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Removable Officers and the Doctrine of Command Responsibility

by *Maureen Contreni*

The grounds of inadmissibility and deportability found in sections 212(a)(3)(E) and 237(a)(4)(D) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(3)(E) and 1227(a)(4)(D), originally consisted of only one section dealing with Nazi persecution and other forms of persecution based on race, religion, national origin, or political opinion. See sections 212(a)(33), 241(a)(19) of the Act, 8 U.S.C. §§ 1182(a)(33), 1251(a)(19) (1988); Act of Oct. 30, 1978, Pub. L. No. 95-549, §§ 101, 103, 92 Stat. 2065, 2065-66. Over time, amendments to the Act have expanded the sections to include aliens who have "committed, ordered, incited, assisted, or otherwise participated in" genocide, acts of torture, or extrajudicial killing. This article will examine the doctrine of command responsibility and explore its applicability, within the context of sections 212(a)(3)(E) and 237(a)(4)(D), to foreign military commanders whose subordinates have committed conduct that falls within these provisions.

The Doctrine of Command Responsibility in International Law

The doctrine of command responsibility stems from the notion that commanders can be held accountable for the actions of their subordinates. The doctrine was first set forth in international law under the Fourth and Fifth Hague Convention of 1907, which imposed upon a commander of an occupying army an affirmative duty regarding prisoners of war and the civilian population. Hague Convention Respecting the Laws and Customs of War on Land (IV), Feb. 23, 1909, 36 Stat. 2277; Hague Convention Relative to the Rights and Duties of Neutral Powers and Persons in case of War on Land (V), Feb. 23, 1909, 36 Stat. 2310. See generally *In Re Yamashita*, 327 U.S. 1 (1946). Since that time, the doctrine has evolved as it has been applied in various contexts.

The doctrine was first tested in the wake of World War I, when the German Supreme Court tried Emil Muller, a captain in the German Army, for the brutal treatment of English prisoners of war. See Matthew Lippman,

Humanitarian Law: The Uncertain Contours of Command Responsibility, 9 Tulsa J. Comp. & Int'l L. 1, 7-8 (2001). The German court convicted Muller, finding that he had knowingly "permitted the committing of a criminal act [by a subordinate], which he could have prevented, and which he was officially bound to prevent." *German War Trials: Judgment in the Case of Emil Muller*, 16 Am. J. Int'l L. 684, 694 (1922).

Following World War II, the United States Supreme Court applied the doctrine of command responsibility to General Tomoyuki Yamashita, the former commander of the Imperial Japanese Army in the Philippines. *Yamashita*, 327 U.S. at 5. Yamashita was convicted by a United States military commission in the Philippines and sentenced to death for war crimes committed by his troops against Filipino civilians. *Id.* The Supreme Court upheld the military commission's decision, finding that Yamashita had "an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population" from violations of the law of war by forces under his command, and he failed to do so. *Id.* at 16. This interpretation of command responsibility was controversial because, as the dissent pointed out, General Yamashita's conviction did not require proof that he knew about the crimes committed by his troops. *See id.* at 50-55 (Rutledge, J., dissenting).

Since *Yamashita*, however, international tribunals applying the doctrine of command responsibility have required that the commander actually knew, or should have known, about the conduct of his subordinates. *See* Lippman, *Uncertain Contours*, *supra*, at 91. Perhaps the most well-known application of the doctrine took place with the prosecutions of high-ranking Nazi officials before the International Military Tribunal at Nuremberg. In addition to holding Nazi leaders criminally liable for crimes in which they actually engaged, the Nuremberg Tribunal held officials responsible for atrocities, committed by subordinates, about which the higher official knew and over which he exercised direct or territorial authority. *See id.* at 14-17.¹

The requirement of knowledge and authority was further developed by the International Military Tribunal for the Far East, or Tokyo Tribunal, which tried Japanese military and civilian officials for the inhumane treatment of prisoners of war during World War II. *See id.* at

17-24. The Tokyo Tribunal imputed knowledge to Japanese officials who exercised direct authority over prisoners and would have known, but for their own disregard or negligence, that their subordinates committed war crimes against prisoners. *Id.* at 18. The Tokyo Tribunal held that officials with authority over prisoners had a duty to anticipate their possible mistreatment and an obligation to take adequate steps to prevent the commission of war crimes by subordinates. *Id.* The Tokyo Tribunal extended the concept of command responsibility to civilian Japanese Cabinet members with either formal authority or informal influence over the individuals committing the crimes. *Id.* at 23-24. Cabinet members with the requisite knowledge, either actual or imputed, who remained in office without taking any action, rather than resigning, were held responsible under the doctrine of command responsibility for crimes against prisoners of war. *Id.*

The first international codification of the doctrine occurred in a 1977 Protocol to the Geneva Convention. Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. Like the international tribunals, Protocol I extends command responsibility to superiors who "knew, or had information which should have enabled them to [know]," of a subordinate's misconduct. *Id.* art. 86(2). Notably, the Protocol refers only to "superiors" without distinguishing between military and civilian leaders, and it does not limit the application of command responsibility to high-ranking officials. *See id.* art. 87(1). Instead, "[t]he liability of commanders [under the Protocol] extends . . . to the lowest level officials in the chain of command." Lippman, *Uncertain Contours*, *supra*, at 53.

More recently, the International Criminal Tribunal for the Former Yugoslavia ("ICTY")² and the International Criminal Tribunal of Rwanda ("ICTR"),³ both of which contain the doctrine of command responsibility within their founding statutes, have applied Protocol I to cases before them.⁴ For instance, in *Prosecutor v. Delalic*, the ICTY discussed command responsibility at length and held that a superior faces criminal responsibility for the war crimes committed by a subordinate if the superior knew or had reason to know that the subordinate was about to commit such acts, or had already done so, and the superior failed to take necessary and reasonable measures to prevent the acts or to punish the perpetrating subordinate. *Prosecutor v. Delalic*, Case No. IT-96-21-A,

Judgment, ¶ 82 (ICTY Feb. 20, 2001). The ICTY also addressed the superior-subordinate relationship, finding that liability under the doctrine of command responsibility applies to both military and civilian commanders so long as the individual in question has “effective control” over the subordinate—that is, the material ability to prevent or punish the subordinate’s conduct. *Id.* ¶¶ 302, 304.

Sections 212(a)(3)(E) and 237(a)(4)(D) of the Act

The Immigration Act of 1990 added to the Act grounds of inadmissibility and deportability for any alien “who has engaged in conduct that is defined as genocide.”⁵ See Pub. L. No. 101-649, §§ 601(a), 602(a), 104 Stat. 4978, 5072, 5081 (1990) (codified at sections 212(a)(3)(E)(ii) and 241(a)(4)(D) of the Act). On December 17, 2004, these provisions were further amended by the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”), Pub. L. No. 108-458, 118 Stat. 3638. First, the IRTPA broadened the reach of these grounds by replacing “engaged in” genocide with “ordered, incited, assisted or otherwise participated in” genocide. IRTPA § 5501(a)(1), 118 Stat. at 3740. The IRTPA amendments also created additional grounds of inadmissibility and deportability for aliens who have “committed, ordered, incited, assisted, or otherwise participated in” the commission of acts of torture⁶ or extrajudicial killing.⁷ *Id.* § 5501(a)(2), (b), 118 Stat. at 3740 (codified at sections 212(a)(3)(E)(iii) and 237(a)(4)(D) of the Act). Finally, the IRTPA amended section 101(f) of the Act, 8 U.S.C. § 1101(f) (2000), such that an alien who has engaged in conduct described in section 212(a)(3)(E) relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killing cannot be found to be a person of good moral character. *Id.* § 5504, 118 Stat. at 3741 (codified at section 101(f)(9) of the Act). The IRTPA amendments apply retroactively and prospectively to conduct committed before, on, or after its enactment. *Id.* § 5501(c), 118 Stat. at 3740.

“Assisted or Otherwise Participated In”

As the foregoing discussion makes clear, the doctrine of command responsibility does not appear in any of the relevant provisions of the Act. Instead, the IRTPA amendments expanded the genocide grounds of inadmissibility and deportability, and created new ones for acts of torture and extrajudicial killing, to cover

those who have “committed, ordered, incited, assisted, or otherwise participated in” such conduct. As we will explore below, and as the Board of Immigration Appeals held in *Matter of D-R-*, 25 I&N Dec. 445, 451-53 (BIA 2011), the legislative history behind this language reveals that Congress specifically intended to hold senior officers in foreign militaries liable, on the theory of command responsibility, for extrajudicial killing and torture carried out by their subordinates.

Although the IRTPA did not address this issue, an earlier piece of legislation—the Anti-Atrocity Alien Deportation Act (“AAADA”) of 2003, S. 710, 108th Cong.—did. See *Matter of D-R-*, 25 I&N Dec. at 452 (explaining that the AAADA “was not passed as separate legislation, but the statutory language from this bill was incorporated into the IRTPA”). As the Board noted, the AAADA was proposed “to close loopholes in U.S. immigration laws that have allowed aliens who have committed serious forms of human rights abuses abroad to enter and remain in the country.” *Id.* (quoting S. Rep. No. 108-209, at 1-2 (2003)). Specifically, the United States Senate Report for the proposed bill cited concerns from commenters and organizations that the United States had become a safe haven for perpetrators of torture and other grave human rights abuses. See S. Rep. No. 108-209, at 2-5. The report pointed to specific individuals living in the United States, including former generals, who had been identified as alleged human rights abusers in their home countries. *Id.* at 3-5.

One of the changes proposed by the AAADA, and adopted by the IRTPA, was the “committed, ordered, incited, assisted, or otherwise participated in” language. *Id.* at 10. The Senate Report recognized the problem of human rights abusers seeking and obtaining refuge in the United States and offered this language as an effective response. *Id.* at 2. Specifically, the report explained that this language was intended to be construed broadly and “reach the behavior of persons directly or personally associated with the covered acts, *including those with command responsibility.*” *Id.* (emphasis added). Looking to this report and the underlying purpose of the AAADA, the Board held that the doctrine of command responsibility was incorporated into the Act with the passage of the IRTPA. *Matter of D-R-*, 25 I&N Dec. at 452-53; see also *Matter of A-H-*, 23 I&N Dec. 744, 784 (A.G. 2005) (explaining in the context of the persecutor bar, which also contains the “ordered, incited, assisted, or

otherwise participated in” language, that such provisions “are to be given broad application” and “do not require direct personal involvement in the [covered] acts”).

Application of Command Responsibility in the Immigration Context

Having established that command responsibility applies in the context of sections 212(a)(3)(E) and 237(a)(4)(D), only one question remains: what does it entail for immigration purposes? As mentioned above, the international community has adopted various articulations of the doctrine. According to the Senate Report:

Command responsibility holds a commander responsible for unlawful acts when (1) the forces who committed the abuses were subordinates of the commander (i.e., the forces were under his control either as a matter of law or as a matter of fact); (2) the commander knew, or, in light of the circumstances at the time, should have known, that subordinates had committed, were committing, or were about to commit unlawful acts; and (3) the commander failed to prove that he had taken the necessary and reasonable measures to (a) prevent or stop subordinates from committing such acts, or (b) investigate the acts committed by subordinates in a genuine effort to punish the perpetrators.

S. Rep. No. 108-209, at 10. The Board appears to have adopted the bulk of this approach. *See Matter of D-R-*, 25 I&N Dec. at 453 (“[W]e conclude that inadmissibility under section 212(a)(3)(E) of the Act is established where it is shown that an alien with command responsibility knew or should have known that his subordinates committed unlawful acts covered by the statute and failed to prove that he took reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators.”).

The alien in *Matter of D-R-* served as a special police officer during the Bosnian war, commanding a platoon of 25 other officers. In the summer of 1995, after the Serbian Army had overtaken the Bosnian town of Srebrenica, the alien’s platoon patrolled the Bratunac-Konjevic Polje, the principal escape route for Bosnian

Muslims fleeing Srebrenica. *Id.* at 447. In one instance, approximately 1,000 Bosnian Muslims who surrendered along the road were taken to a nearby warehouse in Kravica and killed. *Id.* at 448. In another instance, the alien and his subordinates helped load onto buses 200 men and boys, who were later killed. *Id.* While it was well known at the time that mass executions of Bosnian Muslims were taking place, the alien claimed that he neither had knowledge of, nor participated in, the mass killings. *Id.* at 449.

The Board found that the Immigration Judge made reasonable inferences that the alien knew or should have known about the killings at the Kravica warehouse prior to loading the 200 men and boys onto the bus 3 days later and thus either knew or should have known that they would be killed in a similar manner. *Id.* at 454. He was therefore obligated to take “reasonable measures to prevent or stop such acts,” instead of helping load the bus, and to “investigate in a genuine effort” the actions of his subordinates for purposes of punishment. *See id.* at 453-54. His failure to do so was sufficient to support a finding—under the doctrine of command responsibility—that he “assisted in” the extrajudicial killings. *See id.*

Outstanding Issues

The Board’s standard for holding an alien responsible for extrajudicial killing and torture under the doctrine of command authority appears consonant with the standard articulated in the international law context discussed above, encompassing a commander’s failure to prevent, stop, or punish atrocities by subordinates. Yet it remains to be seen how the Board’s approach will be applied to, and potentially expanded by, issues in future cases. For example, by including a commander’s failure to “investigate in genuine effort to punish the perpetrators,” the Board’s standard covers a commander’s after-the-fact conduct regarding his subordinates: a commander who knew or should have known that his subordinates committed torture or extrajudicial killing but failed to investigate, or investigated inadequately or disingenuously, could be found to have assisted or otherwise participated in genocide, torture, or extrajudicial killing. The Board has not yet elaborated on the kinds of “reasonable measures” a commanding officer must have taken to prevent, stop, investigate, or punish torture or extrajudicial killing committed by his subordinates such that he would avoid a finding of inadmissibility or deportability under 212(a)(3)(E) or 237(a)(4)(D). Such a determination may

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR FEBRUARY 2014

by John Guendelsberger

The United States courts of appeals issued 187 decisions in February 2014 in cases appealed from the Board. The courts affirmed the Board in 166 cases and reversed or remanded in 21, for an overall reversal rate of 11.2%, compared to last month's 14.9%. There were no reversals from the First, Sixth, Seventh, Eighth, and Eleventh Circuits.

The chart below shows the results from each circuit for February 2014 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	1	1	0	0.0
Second	32	30	2	6.3
Third	14	12	2	14.3
Fourth	14	13	1	7.1
Fifth	17	13	4	23.5
Sixth	9	9	0	0.0
Seventh	3	3	0	0.0
Eighth	5	5	0	0.0
Ninth	81	70	11	13.6
Tenth	5	4	1	20.0
Eleventh	6	6	0	0.0
All	187	166	21	11.2

The 187 decisions included 98 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 35 direct appeals from denials of other forms of relief from removal or from findings of removal; and 54 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	98	85	13	13.3
Other Relief	35	30	5	14.3
Motions	54	51	3	5.6

The 13 reversals or remands in asylum cases involved credibility (3 cases), nexus (3 cases), well-founded fear (2 cases), internal relocation, corroboration,

derivative applicants, Convention Against Torture, and the material support to terrorists bar.

The five reversals or remands in the "other relief" category addressed crimes involving moral turpitude (two cases), application of the categorical approach to aggravated felony grounds (two cases), and adjustment of status. The three motions cases involved changed country conditions, adjustment of status, and derivative citizenship.

The chart below shows the combined numbers for January and February 2014 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Third	28	23	5	17.9
Ninth	184	155	29	15.8
Fifth	34	29	5	14.7
Tenth	7	6	1	14.3
Second	57	50	7	12.3
Fourth	30	27	3	10.0
Sixth	18	17	1	5.6
First	3	3	0	0.0
Seventh	7	7	0	0.0
Eighth	9	9	0	0.0
Eleventh	12	12	0	0.0
All	389	338	51	13.1

Last year's reversal rate at this point (January and February 2014) was 13.7%, with 344 total decisions and 47 reversals.

The numbers by type of case on appeal for the first 2 months of 2014 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	200	169	31	15.5
Other Relief	76	62	14	18.4
Motions	113	107	6	5.3

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RECENT COURT OPINIONS

Third Circuit:

Bautista v. Att’y Gen. of U.S., No. 11-3942, 2014 WL 783019 (3d Cir. Feb. 28, 2014): A divided panel of the Third Circuit granted the petition for review, reversing the Board’s precedent decision in *Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011). The court held that under the Supreme Court’s decision in *Jones v. United States*, 529 U.S. 848 (2000), the “interstate commerce” requirement of 18 U.S.C. § 844(i) is a *substantive* “jurisdictional element” of the Federal offense, which must be present before any State offense can be deemed “described in” the above statute. In *Matter of Bautista*, the Board held that attempted arson in the third degree in violation of sections 110 and 150.10 of the New York Penal Law is an aggravated felony under section 101(a)(43)(E)(i) of the Act because it is “an offense described in [18 U.S.C. § 844(i)].” Although 18 U.S.C. § 844(i) contains an “interstate commerce” jurisdictional requirement, the Board held in *Bautista* that a State arson offense need not have a nexus to interstate commerce in order to qualify as an offense “described in” the Federal statute. In reaching that conclusion, the Board followed its own precedent in *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002), as well as the precedents of the Fifth, Seventh, and Ninth Circuits. See *Nieto Hernandez v. Holder*, 592 F.3d 681, 685-86 (5th Cir. 2009) (analyzing § 922(g)(1) under section 101(a)(43)(E)(ii) of the Act); *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 501-03 (7th Cir. 2008) (same); *United States v. Castillo-Rivera*, 244 F.3d 1020, 1023-24 (9th Cir. 2001) (same); see also *Spacek v. Holder*, 688 F.3d 536, 538-39 (8th Cir. 2012) (following the Ninth, Seventh, and Fifth Circuits in analyzing 18 U.S.C. § 1962 under section 101(a)(43)(J) of the Act). The Third Circuit distinguished *Vasquez-Muniz* and the circuit court decisions holding that a State offense may be “described in” 18 U.S.C. § 922(g)(1) despite the lack of an interstate commerce nexus by observing that “the salience of a jurisdictional element and its requisite interstate commerce nexus may vary depending on the substantive nature of the offense at hand.” A dissenting opinion argued that section 101(a)(43)(E)(i) of the Act is ambiguous and the Board’s interpretation in *Matter of Bautista* was reasonable, thereby entitling it to *Chevron* deference.

Fourth Circuit:

Urbina v. Holder, Nos. 13-1084, 13-1465, 2014 WL 998324 (4th Cir. Mar. 17, 2014): The Fourth Circuit

denied the petition for review of the Board’s decisions finding the petitioner ineligible for cancellation of removal and denying his motion to reconsider. The petitioner entered the U.S. as a B-2 visitor on October 4, 2000. In December 2009, he was served with a Notice to Appear (“NTA”), charging him with entering the country without having been admitted or paroled pursuant to section 212(a)(6)(A)(i) of the Act. The charge was based on the petitioner’s own assertions in applications he had filed for Temporary Protected Status, in which he claimed a 1998 entry date. Before the Immigration Judge, the petitioner established his 2000 inspection and admission, which eventually led the Department of Homeland Security (“DHS”) to amend the NTA by changing the charge to removability under section 237(a)(1)(B). The NTA had been served on the petitioner before he had accrued the 10 years of continuous physical presence needed to be eligible for cancellation of removal under section 240A(b)(1). However, the petitioner argued before the Immigration Judge that the original incorrect charge rendered the NTA invalid and he continued to accrue continuous physical presence until the proper charge was added, which was more than 10 years after his date of admission. Both the Immigration Judge and the Board disagreed, finding the petitioner statutorily ineligible for cancellation of removal. The Board additionally denied the petitioner’s motion to reconsider the issue of physical presence. In his petition for review, the petitioner argued that he was eligible to apply for cancellation of removal, claimed a denial of due process, and challenged the Board’s denial of his motion to reconsider. The circuit court accorded *Chevron* deference to the Board’s decision in *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011), which held that the accrual of continuous residence is stopped by service of an NTA that does not contain a time and date of hearing. Under the first step of the *Chevron* analysis, the court agreed with the Board that the stop-time provision of section 240A(d)(1)(A) of the Act is ambiguous. In requiring service of an NTA “under section 1229(a) of this title,” the Board found two possible interpretations: that the NTA must satisfy all requirements mandated by § 1229(a), or that the document specified by § 1229(a) (namely, the NTA) must be served in order to trigger the stop-time rule. The court found the Board’s adoption of the second interpretation (in which § 1229(a) serves a purely definitional purpose of specifying the document that must be served) to be reasonable. Although *Camarillo* did not deal directly with the issue of amendment to the charge contained in the NTA, the court also found reasonable the Board’s statement in a

footnote that it saw no reason to believe that Congress intended to allow the accrual of time between the service of an NTA and the later filing of an I-261. The court also noted that the DHS did not initially file a false charge for purposes of stopping the clock; it relied on the petitioner's own statements as to his date and manner of entry. No abuse of discretion was found in the Immigration Judge's decision to deny the petitioner's motion to terminate proceedings and to continue the case to allow DHS to amend the NTA instead. The court was not persuaded by the petitioner's arguments that the DHS lacked the authority to amend the NTA (on the grounds that such authority is not explicitly afforded by statute), or that the Immigration Judge denied the petitioner due process in premitting the cancellation application.

Seventh Circuit:

L.D.G. v. Holder, No. 13-1011, 2014 WL 944985 (7th Cir. Mar. 12, 2014): The Seventh Circuit granted a petition for review of the Board's decision affirming that an Immigration Judge lacked jurisdiction to adjudicate an application for a waiver of inadmissibility under section 212(d)(3)(A) of the Act. The petitioner applied for a nonimmigrant visa under section 101(a)(15)(U) of the Act but was found ineligible because she had been convicted of a drug offense. She sought a waiver of inadmissibility, which, if granted, would allow for approval of the U visa application. The Immigration Judge found that he lacked jurisdiction to consider the request for a waiver. The Board affirmed, noting that the petitioner had not been denied an initial opportunity to seek a waiver of inadmissibility with the DHS under section 212(d)(14) of the Act. The Board additionally held that since the petitioner's illegal entry was the cause of her inadmissibility, she was applying for a retroactive waiver, which the Seventh Circuit had found to be barred in *Borrego v. Mukasey*, 539 F.3d 689 (7th Cir. 2008). The court first clarified that the petitioner was not seeking a retroactive waiver by distinguishing the facts in her case from those in *Borrego*. *Borrego* sought a waiver after a visa had been improvidently issued while she was subject to a 5-year bar from entering the U.S., but this petitioner had not yet been issued a visa. The court explained that retroactive waivers "relieve . . . the effects of past conduct, but this does not make the waivers themselves retroactive." Rather, a waiver is retroactive when it "works to salvage relief previously granted for which the applicant was not qualified, and thus was void from the outset." Regarding the question of jurisdiction, the court found that

deference was not warranted, because the Board (which is part of Department of Justice) was not interpreting its own agency's regulation, but rather one issued by the DHS. The court held that section 212(d)(14), which grants the Secretary of the DHS authority to waive most statutory grounds of inadmissibility for U visa applicants, does not limit section 212(d)(3)(A), which grants the Attorney General broad discretion to grant waivers of inadmissibility to nonimmigrant visa applicants. The court further noted that a scheme authorizing one agency to grant a waiver in order to apply for a visa from another agency "is neither unprecedented nor unique." The court therefore vacated the removal order and remanded the case for the Immigration Judge to consider the waiver request.

Eighth Circuit:

Roberts v. Holder, No. 12-3359, 2014 WL 1062930 (8th Cir. Mar. 20, 2014): The Eighth Circuit denied a petition for review of the Board's decision, which affirmed an Immigration Judge's finding that the petitioner's conviction for aiding and abetting third-degree assault under section 605.223 subdiv. I of the Minnesota Statutes Annotated was for an aggravated felony. The petitioner also had an earlier conviction for second-degree burglary. He was therefore charged as being removable for having committed two crimes involving moral turpitude, as well as for having been convicted of an aggravated felony. The Immigration Judge sustained the latter charge, finding the Minnesota assault conviction to be for a categorical "crime of violence" as defined by 18 U.S.C. § 16. The judge therefore found the petitioner ineligible for cancellation of removal and a waiver under section 212(h) of the Act. The Board affirmed. The circuit court concurred, finding that the offense defined in the Minnesota statute was an aggravated felony crime of violence because it contains as an element "the use, attempted use, or threatened use of physical force" against another. The court noted that third-degree assault requires a higher showing of harm than fourth-degree assault, which the court had found to be a crime of violence in *United States v. Salean*, 583 F.3d 1059 (8th Cir. 2009). The court therefore found the petitioner to be statutorily ineligible for cancellation of removal and adjustment of status. The petitioner argued that he was eligible for a section 212(h) waiver (which would remove his bar to adjustment of status), because he had been admitted to the U.S. as a nonimmigrant and had then adjusted his status to that of a lawful permanent resident ("LPR"). The petitioner therefore

argued that his conviction had not occurred after he was admitted as an LPR, because he was never admitted as an LPR. The court noted that this interpretation had been adopted in four circuits, which found the statutory language “lawfully admitted for permanent residence” to be unambiguous. The court stated that the language of section 212(h) could seem unambiguous if read in isolation. However, reading the Act as a whole, the court determined the language was ambiguous because of inconsistent use of the term “admission” in the Act. The court pointed to the language of section 245(b) of the Act directing the Attorney General to “record the alien’s lawful admission for permanent residence” upon approval of an application for adjustment of status (thus treating adjustment itself as an admission). Finding the statute ambiguous, the court accorded deference to the Board’s reasonable interpretation in *Matter of E.W. Rodriguez*, 25 I&N Dec. 784, 789 (BIA 2012), which held that a section 212(h) waiver is unavailable to anyone convicted of an aggravated felony after acquiring LPR status in any manner. The court was not persuaded by the petitioner’s equal protection argument, which was based on the Board’s application of its holding in *E.W. Rodriguez* only outside of the four circuits that declined to accord it deference. The court held that disagreements between circuit courts, or an agency and one or more circuit court, “will not by itself create an equal protection violation.”

Ninth Circuit:

Turijan v. Holder, No. 10-72027, 2014 WL 905757 (9th Cir. Mar. 10, 2014): The Ninth Circuit granted a petition for review of the Board’s decision finding the petitioner removable under section 237(a)(2)(A)(i) of the Act for having been convicted of a crime involving moral turpitude (“CIMT”) within 5 years of admission. The petitioner had pled guilty to the crime of felony false imprisonment under section 236 of the California Penal Code (“CPC”). The court compared the elements of the State statute to the generic definition of a CIMT to determine if the offense that the petitioner was convicted of was categorically a CIMT. The California statute contains three elements: (1) that the accused intentionally and unlawfully restrained, confined, or detained another person, (2) that the person did not consent, and (3) that such restraint, confinement, or detention was accomplished by violence or menace. The generic definition of a CIMT in crimes that did not involve fraud, however, requires “‘base, vile, and depraved’ conduct that [s]hocks the public conscience,” and case law almost always requires “an intent to injure

someone, an actual injury, or a protected class of victims.” The court found that the California statute did not satisfy these generic CIMT requirements. It further found that the statute had been applied by the California courts “in a non-generic manner,” citing a case upholding a conviction where the defendants did not brandish a weapon, act in a hostile manner, or touch or verbally threaten the victims. The court also cited *Castrijon-Garcia v. Holder*, 704 F.3d 1205 (9th Cir. 2013), in which a Ninth Circuit panel had held that the crime of simple kidnapping under section 207(a) of the CPC was not a CIMT. Noting that the petitioner was originally charged with violating section 207(a) of the CPC but pled guilty to the lesser included offense under section 236, the court concluded that if the greater offense was not found to categorically be a CIMT, the lesser included offense could not be one either. Accordingly, the Board’s decision was vacated.

United States v. Garcia-Santana, 743 F.3d 666 (9th Cir. 2014): The Ninth Circuit affirmed a district court’s decision dismissing an indictment that charged the defendant with illegal reentry. In 2002, she pled guilty to conspiracy to commit the crime of burglary under Nevada law. She was subsequently summarily removed from the U.S. based on an Immigration and Naturalization Service (“INS”) officer’s determination that she was ineligible for any form of relief from removal because of her conviction for an aggravated felony. On her return, she was criminally charged with illegal reentry. Before the district court, she successfully challenged her removal order on due process grounds. The Government appealed. The circuit court observed that an immigration official’s failure to advise an alien of his or her right to apply for relief (including voluntary departure) constitutes a due process violation. The issue before the court was thus the accuracy of the INS officer’s determination. The Ninth Circuit applied the categorical approach to determine whether the Nevada conspiracy statute satisfied the generic Federal law definition of the same crime. The court determined that the elements of the generic Federal definition include the requirement that an overt act was committed in furtherance of the conspiracy’s objective. Since the Nevada statute lacked an overt act requirement, the court found that it covered a broader range of conduct than its Federal counterpart. Accordingly, the court concluded that the Nevada crime was not categorically an aggravated felony and found the INS officer’s determination that the defendant was ineligible for all relief to be erroneous. In reaching its conclusion, the court defined the “generic

definition” of a crime as the definition found in the majority of the States’ criminal codes and stated that the contemporary definition of a term applies. It found that the vast majority of State conspiracy statutes presently contain an overt act requirement. The court was not persuaded by the Government’s argument, which was based on *Matter of Richardson*, 25 I&N Dec. 226 (BIA 2010), holding that section 101(a)(43)(U) of the Act references the common law definition of the crime of conspiracy, which did not include the contemporary “overt act” requirement now adopted by many States. The line of Supreme Court holdings relied on by the Board to support its conclusion was found to be inapplicable because the cases involved specific penal statutes that defined criminal conduct,” whereas the Act defines aggravated felonies for the purpose of “assigning various immigration consequences to prior convictions.”

BIA PRECEDENT DECISIONS

In *Matter of Chavez-Alvarez*, 26 I&N Dec. 274 (BIA 2014), the Board reaffirmed its holding in *Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999), that adjustment of status is an “admission” for purposes of determining whether an alien has been convicted of an aggravated felony at any time “after admission” under section 237(a)(2)(A)(iii) of the Act. Additionally, the Board held that a specification in the Manual for Courts-Martial (“MCM”), which must be proved beyond a reasonable doubt, constitutes an “element” of the underlying offense for immigration purposes. Finally, the Board held that the crime of sodomy in violation of the Uniform Code of Military Justice (“UCMJ”), with a specification under the Punitive Articles of the MCM that such offense be committed “by force and without [] consent,” is a crime of violence.

After adjusting to lawful permanent resident status, the respondent pled guilty in a General Court-Martial proceeding to several charges, including sodomy by force. The Immigration Judge found that the offense was a crime of violence under both 18 U.S.C. §§ 16(a) and (b) and that the respondent’s sentence exceeded 12 months’ imprisonment, thus constituting an aggravated felony under section 101(a)(43)(F) of the Act. The Immigration Judge also concluded that the respondent was ineligible for a stand-alone section 212(h) waiver.

Pointing to its own precedent, the Board explained that the concept of considering an

“adjustment of status” to be an “admission” has been settled in the context of removability under section 237(a)(2)(A)(iii) of the Act, and also in the context of eligibility for relief from removal. The Board acknowledged the Third Circuit’s contrary holding in *Hanif v. Attorney General of the U.S.*, 694 F.3d 479 (3d Cir. 2012) (finding that the phrase “lawfully admitted for permanent residence” in section 212(h) does not apply to an alien who adjusted to that status after entering the country illegally), but regarded that case as not controlling because it did not deal with an alien’s removability for an aggravated felony conviction. Moreover, no court had disagreed with the Board’s view that it would be absurd to allow a lawful permanent resident—who is otherwise *not* subject to the section 212(a) grounds of inadmissibility—to avoid removability on aggravated felony grounds simply because he acquired such status through adjustment. The Board therefore concluded that if the respondent’s offense was an aggravated felony, he was properly charged under section 237(a)(2)(A)(iii) of the Act because he sustained his conviction after he was “admitted” by adjusting his status.

Next, the Board examined the respondent’s offense of sodomy by force. Concurring with the Immigration Judge that the MCM has the force and effect of law, the Board reasoned that although the phrase “by force and without [] consent” was part of an MCM sentencing aggravator, it was the functional equivalent of a statutory element because it had to be pled and proven beyond a reasonable doubt. Since the offense included the use of force against a person, the Board found that it fell within the definition of a crime of violence under 18 U.S.C. § 16(a). Additionally, the Board found the offense to be a crime of violence under § 16(b) because sodomy by force, by its nature, involves a substantial risk that the perpetrator will resort to the use of violent force “to overcome the victim’s natural resistance against participating in unwanted” sexual activity. Concluding that the respondent’s aggregate sentence of 18 months’ imprisonment applied to the sodomy conviction, the Board found that he had been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act.

Turning to the respondent’s application for a stand-alone section 212(h) waiver, the Board found this claim to be foreclosed by *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013), because he is neither an arriving alien seeking to waive a ground of inadmissibility nor an alien charged with removability under section 237(a)

who seeks to waive inadmissibility in conjunction with an application for adjustment of status. The appeal was dismissed.

In *Matter of C-J-H-*, 26 I&N Dec. 284 (BIA 2014), the Board held that an alien whose status has been adjusted from asylee to lawful permanent resident cannot readjust status under section 209(b) of the Act.

The respondent argued that by its silence, section 209(b) permitted readjustment. Specifically, section 209(a)—the provision enabling refugees to acquire lawful permanent residence through adjustment—expressly prohibits refugees who have already acquired lawful permanent resident status from “readjusting.” Without a comparable prohibition for asylees, the respondent argued, section 209(b) authorized readjustment.

The Board disagreed that this absence indicated Congress’ intent to treat refugees and asylees differently. Noting its decision in *Matter of Smriko*, 23 I&N Dec. 836 (BIA 2005), that a refugee who has become a lawful permanent resident is subject to removability—without a termination of refugee status—because he no longer qualifies as a refugee, the Board concluded that an asylee who adjusted to lawful permanent resident status no longer qualifies as an asylee. It also agreed with the Ninth Circuit that the language of section 209(b), which applies to asylees, is plain and does not permit readjustment, because asylees and refugees have similar status under the law. The Board therefore held that the respondent, who lost his status as an asylee when he became a lawful permanent resident, was ineligible to readjust under section 209(b).

Alternatively, the Board found that even if the language of section 209(b) is ambiguous, it would reach the same conclusion based on its interpretation of the language and structure of the Act as a whole. The Board reasoned that since section 209(a) expressly bars readjustment for refugees who have attained lawful permanent resident status, to interpret section 209(b) as allowing previously adjusted asylees to readjust would provide unique relief to asylees that is unavailable to similarly situated refugees. Noting that under 8 C.F.R. § 1001.1(p) the respondent retains his status as a lawful permanent resident until he is subject to a final administrative order of removal, the Board concurred with the Ninth Circuit that section 209(b) of the Act is inapplicable to him.

Rejecting the respondent’s request to extend the availability of readjustment beyond section 245(a) of the Act, the Board was unconvinced that Congress intended the different language and more limited purpose of section 209(b) to offer the same relief. The Board was also unpersuaded that section 209(b) adjustment of status should be available simply because the respondent was ineligible to readjust under section 245(a). The appeal was dismissed.

REGULATORY UPDATE

79 Fed. Reg. 11,808 (Mar. 3, 2014)

**DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
[CIS No. 2539–13; DHS Docket No.
USCIS–2014–0001]
RIN 1615–ZB25**

Extension of the Designation of Haiti for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.
ACTION: Notice.

SUMMARY: Through this Notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is extending the designation of Haiti for Temporary Protected Status (TPS) for 18 months from July 23, 2014 through January 22, 2016.

The extension allows currently eligible TPS beneficiaries to retain TPS through January 22, 2016, so long as they otherwise continue to meet the eligibility requirements for TPS. The Secretary has determined that an extension is warranted because the conditions in Haiti that prompted the TPS designation continue to be met. There continues to be a substantial, but temporary, disruption of living conditions in Haiti based upon extraordinary and temporary conditions in that country that prevent Haitians who have TPS from safely returning.

Through this Notice, DHS also sets forth procedures necessary for nationals of Haiti (or aliens having no nationality who last habitually resided in Haiti) to re-register for TPS and to apply for renewal of their Employment Authorization Documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who have previously

registered for TPS under the designation of Haiti and whose applications have been granted. Certain nationals of Haiti (or aliens having no nationality who last habitually resided in Haiti) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions, if they meet: (1) At least one of the late initial filing criteria; and, (2) all TPS eligibility criteria (including continuous residence in the United States since January 12, 2011, and continuous physical presence in the United States since July 23, 2011).

For individuals who have already been granted TPS under the Haiti designation, the 60-day re-registration period runs from March 3, 2014 through May 2, 2014. USCIS will issue new EADs with a January 22, 2016 expiration date to eligible Haiti TPS beneficiaries who timely re-register and apply for EADs under this extension. Given the timeframes involved with processing TPS re-registration applications, DHS recognizes that not all re-registrants will receive new EADs before their current EADs expire on July 22, 2014. Accordingly, through this Notice, DHS automatically extends the validity of EADs issued under the TPS designation of Haiti for 6 months, from July 22, 2014 through January 22, 2015, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended and their impact on Employment Eligibility Verification (Form I-9) and the E-Verify processes.

DATES: The 18-month extension of the TPS designation of Haiti is effective July 23, 2014, and will remain in effect through January 22, 2016. The 60-day re-registration period runs from March 3, 2014 through May 2, 2014.

Command Responsibility *continued*

include an analysis of the commander's legal obligations and discretionary authority regarding misconduct by his subordinates, comparing his power to act with actions taken, if any.

Another potential area of future development involves the distinction between de jure and de facto superiority. In the international context, some have argued that the doctrine of command authority should be applied only to superiors with both de jure (or "legal") and de facto (or "actual") authority over subordinates, while others, including Protocol I and the ICTY, suggest it should apply to any superior who, as a matter of fact, can command or influence the wrongful actors. See *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment, ¶¶ 186-98. As noted above, the legislative history of

sections 212(a)(3)(E) and 237(a)(4)(D) reveals that Congress contemplated command responsibility within the context of these provisions to include a commander with either de jure or de facto control over his subordinates. S. Rep. No. 108-209, at 10. However, although the Board discussed the Senate Report in *Matter of D-R-*, it did not specifically adopt a de facto approach. The respondent in *D-R-* had direct military command over subordinates who loaded onto buses 200 men and boys who were later killed. Thus, it remains to be seen whether the doctrine of command responsibility in the immigration law context will be extended to informal superiors or de facto leaders, such as civilian political figures.

Likewise, because Congress contemplated a meaning of command responsibility that encompasses *either* de jure authority *or* de facto authority, it remains to be seen whether a commander with only de jure authority would fall under 212(a)(3)(E) or 237(a)(4)(D). For instance, a superior officer with legal authority to plan or conduct military operations may argue that his de jure authority did not translate into de facto authority to prevent, stop, investigate, or punish acts of genocide, torture, or extrajudicial killing committed by his subordinates. Circumstances that might undermine a superior officer's actual authority over his subordinates may include power struggles within the chain of command or among high-ranking officers, a fractious military with competing factions, or disobedient subordinates. While liability under the doctrine of command responsibility in international law has required that an officer have had de facto authority over the subordinates who committed war crimes, it is unknown whether de facto authority is necessarily required within the context of sections 212(a)(3)(E) and 237(a)(4)(D).

Conclusion

The above-noted examples illustrate only some of issues that may arise in future cases. While the Board has held that Congress intended to incorporate the doctrine of command responsibility into sections 212(a)(3)(E) and 237(a)(4)(D) of the Act such that former officers in foreign militaries whose subordinates have carried out genocide, extrajudicial killing, or torture would fall into the scope of those sections, the precise parameters of the doctrine within the context of immigration law have yet to be fully defined.

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1. In comparison, during the controversial 1971 court-martial of Captain Ernest L. Medina for atrocities carried out by his subordinates in My Lai, Vietnam, military judge Kenneth Howard, in his instructions to the panel, retreated from the gross negligence standard in international law and instead required actual knowledge of the subordinates' actions. Lippman, *Uncertain Contours*, *supra*, at 38; *see also* Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. Pub. L. 7, 10-12 (1972). Captain Medina was acquitted. Lippman, *Uncertain Contours*, *supra*, at 39.

2. The ICTY was established in 1993 to prosecute war crimes perpetrated during the wars in the former Yugoslavia in the 1990s. *See* S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

3. The ICTR was established in 1994 to prosecute individuals responsible for genocide and other violations of international humanitarian law in Rwanda. *See* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

4. *See* S.C. Res. 955, *supra*, art. 6(3) (statutes applicable to the ICTR); U.N. Secretary-General, *Report on the Establishment of an International Criminal Tribunal for the Former Yugoslavia*, art. 7(3), U.N. Doc. S/25704 (May 3, 1993) (statutes applicable to the ICTY), *adopted by* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

5. As used in section 212(a)(2)(E)(ii), "genocide" refers to certain specified actions done "with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group." 18 U.S.C. § 1091(a) (2012). The covered conduct includes

- (1) kill[ing] members of that group;
- (2) caus[ing] serious bodily injury to members of that group;
- (3) caus[ing] the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
- (4) subject[ing] the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
- (5) impos[ing] measures intended to prevent births within the group; or
- (6) transferr[ing] by force children of the group to another group.

Id. Such conduct is covered regardless of "whether in time of peace or in time of war." *Id.*

6. "Torture" is defined as an "act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." 18 U.S.C. § 2340(1) (2012). "Severe mental pain or suffering" means "prolonged mental harm" that is caused by or resulting from

- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (B) the administration or application,

or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; (D) or the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. § 2340(2).

7. "Extrajudicial killing," within the meaning of section 212(a)(3)(E)(iii), means "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 28 U.S.C. § 1350 note (2012). However, this does not include "any such killing that, under international law, is lawfully carried out under the authority of a foreign nation." *Id.*

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