AFFIDAVIT OF JULES LOBEL ON DIRECT AND INDIRECT RESPONSIBILITY OF COMMANDERS AND SUPERIORS FOR WAR CRIMES AND CRIMES AGAINST HUMANITY UNDER INTERNATIONAL LAW

Note:
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I. INTRODUCTION

1. It is well established under international law that individual criminal responsibility is not limited to persons who have directly committed an international crime and personally perpetrated its material elements.[1] Superiors of the direct perpetrators of international crimes such as war crimes and crimes against humanity can be held equally liable for these crimes that they have not personally committed but for which they are nevertheless responsible. This principle implies two different kinds of responsibility: the liability of a superior for giving unlawful orders to his subordinates or for soliciting, inducing or otherwise aiding and abetting a crime, as well as the imputed criminal responsibility for a crime committed by a subordinate over whom the superior had effective control, arising from a superior's failure to prevent or punish a crime he knew was about to or had been committed.

[1] A Trial Chamber at the ICTY held that "[t]he principles of individual criminal responsibility enshrined in Article 7, paragraph 1, of the Statute reflect the basic understanding that individual criminal responsibility for the offences under the jurisdiction of the International Tribunal is not limited to persons who directly commit the crimes in question", *Prosecutor v. Zejnil Delalić et al. ("Čelebići")*, Case No. IT-96-21-T, Judgement, 16 November 1998, at 319.

2. The doctrine of command responsibility of superiors has long been recognized by national and international law.[2] It now constitutes customary international law. The German Code of Crimes against International Law ("CCIL") provides for direct responsibility under its Sections 6, 7 and 8,[3] and for indirect command responsibility in sections 4, 13 and 14. As I am not an expert in German law, I will not attempt to assess the meaning and scope of the CCIL. Rather, this affidavit provides an overview of the principles, laws and judicial decisions that have shaped the standards of international criminal law establishing the individual criminal responsibility of superiors for international crimes, on which the German CCIL was directly based.

II. DIRECT RESPONSIBILITY OF COMMANDERS FOR WAR CRIMES AND CRIMES AGAINST HUMANITY UNDER INTERNATIONAL LAW

3. While the theory of indirect command responsibility punishes a superior for an omission, direct command responsibility of superiors holds such persons responsible for the positive acts that have directly triggered or caused the commission of international crimes, such as ordering, soliciting, inducing, aiding and abetting the perpetration of a war crime or a crime against humanity.

4. This general principle of criminal law has been recognized by national courts for centuries and international law has followed this path. The latest development under international law has been the adoption of the Rome Statute establishing the International Criminal Court (ICC) in 1998, and reflects customary international law. Article 25 (3) (b) and (c) of the Rome Statute provides that:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
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> […]
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

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[2] See, e.g., *Prosecutor v. Hadžihasanović et al.* Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002; Additional Protocol I of 8 June 1977 to the Geneva Conventions of 12 August 1949, Articles 86 and 87...

[3] The German CCIL does not contain any particular provision for specific forms of direct responsibility. The CCIL Government Draft has commented on the absence of such a provision by explaining that Article 25 of the ICC Statute that provides for different forms of individual responsibilities, "is equivalent in content to the forms of commission and complicity in Sections 25 to 27 of the [German] Criminal Code" and for that reason, does not require special implementation in the CCIL (See Draft, p. 36). German Government Draft Code of International Law (Commentary of the German Code of Crimes against International Law), BMJ, Referat II A 5 – Sa, December 28, 2001, available in English at: http://www.iuscrim.mpg.de/forsch/legaltext/VStGBengl.pdf (last consulted on October 1, 2004).

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

[…]

A. Ordering A War Crime Or A Crime Against Humanity Triggers Individual Criminal Responsibility

5. The individual who orders an international crime "is not a mere accomplice but rather a perpetrator by means, using a subordinate to commit the crime".[4] Responsibility for ordering a crime requires that a person in a position of authority uses that authority to instruct another to commit an offense. There is no need for the order to be given in writing or in any particular form; it can be express or implied.[5] The appropriate *mens rea* for ordering is that the act or omission is ordered "with the awareness of the substantial likelihood that a crime will be committed in the execution of that order."[6]

6. The International Criminal Tribunals for the Former Yugoslavia and for Rwanda (ICTY and ICTR) are bound by principles of individual criminal responsibility under customary international law. When establishing the ICTY's Statute, which was unanimously adopted, the United Nations' Secretary General insisted on the fact that "the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise."[7] The *Blaškić* Trial Chamber held, when assessing the elements for ordering a crime, that the "order does not need to be given by the superior directly to the person(s) who perform(s) the *actus reus* of the offence."[8] The chain of command is taken into account to assess a superior's responsibility for issuing unlawful orders. Criminal responsibility arises even when the crimes are executed subsequently by lower-rank officials or soldiers, whether or not the order had been personally given to them.

B. Aiding And Abetting A War Crime Or A Crime Against Humanity Generates Individual Criminal Responsibility

7. Aiding and abetting constitutes a theory of liability that generates individual criminal responsibility. The ICTY summarizes the elements of complicity in international law in the context of aiding and abetting. *Tadic* establishes a broad concept of complicity

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[4] AMBOS, Kai [et al.], *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, edited by Otto TRIFFTERER, Baden Baden: Nomos, 1999, p. 480.
[5] *Ibid*. *See also, Prosecutor v. Galić*, Csae No. IT-98-29-T, Judgement and Opinion, 5 December 2003, para. 168, 171-72; *Prosecutor v. Blaškić*, Case No. IT-95-14-T. Judgment, 3 March 2000, paras. 281-82.
[6] *Prosecutor v. Blaškić*, Case No. IT-95-14-A. Judgment, 29 July 2004, para. 42.
[7] Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)), U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993).
[8] *Blaskic*, 2000, at 282.

based on the English "concerned in the killing" theory: "all acts of assistance" which "encourage or support". In *Furundzija*: "moral support or encouragement" is sufficient and "must make a significance difference to the commission". "In sum, aiding and abetting encompasses any assistance, whether physical or psychological, which, however, had a substantial effect on the commission of the main crime."[9] "The case-law does show that complicity in international crimes does not require full participation in the execution of the crime. The assistance given need not be necessary for the crime: we do not have to show that *but for* the assistance the crime would not have taken place. However the support should have a "substantial effect" on the crime."[10] The U.S. Court of Appeals for the Ninth Circuit in *Unocal III* applied the ICTY standards and the theory of aiding and abetting.[11]

8. As to the Rome Statute, it "makes no requirement that the assistance be either direct or substantial. Assistance need not be tangible, nor need the assistance have a "causal effect on the crime.""[12] Assistance means what "otherwise assists" the commission of a crime ("aids, abets or otherwise assists in its commission", Article 28 (3) (c)). By using the wording "otherwise assists" Article 28 leaves the door open to the judges to interpret what else can support the commission of a crime to the point that the individual should be held responsible for it. It shows that the list of means by which a superior can "assist" a crime and engage its individual criminal responsibility is not exhaustive but rather, is wide. Whether an individual is liable under aiding and abetting is determined on a fact-specific and case-by-case basis.

9. A defendant's culpability for aiding and abetting an international law offense will attach only if the defendant knew that his or her actions would aid the offense. However, the accomplice does not need to share the mens rea of the principal. Article 25(c) of the Rome Statute differs from the ICTY/R statutes on aiding and abetting by requiring a heightened *mens rea* that is "stricter than mere knowledge."[13] Article 25 requires that an individual must act "for the purpose of facilitating" the commission of the predicate crime. This differs from the ICTY/R, which only requires knowledge that one is aiding, abetting or otherwise assisting "in the commission of such a crime." The *mens rea* is further clarified by examining Article 30 of the Rome Statute

III. INDIRECT RESPONSIBILITY OF COMMANDERS UNDER INTERNATIONAL LAW

10. The principle of a superior's criminal indirect command responsibility, as established in international law, is based on a superior's culpable omission and is a

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[9] AMBOS, Kai [et al.], *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, edited by Otto TRIFFTERER, Baden Baden: Nomos, 1999, p. 482.
[10] CLAPHAM, Andrew, "On Complicity", in *Le Droit Penal a l'Epreuve de l'Internationalisation*, edited by Marc HENZELIN and Robert ROTH, Bruylant, Brussels, 2002, pp.241-275, p. 253.
[11] Unocal III, 395 F.3d at 949-51.
[12] CLAPHAM, Andrew, "On Complicity", in *Le Droit Penal a l'Epreuve de l'Internationalisation*, edited by Marc HENZELIN and Robert ROTH, Bruylant, Brussels, 2002, pp.241-275, at p. 254.
[13] Kai Ambos [et al.], *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article*, edited by Otto Triffterer Baden Baden: Nomos, 1999, at 483.

complement to the previous principle of direct responsibility. Indirect responsibility provides for the criminal responsibility of a superior for acts committed by his subordinates if he knew or had reason to know that his subordinates were about to commit such crimes or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts, and / or to punish the perpetrators. This principle has long been affirmed and recognized under international law.[14] The Commentary on the Additional Protocols, with regard to Article 86, explained the principle of command responsibility was not a new doctrine: "The recognition of the responsibility of superiors who, without any excuse, fail to prevent their subordinates from committing breaches of the law of armed conflict is therefore by no means new in treaty law."[15]

11. The ICTY in *Hadžihasanović*, explained: "the purpose behind the principle of responsible command and the principle of command responsibility is to promote and ensure the compliance with the rules of international humanitarian law. The commander must act responsibly and provide some kind of organisational structure, has to ensure that subordinates observe the rules of armed conflict, and must prevent violations of such norms or, if they already have taken place, ensure that adequate measures are taken."[16]

A. International Military Tribunals After World War II Have Set Forth The Principle of Command Responsibility of Superiors For International Crimes

12. After WWII, the principle of superiors' indirect command responsibility was affirmed by the war crimes tribunals, and notably by the trials held by the United States, France, the United Kingdom and the Soviet Union under Control Council Law No. 10 in the *Medical*, the *Hostage* and the *High Command* cases[17]. The Nuremberg Tribunal and the subsequent trials held under Control Council Law No. 10 imposed criminal responsibility on military commanders for failure to act and prevent crimes from being committed. The *Medical* case expressed that there is an "affirmative duty" on superiors to take the appropriate steps when facing crimes committed by subordinates:

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[14] See, e.g., *Prosecutor v. Hadžihasanović et al*. Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003.

[15] Commentary on the Additional Protocols, para. 3540. The ICTY in *Hadžihasanović*, explained: "the Commentary observes that the notion of a breach of international law consisting of an omission is "uncontested" and follows from State practice, case law and legal literature. The Commentary found the basis for the post-Second World War convictions to rest "only on national legislation, either on explicit provisions, or on the application of general principles found in criminal codes." Also in the course of the negotiations at the Diplomatic Conference, a number of delegations commented that the provisions of what was finally included in Article 87 were already found in the military codes of all countries." *Prosecutor v. Hadžihasanović et al.* Case No. IT-01-47-PT, para. 85.

[16] *Prosecutor v. Hadžihasanović et al.* Case No. IT-01-47-PT, para. 66.

[17] *United States v. Karl Brandt and others* (the *Medical* case), Vol. II Law Reports of Trials of War Criminals 171; *United States v. Wilhelm List et al.* (the *Hostage* case), Vol. XI Law Reports of Trials of War Criminals 759; *United States v. Wilhelm von Leeb et al.* (the *High Command* case), Vol. XI Law Reports of Trials of War Criminals 1.

> [L]aw of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war. [p.212]

13. The *High Command* case, which prosecuted fourteen individuals who were all senior officers in the army and navy, or in the German High Command, and convicted eleven of them, made it a "moral obligation under international law for commanders" to take measures in order to prevent or punish subordinates' unlawful actions. Also, while superiors have a duty to prevent offences that are taking place, they also have the duty to require complete information of the on-going events. In the *Hostage* case, it was held that a commander of occupied territory:

> may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence. [At 1271]

14. The International Military Tribunal for the Far East (*the Tokyo Tribunal*) also clearly recognized the principle of indirect command responsibility, and applied it to civilian superiors. It held a broad principle of responsibility that included members of the government, military and naval officials in command of formations dealing with guarding and controlling detainees and prisoners. The judgment of Japanese Foreign Minister Hirota rendered by the Tokyo Tribunal stated that the Minister did receive reports informing him of the atrocities that were being committed by the troops in Nanking, and it convicted him for failing to take the necessary measures to put an end to it. The judgment reads as follows:

> As Foreign Minister he received reports of these atrocities immediately after the entry of the Japanese forces into Nanking. According to the Defence evidence credence was given to these reports and the matter was taken up with the War Ministry. Assurances were accepted from the War Ministry that the atrocities would be stopped. After these assurances had been given reports of atrocities continued to come in for at least a month. The Tribunal is of the opinion that HIROTA was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence". [at 791]

15. This international post-WWII jurisprudence also showed that a formal hierarchical structure is not strictly required when establishing the superior-subordinate relationship between individuals involved in the commission of international crimes[18]; a

[18] In the *Yamashita* case, the General did not have formal powers of command, but he was held responsible because of his *de facto* position of control over the conduct of the Japanese troops. *United States of*

de facto authority is sufficient. The *Hostage* case clearly recognized that indirect subordination does not bar the establishment of an existence of a superior-subordinate relationship to assess the responsibility of superiors for the actions of subordinates. The ICTY also stressed that the *High Command* case's finding that:

> a commander may be held criminally liable for failing to prevent the execution of an illegal order issued by his superiors, which has been passed down to his subordinates independent of him, indicates that legal authority to direct the actions of subordinates is not seen as an absolute requirement for the imposition of command responsibility.[19]

16. The United States Government has long been a leading exponent of indirect command liability. One of the leading post-WWII cases establishing the doctrine of command responsibility was the *Yamashita* case, a decision of the United States Military Commission held in Manila in 1945. The Japanese General Yamashita was charged and convicted with breaching his duty to control his troops by failing to provide effective control over them and therefore permitting them to violate the law of war, even though he had lost almost all control on his troops. The Commission stated that:

> [W]here murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops. (…) The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command (…) that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers; (2) that during the period in question you failed to provide effective control of your troops as was required by the circumstances.[20]

17. The United States' Supreme Court, in the year after the Commission's ruling, reaffirmed Yamashita's indirect command liability on grounds of breach of "duty to control."[21] It explained:

> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection.[22]

America v. Tomoyuki Yamashita, United States Military Commission, Headquarters United States Army Forces Western Pacific, Manila (Oct-Dec 1945), Vol. IV Law Reports of Trials of War Criminals 1, 820-1.

[19] *Celebici* at 373.

[20] *United States of America v. Tomoyuki Yamashita*, United States Military Commission, Headquarters United States Army Forces Western Pacific, Manila (Oct-Dec 1945), Vol. IV Law Reports of Trials of War Criminals 1, at 34-35.

[21] *In Re Yamashita,* United States' Supreme Court, 327 U.S. 1 (1946).

[22] *Ibid*. at 15.

The American Congress quoted the Supreme Court language in Yamashita on indirect liability when enacting the Torture Victim Protection Act (TVPA) of 1992. In 2002, the U.S. Court of Appeals for the Eleventh Circuit in *Jose Guillermo Garcia et al.* stated that:

> Although the TVPA does not explicitly provide for liability of commanders for human rights violations of their troops, legislative history makes clear that Congress intended to adopt the doctrine of command responsibility from international law as part of the Act specifically identified in the Senate report is In re Yamashita, 327 U.S. 1, 90 L. Ed. 499, 66 S. Ct. 340 (1946)."[23]

Indeed, various American courts have quoted the Yamashita language to impose indirect liability on commanders, showing the doctrine is also applied by U.S. courts.

B. International Treaty Law Provides For Indirect Command Responsibility

18. The doctrine of indirect command responsibility was codified in 1977 in the Additional Protocol I to the 1949 Geneva Conventions. Article 86(2) states that:

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

19. This provision requires either knowledge of the crime or possession of information that should have enabled the commander to know. It was, as elaborated upon in the commentaries, made clear that the drafters were referring to the *Yamashita* and *High Command* cases. The provision was uncontested when proposed and the majority of delegates expressed their opinion that article 86 was in conformity with pre-existing international law.

20. Although the United States has not yet ratified Protocol I, which it signed in 1977, the basis for article 86(2) and its content is so well-established that it is considered customary international law, and therefore, it is applicable to countries that have not ratified the Additional Protocol. In 1992 the United States made it clear that it approved this doctrine since it claimed, in the context of the Persian Gulf War, that the treatment of civilians and prisoners of war "clearly lay within the Government of Iraq and its senior officials". The Department of Defense Report to Congress further stated that:

> [c]riminal responsibility for violations of the law of war rests with a commander, including the national leadership, if he (or she): permits an offence to be

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[23] *William Ford at al. v. Jose Guillermo Garcia et al.*, 289 F.3d 1283 at 1288-89. See also: "The principle of "command responsibility" that holds a superior responsible for the actions of subordinates appears to be well accepted in U.S. and international law in connection with acts committed in wartime, as the Supreme Court's opinion in *In Re Yamashita* indicates." *Maximo Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996), at 777. See also Kadic v Karadzic, 70 F.3d 232, 239, 242 (2d Cir. 1995); Paul v Avril, 901 F.Supp. 330,335 (S.D.Fla. 1994); Xuncax v. Gramajo, 886 F.Supp. 162, 171-172 (D.Mass. 1995).

committed, or knew or should have known of the offense(s), had the means to prevent or halt them, and failed to do all which he was capable of doing to prevent the offenses or the recurrence.[24]

C. The International *Ad Hoc* Tribunals Confirmed the Criminal Responsibility of Superiors for Failure to Prevent or Punish Crimes Committed by Their Subordinates

21. The establishment and the jurisprudence of the ICTY and ICTR have reinforced and further developed the doctrine of indirect command responsibility. Article 7(3) of the ICTY and 6(3) of the ICTR's statutes both provide for such responsibility and state that:

> The fact that any of the acts referred to in articles 2 to 5 (*ICTR: "2 to 4*") of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

22. In the *Celebici* case, an ICTY Trial Chamber held, as affirmed by the Appeals Chamber in 2001:

> That military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law. … [T]here can be no doubt that the concept of the individual criminal responsibility of superiors for failure to act is today firmly placed within the corpus of international humanitarian law.[25]

23. The tribunals, and in particular the ICTY, have detailed the necessary objective and subjective elements required under international criminal law to find a superior liable for crimes committed by his subordinates. Three essential legal requirements have to be found when establishing a superior's responsibility for failure to act:

> (1) The superior must exercise direct and/or indirect command or control whether *de jure* and/or *de facto*, over the subordinates who commit serious violations of international humanitarian law, and/or their superiors;
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> (2) The superior must know or have reason to know, which includes ignorance resulting from the superior's failure to properly supervise his subordinates, that

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[24] United States: 'Department of Defense Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War', (10 April 1992) 31 ILM (1992), p. 612 and 635-636, quoted in BANTEKAS, Ilias, Principles of Direct and Superior Responsibility in International Humanitarian Law, Manchester University Press, 2002, p.106.

[25] *Prosecutor v. Delalic, Mucic, Delic, Landzo* (the *Celebici* case), ICTY Trial Chamber Judgment (16 November 1998), Case No. IT-96-21 at 333 and 340.

these acts were about to be committed, or had been committed, even before he assumed command and control;

(3) The superior must fail to take the reasonable and necessary measures, that are within his power, or at his disposal in the circumstances, to prevent or punish these subordinates for these offences.[26]

D. The International Criminal Court Also Provides For Indirect Command Responsibility Of Superiors For Acts Committed By Their Subordinates

24. The most recent development in international criminal law has been the adoption in 1998 of the Rome Statute establishing the International Criminal Court (ICC). Article 28 provides in great detail for indirect command responsibility. It stated as follows:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
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> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
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> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
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> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
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> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
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> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[26] *Celebici*, at 344. ADD MORE CITES

25. According to the international law scholar Cherif Bassiouni, the Article 28 "formulation does not depart from extant customary law, and constitutes an adequate restatement of it"[27].

IV. SUPERIORS CAN BE INDICTED UNDER THE THEORY OF COMMAND RESPONSIBILITY, WHETHER THEY ARE MILITARY OR CIVILIAN SUPERIORS

26. The theory of command responsibility whether direct or indirect, applies equally to military and civilian superiors. The Post WWII trials and especially the International Military Tribunal for the Far East established that non-military superiors can be held criminally responsible for crimes committed by their subordinates. The Tokyo tribunal held the Japanese Foreign Minister Koki Hirota and Prime Minister Hideki Tojo criminally responsible for breaching their duty to take appropriate steps to prevent and punish war crimes committed by their subordinates, the Japanese troops[28].

27. The 1977 Additional Protocol I to the Geneva Conventions and both the ICTY and ICTR's Statutes refer to superiors and not to military commanders alone, while the Rome Statute, at Article 28, clearly provides for civilian superiors' responsibility (28(b)). Both the Trial and Appeals Chambers of the ICTY confirmed, in the *Celebici* case, this principle. The Trial Chamber expressly stated that "the applicability of the principle of superior responsibility in Article 7(3) extends not only to military commanders but also to individuals in non-military positions of superior authority" (*Celebici*, 1998, at 363). In *Aleksovski*, the ICTY found a civilian guilty under the doctrine of command responsibility for crimes committed by prison guards. The civilian had been appointed by the minister of justice to be warden of a prison camp. Political leaders and other civilian superiors in position of authority are not exempt from the command responsibility doctrine under international law.

V. CONCLUSION

28. Under international criminal law superiors cannot be freed from individual criminal responsibility for war crimes or crimes against humanity committed by their subordinates by arguing that they did not directly commit the crimes.

29. Superiors are held liable when they directly ordered, solicited, induced, aided, abetted or supported the crimes, and therefore triggered the unlawful acts, but *also* when they failed to act in order to put an end to crimes they had reason to know were being committed. These principles have been thoroughly established, re-affirmed and

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[27] BASSIOUNI, Cherif, Crimes Against Humanity in International Criminal Law, Kluwer Law International, 1999, p.443.

[28] The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East, reprinted in R. John Pritchard and Sonia Magbanua Zaide (eds.), The Tokyo War Crimes Trial, Vol. 20 (Garland Publishing: New York & London 1981), 49, quoted in *Celebici*, at 791.

developed in detail over the past fifty years by international courts and tribunals and by treaty law. They are now clearly part of customary international law.

Respectfully Submitted,

Jules Lobel

On this day of Nov. 10, 2006