

COMMAND RESPONSIBILITY DOCTRINE:
FORMULATION THROUGH *FORD V. GARCIA* AND
*ROMAGOZA V. GARCIA**

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INTRODUCTION

Post September 11, 2001, it is apparent to a larger segment of the world's population that the nature of war is changing: citizens are increasingly popular targets in conflict; a large percentage of human rights abuses are now perpetuated by paramilitary and other non-military actors; and the rules of conflict are being redefined along with the definitions of war, terrorism, and human rights.

Human rights cases have been and will continue to be a critical part of addressing the changing nature of domestic and global societies. Such cases are providing essential information about what is occurring in conflicts, and are allowing individual plaintiffs a chance to heal by having their stories told and acknowledged.¹ Yet, only a small percentage of human rights victims will ever be able to bring a suit in international structures such as the International Criminal Court. Thus, an important step in addressing the grievances of a larger number of the victims, and in gaining information about what human rights abuses are occurring, involves the use of civil remedies; something courts in the United States have helped pioneer.²

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¹ See Michael Ratner, *Civil Remedies for Gross Human Rights Violations*, JUST. & THE GENERALS, available at http://www.pbs.org/wnet/justice/law_background_torture.html (last accessed April 2, 2004) (discussing civil remedies for human rights violations the article states that "in addition to any money that can be collected...Plaintiffs are allowed to tell their stories to a court, can often confront their abusers, and create an official record of their persecutions."). These outcomes are often articulated as goals in international criminal human rights cases as well.

² *Id.*; see also Manuel Roig-Franzia, *Torture Victims Win Lawsuit Against Salvadoran Generals*, WASHINGTON POST, July 24, 2004, at A01 ("human rights groups estimate more than half a million torture victims now live [in the United States].").

The U.S. legislature long ago granted power to U.S. District Courts to hear torts brought by aliens against defendants located within the United States, and in 1991 expanded the legislation to include torture claims brought by U.S. citizens. These pieces of legislation have been essential to the ability of U.S. courts to provide civil remedies for human rights abuses. In the recently expanded legislation, the U.S. also recognized the need to address the fact that human rights abuses such as torture and extrajudicial killing are increasingly popular, yet such abuses are rarely committed by an individual soldier acting alone. Rather, these abuses are products of state-sponsored terrorism and specific military objectives.

Given the nature of these abuses, it has become increasingly important that a new remedy, and new standard of behavior for soldiers on the battlefield, be produced.³ In response, U.S. courts are articulating a doctrine of command responsibility that allows commanders to be held responsible for the abuse of their subordinates. The notion of command responsibility has long been established in international law, and it has long been acknowledged that “through the friction and fog of war, it is primarily the authority of the commander which gets things done.”⁴ However, the formulation of the doctrine of command responsibility in U.S. case law is relatively new. Two major cases, *Ford v. Garcia* and *Romagoza v. Garcia*, have addressed the issue.

The purpose of this comment is to analyze the basis for, and subsequent formulation of, a doctrine of command responsibility in U.S. civil cases for human rights abuses. First, the comment details the passage of two acts that have defined the forum for command responsibility

³ Cf. Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 2 (1982) (“A major revision of the law of war is in process. The unusual timing of historical and political events requires us to seek a practical articulation of the standard of behavior on the battlefield expected of American soldiers.”).

⁴ *Id.* at 3.

cases, the Alien Tort Claims Act and the Torture Victim Protection Act. Second, the international origins of the doctrine of command responsibility are discussed. Next, the comment addresses the formulation of jury instructions for the doctrine in two recent cases. A brief history of the first case, *Ford v. Garcia*, is given; followed by a break down of the three-prong test for command responsibility used in the jury instructions of the case. What proved to be a successful chaos of war defense in *Ford* is discussed in the subsequent section. Afterward, the plaintiff's appeal in *Ford* is broken down into two main objections that deal with the proximate cause and burden-shifting portions of the jury instructions.

While some of the elements of command responsibility were clarified in the jury instructions for *Ford*, a number of issues remained unaddressed until *Romagoza v. Garcia*. Thus, the comment turns to the history of and jury instructions for *Romagoza*. Replacement of *Ford*'s proximate cause component, further clarification of effective command, and distinction between *de facto* and *de jure* command begin the discussion. Next, clarifications of the "knew or should have known" standard and the "failed to take all necessary and reasonable measures" components of the instructions are mentioned. Finally, the comment addresses the future of the doctrine and lays out two areas in which the doctrine needs further advancement.

ALIEN TORT CLAIMS ACT AND TORTURE VICTIM PROTECTION ACT OF 1991: A FORUM FOR COMMAND RESPONSIBILITY DOCTRINE

The Judiciary Act of 1789 was one of the first laws enacted by the first Congress. The Act provided U.S. district courts with jurisdiction over actions brought by aliens concerning torts committed in violation of a treaty of the U.S. or the "laws of nations."⁵ The Alien Tort Claims

⁵ See, e.g., Russell G. Donaldson, *Construction and Application of Alien Tort Statute* (28 U.S.C.A. § 1350), *Providing for Federal Jurisdiction Over Alien's Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387, § 2(a) (1993). The "law of nations" is not clearly defined by the statute

Act (ATCA) is the same statute with only minor changes in language, presently codified at 28 U.S.C. § 1350.⁶ The ATCA was promulgated under Article III, Section 2 of the Constitution of the United States, which in part provides for judicial power to extend to all cases arising under the treaties of the United States.⁷ Recently, the areas in which the ATCA has been most often used became actionable under the Torture Victim Protection Act of 1991 (TVPA).⁸

The TVPA was signed into law by President Bush in 1992 and first employed in 1995 in *Ortiz v. Gramajo*.⁹ The TVPA, like the ATCA, requires a court to decline to hear a claim “if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”¹⁰ Additionally, under both, the perpetrator must be physically served with the lawsuit in the United States in order for the court to have jurisdiction.¹¹ The TVPA is more inclusive than the ATCA in that it expanded jurisdiction to citizens as well as aliens, while at the same time it is more limited than the ATCA in that: it only applies to torture

itself, thus the Courts have tried to look for other domestic definitions. *See id.* (“For guidance in this question [of what constitutes a violation of the ‘law of nations’], the courts...may look to the provisions of the Restatement (3d), Foreign Relations, which in § 702 declares that a state violates international law if, as a matter of policy, it practices, encourages, or condones genocide; slavery...; murder...‘disappearance’...torture...prolonged arbitrary detention; systemic racial discrimination; or a...pattern of gross violation of internationally recognized human rights.”).

⁶ *See, e.g.,* Donaldson, *supra* note 6, at § 2(a).

⁷ *See, e.g., id.; but see id.* (“‘violations of the law of nations,’ bears a more tenuous link to Article III, § 2 of the Constitution, and would appear to be maintainable only under an understanding that the Constitution incorporates the ‘laws of nations.’ or ‘international law,’ as an integral part of the ‘laws of the United States.’ This understanding, in fact, underlies the express holding of some cases...that the statute is a valid exercise of congressional power in granting jurisdiction to the courts it has created under Article III, § 1.”). The basis for jurisdiction under the ATCA is violations of U.S. treaties and/or violations of the law of nations. *Id.*

⁸ Pub. L. No. 102-256, 106 Stat. 1093 (1992); *See* Donaldson, *supra* note 6, at § 2(a) (“Whatever its origins, the continuing effectiveness of the Alien Tort Claims Act...may now be questioned, since its primary function in recent years appears to have been to provide a United States forum for the vindication of fundamental human rights, particularly in the area of torture by officials acting under color of office, an area which may have been superseded by the Torture Victim Protection Act of 1991...which expressly deals with just that issue.”). *But see* Ratner, *supra* note 1 (“The legislative history of the TVPA is clear on this point, stating that the ATCA has ‘important uses and should not be replaced.’”).

⁹ 886 F. Supp. 162 (D. Mass. 1995). *See, e.g.,* Ratner, *supra* note 1.

¹⁰ 28 U.S.C. § 1350. Additionally, some courts in ATCA cases have required extraordinary circumstances such that the tort sued upon must “not only violate international law or a treaty of the United States, but also shock the conscience of the court.” Donaldson, *supra* note 6, at § 7.

¹¹ *See, e.g.,* Ratner, *supra* note 1 (“In part...based on the concept of universal jurisdiction...the [Filartiga] court emphasized that a torturer could be brought to justice where found.”).

and extrajudicial killing, imposes a ten-year statute of limitations, and requires that the defendant act under the authority or law of a foreign nation.¹²

These limitations are actually a large divergence from the ATCA. In some of the early ATCA cases, dicta appeared to state that norms of international law required some form of state action, therefore excluding the possibility of using ATCA to try individuals without state involvement.¹³ But, in *Kadic v. Karadzic*, the court found that “certain forms of conduct violate the law of nations whether undertaken by those acting under auspices of a state or only as private individuals.”¹⁴ Thus, the court recognized that individuals can be held responsible for their part in human rights violations such as war crimes, genocide, and crimes against humanity regardless of their relationship to a state.¹⁵ The TVPA takes a narrower approach than the court in *Kadic* by requiring a connection between the individual and the state; yet the TVPA is not narrowed to just the individuals who actually perpetrate the abuses. It was explicitly intended for the TVPA to include the use of command responsibility doctrine. The Senate Report on the TVPA states:

A higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.¹⁶

Clearly, the Senate intended the TVPA to be used in cases against individuals in accordance with the doctrine of command responsibility as formulated in international law.

¹² See, e.g., *id.*

¹³ *Id.*

¹⁴ 70 F.3d 232, 239 (2d Cir. 1995); see also Ratner, *supra* note 1 (discussing the case).

¹⁵ Ratner, *supra* note 1. This coincided with a larger trend in international law of shifting away from the state-centered approach to human rights, to a more individually focused one.

¹⁶ See *Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002) (citing S. REP. NO. 102-249 (1991)).

ORIGINS OF COMMAND RESPONSIBILITY: DEVELOPMENT IN INTERNATIONAL LAW

As far back as 1625, it was said, “a community or its rulers may be held responsible for the crime of a subject if they knew of it and did not prevent it when they could and should prevent it.”¹⁷ Thus, the notion of command responsibility has long been recognized as part of the definition of civic duty and military professionalism; though it became strongly established in international law as a doctrine only after World War II.¹⁸

The first signs of the doctrine in a modern legal sense began with Article 3 of the Hague Convention of 1907, which provides for “responsibility and potential payment of compensation by the state for breaches committed by members of its armed forces.”¹⁹ There is no suggestion in the Article, however, that “a commander will be personally liable for giving an illegal order or failing to deal with a breach committed by someone under his command.”²⁰

More development of the law occurred after World War I; as the doctrine of command responsibility “became a matter of international concern.”²¹ The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, established to detail the origins of the war, suggested that “all persons belonging to enemy countries...without distinction of rank...who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.”²² Yet, still no express suggestion that

¹⁷ Howard S. Levie, *Command Responsibility*, 8 J. LEGAL STUD. 1,1 (1997-1998) (quoting Hugo Grotius, *De jure Belli Ac Pacis Libri Tres*, Bk. II, Ch. XXI, Sec. ii, CLASSICS OF INTERNATIONAL LAW (Kelsey trans.)).

¹⁸ See, e.g., Anne E. Mahle, *Command Responsibility in the United States*, JUST. & THE GENERALS, available at http://www.pbs.org/wnet/justice/law_background_command.html (last accessed April 2, 2004) [hereinafter Mahle, *Command*]; see also Eckhardt, *supra* note 3, at 8 (“the very heart of military professionalism is command responsibility.”).

¹⁹ Leslie C. Green, *War Crimes, Crimes against Humanity, and Command Responsibility*, *17, available at <http://www.nwc.navy.mil/press/review/1997/spring/art2sp97.htm> (last accessed April 2, 2004).

²⁰ *Id.*

²¹ *Id.* at *3.

²² *Id.* (citing Commission on the Responsibility of the Authors of War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference, 19 March 1919, 14 AM. J. OF INT'L L. 95, 117 (1920) (official English text.)).

commanders were liable for the actions of their subordinates existed. Additionally, no further attempt to articulate command responsibility in the international realm occurred until the end of World War II.²³

Following World War II, and due to influence from the 1942 Declaration of St. James, the London Charter creating the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis determined that “[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”²⁴ It was in this post-World War II era that the current international understanding of the doctrine of command responsibility, which includes the suggestion that a commander is liable for the actions of his subordinates, was articulated. The change is marked with the passage of the Hague regulations and the four Geneva Conventions of 1949 that “constitute the essential body of the modern law of armed conflict.”²⁵ The Conventions require parties to “provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches [war crimes]” listed in the Conventions and Protocol I, and “to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches....”²⁶

²³ *Id.* at *4.

²⁴ *Id.* (citing Charter of the International Military Tribunal of Nuremberg annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8 Aug. 1945, art. 7, 85 U.N.T.S. 280, 288 (1951)).

²⁵ *See, e.g., id.* at *18.

²⁶ *Id.* (citing Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Dec. 08, 1949, art. 49, 75 U.N.T.S. 32, 62 (came into force on Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Dec. 08, 1949, art. 50, 75 U.N.T.S. 86, 116 (came into force on Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, Dec. 08, 1949, art. 129, 75 U.N.T.S. 136, 236 (came into force on Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Dec. 08, 1949, art. 146, 75 U.N.T.S. 288, 386 (came into force on Oct. 21, 1950).) *But see id.* (“This provision, however, refers only to breaches of the four Conventions and makes no reference to offences against the laws and customs of war as they may arise otherwise. However, since the laws and customs of war...are part of customary law, criminal responsibility is in no way diminished as a result of the silence of 1949.”).

In addition to requiring signatories to search for, and to create penal sanctions, for violations; Protocol I attached to the Conventions also provides detailed guidance on how the doctrine of command responsibility is to operate. Article 87 of Protocol I outlines the "Duty of Commanders" and provides that:

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.²⁷

Protocol I also directly addresses a commander's "Failure to Act" in Article 86 which states:

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit

²⁷ *Id.* at *19 (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 87, 1125 U.N.T.S. 3, 43 (entry into force Dec. 7, 1979) available at <http://www.unhcr.ch/html/menu3/b/93.htm> (last accessed April 2, 2004) [hereinafter Protocol I]). The United States is only a signatory to Protocol I and therefore is only bound by the provisions that are customary international law.

such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.²⁸

These same principles of the doctrine of command responsibility were reaffirmed in 1991, when the International Law Commission agreed upon a Draft Code of Crimes Against the Peace and Security of Mankind.²⁹ The Code reproduces the terminology of Article 86 of Protocol I almost verbatim; it states that:

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 they knew or had 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 measures within their power to prevent or repress the crime.³⁰

Finally in 1946, these above principles eventually became part of U.S. case law when the Supreme Court of the United States heard a challenge to the constitutionality and jurisdiction of a United States Military Commission that tried General Tomoyuki Yamashita.³¹ Although the Court declined to review the factual determinations of the Commission, it upheld the verdict and Chief Justice Stone speaking for the majority upheld the validity of the doctrine of command responsibility.³² He stated that:

The question then is whether the law of war imposes 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 whether he may be charged with personal responsibility for his failure to take such measures when violations result. . . . 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

²⁸ *Id.* at *18 (citing Protocol I, at art. 86, 1125 U.N.T.S. 42-3).

²⁹ *Id.* at *20.

³⁰ United Nations: International Law Commission Report on the Draft Articles Adopted at its Forty-third Session, art. 12, 30 I.L.M. 1554, 1587 (1991); Green, *supra* note 19, at *20.

³¹ Green, *supra* note 19, at *5.

³² *Id.* at *6.

brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates...³³

With the validity of the doctrine embodied in case law, the final step in developing command responsibility into a workable standard has been formulating and defining the jury instructions. This is being accomplished through civil cases brought under the ACTA and TVPA in U.S. federal district courts. Two cases that have played a major role in turning the doctrine of command responsibility into a workable standard are *Ford v. Garcia* and *Romagoza v. Garcia*.

FORD V. GARCIA: FORMULATING THE DOCTRINE IN U.S. DOMESTIC COURTS

Prior to *Ford*, the doctrine of command responsibility was defined only through international law and *In re Yamashita*. *Ford* was thus the first major TVPA case to help develop the doctrine of command responsibility into a workable standard.

A BRIEF HISTORY

Ford v. Garcia was filed on May 13, 1999 in the United States District Court for the Southern District of Florida, and the trial began on October 10, 2000.³⁴ The case was brought on behalf of four churchwomen: Ita Ford, Maura Clarke, Dorothy Kazell, and Jean Donovan, all of whom were kidnapped, sexually assaulted, and killed in El Salvador by four National Guardsmen on December 2, 1980.³⁵ During the time of the murders, El Salvador was in the

³³ *In re Yamashita*, 327 U.S. 1, 14-15 (1946); Green, *supra* note 19, at *6.

³⁴ See, e.g., *The Case of the Four American Churchwomen*, JUST. & THE GENERALS, available at <http://www.pbs.org/wnet/justice/education/reading1.html> (last accessed April 2, 2004) [hereinafter *Four Churchwomen*, JUST. & THE GENERALS].

³⁵ See, e.g., Amanda Smith, *Case History: Ford et al. v. Garcia et al.*, JUST. & THE GENERALS, available at http://www.pbs.org/wnet/justice/law_background_ford.html (last accessed April 2, 2004) [hereinafter Smith, *Case History: Ford*].

midst of a civil war in which the military was often implicated in the disappearance, torture, and murder of thousands of civilians.³⁶ Given the systematic nature of these human rights abuses, the plaintiffs in the case brought charges under the TVPA against two of the top military generals in El Salvador at the time, relying on the doctrine of command responsibility.³⁷

The defendants in the case were Jose Guillermo Garcia, Salvadoran Minister of Defense and Public Security from 1979-1983, and Carlos Eugenio Vides-Casanova, the Director-General of the Salvadoran National Guard from 1979-1983 (subsequently the Minister of Defense and Public Security). Garcia and Vides-Casanova emigrated to Florida in 1989 and resided there at the time of the suit.³⁸

The case was decided by a jury, ending with a verdict for the defendants on November 3, 2000.³⁹ The plaintiffs appealed to the United States Court of Appeals for the Eleventh Circuit on the ground that the trial court erred in its jury instructions on the command responsibility doctrine.⁴⁰ Oral arguments for the appeal were heard on December 6, 2001; the Plaintiffs' motion for a new trial was denied and the judgment affirmed on April 30, 2002.⁴¹

THE JURY INSTRUCTIONS IN *FORD*

The jury instructions in Ford consisted of a three-prong test loosely based on international law and *In re Yamashita*, and an additional proximate cause requirement. The jury

³⁶ See, e.g., *id.*

³⁷ See, e.g., *id.*

³⁸ See, e.g., *id.*

³⁹ See, e.g., *Four Churchwomen, JUST. & THE GENERALS*, *supra* note 34.

⁴⁰ See, e.g., Smith, *Case History: Ford*, *supra* note 35.

⁴¹ See, e.g., *id.*

instructions in the case were an essential starting point in formulating the doctrine, but left large gaps in definitions and concepts necessary for a successful formulation.

THE THREE-PRONG TEST

The majority of the command responsibility doctrine in *Ford* was provided to the jury in a three-prong test. The first prong required that “persons under defendant’s effective command had committed, were committing, or were about to commit torture and extrajudicial killing.”⁴² According to the jury instructions, “effective command” meant the commander had “the legal authority and the practical ability to exert control over his troops.”⁴³ Additionally, the commander’s duty would not be absolved if his own actions caused or significantly contributed to his lack of effective command.⁴⁴ The language for this prong was derived from international sources, however the explanation of effective command and practical ability used at trial was far from clear. This confusion was discussed more explicitly on appeal and will be expanded on shortly.

The second prong of the test required that “[t]he defendant knew, or owing to the circumstances at the time, should have known, that persons under his effective command had committed, were committing, or were about to commit torture and extrajudicial killing.”⁴⁵ No clarification of the “knew or should have known” prong was given in the jury instructions, in large part because no provision of Protocol I specifically indicates how a superior is to “know”

⁴² See *Ford v. Garcia*, 289 F.3d 1283, 1287 (11th Cir. 2002) (quoting the district court's jury instructions).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

that one of his subordinates is going to commit such a breach. Thus, this aspect of the doctrine was not defined well in international law and remained undefined in the case.⁴⁶

Lastly, the third prong of the test stated that “[t]he defendant failed to take all necessary and reasonable measures within his power to prevent or repress the commission of torture and extrajudicial killing or failed to investigate the events in an effort to punish the perpetrators.”⁴⁷ A commander may fulfill his duty to investigate and punish wrongdoers if he delegates this duty to a responsible subordinate and has a right to assume that assignments entrusted to a responsible subordinate will be properly executed. On the other hand, his duty to investigate and punish violators will not be fulfilled if the commander knows or reasonably should know that the subordinate will not carry out his assignment in good faith or if the commander impedes or frustrates the investigation.⁴⁸ The question of what constitutes “all necessary and reasonable measures” in a time of war is not fully defined in international law and was a major question throughout the trial, as it became a large part of the defendants’ defense.

In addition to the confusion with the three-prong test, a proximate cause requirement not found in international law also caused great confusion when it became part of the jury instructions.

PROXIMATE CAUSE: THE ADDED REQUIREMENT IN FORD

⁴⁶ Cf. Joanne Mariner, *Milosevic's Command Responsibility: A Key Issue In His War Crimes Trial*, FINDLAW, July 16, 2001, available at http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/mariner/20010716.html (last accessed April 2, 2004) (“Notice may be direct, as when the superior witnessed the crimes or was informed of them. It may also be constructive, as when the offenses were so numerous or notorious that a reasonable person would necessarily conclude that the superior must have known of their commission.”).

⁴⁷ *Ford*, 289 F.3d at 1287.

⁴⁸ See, e.g., Mahle, *Command*, *supra* note 18.

One of the most contested aspects of the *Ford* instructions was the proximate cause requirement imposed in addition to the three-prong test described above. The jury instructions on proximate cause read:

If you find that one or more of the plaintiffs have established all of the elements of the doctrine of command responsibility, as defined in these instructions, then you must determine whether the plaintiffs have also established by a preponderance of the evidence that the church women's injuries were a direct or a reasonably foreseeable consequence of one or both defendants' failure to fulfill their obligations under the doctrine of command responsibility.⁴⁹

There appears to be no basis in international law for the proximate cause requirement.⁵⁰ The issue as to whether the requirement should exist in subsequent U.S. cases involving command responsibility was addressed on appeal and will later be discussed.

A SUCCESSFUL DEFENSE: ACTIONS IN THE CHAOS OF WAR

The Generals conceded the second prong of the test and admitted that they were aware of a pattern of human rights abuses in El Salvador during their tenures, but argued that they did not have the ability to control their troops during this period.⁵¹ The question thus remained whether the Generals' defense was directed at the first prong regarding effective command of their troops, or rather at the third prong of the doctrine requiring a showing that the commanders failed to take "all necessary and reasonable measures" to prevent or punish the commission of torture or extrajudicial killing.⁵²

According to one of the attorneys in *Romagoza*, a large part of the Generals' defense in *Ford* was that war is chaos and that the generals lacked effective command over their troops

⁴⁹ Jury Instructions at 6-10, *Ford v. Garcia* (S.D. Fla. Nov. 3, 2000) (No. 99-8359-CIV); *Ford*, 289 F.3d at 1287.

⁵⁰ See *Ford*, 289 F.3d at 1293 ("no international case has ever required such a showing for liability and that the Ninth Circuit has specifically rejected the argument that proximate cause is a required element of the doctrine.").

⁵¹ *Id.* at 1286.

⁵² *Id.* at 1297.

because of the situation created by the right-wing death squads and the communist insurgency on the left; which would speak to their effective command under the first prong.⁵³ However, the Generals also argued that since the four National Guardsmen responsible for the murders had been tried and convicted in El Salvador, they had "attempted to prevent, repress, and punish human rights violations," thus negating the necessary third prong of the test.⁵⁴ In response, the plaintiffs contended that the Generals had not fulfilled the requirement of the third prong because no further investigation was made "despite voluminous evidence that the Guardsmen had been following specific and direct orders to kill the American women."⁵⁵

The confusion over where the Generals' defense applies to the doctrine, and the lack of definitions for the first and third prong, indicates additional problems that needed to be addressed by the appeal. The *Ford* appeal, however, does not fully address the issues and leaves them in part to be expanded on in future formulations of the doctrine.

THE *FORD* APPEAL: INSTRUCTIONS UNDER FIRE

The plaintiffs' appeal raised two main issues with the jury instructions: the proximate cause instruction and the burden-shifting scheme. Unfortunately, because the plaintiffs failed to object to the command responsibility instruction at trial, the appellate court could review only for

⁵³ E-mail from Jim K. Green, Attorney at Law, to Cortney C. Hoecherl, J.D. Candidate, University of Pennsylvania Law School (Jan. 15, 2003) (on file with author). However, General Yamashita failed on a similar defense claiming that the "American operations in the Philippines was such that his lines of communication with his troops were...completely severed [and] that it was not possible for him to maintain contact and ensure their compliance with the laws of war." Green, *supra* note 19, at *5.

⁵⁴ *Ford*, 289 F.3d at 1297 footnote 1 (Barkett, J., concurring) ("The evidence required to prove the first and third prongs is somewhat related, as the first prong requires demonstrating that the commander had the authority or could prevent or punish the crimes and the third prong requires demonstrating that the commander failed to take all necessary and reasonable measures to prevent or punish the crimes."). *But see id.* at 1290 (quoting *Prosecutor v. Delalic*, Appeals Chamber ICTY, Feb. 20, 2000, at 256) ("Recent international cases consistently have found that effective control of a commander over his troops is required before liability will be imposed under the command responsibility doctrine. The consensus is that 'the concept of effective *control* over a subordinate...the sense of a material ability to prevent or punish criminal conduct...is the threshold to be reached in establishing a superior-subordinate relationship.'").

⁵⁵ Smith, *Case History: Ford*, *supra* note 35.

plain error.⁵⁶ Both issues, however, were addressed in dicta either by the majority or in the concurrence, thus providing some guidance for future formulations of the doctrine.

PROXIMATE CAUSE

The issue of the validity of the proximate cause instruction in *Ford* was not addressed by the majority on appeal beyond a statement by the court that “whatever light international law might shed on proximate cause as it pertains to the command responsibility doctrine, we have no trouble concluding that the challenged instruction constituted invited error and decline to review for reversible error.”⁵⁷ Judge Barkett in his concurrence, however, addressed the issue at length and emphatically argued that the instruction was erroneous. He found the concept of proximate cause “irrelevant to the assignment of liability under the command responsibility doctrine”⁵⁸, and further argued that “a proximate cause requirement practically eviscerated the command responsibility doctrine’s theory of liability.”⁵⁹ He additionally felt it was clear that the “proximate cause instruction in this case confused the jurors, a fact demonstrated by four of the five questions of the jury to the court.”⁶⁰ Judge Barkett could thus clearly be understood as stating that proximate cause should not be a part of future formulations of the doctrine of command responsibility.

BURDEN-SHIFTING

The second major issue addressed on appeal was determining which party bears the burden of showing that the Generals had “effective command” of their subordinates. The burden

⁵⁶ *Ford*, 289 F.3d at 1288.

⁵⁷ *Id.* at 1294.

⁵⁸ *Id.* at 1298 (Barkett, J., concurring).

⁵⁹ *Id.* at 1299 (Barkett, J., concurring).

⁶⁰ *Id.*

at trial was placed on the plaintiffs.⁶¹ On appeal, the lawyers for the plaintiffs argued that the plaintiffs had demonstrated that the Generals, by law, had *de jure* authority over the troops under their command. Thus, the burden should have been on the Generals to raise an affirmative defense and show that they did not have effective control.⁶²

The only other case in U.S. case law, *In re Yamashita*, did not explicitly address the allocation of the burdens on the elements of command responsibility.⁶³ Therefore, the majority looked to recent international tribunals that had applied the doctrine of command responsibility for precedent on the issue.⁶⁴ The court, relying on *Prosecutor v. Delalic*, concluded that "the possession of de jure power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power prima facie results in effective control unless proof to the contrary is produced."⁶⁵ Acknowledging "effective control" as a presumption, the *Ford* court went on to further note that "[i]n other contexts, this court has held that a presumption shifts the burden of production with respect to the element it concerns, but not the burden of persuasion."⁶⁶ The fact that a *de jure* commander "bears the burden of production on this issue does not affect the ultimate jury instruction that should be given...[since] jury instructions are to address the ultimate burden of persuasion only, and should not needlessly confuse the jurors with which party held the burden

⁶¹ See, e.g., Smith, Case History: Ford, *supra* note 35.

⁶² *Ford*, 289 F.3d at 1289 ("Although never explicitly using these terms, Appellants seem to assume that this shift of burdens places both the burden of production...and the burden of persuasion on the defendants with regard to these affirmative defenses.").

⁶³ *Id.* at 1290 ("In re Yamashita did not explicitly address the allocation of the burdens on the elements of command responsibility. Nor is there any indication that the Court there ever considered how to allocate the burdens of production or persuasion in future command responsibility trials.").

⁶⁴ *Id.*; see also *id.* at 1291 ("Thus, although we do not decide the issue, we note that nowhere in any international tribunal decision have we found any indication that the ultimate burden of persuasion shifts on this issue....").

⁶⁵ *Id.* at 1291 (citing *Prosecutor v. Delalic*, Appeals Chamber ICTY, Feb. 20, 2000, at 197.).

⁶⁶ *Id.* (citing *Walker v. Mortham*, 158 F.3d 1177, 1184 (11th Cir. 1998)).

of production at trial."⁶⁷ The issue of "effective command" was thus defined by the court more as a required element of the plaintiffs' prima facie case for command responsibility than as a part of the defendants' defense.

ROMAGOZA V. GARCIA: A SUCCESSFUL FORMULATION

Following the appeal in *Ford*, a few key aspects of the command responsibility doctrine had been clarified, but a number of questions remained unanswered. It was thus not until the second case brought against the Generals, *Romagoza v. Garcia*, that many of these issues were fully addressed. It was in this case that command responsibility doctrine was first defined in a comprehensive manner for a TVPA case in U.S. courts, and it resulted in a multi-million dollar verdict for the plaintiffs.

A BRIEF HISTORY

Romagoza v. Garcia was filed in May 1999 in the United States District Court for the Southern District of Florida.⁶⁸ The case brought by Juan Romagoza Arce, Neris Gonzalez, and Carlos Mauricio went to trial on June 24, 2002 and ended on July 23, 2002.⁶⁹ Juan Romagoza Arce was a doctor providing medical care at a church clinic in El Salvador who was "abducted, detained, and tortured in El Salvador by members of the Salvadorian National Guard for three-and-a-half weeks."⁷⁰ Neris Gonzalez, the second plaintiff, was "a lay worker and catechist with

⁶⁷ *Id.* at 1292 (citing *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1321-22 (11th Cir. 1999)).

⁶⁸ *See, e.g.*, Amanda Smith, *Trial History: Romagoza et al. v. Garcia et al., JUST. & THE GENERALS*, available at http://www.pbs.org/wnet/justice/law_background_romagoza.html (last accessed on April 2, 2004) [hereinafter Smith, *Trial History: Romagoza*].

⁶⁹ *See, e.g.*, David Gonzalez, *Victim Links Retired General to Torture in El Salvador War*, THE NEW YORK TIMES, June 25, 2002, available at http://www.cja.org/cases/Romagoza_News/RomagozaPress6.25.02.htm (last accessed April 2, 2004); David Gonzalez, *Torture Victims in El Salvador Are Awarded \$54 Million*, THE NEW YORK TIMES ON THE WEB, July 24, 2002.

⁷⁰ Smith, *Trial History: Romagoza*, *supra* note 67.

the Catholic Church in El Salvador," and was "abducted, detained, tortured, and raped on December 26, 1979 in El Salvador by members of the Salvadoran National Guard for a period of approximately two weeks."⁷¹ The third plaintiff, Carlos Mauricio, was a professor at the University of El Salvador and was abducted from the University on or about June 13, 1983 and "taken into detention at the National Police Headquarters, interrogated, and tortured for one-and-a-half weeks."⁷² Additionally, the defendants in the case were again Jose Guillermo Garcia and Carlos Eugenio Vides-Casanova.

The case was a civil lawsuit seeking damages under both the ATCA and TVPA, relying on the doctrine of command responsibility. It was decided by a ten-person jury, ending with a 54.6 million dollar verdict for the plaintiffs on July 23, 2002. The jury awarded \$14.6 million in compensatory damages and \$40 million in punitive damages.⁷³ The defendants filed a notice of appeal on August 3, 2002, and submitted their brief to the United States Court of Appeals for the Eleventh Circuit in January of 2003. The defendants appealed on the ground that the trial court erred by tolling the statute of limitations, which is ten years under the TVPA.⁷⁴

THE JURY INSTRUCTIONS IN *ROMAGOZA*

The jury instructions in *Romagoza* were based largely on the formulation of the doctrine in the *Ford* appeal; the instructions therefore addressed the two major issues of proximate cause and burden-shifting. In addition, the instructions went on to address a number of areas of the doctrine that had remained undefined at the close of *Ford*.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Brief of Appellants, *Romagoza v. Garcia* (11th Cir. filed Jan. 2003) (No. 02-14427-FF), available at <http://www.cja.org/cases/romagozadocs.shtml> (last accessed on April 2, 2004).

⁷⁴ *Id.*

TORTURED BY AN APPROPRIATE SUBORDINATE: REPLACING PROXIMATE CAUSE

The first major change in the instructions for *Romagoza* was to replace the proximate cause instruction in *Ford* with a requirement of having to show that the injuries were committed by an appropriate subordinate. The prong was defined as follows: “The plaintiff was tortured by a member of the military, the security forces, or by someone acting in concert with the military or security forces.”⁷⁵

Upon a question from the jury, “Shouldn’t it be absolutely necessary for the accused torturers [to] be identified or at least proven to be subordinates of the defendant commanders,” Judge Hurley further explained that the plaintiffs did not have to identify the individuals who committed the torture.⁷⁶ According to him, the plaintiffs had to show “that the torturers were members of the military, security forces, or someone acting in concert with them, and that such person(s), in fact, were subordinate to a particular defendant.”⁷⁷ Thus, the essence of the plaintiffs’ case remained proving that the commander had effective command over the subordinate, not on showing a connection between the plaintiffs’ particular injuries and the commander’s behavior.

EFFECTIVE COMMAND: A STEP TOWARD CLARIFICATION

The second major issue addressed in *Romagoza* was expanding and further clarifying the definition of effective command. The court, following the influence of the international tribunals discussed in the *Ford* appeal, subsumed effective command under the establishment of a

⁷⁵ Jury Instructions at 7, *Romagoza v. Garcia* (S.D. Fla. July 23, 2002) (No. 99-8364-CIV), available at <http://www.cja.org/cases/romagozadocs.shtml> (last accessed April 2, 2004) [hereinafter Jury Instructions].

⁷⁶ Patty Blum & Joshua Sondheimer, *Trial Update, Days 14 and 15—Closing Arguments, Jury Instructions Read by the Judge, and Clarifications Given to the Jury: Romagoza, Gonzalez and Mauricio v. Garcia and Vides*, at *7, at <http://www.cja.org/RomagozaUpdate7.18and7.19.02.htm> (last accessed April 2, 2004).

⁷⁷ *Id.* at *8.

superior-subordinate relationship.⁷⁸ This was the second prong of the jury instructions given in *Romagoza*, which read: “A superior-subordinate relationship existed between the defendant/military commander and the person(s) who tortured the plaintiff.”⁷⁹ Additionally, the instructions further defined the elements necessary in establishing the relationship determining that:

To establish...the existence of a superior-subordinate relationship between the defendant/military commander and the person(s) accused of torturing the plaintiff, the plaintiff must prove, by a preponderance of the evidence, that (1) the defendant/military commander held a higher rank than, or had authority over, the person(s) accused of torturing the plaintiff, and (2) the defendant/military commander had effective control over the person(s) accused of torturing the plaintiff.⁸⁰

Effective control was defined in the instructions as the defendant/military commander having the "actual ability to prevent the torture or to punish the persons accused of committing the torture."⁸¹ Additionally, the instructions expressly stated that the defendant/military commander could not "escape liability where his own action or inaction causes or significantly contributes to a lack of effective control over his subordinates."⁸² Although the instructions delved further into the place of effective command in the doctrine, exactly what constitutes "actual ability" remained unanswered in the case and proved to be an area that needs further clarification.

DE FACTO AND DE JURE COMMAND: A MAJOR CLARIFICATION

⁷⁸ See *Ford*, 289 F.3d at 1290 (quoting *Prosecutor v. Delalic*, Appeals Chamber ICTY, Feb. 20, 2000, at 256) ("Recent international cases consistently have found that effective control of a commander over his troops is required before liability will be imposed under the command responsibility doctrine. The consensus is that 'the concept of effective *control* over a subordinate...the sense of a material ability to prevent or punish criminal conduct...is the threshold to be reached in establishing a superior-subordinate relationship.'").

⁷⁹ Jury Instructions at 7, *supra* note 74.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 8.

Another major clarification in *Romagoza* involved the issue of *de facto* and *de jure* command. In defining the superior-subordinate relationship of the second prong of the *Romagoza* jury instructions, the role of *de facto* command was explicitly explained. The instructions state that:

A person who is not a member of the military or security forces may nonetheless be a subordinate if that person (1) placed himself under the authority of a defendant military commander and (2) the military commander had effective control (as this concept had been defined) over the nonmilitary actor.⁸³

This addition is essential in the face of changing actors in war, since current trends and definitions of war involve an increasing role for paramilitary forces and other non-military actors in the conflict. A large percent of human rights abuses during conflicts are now carried out by these actors, acting either independent of the government of the country or with only tenuous connections to the official military of the state.

“KNEW OR SHOULD HAVE KNOWN” DEFINED

The *Romagoza* instructions also helped clarify the “knew or should have known” component of the doctrine. As previously stated, international law had not defined the concept well, and the component was not addressed in *Ford*. The jury instructions in *Romagoza* read: “The defendant/military commander knew, or should have known, owing to the circumstances of the time, that his subordinates had committed, were committing, or were about to commit torture/or extrajudicial killing.”⁸⁴ According to the instructions, the plaintiffs did not have to prove that the defendant/military commander knew or should have known of the plaintiffs’ particular instances of torture. Rather, the knowledge element would be satisfied if the plaintiffs proved that the defendant/military commander knew, or should have known, that his

⁸³ *Id.* at 7-8.

⁸⁴ *Id.* at 7.

subordinates "had committed, were committing, or were about to commit, *any* instances of torture and/or extrajudicial killing."⁸⁵ This is a major development in the doctrine since any definition of the "knew or should have known" component is an improvement, and because it makes the doctrine easier for plaintiffs to use by again negating the proximate cause issue raised in *Ford*.⁸⁶

FAILED TO TAKE ALL NECESSARY AND REASONABLE MEASURES

Finally, the jury instructions in *Romagoza* also helped clarify what "all necessary and reasonable measures" in a time of war meant. The instructions for that prong of the instructions read: "The defendant/military commander failed to take all necessary and reasonable measures to prevent torture and/or extrajudicial killing, or failed to punish subordinates after they had committed torture and/or extrajudicial killing."⁸⁷ Failure to punish, according to the instructions, "may be established by proof that the defendant/military commander failed to investigate reliable allegations of torture and/or extrajudicial killing by subordinates, or failed to submit these matters to competent authorities for investigation and prosecution."⁸⁸ Most guidance for this component, however, can be found in *Yamashita* and *Ford*, since both cases dealt with defenses aimed at this aspect of the doctrine.

COMMAND RESPONSIBILITY DOCTRINE IN U.S. DOMESTIC COURTS IN THE 21ST CENTURY: AN UNCERTAIN FUTURE

⁸⁵ *Id.* at 8 (emphasis added).

⁸⁶ Cf. Joanne Mariner, *Milosevic's Command Responsibility: A Key Issue In His War Crimes Trial*, FINDLAW'S, July 16, 2001, available at http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/mariner/20010716.html (last accessed April 2, 2004) ("Notice may be direct, as when the superior witnessed the crimes or was informed of them. It may also be constructive, as when the offenses were so numerous or notorious that a reasonable person would necessarily conclude that the superior must have known of their commission.").

⁸⁷ Jury Instructions at 7, *supra* note 74.

⁸⁸ *Id.* at 9.

The doctrine of command responsibility following *Romagoza* is better articulated and clarified than it was in *Ford*, and the success of *Romagoza* is a promising sign for future command responsibility cases. The effectiveness of the doctrine, however, may still be limited, and require further development and clarification, in two respects.

One limitation of the doctrine of command responsibility as formulated is that it requires the commander to be tied to an official state military. Although the formulation in *Romagoza* provided for *de facto* command between a legitimate commander and an unofficial subordinate, such as a paramilitary member, it does not address the liability of, say, a paramilitary commander and one of his subordinate paramilitary members. Finding a way to articulate the doctrine to accommodate such non-state perpetrators will be increasingly important, given the rise in paramilitary and terrorist organizations, if a large percentage of human rights victims are to be able to utilize civil remedies. Such a formulation, however, would require an understanding of the command structure of the particular paramilitary or terrorist organization; discovering and articulating such an understanding may be difficult at best.⁸⁹

Second, the understanding of the command structure for *de jure* command is itself still fraught with confusion despite the successful articulation of the doctrine in *Romagoza*. One of the jury questions following the case requested a definition of the term “actual ability,” a term that is part of the jury instruction’s definition of “effective control.” Judge Hurley explained that effective control focuses on the “relationship” that existed between the commander and people who committed the torture and requires a showing that the commander who is being sued had the practical ability to prevent his subordinates from committing torture or had the practical ability to

⁸⁹ Cf. Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT’L L. 89 (discussing civilian command responsibility in the ICC).

punish subordinates who had committed torture.⁹⁰ Thus, effective command and practical ability in the current formulation of the doctrine continue to be difficult concepts for the jury, and the court, to understand.

Yet despite its flaws, the doctrine of command responsibility has already played, and will continue to play, a vital role in bringing human rights violators before the courts. It is a modern doctrine, with a strong historical basis, that is essential to justice in the emerging world of the 21st century.

⁹⁰ Blum & Sondheimer, *supra* note 75.