ISSUE SIX
CLOTH FAIR CHAMBERS

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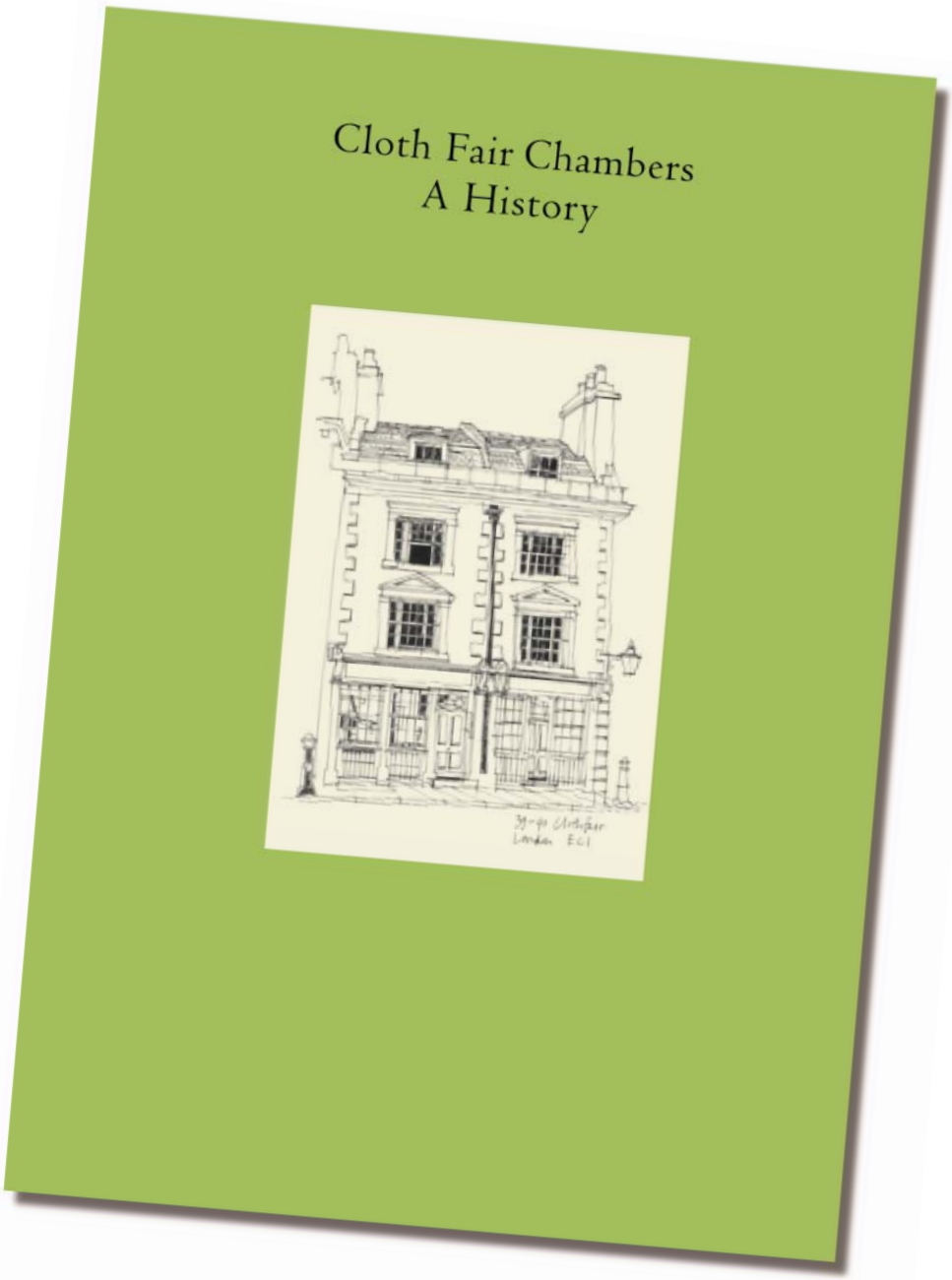
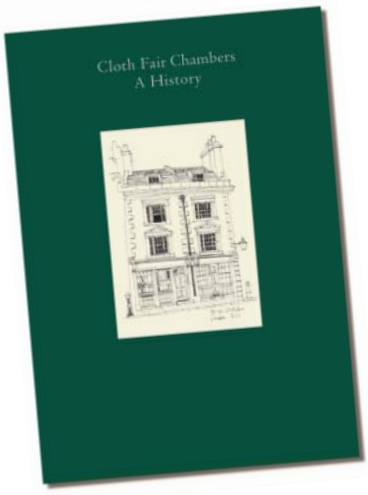




BOOK LAUNCH
CLOTH FAIR CHAMBERS A HISTORY

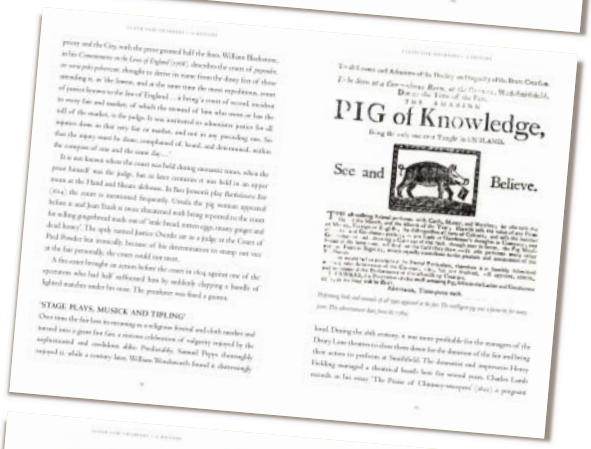
Brief Encounter

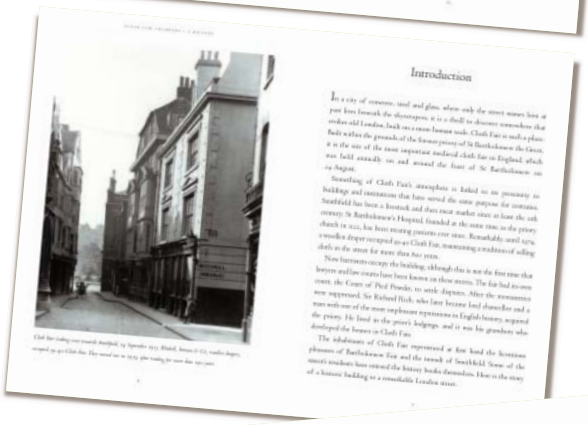
Joshua Rozenberg, The Daily Telegraph

The Lord Chief Justice and other senior judges turned out on Monday [14 April 2008] for a select gathering at Cloth Fair Chambers, a set of seven Silks in one of London's oldest buildings. All were given a beautifully produced history of the building by Bronwen Riley, commissioned and published by the chambers themselves.

The two houses comprising the chambers date from the end of the 16th century, though the first records of the fair after which the street is named go back to 1133. Built within the grounds of the former St Batholomew's priory and adjacent to the 885-year-old hospital, it was the site of the most important medieval cloth fair in England. Bartholomew Fair even had its own summary court, the Court of Pied Powder. And wool was sold from the chambers buildings until as recently as 1979. Now, of course, it's silk.

Joshua Rozenberg / telegraph.co.uk / 14 May 2008
http://www.telegraph.co.uk/news/uknews/1895859/Brief-encounters.html





COMMANDERS' RESPONSIBILITY FOR WAR CRIMES

CRIMINAL RESPONSIBILITY OF THOSE IN EFFECTIVE CONTROL OF SUBORDINATES, WHO COMMIT WAR CRIMES

JULIAN BEVAN QC

A military commander with command responsibility, can be liable for the war crimes or other crimes of his subordinates, over whom he has effective command and control, even though he has not directly participated in the crime or encouraged it in any shape or form.

He cannot safely rely on the defence of the innocent by-stander who neither intended to encourage, nor did encourage, the commission of the offence; a defence recognised in the famous case of R v Coney (1882). This was a case where the defendants, who were part of a crowd watching an unlawful prize-fight, were found guilty of aiding and abetting a criminal offence.

A military commander has a positive duty to take all necessary measures to stop indeed prevent the unlawful conduct, and if he does not, he is deemed to have aided and abetted the commission of the offence and is as responsible for the crime as those that commit it. This distinguishes the legal position between the civilian and the military commander in our domestic law.

The responsibility of a military commander is now enshrined in the International Criminal Court Act 2001 Section 65. Before dealing with that Act, it is worthwhile considering the historical development of command responsibility, because it explains the statutory definition of command responsibility in the Act.

The first indication of a commander being responsible for his troops was in 6th century BC - Sun Tzu argued that it was a commander's responsibility to ensure his subordinates acted lawfully. During the American Civil War, the Lieber Code (24 April 1863) introduced accountability by imposing criminal responsibility on commanders for ordering or encouraging soldiers to wound or kill disabled enemies. The overall concept was codified by the Hague Convention of 1907, namely that a commander of armed forces is responsible for the actions of his subordinates. It was not until after World War One that the Allied Powers on the Responsibility of the Authors of the War and on the Enforcement of Penalties recommended the establishment of an International Tribunal that would try individuals *"for ordering or with knowledge thereof and with power to intervene, abstain(ing) from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws and customs of war."*

BBC News

These principles were used as the platform for the charges laid against General Yamashita by the US in 1945. Yamashita was the General commanding Japanese troops in the Philippines between October 1944 and September 1945. During that time there was an attack by Japanese troops on Manila. It became known as the Manila massacre. This attack, during which many perished including prisoners of war and civilians, was not in fact instigated by Yamashita but, by a Rear Admiral. Yamashita had previously withdrawn with some troops to the hills. However as commander of the Japanese troops who took part in that massacre he was tried by a US Court Martial. He was charged with the war crimes emanating from the atrocities committed.

It seems that he, as the General commanding, was deemed responsible for the crimes of his troops even though there was no evidence that he instigated the massacre or even knew of it at the time. He was found guilty and sentenced to death. This was on the basis that he 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. In this regard he had failed. This test became known as the Yamashita standard.

The essence of the ruling was that the crimes were so extensive and widespread that either they must have been wilfully permitted by him or secretly ordered by him even though there was no evidence he knew of any one of the incidents in particular.

When Yamashita stood on the scaffold in Manila awaiting his execution by hanging, he thanked the US officers who had so ably defended him and presented one with the golden spurs that he normally wore as part of his uniform.

This very strict test was clarified by Additional Protocol One to the Geneva Convention by Article 86(2) 1977 which provides:

> *"the fact that a breach of the conventions of this protocol was committed by a subordinate does not absolve his superiors... **if they knew**, or **had information which should have have enabled them to conclude in the circumstances at the time that he was committing or about to commit such a breach** and if they did not take all feasible measures within their power to prevent or repress the breach."*

The mere fact that the commander was responsible for his subordinates was not enough. He must either have known or had information which should have enabled him to conclude that a breach was to be committed.

The Additional Protocol above was followed by the International Criminal Tribunal for the former Yugoslavia in the cases of Delalic and Blaskic in the 1990s. Delalic was a commander in Bosnia in 1992, coordinating Bosnian Muslims and Bosnian Croats in the Konjic area. He was, in particular, responsible for a camp called Celebi and the captured Bosnian Serbs were sent to this camp, where masses were killed, tortured, sexually assaulted, beaten, and otherwise inhumanely treated.

He was tried for war crimes at the Hague on the basis that he was responsible for that camp, and he had authority over the camp guards and others who entered the camp and mistreated the detainees. The words of the indictment dealing with the neccessary mental element were 'knew or had reason to know' that their subordinates were mistreating detainees and failed to take appropriate measures to prevent it. These words differ slightly from Additional Protocol 1 above but in substance there is no difference in meaning.

The Court considered the words 'had reason to

know' and concluded that ***"a commander must have had in his possession information of a nature, which at the least would have put him on notice of the risk of offences*** *by indicating the need for additional investigation in order to ascertain whether crimes were committed or were about to be committed by his subordinates."*

The emphasis is in the importance of establishing that a commander, at the very least, must have information which would have put him on notice of the risk of offences before being held responsible for the actions of his subordinates.

However there was a considerable shift from this view when interpreting the words 'had reason to know' in the case of Blaskic. Blaskic was a General appointed by the Croatian military authorities in April 1992. He was only 32 at the time, married with two young children. Acting on orders in April 1993 he and his forces attacked a Muslim population with the object of forcing their departure from the area. The attack involved burning houses to the ground, killing civilians regardless of age and burning down mosques. Those arrested were taken to a detention centre, made to dig trenches and at times were used as human shields.

The Court in that case interpreted the words 'reason to know' as 'should have known' this being a much stricter test. The conflicting views were considered by the Appeals Chamber and the rulings concluded that ***"some information of unlawful acts by subordinates must be available to the commander*** *following which he did not discipline or inadequately discipline the perpetrator (or take steps to prevent crime)."*

The decision of the Appeals Chamber in Blaskic to look for some degree of direct knowledge has been confirmed in subsequent case law in both the International Criminal Tribunal for the former Yugoslavia (the cases of Brdjanin, Kordic and Jokic for example) and in the International Criminal Tribunal for Rwanda (in the case of Kajelijeli).

However Article 28 of the Rome Statute of the International Criminal Court Act 2001 has reverted to the first instance Blaskic test. Section 65 of the ICC Act 2001 provides that military commanders are imposed with individual responsibility for crimes committed by forces under their effective command and control if *"either they knew or* ***owing to the circumstances at the time should have known*** *that the forces were committing or about to commit such crimes".*

The words 'should have known' plainly impose a very strict test. No longer does it seem to be necessary to establish that the commander 'had reason to know' or 'was put on notice'. If this were so, the words would no doubt have been included. They are not. The key issue or question is whether, in all the circumstances, the commander should have known. Plainly if he had reason to know or was put on notice, the question is easily answered. If he had no reason to know and was not put on notice, the question is whether, in all the circumstances, he should have known.

Command is not restricted to military commanders. Command can be both military and civil, and includes Heads of State, high ranking government officials, Monarchs, War Cabinets, and Joint Chiefs of Staff. The determining factor is not rank but subordination.

However International case law has developed two special types of *de jure* commanders. The first is Prisoner of War camp commanders who are entrusted with the welfare of all prisoners and subordination in this case is irrelevant. The second is executive commanders, namely the supreme governing authority in the occupied country, whose responsibility is the welfare of the population in the territory under their control. Under this heading, subordination is irrelevant.

It should be appreciated that the military commander must, at the relevant time, have effective command and control of his subordinates. This can produce unusual results. For example a Lance Corporal can be a military commander with criminal responsibility for the soldiers under his command and control. However the Brigadier has no effective command and control of the Lance Corporal's soldiers when he, the Brigadier, is solely concerned with providing advice on the strategies to be employed in the theatre of war. Hence it is not simply a case of focusing upon the most senior officer of the unit, or even the General in overall charge of the troops involved. The key question is who 'was in effective command and control at the time' of the subordinates who committed or who were about to commit the crime?

Finally it should be noted that the Bush Administration has adopted the American Service Members Protection Act and entered agreements in Article 98 of the Statute of Rome in an attempt to protect any US citizen from appearing before the International Court. This interferes with implementing the command responsibility principle when applied to a US citizen.

SAINT YVES – PATRON SAINT OF ADVOCATES AND FOUNDING FATHER OF LEGAL AID

NICHOLAS PURNELL QC

Every year, on the third Sunday of May, the French Judiciary, Magistracy and Bar congregate at Tréguier, a tiny, pink granite cathedral town on the Côtes d'Armor in Brittany to honour the patron saint of *avocats*, Yves Helary, son of Helori, Lord of Kermartin and his wife Azo du Kenquis.

The Judges and lawyers, resplendent in their different velvet gowns and varied mob caps come from all over France and from other European countries to celebrate a Pontifical High Mass, presided over this year by the Archbishop of Quimper. They then process behind a golden casket containing the skull of the Saint from the Cathedral to his place of birth at Kermartin, a distance of a kilometre and a half. The procession is swollen by an additional 10,000 pilgrims who participate in the day's events.

Once the procession puts St Yves to rest in the Church beside his birth place, the congregation settles down to a lengthy and bibulous lunch. Yves was born in 1253 and studied civil law at the University of Paris and canon law at Orleans. He was appointed an ecclesiastical judge at Rennes in 1280 but was recalled to Tréguier in 1284 to become Episcopal Judge for the Bishop. It was here that Yves became famous for his championing of the poor in resisting the taxation demands of the King and the encroachments that the King was introducing on the rights of the Church. He offered his priestly advocacy to the poor without charge. He died on 19 May 1303 and was canonised only 44 years later by Clement VI in 1347.

His tomb bears an epitaph which seemed to reverberate for the advocates at Cloth Fair :

"Sanctus Ivo erat Brito, Advocatus et non latro, Res Miranda populo"

"St Yves was a Breton, an advocate and not a thief, a thing of wonder for the people."

To pay homage to this paragon, Ian Winter and I represented Cloth Fair Chambers at the 2008 Feast Day on 18 May. Bewigged and robed in Court Dress together with the French lawyers to play our part in the celebrations, we found ourselves singled out, because of our wigs, for attention by the French press and the television. We were asked, by a charming television interviewer, how it was possible for so many lawyers to recognise the sacrifices of the saint when they were deposited at the cathedral in a fleet of BMWs and Mercedes. The obvious response was that we had arrived in a hired Citroen C4.

The abiding memory of the day was not that the music was wonderful and the lunch delicious but that so many people had flocked to honour the legacy of an advocate who had died seven hundred years ago. Something for the Ministry of Justice and the Home Office to reflect upon as they strive to reduce the legal profession to production line one-stop lawyers.

CLOTH FAIR CHAMBERS

Nicholas Purnell QC
Julian Bevan QC
Richard Horwell QC
John Kelsey-Fry QC
Timothy Langdale QC
Edmund Lawson QC
Ian Winter QC

Senior Clerk: Nick Newman
nicknewman@clothfairchambers.com

Commercial Director: Charlotte Bircher
charlottebircher@clothfairchambers.com

Consultant Clerk: Michael Greenaway
michaelgreenaway@clothfairchambers.com

39-40 Cloth Fair
London EC1A 7NT
tel: 020 7710 6444
fax: 020 7710 6446
tel: (out of office hours) 07875 012444
dx: 321 Chancery Lane/London
email@clothfairchambers.com
www.clothfairchambers.com