, in such manner as if he himself had committed the crimes or disorders complained of.[94]

The Article XI1 of the American Articles of War, enacted June 30, 1775, reiterated this wording and later this provision was re-enacted as section IX of the American Articles of War of 1776 on September 20, 1776.

The promulgation of the articles of war of the nineteenth century also saw the inclusion of section IX of the American Articles of War 1776. The difference with the 1806 Articles of War was that they included dismissal as punishment where it was deemed necessary. Article 33 reads:

> When any commissioned officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offence against the person or property of any citizen of any of the United States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or company to which the person or persons so accused shall belong, are hereby required, upon application duly made by, or on behalf of, the party or parties injured) to use their utmost endeavours to de- liver over such accused person or persons to the civil magistrate, and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring him or them to trial. If any commanding officer or officers shall wilfully neglect, or shall refuse upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered.

From this point onwards, instances wherein commanding officers were held liable for the acts of their subordinates became more abound. In the War of 1812, the commanding officer, under whose watch, American soldiers needlessly burned some buildings near their encampment in Upper Canada, was summarily dismissed from

[94] Articles of War, Provisional Congress of Massachusetts Bay, April 5, 1775.

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service.[95] In 1832, during the Black Hawk War, militia captain Abraham Lincoln was convicted by a court-martial for the insubordination of his men and was sentenced to carry a wooden sword for two days.[96] In 1851 the United States Supreme Court affirmed a lower court's decision finding Colonel David D. Mitchell responsible for illegal acts that occurred during the Kearney campaign into Mexico in 1846. Colonel Mitchell had received illegal orders from his immediate superior, which he had passed on to his subordinates and in some cases personally carried into execution.[97]

The United States remained steadfast in its relentless campaign of holding the military to a high moral standard through the imposition of criminal responsibility on commanders who allowed violations of the laws of war to go unpunished. In 1863 General Order No. 100, better known as the Lieber Code was promulgated. Article 71 provided for punishment of any commander who ordered or encouraged the intentional wounding or killing of an already "wholly disabled enemy," regardless of the said commander being in the United States army or not. Captain Henry Wirz, Swiss doctor and Commandant of the Confederate prisoner of war camp at Andersonville, Georgia, is cited as the first commander to be convicted by the military commission and hanged for violation of the Lieber Code, after having ordered and permitted the torture, maltreatment, and death of Union prisoners of war in his custody.[98]

It is self-evident from the few individual cases that have been cited above that the phenomena of individuals in positions of command, being held accountable is not an issue of contention.[99]

Having identified and outlined the existence of command responsibility prior to 1945, it is necessary to sketch the creation of the various international tribunals that held

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[95] See Parks (*supra* note 90), 6.

[96] See Parks (*supra* note 90) (citing Sandburg C and Lincols A, 'The Prairie Years and the War Years' 30 (1961): Some of the soldiers under the captain's command had opened and indulged in the officers' supply of whiskey while others were "inclined to straggle on the march".

[97] See Parks (*supra* note 90), at 7: *Mitchel v Harmony*, 54 US (13 How) 420 (1851) Colonel Mitchel incurred a fine of $90,806.44 for seizing the plaintiff's goods, due to the seizure not being justified by military necessity. Parks notes that these principles of responsibility for the execution of patently illegal orders were again prescribed in the trial of *United States v Wilhelm von Leeb* Vols. X and XI (the hostage case), almost a century later.

[98] *Ibid.*

[99] For further information on information on commanders that were apportioned criminal responsibility for the actions of their subordinates, see generally Parks W.H '*Command Responsibility For War Crimes*, (1973) 62 Military Law Review 1 - 21.

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perpetrators of international crimes accountable for their actions and confirmed the authenticity of the doctrine of command responsibility as they had provisions in their individual charters encompassing this crime.

2.4 The International Military Tribunal Nuremberg

The establishment of the 1943 War Crimes Commission set the wheels in motion for the prosecution of war criminals from Germany who had perpetrated heinous crimes during the course of World War II. This commission was tasked with gathering evidence of the said crimes;[100] a mandate it derived from the 1943 Moscow Declaration that stated that all the individuals, namely the German officers, men and Nazi party members who participated in the commission of the egregious crimes perpetrated during the Second World War would be sent back to the countries where their odious deeds were committed. It was in these countries, and according to the laws of these countries, that they were to stand trial and be judged and sentenced for their deplorable conduct.[101]

However, it is worthy to note that there were war criminals whose execrable deeds operated in no particular geographic area. These were left in the hands of the joint governments of the allied powers who by the signing of the London agreement of 1945 were to adjudicate on the criminal liability of these offenders.[102] The formal adaptation of the agreement for the persecution and punishment of major war criminals of the European Axis powers was concluded on the 8th of August 1945. This agreement simultaneously marked the establishment of the IMT Nuremburg whose charter was annexed to the agreement; a testament of Allied power's resolve to prosecute the Nazis for war crimes.[103]

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[100] S. D Roper and L. A Barria *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protections of Human Rights* (2006) Ashgate Publishing Company, 6.

[101] *Trial of the Major War Criminals before the International Military Tribunal Nuremberg, Nuremberg 14 November 1945 – 1 October 1946* Published at Nuremberg Germany 1947, 8.

[102] *Ibid* Acting on behalf of the United Nations, the governments of the United States, the Union of the Soviet Socialist Republic, the United Kingdom of Great Britain and Northern Ireland and the Provisional government of the French republic signed the London agreement that established International Military Tribunal Nuremburg.

[103] W.A Schabas *An Introduction to the International Criminal Court* (2004) Cambridge University Press, 5.

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Initially signed and adopted by only the representatives of the four Allied powers, the treaty was later adhered to by another nineteen states.[104] According to Schabas, these states, despite their absence in the establishment process or in the activities of the tribunal, adhered to the treaty as a gesture of support for the concept.[105] The tribunal had jurisdiction over the following crimes: crimes against peace, war crimes and crimes against humanity. In October 1945, the IMT Nuremburg began serving indictments on the top Nazi personal and on the 20th of November the Tribunal's first and only trial began. This trial carried out for nine months with a total of 22 defendants standing trial. The tribunal rendered its judgment on the 1st of October 1946, it acquitted three defendants, twelve were sentenced to death and seven received prison terms.[106]

The Charter of the IMT Nuremberg did not have a provision dealing with command responsibility however they contributed to the development of the doctrine.[107] The Nuremberg trials extended the application of the doctrine to apply to civilians particularly in the *Medical* case.[108] Karl Brandt who was a senior medical officer of the German government, holding a position wherein he reported directly to Hitler, was charged with the commission of war crimes and crimes against humanity.[109] He was subsequently convicted for these crimes based on his 'special responsibility for, and participation in' numerous experiments on prisoners of war.[110]

2.5 The International Military Tribunal of the Far East (Tokyo)

Though regarded as a twin entity with the IMT Nuremberg, due to the similarities in the two tribunal's founding chapters, a treaty did not create the IMT of the Far East, unlike

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[104] The other 19 States which adhered to the agreement were: Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia.

[105] See Schabas (*supra* note 103) 6.

[106] See generally *Trial of the Major War Criminals before the International Military Tribunal Nuremberg, Nuremberg 14 November 1945 – 1 October 1946* Published at Nuremberg Germany 1947.

[107] G. Boas *et al International Criminal Law Practitioner Library volume 1: Forms of Responsibility in International Criminal Law* Oxford University Press, 148.

[108] *United States v Karl Brandt, Becker – Freyseng, Beiglbock, Blome, Brack, Rudolf Brandt, Fischer, Gebhardt, Genzken, Handloser, Hoven, Mrugowsky, Oberheuser, Pokorny, Poppendick, Rombert, Rose, Rostick, Ruff, Schafer, Schroder, Sievers and Weltz,* in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (1950) ('*Medical* case'), Vol. II, 193 – 194.

[109] *Ibid.*

[110] *Ibid.*

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the IMT Nuremberg. According to Pritchard and Zaide, the establishment of the tribunal facilitated the implementation of the Cairo Declaration of the 1st of December 1943,[111] the Declaration of Potsdam of the 26th of July 1945,[112] the Instrument of Surrender of the 2nd of September 1945,[113] and the Moscow Conference of the 26th of December 1945.[114]

After the signing of the peace treaty with Japan, control over occupational matters was vested in the hands of General Douglas MacArthur who was the supreme commander of the Allied Powers.[115] Drawing his authority from the Moscow Conference, General MacArthur, by way of a Special Proclamation, established the Tribunal popularly known as the International Military Tribunal for the Far East. The constitution, jurisdiction and functions of the tribunal were set out in the Charter that was signed on the same day as the Proclamation; this Charter mirrored that of Nuremberg.[116]

The Tribunal had representatives of the eleven Allied countries, namely, Australia, Canada, China, France, Great Britain, India, New Zealand, the Netherlands, the Philippines, the Soviet Union and the United States.[117] In terms of jurisdiction, the Tribunal like that of Nuremberg adjudicated on the following crimes: crimes against peace, war crimes and crimes against humanity and like the London Charter of the

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[111] See generally International Military Tribunal for the Far East Judgment of 12 November 1948 in John Pritchard and Sonia M. Zaide (eds) The Tokyo War Crimes Trial, vol. 22.The United States (US), Great Britain (Britain) and China vowed to join the United Nations in their fight against Japan that was accused of acts of aggression through its territorial expansion by violence. Proclaiming to possess no ideals of territorial gain, the Allied powers simply sought to strip Japan of the Pacific islands it had seized or occupied since the beginning of World War I and the Islands it had stolen from China.

[112] This again was a vow by the US, Britain and China, it was however later adhered to by the Union of Soviet Socialist Republics. The Allied Powers simply reiterated their vow to strip Japan of islands obtained through violence. They extended Japan an opportunity to end the war and further assured that it was not their intentions to neither enslave nor destroy the people of Japan as a nation. It was nonetheless their resolve to dole out inexorable justice to all war criminals. *Ibid.*

[113] Signed on behalf of the Emperor and Government of Japan and on behalf of the Allied powers, the instrument of surrender was simply the proclamation of Japan's surrender. It placed Japan under the authority of General MacArthur who was the Supreme Commander of the Allied powers entrusted with the responsibility of ensuring that the provisions of the Potsdam declaration were given effect. *Ibid.*

[114] During this conference, it was agreed by the Allied powers that the Supreme Commander would ensure the strict implementation and compliance with the terms of surrender, it was this authority that General MacArthur would use to emit criminal responsibility on the perpetrator of war crimes.

[115] See Pritchard and Zaide (supra note 111), 28.

[116] *Ibid.*

[117] See T. Meron (*supra* note 79), 565.

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IMT Nuremburg it disqualified State immunity and superior orders as a defence against criminal responsibility. Though the indictment issued in April 1946 had 28 individuals, 25 eventually stood trial.[118]

The IMT for the Far East has fallen under sceptical scrutiny when it comes to its adherence to the principles of legality. Firstly, it is rather peculiar how all sentences were subject to the review of one individual, General MacArthur, who had the power to reduce or alter their severity. Lastly, when it came to the controversial charge of crimes against peace, 24 out of the 25 defendants were convicted of this crime unlike in Nuremberg where only one was convicted.[119]

It must be noted that the Charter of the IMTFE Tokyo also contained no provision relating to command responsibility.

2.6 The International Criminal Tribunal for the Former Yugoslavia

The collapse of the Austrian and the Ottoman Empire during the First World War saw a patchwork of states coming together and forming the Yugoslavian state in 1919.[120] Yugoslavia was composed of Bosnia-Herzegovina, [121] Croatia, Macedonia, Montenegro, Serbia and Slovenia. This was however was plagued by tensions, which only escalated during the Second World War.[122] Consequently after the death of President Tito in May 1980, long standing differences were expressed within the communist parties of the country and in 1981 a new generation of leaders began to tear the country apart.[123] Between 1945 and 1985 President Marshal Tito had successfully curbed the religious and ethnic rivalries but there was a lack of efforts dedicated towards reconciliation bridging the gaps between the groups.[124] An example

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[118] During the course of the trial, two of the accused, Natsuoka and Nagano died and one accused, Okawa was declared unfit to stand trial. See generally Pritchard and Zaide (supra note 111), 30.

[119] See T. Meron (*supra* note 79), 565.

[120] Schabas W.A '*The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*' (2006) Cambridge University Press, 13.

[121] Hereinafter referred to as Bosnia.

[122] See Schabas (*supra* note 120)

[123] *Ibid.*

[124] Barria L.A and Roper S.D 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR' (2005) Vol.9 No.3 *The International Journal of Human Rights, 350.*

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of such rivalries was that of the Serbs and Croats.[125]

An environment of secessionist ambitions began to brew and in 1991 it was marked by the declaration of independence by Slovenia and then Croatia.[126] In Croatia, Franjo Tudjman's new government dismissed Serb communist bureaucrats from government and replaced them with Croats. The previously dominant Serbs were now classified as minorities and in response the Yugoslav government started a war immediately after Croatia's secession and by December 1991 they had taken nearly a third of Croatia's territory.[127] At this point, it was evident that a breakup of the previously united states was inevitable and this resulted in the scramble for borders especially those in Bosnia and Herzegovina, in an attempt to strengthen their territorial ambitions, all sides embarked in ethnic cleansing.[128] The Bosnian conflict rapidly supplanted that of Croatia in terms of its carnage which totalled approximately 200 000 deaths and over two million refugees between 1992 – 1995.This can be attributed to the fact that despite the Serbs having being demoted to a minority in a new state they constituted about thirty percent of the population in Bosnia and were determined to remain in a united Yugoslavia.[129] The reign of terror, persecution and inhumane acts directed against the civilian population led to calls for the establishment of an international criminal tribunal.[130]

In the midst of the raging war in Bosnia, concerns for the ethnic cleansing taking necessitated an establishment of a commission of experts that would investigate and gather evidence of 'grave breaches of the Geneva Conventions and other violations of

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[125] *Ibid.* Barria and Roper note that despite these two groups sharing a language, they had different political structures and religious beliefs. The fact that the Serbs emerged as the dominant group in the post-World War I government only compounded the anti-Serb sentiments especially in Croatia, as it would have preferred being independent. The Axis powers had in 1941 occupied Yugoslavia and installed the Croatian radical right (the Ustase) as an independent state. The Ustase's power also extended into Bosnia and thus when the extermination camps were established it was done in both Croatia and Bosnia. These camps were responsible for the deaths of Serbs, Jews and Gypsies. In retaliation, Serbian forces attacked Croatians and Bosnians, it is upon this backdrop that Yugoslavia experienced war, and consequently a division of states in 1991-1992.

[126] See Barria and Roper (*supra* note124).

[127] *Ibid.*

[128] *Ibid.*

[129] *Ibid.*

[130] See Barria and Roper (*supra* note 124), 351.

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international humanitarian law.'[131] The commission in its interim report of February 1993, recommended the establishment of an *ad hoc* international military tribunal, this received support from the Croatian and Bosnian governments.[132]

Operating under the powers derived from Chapter VII of the UN Charter, the Security Council passed Resolution 827 on the 25th May 1993.[133] This created the ICTY whose purpose was to prosecute 'persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia during the 1st of January 1991 to a date determined by the UN Security Council upon the restoration of peace.'[134] It had jurisdiction over the following crimes: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity.

Article 7 (3) of the Statute of the ICTY made the ICTY the first international tribunal to provide for liability under the doctrine of command responsibility.[135] The tribunal also confirmed the application of the doctrine to civilian superiors in the landmark case of *Prosecutor v Zejnil Delalić et al.* [136] The Trial Chamber in justifying the extension of the doctrine to non-military superiors noted how the text of the statute used the generic term "superior" and construed this as deliberate and indicative of how the doctrine extends beyond military commanders.[137]

2.7 The International Criminal Tribunal for Rwanda

Adopted by Resolution 955 on the 8th of November 1994, the ICTR was a response to the genocidal massacres that were rampant throughout Rwanda. A commission of experts was mandated by the Security Council to investigate the horrific events of

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[131] The Commission of Experts was established by UN Security Council Resolution 780 adopted on the 6th of October 1992.

[132] See generally Schabas (*supra* note 120), 13-22.

[133] UN Doc. S/RES/827: Establishment of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia, 25 May 1993.

[134] *Ibid.*

[135] Statute of the ICTY Article 7 (3): The fact that any of the acts referred to in articles 2 to 5 of 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.

[136] See *Prosecutor v Zejnil Delalić et al* (*supra* note 35)

[137] See Prosecutor v Zejnil Delalić et al (supra note 35), 131, par, 356.

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Rwanda and to make recommendations. It was evident from the beginning of the commission's investigations that a criminal tribunal had to be established.[138] Unlike in Yugoslavia the conflict in Rwanda was domestic and between the two main tribes, the Hutu who constituted the majority population in Rwanda and the Tutsis.[139] A detailed and chronological order of events that led to the establishment of this tribunal including its approach to command responsibility provided in Article 6 of the ICTR Statute will be discussed in the next and subsequent chapter.

Having briefly stated the events that necessitated the establishment of the ICTR, the next session outlines the long historic process that led to the establishment of the International Criminal Court.

2.8 The International Criminal Court

The Rome Statute of 1998 established the International Criminal Court, however, ideas of its conception can be traced back over five decades ago. The very first draft code for the ICC,[140] was submitted in March 1950 by a special rapporteur who had been concurrently appointed with a subcommittee and another special rapporteur tasked with preparing a draft code of Offences against Peace and Security of Mankind.[141] In 1950 another Special Rapporteur was appointed to further look into the development of an ICC. It however resulted in conflicting views regarding the timing of establishing the court.

This difference in views is attributed to the contrasting views of the World powers at the time with regards to the establishment of the Court.[142] Whilst the United Kingdom and France welcomed the idea of the Court, The Soviet Union and the United States were against the creation. The Soviets feared the impact the Court might have on its sovereignty and the US was probably anxious about the establishment of the Court during a time it was engaged in the cold war.[143]

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[138] See L.A Barria and S.D Roper (*supra* note 124), 351.

[139] See L.A Barria and S.D Roper (*supra* note 124), 352.

[140] Report of the International Law Commission on Question of International Criminal Jurisdiction, U.N., GAOR, 5th Session, U.N. Doc. A/CN.4/15 (1950).

[141] C. Bassiouni 'From Versailles to Rwanda in Seventy-Five Years: The need to Establish a Permanent International Criminal Court (1997) Harvard Human Rights Journal.

[142] *Ibid.*

[143] *ibid.*

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In 1951 the General Assembly established a Special Committee comprising of seventeen states and it was tasked with drafting a convention for the establishment of an International Criminal Court.[144] One body was tasked with the codification and another with the enforcement. It is clear upon inspection of the discussions and comments over the draft statute submitted by the Special Committee in 1951 that the ideal of an International criminal court was a political misfit.[145] The Committee that had changes in its membership revisited the 1951 draft; the draft code was revised and finalised in 1953.[146] Upon its submission the ICC did not receive any consideration as it was tabled aside pending the finalisation of the draft code of offences. This decision to table aside the consideration of the ICC draft code resulted in a great retardation of the early establishment of the Court.[147] The draft code of offences, despite its submission in 1954, could not be tabled for discussion as Article 2 dealing with aggression lacked the definition of the act as a different Special Committee was tasked with the definition. Consequently, this effectively meant that consideration of the ICC would be further delayed.

The process of defining the crime aggression was arduous and took four different committees a period of 22 years to submit a draft that was finally adopted by a consensus resolution in 1974.[148] Defying common logic the General Assembly did not choose to discuss the consideration of the draft code of offences immediately after the completion of defining the crime of aggression.[149] This draft was only tabled for discussion in 1978, however it was only in 1982 that any progress on the establishment of the ICC was made; with a newly appointed Special Rapporteur producing his report on the ICC draft code in that year. This report was subject to vast criticism by governments and scholars alike; the draft code of the ICC was only adopted in 1996.[150]

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[144] *ibid.*

[145] The Soviet Union was against the establishment of the court as it viewed it as an impediment to its sovereignty while the USA was not willing to support the idea of such a court in the midst of the cold war. See generally Report of the Sixth Committee to the General Assembly, U.N GAOR, 5th Session, U.N Doc. A/1639 (1950) reprinted in B Ferencz *An International Criminal Court* (1980) 265-3005.

[146] See generally W. Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2010) *Oxford University Press*, 3 - 28.

[147] *Ibid.*

[148] *Ibid.*

[149] *Ibid.*

[150] See Bassiouni (*supra* note 141)

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According to Bassiouni the final drive that led to the establishment of the court was via a peculiar route. The General Assembly's Eighth congress realised the need for an International Criminal Court after a Committee of Experts submitted a draft statute for the prosecution of persons engaged in drug trafficking.[151] Consequently the International Law Commission embarked on discussing the structure of the international criminal tribunal, considering its rational, jurisdiction and how criminal proceedings will be instituted before the court. The brewing idea of the court was evident in how despite being mandated to do so, the ILC's draft code of Crimes was intertwined with an eventual draft statute for an international criminal court.

The General Assembly's absence of concern regarding the ILC's overlap in mandate fuelled its boldness and the ILC in 1992 prepared a preliminary report on the court that was favourable received by the General Assembly; this spurred on a comprehensive text being produced in 1993 and later on being modified in 1994 in order to address some of the concerns from the Major world Powers.[152] The lack of finalisation on the draft Code of Offences warranted the separation of the Draft Statute for the ICC from the Draft code of Offences.[153]

Bassiouni applauds the ILC for being pertinacious and ingenious in developing a limited mandate to outlaw drug trafficking into a Draft Statute for an International Criminal Court.[154] This Draft Statute of 1994 was the foundation upon which the General Assembly in 1994 established the *Ad Hoc* Committee on the Establishment of an International Criminal Court and the Preparatory Committee for the Establishment of an International criminal Court in 1995.[155] The latter's report was submitted to the 51st Session of the General Assembly on October 28 of 1996. It recommended an extension in its tenure with a special mandate of negotiating

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[151] *ibid.*

[152] See generally Revised Report of the Working Group on the Draft Statute for an International Criminal Court, U.N. GAOR, 48th Session, U.N. Documents A/CN.4/L.490 (1993); Report of the International Law Commission, U.N. GAOR, 49th Session, Supp.No. 10, U.N. Documents A/49/10 (1994).

[153] See Bassiouni (*supra* note 141)

[154] *Ibid.*

[155] See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. GAOR, 50th Session, Supp. No. 22, U.N. Doc A/50/22; General Assembly Resolution 50/46, U.N. GAOR, 50th Session, U.N. Documents A/RES/50/46 (1995).

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proposals that would foster the production of a consolidated text of a convention, Statute, and annexed instruments by 1998.[156]

The Rome Statute of the ICC in Article 28 provides for liability under command responsibility.[157] The statute is celebrated for confirming the applicability of the doctrine of command responsibility in civilian settings through its provision of Article 28 (b) where in it states the liability of a superior who is not a military commander. In the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*[158] – the most recent case to be completed by the ICC – the court lays down six factors it ought to establish under Article 28 (a) of the Statute. These elements are: (i) the crimes must have been committed by forces; (ii) the accused must have been a military commander or effectively operating as one; (iii) the accused must have had effective command and control/authority over the forces who committed the crimes; (iv) the accused must have had knowledge that the forces were committing crimes; (v) the accused must have failed to take reasonable and necessary measures to prevent the commission of

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[156] See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, U.N. GAOR, 51st Session, Supp. No. 22, paras.212-93, U.N. Doc A/51/22 (1996).

[157] Article 28 of the Rome Statute of the ICC provides: 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.

[158] *The Prosecutor v. Jean-Pierre Bemba Gombo* Case No. ICC-01/05-01/08.

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crimes or failed to either repress the commission of the crimes or submit the matter competent authorities for investigation and prosecution; (vi) finally the crimes committed must have been a result of the accused's failure to exercise effective control over the forces.[159]

Having outlined the history of the establishment of the ICC the study shall embark on a brief overview of the conflict in Sierra Leone and the events that led to the establishment of the Special Court for Sierra Leona.

2.9 The Special Court for Sierra Leone

The conflict that led to the establishment of the Special Court of Sierra Leone differed from other conflicts in that the massacres of individuals lacked an ethnic component.[160] Consequently the crime of genocide is not factored in the statute of the Tribunal. The conflict had a national and international component; it was part of an African crisis that intertwined Liberia and Charles Taylor.[161] Sierra Leone has since its independence, been plagued with corrupt and authoritarian governments consequentially it sunk into a state of instability as a result of military coups that began in 1967 and continued throughout to the 1990s.[162] The reign of General Joseph Mamoh from 1985 saw a dramatic rise in unemployment amongst the youth; accordingly criminality amongst these youth also rose. Student militancy in the local universities increased and most of these students fled to Liberia for refuge and military training namely Foday Sankoh who was the leader of the leader of the Revolutionary United Front (RUF).[163]

During his training in Libya, Sankoh was acquainted with Charles Taylor who later became a formidable ally. The RUF mirrored the tactics of Taylor's National Patriotic Front of Liberia (NPFL), it emitted the following flagrant violations of human rights: It

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[159] See generally *The Prosecutor v. Jean-Pierre Bemba Gombo* Case No. ICC-01/05-01/08, 79 – 98.

[160] When mounting their attacks on civilians, the rebels did not specifically target the Temne, Mende or Krio communities. See Roper and Baria (*supra* note 93), 31.

[161] Charles Taylor was the leader of the National Patriotic Front of Liberia (NPFL), a warlord who later became the President of Liberia. T. Perriell and M. Wierda ' The Special Court for Sierra Leone Under Scrutiny' (2006) *Prosecutions Case Studies*, 5.

[162] *Ibid.*

[163] Sankoh trained beside Charles Taylor whom he developed a close personal relationship with. Consequently, when Sankoh took arms against the government he attacked Eastern Sierra Leone through Liberia. Taylor provided Sankoh with arms and troops. *Ibid.*

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amputated civilians regardless of age and it ravaged the country with its practice of child abduction. It turned boys into child soldiers by forcing them into drug addiction and thus simultaneously making them more vicious.[164] Girls were raped and forced to be wives or concubines, or sold within Sierra Leone or throughout West Africa.[165] These violations were perpetrated over a decade, from March 1991 till the establishment of the United Nations Mission in Sierra Leone (UNAMSIL) in spring of the year 2000.[166]

The continued human rights violation by RUF namely taking hostage of UN peacekeepers were viewed as a direct attack on the UN by the Security Council, thus, it compelled them to assist in the prosecution of the perpetrators. There were disagreements on how to accomplish this task considering the cost implications of setting up an international tribunal like that of the Former Yugoslavia or Rwanda. It was eventually decided that a treaty as opposed to a resolution would establish the court. This released the UN from a commitment to fund this justice process. The court was to operate under the supervision of "Management Committee" and free from the UN bureaucracy. The resolution calling for the negotiation the Secretary-General and government of Sierra Leone on the establishment of this Special Court was passed in August 2000.[167]

However, it was only after the elapse of 17 months that the agreement on the Special Court for Sierra was signed between the UN and the government of Sierra Leone on the 16th of January 2002. The court undertook to try and punish "those who bore the greatest responsibility" for human rights violations.[168] The court had jurisdiction over the following crimes: Crimes against humanity,[169] serious violations of Article 3 common to the Geneva Conventions,[170] intentional direction of attacks against

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[164] *Ibid*

[165] *Ibid*

[166] The UNAMSIL, upon its establishment became the largest peace keeping force in the world, it had a personal of 17 500 and a commanded a budget of approximately 700 million a year. It was necessitated by the RUF's continued adversity and acts of terror despite having signed the Lomé Peace agreement; such acts included taking 500 UN peacekeepers hostage and confiscating their weapons. See T. Perriell and M. Wierda (*supra* note 161), 7.

[167] Special Resolution 1315 (2000), adopted August 14 2000.

[168] See Roper and Baria (*supra* note 93), 36.

[169] Statute of the Special Court for Sierra Leone, Article 2.

[170] Statute of the Special Court for Sierra Leone, Article 3.

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humanitarian or peacekeeping personal,[171] conscription of children into armed forces or groups,[172] and national law relating to the abuse of girls and arson.[173] The Special Court has three Chambers, two Trial Chambers comprising of two judges appointed by the Secretary-General and one appointed by the Government of Sierra Leone; it also has the Appeals Chamber comprising of five judges, three appointed by the Secretary-General and two by the Government of Sierra Leone; all these judges serve for a term of three years.[174] The Prosecutor of the Court is appointed by the Secretary-General while the Deputy Prosecutor is appointed by the Sierra Leone Government.[175]

The Statute of the Court provided for command responsibility in Article 6 (3).[176] The Court in dealing with command responsibility was consistent with how the ICTY had dealt with command responsibility. It confirmed the need to establish a superior subordinate relationship and in doing so ascertain whether the accused had effective control.[177] The Court further found that substantial influence would not suffice to demonstrate the existence of effective control.[178]

2.10 The Extraordinary Chambers for Cambodia

Prince Sihanouk had reigned over Cambodia for a period of 29 years till his disposition by Lol Nol in 1970. This disposition led to a period of civil war that lasted for five years and had a carnage of over 500 million people. By 1975 Khmer Rouge forces emerged victorious as Nol resigned as Prime minister and left the country in the midst of Rouge's forces advancing towards Phnom Penh.[179] In April 1975, headed by Saloth Sar, a democratic Kampuchea state was created. This state, according to Khmer Rouge's ideals was to be an agrarian state; an ideal, which, despite efforts exerted towards its

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[171] Statute of the Special Court for Sierra Leone, Article 4(b).

[172] Statute of the Special Court for Sierra Leone, Article 4(c).

[173] Statute of the Special Court for Sierra Leone, Article 5.

[174] See T. Perriell and M. Wierda (*supra* note 161), 19.

[175] See Roper and Baria (*supra* note 93), 41.

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

[177] See *Prosecutor v; Charles Ghankay Taylor* Case No. SCSL-03-01-T, 2466 – 2469.

[178] *Ibid.*

[179] See generally CP. R. Romano, A Nollkaemper and Jann K. Kleffner, *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (2004)

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realisation, never came to manifestation.[180] In reality, contrary to Khmer Rouge's ambitions to create a utopian society, Cambodia had sunk into a dystopian state where a quarter of the population, between 1975 and 1979, died of both starvation and disease or was targeted and executed by the ruling party.[181]

In 1976, pursuant to the territorial ambitions of Khmer Rouge's regime Cambodia embarked on an onslaught of attacks on Vietnam with the purpose of creating a "greater Cambodia." [182] In retaliation Vietnam launched a counter offence that lasted 12 months and by January 1979 they had taken over the capital and forced the Khmer Rouge regime to retreat to the country where they were reduced to resorting to guerrilla warfare.[183]

Unlike other tribunals, the negotiation for the Extraordinary Chambers for Cambodia (ECC) occurred almost two decades after the Khmer Rouge's regime was over thrown by the Vietnamese.[184] The growing adversity of the Khmer Rouge towards the international community and its decision to boycott the 1993 May election saw the United States, in April 1994, withdrawing its support and passing the Cambodian Genocide Act under which it bound itself to bring Khmer Rouge to justice.[185] After the Cambodian Parliament outlawed the Khmer Rouge in July of 1994, the UN Secretary General's Special Representative for Human Rights in Cambodia initiated the process of the ECC by persuading the two Prime ministers of Cambodia to request for the

[180] In mid-April, over 2 million people were re-settled to agricultural labour camps in the rural fertile lands. These people were reduced to slaves as they were subjected to extremely harsh conditions; they were divested of wages and rights, the sick were ill-treated and the population received inadequate food supplies. See generally Roper and Baria (*supra* note 93), 29-47.

[181] *Ibid.*

[182] See generally Romano *et al* (*supra* note 168)

[183] *Ibid.*

[184] See Roper and Baria (*supra* note 93), 38. The delay in the emission of justice to Khmer Rouge's regime was due to the support that his regime received from both China and the United States. The regime despite the publicity of the atrocities it committed still received unwavering support from the international community and thus continued its fight against the Sen Government. These efforts were however futile till the withdrawal of the Vietnamese military in 1989.

[185] After the withdrawal of the Vietnamese military, the Security Council and other interested states convened the Paris conference on Cambodia. The Khmer Rouge was part of the delegates that attended and after a two year negotiation process a United Nations Transitional Authority in Cambodia (UNTAC) was created to organize elections. The Khmer Rouge was to participate fully in these elections however it discontinued its abidance by the Paris agreement and began targeting both members of the UNTAC and the Vietnamese. *Ibid.*

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creation of an International Tribunal to try the Khmer Rouge.[186] Consequently Resolution 52/135 was passed by the General Assembly. It condemned the Khmer Rouge for the genocide it committed and appealed to the Secretary General to intervene.[187]

Pursuant to the Cambodian government's request the Secretary General convened a group of expects to investigate the allegations against the Rouge regime. In March 1999 the expert's report concluded that the Khmer Rouge had indeed committed the following: War crimes, Crimes against Humanity and Genocide.[188] The report further advocated for the establishment of an International criminal tribunal that was similar to that of the ICTY and ICTR as it questioned the independency and transparency of the Cambodian judicial system. This recommendation was, however, rejected by the Cambodian government; a compromise was reached and in January 2001 the Cambodian government enacted a law establishing the ECC.[189]

The Court comprises both international and Cambodian judges, with the Cambodian judges being the majority in both the Trial Chamber and the Supreme Court Chamber.[190] The Trial Chamber has five judges, three are Cambodian and two international while the Supreme Court Chamber has seven judges; three are international and four Cambodian.[191] In order to guard against the UN's insecurities over local judges being unduly influenced it was agreed that the court would operate on a super majority basis for decision. Thus in the Trial Chamber, four judges must agree with a decision while in the Supreme Court Chamber, a consensus of five judges is required.[192] The international judges mentioned were to be selected by the Cambodian Supreme Council of Magistracy from a list provided by the Secretary General. The Secretary General was to furnish the council with a list of names that contained a minimum of seven judges.[193]

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[186] *Ibid.*

[187] *Ibid.*

[188] *ibid.*

[189] *ibid.*

[190] See S. Linton 'Cambodia, East Timor And Sierra Leone: Experiments In International Justice' (2001) *Criminal Law Forum* 12, 185-246

[191] See Roper and Baria (*supra* note 93), 42.

[192] *ibid.*

[193] *ibid.*

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The court also has two prosecutors and investigating judges; in both instances one is international and the other Cambodian.[194] Both the investigating judges and the prosecutors are equal in status and in case of disagreement in prosecution the matter is referred for pre-trial before the trial chamber and is subject to the super majority agreement.[195]

Article 29 (3) of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia makes provision for command responsibility.[196]

2.11 Conclusion

The doctrine of command responsibility has over the centuries evolved and is now firmly entrenched in international law. The application of the doctrine in civilian settings was a subject riddled with uncertainty as legal scholars were apprehensive about the practicality of transposing a doctrine that was developed for military relationships into civilian relationships. However the wording and jurisprudence of international tribunals have put this debate to rest. It is clear from the reasoning of the ICTY and judgment of the Čelebići case that the operation of the doctrine has been expanded to cover non-military superiors. This notion has subsequently been affirmed by various international statutes of different tribunals and courts. Most notable is the Rome Statute of the ICC which clearly differentiates between the liability of a military commander and a non-military commander.

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[194] See S. Linton (*supra* note 190)

[195] *Ibid.*

[196] Article 29 (3) of the Statute of the Special Court for Sierra Leone states: The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior 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.

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3 COMMAND RESPONSIBILITY WITHIN THE STATUTE OF THE ICTR

3.1 Introduction

The previous chapter traced the emanation of the doctrine of command responsibility and established how the jurisprudence of recent international tribunals has expanded the application of the doctrine into civilian relationships. The present chapter gives a brief historical background of Rwanda in order to offer an understanding of the prevailing circumstances that necessitated the establishment of the ICTR. The chapter also discusses the establishment of the ICTR, the parties involved and the parties who were either sceptical or opposed to the idea. A concise analysis of command responsibility under the ICTR is undertaken before embarking on an in-depth look at how the tribunal dealt with command responsibility within the contours of formal settings.

3.2 Overview of Rwandan History

The predecessors of the Tutsi, Hutu and Twa people settled in the region now known as Rwanda over two thousand years ago and were initially composed of small groups founded on lineage or allegiance to a specific leader.[197] Their main economic activity and way of living was largely farming and pastoralism, good soil fertility and good rainfall saw Rwanda emerging as a major state that was well populated and very productive.[198] Typical of any African state, wealth was measured by the number of cattle one owned and power determined by the number of subject a ruler had and his military prowess.[199]

As the Rwandan state increased in sophistication, the governing elite developed a superiority complex and began to refer to themselves as the "Tutsi," a term which

[197] A. Des Forges *Leave None To Tell The Story: Genocide in Rwanda* (1996) Human Rights Watch, 31.

[198] *Ibid.*

[199] *Ibid.*

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denoted a person rich in cattle.[200] The subordinates or those inferior in status were consequently labelled "Hutu." The Twa, were hunters and gatherers who constituted the least or the smallest number of the Rwandan population; it was estimated that they were less than one percent of the entire population.[201] This group slowly abandoned its practise of forest dwelling and took up as labourers and servants of the Hutu and Tutsi; generally, the Hutu and the Tutsi segregated the Twa and disapproved of marriages with them, in extreme cases they would not share food or drink with the Twa.[202]

Because the majority of the people married within their occupational group – the Tutsi married the Tutsi, while the Hutu married the Hutu and the Twa married one another – a shared gene pool within each group was created.[203] Apparently, this practice resulted in pastoralists developing similar features to other pastoralists – tall, thin and narrow-featured – and cultivators having similar physical features to other cultivators – shorter, stronger, and with broader features.[204]

The relationship between the Hutus and the Tutsis in Rwanda began to be plagued by ill sentiments of resentment due to the local administration injustices which the German and Belgian colonial powers had allowed to foster during the colonial period.[205] During the colonial period both the German and Belgian government conferred the majority of the local administrative powers upon the Tutsi who were a minority clan. The disparities in the distribution of powers was so grave and evident in that despite constituting 85% of the population the Hutus only held less than 4% of the chieftaincy positions.[206]

It has been advanced that the rational for the genocide massacres in Rwanda can be accurately attributed to political agendas rather than the ethnical rivalry that was festered in the former Yugoslavia.[207] This notion is premised on the fact that an intricate inspection of the two groups evidences no characteristics of a tribe. The two groups lived beside one another, shared the same Bantu language and sometimes

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[200] See Des Forges (*supra* note 197), 32.

[201] *Ibid.*

[202] See Des Forges (*supra* note 197), 33.

[203] See Des Forges (*supra* note 197), 32.

[204] *Ibid.*

[205] See Roper and Baria (*supra* note 100) 20.

[206] *Ibid.*

[207] *Ibid.*

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even inter-married.[208] Having a common dominant faith of Catholicism, the only factor that differentiated them was in the form of identity cards introduced by the Belgians in the 1920s.[209]

Despite being the minority, the Tutsis enjoyed unwavering support from the Belgians till 1959 when they began to revolt and advocate for independence.[210] These independence ideals saw the withdrawal of the Belgian support, who in 1960 began to organise election in compliance with the Tutsi requests; the 1960 elections deemed an end to the era of Tutsi dominance as the Hutus received the majority of the mayoral seats.[211] The annihilation of the Tutsi monarchy was confirmed by the outcome of the September 1961 Legislative elections where the *Mouvement Démocratique Républicain - Parti du Mouvement d'Emancipation Hutu* (MDR-PARMEHUTU) under the leadership of Gregoire Kayibanda emerged victorious.[212] The Hutus had unequivocally, over a period of two years, superseded the Tutsis in terms of local authority dominance. It is also during this period that genocide in Rwanda began to sprout.[213]

The 1959 revolution was characterised by ethnic clashes that resulted in Tutsi bloodshed.[214] These widespread Tutsi massacres saw thousands of Tutsis fleeing to neighbouring countries for refuge. These killings continued throughout the beginning of the First Republic; consequently the 1965 elections consisted of candidates from the MDR-PARMHUTU as the violence brought about by the domination of the central and southern Rwanda Hutus had eliminated any form of opposition.[215]

3.3 The Establishment of the ICTR

The mounting reports of systematic, widespread and flagrant violations of international humanitarian law prompted the UN Security Council that was once sceptical to get involved, to mandate a commission of experts to investigate further and make

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[208] G Prunier *The Rwanda Crisis: History of a Genocide* (1995) C. Hurst and Co Publishers.

[209] See Roper and Baria (*supra* note 100) 20.

[210] See Des Forges (*supra* note 197), 36.

[211] *Ibid.*

[212] *Prosecutor v Hassan Ngeze* case no: ICTR-99-52-T, Amended Indictment, par 1.1.

[213] *Ibid* at par, 1.2.

[214] *Ibid*

[215] See *Prosecutor v Hassan Ngeze* (*supra* note 212) par 1.2.

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recommendations. [216] Before embarking on the investigations in Rwanda, the commission first met in Geneva in mid-August 1994. It was evident from the onset of their investigations that there was a need for the establishment of a criminal tribunal and this was confirmed in the preliminary report that the commission issued at the end of September 1994.[217] It must also be noted that Rwanda itself had requested for the establishment of a criminal tribunal.[218] The Rwandan President, Pasteur Bizimungu, further reiterated this request for the establishment of a criminal tribunal in his address to the UN when he asserted that it was imperative that an international tribunal be established.[219]

The recommendations of the Commission of Experts, as per the September preliminary report, suggested that ICTY's jurisdiction be expanded in order to accommodate cases from Rwanda:

> [T]o enhance the fair and consistent interpretation, application and adjudication of international law on individual responsibility for serious human rights violations and to effect the most efficient allocation of resources, the jurisdiction of the International Criminal Tribunal for the former Yugoslavia should be expanded to permit cases concerning the situation in Rwanda to be brought under it.

This suggestion was, however, disregarded in favour of an independent tribunal due to the concern that such an expansion would have created an impression that the Rwandan tribunal was of a subordinate status to its Yugoslav counterpart. [220]

The formation of the tribunal was marked with mixed reactions. China despite having supported the creation of the ICTY was sceptical about creating the ICTR and though it did not make any attempts to impede the process it abstained from the final vote.[221]

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[216] Schabas W.A '*The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*' (2006) Cambridge University Press, 26-27.

[217] 'Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994)', UN Doc. S/1994/1125 (1994).

[218] 'Letter Dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council', UN Doc. S/1994/1115.

[219] UN Doc. S/PV.3453, p. 14 (1994).

[220] *Ibid.*

[221] It must be noted that the wars in Yugoslavia had a clearly established international dimension unlike the case of Rwanda where the genocide was internal in nature. China was thus concerned about the precedence being set by the UN's involvement in the affairs of a sovereign state. China considered the

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Challenges also arose from the new Rwandan regime, which despite agreeing to the formation of the tribunal was opposed to a number of modalities namely: the prohibition of capital punishment, the limitation on temporal jurisdiction to the 1994 calendar year, the lack of an independent prosecutor and appeals chamber, a desire to exclude nationals of 'certain countries' believed to be complicit in the genocide from nominating judges, the possibility that sentences might be served outside Rwanda, and the refusal to commit to locating the seat of the tribunal within Rwanda itself.[222]

Coincidentally, Rwanda was serving a two-year term in the UN Security Council at the time in question, and consequently had a say in the adoption of the Security Council resolution that would create the ICTR.[223] The adoption of the resolution was delayed by a week, as Hans Corell, the UN legal adviser travelled to Kigali in an attempt to gain the support of Rwanda. He was unsuccessful, and Security Council Resolution 955 was adopted on 8 November 1994 with one dissenting vote, that of Rwanda, and an abstention, from China.[224]

3.4 Command Responsibility under the Statute of the ICTR

Under the ICTR, the doctrine of command responsibility is governed by article 6 (3) of the statute which reads:

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

As has been detailed in the previous chapter, the doctrine of command responsibility is a long-standing doctrine that is enshrined in customary international law and is

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act of voting on a draft code and statute that the Rwandan Government itself still found difficulties in accepting, to be an act that lacked caution. See: UN Doc. S/PV.3453, p11 (1994) and also Schabas W.A *'The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone'* (2006) Cambridge University Press, 29.

[222] See Schabas (*supra* note 216)

[223] *Ibid.*

[224] *Ibid.*

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adverted in the Geneva Conventions on international humanitarian law.[225] With the provisions governing command responsibility in the ICTY and ICTR being similar, the ICTR espoused the ICTY's required elements of imposing liability under the doctrine.[226]

In the case of Sylvestre Gacumbitsi, the Appeals Chamber of the ICTR reiterated the standard laid down in the ICTY's landmark Čelebići judgment wherein it was established that in order for an accused to incur command responsibility, it must be proved that there was a superior-subordinate relationship; the accused knew or had reason to know about the crime and that he did not take necessary and reasonable steps to prevent or punish the commission of the crime by the subordinate.[227]

In defining the existence of a superior subordinate relationship both the Trial and the Appeals chambers of the ICTR concurred in that there ought to be a formal or informal hierarchical relationship.[228] In other words the superior must have possessed the power or the authority, whether *de jure* or *de facto,* to prevent or punish an offence committed by his subordinates; this is also known as exercising effective control.[229]

It must be noted that the status of superiority did not confer strict liability on the accused, the prosecution therefore had to prove the superior's prescribed knowledge of the perpetration of offences by his subordinates. In determining the requisite *mens rea,* the Trial Chamber relied on the following indications: the number of illegal acts; the type of illegal acts; the scope of illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved; the

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[225] This doctrine is codified in Article 86 of the of the Additional Protocol to the Geneva Conventions in 1977

[226] Article 7 (3) of the ICTY Statute reads: The fact that any of the acts referred to in articles 2 to 5 of 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.

[227] *The Prosecutor v Sylvestre Gacumbtsi,* case No. ICTR-2001-64-A, 53, par.143.

[228] *The Prosecutor v André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe* case No. ICTR-99-46-A, 101, par.341.

[229] See also: *The Prosecutor v Juvénal Kajelijeli* case No. ICTR-98-44A-T, 31, par.84 and 85; *The Prosecutor v Jean de Dieu Kamuhanda* case no. ICTR-95-54A-T, 105, par.604; *The Prosecutor v François Karera* case no. ICTR-01-74-T, 121, par.564 and *The Prosecutor v Laurent Semanza* case no. ICTR-97-20-T, 122, par.401.

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geographical location of the acts; the widespread occurrence of the acts; the tactical tempo of the operations; the *modus operandi* of similar illegal acts; the officers and staff involved and the location of the commander.[230]

However, it is important to note that in certain circumstances liability will also be imputed to a commander if it is established that he ought to have known/had reason to know of the offences committed by his subordinates. This standard is satisfied when the superior is in possession of some general information that would put him on notice of possible unlawful acts by his subordinates.[231] The information does not need to be specific about the unlawful acts committed or to be committed.[232]

Finally, in order for an accused to incur command responsibility under the doctrine, it must be proven that he failed to take necessary and reasonable measures to prevent the crime, and/or punish the perpetrator.

3.5 Considerations of the ICTR in Cases of Formal Command Responsibility

The ICTR has a total of 71 cases and out of these 71 cases 58 cases have been completed. In this section all of the principles confirmed when the tribunal dealt with individuals falling under formal civilian leaders charged with command responsibility are discussed.

3.5.1 The need to establish a Superior/Subordinate relationship

In order to establish the existence of a superior subordinate relationship the trial chamber is required to ascertain the presence of a formal or informal hierarchical relationship.[233] Furthermore it must be established that the superior was exercising either *de jure* or *de facto* authority over his subjects. In other words, the superior ought to have been wielding effective control over his subordinates at the time of the commission of the crimes.[234] This required the chamber to determine the existence of such a relationship on a case by case basis.

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[230] See *The Prosecutor v André Ntagerura et al* (*supra* note 228), 172, par.648.

[231] *The Prosecutor v Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze* case no. ICTR-99-52-A, 254, par.791.

[232] *Ibid.*

[233] *The Prosecutor v Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Antole Nsengiyumva* case no. ICTR-98-41-T, 510, par.2012.

[234] *Ibid.*

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In the case, *The Prosecutor v Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Antole Nsengiyumva*[235] the Trial Chamber had to establish the veracity of the Prosecution's allegations that he was a superior in the Rwandan Army. In determining whether Théoneste Bagosora[236] was a superior wielding *de jure* authority, the Trial Chamber gave cognisance to the fact he was *directeur de cabinet* in the ministry of defence despite his attempts to down play the significance of his position by averring that preceding the death of President Habyarimana, he was to a certain extent marginalised;[237] The Trial Chamber noted that Bagosora became *directeur de cabinet* in the defence ministry in June 1992 and that despite his retirement as a full colonel in September 1993 he continued to hold this post till he went into exile in July 1994.[238] The Trial Chamber relied on the official journal of the Rwandan government issued in November 1992 which listed the various offices within the Ministry of Defence and their respective functions, this journal also included an organisational chart that depicted the hierarchy and chain of command.[239] It was clear from this organisational chart the position of *directeur de cabinet* was second to that of the Minister in the Rwandan Ministry of Defence and that the individual holding this position was charged with the coordination and supervision of the daily affairs of the Ministry.[240] In the absence of the Minister, he would also act in the position of the Minister of defence as evidenced in

[235] Case no. ICTR-98-41-T

[236] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 8, par.43. Théoneste Bagosora was born on 16 August 1941 in Giciye commune, Gisenyi prefecture. He was married and the father of eight children. Bagosora enrolled at the École d'Officiers de Kigali, which was later renamed *École Supérieure Militaire* (ESM), in 1962 and graduated with distinction as a second lieutenant in 1964. His Indictment alleges that he exercised authority over the Rwandan military, their officers and militiamen given his position as directeur de cabinet in the Ministry of Defence, his military rank and the personal relations with the commanders of units most implicated in the killings. The Prosecution points to evidence of Bagosora's active role after the death of President Habyarimana, such as chairing meetings of the military officers, meeting with UNAMIR and foreign officials, establishing the interim government and meeting with Interahamwe leaders, to show his actual authority during this period.

[237] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 511, par.2016. Bagosora pointed out to the fact the he was retired from active military service between 21 September and 21 May 1994. He also drew attention to delayed promotions throughout his career when compared to other officers. Bagosora claimed to lack operational control and that he could not give orders to chiefs and gendarmerie; he further purported that any eminent decision he took in that position was pursuant to the requests of others and as such he was merely figure head.

[238] *Ibid* at par.2017.

[239] *Ibid* at par.2018.

[240] *Ibid.*

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April 1994 when Augustin Bizimana (the then Minister of Defence) was on an official mission in Cameroon.[241]

As a further testament of the power yielded by Bagosora the Trial Chamber also gave credence to the letter of James Gasana who was the Minister of Defence in January 1993, the letter which was dated 27 January 1993 sought to limit the legal authority vested in the *directeur de cabinet* in the absence of the Minister.[242] The letter from Gasana precluded conferring upon the *directeur de cabinet* the authority to transfer or promote officers and the power to take disciplinary measures.[243] The Trial Chamber questioned the legal force of the of the directives of this letter once Gasana who was deemed to be a moderate fled Rwanda in July 1993 citing security concerns.[244] The trial chamber was still of the opinion that should the assumption be made that the restrictions imposed by Gasana's letter were still in force, the *directeur de cabinet* continued to play an important role in presiding over joint meetings of the chiefs of staff to the army and gendarmerie as well as other Ministry official, thus potentially leading to the issuance of operational orders to these two military forces.[245]

In establishing the *de facto* authority of Bagosora the trial chamber gave recognition to the fact that some of Bagosora's official activities within the first three days of President Habyarimana's death had exceeded the restrictions in his authority that had been imposed by the letter of Gasana dated 27 January 1993.[246] Despite Ndindiliyimana having called for the Crisis Committee meeting on the evening of 6 April, Bagosora is the one who ultimately chaired and dominated the meeting, which of course was well within the purview of his duties as *directeur de cabinet* however a number of actions taken during and after the meeting exceeded his scope of authority.[247] Bagosora proposed the naming and appointment of Marcel Gatsinzi as

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[241] *Ibid.*

[242] *Ibid* at par.2019.The letter obliged the *directeur de cabinet* to ensure the proper functioning of the day to day affairs of the Ministry. Although he was given the authority to call for and preside over meetings of the chiefs of staff of the army and gendarmerie as well as the other directors of the Ministry; the issuance of operational orders to the chiefs of staff of the army and gendarmeries had to be reduced to writing and must have been previously approved by those in attendance of the meeting, particularly the chief of staff concerned.

[243] *Ibid.*

[244] *Ibid* at par.2020.

[245] *Ibid* at par.2021.

[246] *Ibid* at par.2022.

[247] *Ibid.*

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the acting army chief of staff and personally signed the telegram confirming the appointment; this act was contrary to the directives of Gasana's letter which specifically excluded conferring upon the *directeur de cabinet* the authority to promote or transfer personal without the express authorisation of the Minister of Defence.

The Trial Chamber drew further evidence of the unquestionable authority of Bagosora from the fact that he held meetings with a special representative of the Secretary-General and also the United States Ambassador on behalf of the Rwandan military.[248] According to the Trial Chamber, the fact that he represented main authority in operation in the country at that time – the Rwandan military – in meetings with the international community and the fact that senior military officials regarded him with such high esteem by deeming him the most appropriate person to do so, was indicative of the *de facto* control he still possessed despite the death of President Habyarimana. This finding, which viewed Bagosora as still wielding *de facto* control, contradicted his assertion that his role of *directeur de cabinet* was merely functionary and that the notable actions he took while assuming this role were at the behest of other individuals.[249]

According to the Trial Chamber, Bagosora became the face of Rwandan authorities to the general Rwandan populace as he signed the communication that was read over the radio the morning of 7 April 1994.[250] The communication informed the people of the death of the president and further implored the armed forces to be vigilant in ensuring the security of the people. It also requested the people to stay at home and await new orders.[251] He also signed a second communication read in the evening of the 7th of April on behalf of the armed forces which informed the people of the formation of the crisis committee, as well as their commitment to ensure security and support the country's political authorities.[252]

In the eyes of the chamber, Bagosora's prominence and decisive authority was further evidenced by the pivotal role he played in facilitating the installation of the interim government through his meetings with political leaders on the 7th and 8th of April

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[248] *Ibid* at par.2023.

[249] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 511, par.2016

[250] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 513, par.2016

[251] *Ibid.*

[252] *Ibid.*

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1994.[253] The Trial Chamber further noted that it was Bagosora who was approached by Colonel Nubaha during the *École Supérieure Militaire* (ESM) meeting concerning the ongoing attacks against the 10 Belgian peacekeepers at Camp Kigali.[254] Bagosora instructed Colonel Nubaha to take care of the problem and later he went to the camp to follow up on the instructions relayed.[255] The Trial Chamber thus considered Bagosora's actions during the meeting and with respect to the attack on the Belgian soldiers synonymous to that of a commander issuing out orders and ensuring the compliance of such orders. Again this finding was contrary to Bagosora's assertion that his position as *directeur de cabinet* was that of a civilian functionary.

It is upon these considerations and findings discussed above that the Trial Chamber found beyond a reasonable doubt that Bagosora exerted power of the highest authority in the Ministry of Defence, in the aftermath of the death of President Habyarimana from the 7th of April 1994 to the 9th of April 1994.[256] Despite the fact that his particular role and authority over the military and militiamen became unclear upon the return of the Defence Minister and the installation of the interim government, the Trial Chamber was still of the belief that he maintained substantial influence and significance within the Rwandan government and military for the duration of the relevant events.[257]

When the Trial Chamber was deliberating on whether Aloys Ntabakuze[258] was a superior with *de jure* authority, it was evident that the fact that Ntabakuze was the *de*

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[253] *Ibid* at 2027. Despite facing resistance from Colonel Rusatira who resented Bagosora's involvement in the crisis committee meeting when he was retired from the army, Bagosora ultimately triumphed in forming a new government that he presented before the committee for approval; he even succeeded in marginalising Rusatira in the process.

[254] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 514, par.2025.

[255] *Ibid*

[256] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233)* 514, par.2025

[257] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 516, par.2031.

[258] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 524, par.58-63. Aloys Ntabakuze was born on the 20th of August 1954 in Karago commune, Gisenyi préfecture; he was married and a father of four children. Ntabakuze attended the ESM and graduated with rank of second lieutenant in 1978. He obtained a Level B Commando certificate in 1976 and a Level Commando Certificate in 1978 and both were from the Commando Training Centre of Bigogwe, Rwanda. Ntabakuze continued to further his military education and consequently he rose through the ranks. In 1981 he was promoted to lieutenant and between 1983 and 1984 he acquired security training from the Military Security School of Algeria. In April 1984 he was raised to the rank of captain and in 1987 a commandant. Between 1986 and 1988 Ntabakuze was in the United States acquiring military training from various institutes; on the 1st of April 1991 he was promoted to major with retroactive effect to the 1st April 1990. From July 1978 to February

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jure commander of the Para Commando Battalion was not in contention.[259] However the Trial Chamber had to establish whether his authority also extended over the CRAP platoon a notion which Ntabakuze denied citing that the CRAP platoon was assigned to the Para Commando for administrative purposes only and that it received its orders directly from the army headquarters through him.[260]

In reaching its findings, the Trial Chamber did not disregard the fact that several of the orders tasking the CRAP platoon missions originated from the army headquarters.[261] However it deemed it a typical phenomenon when factoring the function of the platoon of undertaking covert operations often behind enemy lines.[262] The Chamber however gave particular attention to the fact that not only did the platoon's orders flow through Ntabakuze, it was also Ntabakuze who supervised the operations and received mission reports after their completion.[263] In other words, Ntabakuze was in terms of Rwandan law legally accountable for the orders he issued and this in the eyes of the Trial Chamber was sufficient evidence which displayed that the CRAP platoon was an intrinsic part of the Para Commando Battalion under the *de jure* command of Ntabakuze.[264]

1982, Ntabakuze was a platoon leader in the Military Police Company in Kigali; between July and December 1978 and from August 1979 to sometime in 1980, he reported to Bagosora who at the time was head of the Military Police Company. Ntabakuze also served as platoon leader in the Presidential Guard in Kigali from February 1982 to November 1983; he held the post of commander of the Military Police Company in Kigali between June 1984 and November 1986. In June 1988, following the assassination of the former commander Colonel Mayuya, Ntabakuze was appointed to lead the Para Commando Battalion in Camp Kanombe until the 3rd of July 1994, when he was transferred to head the operational sector of Gitarama under the overall direction of General Augustin Bizimungu. During this period, the Para Commando Battalion remained one of his subordinate units. Ntabakuze was one of 10 officers that served on the Enemy Commission chaired by Bagosora. In February 1993, the Minister of Defence appointed him to a governmental commission mandated to establish new regulations for the integrated army anticipated to follow the Arusha Peace Accords. He left Rwanda on the 17th of July in 1994. Ntabakuze's Indictment alleges that he exercised authority over the Rwandan military, their officers and militiamen by virtue of his position as commander of the Para Commando Battalion, an elite unit within the Rwandan army. While his Defence concedes that Ntabakuze commanded the Para Commando Battalion; it disputes, however, that he had operational command over the *Commando de Recherche et d'Action en Profondeur* (CRAP platoon).

[259] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 524, par.2058.

[260] *Ibid.*

[261] *Ibid* at par.2059.

[262] *Ibid.*

[263] *Ibid.*

[264] *Ibid.*

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Again with regards to Ntabakuze's *de facto* authority of the Para Commando Battalion, the Trial Chamber found this to be unquestioned as it was common cause that the Para Commando Battalion was well trained, disciplined and loyal to Ntabakuze.[265] Evidence of Ntabakuze's actual authority over the CRAP platoon was evident from him ordering the platoon to on the night of 6 April 1994 to secure the crash site of the President's plane and its joint deployment with units of the Para Commando Battalion at places such as the Sonatube Junction.[266] The Trial Chamber further noted how Colonel Muberaka, who was the Kigali operational commander at the time, ordered Ntabakuze to deploy the CRAP Platoon to the crash site within minutes of the accident;[267] his orders were directed at Ntabakuze and not the army staff and this was a clear indicia of the *de facto* control wielded by Ntabakuze at the time.

In summarizing the above findings, the Trial Chamber found beyond a reasonable doubt that Ntabakuze possessed both *de facto and de jure* authority over the Par Commando battalion including its CRAP platoon.[268]

In assessing whether Anatole Nsengiyumva[269] was a superior who indeed possessed *de jure* and *de facto* control over the Rwandan military, its officers and militiamen

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[265] *Ibid* at par.260.

[266] *Ibid*

[267] *Ibid.*

[268] *Ibid* at 2061.

[269] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 11-13, par.64-74. Antole Nsengiyumva (hereinafter referred to as Nsengiyumva) was born on the 4th of September 1950 in Santinsyi commune, Gisenyi préfecture; He was married and a father of six children. After completing his studies at École d' Officers de Kigali (later ESM) in April 1971, he was appointed to the national police. Upon completion of his course in 1972 wherein he had trained with the German police, Nsengiyumva was appointed second lieutenant in the army and sub-commissioner in the police in 1973. The police had been integrated with the army and was now called the National Guard. In 1984 he became major and in 1988 he was lieutenant colonel. In September of 1973, Nsengiyumva served as an instructor at the *École des Sous Officers* (ESO) in Butare. From December 1973, He served in Kigali as an officer within the General Staff of the Rwandan army in the G-1 department responsible for personnel administration. Between March 1974 and December 1976. He was a private secretary as well as aide-de-camp to President Habyarimana; he occupied the rank of first lieutenant. From December 1976 to August 1981 Nsengiyumva received promotions from first lieutenant to captain and to commander; he was now the head of the G-2 in the General Staff of the Rwandan Army in charge of military intelligence. As commander Nsengiyumva replaced Colonel Féleien Muberuka as interim commander of Ruhengeri Commando Battalion; He also furthered his military training France from February 1982 to December 1983. By October 1984 Nsengiyumva had risen to the rank of Major and had been reappointed the head of G-2 at the army

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particularly in the Gisenyi operational sector, the Trial Chamber established that it was common cause that Nsengiyumva was the army commander of the operational sector of Gisenyi from June 1993 to June 1994, when he was appointed the liaison officer with *Opération Turquoise*.[270] Consequently the Trial Chamber was satisfied with the authority he possessed over the soldiers that were assigned to him in the Gisenyi sector.[271]

However questions still remained with regards to whether Nsengiyumva's authority extended to the Bigogwe Training Centre and the Bututori training facility in Gisenyi prefecture. Nsengiyumva denied having authority over these two facilities alleging that they answered directly to the army general staff.[272] The Trial Chamber noted how the prosecution failed to address the particular issue of whether Bigogwe and Bututori facilities were encompassed under Nsengiyumva's command.[273] The Chamber further noted how in his testimony, Major Willy Biot, who was a Belgian military adviser

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headquarters with the responsibility for army intelligence. His duties encompassed gathering and analysis of intelligence relating to army security as well as the internal and external security of Rwanda; he also prepared reports for President Habyarimana who was also Minister of Defence and chief of staff of the armed forces. Nsengiyumva was appointed commander of camp Kanombe and head of the Para Commando Battalion after the assassination of Colonel Mayuya in April 1988; he occupied these posts for two months before handing over the command of the camp to Bagosora and the Para Commando Battalion to Ntabakuze. In his role as chief of military intelligence, Nsengiyumva participated in several missions and commissions of national security namely: in February 1988 he was member of a mission to Kampala, Uganda addressing the problem of Rwandan refugees in Uganda; in September of 1990 he participated in the negotiation of a trilateral treaty between Rwanda, Uganda and Zaire; he was also a member of an enemy commission chaired by Bagosora and in November 1992 he was appointed chairperson of commission tasked with assessing various scenarios relating to potential enemy threats against Rwanda. In June 1993 Nsengiyumva became commander of Gisenyi operational sector, he also served as an ex officio member of the Prefectoral Security Council of Gisenyi. Before leaving for Goma Zaire in July 1994, Nsengiyumva had upon request been serving as a liaison officer for France's Operation Turquoise deployment to Rwanda. Charged with: conspiracy to commit genocide, genocide, murder as a crime against humanity, extermination as a crime against humanity, rape as a crime against humanity and persecution as a crime against humanity and serious violations of Article 3 to the Geneva Conventions and Additional Protocol II. Nsengiyumva was also charged with direct and public incitement to commit genocide. The Trial Chamber acquitted him of three counts: direct and public incitement to commit genocide, rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions Additional Protocol II. He was however found guilty on all the other counts stated above. *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 6, par.39.

[270] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 527, par.2072.

[271] *Ibid.*

[272] *Ibid* at par.2073.

[273] *Ibid* at par.2074.

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assigned to the Bigogwe camp, did not indicate whether the Bigogwe camp was under the authority of Nsengiyumva; he merely testified to the fact that the Bututori facility fell under Bigogwe's command.[274]

The Trial Chamber also scrutinised the testimony of Omar Serushago who was an *Interahamwe* leader; He testified that Colonel Bahufite, the Gisenyi operational commander oversaw training at Bigogwe beginning in June 1993 which continued when Nsengiyumva took over as operational commander.[275] However the Trial Chamber was of the view that merely attributing the training at these camps to be under the supervision of the operational sector commander was not a definitive indicia that the camps themselves were under the authority of Nsengiyumva and not the army general staff.[276] Furthermore the Trial Chamber took cognisance of the fact that military schools such as the *École des Sous Officiers* (ESO) and the ESM fell directly under the army headquarters; the Chamber also noted how the officers at Bututori and Bigogwe were not located under the Gisenyi operational sector heading in the document listing the place of service of the officers in the Rwandan army.[277]
Therefore, while the Trial Chamber considered it conceivable that these locations could fall under Nsengiyumva's command by virtue of their location in the Gisenyi's operational sector, it did not deem this a conclusive fact to be drawn from the records.[278]

The Trial Chamber was however content, drawing from Nsengiyumva's role as the operational commander in the Gisenyi sector, that the soldiers from these facilities would be in fact operating under his authority when in engaged in military operations. The Chamber therefore found beyond a reasonable doubt that Nsengiyumva wielded command over the soldiers within the Gisenyi operational sector.[279] It did not consider the prosecution to have dispensed of its duty to prove that Nsengiyumva had authority over members of other units of the Rwandan army, including the Bututori and Bigogwe training facilities except for when they were involved in military operations.[280]

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[274] *Ibid.*

[275] *Ibid.*

[276] *Ibid.*

[277] *Ibid* at par.2075.

[278] *Ibid.*

[279] *Ibid* at par.2076.

[280] *Ibid.*

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In determining the scope of command held by Gratien Kabiligi[281] over the Rwandan military, their officers and militiamen in particular those operating in following sectors: Byumba, Ruhengeri, Mutara and Kigali and also the scope of his authority with regards to the Presidential Guard, Reconnaissance Battalion and the Para Commando Battalion the Trial Chamber took into consideration the following:

The Trial Chamber gave credence to the prosecution's expert testimony of Filip Reyntjens who reduced Kabiligi's function as G-3 to that of a bureaucrat who would not fight a war on the front nor have of an operational unit on the front.[282] Filip Reyntjens was of the view that Kabiligi could not issue orders to the Presidential guard.[283] The Trial Chamber took into the consideration Filip Reyntjens' 1998 interview

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[281] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 10, par.54-57. Gratien Kabiligi was born on 18 December 1951 in Kamembe commune, Cyangugu prefecture. He was married and the father of six children. Kabiligi began his military education at the ESM in 1971. He graduated in 1974 with the rank of second lieutenant. He was promoted to lieutenant in 1977, captain in 1980 and major in 1984. Kabiligi completed various technical military training courses within Rwanda, between 1986 and 1988, and undertook the position of senior officer training at the military academy in Hamburg, West Germany. He was promoted to lieutenant-colonel in 1988, and full colonel in 1992 and brigadier-general on 16 April 1994. From 1988 until 1991, he served as the Director of Studies at the ESM. Between 1991 and 1992, he commanded the 21st Battalion at the Mutara frontline. In June 1992, he was appointed commander of military operations in the Byumba operational sector where he served until August 1993. Kabiligi became the head of the G-3 bureau on the general staff of the Rwandan Army from September 1993. He retained that post until 17 July 1994. After the Rwandan army was defeated in July 1994, Kabiligi was named deputy commander, as well as commander of the Bukavu Squad, of the newly reorganised Rwandan Armed Forces High Command which was reconstituted in exile. He was later part of the Movement for the Return of Refugees and Democracy to Rwanda (RDR). Kabiligi was arrested on 18 July 1997 in Nairobi, Kenya. On the same day, he was transferred to the United Nations Detention Facility. Kabiligi's Indictment alleges that Kabiligi exercised authority over the Rwandan military, their officers and militiamen by virtue of his position as head of the military operations bureau (G-3) on the army general staff. In this function, he was responsible for planning, coordinating and ensuring the execution of military operations throughout Rwanda and in particular had command over the operational sectors of Byumba, Ruhengeri, Mutara and Kigali as well as the elite units, such as the Presidential Guard, Reconnaissance Battalion and Para Commando Battalion. The Prosecution points primarily to evidence of Kabiligi's rank as a brigadier general, evidence of him or the G-3 bureau issuing orders and directing combat, as well as documents relating to his military role in exile to demonstrate his actual command authority. Consequently he was charged with conspiracy to commit genocide, genocide, crimes against humanity (murder, extermination, rape, persecution and other inhumane acts) and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II (violence to life and outrages upon personal dignity), Kabiligi was acquitted on all counts.

[282] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 519, par.2045.

[283] Filip Reyntjens was a prosecution expert witness on Rwandan history. *Ibid.*

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where he was on record acknowledging the fact that he had no information or knowledge of Kabiligi's involvement in the genocide.[284]

The Trial Chamber considered the testimony of Lieutenant Colonel Jacques Duvivier who was Kabiligi's Belgian military expert.[285] According to him the bureaus G1 – G3 were tools at the disposal of the Chief of staff that were meant to aid him with adequate information and proposals to enable the chief of staff to respond to any given situation and issue orders; the particular role of the G-3 in this process was to furnish the chief of staff with information pertaining to training and military operations.[286] Once the chief of staff took a decision and issued orders for a military operation, these orders were transmitted by the G-3 to the operational commanders and the G-3 oversaw their implementation however the G-3 did not have any direct authority over the operational commanders.[287] It was the chief of staff who maintained the responsibility for the execution of his orders.[288]

The Trial Chamber considered the closing brief of the Prosecution wherein the Prosecution conceded that Kabiligi may have possessed limited *de jure* authority. It also gave weight to multiple witnesses who testified of Kabiligi's limited *de jure* authority.[289] Consequently the Trial Chamber was of the view that the Prosecution failed to prove beyond a reasonable doubt that Kabiligi had *de jure* authority over various units of the Rwandan Armed Forces in their conduct of military operations.[290]

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[284] *Ibid.*

[285] *Ibid* at par.2046.

[286] *Ibid.*

[287] *Ibid.*

[288] *Ibid.*

[289] *Ibid* at par.2047. The G-3's lack of operational command was also testified to by several other Defence witnesses namely FC-77, KP-22, FLA-4, KVB-19, LAX-2, LCH-1, LX-65, YC-3, YUL-39, SX-1, A-8 and Colonel Luc Marchal. These witnesses included a high ranking French officer (Witness SX-1), who was familiar with the functioning of the G-3 office of the French army. Duvivier and Marchal were familiar with the structure of both the Belgian army and the Rwandan army, which were similarly organised. Also Rwandan officers who had worked at one point on the G-3 staff (Witnesses YC-3 and FC-77) gave similar evidence. The remaining witnesses were also Rwandan army officers. Even Witness XXJ, which the Prosecution is relying heavily on in relation to Kabiligi's command authority, appeared to make a distinction between the general regulations and the factual situation under the extraordinary situation in 1994, focusing on the latter.

[290] *Ibid.*

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In the Trial Chamber's determination of whether Kabiligi had *de facto* command, the Chamber had to determine the veracity of various witness testimonies.[291] The Trial Chamber found the testimony of witness XXJ on receiving orders directly from Kabiligi to be uncorroborated and contrary to that of witness FLA-4.[292] The Chamber deemed his evidence concerning radio contact by Kabiligi to be general, and that the single incident where the witness met with Kabiligi at the army headquarters was not sufficient to demonstrate that Kabiligi was the operational commander of Kigali.[293] Pursuant to these findings, the Chamber accordingly afforded limited weight to his testimony concerning the scope of Kabiligi's authority.[294]

The Trial Chamber also had to determine what inferences it could draw from the testimonies of witness STAR-1, VIP-1, DCH and Jean Kambanda who attested to Kabiligi being present on the ground during military operations.[295] In its findings, the Trial Chamber acknowledged that while these combined testimonies portrayed Kabiligi as having possibly played a more significant role in the execution of military operations than that of a mere desk officer, the evidence was however unclear about the precise nature of his role in these incidents and whether or not he possessed command authority.[296] The Trial Chamber was also of the view that even if these testimonies established that Kabiligi had operational command, they did not show that he participated in operations that resulted in civilian casualties.[297] In addition, the Chamber deemed the evidence of his presence during the operations in question was

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[291] *Ibid* at par.2048. Witness XXJ, a Hutu lieutenant who was an artillery officer, testified that, from mid-May to mid-June, he received orders directly from Kabiligi over the radio and once in person at army headquarters in relation to firing on specific targets during ongoing military operations against the RPF. In his view, as the G-3 officer of the general staff, Kabiligi had overall command of military operations in the city of Kigali, as well as responsibility for operations at a national level. The Kabiligi Defence disputed this evidence and drew attention to the Defence Witness FLA-4, a Hutu artillery officer, who stated that Witness XXJ was never stationed on Mount Kigali and moreover would have received his orders from his unit commander, not Kabiligi.

[292] *Ibid* at par.2049.

[293] *Ibid.*

[294] *Ibid.*

[295] *Ibid.* Witness STAR-1, a Hutu officer in the Huye Battalion, testfied that he saw Kabiligi meet briefly in the field on one occasion with the Kigali-west sector commander concerning a counter offensive against the RPF. Witness VIP-1, an officer assigned to Opération Turquoise, testified that, in mid-July 1994 General Augustin Bizimungu, the chief of staff of the Rwandan army, told him that Kabiligi was retreating with the last group of combatants that had been expelled from Kigali.

[296] *Ibid* at par.2050.

[297] *Ibid.*

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not inconsistent with the function of the G-3 bureau of monitoring all activities relating to military operations.[298]

Jean Kambanda, who was the Prime Minister of Rwanda at the time, testified that he was told that as a G-3 Kabiligi was in command of all the troops in Kigali however there wasn't significant weight attached to this testimony since he did not identify his sources of information and admitted to not being conversant with military matters.[299]

The Prosecution drew attention to two letters which emanated from the G-3 bureau; the first letter was written by Kabiligi after having given a tour of the army's weapons depot to a UNAMIR military observer.[300] The Chamber did not find this letter to infer any form of command authority on Kabiligi.[301] The second letter which was addressed to the Minister of Defence concerned minutes of a meeting on the implementation of a civil defence program.[302] The Chamber noted that the second letter pertained to minutes held in the absence of Kabiligi and that it was not even signed by Kabiligi.[303] The only connection the letter had with Kabiligi was that it was printed on the letter of the G-3 bureau; thus according to the Chamber the only reasonable inference or weight it could attach to the letter was that Kabiligi's office played some role in the preparation of the civil defence program, this was far from demonstrating his authority over members of the armed forces or militiamen.[304]

In conclusion, the Trial Chamber was of the view that the Prosecution had not proven beyond a reasonable doubt that Kabiligi exercised authority over the Rwandan Armed Forces, in particular the operational sectors of Byumba, Ruhengeri, Mutara and Kigali as well as the Presidential Guard, Reconnaissance Battalion and Para Commando Battalion, beyond his subordinates in the operations bureau (G-3) of the army staff.[305]

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[298] *Ibid.*

[299] *Ibid* at par.2051.

[300] *Ibid* at par.2053.

[301] *Ibid.*

[302] *Ibid.*

[303] *Ibid.* The meeting was held on 29 March 1994 between Déogratias Nsabimana, the army chief of staff, Tharcisse Renzaho, the prefect of Kigali, and Félicien Muberuka, who was the operational commander of Kigali. Kabiligi was in Egypt at the time. The letter was signed by Nsabimana.

[304] *Ibid.*

[305] *Ibid.*

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Furthermore, the evidence did not show that these subordinates committed crimes at points when Kabiligi exercised effective control over them; while there was some evidence that Kabiligi was involved in connection with operations conducted against the RPF in Kigali, the Prosecution did not prove that these related to the targeting of civilians.[306]

In the case, *The Prosecutor v Tharcisse Renzaho,* when faced with determining whether Tharcisse Renzaho[307] exercised effective control over the local officials within his prefecture, including sub-prefects, *bourgmestres, conseillers, responsables de cellule* and Nyumba Kumi (ten-house leaders) as well as prefecture and commune employees such as the urban police the Trial Chamber took cognisance of the following:

The Trial Chamber gave recognition to his position as the prefect. It was this position, combined with his high military rank that the Trial Chamber used to draw an inference

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[306] *Ibid.*

[307] *The Prosecutor v Tharcisse Renzaho* case no. ICTR-97-31-T, 195, par.748-750. Tharcisse Renzaho was born in 1944 in Gaseta secteur, Kigarama commune, Kibungo préfecture, in Rwanda, Indictment alleged that as prefect of Kigali-Ville and a colonel in the Rwandan Army Renzaho had de jure and de facto control over bourgmestres, conseillers, responsables de cellule, ten-house leaders, administrative personnel, urban police, the Rwandan army, gendarmes, Interahamwe, militias, armed civilians as well as the Rwandan armed forces who fell under his command. Renzaho argued that the Indictment was not sufficiently precise in outlining the perpetrators over whom he allegedly had authority over. While he conceded his de jure authority over bourgmestres and the urban police, it was his contention that the situation in Kigali-Ville had spiralled out of control and that he lacked the means and resources to exercise control over those committing crimes. Furthermore he claimed that he was unaware of crimes committed by his subordinates. Renzaho was appointed prefect of Kigali-Ville on 5 October 1990, immediately after an RPF invasion, and remained in that position until July 1994, when he fled Kigali. The prefect was the representative of the national government in Kigali-Ville, vested with the authority of the state. His tasks included the maintenance of peace, public order and security of persons and property within the prefecture and ensuring the proper functioning of the prefecture's services. In addition, Renzaho maintained his position within the Rwandan army throughout his tenure as prefect and was promoted to the rank of colonel in July 1992. Consequently he was charged with the following: genocide, complicity in genocide, murder as a crime against humanity, rape as a crime against humanity, murder as a violation to Article 3 common to the Geneva Conventions and Additional Protocol II and rape as a violation to Article 3 Common to the Geneva Conventions and Additional Protocol II. Pursuant to Articles 6(1) and 6(3) of the statute Renzaho was found guilty of genocide, murder as crime against humanity and also a violation to Article 3 Common to the Geneva Conventions and Additional Protocol II. He was also found liable for rapes committed in the Nyarugenge secteur under Article 6(3); he was also found guilty of genocide and rape as crime against humanity and also a violation to Article 3 Common to the Geneva Conventions and Additional Protocol II for crimes committed in this secteur.

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of his importance and influential authority from the fact that he was entrusted with the administration of a key strategic location during a time of war.[308]

The Trial Chamber noted how prior to the events in question, Renzaho participated in discussions concerning the defence of the city.[309] These discussions ultimately sketched out a framework for utilising and mobilising local officials in the effort to secure the city.[310] While the Trial Chamber could not ascertain the fact of when and to what extent these plans were put into place, the Chamber was of the view that this evidence as well as Renzaho's key role in the process offered strong circumstantial evidence, confirmed by what followed, that in the wake of war all resources of local administration would be effectively placed under the authority of the prefect and local military commanders at least with respect to the government's efforts to combat the "enemy".[311]

The Trial Chamber found that in the midst of hostilities, Renzaho constantly convened and chaired meetings at prefecture level involving civilian and military official; in these meetings he would issue instructions and orders pertaining to the maintenance of security.[312] These orders he would issue included the setting up of roadblocks and the distribution of weapons.[313]
Though evidence of his *de jure* authority over other subordinates like *conseillers* was not clear, it was evident that he had *de jure* authority over *bourgmestres* and the urban police force.[314]

However the Trial chamber deemed the following reflective of his possession of *de jure* control over the *conseillers:* Renzaho would issue instructions to the conseillers and provide them with urban police as their personal guards.[315] The conseillers were at the front line of organising the local population to man roadblocks and distributed weapons and finally that he ultimately supervised the replacement of local officials

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[308] See The Prosecutor v Tharcisse Renzaho (supra note 307), 196, par.753.

[309] *Ibid.*

[310] *Ibid.*

[311] *Ibid.*

[312] *Ibid* at par.754.

[313] *Ibid.*

[314] *Ibid.*

[315] *Ibid.*

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under his Kigali-Ville *bourgmestres*.[316] Consequently the Trial Chamber was of the view that his assertion that he lacked the ability to control his subordinates was without merit.

In relation to the authority Renzaho had over soldiers and gendarmes the Trial Chamber was of the opinion that Renzaho, flowing from his position as a prefect and the high rank held in the military, would have been perceived as an authoritative figure.[317] The Chamber noted how the position of being a prefect gave him the legal ability to request the gendarmes and his rank in the military enabled him to enforce compliance with general rules governing discipline by all soldiers below him in the military hierarchy.[318] However concerning the effective control he had over the gendarmes the Trial Chamber was not persuaded that Renzaho's effective control extended to all considering that while he could requisition them, the gendarmes still remained under the operational command of their officers.[319] Accordingly the Trial Chamber decided on establishing this effective control on a case by case basis.

In the case, *The Prosecutor v Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu;*[320] the Trial Chamber had to deliberate on whether Augustin Ndindiliyimana[321] had effective control over the *Gendarmerie*

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[316] *Ibid.*

[317] *Ibid* at par.755

[318] *Ibid.*

[319] *Ibid.*

[320] *The Prosecutor v Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu* case No ICTR-00-56-T.

[321] *The Prosecutor v Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu* case No ICTR-00-56-T, 24, par.81-87. Augustin Ndindiliyimana was born in 1943 and in Nyahungeri commune, Butare préfecture in Rwanda. He enrolled in the military academy in 1966 and graduated in 1968; he further, between 1971 and 1974 enrolled in a war college in Brussels and completed two separate courses of study. Upon his return to Rwanda Ndindiliyimana was stationed at the basic training centre in Kanombe where he helped establish the Para Commando Battalion and served as the unit's director of intelligence and training. In 1977 he transferred to the ESM to teach and command a group of trainees; he in 1979 transferred to the staff headquarters of the Rwandan Army where he occupied the position of chief personnel of the general staff. In February 1982 Ndindiliyimana was appointed Minister of Youth and Sports; he however maintained his military commission and rose through the military ranks till he was ordained a full colonel. In 1990 he was appointed minister of transport and communication and in 1991 he was appointed a minister in the President's Office for Defence and Security Issues. Ndindiliyamana between December 1991 and April 1992 served as Minister of Defence and in June 1992 he was appointed chief of staff of the *Gendarmerie*; he exceeded his typical role of commanding all gendarmes in Rwanda by rebuilding the command structure, reviewing their capacity and

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which ultimately flows from the existence of a superior subordinate relationship. The Chamber took note of Ndindiliyimana's appointment as Chief of Staff of the *Gendarmerie* by the presidential order of June 1992 as a factor that inferred *de jure* authority over the *Gendarmerie*.[322] However the Trial Chamber had to give consideration to the legislative decree of January 1974which created the *Gendarmerie* and set out the organisation and function of the *Gendarmerie*.[323]

Several witnesses of both the Prosecution and the Defence testified to the fact following the RPF attacks of 7 April 1994, the *gendarmes* units were placed under the

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completing a report on the integration of the RPF into the *Gendarnerie*. On the 1st of January 1994 Ndindiliyimana was promoted to Major General under the provisions of the Arusha Accords. On the 5th of June he was replaced as chief of the *Gendarmerie* and appointed ambassador to Germany; on the 17th of June he left Rwanda for Zaire and arrived in Belgium on the 1st or 2nd of July 1994. The Indictment Ndindiliyimana alleged that Ndindiliyimana was Chief of Staff of the *Gendarmerie* at the time of the events in question and that he exercised authority over the entire *Gendarmerie* and had disciplinary power over all gendarmes, even when the latter were on temporary detachment. In response the Defence acknowledged that Ndindiliyimana was Chief of Staff of the *Gendarmerie* during the events in question. However, the Defence submitted that Ndindiliyimana did not have effective command and control of the *Gendarmerie* after hostilities with the RPF resumed on the night of 6 April 1994, when operational command over the majority of gendarmerie units was transferred to the Rwandan Army and Ndindiliyimana was left with only administrative and disciplinary powers over the gendarmes in those units. Ndindiliyimana was charged with: conspiracy to commit genocide, genocide, complicity in genocide, murder as a crime against humanity, extermination as a crime against humanity and murder as a violation of Article 3 common to the Geneva Conventions and of the Additional Protocol II. He was acquitted on conspiracy to commit genocide and had the charge of complicity in genocide dismissed but was convicted on the rest of the charges.

[322] *The Prosecutor v Augustin Ndindiliyimana, et al* (supra note 320), 434, par.1922

[323] *The Prosecutor v Augustin Ndindiliyimana, et al* (supra note 320), 435, par.1923-1924. Pursuant to that decree, the Chief of Staff was the head of the Gendarmerie, but the Gendarmerie was under the supervisory authority of the Ministry of Defence. The primary function of the Gendarmerie was to maintain public law and order and to enforce the laws in force in Rwanda. However, Article 47 of the decree provided that, in times of war, the Gendarmerie "participates in the defence of the territory" as determined by the Minister of Defence. Consequently in times of war, the participation of the Gendarmerie in the defence of territory was triggered by an order of the Minister of Defence to the Chief of Staff of the Gendarmerie; this ultimately transferred operational command over the selected gendarmerie units to the Chief of Staff of the Rwandan Army. Those gendarmerie units thus became operational units within the Rwandan Army, and took their orders from the Chief of Staff of the army. The Gendarmerie only retained authority over the units deployed to assist the army with regard to administrative and disciplinary matters. Those gendarmerie units that were not deployed to assist the army in combat remained under the full command of the Chief of Staff of the Gendarmerie and continued to fulfil the Gendarmerie's primary function of maintaining public law and order and enforcing the laws in force in Rwanda

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operational command of the Rwandan Army.[324] In the light of these testimonies, the notion of Ndindiliyimana's possession of *de jure* control over the majority of the *Gendarmerie* was dramatically reduced; in fact the Trial Chamber found that Ndindiliyimana lacked operational command over the *gendarmes* which had been deployed to assist the army.[325] Ndindiliyimana only remained with full *de jure* command over the *gendarmes* that were not deployed to assist the army. Ndindiliyimana's estimation of the *gendarmes* that were still fully under his control was 200 *gendarmes* as the remainder of the *gendarmes* now fell under the operational command of the Rwandan Army.[326]

In determining the *de facto* authority of Ndindiliyimana, the Trial Chamber was of the view that Ndindiliyimana's constituted the face of the *Gendarmerie* as he would represent the *Gendarmerie* at meetings with the Rwandan Army, government officials, UNAMIR representatives, and foreign diplomats during the period from 6 April 1994 to 5 June 1994.[327] However, cognisant of the fact that Ndindiliyimana's authority of the *Gendarmerie* was significantly reduced following the death of President Habyarimana, the Trial Chamber considered Ndindiliyimana's *de facto* control over the *gendarmes* who had been deployed to assist the Rwandan Army in combat and those who had not been deployed to assist the army separately.[328]

The Trial Chamber noted that after the death of President Habyarimana, the transfer of operational command over the *gendarmes* deployed to assist the Rwandan Army effectively dispossessed Ndindiliyimana of the material ability to exercise the daily

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[324] Prosecution Witness General Roméo Dallaire testified that after 7 April, the country was "reverting to a war footing again ... the command of the Gendarmerie was reverting to the command of the army". Prosecution Expert Witness Alison Des Forges likewise testified that a number of gendarmerie units were integrated into the regular army command following the resumption of hostilities on 7 April. Defence Witness Luc Marchal, who was commander of the UNAMIR Kigali secteur, confirmed that Ndindiliyimana no longer had operational command over the majority of gendarmerie units after 7 April.3631 Colonel Léonidas Rusatira, a senior Rwandan Army officer, Witness CBP46, a gendarmerie unit commander in Kigali, and Witness CBP63, who worked closely with Ndindiliyimana in the Gendarmerie in 1994, also confirmed that a number of gendarmerie units passed under the operational command of the army following the RPF attacks of 7 April. See *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320)*, 435, par.1925.

[325] *The Prosecutor v Augustin Ndindiliyimana, et al* (supra note 320), 436, par.1928.

[326] *The Prosecutor v Augustin Ndindiliyimana, et al* (supra note 320), 437, par.1929.

[327] *Ibid* at par.1930.

[328] *Ibid* at par.1931.

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operational control over these units.[329] This finding was supported by the testimony of Defence witness Colonel Luc Marchal who testified that most *Gendarmerie* units went under military command, a move he attributed to the need for coordination and the need to optimally use the means available.[330] As a result of this move, Marchal testified that Ndindiliyimana instantaneously ceased to control these units and therefore could not issue operational commands to them.[331]

Again with regard to the *gendarmes* units that were not deployed to the Army, the Trial Chamber noted that Ndindiliyimana's ability to control them was greatly impacted negatively as the war progressed.[332] This was attributed to various factors namely the lack of resources, increased communication barriers and infiltration by rogue elements.[333] This was confirmed by the testimonies of Defence Witnesses Colonel Luc Marchal and CBP63 who attested that the gendarmes under Ndindiliyimana's command suffered from a serious lack of means and of troops.[334] According to Witness CBP63, the gendarmes were hampered by a shortage of vehicles and communications equipment.[335]

Ndindiliyimana, in his testimony, confirmed the difficulties in communicating with units on the ground.[336] Though admitting to receiving regular reports from the gendarmerie units based in other *préfectures* throughout the month of April, Ndindiliyimana claimed that those reports were often contradictory.[337] Reports from small units were irregular and often reached him late; Ndindiliyimana stated, this situation worsened as the war progressed.

The Gendarmerie's most important installation was in Kigali, Ndindiliyimana was forced to move his Headquarters to Kimihurura after Camp Kacyiru, which was located in Kigali and served as the logistical hub of the Gendarmerie, came under continuous RPF attack from 9 April.[338] In addition, communication problems continued to torment

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[329] *Ibid* at par.1932.

[330] *Ibid.*

[331] *Ibid.*

[332] *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320)*, 438, par.1936.

[333] *Ibid.*

[334] *Ibid* at par.1937.

[335] *Ibid.*

[336] *Ibid* at par.1938.

[337] *Ibid.*

[338] *Ibid*

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Ndindiliyimana's command as the wireless transmission facilities at the General Staff office were destroyed, telephone lines were cut off, and the Gendarmerie's Alcatel system was shut down at Camp Kacyiru.[339] Ndindiliyimana testified, that communication between those small units operating on the ground and the command post was essentially ineffective.

Lieutenant Colonel Nzapfakumunsi based at Camp Kacyiru corroborated these facts in his testimony when he stated that they had lost contact with the staff command of the *Gendarmerie* and that they resorted to making use of couriers by sending *gendarmes* to carry messages back and forth.[340] General Dallaire also testified to Ndindiliyimana's loss of control over the *Gendarmerie* by mid-April.[341] He further went on to attest that in certain parts of Kigali, he had the impression that the *Gendarmerie* now consisted of rogue elements and did not seem structured anymore.[342]

From the testimonies the Trial Chamber did not dispute that Ndindiliyimana suffered from a lack of resources during the events in question and that he faced challenges in communicating with gendarmerie units operating on the ground.[343] The Chamber was also satisfied that Ndindiliyimana's material ability to control the gendarmes under his command decreased as the war progressed. Consequently the Chamber acknowledged that Ndindiliyimana did not exercise effective control over all gendarmes under his *de jure* operational command from April to June 1994.[344]

However the Chamber found that Ndindiliyimana exercised *de facto* authority over the gendarmes who committed the crimes alleged in paragraphs 73 and 76 of the Indictment.[345] In these circumstances, the Chamber considered that Ndindiliyimana had *de facto* authority over the gendarmes in question.

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[339] *Ibid.*

[340] *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320)*, 439, par.1939.

[341] *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320)*, 440, par.1943.

[342] *Ibid.*

[343] *Ibid* at 1945.

[344] *Ibid.*

[345] On or about 21 April 1994, *gendarmes* on duty at Augustin Ndindiliyimana's residence opposite Nyaruhengeri gave two grenades to an *Interahamwe* militiaman known as Kajuga Pierre and told him to use them to exterminate the Tutsi. The grenades were handed over quite openly during the day at Augustin Ndindiliyimana's residence were his wife and children were living. On or about 22 April 1994, Pierre Kajuga threw a grenade into the Nyaruhengeri *secteur* office where many Tutsi had sought refuge, blowing off both legs of Adolphe Karakesi and wounding many other refugees. On or about 13 April 1994,

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In summation it is evident from the discussion above that the Trial Chambers first established the position of the accused within the government or military hierarchy. In doing so, the Chambers would have determined whether a particular individual wielded *de jure* authority over the subordinates in question. The Chamber then embarked on a reflective introspection of the acts of the accused in order to determine whether the individual wielded *de facto* control. Where the Chambers found the presence of both *de facto* and *de jure* authority, the Chamber were satisfied that the individual had effective control over the subordinates in question and could thus be considered to be a superior of those subordinates.

This approach has been confirmed in the recent ICC case of *The Prosecutor v Jean – Pierre Bemba Gombo.*[346] The Trial Chamber's first point of departure in establishing whether Bemba was a person effectively acting as a military commander and in effective control, the Chamber considered his position as President of the *Mouvement de libération du Congo* (MLC) with the rank of Divisional General.[347] The chamber found that this position conferred upon Bemba the powers to make appointments, promotion and dismissals,[348] thus the Chamber considered Bemba to have *de jure* authority. The Chamber confirmed that the determination of whether a person possesses effective control is centred on the person's material ability to prevent or repress the commission of crimes[349] The Chamber was satisfied that Bemba exercised effective control and it premised its findings from the following: (i) it was Bemba who initially ordered the deployment of the MLC troops to the Central African Republic (CAR) and he maintained regular contact with senior commanders in the field on the state of operations;[350] (ii) Bemba continued to represent the MLC forces in the CAR in

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gendarmes from the Nyamirambo unit, accompanied by militiamen, attacked Saint-André College in Kigali, where hundreds of people, mainly Tutsi, had sought refuge between 7 and 8 April1994. After checking their identity, the attackers selected all the Tutsi men and killed them outside the college. The said *gendarmes* were under the Augustin Ndindiliyimana's command. See *The Prosecutor v Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu* case No ICTR-00-56-I, 13, par.74-76.

[346] See generally *The Prosecutor v Jean – Pierre Bemba Gombo* (*supra* note 158), 341-345, par.696 – 705.

[347] *Ibid,* par 696.

[348] *Ibid,* par.697.

[349] *Ibid,* par.698.

[350] *Ibid, par.700.*

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external matters such as discussions with UN representatives and in responding to the media and other reports of alleged crimes.[351]

3.5.2 Knowledge/requisite *mens rea*

It is a well-established principle of the doctrine of command responsibility that before liability under the doctrine passes to an individual it must be ascertained whether or not the said individual possessed knowledge of the perpetration of the crimes by his subordinates. Therefore a superior will be imputed with requisite *mens rea* sufficient to incur criminal liability if: (a) the superior had actual knowledge, established through direct or circumstantial evidence, that his subordinates were about to commit, were committing, or had committed, a crime under the statute; (b) the superior possessed information which provided notice of the risk of such offences by indicating the need for additional investigations in order to ascertain whether such offences were about to be committed, were being committed, or had been committed by the subordinates.[352]

The following factors would be taken into consideration in determining the existence of actual knowledge: the number, type and scope of illegal acts committed by the subordinates, the time during which the illegal acts occurred, the number and types of troops and logistics involved, the geographical location, whether the occurrence of the acts is widespread, the tactical tempo of operations, the *modus operandi* of similar illegal acts, the officers and staff involved, and the location of the superior at the time.[353]

In assessing whether the evidence against Bagosora was sufficient to satisfy the knowledge requirement, a second ingredient that must be established before an individual incurs liability under the command responsibility doctrine, the Trial Chamber's answer was in the affirmative.[354] It considered the attacks in question to have been organised military operations that required authorisation, planning and orders from the highest levels.[355] The Chamber noted that many of the assailants in the attacks in the Kigali and Gisenyi area between 7 and 9 April were members of elite units, such as the Presidential Guard and the Para Commando Battalion, as well as other soldiers and gendarmes.[356]

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[351] *Ibid,* par.702.

[352] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 510, par.2013.

[353] *Ibid* at par.2014.

[354] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 517, par.2038.

[355] *Ibid.*

[356] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 516, par.2032.

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The Trial Chamber also considered the pattern and frequency of the attacks against civilians, including prominent personalities and opposition figures.[357] The fact that there was the involvement of military personnel, including elite units, in some of these attacks, as well as their close proximity to the death of President Habyarimana and the resumption of hostilities between government forces and the RPF.[358] The Chamber was left with only one logical deduction and that was these attacks were organised military operations.[359] In view of this deduction, as well as when the Chamber factored Bagosora's role at the head of the Rwandan military, it concluded that these assailants were his subordinates and under his effective control.[360]

Consequently the Trial Chamber found it inconceivable that Bagosora would not be aware that his subordinates were deployed for these purposes, especially when one took into consideration the fact that these incidents occurred in the immediate aftermath of the death of President Habyarimana and the resumption of hostilities with the RPF, when the vigilance of military authorities would have been at its height.[361] Furthermore, many of these crimes took place in Kigali where Bagosora was based, including the open and notorious slaughter at roadblocks.[362]

While the Trial Chamber conceded that, in addition to the military perpetrators, civilian militiamen participated in several attacks and manned many of the roadblocks in the Kigali are,[363] the Chamber was convinced that, in certain circumstances, civilian assailants could be considered as acting under the authority of the Rwandan military.[364] This conviction was premised on the fact that these militiamen were often, working in close coordination with military personnel during the attacks at Kigali roadblocks, where a soldier or gendarme was frequently at the head.[365]

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[357] *Ibid* at par.2034.

[358] *Ibid.*

[359] *Ibid.*

[360] *Ibid.*

[361] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 517, par.2038.

[362] *Ibid.*

[363] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 516, par.2033.

[364] *Ibid.*

[365] The attack at Gikondo Parish is a prime example of the seamless symbiotic relationship between the civilian militia and the Rwandan Army. In this attack the soldiers sealed the area, *gendarmes* stewarded area residents to the parish and then held the UNAMIR military observers and parish priests at gunpoint as the militiamen brutally murdered the local inhabitants. It is clear that these civilian militiamen were

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Although many of the Kigali area roadblocks were exclusively manned by civilians, the Trial Chamber considered them to be part of an extensive network in an area of strategic importance to the Rwandan army in its battle for Kigali with the RPF. The Chamber noted that these roadblocks were at times alongside military roadblocks and positions or other barriers which had a soldier or gendarme at its head.[366] Weary of its previous findings that militia groups became increasingly uncontrollable as the conflict progressed, the Trial Chamber nevertheless, at least in their initial days, concluded that these roadblocks could only have existed with the authorisation of the Rwandan military.[367] Alas the Chamber found that those manning the roadblocks from 7 to 9 April 1994 were Bagosora's subordinates, although the finding did not mean that other civilian or military leaders did not exercise control over them.[368]

The Trial Chamber viewed that even if the civilian assailants could not be categorised as subordinates of Bagosora, the cooperation, presence and active involvement of military personnel alongside their civilian counterparts rendered substantial assistance to the crimes perpetrated by the militiamen.[369] The Chamber concluded that soldiers and *gendarmes* present at the scenes of attacks or in their vicinity would have clearly encouraged these operations with full knowledge of the crimes being committed. Bagosora therefore would still remain liable for the crimes of these militiamen since subordinates under his effective control would have aided and abetted them in addition to their own direct participation in the criminal acts.[370]

Finally, in the alternative, the Trial Chamber concluded that Bagosora had reason to know that subordinates under his command would commit crimes from the following circumstances: (i) On the night of 6 April, Bagosora expressed to Dallaire during the Crisis Committee meeting that his main concern was keeping Kigali secure and calm; (ii) The next morning, Bagosora spoke with the United States Ambassador about the shootings that could be heard throughout Kigali the previous night; (iii) He witnessed

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acting as an auxiliary or complementary force to the Rwandan military at least at the time of the commission of the crimes. See *The Prosecutor v Théoneste Bagosora, et al, (supra note 233)*, 516, par.2033.

[366] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233)*, 516, par.2035.

[367] *Ibid.*

[368] *Ibid.*

[369] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233)*, 517, par.2037.

[370] *Ibid.*

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first-hand the ongoing attacks by Rwandan soldiers at Camp Kigali against the 10 Belgian peacekeepers; and (iv) He was informed on the evening of 7 April about the murder of the Prime Minister as well as other prominent or opposition figures, including Father Mahame. Finally considering that UNAMIR was receiving reports from military observers about targeted killings by military personnel it was irrational to accept that similar reports were not being provided to Bagosora.[371]

Thus, in summation the Trial Chamber was satisfied that Bagosora had knowledge of his subordinates' intentions to commit crimes or had in actual fact committed crimes.

Similarly in the case of Ntabakuze when the Trial Chamber was deliberating on whether he possessed knowledge of the fact that his subordinates were about to commit crimes or had committed crimes, the Chamber found that Ntabakuze did indeed possess this knowledge flowing form the fact that the attacks were organised military operations that required authorisation, planning and orders from the highest levels.[372]

[371] *Ibid* at 2039.

[372] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 526, par.2065

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Perpetrators of the attacks at Kabeza,[373] Nyanza hill[374] and IAMSEA[375] included members of the Para Commando Battalion, as well as its CRAP platoon. The attacks reflect military organisation and, in view of the elite nature of these units as well as their discipline, would only have occurred with the authorisation or orders of higher military authorities, in particular the commander of their battalion, Ntabakuze.[376]

The Chamber also found that the military troops committing crimes were undoubtable Ntabakuze's subordinates acting under his effective control and even in certain circumstances the military troops were acting in collaboration with civilian militia which was also deemed to be under Ntabakuze's control as it was considered to be an auxiliary and complementary force to the soldiers.[377]

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[373] The Ntabakuze Indictment alleged that, from 7 April 1994, elements of the Rwandan army, gendarmerie and Interahamwe perpetrated massacres of the civilian population. The Prosecution refered to evidence from Witnesses BL, DBN, AH and DCB that killings were committed by members of the Para Commando Battalion and the Presidential Guard in the Kabeza area. Ntabakuze allegedly personally supervised the killings in the area on 8 April around 10.00 a.m. See *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 227, par.907 The Chamber finds beyond reasonable doubt that, on 7 and 8 April, members of the Para Commando Battalion were going from house to house in the Kabeza area and killing civilians. Members of the Presidential Guard also participated on 8 April. Kabeza was predominately Tutsi and viewed as sympathetic to the RPF. See *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 231, par.926.

[374] The Indictment of Ntabakuze alleged that, on 11 April 1994, after the withdrawal of UNAMIR peacekeepers from *École Technique Officielle* ("ETO"), Rwandan soldiers, including elements of the Presidential Guard, and Interahamwe moved a group of Tutsi refugees from ETO to Nyanza and massacred them there. Bagosora was allegedly present while the soldiers and Interahamwe forced the refugees to walk the several kilometres to Nyanza. The Prosecution argues that Para Commando soldiers under the command of Ntabakuze stopped these refugees at the Sonatube junction and marched them to Nyanza hill where they were openly slaughtered in order to block the road from Bugesera and to send a message to the advancing RPA army that their continued attempts to advance in Rwandan territory will result in the death of their people. According to the Prosecution, the use of ammunition and the specific location of the killings reflects planning, military organisation and intention. See *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 331, par.1315.

[375] Ntabakuze's Indictment alleged that, starting on 7 April, elements of the Rwandan army and Interahamwe perpetrated massacres of the civilian Tutsi population in places where they had sought refuge for their safety. As part of this general allegation, the Prosecution contends that, around 15 April 1994, members of the Para Commando Battalion and Interahamwe, under the authority of Ntabakuze, killed Tutsi civilians who had sought refuge at the *L'Institut Africain et Mauricien de Statistiques et d'Economie* ("IAMSEA") in the Remera area of Kigali. See *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 355, par.1404.

[376] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 525, par.2062.

[377] *Ibid.*

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Consequently the chamber could not reconcile Ntabakuze's assertions that the troops would be deployed for these purposes especially when one factors the volatile period that followed the death of President Habyarimana.[378]

Furthermore, the chamber took into the consideration the fact that the location of the massacres at Nyanza and IAMSEA were near military positions of the Para Commando Battalion, and Kabeza is located near Camp Kanombe where the battalion was based.[379] Moreover, in the case of Nyanza hill, there was extensive radio communication between the Para Commando position at Sonatube junction, Ntabakuze and Rwandan army headquarters concerning a smaller group of refugees stopped there earlier in the day; the Trial Chamber therefore unequivocally refuted the supposition that Ntabakuze would not have been informed about the significantly larger group a few hours later.[380]

When dealing with the case of Ndindiliyimana, the Trial Chamber had to exercise caution as it had acknowledged that Ndindiliyimana was not always wielding effective control over his *gendarmes* due to *inter alia* the breakdown in the communication system as a result of RPF attacks.[381] However, the Chamber was still satisfied beyond reasonable doubt that Ndindiliyimana knew or had reason to know that gendarmes under his command had committed the crimes alleged in paragraphs 73 and 76 of the Indictment.

In reaching this conclusion the Chamber focused on the fact that the attack at Kansi Parish in Nyaruhengeri on 21 and 22 April 1994 was carried out by gendarmes who were guarding Ndindiliyimana's residence in Nyaruhengeri. The Chamber noted that Ndindiliyimana himself admitted that "he would have known" had those gendarmes participated in the attack at Kansi Parish.[382] The Chamber found that Ndindiliyimana was aware of the gathering of Tutsi refugees at Kansi Parish following his two visits on 15 April and on 22 April.[383]

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[378] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233)*, 526, par.2065.

[379] *Ibid* at par.2066.

[380] *Ibid.*

[381] *Ibid.*

[382] *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320)*, 440, par.1946.

[383] *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320)*, 441, par.1950.

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To sum up how the Trial Chamber established that the individuals discussed above were aware of the illegal acts perpetrated by the subordinates, it is apparent that focus was given to the state of Rwanda during the orchestration of the unlawful acts. The Trial Chamber considered it to be a logical deduction that in the aftermath of the death of President Habyarimana there would have been a heightened a sense of vigilance in the military authorities. The Chamber then examined the perpetrators of the attacks, – the involvement of *inter alia* the Para-Commando Battalion and the *gendarmes* – the nature and coordination of the attacks and considered them to be organised military operations that required planning and authorisation. The Chamber could thus not fathom a scenario where the superiors of the units could not have been aware of the involvement of their subordinates in the illegal attacks. Furthermore in some instances the Chamber noted how some attacks were perpetrated in close proximity to where the superiors were stationed.

Similarly, in case of Bemba the ICC Trial Chamber considered the notoriety of the crimes;[384] Bemba and senior officials in the MLC discussed media allegations of crimes committed by the MLC soldiers in the CAR, this resulted in him establishing the Mondonga inquiry to investigate the allegations.[385] Although the crimes committed were not in close proximity to where Bemba was predominantly based, the Chamber took note of the available modes of communication that were at Bemba's disposal and the frequency which he communicated with the senior MLC official in CAR.[386] Finally when the Chamber considered these factors in conjunction with his direct knowledge of allegations of murder, rape and pillaging by the MLC soldiers, it was convinced beyond a reasonable doubt that Bemba was aware of the fact that soldiers under his effective control were committing or were about to commit crimes against humanity.[387]

3.5.3 Failure to prevent the crimes or punish the perpetrators after the fact

The last ingredient that ought to be satisfied before the Trial Chamber can impute command responsibility is the need to establish that the individual in question had failed to prevent the crimes or punish the perpetrators who would have committed the crimes after the fact.

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[384] See *The Prosecutor v Jean – Pierre Bemba Gombo* (*supra* note 158), 349, par.717.

[385] See *The Prosecutor v Jean – Pierre Bemba Gombo* (*supra* note 158), 348, par.711.

[386] See *The Prosecutor v Jean – Pierre Bemba Gombo* (*supra* note 158), 349, par.717.

[387] *Ibid.*

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In establishing the fact that Bagosora did not fulfil his duty to prevent or punish the commission of the crimes, the Chamber took cognisance of the fact Bagosora himself participated in the commission of the crimes.[388] Secondly the Chamber noted the absence of any evidence demonstrating the perpetrators of these crimes where punished.[389]

Again in the case of Ntabakuze the Trial Chamber took into consideration the fact these operations were clearly organised and authorised or ordered at the highest level of the Para Commando Battalion thus Ntabakuze failed in his duty to prevent the crimes; this view was further compounded by the fact that Ntabakuze participated in the commission of the crimes.[390] Further the Trial Chamber found that there was absolutely no evidence that the perpetrators were punished afterwards.[391]

The case of Ndindiliyimana required the Trial Chamber to take into consideration the fact that Ndindiliyimana was plagued by shortage of resources and that he did not always have the support of the government – factors which potentially constituted an impediment to his abilities to punish his subordinates effectively – however in light of these potential hindrances the Chamber maintained the view that Ndindiliyimana still possessed the material ability to implement basic measures to punish the *gendarmes* under his effective control who had committed crimes at Kansi Parish and St. André College.[392] The absence of any evidence indicating that Ndindiliyimana attempted to punish the *gendarmes* under his effective control for the commission of the crimes at Kansi Parish and St. André College was indicative of his failure in dispensing his duty to punish the commissioners of these crimes thus the Chamber found that he failed in his duty to punish these crimes.[393]

In determining whether Bizimungu [394] failed to prevent crimes or punish his subordinates for the perpetration of the said crimes the Trial Chamber first had to

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[388] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 518, par.2040.

[389] *Ibid.*

[390] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 523, par.2056.

[391] *Ibid.*

[392] *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320),* 442, par.1954.

[393] *Ibid.*

[394] Augustin Bizimungu was born on 28 August 1952 in Mukarange *commune,* Byumba *préfecture,* in Rwanda; he received a diploma in modern humanities in Ruhengeri before studying at ESM between 1972 and 1974.[394] Bizimungu was Commander of operations for the Ruhengeri *secteur* and Chief of staff of the Rwandan Army after 19 April 1994.[394] After the completion of his studies, Bizimungu was

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determine the veracity of his claims that Bizimungu's material ability to prevent and punish crimes was significantly reduced by the ongoing combat with the RPF and other adverse factors related to the war.[395]

After having taken into consideration the impact of the prevailing situation on Bizimungu's exercise of effective control over Rwandan Army soldiers and *Interahamwe*, the Trial Chamber was not convinced that the ongoing war with the RPF precluded Bizimungu's material ability to prevent and/or punish the crimes underlying the charges against him to the extent that he could not reasonably be expected to

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commissioned as a Second Lieutenant; during the course of 1974 and June 1975 he was sent for further specialised instruction at two different commando training schools.[394] He became an instructor at the centre in Bigogwe; during his tenure as an instructor he was promoted to Lieutenant in 1977 and then to Captain in 1980.[394] In 1982, Bizimungu attended the Royal Defence Institute in Belgium, where in 1984 he graduated with a diploma in chief of staff studies; Bizimungu was also promoted to the rank of Major while in Belgium.[394] From 1984 till April 1994 Bizimungu slowly rose up the military ranks.[394] At the time of the Rwandan atrocities, Bizimungu had promoted to position of Major General. See *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320),* 25-26, par.88-90. The Indictment of Bizimungu alleged that he was appointed Chief of Staff of the Rwandan Army on 16 April 1994. The Indictment further alleged that during his tenure as Chief of Staff, Bizimungu exercised authority over soldiers of the Rwandan Army and members of the *Interahamwe*. In response the Defence acknowledged that Bizimungu was appointed Chief of Staff of the Rwandan Army on 16 April and took up that post on 19 April 1994. However, the Defence contended that Bizimungu's authority was considerably affected by the ongoing combat with the RPF, the lack of adequate resources and other adverse factors resulting from the war situation. The Defence further submitted that as long as hostilities with the RPF continued, there was very little that Bizimungu could do to prevent and punish crimes. See *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320),* 442, par.1956. Bizimungu faced eight counts of human rights violations, namely: conspiracy to commit genocide, genocide, complicity in genocide, murder as a crime against humanity, extermination as a crime against humanity, rape as crime against humanity, murder as a violation of Article 3 common to the Geneva Conventions and Additional Protocol II and rape as a violation of Article 3 common to the Geneva Conventions and Additional Protocol II. He was found guilty on all counts except conspiracy to commit genocide and complicity in genocide. See *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320),* 442, par.2162.

[395] During his testimony Bizimungu repeatedly claimed that the ongoing combat with the RPF, was a grave impediment to his to prevent and punish crimes. He testified that his situation was further exasperated by desertions from the Army and a lack of reserve troops, and that the availability of adequate reserves would have allowed gendarmerie units, most of which were deployed to the war front, to be relieved from combat engagements and to resume their normal duties of maintaining order. Bizimungu also claimed that his means of communication and the number of staff available to him diminished as the war progressed. He testified that this confluence of factors impaired his ability to exercise command with respect to the crimes that were being committed against civilians. He claimed, therefore, that a cessation of hostilities was necessary for him to effectively restore order; however, the RPF refused to agree to a ceasefire. See *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320),* 450, par.1993 - 1994.

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address those crimes.[396] In addressing Bizimungu's claim of lacking resources, the Chamber recalled that Bizimungu's testimony wherein he admitted that as of April 1994, the forces under his command numbered between 39,000 and 40,000 soldiers and that not all of those troops were engaged in combat operations against the RPF; for example, Bizimungu admitted that in Cyangugu he had troops that were not engaged in combat.[397]

In addition, the Chamber noted the fact that Bizimungu managed to suspend a number of senior officers of the Rwandan Army while serving as Chief of Staff and considered this action to be a testament of his material ability to prevent and punish crimes.[398] The Chamber also noted Bizimungu's evidence that on his recommendations, the Minister of Defence suspended Nkundiye, who was the Mutara operational sector commander, and Colonels Ndendinga and Munyamegama as further indications of his ability to intervene and redress the commission of crimes by his subordinates.[399]

Furthermore the Chamber took note of Bizimungu's evidence that following reports that soldiers in Bugesera had committed unlawful acts. He called for the officer in command of those soldiers to be suspended, and subsequently that officer was, in fact, replaced.[400] Again the Chamber considered this evidence as an indicia of Bizimungu's ability to prevent and/or punish the crimes that underlie the charges against him;[401] a notion that is further affirmed by the fact that representatives of the UN, the United States government and Human Rights Watch considered Bizimungu to be capable of halting the massacres in Rwanda.[402] The Chamber found it irreconcilable that these high-profile representatives would have directed their

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[396] *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320),* 451, par.1996.

[397] *Ibid.*

[398] *Ibid* at 1997

[399] *Ibid.* According to Bizimungu, he proposed the suspension of those officers in order to stabilise the command structure and ensure disciplinary control over his subordinates. He also testified that around 18 or 19 May 1994, he requested the Minister of Defence to appoint Colonel Ndindingira to become the commander of the Mugesera operational sector. However, Bizimungu later requested the suspension of Ndindingira because the latter had failed to stabilise the situation in Mugesera and had disobeyed Bizimungu's specific operational instructions.

[400] *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320),* 451, par.1998.

[401] *Ibid.*

[402] *Ibid* at 1999.

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requests for the cessation of the massacres against civilians to Bizimungu unless they thought he was capable of acting on their requests.[403]

Based on his own testimony and a few scenarios of Bizimungu's effective intervention that the Trial Chamber considered, the Chamber was strongly inclined to believe that he had the ability to prevent the large scale killings committed by soldiers and Interahamwe.[404] Therefore the Chamber attributed Bizimungu's failure to prevent or punish the crimes underlying the charges against him to a general sense of apathy for Tutsi civilian lives; Bizimungu seemed to be more zealous about his pursuit for the prosecution of the war against the RPF.[405]

A close introspection of the selective manner in which Bizimungu chose to exercise his power denotes a proclivity towards refraining from adopting strict disciplinary measures against his subordinates due to concerns that such action would counter act his effort to fight the RPF.[406] A typical example of this tendency can be depicted from his futile attempts to rationalise his failure to take any action against Major Mpiranya, a commander of the Presidential Guard, whose subordinates were accused of perpetrating the killing of a number of high-profile Rwandan politicians.[407]

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[403] *Ibid.*

[404] Bizimungu's intervention at the *Hôtel des Mille Collines*, when he gave stern orders to the commander of the Gisenyi operational sector via telegram to arrange for the evacuation of clergymen to Goma in the midst of him receiving reports that those clergymen were being held against their wishes in Gisenyi. He also dispatched instructions via telegram to the commander stationed at the Bigogwe Camp to stop plans to attack Tutsi civilians who had sought refuge at the camp. Again Bizimungu successfully intervened when he stopped Lieutenant Colonel Sebahire, who was the commander of the Rulindo operational sector, from being removed from his position on account of rumours linking him with the RPF. See *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320)*, 451-452, par.2000-2003.

[405] *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320)*, 452, par.2002.

[406] *Ibid* at 2003. The Chamber took cognisance of the fact that while Bizimungu was willing to take the necessary steps to suspend numerous senior officers as a result of operational lapses while prosecuting the war, he was reluctant to employ his authority to restrain his subordinates or sanction them for crimes committed against Tutsi civilians.

[407] Bizimungu, by his own admission, testified that despite possessing knowledge of the implication of Presidential Guard soldiers in crimes, he refrained from taking any action against Mpiranya, who was engaged in combat against the RPF at the time, because he feared that such action would have an adverse effect on the war campaign against the RPF. See *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320)*, 452, par.2004.

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In the eyes of the Chamber, Bizimungu's [illegible] to the lives of the Tutsi was best exemplified by his attempts to characterise the Tutsi killings as "sporadic, non-connected and non-continuous."[408] Despite evidence of an alarmingly high carnage of the killings, Bizimungu in his testimony, reduced allegations of the massacres by his subordinates to be nothing more but a concatenation of lies being spread by his enemies.[409] He maintained that the massacres were purely "a situation of unrest in which people perished."[410]

Consequently the Chamber, upon consideration of all the reasons above, was of the conviction that despite possessing the ability to prevent or punish crimes, Bizimungu failed to do so. The Chamber did not consider the measures which Bizimungu was claiming to have taken to be assertive enough and reasonably enough to prevent or punish the crimes given the circumstances considered above.[411] Special consideration was given to the fact that of all the measures Bizimungu purportedly took, none of them resulted in disciplinary or punitive action against the subordinates implicated in commission of crimes.[412] The Chamber considered this to be a strong indicia of the inadequacy of the measures and instead viewed the reluctance to punish as an acquiescence of the crimes committed; this would ultimately have an adverse effect on the orders and instructions that he issued to his troops regarding discipline.[413]

In conclusion, the Trial Chamber, in establishing the failure of a superior to prevent or punish the unlawful acts, took cognisance of instances in which a superior had demonstrated control through successful interventions against unlawful acts and contrasted them with instances where he failed to do so in an effort to determine the reasonableness of such failure.[414] The absence of an attempt to punish those who had

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[408] *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320),* 453, par.2006.

[409] *Ibid.*

[410] *Ibid.*

[411] The Trial Chamber conceded that international law does not offer a detailed guideline of preventative mechanisms or modes of punishment that a superior ought to implement in order to dispense of his duty to prevent or punish crimes; instead the law implores superiors to implement measures that are "necessary and reasonable" to prevent the crimes, therefore it was the Chamber's holding that what constituted "necessary and reasonable" had to be dependent on the circumstances of each case with particular focus being given to the power that the superior wielded. *The Prosecutor v Augustin Ndindiliyimana, et al (supra note 320),* 454, par.2008.

[412] *Ibid* at par.2010

[413] *Ibid.*

[414] See *supra* note 371.

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committed unlawful acts was considered to be an acquiescence of the acts by the superior thereby constituting a failure of the superior's duty to punish or prevent the crime.

In the case of Bemba, evidence depicted measures that Bemba had taken in response to the allegations of crimes committed by MLC soldiers during the course of the 2002 – 2003 CAR operation.[415] However these measures were considered to have a limited mandate for the following reasons: the case file of the Mondonga inquiry showed that that the investigators did not pursue all relevant leads;[416] the scope of the Zongo commission, which was created amidst the allegations of murder, rape and pillaging by the MLC soldiers was only limited to investigating whether looted goods from CAR were entering the Democratic Republic of Congo through Zongo.[417] Such measures were inadequately executed and evidenced a lack of sincerity thus the Chamber was of the view that the accused failed to take all necessary and reasonable measures to prevent or repress of crimes. This sentiment was further compounded by the fact that despite possessing the ability to do, Bemba did not withdraw the troops from CAR and this was a key measure at his disposal.[418]

3.6 Conclusion

This chapter demonstrated that the official position of each accused in relation to the subordinates over which his indictment alleged he had authority over would be given significant consideration when establishing if indeed the accused was a superior. The Chambers would therefore even refer to manuals and hierarchical organograms of the various ministries in order to establish whether the accused had *de jure* authority over the subordinates in question. The Chamber would then embark on an in introspection of the accused's actions during the time of the unlawful events in order to determine whether he knew of the acts and also establish if he could prevent the crimes from being committed or the very least punish them. The Chambers found in most cases that the accused individuals were the ones who issued the orders or that they were present at the commission of the crimes thus making it easy for the Chamber to

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[415] See *The Prosecutor v Jean – Pierre Bemba Gombo* (*supra* note 158), 350, par.719. Bemba, *inter alia* established the Mondonga Inquiry; and even tried Lieutenant Willy Bomengo and others at the Gbadolite court-martial he also set up the Zongo Commission.

[416] *Ibid,* par.720. There is no given explanation for the commission failing to investigate the responsibility of commanders among Colonel Moustapha's *Poudrier* Battalioan for the reports of rape.

[417] See *The Prosecutor v Jean – Pierre Bemba Gombo* (*supra* note 158), 351, par.722.

[418] See *The Prosecutor v Jean – Pierre Bemba Gombo* (*supra* note 158), 354, par.730.

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establish knowledge on their part and failure to prevent or punish the commission of the unlawful acts. This approach was evidently adopted by the ICC as an introspection of how the ICC Trial Chamber in the Bemba case established the three elements discussed above evidences no deviance in the factors it considered in order to establish their presence.

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Chapter Four

4 ICTR CASES OF INFORMAL CIVILIAN STRUCTURES AND THE LESSONS FROM THESE CASES

4.1 Introduction

The previous chapter discussed the elements that need to be proven in order to impute criminal liability to an individual operating in formal settings mainly the military wherein the doctrine was initially meant to operate in. The present chapter seeks to analyse and evaluate the considerations which the ICTR Chambers factored in when attempting to establish the elements of command responsibility in cases of individuals operating in informal settings. The chapter therefore discusses the considerations taken into account by the Chambers of the ICTR in proving the existence of the elements of command responsibility in the cases before it. The chapter concludes with an analysis of the implications of these findings.

4.2 The Application of Command Responsibility in Informal Settings

As discussed in the previous chapter, the doctrine of command responsibility was tailored as a safe guard to protect civilians against gross human rights violations perpetrated by military personnel. The following subsections discuss how the ICTR Chambers transposed this doctrine and applied it to informal civilian structures. Similar to the preceding chapter, the present chapter will elicit the considerations of the Chambers in establishing the principles that ought to be proven before an accused is imputed with liability under the doctrine.

4.2.1 The need to establish a Superior/Subordinate relationship

The Trial Chamber in establishing the authority of Alfred Musema[419] took into consideration the position he held at the tea factory. As director of the Gisovu Tea

[419] Alfred Musema-Uwimana, (hereinafter referred to as Musema), was born on 22 August 1949 in the Butare *Commune,* Byumba *Préfecture in* Rwanda. He graduated from the "*Université d'État, Faculté des Sciences Agronomiques*" in Gembloux, Belgium in 1974. Having begun his career in the Ministry of Agriculture and Livestock Breeding, Musema worked closely with the French company ORSTOM; He was later appointed the director of public enterprise at the Gisovu Tea Factory. Having assumed directorship of a young tea factory, Musema managed to boast its stature and productivity to match that of pre-existing factories.[419] His success saw him being identified to take part in missions abroad. Musema was also a member of the *conseil préfectorial* in Byumba *Préfecture* and a member of the Technical Committee in

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Factory, It was common cause that due to his level in the hierarchy of the company, the employees of the company were effectively his subordinates; there was therefore no doubt that Musema exercised *de jure* authority over his subordinates while they were both on the Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory, even if the duties in question were performed outside factory premises.[420] The Chamber noted the legal and financial control Musema exercised over these employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory.[421]

The *de facto* control which Musema possessed can be inferred from the following scenarios in which the Trial Chamber was convinced beyond reasonable doubt that Musema and employs of the Gisovu Tea Factory participated in:

i) An attack on Gitwa Hill that occurred on the 26th of April 1994 where Musema is said to have arrived at the place of attack in a Daihatsu vehicle that belonged to the tea factory and was accompanied by his employees clothed in blue uniforms.[422] Musema and other people then attacked the Tutsi refugees and it was established beyond reasonable doubt that Musema shot into the crowd of refugees; the killings were unmerciful and only a few refugees survived the onslaught.[423]

ii) The attacks on Rwirambo Hill that occurred on the 27th of April and 3rd of May 1994. Musema arrived in a red Pajero followed by four Daihatsu pick-ups from the factory; the men from the pick-ups wore a blue uniform printed "*Usine à thé de Gisovu*" on the back.[424]

iii) The large scale attack that occurred on Muyira Hill on the 13th of May 1994. It is estimated that at least 40 000 Tutsi refugees were at the hill; the attack began

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Butare *commune* however these roles did not encompass any *préfectorial* politics; they were purely dealing with socio-economic and developmental matters. The prosecution charged Musema with: genocide, conspiracy to commit genocide, complicity in genocide, crimes against humanity (murder, rape, extermination and other inhumane acts) and two counts of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Trial Chamber found him guilty of genocide, extermination as a crime against humanity and rape as a crime against humanity; he was acquitted of the other six counts. See *The Prosecutor v Alfred Musema* case No. ICTR-96-13-T, 12-13, par.10 -16.

[420] *The Prosecutor v Alfred Musema* case No. ICTR-96-13-T, 243, par.880.

[421] *Ibid.*

[422] *The Prosecutor v Alfred Musema* case No. ICTR-96-13-A, 245, par.890.

[423] *Ibid.*

[424] *The Prosecutor v Alfred Musema* case No. ICTR-96-13-A, 246, par.896.

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in the morning with some attackers arriving on foot while others came in vehicles.[425] These vehicles included Daihatsus of the Gisovu Tea Factory and the red Pajero of Alfred Musema.[426] Thousands of unarmed Tutsi civilians were killed during this savage onrush.[427]

iv) The large scale attack that occurred on Muyira Hill on the 14th of May 1994. The attackers numbering approximately 15 000 and armed with traditional weapons, firearms and grenades embarked on the senseless killing that saw many innocent Tutsis killed.[428] Employees from the Gisovu Tea factory were amongst these attackers.[429]

v) The attack on Mumataba hill in mid-May 1994. The attack was levelled against Tutsi civilians estimated to be numbering between 2000 and 3000, employees from the Gisovu Tea Factory were amongst the 120 to 150 attackers who unleashed the reign of terror on the Tutsis.[430] Vehicles of the tea were used as the mode of transportation of the attackers to the sites and the Trial Chamber found beyond reasonable doubt that Musema was present during the attack.[431]

vi) The attack on Nyakavumu cave. Musema travelled towards the cave in convoy consisting of his Pajero and Daihatsus of the Tea factory.[432] Upon arrival at the cave, Musema was armed with a rifle and watched while assailants closed off the entrance of the cave with wood and leaves which they went on to set ablaze.[433] Over 300 Tutsi civilians are believed to have died as a result of this fire.

The Trial chamber consequently premised its findings that Musema was a superior wielding effective control over his employees accused of crimes –albeit the crimes were not necessarily committed on the tea factory's premises – on the above outlined factors. Flowing from this power that Musema wielded over the employees the Trial Chamber averred that Musema was in a position to take steps such as removing or threatening to remove individuals from their position of employment should they have

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[425] *The Prosecutor v Alfred Musema* case No. ICTR-96-13-A, 248, par.901.

[426] *Ibid.*

[427] *Ibid* at par.902.

[428] *The Prosecutor v Alfred Musema* case No. ICTR-96-13-A, 250, par.910.

[429] *Ibid* at par.911.

[430] *The Prosecutor v Alfred Musema* case No. ICTR-96-13-A, 251, par.916.

[431] *Ibid.*

[432] *The Prosecutor v Alfred Musema* case No. ICTR-96-13-A, 252, par.921.

[433] *Ibid.*

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been identified as perpetrators of the crimes falling under the jurisdiction of the ICTR Statute.[434]

Furthermore, the Trial Chamber deemed that Musema possessed the ability to take reasonable measures to attempt to forbid or at the very least sanction the use of factory vehicles, uniforms and other factory property in the commission of such crimes.[435] Thus it was the Trial Chamber's view that Musema wielded both *de jure* and *de facto* control over the employees and resources of Gisovu Tea Factory.

In the case of Jean Bosco Barayagwiza,[436] the Chamber had to determine whether he wielded effective control over the *Radio Télévision Libre des Mille Collines*, S.A (RTLM)[437] and establish whether he was a superior in the *Coalition pour la défense*

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[434] *Ibid.*

[435] *Ibid.*

[436] Jean-Bosco Barayagwiza was born in 1950 in Mutura commune, Gisenyi préfecture, Rwanda; he trained as a lawyer and co-founded the CDR party which was formed in 1992. He was also a member of the comité d'initiati, which organized the founding of the *Radio Télévision Libre des Mille Collines*, S.A (RTLM). He concurrently held the position of director of Political Affairs in the Ministry of Foreign Affairs. Barayagwiza was charged with conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, complicity in genocide, persecution as a crime against humanity, extermination as a crime against humanity and murder as a crime against humanity, and two counts of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Articles 2, 3 and 4 of the Statute. He was additionally charged with superior responsibility under Article 6(3) of the Statute in respect of all the counts, except that of conspiracy to commit genocide. He stood charged mainly in relation to the radio station called RTLM and the CDR Party. Barayagwiza was found guilty of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, extermination as a crime against humanity and persecution as a crime against humanity. He was acquitted of complicity in genocide, murder as a crime against humanity, the two counts of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. See *The Prosecutor v Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze* case no. ICTR-99-52-T, 2 and 356, par.6,9 and 1093.

[437] The RTLM was a radio station that commenced its broadcasts in July 1993 and from its inception it captivated the minds of its audience and enjoyed an unrivalled popularity. Prosecution witness François Xavier Nsanzuwera stated that RTLM enjoyed a wide audience as little radio stations would not be found at most public places namely: offices, cafes, bars and even taxis. The gravity of RTLM and its role during the massacres is clear when he testifies to how weapons and radios were the two main objects you would find at roadblocks. He described how he found all the four roadblocks he crossed on the 10th of April were tuned on to RTLM. The fact that "Radio Machete" was the name that RTLM was popularly known as is a testament of how the station arouse ill sentiments and sowed seeds of hatred for the Tutsi population and how in the minds of people a causal link between its broadcasts and Tutsi killings was evident. The station's broadcasts magnified fear and a sense of danger, it ultimately incited the need for

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de la République party (CDR party).[438] In addition to his role in the RTLM the Trial Chamber was convinced that Barayagwiza was a superior who wielded significant and effective control over the management of RTLM.[439] This finding was premised on the fact he was a founding member of the steering committee which ultimately served as the board of directors for the station.[440] Barayagwiza also chaired the legal committee and would represent the station at high level meetings with the Ministry of Information.[441]

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people to take action; both before and after the 6th of April 1994 the station would broadcast names of Tutsi individuals and their families as well as the Hutu political opponents who were sympathetic to the Tutsi group, this in some cases resulted in them being subsequently killed. The Chamber found, to varying degrees, that these deaths were causally linked to their names being broadcast on the station. See The Prosecutor v Ferdinand Nahimana et al (supra note 30), 318,342-3 par.949, 1031-4.

[438] Founded on the principle of "the need to preserve the gains of the 1959 Social Revolution," the CDR was created in February 1992 and registered as a political party in March 1992. This party, under the helm of its co-founder Barayagwiza, was used as a tool that wreaked havoc on Tutsi minority and Hutu moderates said to be sympathisers of the *inyenzi-inkotanyi*. Despite proclaiming "Unity and solidarity" as one of its founding principles the Trial Chamber found that the CDR equated political interest with ethnic identity, it consequently likened the RPF with the Tutsi thus effectively branding the Tutsi population as an enemy to democracy. With regards to the CDR practices, several witnesses testified to the fact that it was an extremist party whose sole purpose was to unite the Hutu populace in the fight against the Tutsi minority by sowing seeds of division and distrust amongst the two ethnic groups. Despite proclaiming that party membership was open to all Rwandan citizens, it became evident that belonging to the Hutu tribe was a prerequisite for membership; witness EB described how he had to tip toe out of a rally covering his nose after the *bourgmestre* of Rubavu commune asked members present to look at the nose of their neighbours. - At the time it, was a well-established practice that if one wanted to ascertain whether an individual was truly a Hutu then all they had to do was to look at the nose and see if one nostril was big enough to accommodate two fingers at once. This was constantly emphasized the leadership of the CDR at rallies and also to people who inquired about eligibility requirements for being a member of the party - CDR rallies were used as a platform to spread the party's extremist propaganda and fuel fear and hatred of the Tutsi minority. Witness AFB, a Hutu businessman, testified that Barayagwiza publicly declared that the CDR was a party for the Hutu at a rally in 1993 at Umuganda stadium. This was affirmed by Witness AHB who testified that the CDR youth were chanting and singing "we shall exterminate them!" echoing the phrase that Barayagwiza had used. See The Prosecutor v Ferdinand Nahimana et al (supra note 30), 100-101 par.301-304.

[439] *The Prosecutor v Ferdinand Nahimana et al*, (*supra* note 30) 193, par.568.

[440] *Ibid* at par. 567.

[441] The first formal concern over RTLM broadcasts was expressed through a letter from the Minister of information dated 25 October 1993. This letter was addressed to RTLM and resulted in a meeting on the on the 26th of November 1993, chaired by the Minister and Barayagwiza and Nahimana were amongst the people in attendance. The two were also present in the meeting held on the 10th of February 1994 where in the Minister continued to express his concerns over the continued broadcasts of RTLM. See The Prosecutor v Ferdinand Nahimana et al (supra note 30), 210, par.617-619.

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Although acknowledging that Barayagwiza did not make the decisions regarding the content of each broadcast, the Chamber deemed that the broadcasts were reflective of an editorial policy for which he was responsible along with Nahimana.[442] The Trial Chamber viewed Barayagwiza to be in possession of *de jure* authority even after 6 April 1994.[443]

With regards to his authority in the CDR, the Trial Chamber noted that despite not initially bearing an office in the CDR party, Barayagwiza was one of the co-founders of the party and possessed great influence in decisions regarding the birth and development of the party.[444] He, to a certain extent, worked behind in the shadows of the CDR President Martin Bucyana, aiding him as an adviser.[445] Cognisant of the fact that a political party and its leaders could not be held accountable for all acts of its members, the Trial Chamber nevertheless deemed that leaders should be held accountable for actions of members acting in obedience of the dictates issued by the party leadership.[446] Consequently Barayagwiza was found to possess superior responsibility over members of the CDR and its militia, the *Impuzamugambi*, as President of the CDR at Gisenyi Prefecture at from February 1994 as President of CDR at national level.[447]

Finally in the case of the Ferdinand Nahimana the Trial Chamber had to establish his superior role in RTLM and determine the extent of control he had in the station. This did not prove to be a vexatious issue as the Chamber relied on the fact that Ferdinand Nahimana was the founder and principle ideologist of RTLM as the conceptualisation of the station arouse solely from his vision.[448] Nahimana along with Barayagwiza effectively acted as the board of directors that controlled the management of RTLM from the time of its creation through to the 6th April 1994.[449] The Chamber noted that the two represented the station externally in an official capacity and were in control of the financial operations, and were also yielding supervisory powers for all activities of

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[442] See The Prosecutor v Ferdinand Nahimana et al (supra note 30), 322, par.970.

[443] See The Prosecutor v Ferdinand Nahimana et al (supra note 30), 193, par.568.

[444] See The Prosecutor v Ferdinand Nahimana et al (supra note 30), 91, par.276.

[445] *Ibid.*

[446] See The Prosecutor v Ferdinand Nahimana et al (supra note 30), 324 par.976.

[447] *Ibid* at par.977.

[448] See The Prosecutor v Ferdinand Nahimana et al (supra note 30), 323, par.974.

[449] See The Prosecutor v Ferdinand Nahimana et al (supra note 30), 193, par.567.

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the RTLM; these powers enabled them to take remedial action when they deemed it necessary to so.[450]

Despite still yielding *de jure* authority after the 6th of April 1994, the duo expressed no concern over the heightened trajectory of the RTLM broadcasts that were clearly a cause for concern nor did they intervene and attempt to stop the broadcasts that were found to have a causing link with some Tutsi killings that occurred after the individuals were named during broadcasts.[451] It was established that Nahimana still possessed *de facto* control over the station and this notion was inferred from his successful intervention of stopping the broadcasts that were attacking General Dallaire and UNAMIR.

Like in the cases relating to formal command the Trial Chambers took cognisance of the individual's positions in their various organisations as a means of establishing some form of *de jure* authority. The Chambers then examined the conduct of the accused persons in order to determine whether their actions displayed control over their subordinates. The Chambers like in the cases relating to formal command seemed to establish effective control in instances where both *de jure* and *de facto* control could be established.

4.2.2 Knowledge/requisite *mens rea*

The second ingredient which the Trial chamber had to dispense of before imputing liability to individuals was the knowledge requirement; the chamber had to establish whether the individual being charged under the command responsibility doctrine actually possessed knowledge of the unlawful acts of his subordinates.

In the case of Barayagwiza, the Chamber took cognisance of Barayagwiza's defence of the broadcasts despite the growing concerns of their trajectory towards a vehement call for Tutsi hatred and violence against the population.[452] In a meeting convened on the 26th of November 1993 by the Minister of Information, Barayagwiza and Nahimana were officially put on notice of the increasing concern that RTLM, through its broadcasts was violating Article 5 paragraph 2 of its agreement with the government

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[450] *Ibid.*

[451] See The Prosecutor v Ferdinand Nahimana et al (supra note 30), 193, par.568.

[452] See The Prosecutor v Ferdinand Nahimana et al (supra note 30), 322, par.971.

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in that it was promoting ethnic division and encouraging opposition to the Arusha Accords.[453]

Again in a meeting convoked by Minister on the 10th of February 1994, concern over the broadcasts of RTLM was expressed by the Minister and Barayagwiza was presenting at this meeting.[454] Though their active involvement in the station's affairs decreased after April 1994, Barayagwiza was still apprised of the station's broadcast and affairs and yet did not intervene despite possessing the ability as was later evidenced by his successful intervention in seizing the attacks RTLM was levelling on UNAMIR and General Dallaire.[455]

As discussed earlier, the Trial Chamber gave credence to the fact that the organisation of a political party differs considerably from that of a company or military setting as the subordinates do not have a definitive formal structure that implores them to adhere to the leadership structures and are susceptible to incur any notable reprobation for non-compliance with orders or for their contravention of laws. Faced with this dilemma the Chamber conceded that imputing liability to the leaders for all the acts of the party members would be unreasonable however the extent to which the members acted in concordance with prescriptions of the party, liability should befall those who would have issued such orders. Consequently the Chamber had to determine whether Barayagwiza was aware of the acts of the CDR.

The Chamber in its attempts to establish Barayagwiza's knowledge, took note of the fact that he was present at meetings, demonstrations and roadblocks where *inter alia* CDR members were summoned into action by party leaders who included Barayagwiza.[456] In such circumstances the Chamber deemed Barayagwiza to be responsible for the activities of the CDR to the extent that these activities were initiated or taken at the behest of Barayagwiza.[457] It is thus a logical deduction that Barayagwiza was aware of the acts of the CDR member as the liability he was to incur was pursuant the activities carried out in accordance to his dictates.

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[453] See The Prosecutor v Ferdinand Nahimana et al (supra note 30), 210, par.617.

[454] *Ibid* at par.618.

[455] See *The Prosecutor v Ferdinand Nahimana et al* (*supra* note 30), 323, par.972.

[456] See *The Prosecutor v Ferdinand Nahimana et al* (*supra* note 30), 324, par.976.

[457] *Ibid.*

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The Trial Chamber had to deliberate on whether Nahimana had sufficient knowledge of the RTLM's alarming broadcasts in order for him to incur liability as a superior under the command responsibility doctrine. Like in the case of Barayagwiza, the Chamber considered Nahimana's defence of the RTLM broadcasts in the midst of growing concerns that these broadcasts were spiralling towards a fierce call for Tutsi hatred and violence against the population.[458] Emphasis was placed on a meeting convened on the 26th of November 1993 by the Minister of Information, wherein Barayagwiza and Nahimana were officially put on notice for the increasing concern that RTLM, through its broadcasts was violating Article 5 paragraph 2 of its Agreement with the government in that it was promoting ethnic division and encouraging opposition to the Arusha Accords.[459]

The above discussion denotes that the wide spread occurrence of an unlawful act will constitute a strong factor in determining that the superior had the requisite knowledge for liability to occur under the doctrine. It was common cause that roadblocks were mounted all over Rwanda and that Barayagwiza was at some instances present at these roadblocks therefore he knew of the crimes being committed. Secondly the knowledge element of a superior can be inferred from his actions. Barayagwiza and Nahimana engaged in defending RTLM broadcast in the wake of concerns over the nature of its broadcasts thus demonstrating their knowledge over the alarming broadcasts of the station.

4.2.3 Failure to prevent the crimes or punish the perpetrators after the fact.

In the case of Musema the Trial Chamber considered the obvious, that Musema was personally present at the places where the attacks occurred yet he failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates. Instead he abetted in the commission of those acts, by his presence and personal participation.[460]

In the case of Barayagwiza the Trial Chamber noted how the accused despite being aware of the untoward broadcasts of the station, failed to address them and left the RTLM programming to follow a "trajectory, steadily increasing in vehemence and

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[458] See *The Prosecutor v Ferdinand Nahimana et al* (supra note 30), 322, par.971.

[459] See *The Prosecutor v Ferdinand Nahimana et al* (supra note 30), 210, par.617.

[460] *The Prosecutor v Alfred Musema* case No. ICTR-96-13-A, 246 , par.894

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reaching a pitched frenzy after 6 April".[461] It is this failure to take reasonable steps to prevent the killing of Tutsi civilians instigated by RTLM broadcasts that lead the Chamber to find Barayagwiza guilty of genocide pursuant to Article 6(3) of its Statute.[462]

Again Barayagwiza did not take any action to reprobate the unlawful acts of the CDR members and its militia wing. The Trial Chamber found that the CDR had a youth wing, called the *Impuzamugambi,* which effectively became the CDR militia.[463] The CDR members and *Impuzamugambi* were supervised by Barayagwiza and acted under his control in carrying out acts of killing and other acts of violence.[464] Barayagwiza supervised roadblocks manned by the Impuzamugambi, established to stop and kill Tutsi.[465] It must be noted that he did not prevent the commission of the crimes but instead abetted the perpetrators.[466] An indication of Barayagwiza abetting the commission of crimes is evidenced by him being present at and participating in demonstrations where CDR demonstrators who were armed with cudgels chanted "Tubatsembatsembe" or "lets' exterminate them", and the reference to "them" was understood to mean the Tutsi. Barayagwiza himself said "tubatsembatsembe" or "let's exterminate them" at CDR meetings.[467]

In reconciling the considerations of the ICTR Chambers with regards to the individuals discussed, it is evident that the main question that was asked was whether there was evidence of the individuals taking positive steps to deter or reprobate the crimes committed by the subordinates. The absence of orders issued to prevent the crimes was thus considered to be a failure of the superiors' duty to prevent the commission of the crimes. This was similar to the approach of the Chambers when dealing with cases of formal command.

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[461] See *The Prosecutor v Ferdinand Nahimana et al* (*supra* note 30), 323, par.973.

[462] *Ibid.*

[463] See The Prosecutor v Ferdinand Nahimana et al (supra note 30), 116, par.341.

[464] *Ibid.*

[465] See The Prosecutor v Ferdinand Nahimana et al (supra note 30), 245, par.719.

[466] *Ibid*

[467] *Ibid.*

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4.3 Implications of the Application of Command Responsibility in Informal Civilian Settings

It is clear that the application of this doctrine in civilian settings requires ingenuity and a generous interpretation of the principles as it was not a doctrine initially meant to operate in such spheres. These traits were portrayed in the case of Barayagwiza, in particular when the Trial Chamber was faced with demonstrating effective control in a superior-subordinate relationship that is not centred on allegiance through a professional hierarchy. The Chamber considered whether the subordinates in question would be acting in accordance to the dictates of the superior. In other words the Chamber considered the influence the superior possessed over the subordinates and considered whether the acts could be linked to the instructions of the superior.

The Chamber was of the view that in cases where it could be established that the crimes were committed at the behest of this influential figure he would be liable to the extent that his subordinates were complying with his instructions. Consequently figures yielding substantial influence would have the duty to prevent the commission of human rights violations. There would be an obligation on them to refrain from using this influence to incite the commission of crimes as they would be similarly held accountable for the acts committed by the subjects under their influence.

However the Trial Chamber's approach of holding a political party leader accountable insofar as his members are acting in obedience to the dictates of orders he has issued was found to be flawed by the Appeal Chamber on basis that the Trial Chamber had erroneously found that effective control between the accused and the perpetrators existed.[468] The Appeals Chamber was not satisfied that the evidence cited by the Trial Chamber was sufficient to establish the effective control of Barayagwiza over the CDR militants and the *Impuzamugambi* in all circumstances.[469] The Appeals Chamber considered such findings to have ultimately been premised on the significant influence which the individual possessed of the members of his party and not necessarily the control; it has been established that members of a political party are not bound by a formal hierarchical structure of a company or the military thus controlling such individuals is nearly impossible.[470]

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[468] *The Prosecutor v Ferdinand Nahimana et al,* AC Judgment Summary, Case No. ICTR-99-52-A, 281, par.882.

[469] *Ibid.*

[470] *Ibid.*

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As a result of the decision by the Appeals Chamber, successful convictions will remain difficult to obtain in informal settings when one factors in the Appeal Chambers decision mere influence alone does not satisfy the threshold for effective control.

Consequently successful convictions will likely be secured when it comes to government officials who are not forming part of the military or in cases of informal civilian relationships where *de jure* command can be established through a formal hierarchy such as that of a company or enterprise that would necessitate obedience through professional affiliation to the organisation as was found in the case of Musema. The effect of such will be that influential figures who undoubtedly yield great influence over their members can like in the case of Barayagwiza escape liability under the doctrine when they essentially are viewed as superiors by those affiliated to their party.

It is therefore submitted that the effects of the decision of the Appeals Chamber counteract the strides made in imploring civilian superiors to be vigilant guardians of if international humanitarian law by holding them accountable for the acts of their subordinates in cases where they issue dictates contrary to the law.

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5 Conclusion and Recommendations

5.1 Introduction

Cognisant of the contribution of the ICTY Chambers in confirming the applicability of command responsibility in civilian relationships, this study set out to investigate the principles that govern the existence of informal command responsibility for international crimes. To achieve this aim the dissertation raises the following questions: firstly, where does where does command responsibility emanate from and whether it has evolved over the years. Secondly how did the ICTR establish the elements of command responsibility in cases of formal command and lastly how the ICTR established elements of the doctrine in cases of informal command. The findings of this investigation are discussed in the subsequent headings below.

5.2 The Evolution of Command Responsibility

Semblances of the doctrine of command responsibility can be traced back to the fifteenth century with its application being strictly limited to military relationships.[471] The doctrine was mainly applied at national level. However the atrocities preluding the establishment of the various international tribunals has evidenced that even civilian superiors wield authority that is significant and may in certain circumstances be held liable under the doctrine for the actions of their subordinate.[472] The expansion of its application to civilian leaders was previously subject to much disputes as scholars argued that securing convictions would be nearly impossible as the elements where not appropriate for civilian structures.[473] However the confirmation of the application of the doctrine in civilian settings by the ICTR and the promulgation of Article 28 (b) of the Rome Statute of the ICC seems to have laid this contention to rest as the notion of holding civilians accountable under the doctrine is now firmly imbedded in international criminal law.

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[471] See Parks (*supra* note 90).

[472] See generally *The Prosecutor v Ferdinand Nahimana et al* (*supra* note 30); *Prosecutor v Zejnil Delalić et al* (*supra* note 35) and *The Prosecutor v Alfred Musema* (*supra* note 393)

[473] See generally Ronen (*supra* note 51)

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5.3 Command Responsibility in Formal Civilian Structures

The ICTR statute was the second international tribunal to incorporate the doctrine of command responsibility. Consequently it did not have much jurisprudence to refer to except for the cases that had been completed by the ICTY. The jurisprudence of the ICTR shows that when dealing with the need to prove the existence of a superior subordinate relationship the Chambers sought to establish whether the accused had effective control over the subordinates in question.[474] The Chambers achieved this by determining the existence of either *de facto* and *de jure* authority the accused had over his subjects.[475]

Due to the majority of the individuals' averments that they did not possess the material ability to control their subordinates after the chaos in Rwanda, the Chambers consequently had to establish the existence of *de facto* control over and above the existence of *de jure* authority. In dispensing of these obligations the Chambers firstly considered the position the accused had in relation to the subjects that allegedly committed the crimes. This would allow the Chambers to determine whether he had *de jure* over the subjects in question. After establishing the *de jure* authority the Chamber would have to review the conduct of the accused to determine if he exercised control of the subjects.[476]

In determining the whether an individual knew of the commission of the unlawful acts, recognition was given to the following: the number of illegal acts; the type of illegal acts; the scope of illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved; the geographical location of the acts; the widespread occurrence of the acts; the tactical tempo of the operations; the *modus operandi* of similar illegal acts; the officers and staff involved and the location of the commander.

Finally in establishing that an accused failed to exercise his duty to prevent the commission of the unlawful acts or punish the commission after the fact, the Chambers

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[474] See *The Prosecutor v Tharcisse Renzaho* (supra note 307).

[475] *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 524, par.2061.

[476] See generally The Prosecutor v Tharcisse Renzaho (supra note 307), 195 – 196.

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inferred this from the absence of any [illegible] that the accused took reasonable measures to do so.[477]

5.4 Command Responsibility in Informal Civilian Structures

The jurisprudence of the ICTR confirms that in certain cases the doctrine has been extended to less formally recognised relationships wherein the principles of determining the prerequisite elements for the doctrine's application are not so easily ascertained nor were they fathomed in the doctrine's early application. The application of command responsibility to civilians who *inter alia* own businesses or control the flow information through the media is a testament of the fluid state of law which constantly has to adapt and be interpreted generously in order to fill emerging *lacunas* and curb the contravention of the violations of international humanitarian law.

It is clear from the jurisprudence of the individuals examined in the preceding chapter that regardless of the informality of the relationships in question the principles used to determine whether or not command should be imposed are similar. In establishing a subordinate relationship; the precise contours that would establish this relationship proved vexatious to the Trial Chamber when dealing with political leaders. While acknowledging that these figures hold a notable social hierarchy in society the Chamber also conceded that the power they yield is unlike that of a government, military or corporate structure in that members lack a strong bound that compels them to subordinate themselves to the dictates of the decision making body. However it was the Trial chamber's assertion that accountability should be imputed to the leaders in instances wherein members act in accordance with the dictates of the party.[478] The Chamber took cognizance of the fact that the atrocities committed by the CDR members was done at the behest of the CDR leadership which as has been earlier established, Barayagwiza formed an integral part of. They also noted Barayagwiza's presence at CDR meetings, demonstrations and roadblocks

It is abundantly evident from the contradictory findings of the Appellate and Trial Chambers that the precise application of the doctrine to civilians is a thorny issue as the latitude of its parameters must be applied with caution so as to safe guard against its loose application. However it must be argued that in the twenty-first century dominated by a pro-social media world, the very concerns of the far reaching arm of

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[477] See *The Prosecutor v Théoneste Bagosora, et al, (supra note 233),* 518, par.2040.

[478] See *The Prosecutor v Ferdinand Nahimana et al* (*supra* note 30), 324, par.976.

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the media and its influence has just grown more so than it was in 1994. It must be asked whether the stern approach and interpretation of the Trial Chamber isn't indeed warranted and called for in order to ensure the message of intolerance to hate speech and gross human rights violations is unequivocally expressed across to all people welding substantial influence over their followers.

5.5 Recommendations

It is recommended that future international tribunals exercise flexibility and generosity in establishing the first ingredient of a superior-subordinate relationship. It must be noted that in the civil society relationships are largely governed by obedience by virtue of the influence an individual holds. An example being that of esteemed figures like pastors and political figures as in the case of Barayagwiza; not holding such individuals liable as superiors for human rights violations committed in accordance to their dictates defeats the purpose of the doctrine which meant to ensure that superiors do not negate their duty to control subjects that are under their authority. It is therefore recommended that extraordinary circumstances like that of the Rwandan Genocide substantial influence should be deemed to be a threshold for the establishment of a superior-subordinate relationship.

It is submitted that in the case of Barayagwiza a political party has hierarchical structures and wherein unlawful acts are committed by the members of his party as a leader Barayagwiza had the prerogative to denounce these members and expel them from the party in situations wherein the perpetrators could be identified. As a leader of a party that purportedly did not advocate for ethnic hatred and violence against the Tutsi, Barayagwiza had the duty to ensure that his members were not engaging in these acts of terror

It is further submitted that inasmuch as Musema was deemed to have negated his duty to prevent or punish the crimes committed by the employees of the Gisovu tea factory by virtue of him allowing the use of the company vehicles during the commission of the crimes which in the eyes of the Trial Chamber amounted to abetting in the commission of the crime, Barayagwiza also negated this duty to punish or prevent the crimes of the CDR members by virtue of him calling for the extermination of the Tutsis at public rallies.

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Finally it is recommended that future international tribunals must factor in the fact that the law constantly needs to develop and adopt to the changing society and the inventiveness of actors who embark on commission of crimes consequently it is recommended that the tribunals must think outside the box and at times "reinvent" the wheel as was done by the ICTY Trial Chamber in the Akayesu case when the Trial chamber broadened the definition of rape to include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.[479] It is submitted that such an inventive approach will assist in deterring individuals from abusing their influence and issuing dictates contrary to international humanitarian law.

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[479] At the time there was no commonly accepted definition of the term "rape" in international law, rape was, in certain national jurisdictions defined as non-consensual sexual intercourse. Consequently the Chamber defined rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. This definition was able to accommodate and classify the acts of the *Interahamwe of* forcing a piece of wood into the woman's sexual organs while she was still breathing as rape (witnessed by Witness KK). See *The Prosecutor v Jean-Paul Akayesu* Case No. ICTR-96-4-T, 111 and 149, par.429 and 598.

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