

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

I am a professor of law at the University of Pittsburgh Law School. I teach International Law and Constitutional Law. I have authored numerous articles on a wide range of issues in international law, including articles appearing in Harvard International Law Journal, Yale Journal of International Law, Virginia Law Review and the American Journal of International Law. In particular, an area of my expertise is the use of force under international law, and I have authored numerous articles on that issue. I have also testified in Federal District Courts on international law issues. A copy of my C.V. is attached hereto as Exhibit A.

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 perpetrated its material elements¹. Superiors of the main 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: on the one hand, the direct command responsibility of a superior for giving unlawful orders to his subordinates or for soliciting, inducing or aiding and abetting a crime, and on the other, the imputed criminal responsibility for a crime committed by a subordinate, arising from a superior's culpable omission to prevent, punish or report a crime he knew was about to or had been committed.

2. The principle of command responsibility of superiors has long been recognized by national and international courts. They now constitute customary law. The German Code of Crimes against International Law (CCIL) implicitly provides for direct responsibility under its Sections 6, 7 and 8², 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 and judicial decisions that have shaped the standards of international criminal

¹ The ICTY stated 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”, *Celebici*, Trial Chamber, 1998, at 319.

² 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 1st, 2004).

law establishing the individual criminal responsibility of superiors for international crimes, on which the German CCIL was directly based.

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

3. While the theory of indirect command responsibility punishes a superior for an omission, the direct command responsibility of superiors holds them responsible for the positive acts that have directly triggered 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 principle has been recognized by national courts for centuries and international law has followed this path. The latest development under international law has been the ratification of the Rome Statute establishing the International Criminal Court (ICC) in 1998, and with regard to this issue, 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:

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(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”.³ Responsibility for ordering a crime requires the existence of a superior-subordinate relationship. The relationship can either be *de jure* or *de facto*, civilian or military. There is no need for it to be given in writing or in any particular form; it can be express or implied⁴.

6. The jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (ICTY and ICTR) adheres to 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

³ 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.

⁴ *Ibid.* and confirmed in *Prosecutor v. Blaskic*, ICTY Trial Chamber Judgment (3 March 2000), Case No. IT-95-14-A.

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”⁵. The ICTY stated, when assessing the standards of direct command responsibility 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”⁶. 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 only subsequently by lower-rank officials or soldiers, whether or not the order had been personally given to them.

7. It is not necessary that the crime had been executed to hold the superior responsible. Article 25 of the Rome Statute provides for such a responsibility for a crime “which in fact occurs *or is attempted*.” (Emphasis added) However, liability is more serious when crimes have occurred: a defendant will be as liable as the main perpetrator of the crime if the order has been executed and the crime committed.

B. Soliciting Or Inducing A War Crime Or A Crime Against Humanity Generates Individual Criminal Responsibility

8. “Soliciting or inducing” a crime encompasses every behavior that amounts to encouraging, requesting, commanding, inciting or influencing, physically or psychologically, another person to commit a crime. [See Kai Ambos, p. 480-481] There is no requirement of a superior-subordinate relationship. According to the ICTY *Blaskic* judgment (at 280), the incitement must be direct and explicit and the commission of the crime must follow. But “it is not necessary to prove that the crime would not have been perpetrated without the accused’s involvement”. [*Kordic and Cerkez*, at 387]

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

9. Aiding and abetting constitute a crime that generates direct individual criminal responsibility. The ICTY summarizes the elements of complicity in international law in the context of aiding and abetting. The *Tadic* judgment established a broad concept of complicity based on the English “concerned in the killing” theory: “all acts of assistance” which “encourage or support” the commission of a crime. The Rome Statute “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.””⁷ Assistance has to meet a very low objective threshold since it accepts 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 (other than strictly aiding and abetting) can support the

⁵ 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).

⁶ *Blaskic*, 2000, at 282.

⁷ 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.

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.

III. INDIRECT COMMAND RESPONSIBILITY 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 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 reasons 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, to punish the perpetrators and/or to report the crimes to higher authorities. This principle has long been affirmed and recognized under international law.

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

11. Until the post World War II (post-WWII) cases, the doctrine of command responsibility was limited to succinct provisions in treaty law stating that responsible commanders had a duty to lead lawful belligerents. After WWII, the principle of superiors’ indirect command responsibility was strongly affirmed by the war crimes tribunals, and notably by the Nuremberg Trials held by the United States of America, France, the United Kingdom and the Soviet Union under Control Council Law No. 10 (*the Nuremberg Tribunal*) in the *Medical*, the *Hostage* and the *High Command* cases⁸. The Nuremberg Tribunal 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:

[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]

12. 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 an “obligation under international law for commanders” to take measures in order to prevent or punish subordinates’ unlawful actions. Also, while

⁸ *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.

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 when a commander of occupied territory:

“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]

13. 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]

14. 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.⁹

15. 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." The Court held that the "laws of war impose on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery" and that a commander, "may be charged with personal responsibility for his failure to take such measures when violations result." In words that presciently apply to the present case, the Court held that the law of war's "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."¹⁰

B. International Treaty Law Provides For Indirect Command Responsibility

16. The doctrine of indirect command responsibility was clearly recognized 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.

17. This provision requires either knowledge of the crime or possession of information that should have enabled the commander to know. It was, as shown 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.

18. Although the United States did not ratify the Protocol I, 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 when dealing with the 1991 Persian Gulf War. The Department of Defense Report to Congress stated that:

⁹ *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.

¹⁰ *In Re Yamashita*, United States' Supreme Court, 327 U.S. 1, 15 (1946).

[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 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.¹¹

19. The principle of criminal individual responsibility of the superiors has also been affirmed by the International Law Commission's 1991 and 1996 Draft Codes of Crimes against the Peace of Security of Mankind, and provides for the same conditions to establish responsibility¹². Article 6 of the 1996 Draft Code states:

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if the knew or had reason information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible necessary measures within their power to prevent or repress the crime.”

C. The International *Ad Hoc* Tribunals Confirmed The Criminal Responsibility of Superiors For Failure To Prevent or Report Crimes Committed By Their Subordinates

20. The establishment of and the jurisprudence of the ICTY and ICTR have reinforced and 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.

21. In the *Celebici* case, the ICTY's Trial Chamber stated, a ruling confirmed 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

¹¹ 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.

¹² International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, 1996, available at <http://www.un.org/law/ilc/texts/dcodefra.htm> (last consulted on November 19, 2004)

criminal responsibility of superiors for failure to act is today firmly placed within the corpus of international humanitarian law.¹³

22. The tribunals, especially 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, they are the following:

(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;

(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 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.¹⁴

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

23. 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:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their

¹³ *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.

¹⁴ *Celebici*, at 344.

commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

24. 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”¹⁵.

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

25. 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 troops¹⁶.

26. 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

¹⁵ BASSIOUNI, Cherif, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, 1999, p.443.

¹⁶ 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.

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

27. 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 perpetrate the crimes. They bear a higher responsibility that is directly related to their status as superiors, whether they are military superiors or civilians in a position of authority.

28. 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 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.

Jules Lobel

Sworn before me at the City of Pittsburgh
this ___ day of November, 2004.

Notary Public