The command responsibility doctrine in international criminal law and its applicability to civilian superiors
Nybondas, M.L.

Citation for published version (APA):
Nybondas-Maarschalkerweerd, M. L. (2009). The command responsibility doctrine in international criminal law and its applicability to civilian superiors

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
CHAPTER 4 APPLYING COMMAND RESPONSIBILITY TO CIVILIAN SUPERIORS

4.1 Introduction

The previous chapter analysed command responsibility as a military concept and found that the international criminal law concept is interwoven with the general command responsibility that serves as a tool for the armed forces to ensure a more efficient conduct of war. The purpose of this chapter is to explore the interpretation and applicability of the command responsibility doctrine specifically in relation to civilian superiors.

When considering the normative basis for the application of command responsibility to civilian superiors, there are two different paths that should be explored. First, there is the practical application of the doctrine to civilian superiors. Secondly, there is the codification of the applicability of command responsibility to civilian superiors in Article 28 ICC. This needs some further explanation.

In the Čelebići Judgement, which was the first judgement rendered by the ICTY that addressed command responsibility, the Trial Chamber considered the applicability of the command responsibility doctrine to civilian superiors. The Trial Chamber noted that the text of Article 7(3) does not limit the scope of the article to cover only military commanders, which means, first, that civilian superiors are also covered by the provision and, secondly, that there are no separate requirements or limitations when applying the provision to civilian superiors. The Trial Chamber sought for confirmation of the Čelebići, TC Judgement, paras. 355-363.

269 Čelebići, TC Judgement, paras. 355-363.
270 Ibid., para. 356. The provision on command responsibility in the Statutes of the ICTY and ICTR, and the provision in the Statute of the Special Court for Sierra Leone, make no specific mention of civilians. They mention the responsibility of the superior, not the commander, which indicates a neutral approach as to whether the superior may be a civilian or a military superior. The Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992) also avoids the use of the term civilian superior. Discussing the applicability of the command responsibility principle, the report notes that “[t]he doctrine of command responsibility is directed primarily at military commanders,” and that “[m]ost legal cases in which the doctrine of command responsibility has been considered have involved military or paramilitary accused.” According to the report, also “[p]olitical leaders and public officials have been held liable under this doctrine in certain circumstance.” The civilian superior is not mentioned.

In the commentary to the Draft Code of Crimes Against the Peace and Security of Mankind the International Law Commission in its 1996 report considered the word superior as included in the article on command responsibility and stated the following: “The reference to ‘superiors’ is sufficiently broad to cover military commanders or other civilian authorities who are in a similar position of command and exercise a similar degree of control with respect to their subordinates.”

271 The view that it is not the distinction between civilians and military commanders that should be the determining factor in relation to command responsibility is supported by scholars. See, for example, R. Cryer, ‘The Boundaries of Liability in International Criminal Law, or “Selectivity by Stealth”’, 6 Journal of Conflict
applicability of the doctrine to civilian superiors as accepted customary law in Second World War jurisprudence, making reference to the Tokyo judgement – the cases against Hirota and Shigemitsu, and to other cases like the US v. Flick and others, and the Roechling case. All these cases concerned civilian superiors who were held accountable for crimes that were committed during the Second World War. Having established that such an application of the provision was indeed supported by customary law, the ICTY has since the Čelebići Judgement accepted that Article 7(3) applies equally to military commanders and civilian superiors. The initial hesitation of the ICTR to apply superior responsibility to civilian superiors that appeared in Akayesu, according to some resulted in a ‘split of authority’ between the ICTR and the ICTY, but changed into frequent reference to the doctrine in later cases, also by the Rwanda Tribunal.

Thus, on the one hand, the existing case law is based on a provision that covers all superiors and on the basis of which there is no need to make a distinction regarding the civilian or military status of the superior. On the other hand, there is Article 28 ICC, which has so far not

---

272 See, for example, Čelebići, TC Judgement, paras. 357-363.
273 It should be noted here that the IMTFE tried several civilian superiors for omissions in relation to international crimes. Hirota (Foreign Minister), Koiso (Prime Minister) and Shigemitsu (Foreign Minister), high level civilian superiors, were convicted for disregarding their legal duty to prevent crimes. Despite these convictions, which could be said to prove the applicability of the command responsibility doctrine to civilian superiors, the Tokyo Judgement confirms the difficulties to apply the doctrine to civilians. Hirota and Shigemitsu, in their position as Foreign Minister, were not in a superior-subordinate relationship with the perpetrators of the crimes, as presently required by the command responsibility doctrine. Koiso, as the Prime Minister, could perhaps more easily have taken measures to put a halt to the atrocities than those accused who held the position of Foreign Minister. However, the case against Koiso is also an example of why the command responsibility doctrine is not well suited for cases against civilian superiors. Koiso was convicted for disregarding his duty to prevent crimes, but by the time he became the Prime Minister the commission of war crimes by the Japanese troops had become notorious. He played a leading role in the Japanese plans for expansion in the 1930s, which led to a conviction for the waging of a war of aggression. By accepting the position of Prime Minister while aware of atrocities being committed and by staying in office for six months without taking action, he played a different role in the events than the superior who under the command responsibility doctrine omitted to prevent or repress crimes. His failure amounted to a deliberate disregard of his duty, which today might be considered as approving of the crimes committed, amounting to aiding and abetting the crime. The fact that the Tokyo Tribunal convicted many of the civilian superiors for the waging a war of aggression and for ordering, authorizing or permitting crimes (Tojo, Head of the War Ministry), but only in a few contentious cases for disregarding their duty to prevent breaches of the laws of war, arguably supports the thesis that the liability of the civilian superior for atrocities within an armed conflict is not very often to be labelled as command responsibility. See the Verdict in the Tokyo Judgement, in N. Boister and R. Cryer, eds., Documents on the Tokyo International Military Tribunal – Charter, Indictment and Judgments (Oxford, Oxford University Press 2008) pp. 598-628.
274 Akayesu, TC Judgement.
served as the basis for any judgement. This article provides explicitly for the application of command responsibility to civilians. In contrast with the ICTY, the ICC does not have to consider whether the doctrine applies to civilian superiors; just as the Statute, its primary source is drafted to include this possibility. In this respect, the ICC will be able to build on the existing case law, be that from the ad hoc tribunals or from the Special Court for Sierra Leone. A complicating factor is the provision - Article 28 - itself. Where the ad hoc tribunals did not have to pronounce on the civilian or military status of the superior, the ICC will have to first establish this status of the superior, before turning to the evidence on the elements. In addition to the status definition, Article 28 contains two separate knowledge requirements that depend on the civilian or military status of the superior.\textsuperscript{276} With regard to these two aspects, the ICC will not be able to build on the experience of the ad hoc tribunals, but will have to develop a new way of applying the command responsibility doctrine and to decide on the importance of the different standards.

Taking this as a starting point, the present chapter first discusses the ‘civilian superior’, or in other words, the superior who does not fit the description of the military commander in Article 28(a) ICC. Secondly, the application of the doctrine to superiors who are not military commanders in the case law of the ad hoc tribunal will be analysed. Several cases have come before the ad hoc tribunals, in which the defendant or defendants were civilians, charged under the command responsibility provision. Some accused have been acquitted under the command responsibility charges and a few have been held criminally liable, either in combination with responsibility for their personal participation in crimes or solely on the basis of command responsibility. The aim is to discover the basis for the convictions or for the even more frequent acquittals. Finally, the chapter aims at drawing some conclusions regarding the present basis for the application of the command responsibility doctrine to civilian superiors.

The whole chapter is considered in the light of Article 28 ICC, both because that provision is a widely accepted standard when prosecuting international crimes and because it offers a clearly set division between a military commander, a de facto military commander and purely civilian commanders. This is not to say that Article 28 ICC offers the only possible way forward, nor that that article may not be subjected to changes in the future.

\textsuperscript{276} On mens rea, see Chapter 2.4.2.2 supra.
4.2 The civilian superior

4.2.1 Identifying the civilian superior

In the previous chapter the issue of command was explored and the commander identified. It was argued that command responsibility in the military context has a particular meaning and position, which explains why command responsibility is particularly suitable for the prosecution of military commanders. How can the civilian superior be identified?

A basic assumption could be that the opposite of the military superior is the civilian superior, that those who do not exercise command within an armed group organised in a hierarchical manner are civilian superiors. This starting point is problematic, though, as the grey area between the commander and the civilian superior is too big for such a black and white division. On the basis of case law that has been produced since the Second World War, it is clear that there are military superiors who do not fit the description of a commander and that there are civilian superiors who, in fact, operate as if they were military commanders. The ad hoc tribunals have to a certain extent avoided the difficulty of establishing which kind of superior is at stake by simply requiring that the superior needs to exercise effective control over his subordinates, whoever the superior is and whoever the subordinates are. In some cases, however, they have paid attention to the civilian/military status of the superior when considering the evidence of a superior-subordinate relationship between the accused and the actual perpetrators.277

At the same time, the fact that the various tribunals do not distinguish between civilian and military superiors means that the case law is not particularly enlightening with regard to the identification of the civilian superior. As both civilian and military superiors may incur command responsibility, the establishing of de facto control has not required the ad hoc tribunals to make findings concerning the civilian or military status of the superior in question.

However, now that the ICC Statute not only recognises that the superior responsibility doctrine is applicable to civilians, but also distinguishes between civilians and military commanders in its Article 28, the practical question of who falls under which category of

277 See Chapter 4.2.4 infra.
superiors will arise. Without a distinction in the definition, it would be enough to prove the constituent elements of this responsibility. With the distinction, it will become necessary to decide whether the superior in the specific case is a civilian or a military. On the other hand, the statute provides that where the superior is a civilian, another knowledge requirement will apply. This provision which compels the Court to categorise the accused is directly related to the concern that, “[A] Tribunal should be very careful in holding civil government officials responsible for the behaviour of the army in the field.”278 While it is apparent that the application of command responsibility to civilians is accepted, it is equally recognised that the application of the principle to civilians constitutes an extension of its original field of application.279

But who is the civilian superior? What should be kept in mind here is the context in which we are trying to identify the civilian superior. It is a context in which international crimes are committed and even if the requirement of an armed conflict is not absolute, the context is not a peaceful one with only incidental occurrences of violations.

The understanding that where a superior is not a military commander he is a civilian, is based on the basic idea in international humanitarian law that distinguishes between two categories only, combatants and non-combatants, or civilians. Those who are not combatants are civilians.280 Despite the fact that the reality of societies in armed conflicts does not correspond

---

278 The Trial Chamber included a direct quote by Röling. See Akayesu, TC Judgement, para. 490.
280 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS p. 3. Art. 50 of Additional Protocol I to the 1949 Geneva Conventions (AP I) provides a definition of civilians. Art. 50(1) provides as follows: “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” The article refers to Art. 4A(1), (2), (3) and (6) of the Third Geneva Convention, which have the following wording: “Art. 4. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.
to this black and white definition of actors or groups, the idea that these groups should be divided rests on a firm historical basis. According to Best, a reference to this idea can be found in Rousseau’s work, who asserted that there is an “unbridgeable conceptual divide between non-combatants and combatants.” The divide is based on the recognition by those who conducted war that it was “possible and desirable not to hurt” persons who were not involved in the fighting and who were “innocent.” Not all civilians are that obviously innocent, however, and “their moral entitlement to exclusion from attack or the risks of attack is not so clear.” The fact that the divide as pointed out by Rousseau was set out in legal provisions has made the distinction more problematic. From having been someone “who formed no part of an enemy country’s armed strength and made no contribution to it,” the civilian is now “an enemy person not dressed in a markedly military way and not enlisted in a designated military organization.” The present picture of a civilian seems to focus more on formal characteristics than the former one, which was based on the reality that the combatant met on the scene of the war.

Article 28 of the ICC Statute which explicitly distinguishes between military commanders and other superiors is not more helpful in this respect. While the ad hoc tribunals and scholars use the ‘either/or’ division between military commanders and civilian superiors, Article 28 provides as follows: “(a) A military commander or person effectively acting as a military commander shall be criminally responsible […] ; (b) With respect to superior and subordinate

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

[...]

(6) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.”

As stated in Art. 50 of Additional Protocol I, civilians are also those persons who do not belong to the armed forces and other armed groups defined in Art. 43 AP I:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, ‘inter alia’, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.”

281 Best, op. cit., pp. 258-259.
282 Ibid., p. 258.
283 Ibid., p. 257.
284 Ibid., p. 258.
285 Ibid.
relationships not described in paragraph (a), a superior shall be criminally responsible […].”

Thus, all superiors who hold the position of a military commander or who are effectively acting as military commanders fall under paragraph (a), while all other superiors fall under paragraph (b). The provision does not explicitly distinguish between military and civilian superiors, but simply leaves paragraph (b) open for all other superior-subordinate relationships. In theory, these relationships could be of whatever kind, but as IHL knows of no other categories than the combatant and the civilian, it is legitimate to call superiors under paragraph (b) civilian superiors.

Accordingly, those who are not military commanders and, thus, may be called civilian superiors whose acts, or rather omissions, as to the rest correspond to the requirements laid down can be held criminally responsible under this superior responsibility provision. This distinction, which retains the traditional division between military commanders and those who cannot be characterised as such, was considered desirable during the negotiating process leading to the present formulation of the article.286

As there is no explicit definition of the civilian superior and as the civilian superior on the basis of the above sources seems to be the superior who does not qualify as a military commander, some authors have made an attempt, making reference to the case law, to identify categories of civilians to which the title civilian superior would apply. Analysing Article 28 of the ICC Statute, Fenrick held that those superiors falling under Article 28(b) “can include political leaders, business leaders, and senior civil servants.”287 It is clear, however, that Fenrick does not want to make any definite statement when he says that the category of superior can include those leaders mentioned. Thus, it is possible that also others may fall under this paragraph of Article 28 ICC. Fenrick also holds that the category of ‘superior’ resembles that of a military organisation in that also these superiors ‘may have varying degrees of responsibility’ and in that there may be superiors who have authority over other superiors at a lower level.288

Zhu, on the other hand, found that, “Military leaders are considered to be those who hold absolute control over the formulation of military policy. But a person will be considered a

288 Ibid.
civilian leader when he was a member of the government, army officer or not, who fulfilled his official duty without a direct relation to or control over or by the armed forces.”

If this is the correct definition of a civilian superior, does that not mean that such a superior could also qualify for the superiors intended for Article 28(b) of the ICC Statute? If even an army officer does not automatically fall under Article 28(a), the determination of who is considered a superior for the purposes of paragraph (b) seems to be dependent on the judges’ case by case evaluation of the sort of superior the leader accused in the case at hand was.

4.2.2 Level of authority

The provisions on command responsibility in international instruments are silent as to the level of authority a superior ought to have in order to incur responsibility under the command responsibility principle. Case law from the ad hoc tribunals further shows that the level of authority is not one of the decisive elements when establishing command responsibility. It has also been explicitly stated that a position of influence and authority alone cannot be considered as proof of an existing superior-subordinate relationship. The decisive factor is the effective power of control that the superior exercises over his subordinates. On the other hand, the effective command issue is closely linked to the level of authority of the superior and much of the discussion concerning command responsibility in case law and by learned scholars and the general public centres around the position and the level of authority of the superior.

The function and position of a superior is of particular interest with regard to civilian superiors. Within the military command structure the level of authority logically depends on how high on the hierarchical ladder the superior has climbed. Based on his rank and his duties, his level of authority can be estimated. Consequently, a commander on the tactical level, with the lowest rank in a position of command, may be held responsible under the command responsibility principle. The settings in which civilian superiors could become liable under the command responsibility principle are not that clearly defined. In principle,

290 Čelebići, TC Judgement, para. 377.
anyone who exercises effective control in a superior-subordinate relationship is in a position that could lead to command responsibility. Does that mean that also lower ‘ranking’ civilians are potential command responsibility ‘candidates’?

According to Zhu: “In reality, the structure of social society is not as rigid as in the military.” As opposed to the military command structure, civilian society knows no equivalent to, for example, a non-commissioned officer exercising command authority at the tactical level of operations. While a lower ranking commander will know that he has a general command responsibility in relation to his subordinates, a breach of which will have some form of consequence, the same situation would be less likely in a civilian setting.

The list of potential civilian superiors in Fenrick’s commentary to Article 28 ICC included business leaders, political leaders and senior civil servants. This list indicates that a certain level of authority is needed, but is open to a case by case interpretation. A better indication regarding the level of authority of the civilian superior is reached when considering the fact that where there is a superior, there must also be a subordinate. According to Fenrick: “Any person who has a superior who can direct his work or work related activities may be a subordinate to that superior.” Following this definition, some persons may be both a superior and a subordinate in a large organisation. At the same time, this definition suggests that any person within a civilian organisation who has a subordinate, may become a civilian superior for the purposes of command responsibility. The requirement of a clear leadership position is thereby removed, at least theoretically.

Ambos found that post-Second World War jurisprudence required that defendants had been leaders, planners or belonged to the policy level, with regard to aggressive war and that the IMTFE “limited the responsibility to cabinet members.” However, these findings give no indication whatsoever as to what, if any, level is necessary in order to incur command responsibility. The question is whether the command responsibility principle as applied to civilians requires any theoretically distinguishable level of authority of the civilian superior.

---

292 Zhu, op. cit., p. 382.
293 Fenrick, op. cit., p. 521.
294 Ibid.
Rather than looking at any possible theoretical requirements inferred from 60-year old case law, it may prove more credible to conclude that the level of authority required of civilian superiors depends on more practical factors. First, the command responsibility principle as defined in international criminal law has almost exclusively been considered and applied in the context of international crimes. After the Second World War as well as after the conflicts in the former Yugoslavia and in Rwanda, the level of authority of the superiors prosecuted has depended more on the availability of the accused and the financial resources and mandate of the tribunals, than on theoretical considerations. In other words, where all alleged war criminals cannot be prosecuted, prosecutorial discretion is a significant factor. While this is not *per se* specific to the prosecution of civilian superiors, it is a fact that on the international level, many of those considered most responsible for cruelties having taken place in a certain conflict, and therefore ‘suitable’ for prosecution at the international level, have been and will be the highest governmental and other leaders, i.e., civilians. The ICC is no different in this respect. The Prosecutor will have to make a choice as to which alleged perpetrators will be prosecuted and, secondly, charged under the command responsibility principle. The level of authority test can only be done when lower level, ‘Corporal-like’, civilian superiors are prosecuted under the command responsibility principle.

Secondly, the level of authority of civilian superiors prosecuted and, more importantly, convicted under the command responsibility principle, is very much related to the issue of commission versus omission. The indictments from the *ad hoc* tribunals show that almost all of the civilian superiors prosecuted have been charged under the command responsibility provision. Evidently, the command responsibility provision is being associated with criminal responsibility of the highest government officials and political leaders. Even more so than in relation to the military commanders, the question with regard to civilian superiors at that level is whether such leaders would not best be prosecuted under the individual criminal responsibility provisions. Where the superior is the highest government official in the

296 Both indictments from the early years of the tribunals’ existence and those of a later date include charges on the basis of command responsibility in relation to civilian superiors. See, for example, *Prosecutor v. Jean-Paul Akayesu*, Amended Indictment, Case No. ICTR-96-4-I, 17 June 1997; and *Prosecutor v. Jadranko Prlić*, Second Amended Indictment, Case No. IT-04-74-T, 11 June 2008, para. 228.

297 This is most notably proven by the fact that Slobodan Milošević, who was the President of Serbia, was indicted pursuant to Art. 7(3). See, among other indictments related to him, the indictment related to crimes in Bosnia and Herzegovina: *Prosecutor v. Slobodan Milošević*, Amended Indictment, Case No. IT-02-54-T, 22 November 2002. Another prominent accused who faces charges of command responsibility is Charles Taylor, at the time of the atrocities the President of Liberia. See *Prosecutor v. Charles Ghankay Taylor*, Amended Indictment, Case No. SCSL-03-01-I, 16 March 2006.
region, it is more likely that he committed, rather than omitted to prevent or punish crimes, where commission includes leading, planning, encouraging and assisting in the commission of crimes.

These two considerations, the ‘most responsible’ factor and the ‘commission’ factor, seem contradictory. On the one hand, there is no interest in prosecuting the ‘small fish’ and, on the other hand, where the level of authority is too high, the role of the superior might be more suitable for prosecution under the individual criminal responsibility provisions. Is it rather the group of superiors ‘in the middle’ that should be the object of this form of responsibility? These superiors may from a political perspective be interesting enough for prosecution. There is also a greater likelihood that these superiors were actually not involved in the crimes, and due to failing supervision or the like, omitted to prevent or punish crimes by subordinates. It is interesting here to note the view expressed by Zhu that the command responsibility principle is applicable to civilian superiors, “so long as the degree of authority is similar to that of a military commander.” While the degree of authority is not the same as the level of authority here, it is interesting to compare also the level of authority with the military commanders, i.e., “so long as the level of authority is similar to that of a military commander.” As was analysed in Chapter 3, the military concept of command responsibility is not limited to the highest level of superiors. However, even if it was possible, in the abstract, to consider the civilian superiors ‘in the middle’, the most suitable objects of the command responsibility principle, the problem of identifying such civilians, except on a case by case basis, remains.

As for the problem with regard to the possible individual rather than command responsibility of the highest level civilian superiors, there is always the possibility of allowing both individual and command responsibility at the same time. Issue solved. Judging by the development of the principle this, however, will not be the preferred solution, which means that there is no simple answer to the problem of the prosecution of the highest level civilian superiors under the command responsibility principle.

---

4.2.3 Categories of civilians

4.2.3.1 Article 28(a) ICC – de jure

In the above we came to the conclusion that the identification of the civilian superior is not possible through exclusion, or by applying the IHL division of combatants and civilians, nor by making lists of positions of which one can assume that the holder may become a civilian superior for the purposes of command responsibility. All these methods focus on what kind of position the superior has. As stated above, it is not the position of the superior or the authority that the position may bring with it that is of importance when applying the command responsibility doctrine. Rather, the important focal point should be what the superior actually does.

It is possible to distinguish between three categories of civilians. While, of course, these categories are also connected to the position that the superior holds, the focus is on what he/she does, instead of what position the superior holds. Considering these categories in terms of Article 28 ICC, we can distinguish between the following superiors: 1) The superior who holds a typically civilian position but who is a de jure military commander; 2) The superior who holds a typically civilian position but who is a de facto military commander; 3) The superior who holds a civilian position and who does not exercise other than civilian duties.

The first category is that of civilians who hold a civilian position but who are de jure charged with duties of a military commander. Schmitt has given some examples of this category of civilians:

“Civilians often fill de jure positions relative to the armed forces. As an example, by Article II of the US Constitution, the President is the ‘Commander-in-Chief’. Similarly, the Queen of England is the British Commander-in-Chief pursuant to the unwritten constitution of the United Kingdom, and each of the royals serves as a regimental ‘Colonel-in-Chief’. In fact, British officers swear an oath of allegiance to the Queen, not the State, and it is the Queen who issues their commission.”299

Not all civilian de jure military commanders may have the same practical importance in carrying out military tasks. While the role of the Queen of England as the Commander-in-

---

Chief is a symbolic role, the President of the United States of America and some other presidents also *de facto* fulfil a role as Commander-in-Chief, in particular during an armed conflict.\(^{300}\)

The division of superior into military and other superiors in Article 28 ICC does not correspond nicely to this category of superiors. While the reason for the inclusion of Article 28(b) was the concern during the negotiations leading to the adoption of the ICC Statute that particularly heads of state could be too easily tried under the command responsibility doctrine, the question is whether such accused would even fall under Article 28(b). As was just mentioned, where the Head of State has *de jure* powers as Commander-in-Chief and also exercises these powers, he is both a *de jure* and a *de facto* commander, despite his civilian function. By definition, Article 28(b) cannot be applicable to him, as *de facto* commanders are to be tried under Article 28(a). Of course, in states where the Head of State is not entrusted with the powers of a *de jure* military commander, he remains a civilian, unless on the basis of the facts of the particular case it appears that the Head of State in relation to the crimes committed was a *de facto* military commander.

On the basis of this analysis it seems that the purpose of the (b) provision is not being served. The division and the separate standard under Article 28(b) do not apply to this particular category of civilians who hold *de jure* military authority and also exercise such authority. This is of course not to say that no superiors fall under the (b) provision. This category of superiors will be considered below.

### 4.2.3.2 Article 28(a) ICC – *de facto*

From the first cases of the *ad hoc* tribunals onwards, the judgements have recognised that the *de jure* authority of the accused superior over the alleged subordinates is neither enough nor necessary in order to prove superior responsibility. Where a superior exercises *de jure* authority, but where at the time of the crimes the *de facto* effective control over the subordinates was exercised by someone else, the *de jure* superior does not incur responsibility under the command responsibility doctrine. On the other hand, where a superior has not been

\(^{300}\) Fenrick, op. cit., p. 517.
appointed to or does not on any other basis occupy a *de jure* superior position, he might still be held criminally liable under the command responsibility provision if he *de facto* exercised control over the subordinates at the time of the crimes. In such cases the *de jure* authority is not a necessary requirement. Accordingly, the *de facto* superior plays a crucial role when establishing command responsibility. As we know by now, the effective control is the decisive factor for showing a superior-subordinate relationship.

The role of the *de facto* superior is emphasised by the fact that Article 28 of the ICC Statute divides the superiors who may incur responsibility under the command responsibility principle into 1) military commanders; 2) persons effectively acting as a military commander; and 3) superiors who do not fit into either of the first two categories. The second category serves to cover the *de facto* superior who cannot *de jure* be defined as a military commander. In other words, the second category concerns a civilian *de facto* exercising the powers of a military commander.

Fenrick found that the category of superiors ‘effectively acting as a military commander’ is a wide category which “may include police officers in command of armed police units, persons responsible for paramilitary units not incorporated into the armed forces, and persons who have assumed *de facto* control over the armed forces, armed police units, or paramilitary units.”\(^\text{301}\) This is not an exhaustive list but gives an impression of those superiors which, in Fenrick’s opinion, could be effectively acting as military commanders. Thus, superiors in similar positions may also be considered as *de facto* military commanders. If these categories are used, a large number of those civilian superiors who would qualify for command responsibility fall under Article 28(a).

Also Schmitt has identified civilians who exercise authority in relation to the armed forces:

“*At times, individuals without a *de jure* position in the chain of command also exercise influence over military operations. For example, Congress must approve all military funding in the United States. This makes Senators and Congressmen, particularly those on committees dealing with the military, enormously influential *vis-à-vis* defense policy. Or consider individuals tied to a dictator who exercise great influence over particular aspects of a conflict, such as certain members of Saddam Hussein’s family or other highly placed members of his tribe from Tikrit.*”\(^\text{302}\)

\(^\text{301}\) Fenrick, op. cit., pp. 517-518.
In identifying the civilian superior, in particular the civilian who is a *de facto* military commander, the problem is that the lists of possible superiors are of no actual relevance when trying the civilian superior under the command responsibility provision. Only the facts established in each case may give reason to hold that a civilian superior exercised authority which was comparable to that of a military commander.

### 4.2.3.3 Article 28(b) ICC

The list by Fenrick, which includes political leaders, business leaders, and senior civil servants as possible civilian superiors, shows that although a certain number of civilians would better qualify as de facto commanders under Article 28(a), there are superiors who do fit under Article 28(b). However, when considering the further requirement of ‘effective authority and control’ which is demanded of both the *de facto* military commander and the civilian superior, there is no difference between the two categories of superiors in this regard. Both differ from the military commander for which the requirement is ‘effective command and control’. This means that for the purposes of the ICC Statute effective authority and control is demanded of both the *de facto* military commander and the civilian superior.

Outside the context of international and internationalized tribunals and their case law, one conflict and in particular certain events in the context of this conflict brought the identification of the civilian superior for the purposes of command responsibility to the forefront. This was the conflict in Iraq, which began in 2003. The mistreatment of prisoners in the Abu Ghraib prison by members of the US armed forces and allegedly also by private military contractors led to questions regarding the command responsibility in relation to these perpetrators. Although there are many conflicts in which the identification of civilian superiors may be necessary, the command responsibility issue in relation to private military contractors is different in that the characteristics of this group of potential civilian superiors do at least not at a first glance correspond to the groups of civilian superiors identified at the *ad hoc* tribunals. Another reason for considering this issue briefly here is the general impression that command responsibility is hardly applicable in relation to these actors/possible perpetrators of international crimes.
At the time of the scandals surrounding the mistreatment of prisoners at the Abu Ghraib prison in Iraq, the question was raised who, except for the perpetrators themselves, could be held responsible for the fact that these crimes could take place. As far as the identification of civilian superiors is concerned, the status of the political leaders at the highest level in the US is not of particular interest here. A Minister or the Head of State as civilian superiors for the purposes of command responsibility have been discussed earlier. Difficulties in identifying the civilian superior also arise at a lower level. Applying command responsibility, the responsibility is not necessarily to be found only on a ministerial level.

The categories of persons listed by Fenrick as possible civilian superiors for the purposes of command responsibility traditionally hold positions that are easily defined as civilian. Political leaders, businessmen and senior civil servants are mostly concerned with civilian affairs or are at least easily distinguished from military commanders. With regard to private military contractors the situation is different, and as was found above, this is why the identification of the civilian superior for the purposes of command responsibility should focus on what the superior does, rather than which position he or she holds. The difficulty concerning private military contractors is twofold. First, there is still the ongoing debate as to whether PMCs are civilian or military actors in the conflict. Secondly, the question is whether the superior of the perpetrator acted as a de jure or a de facto military commander or as a purely civilian superior, as laid down in Article 28 ICC. While this study is not aimed at establishing the difference between civilians and combatants, the ongoing discussion on this topic can be used in this context to establish whether the perpetrators themselves, being PMCs, are civilians.

Analysing the status of PMCs as either civilians of combatants, Schmitt summarised his findings as follows: “Since civilian employees and private contractors do not wear uniforms denoting combatant status, seldom fall under the formal command of military personnel, and generally lie beyond the reach of military discipline that the armed forces use to enforce adherence to the ‘laws and customs of war’, it would be a stretch to style them members of

---


304 It is clear that while private military contractors do not constitute an entirely new category of actors in armed conflict, the level of the impact that their acts may have has never been so prominent. Any conclusions by Schmitt were based on the behaviour and structure of private military companies at present, in particular in the conflict in Iraq, in which the use of private contractors reached an unprecedented level. Accordingly, there is no general agreement regarding the status of PMCs, but the conclusion by Schmitt offers a well-reasoned opinion.
the armed forces.”  

His conclusion with regard to private contractors fulfilling the requirements of Article 4A(2) of Geneva Convention III is similar. Schmitt considered it “highly unlikely that private contractors could qualify for Article 4A(2) combatant status.”

Schmitt’s findings lead him to conclude that PMCs must fall under the other category of actors: civilians.

What is problematic about this approach is the fact that private military companies fulfil different tasks and may have differing structures and ways of operating. In his article from 1998, Zarate discussed the features and roles of private international security companies, in general, and some companies which had been operating in African conflicts and in the conflict in the former Yugoslavia, in particular. According to him, these private security companies had only been working with legitimate governments and “restricted their activities to training national militaries as opposed to serving as infantry in battle.” However, he recognised that this was a situation that might change and that there were certain risks in making use of these private security companies. In more recent studies, it is recognised that private military contractors engage in activities that make them direct participants in hostilities, thereby increasing the likelihood of these contractors being responsible for international crimes to the same extent as members of the armed forces may be so responsible.

McDonald identified a number of tasks carried out by private military contractors in present-day armed conflicts, some of which involve direct participation in hostilities. Examples of such functions are the interrogation at prisons and the operation of weapons systems. The Abu Ghraib scandal, again, is a good example of such a function. For the purposes of establishing

---

306 Ibid., p. 531.
308 Ibid.
310 The functions identified by McDonald include the following: “[P]roviding security for civilian objects; developing and maintaining weapons systems; interrogation at prisons; driving, […] translation, interpretation and linguistics; training armies and police; maintenance of military supply chains and guarding military convoys; computer and technological support; procurement; catering; and other logistics functions, […] guarding military objectives […]; force protection; rescue operations for US forces; combat and combat service support; operating weapons systems […]; and some types of intelligence gathering.” See A. McDonald, ‘Dogs of War Redux? Private Military Contractors and the “New Mercenarism”’, 7 Militair Rechtelijk Tijdschrift (2007) pp. 210-228, at pp. 218-219.
command responsibility, these functions are most interesting, in that persons in combat-like activities are most likely to end up in a situation where international crimes are committed.

Having concluded that PMCs in general have to be considered as civilian actors in the conflict, the logical assumption would be that where the superior of a perpetrator of international crimes is accused under the command responsibility doctrine, that superior would be considered a civilian superior, if he/she works for the enterprise that is engaged as a PMC. Following the division in Article 28 ICC, he is a civilian superior within a civilian enterprise who supervises civilian employees.

On the other hand, could a superior in an enterprise that as a PMC carries out conflict-related activities similar to those of the armed forces in such circumstances become a *de facto* military commander, or would he at all times remain a civilian leader because his company does not fulfil the qualifications of a combatant? As long as the perpetrators are not considered as combatants, thus civilians, and the superior is a civilian, the superior must be considered a civilian superior also for the purposes of Article 28 ICC, as he does not even *de facto* command members of armed forces. If the PMCs were to be considered as combatants, the superior himself would also be a military commander from the outset. In media reporting one PMC, whose employees allegedly abused and tortured prisoners in the Abu Ghraib prison, had its own chain of command.\(^\text{311}\) This still says nothing about the status of the superior, but it does give the impression that some PMCs are organised like an armed group.

A specific problem for the application of command responsibility to superiors of PMCs is the fact that even if the PMCs have their own chains of command they do not usually fall under the chain of command of the armed forces.\(^\text{312}\) The PMCs work for the armed forces, but if a PMC does not fall under the chain of command, the question is whether there is a superior-subordinate relationship between the military commander who is in command of an operation


\(^{312}\) Schmitt 2004, ‘Humanitarian’, p. 526. On this problem, see also Zarate, op. cit., pp. 75-162, at p. 77, where he stated that, “Concern about these SCs [Security Companies, *MNM*], like concern about mercenaries, pirates, and terrorists, stems from the inherent violence of their profession combined with a lack of control over and accountability for their actions. Since these are private companies, countries which recommend or export them arguably can disavow any connection to SCs’ activities.” On the necessity of regulating Private Military Companies in general, see P. van der Kruit, ‘Noodzakelijke regulering van Private Military Compagnies [sic!]. Enkele mogelijkheden’, *7 Militair Rechtelijk Tijdschrift* (2007) pp. 252-263.
and the PMC which carries out tasks within the same operation. It would be fair to say that where the military commander does not have *de facto* effective control over the PMC, he cannot be held responsible under the command responsibility doctrine. However, the fact that a situation is not clearly regulated may not lead to a situation in which no one can be held responsible. The responsibility would then have to be sought higher up, at the political level, in which case the superior would be a civilian superior. Whether in such cases command responsibility could be proven is questionable. The present interpretation and application of the command responsibility doctrine makes proving liability in relation to PMC only feasible if the civilian superior within the PMC enterprise is charged. A determination of whether a specific PMC acts under the supervision and discipline of his own superior within the enterprise or that of the military commanders of one of the parties to the conflict will be case-specific.\(^{313}\)

As has just been set out, in theory it is possible to think of types of superiors that may fall under Article 28(a) as de facto commanders and types that may fall under Article 28(b). The interesting question is whether the existing theoretical difference between the *de facto* military commander under Article 28(a) and the civilian superior under Article 28(b) will also be a practical one.

4.2.4 Civilian superiors identified

Also recent armed conflicts have proven that armed conflicts have different actors and, consequently, different potential perpetrators of international crimes, in addition to the armed forces, depending on the place and context in which the conflict takes place. The *ad hoc* tribunals have rendered judgements in cases concerning crimes that were committed in two very different conflicts, both as regards the context and the manner in which the crimes were perpetrated. Both civilian and military superiors have been identified as having played an important role in the conflicts.

The judgements rendered by the *ad hoc* tribunals reveal that the Chambers have encountered some difficulties when applying the command responsibility doctrine, which is clearly geared towards the prosecution of military commanders, to civilians. In relation to some accused, the identification of their civilian or military status has been an issue, despite the lack of an

explicit requirement and a need to do so in the command responsibility provisions. A few cases may be highlighted in this respect.

Beginning with the ICTY, the Trial Chamber in the case against Kordić found that the accused “was the political leader of the Bosnian Croats in Central Bosnia with particular authority in the Lašva Valley and although having no formal position in the chain of command he was associated with the military leadership; as such he participated in the HVO\textsuperscript{314} take-over of the municipalities and the attacks on Busovača […].”\textsuperscript{315} However, his position as a \textit{de facto} military commander was never established. The case shows that in armed conflicts, the civilian or military function of a person, in this case the superior, may not be clearly distinguishable. The finding of the Trial Chamber is an indication of this. Of course, the problem is also that of a lack of evidence in certain cases. With regard to Kordić, the Appeal Judgement in the Blaškić case, which concerned crimes committed in the same area, mentions new evidence according to which Kordić was in command of certain perpetrators, more specifically the Military Police.\textsuperscript{316} For the purposes of identifying the civilian superior, it is interesting to note this attempt to prove that Kordić was a \textit{de facto} military commander. As such, there is no theoretical need to prove his \textit{de facto} military position, as the Statute does not distinguish between civilian and military superiors. In practice, however, there may very well have been a need to establish his role as a military commander. How, otherwise, should the prosecution convince the judges of the effective control of a political leader over the perpetrators of the crimes?

The Aleksovski case is of interest in this specific instance because of the fact that it was not determined whether he was a civilian or a military superior. In this case, the Appeals Chamber specifically pointed out that for the purposes of the case it was not necessary to determine whether the accused, as a commander of a prison, was a civilian or a military commander. The Appeals Chamber stated as follows:

“In the instant appeal, the Appellant contends that, because he was appointed by the Ministry of Justice rather than the Ministry of Defence, he did not have such powers over the guards as a civilian prison warden, whereas the Trial Chamber finds that he was the superior to the

\begin{footnotes}
\item[314] The Croatian Defence Council.
\item[315] Kordić and Čerkez, TC Judgement, para. 829.
\item[316] Blaškić, AC Judgement, paras. 350, 352 and 395-400.
\end{footnotes}
guards by reason of his powers over them. The Appeals Chamber takes the view that it does not matter whether he was a civilian or military superior, if it can be proved that, within the Kaonik prison, he had the powers to prevent or to punish in terms of Article 7(3). The Appeals Chamber notes that the Trial Chamber has indeed found this to be proven, thus its finding that the Appellant was a superior within the meaning of Article 7(3).”

Regrettably, the Appeals Chamber did not indicate whether commanders of prisons should be considered as de facto military commanders or civilian superiors.

For the purposes of the discussion as to who is considered to be a civilian superior under Article 28(b) ICC only, reference may be made to the existing case law of the ad hoc tribunals. So far, Plavšić is the only political leader who has arguably been convicted by the ICTY under the superior responsibility provision. The conviction was based on a guilty plea, and therefore, on the basis of existing ICTY case law, it is difficult to establish whether political leaders are those superiors which fall under Article 28(b) ICC. Although, the Sentencing Judgement in the case against Plavšić states, among other things, that, “The Presidency [of which Plavšić was a member, MNM] also had authority over the Bosnian Serb police, TO [territorial defence forces, MNM] and civilian authorities.” The position held by the accused shows more characteristics of a de facto military commander than of a purely civilian superior for the purposes of Article 28(b) ICC.

The Brđanin case is illustrative in this respect. Had Brđanin been found to have exercised de facto control over the municipal authorities, the police and the paramilitary units, he would best be described as a de facto military commander under Article 28(a) ICC, as suggested by Fenrick. His control would resemble that of a military commander, as a person who has “assumed de facto control over the armed forces, armed police units, or paramilitary units.”

The next question is had the Trial Chamber found that Brđanin only exercised de facto control over the municipal authorities, would he then qualify as a civilian superior under Article 28(b) ICC? He could be considered a regional political leader with effective authority and control over civil servants, not organised in chains of command like the police or paramilitary units. However, even if that superior was to qualify for Article 28(b) in theory, the question is whether the division will have any practical implications. As has been pointed out earlier,

---

319 Fenrick, op. cit., pp. 517-518.
those who fit the description of a pure civilian superior very often play a role in the conflict and crimes, which is best prosecuted under the provisions on individual criminal responsibility.

While not having been tried, the case against Karadžić and Mladić illustrates the problem related to the question of how superior responsibility should be applied to civilians, in particular if this case was to be dealt with by the ICC, as the Rome Statute makes use of an explicit differentiation between the two groups of superiors.

In its Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence in the case against Karadžić and Mladić the Trial Chamber found that, “Karadžić, as president of the SDS and then of the so-called Serbian Republic of Bosnia and Herzegovina, acceded to broad institutional powers making him the head of a political organisation and of the armed forces throughout Bosnian Serb-held territory of Bosnia and Herzegovina.”320 As for Mladić, the Trial Chamber held that he was the “highest-ranking officer in the army of the self-styled Bosnian Serb Republic” and that he had “repeatedly demonstrated absolute control over his troops.”321 However, his power “extended to the political level. He played an essential part in decisions by the Bosnian Serb Administration and on the latter’s behalf participated in negotiations and signed several agreements, which were all subsequently implemented by his troops.”322

The first of the two categories of superiors mentioned in Article 28 deals with “[a] commander or person effectively acting as a military commander.” The second category defined in Article 28 is “superior and subordinate relationships not described in paragraph (a),” where the perpetrators were “under his or her effective authority and control.” Based on the Rule 61 decision, both Karadžić and Mladić would fit the definition of a commander or a person effectively acting as such. On the other hand, the Trial Chamber in its decision concluded that the responsibility of both accused could better be characterised as Article 7(1) responsibility.323

321 Ibid., para. 77.
322 Ibid., para. 78.
323 Ibid., para. 83.
To the general public it seems clear that both Karadžić and Mladić are responsible for a number of crimes and should be tried by the ICTY. Considering the description of the positions and roles of these two highly authoritative persons, it is apparent that both Karadžić and Mladić were in a position to influence the course of events in Bosnia and Herzegovina at the time of the alleged crimes. What the description of these accused shows is that Article 28 of the ICC Statute complicates matters in that it demands a distinction between civilians and de facto military superiors.

The case against Karadžić and Mladić also illustrates the issue of the level of authority involved in command responsibility. The Trial Chamber in its review of the indictment concluded that the basis for responsibility should be Article 7(1), which shows that it is not plausible to suggest that superiors at a certain level only failed to prevent or punish their subordinates, as opposed to having played some other role in the preparation or commission of the crimes.

The ICTR jurisprudence is somewhat more helpful when considering who could be a civilian superior for the purposes of Article 28(b) ICC. One case has been decided in which the accused was a political leader and incurred responsibility under Article 6(3) of the ICTR Statute. The case at issue is the case against Jean Kambanda, who was the Prime Minister of the interim government of Rwanda in the period when the crimes charged took place. Kambanda pleaded guilty to genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, murder as a crime against humanity and extermination as a crime against humanity. Kambanda was held responsible under Article 6(1) and 6(3) for all crimes charged, except for the crime of conspiracy to commit genocide, for which he was convicted under Article 6(1).

With regard to Article 28(b) ICC, the case against Kambanda is interesting but ‘disappointing’. The accused acknowledged that he incurred command responsibility in relation to the crimes committed by his subordinates. The perpetrators were members of the armed forces, militia and civilians. As the accused admitted his guilt under Article 6(3), the Trial Chamber did not have to prove his de facto control beyond a reasonable doubt. The case

---

325 Ibid., para. 40.
326 Ibid.
shows that the accused, while being a political leader, at the time of the killings acted as a *de jure* or a *de facto* military commander. The ‘other superiors’ qualification under Article 28(b) ICC would not apply to Kambanda.

Using the categories of civilian superiors listed by Fenrick, the accused in the *Kayishema and Ruzindana* case would qualify as a civilian superior in the group of civil servants. At the time of the crimes, Kayishema was the prefect of the Kibuye prefecture. Kayishema was charged and convicted under Article 6(1) and 6(3). The Appeals Chamber upheld the Trial Chamber’s ruling on Kayishema’s Article 6(3) responsibility. According to the Trial Chamber, the accused had “effective control over the communal police and the *gendarmerie*, as evidenced by legislative provisions, and the actual control he wielded over all the assailants including the *gendarmes*, soldiers, prison wardens, armed civilians and members of the *Interahamwe* as demonstrated by the identification of Kayishema as leading, directing, ordering, instructing, rewarding and transporting them to carry out the attacks.” The findings indicate that Kayishema exercised ‘actual control’ or, in other words, *de facto* control over gendarmes, militia and other ‘organised’ perpetrators. Logically, Kayishema would be considered a *de facto* military commander for the purposes of Article 28 ICC.

The ICTR has also convicted a business leader under the command responsibility provision. *The Prosecutor v. Alfred Musema* concerned crimes committed in the Kibuye *préfecture* in Rwanda in the context of the widespread attacks against Tutsi and moderate Hutu civilians in 1994. The accused, Musema, was charged and convicted under Article 6(1) and 6(3). The accused was the director of the Gisovu Tea Factory. In this function and because of the poverty in the region, Musema wielded considerable authority in relation to the people he employed, but also in relation to the communal authorities, which were dependent on the tax income from the Tea Factory employees. The Trial Chamber came to the following conclusion:

“The Chamber finds that it has been established beyond reasonable doubt that Musema exercised *de jure* authority over employees of the Gisovu Tea Factory while they were on Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory, even if those duties were performed outside factory premises. The Chamber

---

327 *Kayishema and Ruzindana*, TC Judgement.
notes that Musema exercised legal and financial control over these employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory. The Chamber notes that Musema was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute. The Chamber also finds that, by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes. The Chamber finds that Musema exercised *de jure* power and *de facto* control over Tea Factory employees and the resources of the Tea Factory.\(^{330}\)

Accordingly, Musema exercised *de facto* control over the Tea Factory employees, i.e., civilian perpetrators. The Trial Chamber did not find it proven beyond a reasonable doubt that Musema exercised *de jure* or *de facto* authority in relation to other members of the population of the region. The Trial Chamber used the following wording: “In relation to other members of the population of Kibuye Préfecture, including thé villageois plantation workers, while the Chamber is satisfied that such individuals perceived Musema as a figure of authority and as someone who wielded considerable power in the region, it is not satisfied beyond reasonable doubt on the basis of the evidence presented to it that Musema did, in fact, exercise *de jure* power and *de facto* control over these individuals.”\(^{331}\) Accordingly, Musema only exercised *de facto* control over civilians. As such, this means that Musema would qualify as a superior under Article 28(b) ICC.

Interestingly, the Trial Chamber, considering the applicable law in the case at hand, stated that the command responsibility principle was also applicable where a civilian superior only exercised *de facto* control The question in the case of Musema was to what extent he exercised control over persons “who *a priori* were not under his authority during the period from April to July 1994, namely, the soldiers, the Gisovu Commune police, and the Interahamwe.”\(^{332}\) In its findings, however, the Trial Chamber only made the above-mentioned statement as to Musema’s control over “the other members of the population of Kibuye Préfecture,”\(^{333}\) making no mention of soldiers, members of the police or the militia. The conclusion, of course, is that Musema’s *de facto* control reached only those perpetrators who were employees of the Tea Factory, but for a complete picture the Trial Chamber should have

330 Ibíd., para. 880.
331 Ibíd., para. 881.
332 Ibíd., paras. 143-144.
333 Ibíd., para. 881.
clarified Musema’s relationship with perpetrators belonging to the armed forces, the police or the militia.

Up until now, Musema is the only convicted civilian who could fit the category ‘other superiors’ under Article 28(b) ICC. That one case indicates, however, that the distinction between *de facto* military commanders and other superiors may become of practical importance. On the other hand, in the Musema case, the accused was convicted under both Article 6(1) and 6(3) in relation to the same events. Trial and Appeals Chambers in more recent judgements have decided in favour of an Article 7(1)/6(1) conviction where both bases for responsibility have been proven. That means that only where the superior incurred responsibility solely on the basis of the command responsibility principle, would the distinction between *de facto* military commanders and other superiors be relevant. The remaining question is whether such a situation is imaginable. The civilian superior would not be involved in the crimes by planning, inciting, ordering, aiding or abetting them. His subordinates, most likely civilians in order not to make him a *de facto* military commander, would commit genocide, crimes against humanity or war crimes “while they were engaged in their professional duties,” as the civilian superior would not be responsible for crimes committed by someone in his personal capacity. The likelihood of that actually happening without the personal involvement of the superior seems rather small.

On the basis of the foregoing analysis and using the categories of persons who, according to Fenrick, could be considered as *de facto* military commanders, it seems that only where the relationship is similar to that of a military commander can the civilian superior be accountable under the command responsibility principle. In other words, a civilian superior will in practice only fulfil the requirements of the command responsibility principle where he shares the characteristics of a *de facto* military commander.

The Trial Chamber in the case against Barayagwiza was puzzled by the potential superior responsibility of members of political parties. It pointed to the following: “A political party is unlike a government, military or corporate structure in that its members are not bound through

---

334 Ibid., para. 880.
335 In support of this view, see, for example, A. Zahar, ‘Command Responsibility of Civilian Superiors for Genocide’, 14 LJIL (2001) p. 591 (“While there is no doubt that civilian superiors are liable to prosecution for command responsibility, the doctrine will be properly operative only in cases where the superior’s control of subordinates resembles that enjoyed by military commanders.”).
professional affiliation or in an employment capacity to be governed by the decision making body of the party. Nevertheless, the Chamber considers that to the extent that members of a political party act in accordance with the dictates of that party, or otherwise under its instruction, those issuing such dictates or instruction can and should be held accountable for their implementation.”

Thus, the finding by the Chamber indicates that also leaders of political parties may incur command responsibility as civilian superiors.

In general, the cases against civilian superiors decided by the ICTR have been criticised by scholars. Among others, Zahar criticised the conviction of Kayishema under the command responsibility provision. According to him, the tribunal applied the wrong test for establishing command responsibility, the test simply requiring a “standard of mere influence.” The problem with that was that “an influential civilian administrator, such as a Rwandan prefect, is thereby transformed into a kind of universal superior – thousands within his sphere of influence become his subordinates in the eyes of the law.” The level of authority was, at least indirectly, also an issue in the case against Kayishema. Zahar, who criticised the judgement, asked the following question: “How could Kayishema have taken measures to prevent the attack when he was the leader of it?” “and how could he have later punished the perpetrators, when he was a perpetrator himself.”

According to Zahar, also the Musema Trial Judgement was erroneous. The Trial Chamber in the Musema case found that the accused exercised de jure and de facto power over the Tea Factory employees, and thereby also found him responsible under the superior responsibility provision. According to Zahar, such reasoning was misguided and did “not distinguish Musema from any ordinary factory director.” Furthermore, he held that, “[I]t cannot be that all business managers stand liable to be convicted for international crimes perpetrated by their employees for the reason only that they were linked to them through commonplace ties of labour.” Accordingly, while Fenrick identified both senior civil servants and business leaders as potential civilian superiors, the practical application of the command responsibility principle to these categories has been criticised.

337 Zahar, op. cit., p. 600.
338 Ibid., pp. 591-616, at p. 598.
339 Ibid., p. 598.
340 Ibid., pp. 601-604.
341 Ibid., p. 602.
These examples from case law give an indication of the difficulty in defining which civilian superiors may be rightly prosecuted under the command responsibility provisions.

4.3 Civilian superiors as objects of the command responsibility principle in the judgements rendered by the *ad hoc* tribunals

4.3.1 Introduction

As set out in the introduction to this chapter, there is no obligation on the part of the *ad hoc* tribunals to establish the civilian or military status of the accused before rendering a decision under the command responsibility provision. While the ICC will have to determine the status of the superior for the purposes of Article 28(a) or 28(b), the *ad hoc* tribunals did not need to overcome this hurdle when trying the accused. Nevertheless, the *ad hoc* tribunals have faced some difficulties when trying cases charging command responsibility in respect of superiors who cannot be considered as military commanders. From the point of view of a successful prosecution on the basis of the command responsibility provision, the problem has been the vast amount of acquittals on these charges. The number of unsuccessful trials of civilian superiors supports the thesis that the command responsibility doctrine is most suitable for the prosecution of military commanders. However, the fact that the command responsibility charges have not been effective does not in itself explain why the *ad hoc* tribunals have only convicted a few civilian superiors under Article 6(3)/7(3). The present section pinpoints the reasons for the convictions rendered and for the acquittals.

Zhu expressed the hope that, “The limits of superior responsibility for acts of omission that are attributable to civilian leaders […] be articulated and elaborated in the case law, including that of the *ad hoc* tribunals.” Such limits have not been explicitly set by the tribunals and, accordingly, it will be useful to analyse the findings in some of the cases concerning civilian superiors, with the intention of discovering whether these limits have been implicitly set out in the case law.

---

342 Zhu, op. cit., p. 375.
4.3.2 Convictions under Article 7(3)/6(3)

4.3.2.1 ICTY

In a majority of the cases brought before the ICTY the accused exercised military or ‘semi-military’ functions. Examples of the latter accused are prison guards who were not necessarily members of the armed forces. In most of the cases concerning clearly civilian accused, the persons charged have been political leaders at various levels. Thus far, only two civilian superiors have been convicted by the ICTY under the command responsibility provision. In both cases the accused pleaded guilty to a certain count in the indictment, thereby accepting his/her command responsibility in relation to that specific crime.

The first case in which the Trial Chamber convicted a civilian superior under the command responsibility provision was the case of the Prosecutor v. Stevan Todorović. At the time of the crimes referred to in the Todorović case, the accused was the Chief of Police in Bosanski Šamac. He was also a member of the Serb Crisis Staff “which took the place of the duly-elected municipal assembly and maintained control over all aspects of the municipal government.” Todorović was charged on the basis of Article 7(1) and 7(3), with persecutions on political, racial and religious grounds, deportation, murder, inhumane acts, rape and torture, as crimes against humanity. He was also charged with several grave breaches of the Geneva Conventions and violations of the laws and customs of war, including murder and torture. In the plea agreement, the prosecution withdrew all charges except the charge of persecution, laid down in count 1 of the indictment. In relation to one allegation of torture, as included in the same count, the prosecution pursued liability only under Article 7(3). Accordingly, the accused pleaded guilty to various crimes, together making up the crime of persecution, under both Article 7(1) and 7(3), but for separate facts.

343 See, for example, Prosecutor v. Duško Sikirica et al., Second Amended Indictment, Case No. IT-95-8-PT, 3 January 2001.
344 Prosecutor v. Stevan Todorović, Case No. IT-95-9/1.
346 Ibid., paras. 25 and 27.
347 Ibid., paras. 29-49.
348 Todorović, Second Amended Indictment. Only para. 34(d) of count 1 concerned the crime of torture, although it was not specified which crime the prosecution referred to. In the Sentencing Judgment, however, the Trial Chamber clarified that superior responsibility was charged for the torture of Omer Nalic and that this fell under count 1 of the indictment. See Prosecutor v. Stevan Todorović, Sentencing Judgement, Case No. IT-95-9/1-S, 31 July 2001, para. 5.
Because of the fact that the case was decided by way of a plea agreement, it differs from cases where the accused denies the charges and the Trial Chamber has to decide whether the facts have been proven beyond a reasonable doubt. As in all cases where a plea agreement is resorted to, the accused, Todorović, made an agreement with the prosecution agreeing that certain facts were true and constituted the factual basis for his guilty plea. In the agreement the accused also acknowledged that as the Chief of Police he had a position of superior authority in relation to all other police officers in Bosanski Šamac and, at the same time, that he bore “responsibility for the acts of his subordinates under Article 7, paragraph 3, of the Statute.”

The second case in which the accused was charged under both Article 7(1) and Article 7(3) and entered a guilty plea in relation to one of the charges is the case against Biljana Plavšić, a political leader, who among other functions held the position of member of the three-member Presidency of the Serbian Republic. The indictment charged Plavšić with genocide; complicity in genocide; persecutions, extermination, murder, deportation and inhumane acts as crimes against humanity; and murder as a violation of the laws and customs of war.

The Sentencing Judgement in this case does not explicitly state whether the basis for responsibility was Article 7(1), Article 7(3) or both. The Trial Chamber in its judgement simply convicted Plavšić of persecutions and sentenced her to eleven years’ imprisonment. However, in the Plea Agreement, Plavšić agreed to plead guilty to the crime of persecution as included in Count 3 of the indictment, and recognised that her crimes constituted either acts or omissions. Count 3 of the indictment explicitly charged Plavšić on the basis of individual criminal responsibility and command responsibility. In the document called Factual Basis for Plea of Guilt, Plavšić admitted to having ignored allegations of ethnic cleansing and to having been aware that other key leaders of the Bosnian Serb Republic ignored crimes that were committed against non-Serbs. No measures were taken to stop the violations “despite the power and responsibility of the collective and the expanded collective Presidencies or the

352 Prosecutor v. Biljana Plavšić, Plea Agreement, Case No. IT-00-40-PT, 30 September 2002, paras. 3 and 5.
353 Plavšić, Amended Consolidated Indictment, in particular, para. 23.
Ministries to prevent and punish such crimes.” By admitting these facts, the accused showed that she incurred responsibility on the basis of Article 7(3). Altogether the statements and admissions by the accused give reason to believe that Plavšić’s conviction was based on both her individual criminal responsibility and her command responsibility.

The two cases discussed are, on the one hand, a confirmation of the applicability of the command responsibility doctrine to civilian superiors. On the other hand, the guilty pleas do not give a truthful picture of the possibilities in a full trial of applying the command responsibility provision to civilian superiors.

4.3.2.2 ICTR

The number of civilians accused before the ICTR is far higher than that at the ICTY. Out of some 74 arrestees by December 2008, only about 14 people had held clearly military positions. A few accused had held ‘semi-military’ positions as leaders of the Interahamwe militia, but the large majority were political leaders, senior government administrators, religious leaders and businessmen. A small number of the accused had held other civilian positions, such as a journalist, a medical doctor, a prosecutor or a youth organiser. As many of these civilians were charged under Article 6(3), the ICTR has actually put the application of the command responsibility doctrine to civilians to the test, more so than the ICTY. In this section some of the convictions under Article 6(3) and the particular reasoning in each case are discussed.

i) Kambanda

The first civilian superior to be convicted by the ICTR on the basis of command responsibility was Jean Kambanda, at the time of the crimes the Prime Minister of Rwanda. The conviction in this case was based on a plea agreement. Jean Kambanda pleaded guilty to all six counts of the indictment.  

---

356 See Chapter 3.2.1 supra.
humanity and extermination as a crime against humanity.\textsuperscript{358} Kambanda was sentenced to life imprisonment.\textsuperscript{359} Kambanda was held responsible under Article 6(1) and 6(3) for all crimes charged, except for the crime of conspiracy to commit genocide, for which he was convicted under Article 6(1).

Just as in the Todorović and Plavšić cases, the Kambanda case adds to the statistics of cases against civilian superiors convicted under the command responsibility doctrine. The conviction being based on a guilty plea, the judgement is not informative of the judges’ approach to the liability of the accused in this case.

\textit{ii) Nahimana, Barayagwiza and Ngeze}

In the case of the \textit{Prosecutor v. Nahimana, Barayagwiza and Ngeze}, all the accused were civilians. Nahimana had been a professor of history and the Dean of the Arts Faculty at the National University of Rwanda. He was one of the founders of the \textit{Radio Télémvision Libre des Milles Collines} (RTLM), which played a crucial role in the events covered in this case. Barayagwiza was the Director of Political Affairs at the Ministry of Foreign Affairs and he was also one of the founders of RTLM, and a founder of the \textit{Coalition pour la Défense de la République} (CDR), a party which promoted unity and solidarity among the Hutu and was closed to Rwandans of Tutsi ethnicity. The CDR was a significant player in the events of this case. The accused Ngeze had worked as a journalist and in 1990 he founded a newspaper called \textit{Kangura}, a well known newspaper within Rwanda and internationally. Ngeze held the position of Editor-in-Chief of this newspaper. Accordingly, the accused all held civilian positions.

All accused were charged with superior responsibility under Article 6(3) in respect of genocide, either on counts of the crime of genocide proper, or of direct and public incitement to commit genocide or complicity in genocide. They were also charged with crimes against humanity under Article 6(3).\textsuperscript{360} While Ngeze, the Editor-in-Chief of \textit{Kangura}, was not found liable on any count on the basis of his command responsibility, both Nahimana and Barayagwiza were convicted under Article 6(3).

\textsuperscript{358} Ibid., para. 40.
\textsuperscript{359} Ibid., at IV. Verdict.
\textsuperscript{360} \textit{Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze}, TC Judgement Summary, Case No. ICTR-99-52-T, 3 December 2003, para. 5.
In this case the findings on the command responsibility of Nahimana and Barayagwiza are interesting, if not peculiar. Prior to its findings on the individual criminal responsibility of each accused, the Trial Chamber found that the genocidal intent of all the accused was established beyond a reasonable doubt. With regard to Barayagwiza the Trial Chamber found that he had publicly expressed his readiness to exterminate the Tutsi population. It held that, “From his words and deeds, Barayagwiza’s ruthless commitment to the destruction of the Tutsi population as a means by which to protect the political gains secured by the Hutu majority from 1959 is evident.” Accordingly, by “words and deeds” Barayagwiza had made clear that he supported or encouraged the extermination of the Tutsi ethnic group.

The Trial Chamber continued by making its findings on the individual criminal responsibility of each accused. In relation to genocide, the findings only concern Barayagwiza, as Nahimana was not charged on the basis of command responsibility. The Trial Chamber found that, “Nahimana and Barayagwiza were, respectively, ‘number one’ and ‘number two’ in the top management of the radio,” the RTLM. The Trial Chamber continued by stating that the accused “represented the radio at the highest level in meetings with the Ministry of Information; they controlled the finances of the company; and they were both members of the Steering Committee, which functioned in effect as a board of directors for RTLM.” The Chamber recognised that Nahimana and Barayagwiza did not make decisions with regard to particular broadcasts, but it found that such decisions “reflected an editorial policy for which they were responsible.” The Chamber held that, “The broadcasts collectively conveyed a message of ethnic hatred and a call for violence against the Tutsi population,” and that, “Nahimana and Barayagwiza were responsible for this message and knew it was causing concern.”

The Chamber considered it established that, “Nahimana and Barayagwiza knew what was happening at RTLM and failed to exercise the authority vested in them as office-holding members of the governing body of RTLM, to prevent the genocidal harm that was caused by RTLM programming.” An earlier intervention by Nahimana to stop attacks by RTLM on UNAMIR and General Dallaire contributed to the finding that the accused,

---

361 *Nahimana et al.*, TC Judgement and Sentence, para. 969.
362 Ibid., para. 967.
363 Ibid., para. 970.
364 Ibid.
365 Ibid.
366 Ibid., para. 971.
Nahimana and Barayagwiza, had *de facto* authority to prevent the ‘genocidal harm’. The role and authority of the accused convinced the Chamber that, “Nahimana and Barayagwiza had superior responsibility for the broadcasts of RTLM.” As Nahimana was not charged with genocide pursuant to Article 6(3), the Trial Chamber made the following finding in relation to Barayagwiza only: “For his active engagement in the management of RTLM prior to 6 April, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians instigated by RTLM, the Chamber finds Jean-Bosco Barayagwiza guilty of genocide pursuant to Article 6(3) of its Statute.”

Why is it necessary to include such a thorough review of the findings? The findings on these specific points raise two issues with regard to command responsibility that deserve some more attention. The first issue concerns the genocidal intent of the accused and the subsequent finding on his command responsibility. As the accused was charged with genocide, the Trial Chamber had to establish the special intent required on the part of the accused. However, by doing so the Chamber showed that Barayagwiza not only knew of genocidal acts taking place, but in fact that the accused himself supported the idea of committing these crimes. On the other hand, the Chamber found that the accused bore command responsibility in relation to the broadcasts of RTLM, which led to ‘genocidal harm’. There is a contradiction here, which as such is not specific to this case but concerns the whole issue of command responsibility for the crime of genocide. In this case, how could one expect that the accused would prevent or punish the acts of his subordinates if, in fact, the extermination of the Tutsi population was exactly what he wanted? The issue of genocide and command responsibility is not exclusively a point of discussion in cases against civilian superiors, but the fact that this controversial line of reasoning was used here partly contributed to another conviction of a civilian superior under Article 6(3).

The second issue concerns Barayagwiza’s *de facto* authority to prevent the ‘genocidal harm’ from occurring. As has been discussed earlier in this study, the *ad hoc* tribunals have interpreted the command responsibility provisions so as to require not only authority in relation to subordinates, but effective control over those subordinates. In the present case, a

---

367 Ibid., para. 972.
368 Ibid., para. 973.
369 Ibid.
causal connection was found between the broadcasts and the actual killings. Groups of perpetrators were also identified. But did Barayagwiza exercise effective control over these perpetrators? It was found that the accused could have used his authority to stop the broadcasts or intervene and change the message of the broadcasts and thereby prevent the crimes. However, it is very questionable, to say the least, whether one can consider all the possible listeners who were possibly carrying out crimes as a consequence of the broadcasts as subordinates of the accused. What authority would Barayagwiza have had to punish the perpetrators for committing crimes or to bring them before the authorities, in accordance with the requirements of the command responsibility principle, as he had no direct hierarchical, professional or personal relationship with all the listeners? Applying the command responsibility provision in relation to these specific facts and to the crime of genocide is stretching the principle too far.

Considering the responsibility of Barayagwiza in relation to direct and public incitement to commit genocide, which the Trial Chamber did, seems more convincing. Indeed, the Chamber found that the broadcasts of RTLM constituted direct and public incitement to commit genocide and it referred to its earlier finding that Barayagwiza had the specific intent required for genocide. Accordingly, the Chamber found “beyond a reasonable doubt that Barayagwiza was responsible for RTLM programming pursuant to Article 6(3) of the Statute of the Tribunal.” Unfortunately, the arguments concerning his Article 6(3) responsibility are not well set out. It was established that the broadcasts constituted incitement to commit genocide. However, if the accused was to incur responsibility on the basis of Article 6(3), his superior-subordinate relationship should have been in relation to those who carried out the crime of direct and public incitement to commit genocide, i.e., those who worked at RTLM, not the actual perpetrators of the crime of genocide. As set out earlier, Barayagwiza was the ‘number two’ at RTLM and thereby undoubtedly exercised authority over those who actually brought the ‘information’ to the listeners. However, finding out whether he exercised effective control over those persons committing the crime of incitement to commit genocide is secondary to the earlier argument concerning the crime of genocide and Barayagwiza’s genocidal intent. Where the accused supported the thought of and encouraged the killing of members of the Tutsi ethnic group, it may be considered incongruous, in fact illogical, to contend that he

\[370\] Ibid., para. 949.
\[371\] Ibid., para. 1034.
should have prevented and punished those committing the crime. Therefore, the command responsibility principle does not constitute the correct basis for liability in relation to these facts and crimes. The arguments concerning command responsibility for direct and public incitement to commit genocide in relation to RTLM broadcasts would also apply to Nahimana.

In relation to the crimes of extermination and persecution as crimes against humanity the Trial Chamber referred to its findings on genocide and applied the same basis as set out above for finding Barayagwiza responsible under Article 6(3). Article 6(1) and Article 6(3) liability for crimes against humanity was established in relation to RTLM broadcasts (Nahimana) and in relation to actions of the CDR and the Impuzamugambi (Barayagwiza). The Trial Chamber found Nahimana responsible under both provisions on the basis of the facts established in relation to genocide. Barayagwiza was said to have directed and planned extermination carried out by the CDR. His active role in promoting the killing of Tutsi civilians by the CDR and the Impuzamugambi was established in relation to genocide and was used as a basis for his Article 6(1) responsibility for persecution as a crime against humanity. At the same time, the Trial Chamber found that the two accused failed to take the necessary and reasonable measures to prevent the killing of Tutsi civilians and thereby incurred command responsibility with respect to the same events. The same argument as mentioned above applies here; it is illogical to hold the accused responsible for their active role in planning, directing, supporting or otherwise assisting the killing of the Tutsi population and, at the same time, to reproach them for not having taken the necessary and reasonable measures to prevent the crimes.

The Appeals Chamber reversed the convictions to a considerable degree in this case. The main issue was the error made by the Trial Chamber in finding that the broadcasts of RTLM before 6 April 1994 contributed to the acts of genocide, which, according to the Appeals Chamber, they did not. In the case of Nahimana, the consequence of the finding was that all

---

372 The same logic was articulated in *Blaškić*, TC Judgement, para. 337, where the Trial Chamber stated the following: “It would be illogical to hold a commander criminally responsible for planning, instigating or ordering the commission of crimes and, at the same time, reproach him for not preventing or punishing them.”

373 *Nahimana et al.*, TC Judgement and Sentence, paras. 1064 and 1082.

374 The Impuzamugambi was the youth wing of the CDR.

375 *Nahimana et al.*, TC Judgement and Sentence, paras. 1063-1067, 1081 and 1083.

376 Ibid., paras. 1064 and 1082.

377 Ibid., paras. 1065 and 1067.

378 Ibid., para. 1083.
the findings of guilt under Article 6(1) were reversed. The convictions under Article 6(3) were upheld, as far as they concerned acts caused by RTLM broadcasts after 6 April 1994. With regard to Barayagwiza, the Appeals Chamber reversed some findings under Article 6(1) relating to his activities within the CDR, while affirming others. His conviction under Article 6(3) for genocide was reversed, with regard to the RTLM, because the effective control of the accused was only established for the period before 6 April 1994. With regard to the finding of guilt on genocide in relation to the CDR, the Appeals Chamber held that an accused could not be convicted under Article 6(1) and 6(3) on the same count and for the same acts. As regards the conviction for direct and public incitement to commit genocide under Article 6(3) in relation to acts committed by the CDR militants and Impuzamugambi, the Appeals Chamber found that the Trial Chamber had erroneously found that effective control between the accused and the perpetrators was established.\(^{379}\)

The outcome of the case was altered by the findings of the Appeals Chamber. However, the issues raised above as a consequence of the Trial Chamber judgement remain issues of concern as these were not explicitly addressed by the Appeals Chamber. As stated, the reversal of the convictions was based on more factual arguments.

iii) Musema

The case against Alfred Musema was thoroughly analysed above in relation to the question whether Musema, the director of a tea factory, could qualify for the category ‘other superiors’ under Article 28(b) of the ICC Statute. As stated in that context, Musema was charged and convicted under both Article 6(1) and Article 6(3) in relation to the same events.\(^{380}\) As in the Barayagwiza case, the Trial Chamber in the Musema case held that the accused should incur both individual criminal responsibility and command responsibility for the same crimes. On one charge of rape as a crime against humanity, the accused was found guilty only on the basis of Article 6(1). The reason for this finding was the fact that the accused himself had raped a woman and while this was proven beyond a reasonable doubt, it could not be established that his subordinates had committed any such act,\(^{381}\) or more accurately that those

\(^{379}\) Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, AC Judgement Summary, Case No. ICTR-99-52-A, 28 November 2007. The findings in relation to Hassan Ngeze were not of direct relevance to the discussion concerning Art. 6(3).

\(^{380}\) See Chapter 4.2.4 supra.

who, in concert with Musema, raped the woman, were his subordinates.\textsuperscript{382} Evidence to that effect would most likely have led to a conviction in line with the rest of the findings in relation to the other charges, i.e., both under Article 6(1) and Article 6(3).

Later case law dismissed the conviction of an accused under both provisions in relation to the same facts. While presently judgements from the \textit{ad hoc} tribunals would not very likely contain this approach, this finding on cumulative convictions in the Musema judgement and other judgements is not of great concern for future cases. However, the fact that Musema was convicted under both provisions for the same facts again adds to the impression of the command responsibility doctrine as being equally applicable to military commanders and civilian superiors.

iv) Kayishema

In the \textit{Prosecutor v. Clément Kayishema and Obed Ruzindana} the accused were charged with genocide; murder, extermination and other inhumane acts as crimes against humanity; and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, under Article 4(a) of the ICTR Statute. The indictment concerned massacres of members of the Tutsi population that took place at a church complex and at a stadium in Kibuye town, at the church in Mubuga and in the area of Bisesero, all places that were part of the \textit{Préfecture} of Kibuye.\textsuperscript{383} At the time of the events concerned in the indictment, Clément Kayishema was the \textit{Prefect} of the Kibuye \textit{Préfecture}.\textsuperscript{384} Both accused were civilians.\textsuperscript{385} While Ruzindana was charged on the basis of Article 6(1), his co-accused Kayishema was charged under both Article 6(1) and Article 6(3). The Trial Chamber found that Kayishema incurred both individual and command responsibility for the crime of genocide.\textsuperscript{386} It held that, “It is clear that for all crime sites denoted in the Indictment, Kayishema had \textit{de jure} authority over most

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{382} Ibid., paras. 846-853 and 861.
\item \textsuperscript{383} \textit{Prosecutor v. Clément Kayishema and Obed Ruzindana}, First Amended Indictment, Case No. ICTR-95-1-I.
\item \textsuperscript{384} \textit{Kayishema and Ruzindana}, TC Judgement, para. 9.
\item \textsuperscript{385} \textit{Kayishema and Ruzindana}, First Amended Indictment, paras. 23-34.
\item \textsuperscript{386} \textit{Kayishema and Ruzindana}, TC Judgement, paras. 568-569. In relation to the crimes against humanity charged the Trial Chamber found that a conviction under the genocide provision absorbed the crimes charged as crimes against humanity. The Chamber found it to be in the interest of justice not to find the accused guilty of other inhuman acts as crimes against humanity, as the accused had not been properly informed of the specific charges under these counts. As regards the violations against Art. 3 common to the Geneva Conventions and Additional Protocol II, the Trial Chamber stated that it had not been proven beyond a reasonable doubt that the crimes were “committed in direct conjunction with the armed conflict.” See \textit{Kayishema and Ruzindana}, TC Judgement, paras. 577, 587 and 623.
\end{itemize}
\end{footnotesize}
of the assailants, and *de facto* control of them all. It has also been proved beyond reasonable
doubt that the attacks that occurred were commenced upon his orders (Mubuga Church
excepted). They were attacks clearly orchestrated by him, and only executed upon his
direction.”  

The Chamber continued by considering the knowledge requirement of the
command responsibility provision and found that “his identification at the site both before and
during the attacks leave the Trial Chamber in no doubt that Kayishema knew of the crimes
that were being committed by his subordinates.”  

With regard to the third element, the omission to prevent and punish, the Trial Chamber was of the opinion that, “No evidence was
adduced that he attempted to prevent the atrocities that he knew were about to occur and
which were within his power to prevent.”  

Finally, the Chamber stated as follows:

“It is unnecessary to elaborate upon Kayishema’s punishment of these perpetrators, or lack
thereof, in any further detail. The task would be a superficial one in light of the Trial
Chamber’s findings that Kayishema exercised clear, definitive control, both *de jure* and *de
facto*, over the assailants at every massacre site set out in the Indictment. It has also been
proved beyond a reasonable doubt that Kayishema ordered the attacks or, knowing of their
imminence, failed to prevent them.”

Therewith, the Trial Chamber considered it proven that Kayishema incurred responsibility
under Article 6(3).

In its conclusion to the findings on Kayishema’s command responsibility, the Trial Chamber
stated that, “The inherent purpose of Article 6(3) is to ensure that a morally culpable
individual is held responsible for those heinous acts committed under his command.” The
Chamber found that, “Kayishema not only knew, and failed to prevent, those under his control
from slaughtering thousands of innocent civilians; but he orchestrated and invariably led these
bloody massacres”. It concluded by saying that, “[T]n order to adequately reflect his
culpability for these deaths, Kayishema must be held responsible for the actions and atrocities
committed.”

The findings of the Trial Chamber are remarkably contradictive. If the accused orchestrated
and led the massacres, he is undoubtedly to be held liable under Article 6(1). Regardless of

---

387 *Kayishema and Ruzindana*, TC Judgement, para. 504.
whether a conviction under Article 6(1) is possible or not, there is at least no role for command responsibility here. The purpose of the command responsibility doctrine is to hold persons accountable who failed to carry out their duty to prevent or punish crimes. Orchestrating and leading are clearly a way of contributing to the commission of the crimes. The Trial Chamber here obviously did not pay attention to the object and purpose of the doctrine, despite the fact that they discussed the “inherent purpose” of Article 6(3). To say that the purpose of Article 6(3) is to hold “a morally culpable individual” criminally liable is in contradiction with the various meanings of the term responsibility, which was discussed in Chapter 3 of this study. The fact that an accused may be considered as morally culpable for heinous international crimes is not sufficient in a criminal trial, where the legal requirements as set out in the Statute are not fulfilled.

The Appeals Chamber dismissed the appeals in the case and upheld the conviction of Kayishema and Ruzindana, including the conviction of Kayishema under Article 6(3). However, the Appeals Chamber did consider whether the Trial Chamber had erred in finding that the accused had effective control over his subordinates. The Appeals Chamber upheld the view of the Trial Chamber. Interestingly, it pointed out that, “Kayishema was also found to have effective control over the communal police and the gendarmerie, as evidenced by legislative provisions, and the actual control he wielded over all the assailants including the gendarmes, soldiers, prison wardens, armed civilians and members of the Interahamwe as demonstrated by the identification of Kayishema as leading, directing, ordering, instructing, rewarding and transporting them to carry out the attacks.” The finding shows that proof of the civilian superior position of the accused was based on facts indicating that the accused carried out acts falling under Article 6(1). This supports the idea presented earlier in this chapter that whether a civilian is a civilian superior for the purposes of the command responsibility provisions should be determined on the basis of what the person in a certain position does, instead of simply on the basis of what position the person has. This approach by the Trial Chamber is to be applauded. On the other hand, by showing what acts the superior carried out, there is no doubt that he was actively involved in the events. As stated earlier, it is doubtful whether the command responsibility is at all applicable in such a case.

---

392 Kayishema and Ruzindana, AC Judgement, para. 372.
393 Ibid., para. 299.
The findings in this case are in line with those in the Musema case, in which case the Trial
Chambers similarly convicted the accused under both Article 6(1) and Article 6(3) in relation
to the same events.

v) Rugambarara

The initial indictment charged Juvénal Rugambarara, the ‘bourgmestre’ (mayor) of Bicumbi
commune, Kigali-Rural prefecture, with genocide, complicity in genocide, conspiracy to
commit genocide, direct and public incitement to commit genocide, extermination, torture and
rape as crimes against humanity and serious violations of common Article 3 to the Geneva
Conventions, under Articles 6(1) and 6(3).\footnote{Prosecutor v. Juvénal Rugambarara, Judgement and Sentence, Case No. ICTR-00-59-T, 16 November 2007, para. 2.} However, on 12 June 2007 the prosecution filed
a motion in which it sought leave to amend the indictment. The amended indictment was
reduced to one count of extermination as a crime against humanity on the basis of Article
6(3).\footnote{Ibid., para. 3.} Interestingly, the prosecution and the accused a day later jointly filed a motion for
consideration of a plea agreement.\footnote{Ibid., para. 4.} The reason for the amended indictment was not a lack of
evidence, but seems to have been a measure to reach a guilty plea, which, of course,
contributes to the expeditiousness of the proceedings.\footnote{Prosecutor v. Juvénal Rugambarara, Decision on
the Prosecution Motion to Amend the Indictment, Case No. ICTR-00-59-T, 28 June 2007, para. 7.}

The accused, Rugambarara, entered a guilty plea in which he accepted his responsibility for
“having failed in his duty to take the necessary and reasonable steps to ensure the punishment
of his subordinates for the crimes they committed.”\footnote{Ibid., para. 4.5.} He thereby “admitted that he had
effective control over his subordinates and the material ability to punish the perpetrators or
commission an investigation into the said crimes.”\footnote{Rugambarara, TC Judgement and Sentence, para. 5.} This means that he admitted the
existence of a superior-subordinate relationship between himself and “all the conseillers,
communal policemen, local administrators, and armed militiamen located in Mwulire, Mabare
and Nawe secteurs in Bicumbi commune,” as alleged in the amended indictment.\footnote{Ibid., para. 45.}

\footnote{Prosecutor v. Juvénal Rugambarara, Amended Indictment, Case No. ICTR-2000-59-I, 2 July 2007, para. 10.}
Together with the other cases decided by way of a guilty plea the Rugambarara case does not contribute much to the discussion on the applicability of the command responsibility doctrine to civilian superiors. As the case adds another civilian to the list of superiors convicted by an international tribunal under the command responsibility doctrine, it may be considered that guilty pleas are a convenient way for the prosecution to ensure a conviction on the basis of Article 6(3)/7(3). While effective control on the part of the civilian superior is difficult to argue convincingly, a guilty plea on the basis of Article 6(3) ensures that a person who is, as stated in Kayishema, at least “morally culpable” agrees to his criminal liability under the command responsibility provision.

4.3.2.3 Discussion

All the convictions under Article 6(3)/7(3) discussed above may be criticised for various reasons. The guilty pleas are regrettable, from the point of view of command responsibility, because they did not give the prosecution and the defence, and ultimately the judges, the possibility to weigh the evidence and the arguments for and against a conviction of a civilian superior under the command responsibility provision. The other judgements discussed contain clearly contradicting arguments as regards the active/passive relationship between the superior accused and the crimes committed. His active role in the events is used to prove the superior-subordinate relationship with the perpetrators of the crime. The manner in which the arguments are brought forward reduces the validity of the command responsibility provision as a basis for criminal liability. In short, the cases discussed do not offer credible support for the applicability in practice of the command responsibility doctrine to civilian superiors.

4.3.3 Acquitted of Article 7(3)/6(3) charges

An acquittal under the superior responsibility principle may be the consequence of different circumstances, one of the main reasons being the lack of evidence in relation to the superior, which evidently means that the superior is not responsible under the applicable law.  

An example of such a case is that against Ljube Boškoski, who was the Minister of the Interior of the former Yugoslav Republic of Macedonia (FYROM). Having established the superior-subordinate relationship and the knowledge requirement for the purposes of Art. 7(3), the prosecution did not show that the accused failed to take the necessary and reasonable measures to punish the perpetrators of the crimes, as he was informed that reports about the atrocities had been sent to the judicial authorities and that an investigation was being attempted. See Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Judgement, Case No. IT-04-82-T, 10 July 2008, paras. 419-536.
However, a simple but (for the purposes of this study) important consequence of an acquittal of a civilian superior in a case where superior responsibility was charged, is that the applicability of the principle to civilians or at least to the specific civilian in that specific case is not shown. On the other hand, an acquittal may also shed some light on why the principle was not applied or applicable to that specific civilian superior. For this reason, analysing some interesting cases of acquittal may contribute to a complete picture of the applicability of the command responsibility principle to civilian superiors.

In the cases before the ad hoc tribunals concerning clearly civilian superiors, the reasons for the acquittal of the accused have varied. One category of cases led to a finding of not guilty because of the lack of specificity in the indictments or related technical issues in the indictments. Another reason for a failing charge under the superior responsibility provision is the plea agreements and guilty pleas entered by the accused. An obvious, but yet interesting category of cases is that which concerns the accused in relation to which the available or presented evidence at some stage posed a problem for establishing the command responsibility of the accused beyond a reasonable doubt. The last category of acquittals identified here concerns the cases where Articles 7(1)/6(1) and 7(3)/6(3) were unsuccessfully charged at the same time in relation to the same facts.

4.3.3.1 Vague indictments

The lack of sufficient detail in the indictments has caused problems in a few cases against civilian superiors before the ICTR. A vague indictment has not been identified as the main reason for a finding of not guilty under the superior responsibility provision in relation to a civilian accused before the ICTY.

i) Akayesu

In 1994, at the time relevant to the crimes charged, the accused in the Akayesu case served as the bourgmestre of Taba commune and, accordingly, held a civilian position. Akayesu was charged with genocide, crimes against humanity and violations of Article 3 common to the 1949 Geneva Conventions in relation to events in Taba commune, including the killing of Tutsi civilians. In its judgement, the Trial Chamber stated that the accused was charged under Article 6(1) for the crimes alleged in the indictment. With regard to three counts of the
indictment, concerning crimes of sexual violence, the Chamber stated that the accused was additionally or alternatively charged under Article 6(3) of the Statute.\textsuperscript{402}

The Chamber found that the accused “had reason to know and in fact knew that acts of sexual violence were occurring on or near the premises of the bureau communal and that he took no measures to prevent these acts or punish the perpetrators of them.”\textsuperscript{403} Accordingly, there was enough evidence to establish the mental element of the superior responsibility provision. In addition, the Chamber noted that, “[T]he evidence supports a finding that a superior/subordinate relationship existed between the Accused and the *Interahamwe* who were at the bureau communal,”\textsuperscript{404} and who were the physical perpetrators of the crimes. Nevertheless, Akayesu was acquitted under Article 6(3).

The Chamber pointed to the fact that the superior–subordinate relationship between the accused and the perpetrators, which was proven, was not alleged in the indictment, although such a “relationship is a fundamental element of the criminal offence set forth in Article 6(3).”\textsuperscript{405} In addition to this, the Chamber drew a rather oddly formulated conclusion: “The amendment of the Indictment with additional charges pursuant to Article 6(3) could arguably be interpreted as implying an allegation of the command responsibility required by Article 6(3).”\textsuperscript{406} What the Trial Chamber seems to have said was that if the indictment is amended to include charges pursuant to Article 6(3), the accused could also be held responsible under that provision, which is self-evident. Following these two observations, the Chamber concluded that it would not be fair to the accused to make inferences in this regard.

The judgement has been criticised for being too technical regarding the fact that the superior–subordinate relationship was not explicitly laid down in the indictment.\textsuperscript{407} In addition to that, however, what made the conclusions as regards superior responsibility and especially the second observation mentioned above sound odd is the fact that the Chamber refers to additional charges pursuant to Article 6(3) in the indictment, while pointing out the lack of explicit charges referring to the superior–subordinate relationship between the accused and

\textsuperscript{402} *Akayesu*, TC Judgement, para. 471.  
\textsuperscript{403} Ibid., para. 691.  
\textsuperscript{404} Ibid.  
\textsuperscript{405} Ibid.  
\textsuperscript{406} Ibid.  
the perpetrators. In fact, neither of these allegations was explicitly set out in the amended indictment. However, the amended indictment did add some charges to the initial indictment, more specifically those charges of crimes of sexual violence, with reference to which the Chamber discusses superior responsibility. The relevant paragraph of the indictment reads as follows:

“12B Jean Paul Akayesu knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul Akayesu facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul Akayesu encouraged these activities.”408

There is, however, no explicit mention in this paragraph or elsewhere in the indictment of charges on the basis of superior responsibility, whereas it was explicitly stated in the indictment that the accused allegedly incurred individual responsibility and what forms of participation in a crime leads to such responsibility under Article 6(1).409 Whether the prosecution presented oral arguments to the effect that the accused was charged under Article 6(3) was not mentioned in the judgement, which leads to the conclusion that the Chamber need not have considered, or could have decided not to consider, the superior responsibility of the accused in the first place.

Paragraph 12B of the indictment mentioned that Akayesu ‘facilitated’ the commission of the crimes ‘by allowing’ the crimes to occur. Furthermore, ‘by virtue of his presence’ during the commission of the crimes and by ‘failing to prevent’ the crimes, the accused ‘encouraged’ the criminal acts. As in other cases before the ad hoc tribunals, this description of the role of the accused could also have constituted a mode of participation in the crimes, such as aiding and abetting, which falls under Article 6(1). Although the Akayesu case was the first case before the ICTR, even the early indictments of accused before the ICTY included an explicit mention of the basis of responsibility, either individual, superior or both, under which the accused was charged.

408 Akayesu, Amended Indictment, para. 12B.
409 Ibid., para. 11.
This is not the right place to elaborate on the modes of participation or the right form of an indictment, and so the analysis only serves to show that while the Akayesu case is considered as the first case before the ad hoc tribunals in which the principle of command responsibility was examined, the superior responsibility of the civilian superior accused in the case was not even mentioned in the indictment. Accordingly, the Chamber should have avoided the discussion on superior responsibility because it knew that such responsibility was not charged, instead of finally in its decision acquitting the accused under the superior responsibility provision in fairness to the accused, a technicality.

The Akayesu case is usually described as the first case of superior responsibility before the ad hoc tribunals and as a case in which hesitation was expressed in relation to civilian superiors.\(^410\) While it is assumed that the hesitation concerned the superior responsibility of the accused, Akayesu, the judgement reveals that the Chamber did not base its hesitation on the case before it, but on one case decided by the Tokyo Tribunal in the post-Second World War period.\(^411\) As is well known, the approach of the Akayesu Trial Chamber in relation to civilians has been overturned in subsequent ICTR cases.\(^412\) As a consequence, the Akayesu judgement offers very little guidance as to why and how the superior responsibility principle should be applied to civilian superiors.

ii) Ntagerura

André Ntagerura was charged jointly with two others, Emmanuel Bagambiki and Samuel Imanishimwe,\(^413\) in relation to attacks against the Tutsi population in the Cyangugu prefecture, during which one hundred thousand or more people were killed.\(^414\) Ntagerura was charged with genocide; conspiracy to commit genocide; complicity in genocide; extermination as a crime against humanity; and violence to life, health and the physical or mental well-being of persons as serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II.\(^415\) All counts, except one, charged the accused on the

---

\(^{410}\) Schabas 2001, op. cit., p. 553.
\(^{411}\) Akayesu, TC Judgement, paras. 490-491.
\(^{412}\) See, for example, Musema, TC Judgement, paras. 135-136.
\(^{414}\) Prosecutor v. André Ntagerura, Amended Indictment, Case No. ICTR-96-10-I, 29 January 1998.
\(^{415}\) Ibid., at Charges.
basis of Article 6(1). Under one count of complicity in genocide, Ntagerura was charged solely on the basis of Article 6(3).

At the time relevant to the indictment, Ntagerura was the Minister of Transport and Communications of the Republic of Rwanda and a prominent member of the ruling party, the Mouvement republican national pour la démocratie et le développement (MRND). Ntagerura allegedly had “strong political and community ties in Cyangugu préfecture.”

The Trial Chamber acquitted the accused on all counts. Considering the charge of complicity in genocide under Count 6 of the indictment, the Trial Chamber simply found that the prosecution had not proven the allegations related to this count beyond a reasonable doubt. In its legal findings, the Chamber considered it unnecessary to consider whether Ntagerura incurred command responsibility “as a superior over civil servants of the Ministry of Transport and Communications,” considering its earlier decision that the provisions of the indictment that were relevant to the charge on command responsibility were both vague and failed to identify any criminal conduct on the part of the accused. The vagueness concerned the failure to specify a superior-subordinate relationship between the accused and the perpetrators, the knowledge of the accused, as well as the failure to take necessary and reasonable measures to prevent or punish the perpetrators. Consequently, for the Trial Chamber a vague indictment was sufficient for completely refraining from discussing the command responsibility of Ntagerura. While technically a correct decision, a lack of specificity in the indictment led the Trial Chamber to dismiss a very rare, if not the only, case that charged a civilian superior solely on the basis of command responsibility under one count.

4.3.3.2 Guilty pleas

As discussed earlier in this Chapter, some convictions of civilian superiors on the basis of command responsibility were entered following a guilty plea by the accused. Interestingly,
other plea agreements have excluded that provision and have focussed on a guilty plea on the basis of the individual criminal responsibility of the accused.

i) Serugendo

Joseph Serugendo was a member of the governing board of Radio Television de Mille Collines (RTLM) and an adviser to the RTLM radio station. He also held a position at the Office Rwandais d’Information and was a member of the “enlarged National Committee of the Interahamwe za MRND that exercised authority over the Interahamwe of Kigali.”

Serugendo was charged with conspiracy to commit genocide; genocide or alternatively complicity in genocide; direct and public incitement to commit genocide; and persecution as a crime against humanity. All charges, except that on conspiracy to commit genocide, were brought under both Article 6(1) and Article 6(3).

Serugendo entered into a plea agreement with the prosecution and pleaded guilty to direct and public incitement to commit genocide and persecution as a crime against humanity, on the basis of Article 6(1). The guilty plea and the withdrawal of the other charges meant that Serugendo was not convicted under Article 6(3). As in most cases, the Trial Chamber did consider the superior position of the accused at the sentencing stage and stated the following:

“At all relevant times, Serugendo had no formal position within the government, military, or political structures of Rwanda. In addition, Serugendo did not personally broadcast any anti-Tutsi messages during the relevant period. However, his technical and managerial role was important to the ability of the RTLM to continue to transmit such messages.”

The Chamber continued by saying that, “Although Serugendo’s crimes are grave, the Chamber is not satisfied that he is deserving of the most serious sanction available under the Statute.” Serugendo was sentenced to six years’ imprisonment.

ii) Bisengimana

---

423 Serugendo, Judgement and Sentence, paras. 3-5.
424 Ibid., para. 84.
425 Ibid., para. 85.
426 Ibid., at VI. Disposition.
Paul Bisengimana was the bourgmestre of Gikoro commune in the period of the events concerned in this case.\(^{427}\) Bisengimana was charged with genocide under Article 6(1) and 6(3), complicity (Art. 6(1)), murder (Art. 6(1)), extermination (Art. 6(1)) and rape (Art. 6(1) and 6(3)) as crimes against humanity,\(^{428}\) crimes that were committed in relation to attacks on the Tutsi population in Gikoro commune, part of the Kigali-Rural prefecture.\(^{429}\) Bisengimana pleaded guilty to aiding and abetting murder and extermination as crimes against humanity, under Article 6(1).\(^{430}\) The Trial Chamber withdrew and dismissed the counts to which the accused had not pleaded guilty.\(^{431}\) Accordingly, the charges under Article 6(3) were also dismissed.

Interestingly enough, in the plea agreement the accused agreed to the following description of his superior position:

“By his own account, the Accused’s position as bourgmestre meant that he exercised both \textit{de jure} and \textit{de facto} authority over all public servants and other holders of public office within Gikoro commune, including, but not limited to, the conseillers de de secteur. The conseillers de secteur represented executive power at the secteur level and were responsible for maintaining law and order in their respective secteurs. Paul Bisengimana acknowledges that he had a duty to protect the population, prevent or punish the illegal acts of the perpetrators of the attacks at Musha Church and Ruhanga Complex but that he failed to do so. He admits that he had the means to oppose the killings of Tutsi civilians in Gikoro commune, but that he remained indifferent to the attacks. With respect to the Musha Church massacres, Paul Bisengimana acknowledges that his presence during the attack would have had an encouraging effect on the perpetrators and given them the impression that he endorsed the killing.”\(^{432}\)

In other words, according to the plea agreement, Bisengimana admittedly fulfilled all the elements necessary to prove command responsibility. There existed a superior-subordinate relationship between him and the perpetrators, he had the means to prevent the crimes and was aware of the perpetrators’ intentions to commit crimes, but he remained indifferent and failed to prevent or punish the crimes of the perpetrators. Nevertheless, the Trial Chamber accepted a guilty plea according to which the accused was responsible for aiding and abetting crimes under Article 6(1) of the Statute. There was no subsequent mention of Article 6(3).

\(^{427}\) \textit{Prosecutor v. Paul Bisengimana}, Judgement and Sentence, Case No. ICTR-00-60-T, 13 April 2006, para. 37.

\(^{428}\) Ibid., para. 7.

\(^{429}\) \textit{Prosecutor v. Paul Bisengimana}, Indictment, Case No. ICTR-00-60-I, 10 July 2000.

\(^{430}\) \textit{Bisengimana}, TC Judgement and Sentence, para. 19.

\(^{431}\) Ibid., para. 12.

\(^{432}\) Ibid., paras. 38-39.
iii) Discussion

While the guilty pleas do not add much to the discussion on the application of the command responsibility doctrine by the *ad hoc* tribunals, they do illustrate the ‘safety-net function’ that the command responsibility charges have had in many cases, in particular in the early cases brought before the tribunals. In relation to both Serugendo and Bisengimana, the accused were clearly involved in the events in a manner that justified a conviction on the basis of their individual criminal responsibility. That they were also charged under Article 6(3) was to be certain that there would be a conviction. Consequently, that the plea agreements left out Article 6(3) is understandable, as the cases did not constitute ‘pure’ command responsibility cases.\(^\text{433}\)

**4.3.3.3 Insufficient proof of the elements**

**4.3.3.3.1 Effective control**

i) Kordić and Čerkez

Where the superior position and authority of a civilian has been established, the Trial Chamber has in some cases based its acquittal of the superior on the lack of effective control of the superior over his subordinates. As has been mentioned earlier, this constitutes one of the crucial factors in establishing the existence of a superior-subordinate relationship, which, in turn, constitutes one of the three elements of superior responsibility. As will be shown below, the effective control requirement has become one of the main reasons for acquitting civilian superiors under superior responsibility.

An interesting case in this respect is the case against Dario Kordić and Mario Čerkez,\(^\text{434}\) and in particular the considerations with regard to Kordić, a regional political leader in Central Bosnia and, hence, a civilian. Kordić was charged with crimes against humanity, grave breaches and violations of the laws or customs of war, including the persecution and murder of Bosnian Muslim civilians, in several different places within Central Bosnia. The prosecution alleged that Kordić was both individually responsible for the crimes charged, and as a superior. The accused was said to have been instrumental in the campaign of persecution.

\(^{433}\) See the references to ‘pure’ command responsibility in Chapters 5.3.2.2 and 6.2.3 *supra*.

\(^{434}\) *Kordić and Čerkez*, TC Judgement.
and in launching attacks on Bosnian Muslim towns and villages. Importantly, the prosecution case was that although, admittedly, the accused was a political leader, he “acted as an HVO Commander, gave orders to local commanders and was known as ‘Colonel’.‘’

The accused was found guilty under Article 7(1) of the Statute for planning, instigating and ordering crimes.

The Trial Chamber found that while Kordić “played an important role in military matters, even at times issuing orders, and exercising authority over HVO forces, he was, and remained throughout the Indictment period, a civilian, who was not part of the formal command structure of the HVO.”

Although Kordić allegedly held the rank of Colonel during the war, the Trial Chamber considered that this indicated “a military role, but no more.” Consequently, the Trial Chamber turned to consider whether Kordić could be held responsible under Article 7(3) as a civilian.

It was admitted that as a civilian, Kordić had tremendous influence and power in Central Bosnia and occupied an important position in the leadership of the HZ H-B. Nevertheless, relying on the Appeals Chamber Judgement in the Čelebići case, the Trial Chamber stressed that even substantial influence was no indication of effective control. Kordić did not have a material ability to prevent or punish crimes, which according to the Trial Chamber meant that he was neither a commander nor a superior in respect of the HVO and, therefore, he was not liable under Article 7(3).

The reasoning of the Trial Chamber could be seen as a straightforward interpretation of earlier case law being applied to the case at hand. On the other hand, the outcome of the case in respect of Kordić raises questions with regard to the object and purpose of the superior responsibility principle. Although the Kordić case is not unique, in this respect, it illustrates a specific problem in applying superior responsibility to civilians.

The reference that was made in the Kordić case to the Čelebići case concerned the accused Delalić. The Trial Chamber agreed with the Appeals Chamber in Čelebići that the influence of

---

Ibid., para. 13.
436 Ibid., para. 839.
437 Ibid., para. 772.
438 The Croatian Community of Herceg-Bosna.
439 Kordić and Čerkez, TC Judgement, paras. 838-841.
a person, as such, did not fulfil the requirement of effective control, the now widely accepted element of superior responsibility. That such an interpretation of this element of superior responsibility is not accurate, would at present, not least considering the case law, be difficult to sustain. Accordingly, the problem is not the theoretical interpretation of how effective control should be established, but the application of this theory in practice.

The problem of an acquittal based on the argument of a lack of effective control is more apparent in relation to the accused, Kordić, than, for example, with regard to Delalić in the Čelebići case. While Kordić was a regional leader with, admittedly, “tremendous influence and power,” 440 and he also “played an important role in military matters,” 441 the Trial Chamber in Čelebići concluded that Delalić was simply a “well-placed influential individual,” but that he did not have any “political or military authority.” 442 All allegations to the contrary were rejected by the Trial Chamber. It is clear from the judgements that the role and authority of Kordić were of significant importance for the commission of the criminal acts, while the evidence did not support such findings in relation to Delalić. The problem of the object and purpose of the superior responsibility of civilians in relation to these two cases is that the assessment of the facts in relation to the effective control of the superior seems to have been the same, despite the significantly different roles and circumstances of the accused. But even if the assessment in both cases was right, the question is when would the effective control factor have been met?

Delalić was acquitted on all counts, both under Article 7(1) and 7(3). Kordić, on the other hand, was sentenced to 25 years’ imprisonment on the basis of his individual criminal responsibility. The prosecutor did not appeal against the acquittal of Kordić on superior responsibility and the Appeals Chamber upheld Kordić’s sentence and did not consider his superior responsibility any further.

It seems easier to accept that someone who was acquitted on all counts and had no part in any of the criminal acts charged, was not responsible under the superior responsibility provision either. As for Kordić, the question from the point of view of the superior responsibility principle is, if the assessment in his case was correct, the following: What does it take to make

440 Ibid., para. 838.
441 Ibid., para. 839.
442 Čelebići, TC Judgement, para. 658.
a civilian superior responsible under the superior responsibility principle? As stated above, the problem may not be the effective control requirement, as such, but how to reach the level of acceptance that a civilian superior indeed had this effective control over the physical perpetrators of the crimes. It could simply be argued that this is a question of evidence, and that in cases where enough evidence has been gathered to prove the effective control, the civilian superior will be found liable under the superior responsibility provision. However, when considering the case law, in particular the cases decided by the ICTY, this argument has proven unsatisfactory, as very few civilians have been actually convicted under Article 7(3).

The reasoning in Kordić was that he was not a commander, nor a superior (or this was not shown to be the case). Also in the Brđanin case, the accused was not considered to have had effective control over the ‘physical perpetrators’. During the period in which the crimes charged were committed, Radoslav Brđanin occupied a political position in the Bosanska Krajina Municipalities Assembly and the position of President of the Autonomous Region of Krajina (ARK) Crisis Staff. With regard to the command responsibility charges, the Trial Chamber found that the ARK Crisis Staff had *de facto* authority over the municipal authorities and the police. The ARK Crisis Staff also exercised influence over the army and Serbian paramilitary units. Although the municipal authorities, the police, the army and the paramilitary organisations implemented the decisions and executed the orders given by the ARK Crisis Staff, the Trial Chamber found that the accused did not exercise *de facto* effective control over the members of these groups, as he did not have the material ability to prevent or punish crimes committed by them.

On the other hand, the Trial Chamber held that, “In the instant case, the Trial Chamber is satisfied that the Accused held positions of authority at the highest level in the ARK and that he abused this authority in a way which discriminated against Bosnian Muslims and Bosnian Croats and brought them great harm and misery. The Trial Chamber therefore agrees with the Prosecution that it is appropriate to consider the Accused’s senior position and his abuse of authority as an aggravating factor of considerable weight.” Accordingly, the accused was found to have fulfilled positions of authority, but not to an extent which justified a finding of command responsibility. In this regard, the Brđanin case is similar to the case against Kordić.

---


444 Ibid., paras. 370-377.
As for the more recent judgements, it seems that the Trial Chambers have chosen an easier way to avoid the problematic ‘effective control’ argument in relation to both civilian and military superiors. They have come up with the ‘not necessary to consider’ argument, which will be elaborated upon in the sub-chapter on unsuccessful cumulative charges.

ii) Kamuhanda

The ‘lack of effective control’ argument has also been used in a number of cases against civilian superiors in the context of the Rwandan genocide. The Prosecutor v. Jean de Dieu Kamuhanda concerned the crimes committed against the Tutsi population in the Gikomero commune, Kigali-Rural prefecture. The accused, Kamuhanda, held the office of Minister of Higher Education and Scientific Research in the interim government of Rwanda from late May 1994 to mid-July 2004. He was also an influential member of MRND in Kigali.  

The indictment charged Kamuhanda under Article 6 in general, making no specification as to whether the charges concerned Article 6(1) or Article 6(3). The Trial Chamber convicted the accused of instigating, ordering and aiding and abetting genocide and extermination as a crime against humanity, under Article 6(1). The AC affirmed the conviction for genocide and extermination as a CAH, but overturned the convictions for instigating and aiding and abetting genocide and extermination.  

The Trial Chamber made the following finding with regard to the superior position of the accused:

“The Chamber finds that no specific evidence has been brought to it as regards the nature of the relationship between the Accused and the attackers of the Gikomero Parish Compound. There has been no clear evidence presented by the Prosecution that the Accused had a superior-subordinate relationship with these attackers nor that he maintained effective control over them during the period relevant to the Indictment. This finding is not inconsistent with the Chamber’s earlier finding that the Accused was in a position of authority over the attackers, for purposes of his responsibility under Article 6(1) for ordering the attack at the Gikomero Parish Compound. The finding of a position of

446 Kamuhanda, Indictment.
448 Kamuhanda, TC Judgement and Sentence, paras. 700 and 750.
authority for purposes of ‘ordering’ under Article 6(1) is not synonymous with the presence of ‘effective control’ for purposes of responsibility under Article 6(3). It is settled that the two provisions are distinct: and, in our view, so are the considerations for responsibility under them. Therefore the Chamber does not find that the Accused can bear criminal responsibility as a superior under article 6(3) of the Statute for the crimes that occurred in Kigali-Rural préfecture between 1 January 1994 and July 1994.*

According to the Trial Chamber, there was a lack of proof as to the effective control of the accused in relation to his subordinates. The fact that the accused was in a position which showed that he had the authority to order an attack, was not equivalent to concluding that he exercised effective control over the perpetrators. The reasoning by the Trial Chamber is problematic. It is true that the two provisions, Article 6(1) and Article 6(3), are distinct and, therefore, need distinct considerations, but this finding raises the following question: If the accused had the authority to order the perpetrators to attack the civilians, did he not have the authority to prevent the attacks by ordering the perpetrators not to attack the Tutsi population? Whether command responsibility is the right basis for responsibility in the case of Kamuhanda is a different issue, as he obviously incurred responsibility under Article 6(1). However, the reasoning of the Trial Chamber is unsatisfactory when asking what, then, would have been required to establish the effective control of the accused, if his authority to ‘order’ was not to be considered when establishing whether the accused exercised effective control over the perpetrators.

iii) Niyitegeka

In the case against Eliezer Niyitegeka the accused was charged with genocide, complicity in genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, crimes against humanity, and with serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, in relation to events that for the most part took place in the Kibuye prefecture. Niyitegeka was charged on the basis of individual and command responsibility in relation to all charges, except conspiracy to commit genocide (Art. 6(1) only). At the time relevant to the indictment, the accused held the position of Minister of Information of the interim government. By profession he was a journalist and a radio

450 Kamuhanda, TC Judgement and Sentence, paras. 611-613.
451 Prosecutor v. Eliézer Niyitegeka, Judgement and Sentence, Case No. ICTR-96-14-T, 16 May 2003, para. 7. The charges concerning serious violations of Art. 3 common to the Geneva Conventions and of Additional Protocol II were later withdrawn.
452 Ibid., para. 8.
presenter on Radio Rwanda. Niyitegeka was also a member of the *Mouvement Démocratique Républicain* (MDR) and the chairman of the same party in the Kigali prefecture between 1991 and 1994, as well as a member of the national political bureau. The Trial Chamber found the accused guilty on all counts except for the crime of complicity in genocide and rape as a crime against humanity. The basis for his responsibility was Article 6(1).

The Trial Chamber found that there was no proven superior-subordinate relationship between the accused and the perpetrators of the crime; there was not enough evidence to show that the accused exercised effective control over the actual perpetrators. The Chamber held that as the Minister of Information, the accused had no *de jure* or *de facto* control over “bourgmestres and conseillers, Interahamwe, gendarmes, soldiers, communal police and armed civilians in Kibuye Préfecture,” as alleged by the prosecution. The evidence showed that the accused had been the leader of attacks, but according to the Chamber there was no evidence indicating that he was in a superior-subordinate relationship with the attackers. While the evidence did show that the attackers followed the orders of the accused, there was no evidence that, “[T]hey did so in a superior-subordinate hierarchy, or that the Accused had the ability to prevent or punish them for crimes committed.” There was evidence that at some point the accused had “persuaded the Interahamwe to leave after quoting a Rwandan proverb, and talking to them for approximately ten minutes,” but this exchange was not seen as proof of a superior commanding his subordinates. Accordingly, the existence of a superior-subordinate relationship had not been proven, a finding which led the Chamber to consider it unnecessary to “examine the other elements of superior responsibility.”

The arguments in the *Niyitegeka* case are similar to those in the case against Kamuhanda. While the actual perpetrators of the crimes followed orders given by the accused, the Trial Chamber did not find the ‘effective control’ element to have been proven, and consequently did not find it necessary to consider the remaining elements of the principle.

**iv) Semanza**

453 Ibid., para. 6.
455 *Niyitegeka*, TC Judgement and Sentence, paras. 473-478.
456 Ibid.
457 Ibid., para. 477.
458 Ibid., paras. 477-478.
The indictment against Laurent Semanza contained charges of genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.\textsuperscript{459} The accused had been the bourgmestre of Bikumbi commune, but was replaced in 1993. He remained a member of the MRND and was nominated as a representative of that party to the National Assembly, which was to be established pursuant to the Arusha Accords.\textsuperscript{460} Semanza was found guilty of complicity in genocide as well as rape, torture, murder and extermination as crimes against humanity,\textsuperscript{461} on the basis of Article 6(1).

The Trial Chamber found that the Prosecutor had failed to establish a superior-subordinate relationship between the accused and the perpetrators of the crimes. Therefore, it considered it unnecessary to consider whether the accused fulfilled the knowledge requirement or whether he took the necessary and reasonable measures to prevent the crimes.\textsuperscript{462} In the opinion of the Trial Chamber, the prosecution had not established that a parliamentarian exercised \textit{de jure} authority over militia members and other persons, the principal perpetrators of the crimes.\textsuperscript{463} It also rejected the assertion that based on his influence in the community he exercised \textit{de facto} authority over the perpetrators.\textsuperscript{464} Subsequently, the Trial Chamber rejected the evidence according to which the accused appeared to be “commanding” or “coordinating” principal perpetrators and “to have given orders or permission to kill or rape Tutsis.”\textsuperscript{465} The Chamber did not consider this evidence “credible or reliable” for the purposes of establishing Semanza’s effective control.\textsuperscript{466} The Chamber indicated that, “[W]itnesses who are outside of or unfamiliar with an alleged formal or informal hierarchy do not necessarily provide the best indication of an individual’s actual superior authority.”\textsuperscript{467} In addition, the Trial Chamber was

\textsuperscript{460} Ibid., para. 15.
\textsuperscript{461} Ibid., para. 553.
\textsuperscript{462} Ibid., para. 418.
\textsuperscript{463} Ibid., para. 412.
\textsuperscript{464} Ibid., para. 413. The influence of the accused was illustrated by: “(i) his more than twenty years of service as bourgmestre ending in 1993; (ii) the support and good will he enjoyed from the majority of the community based on his prior good works; (iii) his ‘promotion’ to serve in parliament for the Kigali-Rural prefecture; (iv) his continued public presence alongside the new bourgmestre, Rugambarara, and many people’s belief that he was still the bourgmestre; (v) his alleged role as chairman of the MRND party in Kigali-Rural; (vi) his alleged close connections to President Habyarimana and other high government officials; and (vii) his wealth.”
\textsuperscript{465} Ibid., para. 414.
\textsuperscript{466} Ibid., para. 416.
\textsuperscript{467} Ibid.
of the view that the prosecution had not presented sufficient evidence as to the material ability of the accused to prevent the crimes or to punish the perpetrators.\footnote{Ibid., para. 417.}

The arguments as to why ‘effective control’ on the part of the accused was not shown beyond a reasonable doubt differ slightly from the arguments in the \textit{Niyitegeka} and \textit{Kamuhanda} cases. In \textit{Niyitegeka} and \textit{Kamuhanda} the Trial Chamber doubted that proof of the accused giving orders to the perpetrators could be used to show effective control, while in Semanza the Trial Chamber doubted the credibility and reliability of certain witnesses on such specific details as the nature of a superior-subordinate relationship.

v) Ntakirutima, Gérard

Gérard Ntakirutima, a medical doctor at the hospital of the Seventh Day Adventist Church, at Mugonero Complex, Gishyita commune,\footnote{Prosecutor \textit{v.} Elizaphan and Gérard Ntakirutimana, Judgement and Sentence, Cases No. ICTR-96-10 \& ICTR-96-17-T, para. 38.} was charged on the basis of Article 6(1) and Article 6(3) in relation to the massacres at Mugonero Complex and on the basis of Article 6(1) in relation to the massacres in the area of Bisesero, in the Gisovu and Gishyita communes.\footnote{Ntakirutimana, TC Judgement and Sentence, paras. 13 and 15. Gérard Ntakirutimana was charged with genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity, and serious violations of Art. 3 common to the Geneva Conventions and of Additional Protocol II. Gérard Ntakirutimana’s co-accused and father, Élizaphan Ntakirutimana, was not charged under Art. 6(3).} The prosecution alleged that on or about 10 April 1994, the accused became the \textit{de facto} director of Mugonero Hospital and that in this capacity he had effective control over certain members of personnel of the hospital, who attacked Tutsi refugees at the Mugonero Complex.\footnote{Ibid., paras. 431-432.} The accused was found guilty of genocide and murder as a crime against humanity under Article 6(1).\footnote{Ibid., para. 878.}

The findings with regard to the command responsibility of Gérard Ntakirutimana seem well reasoned. The Chamber observed that even if there was evidence which established that the accused assumed the directorship of Mugonero Hospital, this evidence, alone did not demonstrate that he exercised effective control over hospital staff. On the other hand, the Chamber pointed out that the fact that there was no administrative relationship between the accused and one of the perpetrators (an employee of the nursing school, which was part of the Mugonero Complex), did not preclude that the accused had effective control over that relationship.

\footnote{Ibid., para. 417.}
\footnote{Prosecutor \textit{v.} Elizaphan and Gérard Ntakirutimana, Judgement and Sentence, Cases No. ICTR-96-10 \& ICTR-96-17-T, para. 38.}
\footnote{Ntakirutimana, TC Judgement and Sentence, paras. 13 and 15. Gérard Ntakirutimana was charged with genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity, and serious violations of Art. 3 common to the Geneva Conventions and of Additional Protocol II. Gérard Ntakirutimana’s co-accused and father, Élizaphan Ntakirutimana, was not charged under Art. 6(3).}
\footnote{Ibid., paras. 431-432.}
\footnote{Ibid., para. 878.}
perpetrator. The Trial Chamber considered that the evidence adduced was decisive in this respect.\footnote{Ibid., para. 436.} Having considered the testimonies given, the Trial Chamber found that very little evidence had been introduced that would have clarified the relationship between the accused and the principal perpetrators. The accused had been seen in the company of the perpetrators, but no information was provided which would have established that the accused exercised effective control over the perpetrators. Consequently, the Trial Chamber concluded that the prosecution had failed to show that Gérard Ntakirutimana exercised effective control over the perpetrators of the crimes.\footnote{Ibid., paras. 437-438.}

473

474

475

476

477

4.3.3.3.2 Knowledge

i) Bagilishema

Ignace Bagilishama was the bourgmestre of Mabanza commune, Kibuye prefecture. Bagilishama was accused under both Article 6(1) and Article 6(3) in relation to crimes committed against Tutsi in several communes of the Kibuye prefecture.\footnote{Prosecutor v. Ignace Bagilishema, Amended Indictment, Case No. ICTR-95-1A-I, 17 September 1999, para. 5. The accused was charged with: genocide; complicity in genocide; murder, extermination and other inhuman acts as crimes against humanity; and serious violations of Art. 3 common to the Geneva Conventions and of Additional Protocol II, under Art. 6(1) and 6(3).} The Trial Chamber acquitted the accused on all counts,\footnote{Prosecutor v. Ignace Bagilishema, Judgement, Case No. ICTR-95-1A-T, 7 June 2001, at VI. Verdict.} and the Appeals Chamber affirmed the acquittal.\footnote{Prosecutor v. Ignace Bagilishema, Appeal Judgement (Reasons), Case No. ICTR-95-1A-A, 3 July 2002, at VI. Disposition.}

The prosecution appeal included allegations of errors relating to the finding of the Trial Chamber under Article 6(3), more specifically as to whether the Trial Chamber considered the ‘had reason to know’ test, as to the finding that it was established beyond a reasonable doubt that the accused ‘had reason to know’ as required by Article 6(3). The prosecution also alleged errors regarding the analysis by the Trial Chamber of the superior-subordinate relationship between the accused and the perpetrators.\footnote{Ibid., para. 24.}

The Appeals Chamber found that the Trial Chamber had rightly established that Bagilishama “neither knew nor possessed information which would have enabled him to conclude, in the circumstances at that time,” that his subordinates had committed or were about to commit
Although not invalidating the judgement of the Trial Chamber, the Appeals Chamber on this issue admitted that the Trial Chamber had committed an error of law when applying the ‘had reason to know’ test. The Appeals Chamber found that the Trial Chamber had applied a ‘criminal negligence’ test, which in the opinion of the Appeals Chamber “cannot be the same as the ‘had reason to know’ test in terms of Article 6(3) of the Statute.” The Appeals Chamber made the following statement:

“References to ‘negligence’ in the context of superior responsibility are likely to lead to confusion of thought, as the Judgement of the Trial Chamber in the present case illustrates. The law imposes upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed, and to punish crimes which he knows or has reason to know had been committed, by subordinates over whom he has effective control. A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or wilfully disregarding them.

Depending on the nature of the breach of duty (which must be a gross breach), and the gravity of the consequences thereof, breaches of duties imposed by the laws of war may entail a disciplinary rather than a criminal liability of a superior who is subject to military discipline. The line between those forms of responsibility which may engage the criminal responsibility of the superior under international law and those which may not can be drawn in the abstract only with difficulty, and the Appeals Chamber does not need to attempt to do so in the present Judgement. It is better, however, that Trial Chambers do not describe superior responsibility in terms of negligence at all.

As stated earlier, the wrongly applied test did not invalidate the finding of the Trial Chamber that the accused did not have knowledge of the crimes as required by Article 6(3), and should, therefore, be acquitted. The same outcome was upheld even after additional findings of two errors of law made by the Trial Chamber. First, the Appeals Chamber found that the Trial Chamber had made an error with regard to the notion of ‘effective control’, “to the extent that it suggested that the control exercised by a civilian superior must be of the same nature as that exercised by a military commander.” According to the Appeals Chamber it is “sufficient that, for one reason or another, the accused exercises the required ‘degree’ of control over his subordinates, namely, that of effective control.” “It is not suggested that ‘effective control’ will necessarily be exercised by a civilian superior and by a military commander in the same way, or that it may necessarily be established in the same way in relation to both a civilian

479 Ibid., paras. 37 and 45-46.
480 Ibid., para. 37.
481 Ibid., para. 35-36.
482 Ibid., para. 55.
483 Ibid.
superior and a military commander.”\textsuperscript{484} Secondly, the Appeals Chamber found that the Trial Chamber had failed to consider the \textit{de facto} authority of the accused. The Trial Chamber erroneously held that, “[B]oth \textit{de facto} and \textit{de jure} authority need to be established before a superior can be found to exercise effective control over his or her subordinates.”\textsuperscript{485}

All things considered, the conclusion of the Appeals Chamber was that even if a \textit{de facto} superior-subordinate relationship had been found when applying the right test, the lack of knowledge of the accused would anyway have led to an acquittal under Article 6(3).

\textbf{4.3.3.3.3 Necessary and reasonable measures}

At the time of the events referred to in the indictment in the \textit{Ntagerura, Bagambiki and Imanishimwe} case, one of the accused, Emmanuel Bagambiki, was the prefect of the Cyangugu prefecture. He was charged under Article 6(1) and 6(3) in relation to crimes committed in Cyangugu prefecture.\textsuperscript{486} Bagambiki was acquitted on all counts.\textsuperscript{487}

According to the prosecution, Bagambiki was the \textit{de jure} and \textit{de facto} superior of “sub-prefects, bourgmestres, all government employees in the prefecture, gendarmes and soldiers.”\textsuperscript{488} The Trial Chamber considered the alleged superior-subordinate relationship between the accused and each group of subordinates in turn. With regard to the gendarmes, Rwandan law provided that a prefect could requisition the gendarmes to participate in operations in a prefecture. However, an ability to requisition was not the same as \textit{de jure} authority over the gendarmes, as the control of the gendarmes stayed with the officer in charge. While there was evidence to show that Bagambiki did requisition the gendarmes, there was insufficient evidence that the accused would have exercised \textit{de facto} control over how the gendarmes carried out their mission.\textsuperscript{489} The same reasoning applied to the soldiers. While a prefect had authority to requisition their participation, the Trial Chamber found that the accused had neither \textit{de jure} authority over them, nor \textit{de facto} authority, based on the

\textsuperscript{484} Ibid., para. 52.  
\textsuperscript{485} Ibid., para. 61.  
\textsuperscript{486} Prosecutor v. Emmanuel Bagambiki and Samuel Imanishimwe, Indictment, Case No. ICTR-97-36-I, 13 October 1997, para. 3.31. Bagambiki was charged with genocide, complicity in genocide, conspiracy to commit genocide (Art. 6(1) only), crimes against humanity and serious violations of Art. 3 common to the Geneva Conventions and of Additional Protocol II.  
\textsuperscript{487} Ntagerura et al., TC Judgement and Sentence, para. 805.  
\textsuperscript{488} Ibid., para. 631.  
\textsuperscript{489} Ibid., paras. 633-639.
With regard to the other officials, the Trial Chamber found that Rwandan law provided for a *de jure* relationship of authority between the prefect and the bourgmestre and the communal police. As the accused did not refute that he had effective control over these officials, the Chamber considered that established. No other *de jure* or *de facto* superior-subordinate relationships between the accused and the perpetrators were established.

The Trial Chamber continued by considering whether the accused fulfilled the knowledge requirement in relation to the crimes committed by his subordinates, the bourgmestre of Kagano commune and the communal police. There was evidence to show that the accused was neither present nor was he informed about a certain attack in which the bourgmestre and the communal police participated, until after its completion. The Chamber concluded that the accused did not have advance knowledge of the attack and, therefore, could not have prevented it. In addition, there was insufficient evidence to establish whether Bagambiki “should have known” that the communal police were involved in the attack. With regard to the knowledge of the accused in relation to the bourgmestre, the Chamber found that items looted during the attack were found in the possession of the bourgmestre and, consequently, that Bagambiki “should have known” that the bourgmestre participated in the attack. That having been established, the Trial Chamber finally found that the prosecution had failed to prove beyond reasonable doubt that the accused did not take the necessary and reasonable measures to punish the bourgmestre for his role in the attack. Bagambiki was shown to have suspended the bourgmestre and according to the Chamber, this was the correct available disciplinary measure for a prefect under the applicable law. As the prosecution did not submit any evidence as to what other punitive measures the accused could have taken, the Trial Chamber found that Bagambiki did take the necessary and reasonable measures as required by the command responsibility principle. The Appeals Chamber dismissed the appeal by the prosecution on Bagamibiki’s responsibility under Article 6(3).

The *Bagambiki* case is one of very few cases in which the *ad hoc* tribunals found the superior-subordinate relationship and the knowledge requirement proven and then went on to consider

---

490 Ibid., paras. 640-643.
491 Ibid., paras. 644-646.
492 Ibid., para. 649.
493 Ibid., para. 650.
whether there was an actual failure on the part of the superior. In this sense the reasoning in
the case is not inconsistent or contradictory.

There may be a discussion as to whether the dismissal of the bourgmestre constituted the
necessary and reasonable measures to be taken by a superior. If the dismissal of a subordinate
who has committed international crimes is a sufficient measure to escape command
responsibility, the case sets a disturbing precedent for future cases. Where it is not necessary
that the superior ensures the initiation of a criminal procedure against the subordinate, it
seems that the necessary measure needed for the purposes of the command responsibility
provision is not in proportion with the harm caused. The civilian superior finds out that a
subordinate has committed international crimes, simply dismisses the subordinate and knows
that he will not incur responsibility under the command responsibility provision.

On the other hand, it may be argued that a dismissal is, indeed, the only measure available for
a civilian superior in the position of prefecture in relation to the bourgmestre in the Rwandan
context. If that is the case, the Bagambiki judgement is a clear illustration of why the
command responsibility principle is more suitable for the prosecution of military
commanders. The military law system enables a commander to either impose disciplinary
measures or to report the crime of a subordinate to a prosecuting authority. In other words, a
military commander cannot that easily fulfil the necessary and reasonable measures
requirement, which in turn ensures that the hierarchical responsibility system of the armed
forces is maintained.

4.3.3.4 Unsuccessful ‘cumulative charges’

In some cases the accused have been cumulatively charged both under Article 7(1)/6(1) and
Article 7(3)/6(3), but the tribunals have found that a conviction under the individual criminal
responsibility provision is the preferred basis for a conviction, leading to an ‘acquittal’ under
the command responsibility charges. There have been two alternative ways of reasoning. In
some cases the tribunal has found both individual and command responsibility established by
the prosecution but has decided that the command responsibility incurred is subsumed by the
individual criminal responsibility, or in other words, where responsibility under Article 7(1)
and 7(3) has been established, an Article 7(1) conviction will be entered. The second option
applied by the tribunals was to consider a finding under Article 7(3) unnecessary where
Article 7(1) responsibility was established. Accordingly, in these cases the tribunal refrained from making any finding at all under the command responsibility provision, which means that the question whether the civilian superior could have been held responsible under Article 7(3) was left unsettled.

4.3.3.4.1 Article 7(1) and 7(3) = 7(1)

For a short period relevant to the indictment, Juvénal Kajelijeli, the accused, was the officially appointed bourgmestre of Mukingo commune. During that period, he allegedly exercised de facto authority as bourgmestre of the same commune.\(^{495}\) Kajelijeli was further alleged to be one of the founders and a leader of the Interahamwe-MRND. According to the prosecution he had close connections to the national secretary general of the MRND, whom he consulted regarding “military training, distributions of weapons and uniforms to Interahamwe and distribution of lists of Tutsi to be eliminated.”\(^{496}\) Kajelijeli was charged in relation to his participation in and his failure to prevent and punish assaults and killings of members of the Tutsi population.\(^{497}\)

The Trial Chamber convicted Kajelijeli of genocide and crimes against humanity under both Article 6(1) and 6(3). Kajelijeli appealed against his conviction under Article 6(3) in relation to crimes committed by the Interahamwe. The Appeals Chamber overturned the decision of the Trial Chamber and quashed the convictions under these counts in so far as they were based on Article 6(3), but not on the basis of an error made by the Trial Chamber concerning the superior-subordinate relationship between Kajelijeli and the perpetrators, as argued by the appellant. Instead the Appeals Chamber based its decision to quash the convictions under Article 6(3) on findings by the ICTY Appeals Chamber, according to which responsibility under both Article 7(1) and Article 7(3) should lead to a conviction on the basis of Article 7(1) only.\(^{498}\)

\(^{497}\) Ibid., paras. 20-22. Kajelijeli was charged with conspiracy to commit genocide, genocide or alternatively complicity in genocide, direct and public incitement to commit genocide, and murder, extermination, rape, persecution and other inhumane acts as crimes against humanity, under both Art. 6(1) and Art. 6(3).
“The ICTY Appeals Chamber has held that in relation to a particular count where a Trial Chamber has convicted an accused under the legal requirements of both Articles 7(1) and 7(3) of the ICTY Statute, ‘a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused’s superior position as an aggravating factor in sentencing.’ Indeed, ‘where the Trial Chamber finds that both direct responsibility and responsibility as superior are proved […] the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of the sentence.’ Clearly, before taking an accused’s superior position into account at sentencing, the Trial Chamber must have found that the accused’s superior position was proven at trial. As held by the ICTY Appeals Chamber, ‘only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused’s sentence or taken into account in aggravation of that sentence.’”

The formulation by the Appeals Chamber is somewhat peculiar in that, on the one hand, it considered a conviction under Article 6(1) to be sufficient, but on the other hand, it found that proof beyond reasonable doubt of the superior position of the convicted person was necessary when considering the aggravating circumstances at the sentencing stage. The Appeals Chamber did not explain what it meant by proving a ‘superior position’ ‘beyond reasonable doubt’. In several other cases an established position of authority has been considered an aggravating circumstance, without having gone through the process of establishing the superior-subordinate relationship beyond reasonable doubt. The purpose of the doctrine is not to be used as a requirement which has to be fulfilled for the purposes of finding the superior position as an aggravating circumstance at the sentencing stage.

4.3.3.4.2 Article 7(1), so no Article 7(3)

One of the main reasons for the acquittal of civilians under the superior responsibility principle by the ICTY is that Article 7(1) responsibility has been established before even considering the charges under Article 7(3). According to both ICTY and ICTR case law, such a finding renders it unnecessary to consider any responsibility under Article 7(3).

i) Kvočka et al.

499 Ibid., para. 82.
500 See, for example, Kamuhanda, TC Judgement and Sentence, para. 764; and Prosecutor v. Laurent Semanza, Appeal Judgement, Case No. ICTR-97-20-A, 20 May 2005, para. 336, where the Appeals Chamber stated the following: “The question of criminal responsibility as a superior is analytically distinct from the question of whether an accused’s prominent status should affect his or her sentence. It was within the Trial Chamber’s competence and reasonable for it to conclude that the Appellant did not hold a hierarchical position sufficient to render him liable for criminal responsibility as a superior while also finding that his influence was substantial enough to constitute an aggravating factor.”
An example of this interpretation of the individual responsibility provision of the Statute can be seen in the *Kvočka* case, where the prosecution had brought charges under both Article 7(1) and Article 7(3).\(^{501}\) Except for the accused Zigić, all the accused were charged under Article 7(3). However, the Chamber found that because liability had already been established for the role of the accused in a joint criminal enterprise under Article 7(1), there was no need to further consider the issue of responsibility as a superior.\(^{502}\) In relation to one of the accused, the Chamber held that, “[H]is participation in the joint criminal enterprise of Omarska camps renders him liable for crimes committed therein and arguably makes Article 7(3) liability duplicative.”\(^{503}\) The Chamber did not elaborate on the reason for its decision.

ii) Stakić

A similar decision was made in the *Stakić* case. At the time of the events described in the case, the accused, Stakić, who by profession was a physician,\(^{504}\) was the President of the self-proclaimed Assembly of the Serbian People of the Municipality of Prijedor. He further assumed the positions of President of the Prijedor Municipal People’s Defence Council, President of the Prijedor Municipal Crisis Staff and later on the position of President of the Municipal Assembly of Prijedor.\(^{505}\) Accordingly, at all times relevant to the case, the accused was a civilian, who held high positions within the municipality, and according to the Chamber, who was “a figure of greatest authority.”\(^{506}\)

However, the Trial Chamber found that the accused had participated in the crimes committed, within the meaning of Article 7(1), and that his mode of participation could best be described as “co-perpetratorship.”\(^{507}\) As in the *Kvočka* case, the Chamber in *Stakić* concluded that as such individual responsibility under Article 7(1) was found, any findings under Article 7(3) were unnecessary. The Chamber reasoned that it was “in general not necessary in the interest of justice and of providing an exhaustive description of individual responsibility to make

\(^{501}\) The accused had a civilian background and occupied various positions with the police before taking up duty at the Omarska, Keraterm and Trnopolje prison camps in the Prijedor region, Bosnia and Herzegovina.


\(^{503}\) Ibid., paras. 412.


\(^{505}\) Ibid., para 336.

\(^{506}\) Ibid., paras. 912-913.

\(^{507}\) Ibid., para. 468.
findings under Article 7(3).”\textsuperscript{508} It even stated that it would be a waste of judicial resources to enter into a debate on Article 7(3) knowing that Article 7(1) responsibility subsumes Article 7(3) responsibility. However, the Chamber specified that this was the case where the Chamber was satisfied beyond reasonable doubt of “both responsibility under 7(1) and the superior positions held by the accused.”\textsuperscript{509}

iii) Ngeze

Prior to and during the events relevant to the indictment the accused, Hassan Ngeze, was the editor-in-chief of the Kangura Newspaper. He was a former member of the political party MRND and one of the founding members of the Coalition for the Defense of the Republic (CDR). Ngeze exercised political control over the \textit{Interahamwe} militia groups. He was charged with crimes in relation to the newspaper \textit{Kangura} under both Article 6(1) and Article 6(3).\textsuperscript{510} The Trial Chamber found Ngeze guilty of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide and persecution and extermination as crimes against humanity on the basis of Article 6(1).\textsuperscript{511} The Trial Chamber made reasoned arguments as to why Ngeze did or did not incur individual criminal responsibility. However, nowhere in its legal findings did the Chamber present any arguments as to why it did not even consider whether the accused fulfilled the elements of the command responsibility principle. One explanation for this may be that in the opinion of the Chamber, a conviction under Article 6(1) makes a finding under Article 6(3) superfluous.

iv) Gacumbitsi

During the period covered by the indictment, the accused, Sylvestre Gacumbitsi, held the position of bourgmestre of Rusumo commune, Kibungo prefecture.\textsuperscript{512} He was charged under both Article 6(1) and Article 6(3) in relation to crimes committed against the Tutsi population in the Kibungo prefecture.\textsuperscript{513} The Trial Chamber found the accused guilty of genocide, and

\footnotesize{\textsuperscript{508} Ibid., para. 466.  
\textsuperscript{509} Ibid.  
\textsuperscript{510} \textit{Nahimana et al.}, TC Judgement and Sentence, para. 10. The accused was charged with conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, complicity in genocide and persecution, extermination and murder as crimes against humanity. Conspiracy to commit genocide was charged under Art. 6(1) only. All the other alleged crimes were based on both Art. 6(1) and Art. 6(3).  
\textsuperscript{511} Ibid., para. 1094.  
\textsuperscript{512} \textit{Prosecutor v. Sylvestre Gacumbitsi}, Indictment, Case No. ICTR-01-64-I, 20 June 2001, part II.  
\textsuperscript{513} Ibid., part III. Gacumbitsi was charged with genocide (Art. 6(1) and 6(3)) or alternatively complicity in genocide (Art. 6(1)), and extermination, murder and rape as crimes against humanity (Art. 6(1) and 6(3)).}
extermination and rape as crimes against humanity.\textsuperscript{514} The Trial Chamber made its findings under Article 6(1) and, due to the similarity of the acts charged, considered it unnecessary to enquire whether the accused also incurred responsibility under Article 6(3).\textsuperscript{515} In addition to the similarity of the acts charged under Article 6(1) and Article 6(3), the Trial Chamber mentioned the lack of evidence of a superior-subordinate relationship as a reason for not considering the Article 6(3) responsibility of the accused.\textsuperscript{516}

In its appeal, the prosecution contended that the Trial Chamber had made an error in not convicting Gacumbitsi under Article 6(3) of the Statute. The Appeals Chamber found that the Trial Chamber had erred in only considering the \textit{de jure} authority of the accused, and that it should have considered whether the accused exercised \textit{de facto} authority over the perpetrators. However, the Appeals Chamber found that the prosecution at the trial stage had only presented evidence of the general authority of the accused to impose law and order in the commune and of the accused playing a leading role in the genocidal campaign. In the opinion of the Appeals Chamber, this did not prove that the accused exercised effective control over the perpetrators. The Appeals Chamber dismissed the appeal on this point.\textsuperscript{517}

\textbf{4.3.3.4.3 Discussion}

The attractive aspect of charging civilian superiors and military commanders cumulatively under Articles 6(1)/6(3) and 7(1)/7(3) is its ‘safety-net function’. If the prosecution cannot prove individual criminal responsibility there is always the chance of a command responsibility conviction. But in relation to civilian superiors in particular, how successful or meaningful has this approach been? Individual criminal responsibility is preferred in all instances, of course not because of some possibility of actually choosing between the two, but because the facts of the cases show that the responsibility of the civilian superior corresponds to that set out in Article 6(1)/6(3). As will be discussed in Chapter 5, there are situations where the individual and command responsibility is not clearly distinguishable, which could justify charges under both provisions. On the other hand, in cases where a superior-subordinate relationship was proven, the effective control requirement has often been

\begin{itemize}
\item \textsuperscript{514} \textit{Prosecutor v. Sylvestre Gacumbitsi}, Judgement, Case No. ICTR-01-64-T, 17 June 2004, para. 334.
\item \textsuperscript{515} Ibid., paras. 290, 315 and 332.
\item \textsuperscript{516} Ibid., para. 332.
\item \textsuperscript{517} \textit{Prosecutor v. Sylvestre Gacumbitsi}, Appeal Judgement, Case No. ICTR-01-64-A, 7 July 2006, paras. 141-146.
\end{itemize}
established on the basis of facts that show that the superior ordered crimes to be committed. The existence of such proof is an indication of the bigger involvement in the crimes than the involvement of the superior for the purposes of command responsibility. Accordingly, that cumulative charges in relation to the same facts would be decided ‘in favour of’ a command responsibility conviction is unlikely.

4.4 Conclusion

The present chapter has shown that just as IHL does not clearly define a civilian, there is no meaningful definition of a civilian superior for the purposes of command responsibility. More important than the definition is the understanding of whether the superior carries out such activities and exercises such powers that the perpetrators committing crimes will be considered as subordinates for the purposes of command responsibility and that the person holding the position may be held criminally liable in relation to the acts committed by these subordinates.

The level of authority of a superior is not an element of command responsibility, but it certainly influences the possibilities of and interest in prosecuting a certain superior under the command responsibility provision. The position and level of authority also constitutes an indication of the ‘effective control’ element that has to be established. A survey of ad hoc tribunal case law indicates that most accused identified as non-military commanders would qualify as de facto military commanders if tried under the ICC provision. The survey also shows that most cases against civilian superiors have ended in an ‘acquittal’, the acquittal, however, not always being based on their lack of effective control. In fact, the bases for the ‘acquittals’ have varied to a great extent. While some command responsibility charges were thrown out because of insufficient information in the indictment, other command responsibility charges were set aside when the accused pleaded guilty under charges of individual criminal responsibility. The effective control of some civilian superiors was established, but in these cases sufficient proof was lacking in relation to the mens rea requirement or in relation to the alleged failure of the superior to take the necessary and reasonable measures. The single most important reason for the dismissal of command responsibility charges has been the preference given by the judges to a conviction under the individual criminal responsibility provision, where both bases of responsibility were charged cumulatively.
It may be concluded that despite the fact that the *ad hoc* tribunals have not had to establish criteria for who qualifies as a civilian superior and, thus, have applied the command responsibility provision as being identically applicable to both military commanders and civilian superiors, the result has been very meagre. What does this say about the application of the doctrine to civilian superiors? An obvious conclusion is that so far all cases, whether charging military or civilian superiors, have been based on the same requirements. In theory, there is no higher threshold for holding civilian superiors liable, but in practice case law shows that proving the elements of the command responsibility doctrine in relation to civilian superiors is far from easy. Another conclusion that can be drawn on the basis of the existing case law is that where command responsibility ‘competes’ with individual criminal responsibility in relation to the same facts, there is usually an indication of the superior’s involvement in the crimes, which gives reason to convict him on the basis of his individual responsibility.

As applied and as formulated in Article 28 ICC, the command responsibility doctrine is clearly geared towards military commanders who, indeed, only failed to prevent or punish crimes committed by their subordinates and did not play any other role in carrying out atrocities. There may be superiors in situations that have not been tried by the international tribunals that are suitable for prosecution under the command responsibility provision, but up until now the reality seems to be that where civilians are charged, they occupy high-level positions in which the superior is somehow involved in the events. If the purpose is to hold superiors liable who should have known or even knew about crimes but failed to do anything about this situation, then that is what the superior should have done – failed to prevent or punish – nothing more.