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Case Matrix Network

Command Responsibility

2nd edition

Case Mapping, Selection and Prioritisation
Case Analysis

International Criminal Law
Guidelines



Case Matrix Network

The Case Matrix Network (CMN) provides knowledge-transfer and capacity development services to national and international actors in the fields of international criminal and human rights law. We seek to empower those working to provide criminal accountability for violations of core international crimes and serious human rights violations, by providing access to legal information, legal expertise and knowledge tools. The CMN is a department of the Centre for International Law Research and Policy, which is an international not for profit organisation, registered in Belgium.

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1. Introduction

Command responsibility assigns criminal responsibility to higher-ranking members of military for crimes of genocide, crimes against humanity and war crimes committed by their subordinates. It has been adjudicated upon through the form of *superior* responsibility in a number of cases before the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, based on overlapping yet distinct legal classifications as well as the International Criminal Court, through the classification of *command* responsibility.¹

While command responsibility has emerged from the practice of international criminal tribunals, its relevance for national criminal justice efforts for conduct that amounts to core international crimes should not be overlooked. The possibility to hold those individuals who are in positions of seniority or leadership accountable for their failures to adequately supervise their subordinates or who ‘turn a blind eye’ may have a valuable deterrent effect on the commission of future crimes. It can also contribute towards ensuring accountability of those considered to be most responsible before criminal justice institutions at the national and international level.

However, the concept of command responsibility has many guises: it is recognised as a form of criminal liability, a disciplinary offence for violation of military duties and a corollary to other liabilities or separate offences. It is also variously applicable to military leaders as well as leaders of military-like organisations, such as paramilitary groups, armed defence organisations and rebel groups. Moreover, the legal classification of command responsibility as established in the Rome Statute of the International Criminal Court (ICC Statute) introduces a requirement of causation, which cannot be found in the legal definitions of preceding international legal instruments.² Taken together, it is understandable that the concept of command responsibility as well as its legal codification in the ICC Statute may generate misunderstandings among criminal law practitioners for many of the 123 States Parties of the ICC. An absence of information on the construction and application of the liability by national authorities may also limit accountability efforts against those most responsible persons who hold positions of authority. At least 16 State Parties have implemented all or many of the legal requirements of command responsibility, described in Article 28(a) of the ICC Statute (ICC Art.28(a)) and at least 50 other States include various provisions which punish commanders or those in positions of responsibility for the failure to act or of acts of omission.³

¹ These Guidelines adopt the terminology of Art. 28 of the ICC Statute, differentiating between the responsibility of *commanders* under Art. 28(a) and non-military or military-like *superiors* in Art. 28(b). See 1.4.

² ICC Statute.

³ A further publication on the status of command responsibility in national laws is under preparation by CMN.

Purpose

These Guidelines have been prepared for national criminal justice practitioners who wish to familiarise themselves with the definition of command responsibility according to the ICC Statute (as well as other international and national laws), and the international case law on the modes of liability. It may also be informative to those engaged in policy issues concerning the responsibility of alleged perpetrators, particularly as part of a prioritisation strategy.

As such, the purpose of the text is to enable practitioners to:

- Recognise the six legal requirements of command responsibility under the ICC Statute;
- Compare the legal classifications of command responsibility under international legal instruments;
- Access the relevant paragraphs of international judgements that address the elements of command responsibility;
- Review the trends and variation in international jurisprudence as recognised by leading international publicists.

Structure

Section 1 establishes the structure and methodology adopted in these Guidelines. It also includes a glossary of key terms.

Section 2 introduces the definitions of command responsibility found in at least 13 international legal instruments including the Statutes of the *ad hoc* Tribunals. This section uses the six legal requirements of command responsibility as codified under ICC Art.28(a) as a comparative framework in order to identify the shifts in the definition of command responsibility in international legal instruments. This serves as a primer to sections 6 to 13, where quotations from international case law and publicists are organised according to the distinct legal requirements of ICC Art.28(a). It also provides a comparative chart of these classifications, using the six legal requirements and twelve components of command responsibility defined in ICC Art.28(a).

Section 3 provides an introduction to the adjudication and development of command responsibility in the jurisprudence of the international criminal tribunals.

Sections 4 to 9 provide a guide to the international case law on command responsibility. It includes quotations from international(ised) criminal tribunals and courts and publicists' commentaries on the material and mental elements of command responsibility, according to the legal requirements framework of ICC Art.28(a). Section 6 to 13 is a substantially revised and updated edition of the Case Matrix Digests.

Section 10 includes the index of the international cases and publicists, which have been cited.

Each section is organised according to the following stylistic and formal constraints:

- Legal Requirement** The section heading indicates the legal requirement, as identified in the LRF in Section 1.3. Alternate components of legal requirements are included with sub-headings with the indication [OR] to specify their status.
- Keywords** The list of keywords highlights the various issues that will be sequentially addressed in that specific section.
- International Case Law** Quotations are chronologically ordered in order to understand how the jurisprudence has evolved for each of the legal requirements (and components) of command responsibility.
- Each quotation is introduced briefly and identified by the tribunal, the case name (in *italic*), and the Chamber that issued the decision. The introductory ‘filler’ text will also indicate the legal issue that is addressed or the relevance of the quotation.
- The tribunal is first referenced with its full name and then by its acronym in all subsequent references. In the first instance, cases are referenced by the formal case name. Where popular case names exist, they appear in brackets in the first reference, where it exists, and are then adopted subsequently.
- Publicists** Selected quotations of leading publicists are included as sub-sections, including comments and analyses on the jurisprudential evolution of the legal requirements and their components. They are therefore ordered chronologically according to the decision or judgement discussed by the publicist, rather than the date of the publication. Each quote is introduced using the last name of the author (underlined).
- Hyperlinks to the ICC Legal Tools Database** The vast majority of documents, including the cases, are hyperlinked to the specific legal document, recorded in the ICC Legal Tools Database, through the footnote reference. Thus, readers using an electronic version can access the entire judgement or decision whenever they have an internet connection.
- Footnotes: International Case Law** Decisions or judgements are fully referenced within the footnotes: including the institution acronym, the last name of the accused (in italics), the acronym of Chamber, the type of decision or judgement, the case number, the date it was issued and the paragraph number.
- If there is more than one accused person, only the surname of the first accused will be written, followed by the expression ‘et al.’ Where the case law quotation includes footnotes, they will be indicated. This is a discretionary practice: those references that were deemed of little relevance have been removed and acknowledged as such. When two successive quotations come from the same decision, the second footnote will not contain all the details of the decision or judgement - except for the paragraph number – but will instead use the term *ibid* (in italics).

The term *ibid* refers to the first decision or judgement cited in the previous footnote.

Footnotes: Publicists

Footnotes contained within the publicist quotation will appear in the text but the footnote number is adjusted to the numbering system of the Guidelines. The content of the footnote (including the style for the references) has also been adjusted. The last footnote of each publicist quotation gives the full reference. When it was deemed that a part of the text in the original footnote was of little use for the reader, the elision will be indicated by an ellipsis in square brackets [...]. When it was deemed that the footnote within the publicist quote was of little use for the reader, the omission will be indicated.

Methodology

In order to provide a succinct overview of the definition and application of command responsibility, the research methods of these Guidelines is largely comparative. A large amount of data has been collected and assessed, including decisions and judgements of international tribunals and articles and books of leading publicists. Selectivity has been necessary in order to maintain a succinct, rather than exhaustive collection: as such, the most emblematic judicial decisions, judgements and publicists' commentaries at the time of writing have been included.

The *Guidelines* adopt the *Legal Requirements Framework for Core International Crimes and Modes of Liability (Legal Requirements Framework or LRF)*.⁴ This is in recognition that the ICC Statute provides the most recent and comprehensive expression of core international crimes and liabilities.

The Legal Requirements of Command Responsibility

The Legal Requirements Framework provides a structure for the interpretation of the crimes and modes of liability enshrined in the ICC Statute. It helps to define: (a) the material elements (*actus reus*) of each crime and mode of liability, such as the conduct, consequences and circumstances, which are objective in their nature; and (b) the mental elements (*mens rea*), which require subjective proof of intent and knowledge⁵ for the respective material elements. Together, the material and mental elements help to establish the scope and essence of criminal behaviour or prohibitive act as defined by the ICC Statute.⁶

⁴ The Legal Requirements Framework has been developed by Morten Bergsmo and Ilia Utmelidze and provides the structure for the Case Matrix Digests and Core International Crimes Database. See Morten Bergsmo (ed), [Active Complementarity: Legal Information Transfer](#), Torkel Opsahl Academic EPublisher, 2011.

⁵ [ICC Statute](#), Art. 30, requires that each material element is committed with intent and knowledge.

⁶ The LRF also provides guidance on the typology and standard of evidence for the crimes and modes of liability of the [ICC Statute](#). This builds on the evidentiary guidelines of the ICC, known as the Means of Proof, a document that was created following empirical analysis of the jurisprudence of the international Tribunals and other legal sources. The purpose of the Means of Proof is to define a common standard and typology of the evidence that has been used for adjudication of core international crimes and modes of liability. For another introduction, see Sangkul Kim, "The Anatomy of the Means of Proof Digest" in Bergsmo, *Active Complementarity*, pp. 197-222.

Under the ICC Statute, each of the current crimes – genocide, crimes against humanity and war crimes – are described in ICC Arts. 6 to 8 and are elaborated in the Elements of Crimes (EoC)⁷, a subsidiary legal source of the ICC.⁸ However, the modes of liability under the ICC Statute – as defined in its Art.25 and Art.28 – do not have an equivalent subsidiary legal source that would help to define the distinct elements that comprise the modes of liability. Furthermore, the EoC document lacks an element-by-element application of the *mens rea* of ICC Art.30. Instead, the EoC limits its assessment of the mental elements to the specific *mens rea* of selected Elements of Crimes, whereas ICC Art.30 usually applies as a “default rule.”⁹

To address this gap, the *Legal Requirements Framework* adapts and expands the *EoC* in order to include the modes of liability as well as mental elements under ICC Art.30. It provides a practical and conceptual framework to understand international criminal law. Similarly, it offers a clear and consistent structure to interpret the crimes and liabilities found in the ICC Statute, which can guide a Prosecutor, defence attorney or judge in the evaluation of available evidence, development of legal arguments and legal analyses.¹⁰ Furthermore, the *LRF* is issue-specific. It provides the analytical framework through which hundreds of decisions and judgements of international criminal tribunals can be organised, according to the type of crime or mode of liability rather than by specific cases.¹¹

Underlying Offence

ICC Art.28 defines command responsibility as a form of liability for the crimes that are “within the jurisdiction of the Court”, namely the crimes of genocide, crimes against humanity and war crimes, as set out in ICC Arts. 6 to 8.¹²

Accordingly, the *LRF* sets out the jurisdictional requirement as the first element for Art. 28(a):

A crime within the jurisdiction of the Court was committed or was about to be committed by the forces.

Superior – Subordinate Status and Control

The text of ICC Art 28(a) creates a cluster of two requirements related to the status of the accused and functional hierarchical organisational structures of the military institution.

⁷ ICC Statute, Art. 9, and Elements of Crimes document, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002.

⁸ ICC Statute, Art. 21(a), and Elements of Crimes.

⁹ “As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge”, Elements of Crimes, para. 2 of General introduction.

¹⁰ This in turn can contribute towards more efficient and equal trials.

¹¹ Case specific information is hugely valuable and of great intuitive interest. However, while judgments are increasingly available through digital platforms, their length and language can restrict their accessibility to national practitioners, particularly when working under time and language constraints.

¹² This was affirmed in ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 407.

The first requirement is that the accused is “a military commander or person effectively acting as a military commander”. In other words, it requires a *de facto* or *de jure* status of a military commander, which implies powers as well as duties:

The perpetrator was a military commander or a person effectively acting as a military commander

The perpetrator was a military commander; OR

The perpetrator was effectively acting as a military commander.

Secondly, it requires the existence of functional hierarchical structure within the military institution, where “forces [are] under his or her effective command and control, or effective authority and control.” For both requirements, a distinction is made between a person who is a formal military commander with the power to command and control and a person effectively acting as a military commander with the authority and control:

The perpetrator had effective command and control, or effective authority and control over the force that committed the crime.

The perpetrator had effective command and control: OR

The perpetrator had effective authority and control

Causation and Acts of Omission

Taken with the acts of omission, the legal requirement of causation, captures the totality of the criminal conduct of the accused. ICC Art 28(a) describes the first act of omission of a commander as their ‘failure to exercise control properly over the forces’, a consequence of which is that the subordinate forces committed the crimes within the jurisdiction of the Court:

The crimes committed by the forces resulted from the perpetrator’s failure to exercise control properly over forces.

Secondly, ICC Art 28(a) requires one of three specific acts of omission to have occurred. They have also been referred to as the ‘result’ crimes, due to the requirement of causation. Namely, that the perpetrator failed to: (a) ‘prevent’ (b) ‘repress’ and/or (c) ‘submit the matter to the competent authorities for investigation and prosecution’:

The perpetrator failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.

The perpetrator failed to take the necessary and reasonable measures within his or her power to prevent the commission of such crime; OR

The perpetrator failed to take the necessary and reasonable measures within his or her power to repress the commission of such crime; OR

The perpetrator failed to take the necessary and reasonable measures within his or her power to submit the matter to the competent authorities for investigation and prosecution

Mens Rea

As a general rule, ICC Art.30 is applicable to establish the *mens rea*, unless otherwise provided in the ICC Statute or the Elements of Crimes. However, ICC Art 28(a) clearly defines that the failure of the commander to exercise their powers properly shall lead to criminal liability. Consequently, ICC Art 28(a) provides an exception to the *mens rea* requirements of ICC Art 30, which requires both intent and knowledge. Instead, the key *mens rea* requirement for command responsibility is that accused “knew” or “should have known” about the criminal acts. This specific mental element refers to both the commander’s “failure to exercise control properly over the forces” (causation) and the acts of omission (acts of omission) specifically to (a) “prevent” (b) “repress” or (c) initiate “investigation and prosecution”:

The perpetrator either knew or owing to the circumstances at the time, should have known that the forces were committing or about to commit one or more of the crimes.

The perpetrator knew that the forces were committing or about to commit one or more of the crimes; OR

The perpetrator should have known that the forces were committing or about to commit one or more of the crimes

Glossary of key terms and acronyms

AC: Appeals Chamber.

Actus reus: Material element of a criminal offence.

Ad hoc tribunals: are the two tribunals established by the United Nations Security Council to prosecute persons responsible for committing international crimes in the Former Yugoslavia since 1991 and in Rwanda in 1994. They are also referred in this publication as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

Case Matrix Digests: is one part of the ICC Case Matrix, a software platform that provides users with legal information on international criminal law, helps organise case files and manage evidence and contains a database structure for the meeting of law and fact in core international crimes cases.

Circumstantial evidence: is a fact that can be used to infer another fact.

Command responsibility: the specific mode of liability of military commanders or persons effectively acting as a military commander, as defined in Art.28(a) ICC Statute or well as *de facto* command responsibility found through the jurisprudence of the *ad hoc* Tribunals and the SCSL.

Concurrent conviction: this occurs when an accused is found guilty for two crimes based on the same facts.

Core International Crimes Database (CICD): is an online directory that classifies and deconstructs case law and doctrine, according to the means of proof and elements of core international crimes. It consists of three parts: (i) Elements of Crimes; (ii) Modes of Liability and (iii) Means of Proof.

De facto: in fact, whether by right or not; actual.

De jure: according to law.

ECCC: Extraordinary Chambers in the Courts of Cambodia.

Elements: See legal requirements.

ICC: International Criminal Court.

ICC Pre-Trial Chamber (PTC): The first Chamber of the ICC, which decides on issues preceding the trial.

ICTR: International Criminal Tribunal for Rwanda.

ICTY: International Criminal Tribunal for the former Yugoslavia.

International(ised) Criminal Courts and Tribunals: term used to refer to international criminal courts and tribunals and to courts and tribunals with an international feature. This term encompasses *inter alia* the ECCC, the Iraqi Special Tribunal and the SCSL.

International Case Law: international criminal jurisprudence.

Legal requirements: elements (including the material and mental elements) that need to be proven to find an accused guilty of a particular crime

Material facts: facts that need to be proven in order to fulfil all the legal requirements of a crime.

Mens rea: Mental element of a crime.

Publicists: Scholars.

SCSL: Special Court for Sierra Leone.

Superior responsibility: superior responsibility at the *ad hoc* tribunals, as well as before the SCSL and the ECCC is understood as *de facto* command responsibility and civilian superior responsibility. Conversely, superior responsibility at the ICC is a distinct mode of liability from command responsibility, provided in Art.28(b) ICC Statute.

TC: Trial Chamber.

2. Command Responsibility in International Legal Instruments

As a mode of liability, command responsibility assigns criminal responsibility to high-ranking members of military as well as militia for the crimes committed by their subordinates. At the most basic conceptual level, the individual criminal responsibility of such high-ranking individuals is attributed through their inactivity and requires both that they hold a superior-subordinate relationship with the direct perpetrators and that they knew or should have known that the crimes were being or had been committed. These requirements have been codified in various ways in international legal instruments, as forms of military discipline in international humanitarian law, into a mode of individual criminal responsibility which is applicable to military leaders as well as leaders of military-like organisations, such as paramilitary groups, armed defence organisations and rebel groups. As such it has been recognised by van Sliedregt as ‘an important tool in punishing those in superior positions for lack of supervision over persons under their command or authority’¹³ but also as a peculiarity of international criminal law.¹⁴

This section introduces the definitions of command responsibility found in international legal instruments. It does so in a comparative way, using the definition in ICC Art.28(a) to elucidate the different codifications of the concept of the criminal responsibility of commanders and superiors in international law. The section also provides a comparative chart of these classifications, using the six legal requirements and alternate components of command responsibility defined in ICC Art.28(a). Notwithstanding the different approaches to codifying command responsibility, it continues to offer a valuable mode of liability, which complements other indirect liabilities, such as ordering, planning or instigating, by providing a distinct form of responsibility for leaders.

The International Criminal Court (1998)

Following the adoption of the ICC Statute, the responsibility of military and military-like leaders has been distinguished from the responsibility of non-military leaders, through the provision of alternate liabilities for *commanders* and *superiors* (of non-military or military-like bodies).¹⁵ The definition of command and superior responsibility has been acknowledged as ‘*the longest definition of a single modality concerning individual*

¹³ Elies van Sliedregt, *Individual Criminal Responsibility in International Law*, OUP 2012, pp. 183-184.

¹⁴ Chantal Meloni, “Command Responsibility Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?”, in *Journal of International Criminal Justice*, 2007, vol. 5, no. 3, p. 632.

¹⁵ In *Bemba*, the Pre-Trial Chamber affirmed that military-type commanders may include those superiors who have authority and control over irregular forces, including rebel groups, paramilitary units, armed resistance movements and militias, where they are structured in a military like hierarchy and operate with a chain of command. See ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 408.

*criminal responsibility under international law*¹⁶ while also bearing a ‘*particularly complex structure*.’¹⁷ Its length and complexity bears witness to the influence of the jurisprudence of the *ad hoc* tribunals as well as provisions governing the duty of commanders under international humanitarian law, notably the of Additional Protocol I to the Geneva Conventions (API).¹⁸ Notwithstanding these factors, the definition has influenced the adoption of provisions concerning the responsibility of Commanders and Other Superiors in subsequent international treaties as well as national laws. The provision defines two liabilities – *command* responsibility and *superior* responsibility:

Article 28 Responsibility of Commanders and Other Superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

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

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

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

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

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

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

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.¹⁹

The two liabilities share several overlapping requirements as well as key differences. Of note, command responsibility (Art 28(a)) differs from superior responsibility (Art. 28(b)) in the status of the superior-subordinate relationship, the classifications of control over the subordinates and its additional *mens rea* standard (Table 1). As the focus of the

¹⁶ Roberta Arnold and Otto Triffterer, “Article 28: Responsibility of Commanders and Other Superiors” in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd ed, Beck 2008), p. 798.

¹⁷ van Sliedregt, p. 199.

¹⁸ For a more complete discussion of its drafting history, see Arnold and Triffterer, pp.799-808, as well as the complete Preparatory Works, available within the ICC Legal Tools Database (https://www.legal-tools.org/en/go-to-database/ltfolder/0_15715/#results), accessed 13 July 2015.

¹⁹ ICC Statute, Art. 28.

Guidelines remains the liability of military commanders and those acting as such, the will focus on the command responsibility (ICC Art. 28(a)).²⁰

Underlying Offence / Principal Crime		
A crime within the jurisdiction of the Court was committed or was about to be committed by the forces/[subordinates]	YES	YES
Superior – Subordinate Status		
The perpetrator was a military commander or a person acting as a military commander	YES	
a superior-subordinate relationship not described in Command Responsibility existed between the perpetrator and the subordinates		YES
Control		
The perpetrator had effective command and control or	YES	
The perpetrator had effective authority and control	YES	YES
Causation		
The crimes resulted from the perpetrators failure to exercise control properly over the forces	YES	YES
Acts of Failure/ Omission		
The perpetrator failed to take necessary and reasonable measures within his or her power to prevent the commission of the crime	YES	YES
The perpetrator failed to take necessary and reasonable measures within his or her power to repress the commission of the crime	YES	YES
The perpetrator failed to take necessary and reasonable measures within his or her power to submit the matter to competent authorities for investigation and prosecution	YES	YES
Mens Rea		
The perpetrator knew that the forces/subordinates were committing or about to commit the crimes	YES	YES
Owing to the circumstances at the time, the perpetrator should have known that the forces were committing or about to commit the crimes	YES	
The perpetrator knew or consciously disregarded information that clearly indicated that the forces were committing or about to commit the crimes		YES
Table 1. Legal Requirements of Command and Superior Responsibility as derived from ICC Art. 28		

²⁰ For further case law concerning the distinct elements of superior responsibility and their consequential means of proof, see the [Case Matrix Digests](#).

Other Treaties Establishing ad hoc or International(ised) Tribunals

As a distinctly ‘international’ mode of liability, several of the requirements found in Art. 28(a) *Command Responsibility* draw on the codifications of preceding international legal instruments of the *ad hoc* and international(ised) tribunals and their ensuing jurisprudence, as well as international humanitarian law. Equally, some international instruments have adopted or engaged with aspects of Art.28. Within this sub-section it is possible to identify the similarities and differences in the coverage of command responsibility in other international instruments. This serves as a useful reference for sections 6-13, where the international case law and subsequent publicists’ analysis demonstrates the evolution of command responsibility, as different tribunals sought to apply and interpret *their* law according to the different facts of each case.

The ad hoc and International(ised) Criminal Tribunals

Each of the *ad hoc* and international(ised) tribunals has adopted provisions to assign criminal responsibility to high-ranking members of military and military-like bodies for the crimes committed by their subordinates. Unlike ICC Art.28, which establishes the failure of the commander or superior as a distinct mode of liability, the Statutes of many of the tribunals adopt it as a corollary of subordinate liability²¹ or an exclusionary clause.²² The exception is the Statute of the Special Tribunal for Lebanon, which directly adopts the positive construction of ICC Art. 28(b) on *Superior Responsibility*.

International Criminal Tribunal for the former Yugoslavia (ICTY, 1993), International Criminal Tribunal for Rwanda (ICTR, 1994), Special Panels in East Timor (2000), Special Court for Sierra Leone (SCSL, 2000)

Between 1993 and 2000, the Statutes establishing the ICTY,²³ ICTR,²⁴ the Special Panels in East Timor²⁵ and SCSL²⁶ adopted the same substantive text, allocating criminal responsibility to *superiors*. The clauses differ only in references to the material jurisdiction of each tribunal:²⁷

The fact that any of the acts referred to in articles [...] of the present Statute was committed by a subordinate does not relieve his superior of criminal

²¹ van Sliedregt, p. 197.

²² Guénaél Mettraux, *The Law of Command Responsibility*, Oxford University Press, 2009, p. 25.

²³ ICTY Statute, established by Security Council Resolution 827, 25 May 1993.

²⁴ ICTR Statute, established by Security Council Resolution 955, 8 November 2004.

²⁵ Regulation No. 2000/15, On the Establishment of the Panels with Exclusive Jurisdiction over Serious Criminal Offences, United Nations Transitional Administration in East Timor, 6 June 2000 (“UNTAET Regulation No. 2000/15”).

²⁶ Special Court for Sierra Leone, established by the Agreement between the United Nations and the Government of Sierra Leone and Statute of the Special Court for Sierra Leone, adopted on 16 January 2002.

²⁷ ICTY Statute, Arts. 2-5; ICTR Statute, Arts. 2-4; UNTAET Regulation No. 2000/15, Sections 4 to 7 [i.e. genocide, crimes against humanity, war crimes and torture]; and SCSL Statute, Arts. 2-4 [i.e. crimes against humanity, violations of common Art. 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II, and other serious violations of international humanitarian law].

*responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.*²⁸

Unlike the ICC, the Statutes of these tribunals do not distinguish between the status or organisational belonging of the superior. Whereas ICC Art. 28 distinguishes between the liability of military Commanders and Other Superiors, the legal provision in the Statutes of the four tribunals refers only to a superior (as section 8 shows, the jurisprudence of the tribunals has applied the superior status to those in the military or military-like organisations, including paramilitary organisations and armed resistance groups, as well as civilian organisations). The control requirement is also absent, as is that of causation: instead, the two modes of control under ICC Art. 28(a) – effective command and control (*de jure* control) or effective authority and control (*de facto* control) – over the subordinates have also been developed through jurisprudence. Turning to the acts that the superior is required to have failed to fulfil, the tribunals adopt the same standard as the ICC – that of necessary and reasonable measures – but apply it only to the superior’s failures to prevent or punish (the ICC adopts *repress*). There is no requirement for the superior to submit the matter to the competent authorities. Finally, liability can be established through two forms of *mens rea* – the more purposive standard where the superior knew [...] that the subordinate was about to commit such acts or had done so – as well as a standard of culpable failure where the perpetrator had reason to know. This standard deviates from ICC Art. 28, which requires that the perpetrator should have known and has formed the subject of jurisprudential and doctrinal debate (see section 13).

The relative ambiguity of this provision on the responsibility of superiors has contributed to the development of detailed and occasionally contradictory jurisprudence, as the Trial and Appeal Chambers of the ICTY, ICTR and SCSL have sought to apply the law to the facts of the cases brought before them. Within the ICTY and ICTR – which prosecuted greater number of cases on superior responsibility – additional rules or tests have been developed over time (see section 6), several of which influenced the codification of ICC Art 28(a). Similarly, as Table 2 shows, superior responsibility before these tribunals adopted and revised several requirements of API Art. 86(2).

The Extraordinary Chambers in the Courts of Cambodia (ECCC, 2004)

In establishing the ECCC, the Government of Cambodia combined the ICC’s alternate control requirement of *effective command and control* or *effective authority and control* into the text of its Statute (emphasis added):²⁹

²⁸ ICTY Statute, Art. 7(3); ICTR Statute, Art. 6(3); UNTAET Regulation No. 2000/15, Section 16; and SCSL Statute, Art. 6(3).

²⁹ As a hybrid tribunal, the ECCC is founded under national law and is supported internationally through its agreement with the United Nations. See Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003.

The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.³⁰

The Iraqi Supreme Tribunal (2005)

The law establishing the internationalised Iraqi Supreme Tribunal combined aspects of API Art. 86(2) with those of the common definition of the *ad hoc* tribunals:

A superior is not relieved of the criminal responsibility for crimes committed by his subordinates, if he knew or had reason to know that the subordinate had committed, or was about to commit such acts, and the superior failed to take the necessary and reasonable measures to prevent such acts or to refer the matter to the competent authorities for investigation and prosecution.³¹

With regard to the underlying offence and the superior-subordinate status, the provision is in line with API Art 86(2), requiring the crimes to have been committed by the subordinates of the superior, without elaborating on the character of the hierarchical position. The clause does not adopt requirements of control or causation and, while adopting the same standard of ‘necessary and reasonable measures’ as the ICC Art.28(a), the specified acts of failure or omission are limited only to that of prevention and referral to competent authorities, excluding the repression or prevention of the crime. Finally, the Iraqi Supreme Tribunal adopted the *ad hoc* tribunals’ standards of the specific *mens rea*, i.e. superior knew or had reason to know.

The Special Tribunal for Lebanon (STL, 2007)

The Statute of the STL³² adopts the Rome Statute provision on *superior* responsibility (Art. 28(b)) as its Art. 3(2):

With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in Article 2 of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

³⁰ Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Art. 29. Crimes under the jurisdiction of the ECCC include homicide, torture, religious persecution, genocide, crimes against humanity, grave breaches of the Geneva Conventions, destruction of cultural property during armed conflict, crimes against internationally protected persons.

³¹ Statute of the Iraqi Special Tribunal for Crimes against Humanity, Law No. 1 of 2003, revised in 2005, as Law 4006, enacted 18 October 2005, Art. 15(4). The Iraqi Special Tribunal is also known as the Iraqi High Tribunal (IHT), the Special Iraqi Criminal Tribunal (SICT) or the Supreme Iraqi Criminal Tribunal.

³² Statute of the Special Tribunal for Lebanon, Agreement between the United Nations and the Lebanese Republic pursuant to Security Council Resolution 1664, 29 March 2006, Art. 3(2).

- (a) *The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes;*
- (b) *The crimes concerned activities that were within the effective responsibility and control of the superior; and*
- (c) *The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*³³

International Humanitarian Law

The structure of command responsibility is rooted in international humanitarian law (IHL), which develops the duties of commanders to prevent, punish or report crimes committed during periods of war. However, ICC Art.28(a) differs in several key functions: first, it is structured as a positive mode of liability, whereas under IHL it is often established as an exclusionary clause (*the fact that ... does not absolve/ relieve superiors from...*); second, it establishes the individual criminal responsibility of the commander, whereas IHL establishes options for penal responsibility alongside disciplinary measures; third, the ICC has material jurisdiction over genocide, crimes against humanity *and* war crimes, whereas IHL concerns only war crimes; and fourth, Art.28(a) contains an explicit requirement of causation.

Hague Regulations (1899, 1907)

The responsibility of commanders of the armed forces over their subordinates can be traced to the *Hague Regulations* adopted in 1899 and 1907, which establish that, in order for the armed forces to be accorded the rights of belligerents, they must ‘*be commanded by a person responsible for his subordinates.*’³⁴

Hague Convention and Geneva Convention (1907, 1929)

The Hague Convention of 1907 and the 1929 Geneva Conventions established a general duty of the commanders-in-chief of fleets³⁵ and armies³⁶ to ensure that their forces act in conformity with the general principles of the respective Conventions, although they do not establish any sanction or consequence for the failure to do so.

³³ Crimes under the jurisdiction of the STL include terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences. See summary in ICTJ, Handbook on the Special Tribunal for Lebanon, 10 April 2008.

³⁴ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, Art. 1(1); and Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Art. 1(1).

³⁵ Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

³⁶ Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929.

In Art.19, the Hague Convention provides:

The commanders-in-chief of the belligerent fleets must see that the above articles are properly carried out; they will have also to see to cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.

Art.26 of the Geneva Convention provides:

The Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding articles as well as for cases not provided for in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.

Additional Protocol I (1977)

A more complete framework detailing the concept of the responsibility of superiors emerged in *API* of the 1949 Geneva Conventions.³⁷ Adopted 16 years before the ICTY Statute, provisions of the API establishes the responsibility of superiors for acts of their subordinates (API Art. 86(2)) and the positive obligations of military commanders to prevent, repress and report (API Art. 87). However, it should be noted that the jurisdictional scope of the two API provisions are limited only to international armed conflicts.

Art.86(2) provides:

The fact that a breach of the Conventions or 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 such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

This provision establishes the *superior-subordinate* relationship adopted by the *ad hoc* and international(ised) tribunals without distinction of the types of superior belonging. As with the other international laws preceding the ICC Statute, the requirements of control and causation remain absent. Turning to the acts of omission or failure by the superior, API Art. 86(2) triggers a standard of *feasible measures* for the prevention or repression of crimes, but makes no requirement to submit the matter to authorities. Finally, while the first *mens rea* standard – that the superior *knew* – is common to the *ad hoc* tribunals and the ICC St., the lower standard in the API requires superiors to *have had information which should have enabled them to conclude*, is distinguishable from both the *ad hoc*

³⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977.

tribunals – which adopted a standard of *reason to know* – and the ICC standard (*should have known*).

Art.87 describes the duties of military commanders and the conditions under which sanction should be applied for their breach. It reads:

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 report to competent authorities breaches of the Conventions and of 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.

Accordingly, the superior-subordinate relationship applies only to military commanders (not persons acting as such) but includes subordinates from irregular forces, where they are under the control of the commander, in addition to regular armed forces. The clause establishes different standards of control by the commander, depending on the status of the subordinate: ‘command’ extends to those subordinates from the armed forces and ‘control’ to those in irregular forces. There is no requirement of causation. However, each of the acts of failure or omission defined in ICC Art.28 are also established, but rather as positive duties, where the commander must initiate ‘necessary steps’ as opposed to the ICC standard of taking reasonable and necessary measures. Finally, API Art.87 imposes one standard of *mens rea* – that of awareness.

In contrast to the Statutes of all of the international(ised) criminal tribunals, API Art.86(2) and API Art.87 provide discretion to impose penal or disciplinary sanctions on superiors who have breached the standard of duty described. Art 87 also subjects the options of sanctions to a discretionary standard of appropriateness.

Second Protocol to the Hague Convention for the Protection of Cultural Property (1999)

The Second Protocol to the Hague Convention for the Protection of Cultural Property obliges its State Parties to extend command responsibility, as an indirect liability, on the basis of the treaty’s status under general principles of law and international law, in both international and non-international armed conflicts.³⁸

³⁸ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, Art. 22(1).

Art.15 provides:

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.³⁹

International Human Rights Treaties

The importance of extending liability to persons in positions of leadership for the offences committed by their subordinates has been recognised in one UN treaty, the Convention on Enforced Disappearance, which was adopted in 2006.

UN Convention for the Protection of All Persons from Enforced Disappearance (ICPED, 2006)

With the exception of the causation requirement that is common to both command and superior responsibility under the ICC Statute, the ICPED adopts the framework of *superior* responsibility of ICC Art 28(b).

Its Art.6(1) provides:

‘Each State Party shall take the necessary measures to hold criminally responsible at least:

...

(b) A superior who:

- (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;*
- (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and*
- (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;*

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.⁴⁰

³⁹ *Ibid.*

⁴⁰ International Convention for the Protection of All Persons from Enforced Disappearance, A/RES/61/177, 20 December 2006, Art. 6(1).

COMMAND RESPONSIBILITY IN INTERNATIONAL LEGAL INSTRUMENTS

	ICC: Art.28(a)	Ad-Hoc and Internationalised Tribunals	API: Art.86(2)	API: Art.87
Underlying Offence	Jurisdictional crime was committed or was about to be committed	Acts [...] of the present Statute was committed	a breach was committed by a subordinate	Breaches of the Conventions and of this Protocol
Superior-Subordinate Relationship	Military Commander	Superior of the subordinate	Superior	Military Commander
	Effectively Acting as Military Commander			
Control	Effective Command and Control [OR]			Command / military subordinates [OR]
	Effective Authority and Control			Control/ other persons
Causation	Crimes resulted from failure to exercise proper control			
Acts of Failure / Omission	Prevent the Commission / Necessary and reasonable measures [OR]	Failed to take the necessary and reasonable measures to prevent such acts [OR]	Prevent the breach / all feasible measures [OR]	Prevent breaches / initiate such steps as are necessary [OR]
	Repress the Commission / Necessary and reasonable measures [OR]	Failed to take the necessary and reasonable measures to punish the perpetrators	Supress, where necessary / all feasible measures [OR]	Repress the Commission / initiate such steps as are necessary [OR]
	Submit to Competent Authorities / Necessary and reasonable measures		Report, where necessary /all feasible measures	Submit to Competent Authorities/ initiate such steps as are necessary
Mens Rea	Knew – Committing or About to Commit [OR]	Knew that the subordinate was about to commit such crime or had done so	Knew [OR]	Knew – Committing or About to Commit [OR]
	Owing to Circumstances - Should have Known	Had reason to know that the subordinate was about to commit such acts or had done so	Had information which should have enabled them to conclude, in the circumstances at the time	Owing to Circumstances - Should have Known

Table 2: comparative chart of the requirements of command responsibility under key international legal instruments.

3. Introduction to Command Responsibility

Elements of command responsibility according to the case law of the ad hoc tribunals and the ICC

Keywords: Elements of Command Responsibility – Material Facts

International Case Law

Following an in-depth assessment of the recognition of superior responsibility in international law,⁴¹ the ICTY Trial Chamber in *Mucić et al. ("Čelebići")* concluded that:

"[...] the principle of individual criminal responsibility of superiors for failure to prevent or repress the crimes committed by subordinates forms part of customary international law."⁴²

On the elements of command responsibility under the ICTY Statute, the Trial Chamber in *Čelebići* also held that:

"From the text of Article 7(3) it is thus possible to identify the essential elements of command responsibility for failure to act as follows:

- (i) the existence of a superior-subordinate relationship;
- (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
- (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof."⁴³

With regard to the material facts that the Prosecution must plead to establish superior responsibility under Article 6(3) of the ICTR Statute, the Trial Chamber in *Ndindiliyimana et al.* reiterated that:

⁴¹ ICTY, *Mucić et al. ("Čelebići")*, TC, *Judgement, Case No. IT-96-21-T*, 16 November 1998, paras. 333- 343

⁴² *Ibid.*, para. 343. Confirmed in ICTY, *Blaškić*, TC, *Judgement, Case No. IT-95-14-T*, 3 March 2000, para. 290.

⁴³ *Ibid.*, para. 346.

"[w]here superior responsibility is alleged, the Prosecution should plead the following material facts: (1) the relationship of the accused to his subordinates; (2) the acts and crimes of his alleged subordinates; (3) the criminal conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent the crimes or to punish his subordinates thereafter [...] these are material facts which must be pleaded with a sufficient degree of specificity."⁴⁴

In the *Nyiramasuhuko et al.* Judgement, the ICTR Trial Chamber also reiterated that:

"If the Prosecution intends to rely on the theory of superior responsibility to hold an accused criminally responsible for a crime under Article 6 (3) of the Statute, the Indictment should plead the following: (1) that the accused is the superior of subordinates sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (2) the criminal conduct of those others for whom he is alleged to be responsible; (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them."⁴⁵

Summarising the requirements needed for criminal responsibility under Art. 28(a) Rome Statute, the ICC Trial Chamber in the *Bemba* Judgement held:

"[...] for an accused to be found guilty and convicted as a military commander or person effectively acting as a military commander under Article 28(a), the following elements must be fulfilled:

- a. crimes within the jurisdiction of the Court must have been committed by forces;
- b. the accused must have been either a military commander or a person effectively acting as a military commander;
- c. the accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes;
- d. the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes;

⁴⁴ ICTR, *Ndindiliyimana et al.*, TC II, Judgement, Case No. ICTR-00-56-T, 17 May 2011, para. 126. See also para. 1916.

⁴⁵ ICTR, *Nyiramasuhuko et al.*, TC II, Judgement, Case No. ICTR-98-42-T, 24 June 2011, para. 121. See also ICTR, *Bizimungu et al.*, TC II, Judgement, Case No. ICTR-99-50-T, 30 September 2011,, para. 1872.

- e. the accused must have failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; and
- f. the crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them."⁴⁶

Publicists

Summarising the requirements for criminal responsibility to arise from command responsibility before the ICTY and the ICTR, Martinez states:

"[...] three elements are necessary to establish liability based on superior responsibility:

- (i) the existence of a *de jure* or *de facto* superior-subordinate relationship of effective control;
- (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed;
- (iii) the superior failed to take the necessary steps to prevent or punish the offences."⁴⁷⁴⁸

Nybondas specifies that:

"[...] The elements may best be divided into objective and subjective elements, often referred to as *actus reus* and *mens rea* respectively. The objective elements of command responsibility can be found in subparagraphs (i) and (iii) of the definition, while the *mens rea* is the knowledge requirement of the superior, as laid down in subparagraph (ii)."⁴⁹

However, Meloni considers that:

"[...] This tripartition of command responsibility [adopted by the *ad hoc* tribunals] [...] does not appear to be satisfactory: it leaves aside the first objective requirement, which is the 'commission of a crime by the subordinates' (the so-called 'underlying offence', or 'principal crime'). Moreover, it lacks any effort at systematisation; in particular the mental element is listed as the second requirement to prove, before the *actus reus*, while it should follow it. Indeed,

⁴⁶ ICC, Bemba, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016; para. 170. See also ICC, Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 407 (footnote omitted).

⁴⁷ See e.g. ICTY, Kordić and Čerkez, AC, Appeal Judgment, Case No. IT-95-14/2-A, 17 December 2004, para. 839.

⁴⁸ Jenny S. Martinez, "Understanding Mens Rea in Command Responsibility From Yamashita to Blaškić and Beyond", in *Journal of International Criminal Justice*, 2007, vol. 5, no. 3, p. 642.

⁴⁹ Maria L. Nybondas, *Command Responsibility and Its Applicability to Civilian Superiors*, T.M.C. Asser Press, 2010, p. 31.

pursuant to the basic principles of criminal law the *mens rea* requirement only comes after the assessment of the existence of the objective element, namely, in the case at issue, not only the superior-subordinate relationship but also the conduct of the defendant (i.e., the failure to take the required measures in order to prevent or punish)."⁵⁰

In addition to the three elements, van Sliedregt notes:

"[...] In *Orić*, the [ICTY] Trial Chamber added a fourth element; (iv) a subordinate commits a crime under international law."⁵¹⁵²

Cryer et al. specify:

"[...] To that, the ICC Statute has added another requirement: causation."⁵³

Regarding Article 28 of the Rome Statute, van Sliedregt observes:

"The structure of Article 28 is rather complex. The provision encapsulates two omissions. There is a general omission in the 'chapeau', phrased as a 'result crime' through the explicit causal link (a superior is liable when he fails 'to exercise control properly' as a result of which crimes have been committed) and a more specific omission in subparagraphs (a)(ii) and (b)(ii) (he/she 'failed to take all measures... to prevent or repress or submit the matter to the competent authorities'). Both the general/chapeau omission and the specific omission—at least when it concerns the element 'knew'—need to be interpreted in accordance with Article 30 of the Statute, which contains a default rule for the mental element."⁵⁴

With regard to the requirements of Article 28, Ambos states that:

"[...] five objective elements of Article 28 are apparent:

(1) The perpetrator or agent of the offence is a (*de facto*) military or non-military (civilian) superior who has 'forces' or 'subordinates' under his or her command; there is no more precise description or delimitation of his or her status within the military hierarchy; any kind of 'superior and subordinate relationship' seems to be sufficient.

(2) The 'command and control', in the case of the military superior, or the 'authority and control', in the case of both types of superiors, over the subordinates must be 'effective'; this restrictive requirement of the superior's liability is reaffirmed with regard to the civilian superior, who must, in addition, have

⁵⁰ Chantal Meloni, *Command Responsibility in International Criminal Law*, T.M.C. Asser, 2010, pp. 83-84.

⁵¹ ICTY, *Orić, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006*, para. 294.

⁵² Elies van Sliedregt, "Command Responsibility at the ICTY-Three Generations of Case Law and Still Ambiguity" in Bert Swart, Alexander Zahar, and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2011, p. 378.

⁵³ Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, p. 386 (footnote omitted).

⁵⁴ van Sliedregt, 2011, p. 392.

‘effective responsibility and control’ over the activities that led to the crimes concerned.

(3) The crimes committed by the subordinates are a ‘result’ of the superior’s failure to exercise proper control over them; this element can be called the causal requirement.

(4) The superior fails to take the ‘necessary and reasonable measures within his or her power’ against the crimes committed; the power to take these countermeasures obviously derives from the ‘effective’ control.

(5) The countermeasures are supposed to ‘prevent’ or ‘repress’ the commission of the crimes or the superior has ‘to submit the matter to the competent authorities for investigation and prosecution’; the latter option was not contained in the earlier codifications.

If these requirements are fulfilled and the superior had the necessary *mens rea*, his or her criminal responsibility is established."⁵⁵

Concurrent conviction

Keywords: Individual Criminal Responsibility and Command Responsibility – Judicial Discretion – Sentencing – Aggravating Circumstances – Alternative Charging

International Case Law

With respect to concurrent conviction, the ICTY Trial Chamber in *Čelebići* primarily held:

"As has been pointed out, an accused may be charged for the commission of an offence in his individual and personal capacity as one of the actual perpetrators of the offence in accordance with Article 7(1) of the Statute, and/or in his capacity as a superior authority with respect to the commission of the offence in accordance with Article 7(3). The Defence for Hazim Delić has submitted that it would be improper to impose double sentences on an accused charged and found guilty on both counts. The contention is that both counts are mutually exclusive. A charge under Article 7(1) is based on a theory of acts, whereas a charge under Article 7(3) is based on omission and failure to perform a duty to prevent and/or punish war crimes.

While the proposition in theory appears to be unimpeachable, in practice there are factual situations rendering the charging and convicting of the same person under both Articles 7(1) and 7(3) perfectly appropriate. For instance, consider the situation where the commander or person exercising superior authority personally

⁵⁵ Kai Ambos, “Superior Responsibility”, in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 849-850.

gives orders to his subordinates to beat the victim to death, and joins them in beating the victim to death. There is here criminal liability under Article 7(1) as a participant in the perpetration of the offence, and under Article 7(3) as a superior. Liability in this case is not mutually exclusive, since the exercise of superior authority in this case is not only the result of an omission to prevent the commission of the crime. It is a positive act of knowledge of the crime and participation in its commission.

The question is whether the crime attracts only one sentence in respect of a superior who participates in the offence charged. Ideally a superior who participates in the actual commission of a crime should be found guilty both as a superior and also as a direct participant as any of the other participants who did so in obedience to his orders. However, to avoid the imposition of double sentencing for the same conduct, it should be sufficient to regard his conduct as an aggravating circumstance attracting enhanced punishment."⁵⁶

The ICTY Trial Chamber in *Blaškić* stated that:

"It will be illogical to hold a commander criminally responsible for planning, instigating or ordering the commission of crimes and, at the same time, reproach him for not preventing or punishing them. However, [...] the failure to punish past crimes, which entails the commander's responsibility under Article 7(3), may, pursuant to Article 7(1) and subject to the fulfilment of the respective *mens rea* and *actus reus* requirements, also be the basis for his liability for either aiding and abetting or instigating the commission of further crimes."⁵⁷

The Trial Chamber found the accused guilty:

"[o]f having ordered a crime against humanity, namely persecutions against the Muslim civilians of Bosnia [...] and by these same acts, in particular, as regards an international armed conflict, General Blaškić committed: [several crimes]."⁵⁸

It also continued:

"In any event, as a commander, he failed to take the necessary and reasonable measures which would have allowed these crimes to be prevented or the perpetrators thereof to be punished."⁵⁹

In *Kordić and Čerkez*, the Trial Chamber was:

"[o]f the view that in cases where the evidence presented demonstrates that a superior would not only have been informed of subordinates' crimes committed

⁵⁶ ICTY, *Mucić et al.*, ("*Čelebići*"), *TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, paras. 1221-1223..

⁵⁷ ICTY, *Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, para. 337. Cited also in ICTY, *Mucić et al. ("*Čelebići*")*, *TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, para. 341.

⁵⁸ *Ibid.*, para. 359.

⁵⁹ *Ibid.*, para. 362.

under his authority, but also exercised his powers to plan, instigate or otherwise aid and abet in the planning, preparation or execution of these crimes, the type of criminal responsibility incurred may be better characterised by Article 7(1). [...] Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under Article 7(1)."⁶⁰

Nonetheless, the Trial Chamber found the accused Čerkez guilty both under Article 7(1) and 7(3) ICTY Statute in relation to some counts,⁶¹ whereas the Appeals Chamber overruled this as a legal error, since: "[t]he concurrent conviction pursuant to Article 7(1) and Article 7(3) of the Statute in relation to the same counts based on the same facts", and therefore a conviction should be based on Article 7(1) only.⁶²

At the ICTR, the Trial Chamber in *Kayishema and Ruzindana* held that:

"The finding of responsibility under Article 6(1) of the Statute does not prevent the Chamber from finding responsibility additionally, or in the alternative, under Article 6(3). The two forms of responsibility are not mutually exclusive. The Chamber must, therefore, consider both forms of responsibility charged in order to fully reflect the culpability of the accused in light of the facts."⁶³

Furthermore, the Trial Chamber stated:

"If the Chamber is satisfied beyond a reasonable doubt that the accused ordered the alleged atrocities then it becomes unnecessary to consider whether he tried to prevent; and irrelevant whether he tried to punish."⁶⁴

"However, in all other circumstances, the Chamber must give full consideration to the elements of 'knowledge' and 'failure to prevent and punish' that are set out in Article 6(3) of the Statute."⁶⁵

In the case against *Kvočka et al.*, the ICTY Trial Chamber declined to find the accused Radić (additionally) responsible under Article 7(3) of the ICTY Statute on the following grounds:

"[A]lthough there is substantial evidence of crimes committed by Radić's subordinates, there is some doubt as to whether, within the context of a joint criminal enterprise, a co-perpetrator or aider or abettor who is held responsible for

⁶⁰ ICTY, *Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001*, paras. 370-371.

⁶¹ *Ibid.*, paras. 370-371, cf. paras. 836-837 and 842-843, and the disposition.

⁶² ICTY, *Kordić and Čerkez, AC, Appeal Judgement, Case No. IT-95-14/2-A, 17 December 2004*, para. 34 et seq. (emphasis added).

⁶³ ICTR, *Kayishema and Ruzindana, TC, Judgement, Case No. ICTR-95-1-T, 21 May 1999*, para. 210.

⁶⁴ *Ibid.*, para. 223.

⁶⁵ *Ibid.*, para. 224. For examples of factual findings of a liability both under Art. 6(1) and 6(3), see also paras. 344, 350, 352, 504, 506, 552, 553, and 555.

the totality of crimes committed during his tenure on the basis of a criminal enterprise they can be found separately responsible for part of those crimes on an Article 7(3) superior responsibility theory. In any case there is no need to do so as his liability for those crimes is already covered. In the light of this doubt, the Trial Chamber finds that Radić's superior responsibility within the context of a joint criminal enterprise need not be decided. The Trial Chamber declines to find that Radić incurs superior responsibility pursuant to Article 7(3) of the Statute."⁶⁶

Nevertheless, in *Krnojelac*, the Trial Chamber found that, in relation to a number of instances, the criminal responsibility of the accused was established under both Articles 7(1) and 7(3). It stated that as a matter of law, it:

"[h]as a discretion to choose which is the most appropriate head of responsibility under which to attach criminal responsibility of the accused."⁶⁷

With regard to a particular count, the Trial Chamber decided that given the circumstances of the underlying incident, the criminality of the accused was better characterised as that of an aider and abettor under Article 7(1) ICTY Statute.⁶⁸ In relation to another count, the Trial Chamber considered Article 7(3) to be the more appropriate basis for liability.⁶⁹

While the Trial Chamber in *Stakić* "endorse[d]" and "share[d]" the views set out by the Trial Chambers in both *Blaškić* and *Krnojelac*,⁷⁰ as well as recognised that other Trial Chambers have allowed concurrent convictions, it nevertheless rejected the need for convicting a person under both Articles 7(1) and 7(3).⁷¹ The Trial Chamber in *Stakić* was of the view that:

"[c]onviction under both Article 7 (1) and Article 7 (3) for the same criminal conduct is generally not possible."⁷²

The Trial Chamber decided that the participation of Dr. *Stakić* in the offences committed in the Prijedor Municipality in 1992 was best characterised as "the mode of liability described as 'co-perpetratorship'" under Article 7(1).⁷³ The Trial Chamber did not discuss the responsibility of Dr. *Stakić* under Article 7(3) because:

"[i]t would be a waste of judicial resources to enter into a debate on Article 7(3) knowing that Article 7(1) responsibility subsumes Article 7(3) responsibility."⁷⁴

⁶⁶ ICTY, *Kvočka et al., TC, Judgement, Case No. IT-98-30/1-T, 2 November 2001*, para. 570.

⁶⁷ ICTY, *Krnojelac, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002*, para. 173.

⁶⁸ *Ibid.*, para. 173.

⁶⁹ *Ibid.*, para. 316.

⁷⁰ ICTY, *Stakić, TC II, Judgement, Case No. IT-97-24-T, 31 July 2003*, para. 463.

⁷¹ *Ibid.*, paras. 466-467.

⁷² *Ibid.*, para. 464.

⁷³ *Ibid.*, para. 468.

⁷⁴ *Ibid.*, para. 466.

In *Blaškić*, the Appeals Chamber held on concurrent convictions:

"The Appeals Chamber considers that the provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. However, the Appeals Chamber considers that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute. Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing."⁷⁵

"The Appeals Chamber therefore considers that the concurrent conviction pursuant to Article 7(1) and Article 7(3) of the Statute in relation to the same counts based on the same facts [...] constitutes a legal error invalidating the Trial Judgement in this regard."⁷⁶

The SCSL Trial Chamber in *Brima et al.* also rejected a cumulative application of individual and superior responsibility under the same count:

"[I]t would constitute a legal error invalidating a Judgement to enter a concurrent conviction under both provisions. Where a Trial Chamber enters a conviction on the basis of Article 6(1) only, an accused's superior position may be considered as an aggravating factor in sentencing"⁷⁷

However, this was successfully challenged before the Appeal Chamber in *Brima et al.*:

"[N]o identifiable legal principle should prevent compound convictions for multiple instances of the same offence charged in a single count, when multiple convictions would be allowed if multiple instances of the same offence at issue were charged in separate counts."⁷⁸

Furthermore the SCSL Appeal Chamber found that:

"[...] when the accused is charged for multiple instances of an offence under a single count pursuant to both Articles 6(1) and 6(3), and one or more is proved beyond a reasonable doubt for each mode of responsibility, then a compound conviction should be entered against the accused, and the Trial Chamber must take into account all of the convictions and the fact that both types of responsibility were proved in its consideration of sentence."⁷⁹

⁷⁵ ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004*, para. 91 Confirmed in ICTY, *Đorđević, TC II, Judgement, Case No. IT-05-87/1-T, 23 February 2011*, paras. 1891 and 2195.

⁷⁶ *Ibid.*, para. 92.

⁷⁷ SCSL, *Brima et al., TC II, Judgement, Case No. SCSL-04-16-T, 20 June 2007*, para. 800.

⁷⁸ SCSL, *Brima et al., AC, Appeal Judgement, Case No. SCSL-2004-16-A, 22 February 2008*, para. 214.

⁷⁹ *Ibid.*, para. 215. Text footnote: "This is the practice when, for example, an accused is convicted for personally committing some instances of a crime and aiding and abetting other instances of the same substantive crime

Conversely, in *Dorđević*, the ICTY Trial Chamber followed the view against concurrent conviction adopted by the ICTY Appeals Chamber in *Blaškić* and *Kordić and Čerkez*:

"Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing."⁸⁰

In *Gatete*, the ICTR Trial Chamber stated that even though a person was not charged as a superior under Article 6 (3) of the ICTR Statute, his superior position or influence may be considered as an aggravating factor:

"The Appeal Chamber has held that an accused's abuse of his superior position or influence may be considered as an aggravating factor. While Gatete is not charged as a superior under Article 6 (3) of the Statute, his position of authority may be a sentencing consideration."⁸¹

In *Nyiramasuhuko et al.*, the ICTR Trial Chamber adopted this application, stating that:

"It is not appropriate to convict an accused on a particular count for the same conduct under both Article 6(1) and Article 6(3). Where the conduct of an accused constitutes a violation of both Article 6(1) and Article 6(3), the Chamber will enter a conviction on the basis of Article 6(1) of the Statute alone and consider whether the superior position of the accused is an aggravating factor. While a position of authority, even at a high level, does not automatically warrant a harsher sentence, it is the abuse of such authority which may serve as an aggravating factor in sentencing."⁸²

The ECCC Trial Chamber in *Kaing Guek Eav ("Duch")* agreed:

"[w]ith the international jurisprudence that has found that an accused may not be concurrently convicted pursuant to a "direct" form of responsibility (as listed in the first paragraph of Article 29 (new) of the ECCC Law) on the one hand, and superior responsibility on the other. Instead, where both a form of "direct" responsibility and superior responsibility are established in relation to the same conduct, the Chamber will enter a conviction on the basis of the "direct" form of responsibility

charged within a single Count. See [ICTY, *Limaj et al.*, *TC II, Judgement, Case No. IT-03-66-T, 30 November 2005*, para. 741] (finding the Accused Haradin Bala guilty, inter alia, of "Count 6: Cruel treatment, a violation of the laws or customs of war, under Article 3 of the Statute, for having personally mistreated detainees L04, L10 and L12, and aided another episode of mistreatment of L04, and for his personal role in the maintenance and enforcement of inhumane conditions of detention in the Llapushnik/Lapusnik prison camp.")"

⁸⁰ ICTY, *Dorđević, TC II, Judgement, Case No. IT-05-87/1-T, 23 February 2011*, para. 1891.

⁸¹ ICTR, *Gatete, TC III, Judgement, Case No. ICTR-2000-61-T, 31 March 2011*, para. 678.

⁸² ICTR, *Nyiramasuhuko et al.*, *TC II, Judgement, Case No. ICTR-98-42-T, 24 June 2011*, para. 5652.

only, and consider the accused's superior position as an aggravating factor in sentencing."⁸³

In the same vein, the ICTR Trial Chamber in *Karemera and Ngirumpatse* stated that:

"[i]t is not appropriate to convict an accused for a specific count under both Article 6(1) and Article 6(3) of the Statute. When the accused's responsibility is pleaded pursuant to both provisions for the same conduct and the same set of facts, and the accused could be found liable under both, the Trial Chamber should enter a conviction on the basis of Article 6(1) of the Statute alone and consider the superior position of the accused as an aggravating factor in sentencing."⁸⁴

It also recalled that:

"[t]he Trial Chamber must make a finding beforehand on the accused's superior responsibility. While a position of authority, even at a high level, does not automatically warrant a harsher sentence, it is the abuse of such authority which may serve as an aggravating factor in sentencing."⁸⁵

In the *Lubanga* Confirmation of Charges Decision, the ICC Pre-Trial Chamber did not consider other forms of liability after finding substantial grounds for charges committed as a co-perpetrator:

"Hence, if the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is criminally responsible as a co-perpetrator for the crimes listed in the Document Containing the Charges, for the purpose of the confirmation of the charges, the question as to whether it may also consider the other forms of accessory liability provided for in Articles 25(3)(b) to (d) of the Statute or the alleged superior responsibility of Thomas Lubanga Dyilo under Article 28 of the Statute becomes moot."⁸⁶

With respect to alternative charging, the ICC Pre-Trial Chamber in the *Bemba* Confirmation of Charges Decision maintained that:

"[c]riminal responsibility under Article 28 of the Statute shall not be examined, unless there is a determination that there is not sufficient evidence to establish substantial grounds to believe that the suspect is criminally responsible as a 'co-

⁸³ ECCC, *Kaing Guek Eav, TC, Judgement, 26 July 2010*, para. 539.

⁸⁴ ICTR, *Karemera and Ngirumpatse, TC III, Judgement, Case No. ICTR-98-44-T, 2 February 2012*, para. 1502 (footnote omitted).

⁸⁵ *Ibid.*, para. 1503 (footnote omitted).

⁸⁶ ICC, *Lubanga, PTC I, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/06, 29 January 2007*, para. 32. See also ICC, *Katanga and Ngudjolo Chui, PTC I, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/07, 30 September 2008*, para. 471.

perpetrator' within the meaning of Article 25(3)(a) of the Statute for the crimes set out in the Amended DCC."⁸⁷

In the *Ntaganda* Decision on the Confirmation of Charges, the ICC Pre-Trial Chamber departed from the position it had previously taken in *Lubanga* and *Bemba* on alternative charging and found that:

"Based on the evidence presented, the Chamber finds that, in the alternative, Mr. Ntaganda is criminally responsible pursuant to Article 28(a) of the Statute [...]."⁸⁸

This decision was prompted by the fact that:

At this stage of the proceedings, the Chamber is not called upon to engage in a full-fledged trial and to decide on the guilt or innocence of the person charged. Rather, the mandate of the Pre-Trial Chamber is to determine which cases should proceed to trial. Additionally, the Chamber may be presented with facts, supported with evidence, which may satisfy different modes of responsibility. Accordingly, the Chamber considers that at this stage of the proceedings it may confirm alternative charges presented by the Prosecutor as long as each charge is supported by sufficient evidence to establish substantial grounds to believe that the suspect has committed one or more of the crimes charged."⁸⁹

Similarly, in the *Gbagbo* Decision on the Confirmation of Charges, the ICC Pre-Trial Chamber chose to confirm the alternate mode of liability that had been submitted by the Prosecutor:

"...the Chamber considers there to be no legal impediment to the confirmation of alternative modes of liability, and has concluded on the basis of the facts and evidence of the case that there are substantial grounds to believe that Laurent Gbagbo is individually criminally responsible for the commission of crimes against humanity under consideration, in the alternative, under Article 25(3)(a), (b) or (d) of the Statute."⁹⁰

⁸⁷ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424*, 15 June 2009, para. 407 (footnote omitted).

⁸⁸ ICC, *Ntaganda, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/04-02/06*, 9 June 2014, para. 165.

⁸⁹ *Ibid.*, para. 100.

⁹⁰ ICC, *Gbagbo, PTC I, Decision on the Confirmation of Charges, Case No. ICC-02/11-01/11*, 12 June 2014, para. 260 (footnote omitted).

Publicists

Concerning concurrent conviction, Arnold remarks:

"As stressed by the ICTY in *Čelebići*, omission of intervention may imply an accumulative charge for individual and command responsibility.⁹¹ The Court held that although *prima facie* it would be illogical to hold a superior criminally responsible for planning, instigating or ordering the commission of crimes and, at the same time, reproach him for not preventing or punishing them, the concurrent application of Article 7 para. 1 and 7 para. 3 of the ICTY Statute is acceptable where his failure to intervene allows the commission of subsequent crimes. This may occur in relation with the failure to punish.⁹² The same view was shared in the *Čelebići* and *Aleksovski* appeal judgements, ruling that these cases will result in a single but aggravated conviction for command responsibility.⁹³⁹⁴

Nybondas specifies:

"In the *Blaškić* Appeal Judgement, a cumulative conviction entered by the Trial Chamber was reversed. In the opinion of the Appeals Chamber, a conviction pursuant to both Article 7(1) and 7(3) 'in relation to the same count based on the same facts', i.e., a 'true cumulation', constituted a legal error.⁹⁵ This approach has been accepted and applied by the *ad hoc* tribunals in more recent case law, the general acceptance being based primarily on the 'logical argument' that a person who committed a crime cannot at the same time be held responsible for omitting to prevent or punish the same crime.⁹⁶ This argument is connected to the *ne bis in idem* argument, which is convincing in that a conviction under Article 7(1) and 7(3) would hold the accused liable twice in relation to the same facts."⁹⁷

On the same matter Schabas argues:

"It is now well established that where evidence establishes guilt based both upon actual perpetration and command responsibility, a conviction is to be entered for perpetration and the count of command responsibility is dropped. This jurisprudence was accepted by Pre-Trial Chamber III [in *Bemba*], which said charges based upon Article 28 of the Rome Statute 'would only be required if there was a determination that there were no substantial grounds to believe that the suspect was, as the Prosecutor submitted, criminally responsible as a "co-

⁹¹ ICTY, *Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, paras. 263, 270 and 284.

⁹² *Ibid.*, paras. 337-338.

⁹³ ICTY, *Aleksovski, TC, Judgement, Case No. IT-95-14/1-T, 25 June 1999*, para. 183, and ICTY, *Mucić et al. ("Čelebići"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, paras. 736 and 743 et seq. [...].

⁹⁴ Roberta Arnold, "Article 28: Responsibility of Commanders and Other Superiors" in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Hart, 2007, p. 834.

⁹⁵ ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004*, paras. 91-92.

⁹⁶ ICTY, *Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, para. 337.

⁹⁷ Nybondas, 2010, p. 156.

perpetrator" within the meaning of Article 25(3)(a) of the Statute'.⁹⁸ One Trial Chamber at the *ad hoc* tribunals described the superior responsibility inquiry as 'a waste of judicial resources' in cases where liability as a principal perpetrator or accomplice has already been established.⁹⁹¹⁰⁰

Liability for crimes committed by others

Keywords: Multiple Superior Responsibility – Neglect of Duty – Omission

International Case Law

In the *Blaškić* Judgement, the Trial Chamber held:

"[t]hat the test of effective control exercised by the commander implies that more than one person may be held responsible for the same crime committed by a subordinate."¹⁰¹

In *Čelebići*, the ICTY Appeals Chamber specified:

"The Prosecution's argument that a breach of the duty of a superior to remain constantly informed of his subordinates actions will necessarily result in criminal liability comes close to the imposition of criminal liability on a strict or negligence basis. It is however noted that although a commander's failure to remain apprised of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability."¹⁰²

In *Bagilishema*, the ICTR Trial Chamber was of the view that an accused could be found liable not only under Article 6(1) or 6(3) of the Statute, but also, under a third theory that it referred to as "(gross) criminal negligence":

"A third basis of liability in this context is gross negligence. This is a species of liability by omission, omission here taking the form of criminal dereliction of a public duty."¹⁰³

⁹⁸ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, paras. 342 and 402.

⁹⁹ ICTY, *Stakić, TC II, Judgement, Case No. IT-97-24-T, 31 July 2003*, para. 466.

¹⁰⁰ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 458.

¹⁰¹ ICTY, *Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, para. 303.

¹⁰² ICTY, *Mucić et al. ("Čelebići"), TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, para. 226.

¹⁰³ ICTR, *Bagilishema, TC I, Judgement, Case No. ICTR-95-1A-T, 7 June 2001*, para. 897.

The Appeals Chamber disagreed with this approach and argued that there is no room for theories of liability apart from those set out in the ICTR Statute. The Appeals Chamber found the theory of criminal negligence advanced by the Trial Chamber confusing, particularly in the context of superior responsibility:

"The Statute does not provide for criminal liability other than for those forms of participation stated therein, expressly or implicitly. In particular, it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law."¹⁰⁴

"References to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought, as the Judgement of the Trial Chamber in the present case illustrates."¹⁰⁵

On omission as a failure of the duty to prevent and/or punish, the *Mpambara* Trial Chamber held:

"[Responsibility] for an omission may arise [...] where the accused is charged with a duty to prevent or punish others from committing a crime. The culpability arises not by participating in the commission of a crime, but by allowing another person to commit a crime which the accused has a duty to prevent or punish."¹⁰⁶

"The circumstances in which such a duty has been recognized in international criminal law are limited indeed. [...] Article 6(3) of the Statute creates an exception to [the] principle [of *nulla poena sine culpa*] in relation to a crime about to be, or which has been, committed by a subordinate. Where the superior knew or had reason to know of the crime, he or she must 'take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.'"¹⁰⁷

"[...] [Responsibility] for failing to discharge a duty to prevent or punish requires proof that: (i) the accused was bound by a specific legal duty to prevent a crime; (ii) the accused was aware of, and wilfully refused to discharge, his legal duty; and (iii) the crime took place."¹⁰⁸

In the *Gbagbo* Decision on the Confirmation of Charges, the ICC Pre-Trial Chamber distinguished command responsibility from the other modes of liability contained in the Statute as follows:

"[a] fundamental difference exists between the forms of commission incriminated in Article 25 of the Statute, which establish liability for one's own

¹⁰⁴ ICTR, *Bagilishema, AC, Appeal Judgement, Case No. ICTR-95-1A-A, 3 July 2002*, para. 34.

¹⁰⁵ *Ibid.*, para. 35.

¹⁰⁶ ICTR, *Mpambara, TC I, Judgement, Case No. ICTR-01-65-T, 11 September 2006*, para. 25.

¹⁰⁷ *Ibid.*, para. 26; referring to ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004*, paras. 53-85, where the conditions for such liability are discussed.

¹⁰⁸ *Ibid.*, para. 27 (footnote omitted).

crimes, and Article 28 of the Statute, which establishes liability for violation of duties in relation to crimes committed by others."¹⁰⁹

The *Bemba* Trial Chamber reinforced this distinction by asserting the *sui generis* character of this mode of liability:

“The plain text of Article 28 – “[i]n addition to other grounds of criminal responsibility” – and its placement in Part 3 of the Statute indicate that Article 28 is intended to provide a distinct mode of liability from those found under Article 25. Further, the language of Article 28 expressly links the responsibility of the commander to the crimes committed by subordinates – “shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control [...]” [...]. In this regard, it is, however, important to recognise that the responsibility of a commander under Article 28 is different from that of a person who “commits” a crime within the jurisdiction of the Court. This is supported by the language of Article 28 itself: the crimes for which the commander is held responsible are “committed” by forces, or subordinates, under his or her effective command and control, or effective authority and control, rather than by the commander directly.”

“Consequently, Article 28 must be viewed as a form of *sui generis* liability. [I]n certain circumstances, a commander’s conduct may be capable of satisfying a material element of one or more modes of liability.”¹¹⁰

Publicists

Regarding the evolution of the nature of command responsibility, Meloni reports:

"[...] although post-WW2 case law ‘was not uniform in its determination as to the nature of the responsibility arising from the concept of command responsibility’, at that time command responsibility was largely interpreted as a mode of liability by which the superior was responsible for the crimes of the subordinates. This form of responsibility sometimes appeared as a form of participation in the subordinates’ crime, and sometimes shifted towards forms of vicarious/imputed liability. In either case, the superior was charged and convicted for the principal crime (i.e. the underlying offence committed by his subordinates). Command responsibility, however, was not necessarily understood as it is today in terms of being based on a pre-existing legal duty to prevent or punish: in most of the cases the superior was found guilty for having positively contributed to the commission of crimes by his subordinates and therefore sentenced."¹¹¹

¹⁰⁹ ICC, *Gbagbo, PTC I, Decision on the Confirmation of Charges, Case No. ICC-02/11-01/11, 12 June 2014*, paras. 264-265 (footnote omitted).

¹¹⁰ ICC, *Bemba, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016*, para. 173-174

¹¹¹ Chantal Meloni, “Command Responsibility Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?”, in *Journal of International Criminal Justice*, 2007, vol. 5, no. 3, p. 623 (footnotes omitted).

Cassese claims:

"In order to fully understand the special nature of superior responsibility, it is useful to draw a distinction between failure to prevent and failure to punish.¹¹² When a superior knows or has reason to know that a subordinate is about to or is committing a crime and fails to prevent it, he should be legally treated as participating in the crime. Whether or not causation is legally required, there is at least a connection between the omission of the superior and the crimes.¹¹³¹¹⁴

Similarly, Nybondas notes that:

"[...] the case law of the *ad hoc* tribunals shows that in cases where the superior failed to act, showed passivity, and subordinates committed crimes under the jurisdiction of the tribunals, the act of omission has in certain cases led to criminal liability for participation in or a contribution to a joint criminal enterprise or for aiding and abetting a crime."¹¹⁵

On the other hand, Cassese distinguishes a superior who is held responsible for his/her failure to fulfil the duty to punish:

"[...] a superior who breaches his *duty* to punish is in a different situation. A superior who only learns of the crime after its commission, cannot be said to have participated in the criminal offence. In this case, the superior's responsibility should be conceptualized as a distinct crime, consisting of the failure to discharge supervisory duties, rather than any form of participation in the underlying offence of the subordinate."¹¹⁶

According to van Sliedregt:

"[...] Pursuant to Article 7(3) the superior is held responsible for the same crime as his subordinate, which would qualify command responsibility as a mode of liability. In more recent case law, however, doubts have arisen as to the meaning of the expression 'responsible for the crimes of his subordinates'. In the *Halilović* case the Trial Chamber interpreted 'responsible for' as an expression that [d]oes not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that..., the commander should bear responsibility for his failure to act'.¹¹⁷ In *Orić*, the

¹¹² See e.g. ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004*, paras. 476-477 (noting the Trial Chamber's reasoning that causation could not be an element of superior responsibility under the ICTY Statute because it was impossible to link failure to punish with the commission of the crime).

¹¹³ ICTY, *Mucić et al. ("Čelebići"), TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, para. 399 ("the superior may be considered to be causally linked to the offences, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed").

¹¹⁴ Antonio Cassese et al, *Cassese's International Criminal Law*, Oxford University Press, 2013, p. 191.

¹¹⁵ Maria L. Nybondas, *Command Responsibility and Its Applicability to Civilian Superiors*, T.M.C. Asser Press, 2010, p. 139.

¹¹⁶ Cassese et al., 2013, p. 192.

¹¹⁷ ICTY, *Halilović, AC, Appeal Judgement, Case No. IT-01-48-A, 16 October 2007*, para. 54. For a similar approach see ICTY, *Hadžihasanović and Kubura, TC, Judgement, Case No. IT-01-47-T, 15 March 2006*, paras. 74-75. See also Appeals Chamber in *Krnjelac*: "It cannot be overemphasised that, where responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control.", ICTY, *Krnjelac, AC, Appeal Judgement, Case No. IT-97-25-A, 17 September 2003*, para. 171.

superior was found to be responsible 'merely for his neglect of duty with regard to crimes committed by subordinates'.¹¹⁸ The accused was, therefore, found guilty not of the crimes committed by his subordinates (murder and cruel treatment) but of 'failure to discharge his duty as a superior'.¹¹⁹ With this change in ICTY jurisprudence, comes a change in formulation. The superior is not 'responsible for' but 'responsible in respect of or 'with regard to' the crimes of subordinates."¹²⁰

Likewise, regarding the *ad hoc* tribunals' interpretation of command responsibility as a *sui generis* form of responsibility, Cryer et al. observe:

"[...] Such views have also gained support in the Appeals Chamber. In *Krnjelac*, that Chamber, in an entirely unreasoned, rather 'throwaway' line, said it cannot be overemphasized that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control'.¹²¹ In *Hadžihasanović et al.*, the Chamber 'took into consideration' the views expressed in *Halilović* that command responsibility is a *sui generis* form of omission liability.¹²² In the *Orić* appeal Judgement, Judge Shahabuddeen, with whom Judges Shomburg and Liu basically agreed, reasserted his view from the earlier *Hadžihasanović et al.* decision, that command responsibility was not liability for the underlying offences. "¹²³

In the same vein, Nybondas comments:

"[...] While the case law of the *ad hoc* tribunals during the first ten years of their existence suggests that command responsibility was interpreted as liability for an international crime, more recent judgements insist on applying command responsibility as an act *sui generis*. The disadvantage of command responsibility as liability for an international crime is the lack of intent on the part of the superior in relation to the crimes committed. Considering command responsibility as a crime of its own kind would remove this disadvantage because it does not require such intent."¹²⁴

Meloni specifies that:

"This form of liability is actually unknown in domestic criminal law and represents a hybrid of several concepts. On one hand, it is not consistent with any form of complicity, since there is no need to prove the causal link with the underlying crime committed by the subordinate and since the *mens rea*

¹¹⁸ ICTY, *Orić, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006*, paras. 292-293.

¹¹⁹ See ICTY, *Orić, AC, Prosecution's Appeal Brief, Case No. IT-03-68-A, 16 October 2006*, para. 152.

¹²⁰ Elies van Sliedregt, "Command Responsibility at the ICTY-Three Generations of Case Law and Still Ambiguity", in Bert Swart, Alexander Zahar, and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2011, p. 388.

¹²¹ ICTY, *Krnjelac, AC, Appeal Judgement, Case No. IT-97-25-A, 17 September 2003*, para. 171.

¹²² ICTY, *Hadžihasanović and Kubura, AC, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case No. IT-01-47-AR72, 16 July 2003*, para. 39.

¹²³ Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, p. 394.

¹²⁴ Nybondas, 2010, p. 180.

threshold is lower than the one required for complicity.¹²⁵ On the other hand, it is hardly conceivable as a separate offence of failure to act since the liability of the superior is strictly and necessarily dependent from the commission of the crime by the subordinate. This is well reflected with respect to the sentencing process: notwithstanding the affirmation that the failure to prevent or punish 'in itself is the only crime for which he/she is to be sentenced', it is affirmed that the determination of sentence shall be considered in proportion to the gravity of the crimes committed by the subordinates.¹²⁶ The gravity of the offence of the superior, which is indicated as the most important criterion to determine the measure of the sentence to be imposed,¹²⁷ actually depends on various factors among which the gravity of the subordinates' crime is the first of the principal factors.¹²⁸¹²⁹

With regard to sentencing, Cryer et al. state:

"[...] The [*ad hoc* tribunals] Appeals Chamber has most recently attempted to square the circle, providing that, although the culpable conduct in command responsibility is the failure to prevent or punish,¹³⁰ 'the seriousness of the superior's conduct in failing to prevent or punish crimes must be measured to some extent by the nature of the crimes to which this relates, i.e. the gravity of the crimes committed by the direct perpetrator(s)'.¹³¹¹³²

Cassese also agrees that the nature of command responsibility affects sentencing but considers that:

"[...] If a failure to prevent a subordinate's criminal activity is conceived as a form of participation in the underlying offence, then the subordinate's crimes should be the starting point of the sentencing analysis. Depending on the circumstances, the fact that a superior is under a duty to prevent crimes may warrant a higher sentence than the principal perpetrator. In contrast, when dealing with a failure to punish, the starting point for sentencing should be the seriousness of the superior's breach of duty. While the gravity of the underlying

¹²⁵ Nybondas, 2010, p. 180. In order to assess accomplice liability for an intentional offence, the minimum criteria required are the accomplice's awareness of making a contribution that facilitated the commission of the crime and the substantial and direct effect of the contribution on the commission of the crime. See ICTY, *Furundžija, TC, Judgement, Case No. IT-95-17/1-T, 10 December 1998*, para. 229; see also Art. 2 of the *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, International Law Commission, 1996. For a broader analysis, see Enrico Amati, "Concorso di persone nel diritto penale internazionale", in *Digesto Discipline Penalistiche*, Appendice di approfondimento (Torino, 2004), p.128 ff.

¹²⁶ ICTY, *Orić, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006*, para. 727.

¹²⁷ *Ibid.*, para. 726 with related notes.

¹²⁸ *Ibid.*, paras. 728-729. The Trial Chamber found that in determining the gravity of the subordinates' crimes in relation to the responsibility of the superior the following factors shall be considered: the legal nature of the offences, their scale and brutality, their impact upon the victims and their families and the extent of the long term physical, psychological and emotional suffering of the survivors.

¹²⁹ Meloni, 2007, p. 632.

¹³⁰ ICTR, *Ntabakuze, AC, Appeal Judgement, Case No. ICTR-98-41A-A, 8 May 2012*, para. 282.

¹³¹ *Ibid.*, para. 302. The two steps may be traced back to ICTY, *Hadžihasanović and Kubura, AC, Appeal Judgement, Case No. IT-01-47-A, 22 April 2008*, para. 318, which, in turn refers back to ICTY, *Mucić et al. ("Čelebići"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 313.

¹³² Cryer et al., 2014, p. 395.

offence may play a part in sentencing, it is a more remote factor in the sentencing equation for failure to punish."¹³³

As Nerlich points out, for command responsibility to arise the commander must be under a duty to act:

"[...] Failure to exercise control properly may only result in criminal liability if the superior is under a duty to act.¹³⁴ The duty of military commanders to control their troops is fundamental to international humanitarian law¹³⁵ and has been codified expressly as an individual duty of the military commander in Article 87 Additional Protocol I (API). As to non-military superiors, a similar duty to exercise control properly derives from customary international law. This duty is reflected in the jurisprudence of the ICTY and ICTR¹³⁶ and its existence is presumed by Article 28(b) ICC St."¹³⁷

Meloni cautions on the risk of considering command responsibility as a vicarious liability:

"[...] From a literal interpretation of [Article 28 of the Rome Statute] it follows that the superior is responsible (and, therefore, should be punished) for the principal crime committed by his subordinates. However, it is necessary to avoid the risk of holding someone guilty for an offence committed by others in violation of the principle of individual and culpable criminal responsibility."¹³⁸

Finally, Schabas defines the nature of command responsibility as contained in the Rome Statute as follows:

"Superior responsibility has been described as a 'a *sui generis* form of liability', distinct from the modes of liability set out in Article 25 of the Rome Statute.¹³⁹ Although framed in the Rome Statute as a form by which crimes within the jurisdiction of the Court, as defined in Articles 6, 7, and 8, are perpetrated, in a sense it really stands alone as a distinct crime whose gravamen is the failure to supervise or punish."¹⁴⁰

¹³³ Cassese et al., 2013, p. 192.

¹³⁴ See Kai Ambos, "Superior Responsibility", in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 853; Ilias Bantekas, "The Contemporary Law of Superior Responsibility", in *American Journal of International Law*, 1999, vol. 93, p. 575 et seq.

¹³⁵ See Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, Art. 1(1); Convention (III) relative to the treatment of prisoners of war of August 12, 1949, Art. 4(2)(a).

¹³⁶ ICTY, Brđanin, TC II, Judgement, Case No. IT-99-36-T, 1 September 2004, para. 281; ICTY, Stakić, TC II, Judgement, Case No. IT-97-24-T, 31 July 2003, para. 462; ICTR, Baqilishema, TC I, Judgement, Case No. ICTR-95-1A-T, 7 June 2001, para. 42; ICTY, Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 416; ICTR, Musema, TC I, Judgement, Case No. ICTR-96-13-A, 27 January 2000, para. 135; ICTR, Kayishema and Ruzindana, TC, Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 213; ICTY, Mucić et al., TC, Judgement, Case No. IT-96-21-T, 16 November 1998; ICTR, Akayesu, TC I, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 491.

¹³⁷ Volker Nerlich, "Superior Responsibility under Article 28 ICC Statute: For What Exactly Is the Superior Held Responsible?", in *Journal of International Criminal Justice*, 2007, vol. 5, no. 3, p. 671.

¹³⁸ Meloni, 2007, p. 633 (footnotes omitted).

¹³⁹ ICTY, Halilović, AC, Appeal Judgement, Case No. IT-01-48-A, 16 October 2007, para. 78.

¹⁴⁰ William Schabas. *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 457.

4. The Underlying Offence or Principal Crime

A crime within the jurisdiction of the Court was committed or was about to be committed by the forces

Keywords: Subordinate Liability of Aiding and Abetting – Omission – General Principle of Individual Criminal Responsibility – Identity of the Direct Perpetrators

International Case Law

On subordinates who aided and abetted others to commit crimes, the ICTY Trial Chamber in *Orić* held that:

"[...] decisive weight must be given to the purpose of superior criminal responsibility: it aims at obliging commanders to ensure that subordinates do not violate international humanitarian law, either by harmful acts or by omitting a protective duty. This enforcement of international humanitarian law would be impaired to an inconceivable degree if a superior had to prevent subordinates only from killing or maltreating in person, while he could look the other way if he observed that subordinates 'merely' aided and abetted others in procuring the same evil."¹⁴¹

On omission, the Trial Chamber held further:

"[...] a superior's criminal responsibility for crimes of subordinates is not limited to the subordinates' active perpetration or participation, but also comprises their committing by omission."¹⁴²

In *Nahimana et al.*, the ICTR Appeals Chamber held that:

"[...] an accused may be held responsible as a superior under Article 6(3) of the Statute where a subordinate 'planned, instigated, ordered, committed or otherwise

¹⁴¹ ICTY, *Orić, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006*, para. 300.

¹⁴² *Ibid.*, para. 302.

aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute,' provided, of course, that all the other elements of such responsibility have been established."¹⁴³

Moreover, the Appeals Chamber in *Nahimana et al.* held that:

"[I]t is not necessary for the Appellant's subordinates to have killed Tutsi civilians: the only requirement is for the Appellant's subordinates to have committed a criminal act provided for in the Statute, such as direct and public incitement to commit genocide."¹⁴⁴

With regard to the general principle underlining the individual criminal responsibility of superiors, the ICTY Trial Chamber in *Dorđević* stated that the:

"[p]rinciple of individual criminal responsibility of superiors for failure to prevent or to punish crimes committed by subordinates is an established principle of customary international law, applicable to both international and international armed conflicts. This basis of criminal responsibility is usually referred to as superior or command responsibility. This encompasses all forms of criminal conduct by subordinates, not only the "committing" of crimes in the restricted sense of the term, but also any other modes of participation in crimes envisaged under Article 7(1) of the Statute. A superior's criminal liability for crimes or underlying offences committed by subordinates also includes their commission by omission."¹⁴⁵

In *Nyiramasuhuko et al.*, the ICTR Trial Chamber stated that:

"Superior responsibility encompasses criminal conduct by subordinates under all modes of participation pursuant to Article 6 (1) of the Statute. As a result, a superior can be held criminally responsible for his or her subordinates' planning, instigating, ordering, committing or otherwise aiding and abetting a crime. An accused, however, cannot be held responsible for a subordinate's criminal conduct before he or she assumed command over this subordinate."¹⁴⁶

In the *Perišić Judgement*, the ICTY Trial Chamber stated that:

"Article 7(3) of the Statute is applicable to all acts referred to in Articles 2 and 5 of the Statute and applies to both international and non-international armed conflicts."¹⁴⁷

¹⁴³ ICTR, *Nahimana et al., Appeal Judgement, 28 November 2007*, para. 486, referring to *ICTY, Blagojević and Jokić, AC, Appeal Judgement, Case No. IT-02-60-A, 9 May 2007*, paras. 280-282.

¹⁴⁴ *Ibid.*, para. 865.

¹⁴⁵ ICTY, *Dorđević, TC II, Judgement, Case No. IT-05-87/1-T, 23 February 2011*, para. 1878.

¹⁴⁶ ICTR, *Nyiramasuhuko et al., TC II, Judgement, Case No. ICTR-98-42-T, 24 June 2011*, para. 5646.

¹⁴⁷ ICTY, *Perišić, TC I, Judgement, Case No. IT-04-81-T, 6 September 2011*, para. 138 (footnote omitted).

In the *Ntaganda* Decision on the Confirmation of Charges, the ICC Pre-Trial Chamber considered that even the attempt by the subordinate to commit a crime is sufficient:

"[t]he findings in relation to this mode of liability [Command Responsibility] also concern the attempted acts of murder [...]. In addition, the Chamber finds that the instances of attempted murder resulted from the acts of Mr. Ntaganda's subordinates and that the crime of murder did not occur because of circumstances independent of the perpetrators' intentions, as stipulated in Article 25(3)(f) of the Statute."¹⁴⁸

In the *Bemba* Judgement, the ICC Trial Chamber established that the underlying crimes had been committed by Bemba's force (Mouvement de Libération du Congo/MLC) despite evidences that other forces also committed crimes:

"The Chamber emphasises that its conclusions as to the perpetrators' identities were reached based on a cumulative assessment of relevant identification criteria, including the consistent and corroborated evidence, taken together, of the MLC soldiers' uniforms, language, modus operandi, motives, and, often exclusive, presence in a given area at a given time. Many of the witnesses and victims who identified MLC soldiers as perpetrators had repeated and ongoing interactions with the MLC and other armed forces, and were therefore able to distinguish between them. In light of the above, the fact that other forces may have committed crimes during the relevant time period or had some characteristics in common with the MLC soldiers cannot, without further specification, undermine the Chamber's findings beyond reasonable doubt that the perpetrators of the crimes charged were MLC soldiers."¹⁴⁹

Publicists

On the need to prove that the subordinate committed an international crime, Meloni observes:

"It was only recently that a Trial Chamber of the ICTY explicitly affirmed the necessity of proving the actual commission of the 'principal crime', namely that 'an act or omission incurring criminal responsibility according to Articles 2 to 5 and 7(1) of the Statute has been committed by other(s) than the accused.'¹⁵⁰ As the judges further observed, 'until recently, both the requirement of a principal crime (committed by others than the accused) and its performance in any of the modes

¹⁴⁸ ICC, *Ntaganda, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/04-02/06, 9 June 2014*, para. 175.

¹⁴⁹ ICC, *Bemba, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016*, para. 695.

¹⁵⁰ ICTY, *Orić, TC II, Judgment, Case No. IT-03-68-T, 30 June 2006*, para. 294.

of liability provided for in Article 7(1) appeared so obvious as to hardly need to be explicitly stated.¹⁵¹¹⁵²

Van Sliedregt specifies that all modes of participation may constitute a crime:

"[...] 'Commission' in Article 7(3) has been interpreted as encompassing all modes of participation listed in Article 7(1): planning, ordering, instigating, and aiding and abetting crimes.¹⁵³ The Appeals Chamber held that '[t]he meaning of "commit", as used in Article 7(3) of the Statute, necessarily tracks the term's broader and more ordinary meaning, as employed in Protocol I'.¹⁵⁴ In *Orić* the appellate judges held that 'a superior can be held criminally responsible for his subordinates' planning, instigating, ordering, committing or otherwise aiding and abetting a crime'.¹⁵⁵ The position that superior responsibility covers all subordinates' criminal conduct falling under Article 7(1) has also been adopted by the International Criminal Tribunal for Rwanda (ICTR).¹⁵⁶¹⁵⁷

Arnold adds:

"[...] There must be a "crime within the jurisdiction of the Court committed by subordinates" which means at least an attempted crime, to base command responsibility upon. The responsibility then is according to Article 28 "for crimes within the jurisdiction of the Court". This means, the commander has to be sentenced for committing, for instance, a specific crime or for genocide "per command responsibility". The commission of the crime by the subordinates, thus, has to be established beyond any doubt."¹⁵⁸

Meloni maintains that the act of the subordinate must be objectively unlawful

"[...] for the purposes of determining superior responsibility pursuant to Article 28 ICC Statute, the subordinate has to have committed a wrongful act fulfilling the objective elements of a particular crime, with no need for the subordinate to be also culpable and punishable. On the contrary, if the act of the subordinate was

¹⁵¹ *Ibid.*, para. 295.

¹⁵² Chantal Meloni, *Command Responsibility in International Criminal Law*. T.M.C. Asser, 2010, p. 85.

¹⁵³ ICTY, *Blagojević and Jokić, AC, Appeal Judgement, Case No. IT-02-60-A, 9 May 2007*, paras. 277-285; See ICTY, *Orić, AC, Appeal Judgement, Case No. IT-03-68-A, 3 July 2008*, para. 20; ICTY, *Boškoski and Tarčulovski, TC II, Judgement, Case No. IT-04-82-T, 10 July 2008*, para. 404.

¹⁵⁴ See Barrie Sander, "Unravelling the Confusion Concerning Successor Responsibility in the ICTY Jurisprudence", *Leiden Journal of International Law*, 2010, vol. 23, pp. 121-122.

¹⁵⁵ ICTY, *Orić, AC, Appeal Judgement, Case No. IT-03-68-A, 3 July 2008*, para. 21.

¹⁵⁶ ICTR, *Nahimana et al., TC I, Judgement, Case No. ICTR-99-51-T, 3 December 2003*, para. 485.

¹⁵⁷ Elies van Sliedregt, "Command Responsibility at the ICTY-Three Generations of Case Law and Still Ambiguity", in Bert Swart, Alexander Zahar, and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2011, p. 383.

¹⁵⁸ Roberta Arnold, "Article 28: Responsibility of Commanders and Other Superiors", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Hart, 2007, p. 823.

justified, thus objectively not unlawful, the superior cannot be made accountable for not preventing or punishing it."¹⁵⁹

Finally, Nerlich argues that the subordinate crime can be under any mode of liability, including attempt and even command responsibility:

"Although Article 28 ICCSt. requires that the base crimes be 'committed', it is sufficient if liability for the base crime is incurred on the basis of *any* form of principle perpetratorship or accomplice liability recognized in Article 25(3) ICCSt.¹⁶⁰ [...] As criminal liability under Article 25(3) ICCSt. reaches beyond the principle perpetrator of a crime, the superior also can be held criminally liable when the subordinate 'only' is an assistant or instigator to the crime of another person and not a principle perpetrator. Even an inchoate crime may be a base crime: pursuant to Article 28(1)(a)(i) and (2)(a)(i) ICCSt., it suffices that the base crime is 'about to be committed'. The base crime, however, must have reached the threshold of Article 25(3)(f) ICCSt., which recognizes criminal liability for attempted crimes. If the subordinate's conduct does not even fulfil the requirements of liability for attempted crimes under Article 25(3)(f) ICCSt., superior responsibility cannot attach; in such cases, the subordinate has not committed 'a crime in the jurisdiction of the Court.' Finally, even criminal liability for a crime incurred under Article 28 ICCSt. may serve as a base crime."¹⁶¹

¹⁵⁹ Meloni, 2010, p. 154.

¹⁶⁰ See, in respect of Art. 7(3) of the ICTY Statute; ICTY, *Bošković and Tarčulovski, TC II, Decision on the Prosecution's Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment and Submission of Amended Pre-Trial Brief, Case No. IT-04-82-PT, 26 May 2006*, para. 18 et seq.; followed in ICTY, *Orić, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006*, para. 297 et seq.

¹⁶¹ Volker Nerlich, "Superior Responsibility under Article 28 ICC Statute: For What Exactly Is the Superior Held Responsible?", in *Journal of International Criminal Justice*, 2007, vol. 5, no. 3, pp. 668-669.

5. Superior – Subordinate Status

The perpetrator was a military commander or a person effectively acting as a military commander

The perpetrator was a military commander; [OR]

Keywords: Superior-Subordinate Relationship – Formal Position of Authority – Official Appointment

International Case Law

In *Mucić et al. ("Čelebići")*, the ICTY Trial Chamber stated that:

"The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops."¹⁶²

The Trial Chamber in the *Kunarac et al.* Judgement stated:

"Depending on the circumstances, a commander with superior responsibility under Article 7(3) may be a colonel commanding a brigade, a corporal commanding a platoon or even a rankless individual commanding a small group of men."¹⁶³

In *Kordić and Čerkez*, the Trial Chamber stated:

"A formal position of authority may be determined by reference to official appointment or formal grant of authority. Military positions will usually be strictly defined and the existence of a clear chain of command, based on a strict hierarchy, easier to demonstrate. Generally, a chain of command will comprise different hierarchical levels starting with the definition of policies at the highest level and going down the chain of command for implementation in the battlefield. At the top of the chain, political leaders may define the policy objectives. These objectives will

¹⁶² ICTY, *Mucić et al. ("Čelebići")*, TC, Judgement, Case No. IT-96-21-T, 16 November 1998, para. 647.

¹⁶³ ICTY, *Kunarac et al.*, TC, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 398.

then be translated into specific military plans by the strategic command in conjunction with senior government officials. At the next level the plan would be passed on to senior military officers in charge of operational zones. The last level in the chain of command would be that of the tactical commanders which exercise direct command over the troops."¹⁶⁴

In *Ntaganda*, the ICC Pre-Trial Chamber concluded that the accused was a military commander:

"Mr. Ntaganda was appointed Deputy Chief of Staff at the beginning of September 2002 and officially became Chief of Staff in December 2003. He was considered to be the military expert in the UPC/FPLC and, accordingly, had significant military responsibilities, such as developing and implementing military strategies and securing weapons from, inter alia, Rwanda. In addition, Mr. Ntaganda routinely issued instructions to subordinates and specifically insisted on compliance with his orders. He also ensured respect for discipline by ordering the arrest and imprisonment of disobedient subordinates and went as far as personally shooting or ordering the execution of insubordinate UPC/FPLC members."¹⁶⁵

Furthermore, the ICC Pre-Trial Chamber established that:

"Mr. Ntaganda's command and control also extended over the civilians within the UPC/FPLC, considering that he possessed the capacity to order them to engage in hostilities. Mr. Ntaganda described certain of these civilians as "our combatants" and, in addition, he armed and instructed some of them to kill and oust the Lendu."¹⁶⁶

The perpetrator was effectively acting as a military commander of the forces that committed the crime

Keyword: De facto Commander/Superior – Absence of Formal Legal Authority – Contemporary Conflicts – Actual Tasks Performed – Military-like Commander

International Case Law

In the *Mucić et al. ("Čelebići")* Judgement, the ICTY Trial Chamber stated that:

¹⁶⁴ ICTY, *Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001*, para. 419.

¹⁶⁵ ICC, *Ntaganda, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/04-02/06, 9 June 2014*, para. 120 (footnotes omitted).

¹⁶⁶ *Ibid.*, para. 166.

"[p]ersons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so. Thus, the Trial Chamber accepts the [...] proposition that individuals in positions of authority, whether civilian or military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as their *de jure* positions as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude impositions of such responsibility."¹⁶⁷

In the *Aleksovski* Judgement, the Trial Chamber held:

"The Trial Chamber considers that anyone, including a civilian, may be held responsible pursuant to Article 7(3) of the Statute if it is proved that the individual had effective authority over the perpetrators of the crimes. This authority can be inferred from the accused's ability to give them orders and to punish them in the event of violations."¹⁶⁸

The Trial Chamber held further:

"Superior responsibility is thus not reserved for official authorities. Any person acting *de facto* as a superior may be held responsible under Article 7(3)."¹⁶⁹

In *Čelebići*, the Appeals Chamber held:

"The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against *de facto* superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander."¹⁷⁰

¹⁶⁷ ICTY, *Mucić et al. ("Čelebići")*, TC, Judgement, Case No. IT-96-21-T, 16 November 1998, para. 354.

¹⁶⁸ ICTY, *Aleksovski*, TC, Judgement, Case No. IT-95-14/1-T, 25 June 1999, para. 103.

¹⁶⁹ *Ibid.*, para. 67.

¹⁷⁰ ICTY, *Mucić et al. ("Čelebići")*, AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001, para. 193.

In the *Kordić and Čerkez* Judgement, the Trial Chamber held that:

"[...] not only persons in formal positions of command but also persons found to be “effectively” in command of more informal structures, with the power to prevent and punish the commission of crimes of persons in fact under their control, may be held criminally responsible on the basis of their superior authority. In the absence of a formal appointment, it is the actual exercise of authority which is fundamental for the purpose of incurring criminal responsibility, and in particular a showing of effective control."¹⁷¹

"The capacity to sign orders will be indicative of some authority. The authority to issue orders, however, may be assumed *de facto*. Therefore in order to make a proper determination of the status and actual powers of control of a superior, it will be necessary to look to the substance of the documents signed and whether there is evidence of them being acted upon. For instance in the Ministries case, the Court found that the mere appearance of an official’s name on a distribution list attached to an official document could simply provide evidence that it was intended that he be provided with the relevant information, and not that ‘those whose names appear on such distribution lists have responsibility for, or power and right of decision with respect to the subject matter of such document.’ Similarly, direct signing of release orders would demonstrate authority to release. An accused’s signature on such a document, however, may not necessarily be indicative of actual authority to release as it may be purely formal or merely aimed at implementing a decision made by others."¹⁷²

Moreover, the Trial Chamber held:

"A superior status, when not clearly spelled out in an appointment order, may be deduced though an analysis of the actual tasks performed by the accused in question. This was the approach taken by the Trial Chamber in *Nikolic*. Evidence that an accused is perceived as having a high public profile, manifested through public appearances and statements, and thus as exercising some authority, may be relevant to the overall assessment of his actual authority although not sufficient in itself to establish it, without evidence of the accused’s overall behaviour towards subordinates and his duties. Similarly, the participation of an accused in high-profile international negotiations would not be necessary in itself to demonstrate superior authority. While in the case of military commanders, the evidence of external observers such as international monitoring or humanitarian personnel may be relied upon, in the case of civilian leaders evidence of perceived authority may not be sufficient, as it may be indicative of mere powers of influence in the absence of a subordinate structure."¹⁷³

¹⁷¹ ICTY, *Kordić and Čerkez*, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 406, referring to ICTY, *Mucić et al. ("Čelebići")*, AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001, paras. 194-195, 198.

¹⁷² *Ibid.*, para. 421 (footnotes omitted), confirming ICTY, *Mucić et al. ("Čelebići")*, TC, Judgement, Case No. IT-96-21-T, 16 November 1998, para. 672. Also ICTY, *Naletilić and Martinović*, TC, Judgement, Case No. IT-98-34-T, 31 March 2003, para. 67.

¹⁷³ *Ibid.*, para. 424. Also ICTY, *Halilović*, TC I, Judgement, Case No. IT-01-48-T, 16 November 2005, para. 58.

In *Kajelijeli*, the ICTR Appeals Chamber held:

"[...] a superior is one who possesses power or authority over subordinates either *de jure* or *de facto*; it is not necessary for that power or authority to arise from official appointment."¹⁷⁴

In the *Muvunyi* Trial Judgement, the ICTR Chamber found:

"As stated by the Appeals Chamber in the *Čelebići* Judgement, the absence of a formal appointment is not fatal to a finding of criminal responsibility, provided it can be shown that the superior exercised effective control over the actions of his subordinates."¹⁷⁵

In the *Bemba* Confirmation of Charges Decision, the ICC Pre-Trial Chamber on the basis of the wording of Article 28 distinguished between military-like commander and civilians holding *de jure* and *de facto* positions of authority:

"Article 28 of the Statute is drafted in a manner that distinguishes between two main categories of superiors and their relationships - namely, a military or military-like commander (paragraph (a)) and those who fall short of this category such as civilians occupying *de jure* and *de facto* positions of authority (paragraph (b))."¹⁷⁶

"With respect to a 'person effectively acting as a military commander', the Chamber considers that this term is meant to cover a distinct as well as a broader category of commanders. This category refers to those who are not elected by law to carry out a military commander's role, yet they perform it *de facto* by exercising effective control over a group of persons through a chain of command."¹⁷⁷

"[...] this category of military-like commanders may generally encompass superiors who have authority and control over regular government forces such as armed police units or irregular forces (non-government forces) such as rebel groups, paramilitary units including, inter alia, armed resistance movements and militias that follow a structure of military hierarchy or a chain of command."¹⁷⁸

In the *Bemba* Judgement, the Trial Chamber added:

"These individuals are not formally or legally appointed as military commanders, but they will effectively act as commanders over the forces that committed the crimes. In addition, the phrase "military commander or person effectively acting

¹⁷⁴ ICTR, *Kajelijeli, AC, Appeal Judgement, Case No. ICTR-98-44A-A, 23 May 2005*, para. 85.

¹⁷⁵ ICTR, *Muvunyi, TC II, Judgement, Case No. ICTR-2000-55A-T, 12 September 2006*, para. 51.

¹⁷⁶ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 406.

¹⁷⁷ *Ibid.*, para. 409.

¹⁷⁸ *Ibid.*, para. 410 (footnote omitted).

as a military commander” includes individuals who do not perform exclusively military functions.”¹⁷⁹

Publicists

With respect to military commanders or person effectively acting as commanders, Jia observes:

"The powers of a commander may derive from his place in the chain of command, with the commander being a link in that chain, or they may derive from the actual situation on the ground. The former may conveniently be termed *de jure* powers, the latter, *de facto* powers, embracing all other possible scenarios. The former type of power is generally conferred through normal appointment, and the commander has the legitimate powers specific to the position he is assigned to. The latter type accrues to an individual in the absence of a formal appointment but is also legitimate in the sense that he is treated as commander by those who are in the same unit."¹⁸⁰

Concerning the structure of a chain of command and its relevance for command responsibility, Arnold specifies:

"[...] There is usually more than one commander in a chain of command. The latter may include, *e.g.*, a section leader, a platoon commander, a company commander, a battalion commander, a brigade commander, a division commander and others in ascending seniority. The significant element, for the purpose of command responsibility, is a person's effective exercise of command, not the fact that he or she holds a particular rank."¹⁸¹

Similarly, Cryer et al. point out that the *ad hoc* tribunals jurisprudential criteria developed to find superior responsibility were made to encompass formal and informal chains of command:

"Where there are the clear formal chains of command that characterise modern well- disciplined armies, this criterion may appear simple to apply. However, modern conflicts are not always fought on this basis and by such forces.¹⁸² Therefore, and understandably, the Appeals Chamber in *Čelebići* based itself on a test of 'effective control', defined as 'a material ability to prevent or punish criminal

¹⁷⁹ ICC, Bemba, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, *21 March 2016*, para. 177.

¹⁸⁰ Bing Bing Jia, "The Doctrine of Command Responsibility: Current Problems", in *Yearbook of International Humanitarian Law* 2000, vol. 3, p. 148 (footnote omitted).

¹⁸¹ Roberta Arnold, "Article 28: Responsibility of Commanders and Other Superiors", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Hart, 2007, p. 830.

¹⁸² For an excellent discussion of aspects of command responsibility in such contexts, see Sandesh Sivakumaran, "Command Responsibility in Irregular Groups", in *Journal of International Criminal Justice*, 2012, vol. 10, para. 1129.

conduct'.¹⁸³ Substantial influence is not enough;¹⁸⁴ the ICC agrees with this.¹⁸⁵ It is required that 'the accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator'.¹⁸⁶ The *de jure* position of the superior is not determinative of this, it is largely factual ability to prevent and punish that counts.¹⁸⁷¹⁸⁸

With regard to *de jure* powers Mettraux specifies:

"The forms and procedure by which appointment to a commanding position or a *de jure* position of authority is made will vary a great deal between different national armies and national civilian structures.¹⁸⁹ International law does not provide for any condition of form or procedure in relation to this matter. In particular, *de jure* powers could be granted in writing or orally.¹⁹⁰ In the context of a criminal trial where the accused is being charged with failing in his duties as commander, proof of *de jure* command does not require the prosecution to produce the order by which the accused was appointed or elected to this position. *De jure* command may indeed be established circumstantially.¹⁹¹ But an inference that the accused has been appointed to a particular function will not be drawn lightly and the inability of prosecuting authorities to produce an order of appointment might weigh heavily against a finding of *de jure* command. This is particularly true in more formalised settings such as a military hierarchy."¹⁹²

¹⁸³ ICTY, *Mucić et al. ("Čelebići")*, AC, *Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 256 [...].

¹⁸⁴ *Ibid.*, para. 266.

¹⁸⁵ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, paras. 414-416.

¹⁸⁶ ICTY, *Halilović, AC, Appeal Judgement, Case No. IT-01-48-A, 16 October 2007*, para. 59. Otherwise, as the Chamber said, police officers could be considered superiors to all in their jurisdiction owing to their ability to prevent and set punishment in motion; see also, para. 210. There may be an exception for occupation commanders, who do not have to have this type of relationship [...].

¹⁸⁷ ICTY, *Mucić et al. ("Čelebići")*, AC, *Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, paras. 186-198; ICTY, *Halilović, AC, Appeal Judgement, Case No. IT-01-48-A, 16 October 2007*, para. 59; ICTR, *Kajelijeli, AC, Appeal Judgement, Case No. ICTR-98-44A-A, 23 May 2005*, para. 85. See also e.g. *U.S.A. v. Wilhelm List et al. (the 'Hostages case')*, VIII LRTWC 89; Tokyo IMT, reprinted in Neil Bolster and Robert Cryer, *Documents on the Tokyo International Military Tribunal, Oxford University Press, 2008*, pp. 48, 820.

¹⁸⁸ Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, p. 386.

¹⁸⁹ That determination may only be made pursuant to and in accordance with local domestic law. [...] International law does not provide for procedure or requirements as to the manner or procedure whereby an individual may be appointed to a *de jure* position of command. According to the ICTR Appeals Chamber, the source or basis of an accused's *de jure* authority could lay in the relevant domestic law or even in a contract (ICTR, *Nahimana et al., AC, Appeal Judgement, Case No. ICTR-99-52-A, 28 November 2007*, para. 787).

¹⁹⁰ *Ibid.*, para. 787.

¹⁹¹ See, e.g., ICTY, *Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001*, para. 424; ICTY, *Nikolić, TC, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-94-2-R61, 20 October 1995*, para. 24. The ad hoc Tribunals have held that such an inference must be the only reasonable one to be drawn from the evidence [...].

¹⁹² Guénaél Mettraux, *The Law of Command Responsibility*, Oxford University Press, 2009, p. 140.

Taking stock of the ICC Pre-Trial Chamber Decision on Confirmation of Charges in the *Bemba* case, Meloni explains:

"The ICC specified that the notion of military commander can be integrated irrespective of whether the superior performs an exclusively military function; the notion also covers situations, such as those where a Head of State is the Commander-in-Chief of the armed forces. Although in this case the superior does not carry out a military duty in an exclusive manner, he 'may be responsible for crimes committed by his forces (i.e., members of the armed forces)'.¹⁹³¹⁹⁴

However, Ambos specifies that the formal status of a commander may not suffice:

"[...] A position of command cannot be determined by 'reference to a formal status alone' but by 'the actual possession, or non-possession, of powers of [effective] control over the actions of subordinates.'¹⁹⁵ In this sense, superior responsibility extends to civilian, non-military superiors, but 'only to the extent that they exercise a degree of control over their subordinates similar to that of military commanders'.¹⁹⁶¹⁹⁷

In the same vein, Arnold states:

"[...] the doctrine applies to *all* individuals,¹⁹⁸ as long as these exercised *effective control* over the offenders and had "*the material ability to prevent and punish the commission of these offences.*"¹⁹⁹ The [ICTY] Appeals Chamber [in *Čelebići*] concurred with this view by holding that this standard had been also adopted by Article 28 of the Statute for an International Criminal Court.²⁰⁰²⁰¹

Gordy observes that the the legal requirements developed by the *ad hoc* tribunals for command responsibility to arise encompass *de jure* as well as *de facto* command:

"In the *Čelebići* camp case, the ICTY Trial Chamber determined that it was possible to consider evidence of the existence of both "*de jure* and *de facto* command," [§ 127] with the proviso that to establish the responsibility of a commander it is

¹⁹³ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 408 [...].

¹⁹⁴ Chantal Meloni, *Command Responsibility in International Criminal Law*, T.M.C. Asser, 2010, p. 156.

¹⁹⁵ ICTY, *Mucić et al. ("Čelebići"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 198; also ICTY, *Aleksovski, TC, Judgement, Case No. IT-95-14/1-T, 25 June 1999*, para. 76; ICTY, *Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, paras. 301, 335; ICTY, *Krstić, TC, Judgement, Case No. IT-98-33-T, 2 August 2001*, para. 648.

¹⁹⁶ ICTY, *Mucić et al. ("Čelebići"), TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, paras. 355 et seq., 363, 378; ICTY, *Aleksovski, TC, Judgement, Case No. IT-95-14/1-T, 25 June 1999*, paras. 75, 78.

¹⁹⁷ Kai Ambos, "Superior Responsibility", in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 833.

¹⁹⁸ ICTY, *Mucić et al. ("Čelebići"), TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, paras. 354 et seq., and 735; ICTY, *Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001*, par. 416.

¹⁹⁹ *Ibid.*, para. 178.

²⁰⁰ ICTY, *Mucić et al. ("Čelebići"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, paras. 196-197.

²⁰¹ Arnold, 2007, p. 831.

necessary to show that the “commander had actual knowledge” and “the commander’s failure to act was the cause of the war crime” [§ 128]. In doing so the Trial Chamber recognised that “the legal duties of a superior (and therefore the application of the doctrine of command responsibility) do not depend only on *de jure* (formal) authority, but can arise also as a result of *de facto* (informal) command and control, or a combination of both” [§ 129]. This led the judges to the innovative finding that “the mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility” [§ 131], and that consequently the Tribunal had to “be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts” [§ 140].²⁰²

Thus, Gordy concludes that:

"[...] the verdict [in *Čelebići*, Trial Judgement] established a precedent in the sense that chains of command could not be established by purely formal means, and that the possibility had to be considered that somebody occupying a position of command may not have exercised it, while somebody outside of a chain of command may have exercised informal authority. In all cases it is necessary not simply to rely on evidence of how chains of command would have functioned if military organisations followed their own procedures, but to determine how chains of command actually operated on the ground."²⁰³

Meloni observes that the *ad hoc* tribunal case law on *de facto* commander has been upheld by the ICC:

"In line with the jurisprudence of the ICTY and ICTR, in its first decision on the issue [Bemba] the ICC affirmed that the category of military-like commanders may encompass superiors who have authority and control over irregular forces, such as rebel groups, paramilitary units, including armed resistance movements and militias structured in a military hierarchy and having a chain of command."²⁰⁴²⁰⁵

With respect to *de facto* commanders in irregular forces, Sivakumaran cautions:

"[...] It is important to keep in mind that responsible command in irregular groups may not look the same as that in regular armed forces. The very notion of the *de facto* commander and judging superior-subordinate relationships by reference to effective control testify to this."²⁰⁶

²⁰² Eric Gordy, “The Blaškić Trial: Politics, the Control of Information and Command Responsibility”, in *Southeastern Europe*, 2012, vol. 36, no. 1, p. 64.

²⁰³ *Ibid.*, p. 65.

²⁰⁴ See ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 410.

²⁰⁵ Meloni, 2010, p. 156.

²⁰⁶ Sandesh Sivakumaran, “Command Responsibility in Irregular Groups”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 5, p. 1137.

6. Control

The perpetrator had effective command and control, or effective authority and control over the forces that committed the crime

*The perpetrator had effective command and control;
[OR]*

Keywords: Effective Control – Material Ability – Hierarchy – Chain of Command – Temporary Structure of the Military Unit – Identity of the Direct Perpetrator – Temporal Requirement – Multiple Command Responsibility – Indicia for the Existence of Effective Control

International Case Law

The ICTY Trial Chamber in the *Mucić et al. ("Čelebići")* Judgement found:

"Accordingly, it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. With the caveat that such authority can have a *de facto* as well as a *de jure* character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders."²⁰⁷

²⁰⁷ ICTY, *Mucić et al. ("Čelebići")*, TC, Judgement, Case No. IT-96-21-T, 16 November 1998, para. 378. Also ICTY, *Naletilić and Martinović*, TC, Judgement, Case No. IT-98-34-T, 31 March 2003, para. 66; ICTY, *Stakić*, TC II, Judgement, IT-97-24-T, 31 July 2003, para. 459.

The Trial Chamber further asserted:

"[I]n order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences."²⁰⁸

In *Aleksovski*, the Trial Chamber stated:

"The decisive criterion in determining who is a superior according to customary international law is not only the accused's formal legal status but also his ability, as demonstrated by his duties and competence, to exercise control."²⁰⁹

According to the Trial Chamber:

"Control is: 'the commander is in the formal and actual position of having the authority over the subordinate persons' and if 'authority is the result of his or her function in the military or civil or political hierarchy'"²¹⁰

The ICTY Trial Chamber in the *Blaškić* case held:

"Although the Trial Chamber agrees with the Defence that the 'actual ability' of a commander is a relevant criterion, the commander need not have any legal authority to prevent or punish acts of his subordinates. What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken."²¹¹

The Appeals Chamber added:

"With regard to the position of the Trial Chamber that superior responsibility 'may entail' the submission of reports to the competent authorities, the Appeals Chamber deems this to be correct. The Trial Chamber only referred to the action of submitting reports as an example of the exercise of the material ability possessed by a superior.

The Appeals Chamber also notes that the duty of commanders to report to competent authorities is specifically provided for under Article 87(1) of Additional Protocol I, and that the duty may also be deduced from the provision of Article 86(2) of Additional Protocol I. The Appeals Chamber also notes the Appellant's argument that to establish that effective control existed at the time of the commission of subordinates' crimes, proof is required that the accused was not

²⁰⁸ ICTY, *Mucić et al. ("Čelebići")*, TC, *Judgement, Case No. IT-96-21-T*, 16 November 1998, para. 378.

²⁰⁹ ICTY, *Aleksovski*, TC, *Judgement, Case No. IT-95-14/1-T*, 25 June 1999, para. 76.

²¹⁰ *Ibid.*, para. 74.

²¹¹ ICTY, *Blaškić*, TC, *Judgement, Case No. IT-95-14-T*, 3 March 2000, para. 302; see also ICTY, *Aleksovski*, TC, *Judgement, Case No. IT-95-14/1-T*, 25 June 1999, para. 78.

only able to issue orders but that the orders were actually followed. The Appeals Chamber considers that this provides another example of effective control exercised by the commander. The indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate."²¹²

The Appeals Chamber in *Čelebići* specified:

“Command”, a term which does not seem to present particular controversy in interpretation, normally means powers that attach to a military superior, while the term “control”, which has a wider meaning, may encompass powers wielded by civilian leaders.²¹³

Moreover, the Appeals Chamber held:

"The concept of effective control over a subordinate - in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised - is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute."²¹⁴

Furthermore, it held:

"The Appeals Chamber understands the necessity to prove that the perpetrator was the ‘subordinate’ of the accused, not to import a requirement of direct or formal subordination but to mean that the relevant accused is, by virtue of his or her position, senior in some sort of formal or informal hierarchy to the perpetrator. The ability to exercise effective control in the sense of a material power to prevent or punish, which the Appeals Chamber considers to be a minimum requirement for the recognition of the superior-subordinate relationship, will almost invariably not be satisfied unless such a relationship of subordination exists. However, it is possible to imagine scenarios in which one of two persons of equal status or rank – such as two soldiers or two civilian prison guards – could in fact exercise ‘effective control’ over the other at least in the sense of a purely practical ability to prevent the conduct of the other by, for example, force of personality or physical strength. The Appeals Chamber does not consider the doctrine of command responsibility – which developed with an emphasis on persons who, by virtue of the position which they occupy, have authority over others – as having been

²¹² ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004*, paras. 68-69 (footnote omitted).

²¹³ ICTY, *Mucić et al. ("Čelebići"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 196.

²¹⁴ *Ibid.*, para. 256. See also ICTY, *Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001*, para. 405-406; ICTY, *Kvočka et al., TC, Judgement, Case No. IT-98-30/1-T, 2 November 2001*, para. 315; ICTY, *Naletilić and Martinović, TC, Judgement, Case No. IT-98-34-T, 31 March 2003*, para. 67; ICTY, *Stakić, TC II, Judgement, Case No. IT-97-24-T, 31 July 2003*, para. 459; ICTY, *Halilović, TC I, Judgement, Case No. IT-01-48-T, 16 November 2005*, para. 58.

intended to impose criminal liability on persons for the acts of other persons of completely equal status."²¹⁵

However, in *Čelebići*, the Appeals Chamber stated:

"The Appeals Chamber considers, therefore, that customary law has specified a standard of effective control, although it does not define precisely the means by which the control must be exercised. It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions. Nothing relied on by the Prosecution indicates that there is sufficient evidence of State practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed."²¹⁶

The Appeals Chamber in the *Halilović* case held:

"[...] the accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator. The ability to exercise effective control in the sense of a material power to prevent or punish, which the Appeals Chamber considers to be a minimum requirement for the recognition of a superior-subordinate relationship for the purpose of superior responsibility, will almost invariably not be satisfied unless such a relationship of subordination exists. The Appeals Chamber considers that a material ability to prevent and punish may also exist outside a superior-subordinate relationship relevant for Article 7(3) of the Statute."²¹⁷

The Appeals Chamber then added:

"[t]he material ability to punish and its corresponding duty to punish can only amount to effective control over the perpetrators if they are premised upon a pre-existing superior-subordinate relationship between the accused and the perpetrators. In this regard, the ability to exercise effective control in the sense of a material power to prevent or punish necessitates a pre-existing relationship of subordination, hierarchy or chain of command. Of course, the concepts of subordination, hierarchy and chains of command need not be established in the sense of formal organisational structures so long as the fundamental requirement

²¹⁵ ICTY, *Mucić et al. ("Čelebići")*, AC, *Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 303. This has been confirmed in ICTY, *Stakić, TC II, Judgement, Case No. IT-97-24-T, 31 July 2003*, para. 459.

²¹⁶ *Ibid.*, para. 266; See also ICTY, *Krnjelac, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002*, para. 93; ICTY, *Stakić, TC II, Judgement, Case No. IT-97-24-T, 31 July 2003*, para. 459.

²¹⁷ ICTY, *Halilović, AC, Appeal Judgement, Case No. IT-01-48-A, 16 October 2007*, para. 59.

of effective control over the subordinate, in the sense of material ability to prevent or punish criminal conduct, is satisfied."²¹⁸

In the *Naletilić and Martinović* Trial Judgement it was found that:

"Even a rankless individual commanding a small group of men can have superior responsibility. When the subordinate perpetrator was under the command of two superiors, both of them may be held responsible for the same crime."²¹⁹

In the *Karera et al.* Judgement, the ICTR. Trial Chamber found:

"With respect to the first element, a superior-subordinate relationship is established by showing a formal or informal hierarchical relationship. The superior must have possessed the power or the authority, *de jure* or *de facto*, to prevent or punish an offence committed by his subordinates. The superior must have had effective control over the subordinates at the time the offence was committed. Effective control means the material ability to prevent the commission of the offence or to punish the principal offenders. This requirement is not satisfied by a simple showing of an accused individual's general influence."²²⁰

In the *Bemba* Judgement, the ICC Trial Chamber indicated that command responsibility applies at every level of the chain of command:

"Article 28(a) not only covers the immediate commanders of the forces that committed the crimes, but is applicable to superiors at every level, irrespective of their rank, from commanders at the highest level to leaders with only a few men under their command."²²¹

The Trial Chamber also specified that multiple command responsibility was accepted in international criminal law and that the participation of multiple forces to an operation did not discharge a commander of his/her responsibility:

"[...] Article 28 contains no requirement that a commander have sole or exclusive authority and control over the forces who committed the crimes. Further, the effective control of one commander does not necessarily exclude effective control being exercised by another commander. A fact-specific analysis is required in each case to determine whether or not the accused commander did in fact have effective control at the relevant time. Similarly, international criminal jurisprudence supports the possibility that multiple superiors can be held concurrently responsible for actions of their subordinates. [...] In addition, the "mere

²¹⁸ *Ibid.*, para. 210 (footnote omitted).

²¹⁹ ICTY, *Naletilić and Martinović*, TC, Judgement, Case No. IT-98-34-T, 31 March 2003, para. 69.

²²⁰ ICTR, *Karera*, TC I, Judgement, Case No. ICTR-01-74-T, 7 December 2007, para. 564, referring to ICTY, *Mucić et al.* ("*Čelebići*"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001, para. 266, 303; ICTR, *Ntagerura et al.*, Appeal Judgement, Case No. ICTR-99-46-A, 7 July 2006, para. 341 (quoting with approval); ICTR, *Ntagerura et al.*, TC III, Judgement, Case No. ICTR-99-46-T, 25 February 2004, para. 628).

²²¹ ICC, *Bemba*, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 179.

participation” of particular forces in joint combat operations is not sufficient in itself to establish that a commander had effective control over all of the different units participating in the operation.”²²²

The Trial Chamber specified that in the context of re-subordination of troops under another commander the test of effective control remained pertinent:

“it is important to distinguish the military principle of “unity of command” from the assessment of effective control. The principle of “unity of command” or “singleness of command” suggests that, “[f]or the proper functioning of an army, there can be only one individual in command of any particular unit at one time.” However, the determination of whether a person has effective authority and control rests on that person’s material power to prevent or repress the commission of crimes or to submit the matter to a competent authority. This need not be an exclusive power and multiple superiors can be held concurrently responsible for their subordinates’ actions.”²²³

With regard to the temporal structure of a military unit, the ICTY Trial Judgement in *Kunarac* reads:

"Both those permanently under an individual’s command and those who are so only temporarily or on an *ad hoc* basis can be regarded as being under the effective control of that particular individual. The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination between the members of a unit and its commander. To be held liable for the acts of men who operated under him on an *ad hoc* or temporary basis, it must be shown that, at the time when the acts charged in the Indictment were committed, these persons were under the effective control of that particular individual."²²⁴

Concerning the identification of the person(s) who committed the crime, the Trial Chamber in *Orić* stated:

"With respect to the Defence’s submission requiring the ‘identification of the person(s) who committed the crimes’, the Trial Chamber finds this requirement satisfied if it is at least proven that the individuals who are responsible for the commission of the crimes were within a unit or a group under the control of the superior regarding the ‘identification of the person(s) who committed the crimes’, the Trial Chamber finds this requirement satisfied if it is at least proven that the

²²² *Ibid.*, para. 185.

²²³ *Ibid.*, para. 698.

²²⁴ ICTY, *Kunarac et al., TC, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001*, para. 399. Note that the Trial Chamber found that in this case the Prosecutor failed to prove that *Kunarac* exercised effective control over the soldiers (which were under his command on a temporary *ad hoc* basis) at the time they committed the offences (para. 628).

individuals who are responsible for the commission of the crimes were within a unit or a group under the control of the superior."²²⁵

Similarly, in *Perišić*, the ICTY Trial Chamber held that command responsibility:

"[...] also includes responsibility, for example, for military troops who have been temporarily assigned to a military commander, if the troops were under the effective control of that commander at the time when the acts charged in the Indictment were committed. [...] The superior does not need to know the exact identity of those subordinates who committed the crimes, to be held responsible under Article 7(3) of the Statute."²²⁶

As for the temporal requirement, the ICC Pre-Trial Chamber in the *Bemba* Confirmation of Charges referred to the wordings of Art. 28(a) Rome Statute and held that:

"[...] according to Article 28(a) of the Statute, the suspect must have had effective control *at least* when the crimes were about to be committed."²²⁷

Regarding effective control, the ICTY Trial Chamber in *Blaškić* stated that:

"[...] a commander may incur criminal responsibility for crimes committed by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them."²²⁸

Moreover, the Trial Chamber held:

"[...] that the test of effective control exercised by the commander implies that more than one person may be held responsible for the same crime committed by a subordinate."²²⁹

The Appeals Chamber in the *Čelebići* case stated:

"As long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control."²³⁰

²²⁵ ICTY, *Orić, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006*, para. 31

²²⁶ ICTY, *Perišić, TC I, Judgement, Case No. IT-04-81-T, 6 September 2011*, para. 138.

²²⁷ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424*, 15 June 2009, paras. 418-419.

²²⁸ ICTY, *Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, para. 301.

²²⁹ *Ibid.*, para. 303 with reference to ICTY, *Aleksovski, TC, Judgement, Case No. IT-95-14/1-T, 25 June 1999*, para. 106. See also ICTY, *Krnjelac, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002*, para. 93.

²³⁰ ICTY, *Mucić et al. ("Čelebići"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 198. See also ICTY, *Kunarac et al., TC, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001*, para. 396; ICTY, *Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001*, paras. 405-406; ICTY, *Krnjelac,*

The ICC Pre-Trial Chamber in the *Bemba* Confirmation of Charges Decision held:

"[...] 'effective control' is generally a manifestation of a superior-subordinate relationship between the suspect and the forces or subordinates in a *de jure* or *de facto* hierarchal relationship (chain of command). As the ICTY Appeals Chamber stated in the Čelebići case: '[t]he ability to exercise effective control [...] will almost invariably not be satisfied unless such a relationship of subordination exists'."²³¹

"The concept of 'effective control' is mainly perceived as 'the material ability [or power] to prevent and punish' the commission of offences, [...]. In the context of Article 28(a) of the Statute, 'effective control' also refers to the material ability to prevent or repress the commission of the crimes or submit the matter to the competent authorities. To this end, this notion does not seem to accommodate any lower standard of control such as the simple ability to exercise influence over forces or subordinates, even if such influence turned out to be substantial."²³²

"That said, indicia for the existence of effective control are 'more a matter of evidence than of substantive law', depending on the circumstances of each case, and that those indicia are confined to showing that the suspect had the power to prevent, repress and/or submit the matter to the competent authorities for investigation."²³³

Several factors adopted by the *ad hoc* tribunals have been retained by the ICC Pre-Trial Chamber, which may indicate the existence a superior's position of authority and effective control:

"(i) the official position of the suspect; (ii) his power to issue or give orders; (iii) the capacity to ensure compliance with the orders issued (i.e., ensure that they would be executed); (iv) his position within the military structure and the actual tasks that he carried out; (v) the capacity to order forces or units under his command, whether under his immediate command or at a lower levels, to engage in hostilities; (vi) the capacity to re-subordinate units or make changes to command structure; (vii) the power to promote, replace, remove or discipline any member of the forces; (viii) the authority to send forces where hostilities take place and withdraw them at any given moment."²³⁴

TC II, Judgement, Case No. IT-97-25-T, 15 March 2002, para. 93; ICTY, *Stakić, TC II, Judgement, Case No. IT-97-24-T, 31 July 2003*, para. 459.

²³¹ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 414 (footnotes omitted).

²³² *Ibid.*, para. 415 (footnotes omitted).

²³³ *Ibid.*, para. 416 (footnotes omitted).

²³⁴ *Ibid.*, para. 417 (footnotes omitted).

The ICTY Trial Chamber in *Perišić* recalled the factors upheld at the ICC in the *Bemba* Confirmation of Charges Decision:

"Factors indicative of an individual's position of authority and effective control may include: the procedure used for appointment of an accused, his official position, his ability to issue orders and whether these are in fact followed, the power to order combat action and re-subordinate units, the availability of material and human resources, the authority to apply disciplinary measures, the authority to promote, demote or remove particular soldiers and the capacity to intimidate subordinates into compliance."²³⁵

The ICC Trial Chamber in the *Bemba* Judgement added some factors to the list endorsed by the Pre-Trial Chamber:

"(vii) his independent access to, and control over, the means to wage war, such as communication equipment and weapons; (viii) his control over finances; (ix) the capacity to represent the forces in negotiations or interact with external bodies or individuals on behalf of the group; and (x) whether he represents the ideology of the movement to which the subordinates adhere and has a certain level of profile, manifested through public appearances and statements."²³⁶

[OR] The perpetrator had effective authority and control

Keywords: Actual Possession of Powers of Control – Absence of Formal Legal Authority – Degree of Control – General Influence – Informal Hierarchical Relationship – Effective Authority

International Case Law

In *Mucić et al. ("Čelebići")*, the ICTY Trial Chamber found that:

"[...] on the basis of either their *de facto* or their *de jure* positions as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility."²³⁷

²³⁵ ICTY, *Perišić, TC I, Judgement, Case No. IT-04-81-T, 6 September 2011*, para. 148.

²³⁶ ICC, *Bemba, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016*, para. 188.

²³⁷ ICTY, *Mucić et al. ("Čelebići"), TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, para. 354; this was confirmed in ICTY, *Kunarac et al., TC, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001*, para. 396; ICTY, *Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001*, paras. 405-406; ICTY, *Naletilić*

Moreover, the Trial Chamber stated:

"Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's *de facto*, as well as *de jure*, position as a commander."²³⁸

The ICTR Trial Chamber in the *Kayishema and Runzindana* Judgement stated:

"Thus, even where a clear hierarchy based upon *de jure* authority is not present, this does not prevent the finding of command responsibility. Equally, as we shall examine below, the mere existence of *de jure* power does not always necessitate the imposition of command responsibility. The culpability that this doctrine gives rise to must ultimately be predicated upon the power that the superior exercises over his subordinates in a given situation."²³⁹

Furthermore, the Trial Chamber held:

"The Trial Chamber has found that acts or omissions of a *de facto* superior can give rise to individual criminal responsibility pursuant to Article 6(3) of the Statute. Thus, no legal or formal position of authority need exist between the accused and the perpetrators of the crimes. Rather, the influence that an individual exercises over the perpetrators of the crime may provide sufficient grounds for the imposition of command responsibility if it can be shown that such influence was used to order the commission of the crime or that, despite such *de facto* influence, the accused failed to prevent the crime."²⁴⁰

The Trial Chamber in the *Musema* case held:

"It is also significant to note that a civilian superior may be charged with superior responsibility only where he has effective control, be it *de jure* or merely *de facto*, over the persons committing violations of international humanitarian law."²⁴¹

and Martinović, TC, Judgement, Case No. IT-98-34-T, 31 March 2003, para. 67; ICTY, *Stakić, TC II, Judgement, Case No. IT-97-24-T, 31 July 2003*, para. 459.

²³⁸ ICTY, *Mucić et al. ("Čelebići"), TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, para. 370. See also ICTY, *Kunarac et al., TC, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001*, para. 396; ICTY, *Stakić, TC II, Judgement, Case No. IT-97-24-T, 31 July 2003*, para. 459; ICTY, *Halilović, TC I, Judgement, Case No. IT-01-48-T, 16 November 2005*, para. 58.

²³⁹ ICTR, *Kayishema and Ruzindana, TC, Judgement, Case No. ICTR-95-1-T, 21 May 1999*, para. 491.

²⁴⁰ *Ibid.*, para. 492.

²⁴¹ ICTR, *Musema, TC I, Judgement, Case No. ICTR-96-13-A, 27 January 2000*, para. 141.

In *Čelebići*, the ICTY Appeals Chamber held:

"Under Article 7(3), a commander or superior is thus the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed."²⁴²

Moreover, the Appeals Chamber stated:

"The Appeals Chamber considers that the ability to exercise effective control is necessary for the establishment of *de facto* command or superior responsibility and thus agrees with the Trial Chamber that the absence of formal appointment is not fatal to a finding of criminal responsibility, provided certain conditions are met. Mucić's argument that *de facto* status must be equivalent to *de jure* status for the purposes of superior responsibility is misplaced. Although the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts. The Appeals Chamber therefore agrees with the Trial Chamber's conclusion."²⁴³

Furthermore, the Appeals Chamber held:

"It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions. Nothing relied on by the Prosecution indicates that there is sufficient evidence of State practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed."²⁴⁴

Emphasising that effective control requires the material ability to prevent or repress the commission of the crimes or to submit the matter to the competent authorities, the ICC Trial Chamber in the *Bemba* Judgement specified:

²⁴² ICTY, *Mucić et al. ("Čelebići")*, AC, *Appeal Judgement*, Case No. IT-96-21-A, 20 February 2001, para. 192; confirmed in ICTY, *Kunarac et al.*, TC, *Judgement*, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 396; ICTY, *Kordić and Čerkez*, TC, *Judgement*, Case No. IT-95-14/2-T, 26 February 2001, paras. 405-406; ICTY, *Kvočka et al.*, TC, *Judgement*, Case No. IT-98-30/1-T, 2 November 2001, para. 315; ICTY, *Krnojelac*, TC II, *Judgement*, Case No. IT-97-25-T, 15 March 2002, para. 93.

²⁴³ ICTY, *Mucić et al. ("Čelebići")*, AC, *Appeal Judgement*, Case No. IT-96-21-A, 20 February 2001, para. 197. See also ICTY, *Kunarac et al.*, TC, *Judgement*, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 396; ICTY, *Kvočka et al.*, TC, *Judgement*, Case No. IT-98-30/1-T, 2 November 2001, para. 315; ICTY, *Krnojelac*, TC II, *Judgement*, Case No. IT-97-25-T, 15 March 2002, para. 93; ICTY, *Stakić*, TC II, *Judgement*, Case No. IT-97-24-T, 31 July 2003, para. 459.

²⁴⁴ *Ibid.*, para. 266; see also: ICTY, *Kordić and Čerkez*, TC, *Judgement*, Case No. IT-95-14/2-T, 26 February 2001, paras. 412-413.

“Any lower degree of control, such as the ability to exercise influence – even substantial influence – over the forces who committed the crimes, would be insufficient to establish command responsibility.”²⁴⁵

The Trial Chamber also highlighted the need for a sort of formal or informal hierarchy to be established between the superior and the subordinate:

“By virtue of his position, the commander must be senior in some sort of formal or informal hierarchy to those who commit the crimes. Whether or not there are intermediary subordinates between the commander and the forces which committed the crimes is immaterial; the question is simply whether or not the commander had effective control over the relevant forces.”²⁴⁶

In the *Naletilić and Martinović* Judgement, the Trial Chamber stated:

"The capacity to sign orders is indicative of some authority, but in order to ascertain the actual powers of control of the superior it is also necessary to consider the substance of the documents signed and if they were complied with."²⁴⁷

In *Kordić and Čerkez*, the Trial Chamber found:

"A starting point will be the official position held by the accused. Actual authority however will not be determined by looking at formal positions only. Whether *de jure* or *de facto*, military or civilian, the existence of a position of authority will have to be based upon an assessment of the reality of the authority of the accused."²⁴⁸

Furthermore the Trial Chamber held:

"[...] it will often be the case that civilian leaders will assume powers more important than those with which they are officially vested. In these circumstances, *de facto* powers may exist alongside *de jure* authority, and may be more important than the *de jure* powers."²⁴⁹

²⁴⁵ ICC, *Bemba*, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, *21 March 2016*, para. 183.

²⁴⁶ *Ibid.*, para. 184.

²⁴⁷ ICTY, *Naletilić and Martinović*, TC, Judgment, Case No. IT-98-34-T, *31 March 2003*, para. 67; referring to the ICTY, *Kordić and Čerkez*, TC, Judgment, Case No. IT-95-14/2-T, *26 February 2001*, para. 421.

²⁴⁸ ICTY, *Kordić and Čerkez*, TC, Judgment, Case No. IT-95-14/2-T, *26 February 2001*, para. 418; see also ICTY, *Halilović*, TC I, Judgment, Case No. IT-01-48-T, *16 November 2005*, para. 58.

²⁴⁹ *Ibid.*, para. 422. See also ICTY, *Halilović*, TC I, Judgment, Case No. IT-01-48-T, *16 November 2005*, para. 58.

Similarly, the ICTR Appeals Chamber in *Bagilishema* held:

"The effective control test applies to all superiors, whether *de jure* or *de facto*, military or civilian."²⁵⁰

In *Semanza*, the Trial Chamber held:

"The superior must possess the power or authority, either *de jure* or *de facto*, to prevent or punish an offence committed by his subordinates. The Trial Chamber must be satisfied that the superior had effective control over the subordinates at the time the offence was committed. Effective control means the material ability to prevent the commission of the offence or to punish the principal offenders. This requirement is not satisfied by a simple showing of an accused individual's general influence."²⁵¹

The ICTY Trial Chamber in *Mrkšić et al.* stated:

"Likewise, there need not be a permanent relationship of command and subordination, and the temporary nature of a unit has been held not to be, in itself, sufficient to exclude the existence of a superior-subordinate relationship."²⁵²

In the *Perišić* Trial Judgement, the Chamber found that, even if the accused had influence over his subordinates, he did not have enough control over them to be held criminally responsible:

"Perišić could influence conduct of the 30th PC members through exercising certain discretion in terminating their professional contracts, suspending their salaries or through verification of their promotions for the purposes of acquiring certain benefits. Nevertheless, his ability to effectively control the acts of the 30th PC members is called into question by his inability to issue binding orders to them. His material ability to prevent or punish them is also partly called into question by his secondary role in the process of imposing disciplinary sanctions for their conduct while serving in the VRS."²⁵³

²⁵⁰ ICTR, *Bagilishema*, AC, Appeal Judgement, Case No. ICTR-95-1A-A, 3 July 2002, para. 50. Referring to ICTY, *Mucić et al.* ("*Čelebići*"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001, paras. 192, 193, 198; ICTY, *Aleksovski*, AC, Appeal Judgement, Case No. IT-95-14/1-A, 24 March 2000, para. 76.

²⁵¹ ICTR, *Semanza*, TC, Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003, para. 402. Referring to ICTR, *Kayishema and Ruzindana*, Appeal Judgement, Case No. ICTR-99-46-A, 1 June 2001, para. 294; ICTY, *Mucić et al.* ("*Čelebići*"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001, paras. 192, 266, 303.

²⁵² ICTY, *Mrkšić et al.*, TC II, Judgement, Case No. IT-95-13/1-T, 27 September 2007, para. 560 (footnote omitted); see also ICTY, *Kunarac et al.*, TC, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 399; ICTY, *Strugar*, TC II, Judgement, Case No. IT-01-42-T, 31 January 2005, para. 362.

²⁵³ ICTY, *Perišić*, TC I, Judgement, Case No. IT-04-81-T, 6 September 2011, para. 1777.

The ICTR Trial Chamber in *Karera et al.* found:

"With respect to the first element, a superior-subordinate relationship is established by showing a formal or informal hierarchical relationship. The superior must have possessed the power or the authority, *de jure* or *de facto*, to prevent or punish an offence committed by his subordinates. The superior must have had effective control over the subordinates at the time the offence was committed. Effective control means the material ability to prevent the commission of the offence or to punish the principal offenders. This requirement is not satisfied by a simple showing of an accused individual's general influence."²⁵⁴

The wording of Art. 28 Rome Statute refers to 'effective command and control' and 'effective authority and control' as alternatives. In the *Bemba* Confirmation of Charges Decision, the ICC Pre-Trial Chamber clarified how to interpret these two terms in relation to the 'effective control' test developed by the *ad hoc* tribunals:

"The Chamber observes that Article 28(a) of the Statute refers to the terms 'effective command and control' or 'effective authority and control' as applicable alternatives in situations of military commanders *strictu sensu* and military-like commanders. In this regard, the Chamber considers that the additional words 'command' and 'authority' under the two expressions has no substantial effect on the required level or standard of 'control'. This is apparent from the express language of the two terms, which uses the words 'effective' and 'control' as a common denominator under both alternatives. This conclusion is also supported by a review of the travaux préparatoires of the Statute, in which it was acknowledged by some delegations that the addition of the term 'effective authority and control' as an alternative to the existing text was 'unnecessary and possibly confusing'. This suggests that some of the drafters believed that the insertion of this expression did not add or provide a different meaning to the text."²⁵⁵

"In this context, the Chamber underlines that the term 'effective command' certainly reveals or reflects 'effective authority'. Indeed, in the English language the word 'command' is defined as 'authority, especially over armed forces', and the expression 'authority' refers to the 'power or right to give orders and enforce obedience. However, the usage of the disjunctive 'or' between the expressions 'effective command' and 'effective authority' calls the Chamber to interpret them as having close, but distinct meanings in order to remedy the appearance of redundancy in the text. Thus, the Chamber is of the view that although the degree of 'control' required under both expressions is the same [...], the term 'effective authority' may refer to the modality, manner or nature, according to which, a

²⁵⁴ ICTR, *Karera, TCI, Judgement, Case No. ICTR-01-74-T, 7 December 2007*, para. 564. Referring to ICTR, *Ntagerura et al., AC, Appeal Judgement, Case No. ICTR-99-46-A, 7 July 2006*, para. 341 (quoting with approval); ICTR, *Ntagerura et al., TC III, Judgement, Case No. ICTR-99-46-T, 25 February 2004*, para. 628); ICTY, *Mucić et al. ("Čelebići"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, paras. 266, 303.

²⁵⁵ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424*, 15 June 2009, para. 412 (footnotes omitted).

military or military-like commander exercise ‘control’ over his forces or subordinates.”²⁵⁶

In the *Bemba* Judgement, the Trial Chamber added

“Regardless of whether an accused is a military commander or a person effectively acting as such, and regardless of whether he exercises “effective command” or “effective authority”, the required level of control remains the same.”²⁵⁷

Publicists

Ambos distinguishes the terms control and authority as follows:

"As both concepts contain the term ‘control’, it is clear that control is linked to or dependent on command or authority. In a way, ‘control’ is a kind of umbrella term encompassing command and authority. While the command refers in a rather material sense to ‘an order, a directive’, possibly backed by threats; ‘authority’ seems to have a rather formal meaning in the sense of the ‘the right or permission to act legally’. Both terms imply control: command explicitly as power to control, authority implicitly as a right to command. Thus, a superior with command and authority normally controls his or her ‘forces’ or subordinates and has the capacity to issue orders.”²⁵⁸

As Meloni indicates, the ICC has found effective command and effective control to be substantially similar:

"[...] dealing with letter a) of Article 28 the judges [in *Bemba*] found that the expressions 'effective command and control' and 'effective authority and control' are applicable alternatives in situations of military commanders *stricto sensu* and military-like commanders. The words 'command' and 'authority' would not have any substantial effect on the required standard of control of the superior and would not provide a different meaning to the text."²⁵⁹²⁶⁰

²⁵⁶ *Ibid.*, para. 413 (footnotes omitted).

²⁵⁷ ICC, *Bemba, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016*, para. 177.

²⁵⁸ Kai Ambos, “Superior Responsibility”, in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 834 (footnotes omitted).

²⁵⁹ See ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, paras. 415-417.

²⁶⁰ Chantal Meloni, *Command Responsibility in International Criminal Law*, T.M.C. Asser, 2010, p. 161.

Thus, according to Ambos:

"[...] various persons may—as superiors—be responsible for a crime committed by a subordinate.²⁶¹ However, responsibility is excluded if such control was ‘absent or too remote’,²⁶² or if the superior lacked ‘the material *ability* to prevent and punish the commission of the[se] offences’.^{263”}²⁶⁴

Van Sliedregt summarises the *ad hoc* tribunal case law on multiple superior responsibility as follows:

"Multiple superior responsibility implies a remote link to the perpetrators. In the view of the Appeals Chamber judges in *Orić*, this in itself is irrelevant as long as there is 'effective control', ie the material ability to prevent the crime or punish, over the subordinate. The appellate judges held that it does not matter 'whether the effective control descends from the superior to the subordinate culpable of the crime through intermediary subordinates'.²⁶⁵ It was felt that whether the superior indeed possesses effective control is a matter of evidence and not one of substantive law.²⁶⁶ In the *Karadžić* Indictment, the ICTY Prosecutor charged the latter for crimes on the basis of multiple superior responsibility.²⁶⁷ The Prosecutor has taken the Appeals Chamber's words in *Orić* to heart and explicitly charged *Karadžić* on the basis of Article 7(3) for crimes committed by subordinates, who are themselves liable under Article 7(3)."²⁶⁸

Commenting on the need for a hierarchical organisation, Meloni states:

"[...] The point [in *Halilović* and *Semanza*] is, on the one hand, to make sure that the power of control was exercised within a hierarchical organisation and, on the other, to establish that such power was not exercised occasionally, was not limited to the specific context in which the crime occurred and that it was not exclusively based upon any personal relationship between the defendant and the perpetrators of the crime."²⁶⁹

²⁶¹ ICTY, *Aleksovski, TC, Judgement, Case No. IT-95-14/1-T, 25 June 1999*, para. 106; ICTY, *Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, para. 303.

²⁶² ICTY, *Mucić et al. ("Čelebići"), TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, para. 377.

²⁶³ *Ibid.*, para. 378 (emphasis added); ICTY, *Aleksovski, TC, Judgement, Case No. IT-95-14/1-T, 25 June 1999*, para. 81; ICTY, *Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, paras. 302, 335: 'capacité matérielle'.

²⁶⁴ Ambos, 2002, p. 834.

²⁶⁵ ICTY, *Orić, AC, Appeal Judgement, Case No. IT-03-68-A, 3 July 2008*, para. 39 20 ff. In the view of the Appeals Chamber the link between the accused and the crime was too remote. It held that the Trial Chamber failed to establish the level of control, if any, that the accused exercised over the principal perpetrators.

²⁶⁶ *Ibid.*

²⁶⁷ ICTY, *Karadžić, Third Amended Indictment, Case No. IT-95-5/18-PT, 27 February 2009*, para 35.

²⁶⁸ Elies van Sliedregt, "Command Responsibility at the ICTY-Three Generations of Case Law and Still Ambiguity", in Bert Swart, Alexander Zahar, and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2011, pp. 383-384.

²⁶⁹ Meloni, 2010, p. 106 (footnote omitted).

Nevertheless, Arnold observes that it is possible to find that people of equal status may have *de facto* authority:

"[...] it is also possible that a person holding *no* official military rank may exercise *de facto* authority over third persons. This means that a superior-subordinate relationship does not require the existence of a military chain of command or of a military contest. This was stated by the Appeal's Chamber in the [Čelebići] Case, which concluded that even people holding equal status may exercise command over each other.²⁷⁰²⁷¹

Cassese suggests that the concept may apply differently for non-State armed groups:

"The SCSL Trial Chamber in *Brima and others* noted that although the ability to issue orders and mete out discipline is always important in assessing effective control, some of the 'traditional criteria' of effective control may not be appropriate or useful in a context involving an irregular army or rebel group (*Brima and others*, TC, § 787-9). The Chamber offered an additional set of indicia that might be suited to less formal military hierarchies.²⁷²²⁷³

Mettraux describes what can be inferred from the existence of a chain of command as follows:

"The chain of command between the accused and the perpetrators will permit the Court, inter alia, to 'distinguis[h] [for instance] civilian superiors from mere rabble-rousers or other persons of influence'.²⁷⁴ It will also allow the Court to exclude from the realm of superior responsibility those relationships of power or authority which were never structured hierarchically and remained too loose or informal to allow a party to exercise 'effective control' over others.²⁷⁵ This requirement also means that the fact that a superior (and his men) might have benefited—militarily or otherwise—from the assistance of another group of men that were not subordinated to the accused, will not create between him and the members of that other group a relationship of subordination of the sort that would be necessary to trigger the application of the doctrine of superior responsibility for any crimes which members of that other group might have committed.²⁷⁶ Finally, such a chain of command provides a path to establishing that the accused exercised

²⁷⁰ ICTY, *Mucić et al. ("Čelebići")*, AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001, para. 303 [...].

²⁷¹ Roberta Arnold, "Article 28: Responsibility of Commanders and Other Superiors", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Hart, 2007, p. 826.

²⁷² SCSL, *Brima et al.*, TC II, Judgement, Case No. SCSL-04-16-T, 20 June 2007, para. 788 [...].

²⁷³ Antonio Cassese et al., *Cassese's International Criminal Law*, Oxford University Press, 2013, pp. 188-189.

²⁷⁴ ICTY, *Mucić et al. ("Čelebići")*, TC, Judgement, Case No. IT-96-21-T, 16 November 1998, para. 87, cited in ICTR, *Baqilishema*, AC, Appeal Judgement, Case No. ICTR-95-1A-A, 3 July 2002, para. 53. See also, ICTR, *Bikindi*, AC, Appeal Judgement, Case No. ICTR-01-72-A, 18 March 2010, para. 413, where the ICTR Appeals Chamber rejected the Prosecution's suggestion that the accused could be held criminally responsible as a superior for crimes committed by the 'Hutu Population' at large by using his influence and authority.

²⁷⁵ See, e.g. ICTR, *Bikindi*, AC, Appeal Judgement, Case No. ICTR-01-72-A, 18 March 2010, para. 413.

²⁷⁶ See ICTY, *Hadžihasanović and Kubura*, AC, Appeal Judgement, Case No. IT-01-47-A, 22 April 2008, par 213; ICTY, *Delić*, TC I, Judgement, Case No. IT-04-83-T, 15 September 2008, par 61.

his authority through and along that chain [...]. The existence of a chain of command between the superior and his subordinates will also serve to limit the scope of acts for which a superior may be held criminally responsible. [...] In *Toyoda*, for instance, the Tribunal made it clear that the accused could only be made responsible for crimes 'commi[tte]d by his subordinates, immediate or otherwise'.²⁷⁷²⁷⁸

Meloni observes that in *Čelebići*, substantial influence was not sufficient to establish effective control:

"[...] The Appeals Chamber in the *Čelebići* case [...] rejected the Prosecutor's theory according to which substantial influence constituted a sufficient degree of control to establish command responsibility. [...] In the view of the Chamber there were not sufficient precedents in States practice and in international jurisprudence to state that there exists a customary law principle pursuant to which a mere standard of 'influence' is sufficient to establish command responsibility."²⁷⁹²⁸⁰

Nevertheless, Bantekas argues that significant powers of influence may in some cases result in effective control:

"[...] One should not rule out the possibility that the possession of significant powers of influence may under certain circumstances establish a superior-subordinate relationship, although the ICTY clearly thought otherwise in the *Čelebići* case.²⁸¹ An influential individual that yields full respect and obeisance, whether out of fear or otherwise, can establish as a result effective control over his subjects, having intentionally placed himself in a position of authority. There is sufficient precedent for this from the *Ministries* case,²⁸² but it is also a conclusion based on reason, which legal rationale cannot ignore."²⁸³

Jia comments on the significance of binding orders as follows:

"[...] The *Kayishima and Ruzindana* Judgement, for one, concludes that 'the ability to prevent and punish a crime is a question that is inherently linked with the given factual situation'.²⁸⁴ This element of superior responsibility is

²⁷⁷ U.S.A. v. *Soemu Toyoda*, Official Transcript of Record of Trial, p. 5006 [...].

²⁷⁸ Guénaél Mettraux, *The Law of Command Responsibility*, Oxford University Press, 2009, pp. 147-148.

²⁷⁹ ICTY, *Mucić et al. ("Čelebići")*, AC, *Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, paras. 257-268. The Prosecutor had relied on several precedents to demonstrate that substantial influence was sufficient for establishing superior responsibility and, in particular, on the convictions of members of the Japanese government, like Hirota and Shigemitsu, and military commanders such as Muto, chief of staff of General Yamashita [...].

²⁸⁰ Meloni, 2010, pp. 100-101.

²⁸¹ ICTY, *Mucić et al. ("Čelebići")*, TC, *Judgement, Case No. IT-96-21-T, 16 November 1998*, paras. 658, 669; ICTY, *Mucić et al. ("Čelebići")*, AC, *Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para 266; but SCSL, *Brima et al., TC II, Judgement, Case No. SCSL-04-16-T, 20 June 2007*, para. 787.

²⁸² *U.S.A. v. Ernst von Weizsaecker (the 'Ministries case')*, reprinted in *The Ministries Case, Trials of War Criminals before the Nuremberg Military Tribunals, Volume XIV*, p. 308.

²⁸³ Ilias Bantekas, *International Criminal Law*, Hart, 2010, p. 86.

²⁸⁴ ICTR, *Kayishema and Ruzindana, TC, Judgement, Case No. ICTR-95-1-T, 21 May 1999*, para. 231.

intrinsically integrated in the concept of effective control which is the key to that responsibility.²⁸⁵ Effective control is often manifested through binding orders issued by a superior. The orders will effect prevention or punishment. If his orders to prevent or punish were disregarded by subordinates, he might be found not to be in a position of effective control at the time when the subordinate crimes took place, for the purposes of Article 7(3) of the ICTY Statute, Article 6(3) of the ICTR Statute, or Article 28 of the Rome Statute. This could then be acquitted of superior liability."²⁸⁶

According to Mettraux:

"[...] it is the cumulative effect of evidence of subjugation to orders and respect for the authority of the accused generally that might convince a tribunal of the existence of a superior–subordinate relationship amounting to ‘effective control’ on the part of the accused over the perpetrators."²⁸⁷²⁸⁸

Taking stock of the SCSL case law, Mettraux specifies that:

"[...] It would not, therefore, be sufficient to establish that the accused was in charge of a particular group of men or that he otherwise exercised commanding functions in that context short of establishing that this role or function gave him ‘effective control’ over the members of the group who have committed the crimes. Thus, in the *Fofana* case, a Trial Chamber of the SCSL highlighted the fact that the accused Fofana had control over certain groups of Kamajor fighters in a particular area where crimes had been committed was not enough to conclude that he had control over all Kamajor fighters and commanders in that region.²⁸⁹ Likewise, in the *Brima* Judgement, the Trial Chamber refused to adopt the Prosecution’s suggestion that different fighting parties that had at times cooperated in military operations could be regarded as one single group for the purpose of the doctrine of superior responsibility and that the accused could be said to have had control over that group [...].²⁹⁰²⁹¹

²⁸⁵ Cf., ICTY, *Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001*, para. 443.

²⁸⁶ Bing Bing Jia, “The Doctrine of Command Responsibility: Current Problems”, in *Yearbook of International Humanitarian Law*, 2000, vol. 3, p. 160.

²⁸⁷ See, e.g., ICTY, *Nikolić, TC, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-94-2-R61, 20 October 1995*, para. 24; See ICTY, *Strugar, AC, Appeal Judgement, Case No. IT-01-42-A, 17 July 2008*, para. 54 [...].

²⁸⁸ Mettraux, 2009, p. 180.

²⁸⁹ See, e.g., SCSL, *Fofana and Kondewa, TC I, Judgement, Case No. SCSL-04-14-T, 2 August 2007*, para. 819.

²⁹⁰ SCSL, *Brima et al., TC II, Judgement, Case No. SCSL-04-16-T, 20 June 2007*, para. 1655, [...]; see also, *Ibid*, paras. 1872-1875.

²⁹¹ Mettraux, 2009, p. 160.

With respect to the identity of the subordinate over which the superior exercised effect control, van Sliedregt states:

"[...] In at least two cases before the ICTY the question arose whether a superior can be held responsible for acts of 'unidentified' subordinates. The judges in *Hadžihasanović* held that in establishing the existence of a superior--subordinate relationship, it is important to be able to identify the alleged perpetrators. This does not mean that the perpetrator needs to be identified exactly. It is sufficient to specify which group the perpetrator belonged to and to prove that the accused exercised effective control over that group."²⁹²²⁹³

Finally, on the need to establish that the superior had effective control at the time of the offence, van Sliedregt observes:

"[...] It follows from the decision by the ICTY Appeals Chamber in *Hadžihasanović*²⁹⁴ that the post-crime scenario only generates superior responsibility when it can be established that there was a superior—subordinate relationship governed by effective control *at the time of the offence*.²⁹⁵ The Appeals Chamber found that since there was no effective control at the time of the offence, there was no criminal liability for these crimes under Article 7(3) of the ICTY Statute. It was held that customary international law, the text of Article 7(3) of the Statute and the provision from which it stems, Article 86(2) of the First Additional Protocol to the 1949 Geneva Conventions (API), militate against extending liability to the post-crime scenario without the temporal coincidence."²⁹⁶

²⁹² ICTY, *Hadžihasanović and Kubura, TC, Judgement, Case No. IT-01-47-T, 15 March 2006*, para. 90.

²⁹³ van Sliedregt, 2011, p. 384.

²⁹⁴ ICTY, *Hadžihasanović and Kubura, AC, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case No. IT-01-47-AR72, 16 July 2003*, para. 51.

²⁹⁵ *Ibid.*

²⁹⁶ van Sliedregt, 2011, p. 381.

7. Causation

The crimes committed by the forces resulted from the perpetrator's failure to exercise control properly over forces

Keywords: A Question of Fact – Sui Generis Form of Liability – Causal Link for the Duty to Prevent – 'but for' Test

International Case Law

Rejecting the requirement of causation in the concept of command responsibility, the ICTY Trial Chamber in *Mucić et al. ("Čelebići")* held:

"Notwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formulation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject. This is not to say that, conceptually, the principle of causality is without application to the doctrine of command responsibility insofar as it relates to the responsibility of superiors for their failure to prevent the crimes of their subordinates. In fact, a recognition of a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior's failure to take the measures within his powers to prevent them. In this situation, the superior may be considered to be causally linked to the offences, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed."²⁹⁷

²⁹⁷ ICTY, *Mucić et al. ("Čelebići")*, TC, Judgment, Case No. IT-96-21-T, 16 November 1998, para. 398-399 (footnote omitted).

The Trial Chamber concluded that:

"[...] no such casual link can possibly exist between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence. The very existence of the principle of superior responsibility for failure to punish, therefore, recognised under Article 7(3) and customary law, demonstrates the absence of a requirement of causality as a separate element of the doctrine of superior responsibility."²⁹⁸

In ***Blaškić***, the ICTY Trial Chamber held that:

"[...] the test of effective control exercised by the commander implies that more than one person may be held responsible for the same crime committed by a subordinate."²⁹⁹

The Appeals Chamber held that it was not:

"[...] persuaded by [the argument] that existence of causality between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes, is an element of command responsibility that requires proof by the Prosecution in all circumstances of the case. [...] [I]t is more a question of fact to be established on a case-by-case basis, than a question of law in general."³⁰⁰

Also, in ***Halilović***, the Trial Chamber noted:

"[...] that the nature of command responsibility itself, as a *sui generis* form of liability, which is distinct from the modes of individual responsibility set out in Article 7(1), does not require a causal link. Command responsibility is responsibility for omission, which is culpable due to the duty imposed by international law upon a commander. If a causal link were required this would change the basis of command responsibility for failure to prevent or punish to the extent that it would practically require involvement on the part of the commander in the crime his subordinates committed, thus altering the very nature of the liability imposed under Article 7(3)."³⁰¹

Nevertheless, the Trial Chamber in ***Hadžihasanović and Kubura*** made the following findings regarding a superior's failure to prevent his subordinates from committing crimes:

"Firstly, a superior who exercises effective control over his subordinates and has reason to know that they are about to commit crimes, but fails to take the necessary

²⁹⁸ *Ibid.*, para. 400. This view is endorsed in ICTY, *Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001*, para. 445, and ICTY, *Brđanin, TC II, Judgement, Case No. IT-99-36-T, 1 September 2004*, para. 279.

²⁹⁹ ICTY, *Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, para. 303.

³⁰⁰ ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004* para. 77.

³⁰¹ ICTY, *Halilović, TC I, Judgement, Case No. IT-01-48-T, 16 November 2005*, para. 78.

and reasonable measures to prevent those crimes, incurs responsibility, both because his omission created or heightened a real and reasonably foreseeable risk that those crimes would be committed, a risk he accepted willingly, and because that risk materialised in the commission of those crimes. In that sense, the superior has substantially played a part in the commission of those crimes. Secondly, it is presumed that there is such a nexus between the superior's omission and those crimes."³⁰²

The Appeals Chamber overruled the Trial Chamber and stated:

"Considering that superior responsibility does not require that a causal link be established between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes, there is no duty for an accused to bring evidence demonstrating that such a causal link does not exist."³⁰³

Also in the *Orić* Judgement, the ICTY Trial Chamber did not consider a causal link as being necessary.³⁰⁴ Similarly, in ICTR case law, a causal link has not been considered as a requirement for command responsibility.³⁰⁵

At the SCSL, the Trial Chamber in *Fofana and Kondewa* held:

"The Chamber notes that a casual link between the superior's failure to prevent the subordinates' crimes and the occurrence of these crimes is not an element of the superior's responsibility; it is a question of fact rather than of law."³⁰⁶

Based on the wordings "as a result of" in Art. 28(a) and Art. 22 Rome Statute, the ICC Pre-Trial Chamber found in the *Bemba* Confirmation of Charges Decision that there must be causality between a superior's dereliction of duty and the alleged crime.

"The Chamber also observes that the chapeau of Article 28(a) of the Statute establishes a link between the commission of the underlying crimes and a superior's 'failure to exercise control properly'. This is reflected in the words 'as a result of', which indicates such relationship. The Chamber therefore considers that the chapeau of Article 28(a) of the Statute includes an element of causality between a superior's dereliction of duty and the underlying crimes. This interpretation is consistent with the principle of strict construction mirrored in Article 22(2) of the Statute which, as a part of the principle *nullum crimen sine lege*, compels the Chamber to interpret this provision strictly."³⁰⁷

³⁰² ICTY, *Hadžihasanović and Kubura, TC, Judgement, Case No. IT-01-47-T, 15 March 2006*, para. 193.

³⁰³ ICTY, *Hadžihasanović and Kubura, AC, Appeal Judgement, Case No. IT-01-48-A, 22 April 2008*, para. 41.

³⁰⁴ ICTY, *Orić, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006*, para. 338.

³⁰⁵ Cf., e.g., on the stipulated elements for command responsibility see ICTR, *Baqilishema, TC I, Judgement, Case No. ICTR-95-1A-T, 7 June 2001*, para. 38, there is no reference to a causal link.

³⁰⁶ SCSL, *Fofana and Kondewa, TC I, Judgement, Case No. SCSL-04-14-T, 2 August 2007*, para. 251.

³⁰⁷ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 423 (footnotes omitted).

However, the Pre-Trial Chamber in the *Bemba* Confirmation of Charges Decision only required such a causal link for the duty to prevent the commission of future crimes:

"Although the Chamber finds that causality is a requirement under Article 28 of the Statute, its actual scope needs to be further clarified by the Chamber. As stated above, Article 28(a)(ii) of the Statute refers to three different duties: the duty to prevent crimes, repress crimes, or submit the matter to the competent authorities for investigation and prosecution. The Chamber considers that a failure to comply with the duties to repress or submit the matter to the competent authorities arise during or after the commission of crimes. Thus, it is illogical to conclude that a failure relating to those two duties can retroactively cause the crimes to be committed. Accordingly, the Chamber is of the view that the element of causality only relates to the commander's duty to prevent the commission of future crimes. Nonetheless, the Chamber notes that the failure of a superior to fulfil his duties during and after the crimes can have a causal impact on the commission of further crimes. As punishment is an inherent part of prevention of future crimes, a commander's past failure to punish crimes is likely to increase the risk that further crimes will be committed in the future."³⁰⁸

As for the examination of causality, the Pre-Trial Chamber adopted the "but for test" with respect to the positive act:

"The Chamber also considers that since Article 28(a) of the Statute does not elaborate on the level of causality required, a possible way to determine the level of causality would be to apply a 'but for test', in the sense that, but for the superior's failure to fulfil his duty to take reasonable and necessary measures to prevent crimes, those crimes would not have been committed by his forces. However, contrary to the visible and material effect of a positive act, the effect of an omission cannot be empirically determined with certainty. In other words, it would not be practical to predict exactly what would have happened if a commander had fulfilled his obligation to prevent crimes. There is no direct causal link that needs to be established between the superior's omission and the crime committed by his subordinates. Therefore, the Chamber considers that it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under Article 28(a) of the Statute."³⁰⁹

In the *Ntaganda* Confirmation of Charges Decision, the ICC Pre-Trial Chamber found that the:

"[f]ailures of Mr. Ntaganda increased the risk of the commission of crimes by UPC/FPLC members during the time frame relevant to the charges. As a powerful military commander, he omitted to act in response to serious crimes against non-

³⁰⁸ *Ibid.*, para. 424 (footnotes omitted).

³⁰⁹ *Ibid.*, para. 425 (footnotes omitted).

Hema civilians, which rendered the disciplinary system of the UPC/FPLC or any other measures ineffective in relation to such conduct.”³¹⁰

With respect to the correlation between "effective control" and "exercise control properly", the **Bemba** Confirmation of Charges Decision reads:

"[...] the Chamber considers that it cannot be said that a superior failed to ‘exercise control properly’, without showing that he had ‘effective control’ over his forces. Since effective control is actually the ‘material ability’ to prevent, repress or submit the matter to the competent authorities, then a failure to ‘exercise control properly’ is, in fact, a scenario of noncompliance with such duties. This suggests that the reference to the phrase ‘failure to exercise control properly’ must be read and understood in light of Article 28(a)(ii) of the Statute.”³¹¹

The Trial Chamber in the **Bemba** Judgement, agreed with the Pre-Trial Chamber that Article 28 (a) did not require the establishment of “but for” causation between the commander’s omission and the crimes committed by his subordinates. It considered that:

“A nexus requirement would clearly be satisfied when it is established that the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would have prevented the crimes. [...] [T]he Chamber emphasises that such a standard is, however, higher than that required by law [...].”³¹²

The Trial Chamber pinpointed measures the accused could have undertaken:

“The Chamber emphasises that, as demonstrated by the measures Mr Bemba did take in response to allegations of crimes, including on CAR territory in the midst of the 2002-2003 CAR Operation and despite his remote location, Mr Bemba had the authority and ability to take measures to prevent and repress the commission of crimes. For example, [...] Mr Bemba could have, inter alia, taken measures to ensure consistent and adequate training of MLC troops, including ensuring promulgation of a clear and complete Code of Conduct which reflected the requirements of international law; ensured adequate supervision; issued clear and consistent orders to his troops not to commit the crimes; genuinely and fully investigated allegations of crimes; ensured that MLC commanders and soldiers implicated as committing or condoning such crimes were, as appropriate, tried, removed, replaced, dismissed, and

³¹⁰ ICC, *Ntaganda, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/04-02/06, 9 June 2014*, para. 174 (footnotes omitted).

³¹¹ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 422.

³¹² ICC, *Bemba, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016*, para. 213.

punished; and/or shared relevant information with the CAR authorities or others, and supported them in any efforts to investigate criminal allegations. Such measures would have deterred the commission of crimes, and generally diminished, if not eliminated, the climate of acquiescence – which is inherent where troops have inadequate training, receive unclear orders, and/or observe their commanders committing or collaborating in crimes – surrounding and facilitating the crimes committed during the 2002-2003 CAR Operation. Mr Bemba’s failures in this regard directly contributed to, *inter alia*, the continuation and further commission of crimes.”³¹³

The Trial Chamber continued:

“Further, clear training, orders, and hierarchical examples indicating that the soldiers should respect and not mistreat the civilian population would have reduced, if not eliminated, crimes motivated by a distrust of the civilian population, as enemies or enemy sympathisers. Recalling Mr Bemba’s position of high authority as President of the MLC and Commander-in-Chief of the ALC, as well as of his effective authority and control, the Chamber finds that Mr Bemba’s position obligated him to take such measures, both personally and through the hierarchical chain of command. Likewise, if the soldiers had received adequate payment and rations, the risk that they would pillage or rape for self-compensation, and murder those who resisted, would have been reduced, if not eliminated. The Chamber recalls in this regard its finding in relation to Mr Bemba’s control over the MLC’s financial resources.”³¹⁴

The Trial Chamber also found that had Bemba not sent his troops in primarily civilian populated areas the opportunity for the commission of crimes could have been minimised:

“[...] consistent with evidence of a *modus operandi*, most of the crimes were committed when the MLC was the only armed group in the area. In particular, the attack on Mongoumba, of which Mr Bemba knew, but did not take any preventative or remedial action, occurred when only civilians were present. The redesign of such military operations – for example, avoiding primarily civilian areas, not ordering military operations against areas where only civilians were present, and otherwise limiting contact with civilians – would have minimised the opportunity for the commission of the crimes. Finally, the Chamber notes that Mr Bemba ultimately ended the commission of crimes by MLC soldiers by withdrawing them from the CAR in March 2003. Had he withdrawn them earlier – a possibility he acknowledged as early as November 2002 – crimes would have been prevented.”³¹⁵

³¹³ *Ibid.*, para. 738.

³¹⁴ *Ibid.*, para. 739.

³¹⁵ *Ibid.*, para. 740.

Publicists

Bantekas argues in favour of the causality requirement:

“[...] The ICTY in a sweeping Judgement in the *Čelebići* case dismissed any causality requirement in the operation of the command responsibility doctrine³¹⁶ and this reasoning has been followed by other ICTY chambers without any jurisprudential consideration whatsoever.³¹⁷ The absence of causality as espoused in the ICTY sits uncomfortably with the practice of subsequent WWII tribunals,³¹⁸ as well as the express language of more recent instruments. Article 6 of the 1996 version of the ILC Draft Code of Crimes Against the Peace and Security of Mankind upholds the liability of the superior where he 'contributes directly' to the commission of crimes by subordinates. Equally, Article 28 of the ICC Statute postulates command liability only in respect of subordinate crimes committed 'as a result of' a commander's failure. It comes as no surprise therefore that in its early jurisprudence the ICC accepted that some causation is required between the commission of the underlying crimes and a superior's failure to exercise control properly.³¹⁹”³²⁰

Despite acknowledging that the ICTY discarded causation, Cryer et al. argue that it should be retained it as follows:

"In the *Orić* case, the Trial Chamber was certain that there was no requirement of causation for either type of superior responsibility, as, 'even with regard to the superior's failure to prevent, a requirement of causation would run counter to the very basis of this type of superior responsibility as criminal liability of omission'.³²¹ Whether or not this reflects the law, this appears to misunderstand the idea of negative causation, where an omission permits something to occur. Leaving a window open allows the rain in, even if it does not cause a change in the weather. Still, the Appeals Chamber in *Hadžihasanović et al.* reaffirmed its view that no causation requirement exists.³²²”³²³

Meloni specifies that the ICC held that the causality requirement only applies to the failure to prevent:

"In the [*Bemba*] Decision the Pre-Trial Chamber considered that the causality requirement 'only relates to the commander's duty to prevent the commission of

³¹⁶ ICTY, *Mucić et al. ("Čelebići")*, TC, Judgement, Case No. IT-96-21-T, 16 November 1998, paras. 398-400.

³¹⁷ See ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A*, 29 July 2004, para. 77; ICTY, *Hadžihasanović and Kubura, AC, Appeal Judgement, IT-01-47-A*, 23 April 2008, paras. 38-43.

³¹⁸ See Guénaél Mettraux, *The Law of Command Responsibility*, Oxford University Press, 2009, pp. 82-87.

³¹⁹ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424*, 15 June 2009, para. 423.

³²⁰ Ilias Bantekas, *International Criminal Law*, Hart, 2010, p. 81.

³²¹ ICTY, *Orić, TC II, Judgement, Case No. IT-03-68-T*, 30 June 2006, para. 338.

³²² ICTY, *Hadžihasanović and Kubura, AC, Appeal Judgement, Case No. IT-01-47-A*, 22 April 2008, para. 39.

³²³ Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, p. 393.

future crimes'.³²⁴ In the view of the Chamber it would be illogical to conclude that a failure to repress (meaning also the failure to punish) crimes or to submit the matter to the competent authorities can retroactively cause the crimes committed by the subordinates.³²⁵³²⁶

According to Mettraux, the causality requirement should apply to failure to prevent as well as to failure to punish:

"[...] Where the accused is charged with a failure to prevent crimes of subordinates, it would have to be established that his failure was a significant—though not necessarily the sole—contributing factor in the crime. Where a superior has been charged with a failure to punish crimes, it would have to be established that his failure was a significant contributing factor in the failure of the competent authorities to investigate the crimes, and to identify and punish the perpetrator."³²⁷

Ambos describes the test to be applied as follows:

"[...] the prosecution—in accordance with the generally recognized *conditio* formula or 'but for' test—must prove that the crimes would not have been committed if the superior had properly supervised the subordinates. Thus, the *conditio* formula must be inverted. While normally a positive act causes a certain consequence, *i.e.* the consequence would not have occurred without this act, in the case of omission the argument goes the other way around: the omission 'causes' the consequence, since the omitted act would have prevented it from occurring. [...] As a result, it is sufficient that the superior's failure of supervision increases the risk that the subordinates commit certain crimes. Any higher standard would overstretch the causation requirement, since we deal with a hypothetical causation of events 'in an imaginary world': it is empirically impossible to say what would have happened if the superior had complied with the duty of supervision. In other words, the existence of an exact causal relationship between the failure of supervision and the commission of the crimes can hardly be proven *ex post*."³²⁸

However, Ambos cautions:

"[...] there are cases where the pure (inverted) *conditio* formula could lead to unsatisfying results. In such cases, normative theories of (objective) attribution or the proximate cause doctrine could be helpful."³²⁹

³²⁴ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 424.

³²⁵ *Ibid.* Nonetheless, the Chamber considered, in accordance with the ICTY jurisprudence on the issue, that the failure of a superior to adopt the requested measures during and after the crimes can have a causal impact on the commission of further crimes, in the sense that it is likely to increase the risk that further crimes will be committed in the future. Reference is made to similar findings of the ICTY, in particular in the *Hadžihasanović* case.

³²⁶ Chantal Meloni, *Command Responsibility in International Criminal Law*, T.M.C. Asser, 2010, p. 176.

³²⁷ Mettraux, 2009, p. 263 (footnote omitted).

³²⁸ Kai Ambos, "Superior Responsibility", in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 860 (footnotes omitted).

³²⁹ *Ibid.*, p. 861 (footnotes omitted).

8. Acts of omission

The perpetrator failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution

Keywords: Materially Possible – Predicated upon the Degree of Effective Control and Material Ability – Material Ability must be Evaluated on a Case-by-Case Basis – Necessary and Reasonable Measures – Factors to be Taken into Account – Temporal Trigger Point – Burden of Proof

International Case Law

In the aftermath of World War II, the tribunals held as a basic principle, that a superior cannot be obliged to perform the impossible.³³⁰ At the United States Military Tribunal, in the trial of *Wilhelm von Leeb and Thirteen Others*, it was stated, that where subordinates act pursuant to criminal orders passed down from those higher up in the chain of command, which have bypassed the commander, the commander remains under an obligation to take whatever measures may be possible in the circumstances:

"The choices which he has for opposition in this case are few: (1) he can issue an order countermanding the order; (2) he can resign; (3) he can sabotage the enforcement of the order within a somewhat limited sphere. [...] Under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows

³³⁰ In re *Yamashita*, 327 U.S. 1, 15 (1945) (referring to the "duty to take such appropriate measures as are within his power to control the troops under his command"); The Medical Case, Trials of War Criminals before the Nuremberg Military Tribunals, Volume II, p. 212 ("the law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power").

is criminal, violates a moral obligation under International Law. By doing nothing he cannot wash his hands of international responsibility."³³¹

To assess a commander's failure, an action of the superior has to be, firstly, materially possible, as was held by the ICTY Trial Chamber in *Mucić et al. ("Čelebići")*:

"It must, however, be recognized that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers. The question then arises of what actions are to be considered to be within the superior's powers in this sense. As the corollary to the standard adopted by the Trial Chamber with respect to the concept of superior, we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility. The Trial Chamber accordingly does not adopt the position taken by the ILC [International Law Commission] on this point, and finds that the lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior."³³²

On the connection between a commander's powers and his failure to take measures, the ICTY Trial Chamber in the *Čelebići* Judgement held:

"The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine."³³³

Similarly, the ICTY Appeals Chamber in *Aleksovski* stated:

"Article 7(3) provides the legal criteria for command responsibility, thus giving the word 'commander' a juridical meaning, in that the provision becomes applicable only where a superior with the required mental requirement failed to exercise his powers to prevent subordinates from committing offences or to punish them

³³¹ *Trial of Wilhelm von Leeb and Thirteen Others ("The German High Command Trial")*, United States Military Tribunal (1948), *Law Reports of Trials of War Criminals*, Volume XII, pp. 74-75.

³³² ICTY, *Mucić et al. ("Čelebići")*, TC, Judgement, Case No. IT-96-21-T, 16 November 1998, paras. 394-395 (emphasis added); confirmed, e.g., in ICTY, *Hadžihasanović and Kubura*, TC, Judgement, Case No. IT-01-47-T, 15 March 2006, para. 122; also recalled in ICTY, *Limaj et al.*, AC, Appeal Judgement, Case No. T-03-66-A, 27 September 2007, para. 273; see moreover ICTY, *Krnjelac*, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002, para. 95, holding that the superior has a duty to exercise the measures possible under the circumstances; ICTY, *Blagojević and Jokić*, TC I, Judgement, Case No. IT-02-60-T, 17 January 2005, para. 793; ICTY, *Brđanin*, TC II, Judgement, Case No. IT-99-36-T, 1 September 2004, para. 279.

³³³ ICTY, *Mucić et al. ("Čelebići")*, TC, Judgement, Case No. IT-96-21-T, 16 November 1998, para. 377.

afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them."³³⁴

In line with the ICTY jurisprudence, the ICTR Trial Chamber in *Ntagerura et al.* acknowledged that the superior's effective control predicates the measures that he/she is required to take:

"The degree of the superior's effective control guides the assessment of whether the individual took reasonable measures to prevent, stop, or punish a subordinates' [sic] crime."³³⁵

In *Đorđević*, the ICTY Trial Chamber specified:

"A superior may be held liable for failing to take measures, even in the absence of explicit legal capacity to do so, if it is proven that it was within his material ability to take such measures. As held by the Appeals Chamber "'necessary' measures are the measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish) and 'reasonable' measures are those reasonably falling within the material power of the superior." Any measures taken by a superior should, however, be specific and closely linked to the acts that they are intended to prevent. Further, it is the degree of effective control that may guide a Chamber in its assessment of whether the measures an accused took were necessary and reasonable under the circumstances."³³⁶

Similarly, the SCSL Trial Chamber in *Taylor* specified:

"Generally, it can be said that the measures required of the superior are limited to those within his or her material ability under the circumstances, including those that may lie beyond his or her formal powers. The type and extent of measures to be taken depend on the degree of effective control exercised by the superior at the relevant time, and on the severity and imminence of the crimes that are about to be committed."³³⁷

In the *Bemba* Judgement, the ICC Trial Chamber made clear from the outset that:

"[...] if the commander has discharged his obligation to take all necessary and reasonable measures within his power, he cannot be held responsible, even if the crimes nonetheless ultimately occur or the perpetrators go unpunished."³³⁸

³³⁴ ICTY, *Aleksovski, AC, Appeal Judgement, Case No. IT-95-14/1-A, 24 March 2000*, para. 76.

³³⁵ ICTR, *Ntagerura et al., TC III, Judgement, Case No. ICTR-99-46-T, 25 February 2004*, para. 630 (footnote omitted); with reference to ICTR, *Semanza, TC, Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003*, para. 406; see also ICTR, *Kayishema and Ruzindana, TC, Judgement, Case No. ICTR-95-1-T, 21 May 1999*, para. 217; ICTR, *Ntakirutimana, TC I, Judgement, Cases No. ICTR-96-10 and ICTR-96-17-T, 21 February 2003*, para. 438.

³³⁶ ICTY, *Đorđević, TC II, Judgement, Case No. IT-05-87/1-T, 23 February 2011*, para. 1887.

³³⁷ SCSL, *Taylor, TC II, Judgement, Case No. SCSL-03-01-T, 18 May 2012*, para. 501.

³³⁸ ICC, *Bemba, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016*, para. 200.

Several judgements of the *ad hoc* tribunals have found that material possibility must be individually assessed on a case-by-case basis, e.g.:

"Such a material possibility must not be considered abstractly but must be evaluated on a case-by-case basis depending on the circumstances."³³⁹

In ***Strugar***, the ICTY Appeals Chamber found the following factors to be examples of the material ability of the superior:

"For example, with respect to the capacity to issue orders, the nature of orders which the superior has the capacity to issue, the nature of his capacity to do so as well as whether or not his orders are actually followed would be relevant to the assessment of whether a superior had the material ability to prevent or punish."³⁴⁰

With respect to the need to assess the accused material ability on a case-by-case basis, the ICTR Trial Chamber found in ***Renzaho*** that the accused:

"[...] had the legal ability to requisition gendarmes, although they remained under the operational command of their officers. Furthermore, as an army officer, he had the right and duty to enforce compliance with the general rules governing discipline by all soldiers below him in the hierarchy, even where the soldiers were not under his operational authority. Nonetheless, given his position within the civilian administration, and the formal limitations on his authority over gendarmes, the Chamber is not convinced beyond reasonable doubt that Renzaho's effective control extended to all gendarmes or every army soldier of a lesser rank. Instead, the Chamber must assess his authority over these individuals on a case-by-case basis."³⁴¹

With respect to the terms 'necessary' and 'reasonable', in ***Bagilishema***, the ICTR Trial Chamber described:

"[...] 'necessary' to be those measures required to discharge the obligation to prevent or punish in the circumstances prevailing at the time; and, 'reasonable' to be those measures which the commander was in a position to take in the circumstances."³⁴²

³³⁹ ICTY, *Aleksovski, TC, Judgement, Case No. IT-95-14/1-T, 25 June 1999*, para. 81 (emphasis added); see also ICTY, *Aleksovski, AC, Appeal Judgement, Case No. IT-95-14/1-A, 24 March 2000*, paras. 73-74; ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004*, para. 72; ICTY, *Mucić et al. ("Čelebići"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 206; ICTY, *Hadžihasanović and Kubura, TC, Judgement, Case No. IT-01-47-T, 15 March 2006*, para. 123; ICTY, *Halilović, TC I, Judgement, Case No. IT-01-48-T, 16 November 2005*, para. 74 (seeing this as "well established"), reaffirmed ICTY, *Halilović, AC, Appeal Judgement, Case No. IT-01-48-A, 16 October 2007*, para. 175.

³⁴⁰ ICTY, *Strugar, AC, Appeal Judgement, Case No. IT-01-42-A, 17 July 2008*, para. 254; similarly in ICTY, *Delić, TC I, Judgement, Case No. IT-04-83-T, 15 September 2008*, para. 76.

³⁴¹ ICTR, *Renzaho, TC I, Judgement, Case No. ICTR-97-31-T, 14 July 2009*, para. 755.

³⁴² ICTR, *Bagilishema, TC I, Judgement, Case No. ICTR-95-1A-T, 7 June 2001*, para. 47 (emphasis added).

In *Blaškić*, the ICTY Appeals Chamber recognised that:

"[what constitutes "necessary and reasonable measures" is] not a matter of substantive law but of evidence."³⁴³

Moreover the ICTY Appeals Chamber in *Halilović* stated:

"[...] 'necessary' measures are the measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish) and 'reasonable' measures are those reasonably falling within the material power of the superior."³⁴⁴

The ICC Pre-Trial Chamber in the *Bemba* Confirmation of Charges Decision held:

"The Chamber considers that what constitutes 'necessary and reasonable measures' must be addressed in concreto. A commander or military-like commander will only be responsible under Article 28(a) of the Statute for failing to take measures 'within his material possibility'. The Chamber's assessment of what may be materially possible will depend on the superior's degree of effective control over his forces at the time his duty arises. This suggests that what constitutes a reasonable and necessary measure will be assessed on the basis of the commander's *de jure* power as well as his *de facto* ability to take such measures."³⁴⁵

As to factors taken into account when considering whether all necessary and reasonable measures to prevent or to punish have been taken, the ICTY Trial Chamber in the *Strugar* Judgement stated:

"Factors relevant to the Chamber's assessment include, but are not limited to, whether specific orders prohibiting or stopping the criminal activities were issued; what measures to secure the implementation of these orders were taken; what other measures were taken to secure that the unlawful acts were interrupted and whether these measures were reasonably sufficient in the specific circumstances; and, after the commission of the crime, what steps were taken to secure an adequate investigation and to bring the perpetrators to justice."³⁴⁶

³⁴³ ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004*, para. 72; see also ICTY, *Hadžihasanović and Kubura, TC, Judgement, Case No. IT-01-47-T, 15 March 2006*, para. 124; ICTY, *Halilović, AC, Appeal Judgement, Case No. IT-01-48-A, 16 October 2007*, para. 63-64; ICTY, *Hadžihasanović and Kubura, AC, Appeal Judgement, Case No. IT-01-47-A, 22 April 2008*, para. 33, ICTY, *Orić, AC, Appeal Judgement, Case No. IT-03-68-A, 3 July 2008*, para. 177.

³⁴⁴ ICTY, *Halilović, AC, Appeal Judgement, Case No. IT-01-48-A, 16 October 2007*, para. 63; reaffirmed in ICTY, *Orić, AC, Appeal Judgement, Case No. IT-03-68-A, 3 July 2008*, para. 177.

³⁴⁵ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424*, 15 June 2009, para. 443 (footnotes omitted).

³⁴⁶ ICTY, *Strugar, TC II, Judgement, Case No. IT-01-42-T, 31 January 2005*, para. 378; confirmed by ICTY, *Halilović, TC I, Judgement, Case No. IT-01-48-T, 16 November 2005*, para. 74.

In the *Hadžihasanović and Kubura* Judgement, the Trial Chamber acknowledged that national law was a relevant source to detect existing duties:

"To determine measures a superior must take, an examination of national law is relevant. [...] [T]he national law of a State establishes the powers and duties of civilian or military representatives of that State, but international law lays down the way in which they may be exercised within the area governed by it."³⁴⁷

In *Fofana and Kondewa*, the SCSL Trial Chamber specified possible failures that would comport with the duties to prevent or punish under Art. 6(3) SCSL Statute:

"[...] failure to secure reports that military actions have been carried out in accordance with international law, the failure to issue orders aimed at bringing the relevant practices into accord with international law, the failure to protest against or to criticise criminal action, the failure to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command and the failure to insist before a superior authority that immediate action be taken. As part of his duty to prevent subordinates from committing crimes, the Chamber is of the view that a superior also has the obligation to prevent his subordinates from following unlawful orders given by other superiors."³⁴⁸

In *Hadžihasanović and Kubura*, the ICTY Appeals Chamber, specifically relied on the need of an assessment on a case-by-case basis to find that disciplinary measures may be sufficient to fulfil the duty to punish:

"It cannot be excluded that, in the circumstances of a case, the use of disciplinary measures will be sufficient to discharge a superior of his duty to punish crimes under Article 7(3) of the Statute. In other words, whether the measures taken were solely of a disciplinary nature, criminal, or a combination of both, cannot in itself be determinative of whether a superior discharged his duty to prevent or punish under Article 7(3) of the Statute."³⁴⁹

The Appeals Chamber also held:

"[...] there might be situations in which a superior has to use force against subordinates acting in violation of international humanitarian law. A superior may have no other alternative but to use force to prevent or punish the commission of crimes by subordinates. This kind of use of force is legal under international humanitarian law insofar as it complies with the principles of proportionality and

³⁴⁷ ICTY, *Hadžihasanović and Kubura, TC, Judgement, Case No. IT-01-47-T, 15 March 2006*, para. 137 with further references.

³⁴⁸ SCSL, *Fofana and Kondewa, TC I, Judgement, Case No. SCSL-04-14-T, 2 August 2007*, para. 248 (footnotes omitted), referring to ICTY, *Strugar, TC II, Judgement, Case No. IT-01-42-T, 31 January 2005*, para. 374; the case law developed by the military tribunals in the aftermath of World War II; and additionally to ICTY, *Limaj et al., TC II, Judgement, Case No. IT-03-66-T, 30 November 2005*, para. 528; ICTY, *Orić, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006*, para. 331; ICTY, *Halilović, TC I, Judgement, Case No. IT-01-48-T, 16 November 2005*, para. 89.

³⁴⁹ ICTY, *Hadžihasanović and Kubura, AC, Appeal Judgement, Case No. IT-01-47-A, 22 April 2008*, para. 33.

precaution and may even demonstrate that a superior has the material ability to prevent and punish the commission of crimes."³⁵⁰

More specifically, the ICC Pre-Trial Chamber in the *Bemba* Confirmation of Charges Decision found:

"The Chamber considers that, regardless of Mr Jean-Pierre Bemba's warning to his troops that any soldier who was involved in misconduct would be arrested and tried under the movement's military law, only two commanders were preventively suspended and seven soldiers were charged of pillaging before the military Court in Gbadolite. In this regard, the Chamber recalls the conclusion reached by the ICTY Appeals Chamber in the Kubura and the Halilović cases in which it was stated that the measures taken by a superior does not depend on whether they 'were of a disciplinary or criminal nature' so far as they were necessary and reasonable in the circumstances of the case. Thus, it is the Chamber's view that its assessment in the present case is not dependent on the fact that Mr Jean-Pierre Bemba merely took a disciplinary measure against the two commanders or any other measure of a specific nature, if at all. Rather, the Chamber believes that the assessment of any measures taken by Mr Jean-Pierre Bemba should be first and foremost based on his material ability. Moreover, the reasonable and necessary measures were those 'suitable to contain the situation' at the time in term of preventing and/or repressing the crimes and thus were within his powers and abilities. The Chamber considers that this was not the case and that Mr Jean-Pierre Bemba disregarded the scale and gravity of the crimes committed and opted for measures that were not reasonably proportionate to those crimes during his visit in November 2002. This was followed by a passive attitude in relation to the prevention of future crimes that were committed thereafter or repression thereof. According to the evidence before the Chamber, such disproportionate measures taken by Mr Jean-Pierre Bemba with respect to the acts of pillaging were the only measure resorted to by him throughout the five-month period of intervention, and accordingly, crimes continued to be carried out thereafter."³⁵¹

In the *Bemba* Judgement, the Trial Chamber agreed with the Pre-Trial Chamber finding that the accused failed to take all reasonable and necessary measures. It further found that the measures undertaken were not properly or sincerely executed:

[...] the measures Mr Bemba took were a grossly inadequate response to the consistent information of widespread crimes committed by MLC soldiers in the CAR of which Mr Bemba had knowledge. The inadequacy of the minimal measures Mr Bemba took is aggravated by indications [...] that they were not genuine, the manner in which such measures were executed, and the fact that only public

³⁵⁰ *Ibid.*, para. 228.

³⁵¹ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 495 (footnotes omitted).

allegations of crimes by MLC soldiers prompted any reaction, and then only to limited extent."³⁵²

The Trial Chamber went deeper in the intention underlying the measures:

"The Chamber also notes the corroborated evidence that the above measures were primarily motivated by Mr Bemba's desire to counter public allegations and rehabilitate the public image of the MLC. The fact that Mr Bemba used the above minimal and inadequate measures as a basis to address all allegations of crimes against the MLC, taken with the evidence as to his motives behind ordering such measures, illustrates that a key intention behind the measures Mr Bemba took was to protect the image of the MLC. His primary intention was not to genuinely take all necessary and reasonable measures within his material ability to prevent or repress the commission of crimes, as was his duty."³⁵³

In the *Ntaganda* Confirmation of Charges Decision, the Pre-Trial Chamber found that the:

"[t]he limited measures taken by Mr. Ntaganda fall short of necessary and reasonable measures within his power. Disciplinary measures were adopted to redress the failure of UPC/FPLC members to comply with orders or because some of them were suspected enemies and they were, therefore, not taken in response to the crimes charged. In particular, while Mr. Ntaganda ordered the arrest of several UPC/FPLC members suspected of attempted rape on 21 December 2002, he subsequently informed one of these persons that he was promoted on 11 February 2003, which indicates, at least, that this person was not subject to punishment. In addition, despite Mr. Ntaganda's order to halt pillaging in the First Attack, high-ranking UPC/FPLC commanders continued to pillage and no one was in fact punished for such conduct."³⁵⁴

In the *Gbagbo*, Confirmation of Charges Decision, the Pre-Trial Chamber found the person's failure to cooperate with international inquiries:

"The evidence indicates that investigation attempts by the UN were actively obstructed by the pro-Gbagbo forces.

In late December 2010, the UN High Commissioner for Human Rights sent letters to Laurent Gbagbo and certain high commanders of the FDS, reminding them of their obligations and informing them about allegations of human rights violations committed by members of FDS units. While it appears that some inquiries were

³⁵² ICC, *Bemba, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016*, para. 727.

³⁵³ *Ibid.*, para. 728.

³⁵⁴ ICC, *Ntaganda, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/04-02/06, 9 June 2014*, para. 173 (footnote omitted).

made in response to the letter, the evidence also suggests that allegations against pro-Gbagbo forces were generally denied by the Gbagbo side.³⁵⁵

The ICTY Trial Chamber in *Kvočka et al.* considered that a superior must take action from the moment at which he "knew or had reason to know" of the crimes committed or about to be committed by the subordinates.³⁵⁶

On the due point of time for the superior to take action, the ICC Pre-Trial Chamber in the *Bemba* Confirmation of Charges Decision held:

"In its written submission, the Defence contends that Mr Jean-Pierre Bemba called upon the United Nation Secretary General Special Representative to open an international investigation into any crimes that were committed in the CAR during the 2002-2003 intervention."³⁵⁷

"With respect to the Defence submission, the Chamber observes that the letter was only sent on 4 January 2003 - i.e., more than two months after the beginning of the 2002-2003 intervention in the CAR. In the Chamber's opinion, Mr Jean-Pierre Bemba had the material ability to trigger internal investigations into the allegations at the time, as he had previously done during the first week of the 2002-2003 intervention in the CAR (although the measure was not proportionate). Yet, he failed to do so since the beginning of November 2002 throughout the remaining period of intervention. Thus, sending a letter to the United Nations to request an international investigation, let alone two months after the beginning of the intervention, is in the Chamber's opinion neither a necessary nor a reasonable a measure."³⁵⁸

To affirm a failure to take measures, all possible necessary and reasonable measures and all measures taken are to be ascertained. In *Nahimana et al.*, where the accused did not take any measures at all, the ICTR Appeals Chamber held:

"Having found that Appellant [Nahimana] had the power to prevent or punish the broadcasting of criminal discourse by RTLM [Radio Télévision Libre des Mille Collines], the Trial Chamber did not need to specify the necessary and reasonable measures that he could have taken. It needed only to find that the Appellant had taken none."³⁵⁹

³⁵⁵ ICC, *Gbagbo, PTC I, Decision on the Confirmation of Charges, Case No. ICC-02/11-01/11, 12 June 2014*, para. 173 (footnote omitted).

³⁵⁶ ICTY, *Kvočka et al., TC, Judgement, Case No. IT-98-30/1-T, 2 November 2001*, para. 317.

³⁵⁷ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 497 (footnotes omitted).

³⁵⁸ *Ibid.*, para. 498.

³⁵⁹ ICTR, *Nahimana et al., AC, Appeal Judgement, Case No. ICTR-99-52-A, 28 November 2007*, para. 792.

In *Bagosora et al.*, the ICTR Trial Chamber found that the accused:

"[...] failed in his duty to prevent the crimes because he in fact participated in them. There is absolutely no evidence that the perpetrators were punished afterwards."³⁶⁰

As highlighted by the ICTR Trial Chamber in the *Ntagerura et al.* Judgement, the burden of proving the accused's failure lies with the Prosecution:

"The Chamber finds that the Prosecutor did not prove beyond a reasonable doubt that Bagambiki failed to take necessary and reasonable measures to punish Kamana for his role in the massacre. The Chamber notes that Bagambiki suspended Kamana, which was the extent of the disciplinary measures available to a prefect under the law on the organisation of the commune. A bourgmestre's suspension involves a disciplinary proceeding allowing the bourgmestre to explain his actions and appeal to higher authorities. As such, a suspension is one component of a larger process involving authorities in addition to and beyond the prefect. The Chamber has no evidence about what followed the suspension or if Bagambiki took other actions as well. The Prosecutor submitted no evidence indicating what other possible forms of punishment were available to Bagambiki, as prefect, and indicating that Bagambiki failed to take these measures."³⁶¹

Distinct duties: the duty to prevent, to repress and/or to punish

Keywords: Not Alternative Duties – Prevent is for Future Crimes and Punish is for Past Crimes – Distinct but Related Facets – Three Duties under the Rome Statute

International Case Law

According to the *ad hoc* tribunals' case law, command responsibility includes two distinct duties of the superior: a duty to prevent and a duty to punish. The ICTY Trial Chamber in *Blaškić* stressed that the obligation to 'prevent or punish' does not provide the accused with two alternative and equally satisfying options:

³⁶⁰ ICTR, *Bagosora et al.*, *TC I, Trial Judgement, Case No. ICTR-98-41-T, 18 December 2008*, para. 2040 (Bagosora), para. 2067 (Ntabakuze), and para. 2083 (Nsengiyumva).

³⁶¹ ICTR, *Ntagerura et al.*, *TC III, Judgement, Case No. ICTR-99-46-T, 25 February 2004*, para. 650 (footnotes omitted).

"Obviously, where the accused knew or had reason to know that subordinates were about to commit crimes and failed to prevent them, he cannot make up for the failure to act by punishing the subordinates afterwards."³⁶²

With respect to the temporal frame with which each duty is concerned, the ICTY Appeals Chamber in *Blaškić* stated:

"Disciplinary or penal action can only be initiated after a violation is discovered, and a violator is one who has already violated a rule of law. Further, it is illogical to argue both that 'a superior's responsibility for the failure to punish is construed as a sub-category of his liability for failing to prevent the commission of unlawful acts,' and that 'failure to punish only led to the imposition of criminal responsibility if it resulted in a failure to prevent the commission of future crimes.' The failure to punish and the failure to prevent involve different crimes committed at different times: the failure to punish concerns past crimes committed by subordinates, whereas the failure to prevent concerns future crimes of subordinates."³⁶³

On the relationship between 'prevent' and 'punish', the ICTR Trial Chamber in *Semanza* stated:

"The obligation to prevent or punish is not a set of alternative options. If a superior is aware of the impending or ongoing commission of a crime, necessary and reasonable measures must be taken to stop or prevent it. A superior with such knowledge and the material ability to prevent the commission of the crime does not discharge his responsibility by opting simply to punish his subordinates in the aftermath."³⁶⁴

The distinction between the two duties was affirmed by the ICTY Trial Chamber in *Hadžihasanović and Kubura*:

"Tribunal case law has clearly established that Article 7(3) of the Statute distinguishes between two different duties of a superior. The Trial Chamber in *Strugar* recently reaffirmed this distinction unambiguously by holding that Article 7(3) does not provide a superior with two alternative options but contains two distinct legal obligations: (1) to prevent the commission of the crime and (2) to punish the perpetrators. The duty to prevent arises for a superior from the moment he acquires knowledge or has reasonable grounds to suspect that a crime is being or is about to be committed, while the duty to punish arises after the commission of the crime."³⁶⁵

³⁶² ICTY, *Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, para. 336; cf. also ICTY, *Stakić, TC II, Judgement, Case No. IT-97-24-T, 31 July 2003*, para. 461.

³⁶³ ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004*, para. 336; cf. also ICTY, *Stakić, TC II, Judgement, Case No. IT-97-24-T, 31 July 2003*, para. 83.

³⁶⁴ ICTR, *Semanza, TC, Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003*, para. 407; confirmed in ICTR, *Bagilishema, TC I, Judgement, Case No. ICTR-95-1A-T, 7 June 2001*, para. 49.

³⁶⁵ ICTY, *Hadžihasanović and Kubura, TC, Judgement, Case No. IT-01-47-T, 15 March 2006*, para. 125, referring to ICTY, *Strugar, TC II, Judgement, Case No. IT-01-42-T, 31 January 2005*, para. 373.

The relationship between the duty to prevent and the duty to punish has been described as ‘consecutive’, ‘distinct’ and ‘related’ by the Trial Chamber in **Orić**:

"The superior's obligations are instead consecutive: it is his primary duty to intervene as soon as he becomes aware of crimes about to be committed, while taking measures to punish may only suffice, as substitute, if the superior became aware of these crimes only after their commission. Consequently, a superior's failure to prevent the commission of the crime by a subordinate, where he had the ability to do so, cannot simply be remedied by subsequently punishing the subordinate for the crime. Therefore, the failure to prevent or to punish constitutes two distinct, but related, aspects of superior responsibility, which correlate to the timing of a subordinate's commission of a crime. Hence, the duty to prevent concerns future crimes whereas the duty to punish concerns past crimes of subordinates."³⁶⁶

Similarly, in **Dorđević**, the Trial Chamber underlined the fact that the duty to prevent and the duty to punish are not "alternative obligations."³⁶⁷

At the SCSL, the Trial Chamber in **Sesay et al.** held on the relationship between the duties to prevent and to punish:

"Under Article 6(3), the superior has a duty both to prevent the commission of the offence and to punish the perpetrators. These are not alternative obligations – they involve different crimes committed at different times: ‘the failure to punish concerns past crimes committed by subordinates, whereas the failure to prevent concerns future crimes of subordinates.’ The duty to prevent arises from the time a superior acquires knowledge, or has reason to know that a crime is being or is about to be committed, while the duty to punish arises after the superior acquires knowledge of the commission of the crime. ‘A superior must act from the moment that he acquires such knowledge. His obligations to prevent will not be met by simply waiting and punishing afterwards.’"³⁶⁸

However, the ICC Pre-Trial Chamber in the **Bemba** Confirmation of Charges Decision distinguished between three duties, which a suspect might have failed to meet: to prevent, to repress and/or to punish:

"In order to find the suspect responsible under command responsibility, once the mental element is satisfied, it is necessary to prove that he or she failed at least to fulfil one of the three duties listed under Article 28(a)(ii) of the Statute: the duty to

³⁶⁶ ICTY, *Orić, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006*, para. 326.

³⁶⁷ ICTY, *Dorđević, TC II, Judgement, Case No. IT-05-87/1-T, 23 February 2011*, para. 1888.

³⁶⁸ SCSL, *Sesay et al., TC I, Judgement, Case No. SCSL-04-15-T, 2 March 2009*, para. 314 (footnotes omitted), with references to ICTY-jurisdiction: ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004*, para. 83; ICTY, *Limaj et al., TC II, Judgement, Case No. IT-03-66-T, 30 November 2005*, para. 527; ICTY, *Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001*, paras. 445-446; ICTY, *Strugar, TC II, Judgement, Case No. IT-01-42-T, 31 January 2005*, para. 373.

prevent crimes, the duty to repress crimes or the duty to submit the matter to the competent authorities for investigation and prosecution."³⁶⁹

On the relationship between these duties, the ICC Pre-Trial Chamber held:

"The Chamber first wishes to underline that the three duties under Article 28(a)(ii) of the Statute arise at three different stages in the commission of crimes: before, during and after. Thus, a failure to fulfil one of these duties is itself a separate crime under Article 28(a) of the Statute. A military commander or a military-like commander can therefore be held criminally responsible for one or more breaches of duty under Article 28(a) of the Statute in relation to the same underlying crimes. Consequently, a failure to prevent crimes which the commander knew or should have known about cannot be cured by fulfilling the duty to repress or submit the matter to the competent authorities."³⁷⁰

The perpetrator failed to take the necessary and reasonable measures within his or her power to prevent the commission of such crime; OR

Keywords: Any Stage before the commission of a crime – Limited Time to Perform it – Planning and Preparation – Arise when the Commander Knew or should have known – Temporal Framework – Duty to Suppress – Foreseeable Reoccurrence of Crimes – General Obligation to Prevent – Specific Obligation to Prevent – Relevant Factors

International Case Law

With respect to the point in time at which the duty to prevent arises, the ICTY Trial Chamber in *Kordić and Čerkez* held:

"The duty to prevent should be understood as resting on a superior at any stage before the commission of a subordinate crime if he acquires knowledge that such a crime is being prepared or planned, or when he has reasonable grounds to suspect subordinate crimes."³⁷¹

³⁶⁹ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 435.

³⁷⁰ *Ibid.*, para. 436, citing ICTY, *Delić, TC I, Judgement, Case No. IT-04-83-T, 15 September 2008*, para. 69, and with further references.

³⁷¹ ICTY, *Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001*, para. 445; confirmed in ICTY, *Strugar, TC II, Judgement, Case No. IT-01-42-T, 31 January 2005*, para. 373; ICTY, *Halilović, TC I, Judgement, Case No. IT-01-48-T, 16 November 2005*, para 79.

In *Hadžihasanović and Kubura*, the Trial Chamber stated:

"As for the duty to prevent, a superior clearly has a limited time to perform it. Once the crime has been committed by his subordinates, it is too late and the superior has failed in his duty. [...] In no case may the superior 'make up' for the failure to act by punishing the subordinates afterwards. Accordingly, if it is established that a superior did nothing to prevent his subordinates from committing a crime, an examination of the measures taken to punish them serves no purpose. He has failed in his duty to prevent and therefore entails responsibility."³⁷²

The Trial Chamber in *Orić*:

"[...] called for further determination with regard to what a superior must prevent and at what time he must do so. [...] it cannot be merely the completion of a crime which must be prevented, but also its planning and preparation, if for no other reason than as a matter of efficiency. Further, since a superior is duty bound to take preventive measures when he or she becomes aware that his or her subordinates 'are about to commit such acts', and, as stated before, such acts comprise the commission of a crime from its planning and preparation until its completed execution, the superior, being aware of what might occur if not prevented, must intervene against imminent planning or preparation of such acts. This means, first, that it is not only the execution and full completion of a subordinate's crimes which a superior must prevent, but the earlier planning or preparation. Second, the superior must intervene as soon as he becomes aware of the planning or preparation of crimes to be committed by his subordinates and as long as he has the effective ability to prevent them from starting or continuing."³⁷³

The ICC Pre-Trial Chamber in the *Bemba* Confirmation of Charges Decision held:

"[...] that the duty to prevent arises when the commander or military-like commander knew or should have known that forces under his effective control and command/authority 'were committing or about to commit' crimes. Thus, such a duty is triggered at any stage prior to the commission of crimes and before it has actually been committed by the superior's forces."³⁷⁴

Upon appeal in *Sesay et al.*, the Appeals Chamber, corrected the Trial Chamber's conviction for a failure to prevent crimes committed after the accused, Kallon, had effective control. It found:

³⁷² ICTY, *Hadžihasanović and Kubura*, TC, Judgement, Case No. IT-01-47-T, 15 March 2006, para. 126 (footnotes omitted), referring to ICTY, *Blaškić*, TC, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 336; and ICTR, *Kayishema and Ruzindana*, TC, Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 515.

³⁷³ ICTY, *Orić*, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006, para. 328.

³⁷⁴ ICC, *Bemba*, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 437, referring to ICTY, *Delić*, TC I, Judgement, Case No. IT-04-83-T, 15 September 2008, para. 72.

"Kallon is responsible for his failure to prevent the crime of enslavement up to and including the last day on which he was found to have exercised effective control over Rocky and the RUF troops who detained civilians in camps in Kono District. Thereafter, the consequent harm caused by the continuation of the crime of enslavement, which he is found to have failed to prevent at the time when he had the ability to do so, continues to be relevant to sentencing and properly reflected in findings on the gravity of his offence. However, the Trial Chamber has failed to support, either by findings of facts or reasoning of applicable law, its conclusion that Kallon is criminally liable under Article 6(3) for the crimes of enslavement in Kono District found to have been committed, after August 1998."³⁷⁵

In *Strugar*, the ICTY Trial Chamber specified:

"What the duty to prevent will encompass will depend on the superior's material power to intervene in a specific situation."³⁷⁶

Similarly, in *Dorđević*, the Trial Chamber asserted that:

"If an accused's material ability to intervene merely allows that he report imminent or ongoing crimes or underlying offences of which he knows or has reason to know to the competent authorities, then such reporting may be sufficient to satisfy his duty to prevent."³⁷⁷

In *Hadžihasanović and Kubura*, the Trial Chamber held:

"[b]y deciding not to use force against his subordinated troops and by deciding, on the contrary, to adopt a passive attitude towards resolving the ongoing crisis, the Accused Hadžihasanović failed to take the necessary and reasonable measures, in view of the circumstances of the case, in order to prevent the crimes of murder and mistreatment which he had reason to believe about to be committed."³⁷⁸

However, the Trial Chamber also specified:

"Before finding the Accused Hadžihasanović criminally responsible, however, it should be asked both whether accused Hadžihasanović could have prevented the crimes of murder and mistreatment by using force and whether the Accused Hadžihasanović had the material ability to use force against the El Mujahedin detachment."³⁷⁹

³⁷⁵ SCSL, *Sesay et al., AC, Appeal Judgement, Case No. SCSL-04-15-A, 26 October 2009*, para. 875 (discussion in paras. 872-876).

³⁷⁶ ICTY, *Strugar, TC II, Judgement, Case No. IT-01-42-T, 31 January 2005*, para. 374 (continuing further with references to actual factors considered by the military tribunals in the aftermath of World War II).

³⁷⁷ ICTY, *Dorđević, TC II, Judgement, Case No. IT-05-87/1-T, 23 February 2011*, para. 1888.

³⁷⁸ ICTY, *Hadžihasanović and Kubura, TC, Judgement, Case No. IT-01-47-T, 15 March 2006*, para. 1461.

³⁷⁹ *Ibid.*, para. 1462.

With respect to the "duty to suppress", the Trial Chamber clarified:

"The case law makes an unequivocal distinction between the duty to prevent and the duty to punish: the first arises prior to the commission of the criminal offence by the subordinate and the second, after. Nevertheless, the duty to "suppress" is recognised by the case law and seems to be included in the duty to prevent, even though it arises while the unlawful act is in the process of being committed. The duty to suppress should be considered part of the superior's duty to prevent, as its aim is to prevent further unlawful acts."³⁸⁰

The Trial Chamber dealt with imaginable situations, where both the duty to prevent and the duty to punish have a causal link (typically in situations, where a failure to punish caused a reoccurrence of unlawful acts).³⁸¹ The *Hadžihasanović and Kubura* Trial Judgement reads:

"It follows that the duty to prevent the recurrence of similar acts must be limited to the acts of subordinates who form part of an 'identifiable group', some members of which have already committed similar acts. That limitation bears a relationship to the very nature of the duty to prevent, which is based on the risk of a recurrence of similar acts. In fact, such responsibility can be established only when the recurrence is foreseeable, since it is premised on the fact that the failure to punish encourages soldiers – who have already committed unlawful acts – to commit those acts once again. The failure to intervene results in the foreseeable consequence of such conduct being repeated."³⁸²

Regarding components of the duty to prevent, the Trial Chamber held:

"[...] the role of a commander is decisive for the proper application of the Conventions and Additional Protocol I and to avoid a fatal gap between the undertakings entered into by parties to the conflict and the conduct of individuals under their orders. A superior must therefore provide structure for his subordinates to ensure they observe the rules of armed conflict and must also prevent the violation of these norms."³⁸³

Furthermore, the Trial Chamber in *Hadžihasanović and Kubura* distinguished between general and specific preventive measures:

"[...] a distinction must be made between general measures taken by a commander to provide structure for his subordinates and those ordered to prevent specific crimes of which he has knowledge. By failing to take the first, the commander runs

³⁸⁰ *Ibid.*, para. 127 (with further references).

³⁸¹ Cf. ICTY, *Hadžihasanović and Kubura, TC, Judgement, Case No. IT-01-47-T, 15 March 2006*, para. 128 et seq. with further references.

³⁸² *Ibid.*, para. 164.

³⁸³ ICTY, *Hadžihasanović and Kubura, TC, Judgement, Case No. IT-01-47-T, 15 March 2006*, para. 143 (with reference to the ICRC Commentary on Additional Protocol I).

the increased risk that his subordinates will engage in unlawful acts, although this will not necessarily entail his criminal responsibility. Failure to take the second will result in criminal sanctions."³⁸⁴

"Although international law intends to bar not only actual but also potential breaches, the fact remains that a commander's failure to take general preventive measures does not entail the same consequences for his criminal responsibility as the failure to act in a specific circumstance where a crime of which he has knowledge is about to be committed."³⁸⁵

In the *Halilović* Trial Judgement a similar differentiation was made:

"The duty to prevent may be seen to include both a 'general obligation' and a 'specific obligation' to prevent crimes within the jurisdiction of the Tribunal. The Trial Chamber notes, however, that only the "specific obligation" to prevent triggers criminal responsibility as provided for in Article 7(3) of the Statute."³⁸⁶

The *Halilović* Trial Judgement further elucidated the general obligation to prevent the commission of crimes:

"The existence of a general obligation to prevent the commission of crimes stems from the duty of a commander, arising from his position of effective control, which places him in the best position to prevent serious violations of international humanitarian law. [...] This obligation can be seen to arise from the importance which international humanitarian law places on the prevention of violations."³⁸⁷

"There also appears to be a requirement that a commander ensure order and exercise control over troops, which includes, for example, a need to be aware of the condition of troops, and to impose discipline."³⁸⁸

"[I]nternational humanitarian law entrusts commanders with a role of guarantors of laws dealing with humanitarian protection and war crimes, and for this reason they are placed in a position of control over the acts of their subordinates, and it is this position which generates a responsibility for failure to act. It is a natural element of the preventative constituent of command responsibility that a commander must make efforts to ensure that his troops are properly informed of their responsibilities in international law, and that they act in an orderly fashion."³⁸⁹

³⁸⁴ *Ibid.*, para. 144 et seq.

³⁸⁵ *Ibid.*, para. 147.

³⁸⁶ ICTY, *Halilović, TC I, Judgement, Case No. IT-01-48-T, 16 November 2005*, para. 80 (confirmed in ICTY, *Orić, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006*, para. 330).

³⁸⁷ *Ibid.*, para. 81 with further references (a.o., on World War II jurisprudence and ICRC Commentary on Article 87 of Additional Protocol I).

³⁸⁸ *Ibid.*, para. 84.

³⁸⁹ *Ibid.*, para. 87.

"However, the adherence to this general obligation does not suffice by itself to avoid the commanders criminal liability in case he fails to take the necessary appropriate measure under his specific obligation."³⁹⁰

Concerning the general obligation to prevent crimes, the Trial Chamber in *Halilović* held that:

"[...] armed forces must be subject to an internal disciplinary system enforcing compliance with the rules of international law applicable in armed conflict; commanders are responsible for carrying out this task. In this respect, commanders have a duty to disseminate those rules and to include the study thereof in their programmes of military instruction. Legal advisers must be available to advise military commanders on the instruction to be given to the armed forces on the subject of the application of the Conventions and Additional Protocol I. The purpose of such instruction is to ensure that the members of the armed forces under their command are aware of their obligations under the Conventions and Additional Protocol I."³⁹¹

For the specific obligation to prevent crimes, the Trial Chamber in *Halilović* stated that:

"[...] the duty to prevent entails in a particular case will depend on the superior's material ability to intervene in a specific situation."³⁹²

Moreover, the Trial Chamber found that:

"[...] the preventative element of the duty to prevent attaches where the subordinate 'was about to commit such acts', but before the actual offence has been committed."³⁹³

In *Strugar*, the Trial Chamber held:

"[...] an accused cannot avoid the intended reach of the provision by doing nothing, on the basis that what he knows does not make it entirely certain that his forces were actually about to commit offences, when the information he possesses gives rise to a clear prospect that his forces were about to commit an offence. In such circumstances the accused must at least investigate, i.e. take steps inter alia to determine whether in truth offences are about to be committed, or indeed by that stage have been committed or are being committed."³⁹⁴

³⁹⁰ *Ibid.*, para. 88.

³⁹¹ *Ibid.*, para. 145 (footnotes omitted), referring to ICRC Commentary on Additional Protocol I, Art. 87, paras. 3550 and 3557.

³⁹² ICTY, *Halilović, TC I, Judgement, Case No. IT-01-48-T, 16 November 2005*, para. 89.

³⁹³ *Ibid.*, para. 90; confirmed by ICTY, *Orić, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006*, paras. 330-331.

³⁹⁴ ICTY, *Strugar, TC II, Judgement, Case No. IT-01-42-T, 31 January 2005*, para. 415; confirmed by ICTY, *Halilović, TC I, Judgement, Case No. IT-01-48-T, 16 November 2005*, para. 90.

With respect to factors relevant to assess required measures to meet the duty to prevent, the ICC Pre-Trial Chamber in the *Bemba* Confirmation of Charges Decision found:

"Article 28 of the Statute does not define the specific measures required by the duty to prevent crimes. In this context, the Chamber considers it appropriate to be guided by relevant factors such as measures: (i) to ensure that superior's forces are adequately trained in international humanitarian law; (ii) to secure reports that military actions were carried out in accordance with international law; (iii) to issue orders aiming at bringing the relevant practices into accord with the rules of war; (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command."³⁹⁵

In the *Bemba* Judgement, the Trial Chamber added:

"Additional measures which should be taken under Article 28(a)(ii) may include: (i) issuing orders specifically meant to prevent the crimes, as opposed to merely issuing routine orders; (ii) protesting against or criticising criminal conduct; (iii) insisting before a superior authority that immediate action be taken; (iv) postponing military operations; (v) suspending, excluding, or redeploying violent subordinates; and (vi) conducting military operations in such a way as to lower the risk of specific crimes or to remove opportunities for their commission."³⁹⁶

In *Karemera et al.* the ICTR Trial Chamber found that one of the accused, Ngirumpatse, failed to prevent the crimes because he did not take the right actions to prevent the crimes from being committed:

"In light of these circumstances, the Chamber considers that the necessary and only reasonable measure for preventing mass killings by the Kigali Interahamwe would have been to take any step that delivered the unequivocal message that the Interahamwe should stop massacring innocent Tutsi civilians immediately.

Instead, Ngirumpatse chose to either use unreasonably vague language that completely ignored the unfolding genocide being perpetrated by his subordinates, or make unreasonably abstract requests that killings be stopped. Instead of ordering the Kigali Interahamwe to immediately stop massacring innocent Tutsi civilians, Ngirumpatse, the individual with ultimate authority over this group, squandered his first opportunity to prevent the killings by deliberately restricting his address to comments like: 'opt for the path of security;' 'see to other people's security;' 'leave the roads;' 'thieves should stop stealing;' 'instead of doing evil...provide security for others, especially the weak ones;' 'we have dispatched people...to free the roads so that they could provide security for others instead of

³⁹⁵ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 438; citing, a.o., ICTY, *Strugar, TC II, Judgement, Case No. IT-01-42-T, 31 January 2005*, para. 374; and ICTY, *Hadžihasanović and Kubura, TC, Judgement, Case No. IT-01-47-T, 15 March 2006*, para. 153.

³⁹⁶ ICC, *Bemba, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016*, para. 204.

robbing and attacking them;’ ‘we should fight those who attack us...not those who are not armed;’ and ‘members must know that those...attacking them are the Inkotanyi...not the ordinary citizen.’”³⁹⁷

According to the ICTR Appeals Chamber in *Bagosora and Nsengiyumva*,

"However, the paragraphs relied upon by the Trial Chamber as a basis for Nsengiyumva's convictions charged pursuant to Article 6(3) of the Statute either allege that the crimes were committed on Nsengiyumva's orders,³⁹⁸ or with his authorisation.³⁹⁹ This, in the Appeals Chamber's opinion, gave sufficient notice to Nsengiyumva of the conduct by which he was alleged to have failed to take the necessary measures to prevent or punish the crimes."⁴⁰⁰

The perpetrator failed to take the necessary and reasonable measures within his or her power to repress the commission of such crime; OR

Keywords: Separate Form of Liability – Duty to Repress vs Duty to Punish – Temporal Framework – Temporal Trigger Point – Minimum Standard – Referring the Matter to the Competent Authorities – Disciplinary Measures - Obligation to Investigate

International Case Law

According to the ICTR Trial Chamber in *Bagilishema*, the failure to punish may spring from a failure to create or sustain an environment of discipline and respect for the law:

"The Chamber is of the view that, in the case of failure to punish, a superior's responsibility may arise from his or her failure to create or sustain among the persons under his or her control, an environment of discipline and respect for the law. For example, in *Čelebići*, the Trial Chamber cited evidence that Mucić, the accused prison warden, never punished guards, was frequently absent from the camp at night, and failed to enforce any instructions he did happen to give out. In *Blaškić*, the accused had led his subordinates to understand that certain types of illegal conduct were acceptable and would not result in punishment. Both Mucić and Blaškić tolerated indiscipline among their subordinates, causing them to believe that acts in disregard of the dictates of humanitarian law would go

³⁹⁷ ICTR, *Karemera and Ngirumpatse*, TC III, *Judgement*, Case No. ICTR-98-44-T, 2 February 2012, paras. 1564-1565.

³⁹⁸ See ICTR, *Nsengiyumva*, *Indictment*, Case No. IT-01-69-I, 10 August 2001, paras. 6.16, 6.20, 6.22, and 6.36.

³⁹⁹ See Particulars, para. 6.20.

⁴⁰⁰ ICTR, *Bagosora and Nsengiyumva*, *Appeal Judgement*, 14 December 2011, para. 207.

unpunished. It follows that command responsibility for failure to punish may be triggered by a broadly based pattern of conduct by a superior, which in effect encourages the commission of atrocities by his or her subordinates."⁴⁰¹

On the duty to punish, the ICTY Trial Chamber in *Halilović* stated:

"The duty to punish is a separate form of liability, distinct from the failure to prevent it has in fact developed from the importance attached to a commander's duty to take preventative actions."⁴⁰²

"The argument that a failure to punish a crime is a tacit acceptance of its commission is not without merit. The Trial Chamber recognises that a commander, as the person in possession of effective control over his subordinates is entrusted by international humanitarian law with the obligation to ensure respect of its provisions. The position of the commander exercising authority over his subordinates dictates on his part to take necessary and reasonable measures for the punishment of serious violations of international humanitarian law and a failure to act in this respect is considered so grave that international law imputes upon him responsibility for those crimes. He has, in the words of the ICRC Commentary to the Additional Protocol "tolerated breaches of the law of armed conflict".⁴⁰³

"Finally, the Trial Chamber considers that punishment is an inherent part of prevention of future crimes. It is insufficient for a commander to issue preventative orders or ensure systems are in place for the proper treatment of civilians or prisoners of war if subsequent breaches which may occur are not punished. This failure to punish on the part of a commander can only be seen by the troops to whom the preventative orders are issued as an implicit acceptance that such orders are not binding."⁴⁰⁴

The ICC Pre-Trial Chamber in the *Bemba* Confirmation of Charges Decision held on the duty to punish and the duty to repress:

"The duty to 'repress' encompasses two separate duties arising at two different stages of the commission of crimes. First, the duty to repress includes a duty to stop ongoing crimes from continuing to be committed. It is the obligation to 'interrupt a possible chain effect, which may lead to other similar events'. Second, the duty to repress encompasses an obligation to punish forces after the commission of crimes."⁴⁰⁵

⁴⁰¹ ICTR, *Bagilishema, TC I, Judgement, Case No. ICTR-95-1A-T, 7 June 2001*, para. 50.

⁴⁰² ICTY, *Halilović, TC I, Judgement, Case No. IT-01-48-T, 16 November 2005*, para. 94.

⁴⁰³ *Ibid.*, para. 95

⁴⁰⁴ *Ibid.*, para. 96.

⁴⁰⁵ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 439 (footnotes omitted).

In *Hadžihasanović and Kubura*, the ICTY Trial Chamber held that the duty to punish naturally arises after a crime has been committed:

"The duty to punish the subordinates arises after the crimes have already been committed."⁴⁰⁶

According to the Trial Chamber in *Orić*:

"[...] the superior must have had control over the perpetrators of a relevant crime both at the time of its commission and at the time that measures to punish were to be taken."⁴⁰⁷

The SCSL Trial Chamber in *Sesay et al.* developed the temporal trigger point of the superior's responsibility, focusing on the duty to punish crimes committed outside the time frame where the accused had command over the subordinates:

"Given this basis of superior responsibility, the Chamber considers that the focus of the liability must be on the time during which the superior failed in his duty to prevent or punish. Thus, the Chamber is satisfied that, in order to incur criminal responsibility as a superior, the superior must have had effective control over the perpetrator at the time at which the superior is said to have failed to exercise his powers to prevent or to punish. While in practice the superior will also often have effective control at the time that the subordinate commits or is about to commit a criminal act, this in itself is not required. Thus, if a superior assumes command after a crime has been committed by his subordinates and he knows or has reason to know that such a crime has been committed, the Chamber is of the opinion that to assume his responsibility as a superior officer, he will have the duty to punish the perpetrators from the moment he assumes effective control."⁴⁰⁸

Moreover, the SCSL Trial Chamber in *Sesay et al.* further held that:

"[...] this Chamber is satisfied that the principle of superior responsibility as it exists in customary international law does include the situation in which a Commander can be held liable for a failure to punish subordinates for a crime that occurred before he assumed effective control. While it must clearly be established that the superior exercised effective control over the subordinate who committed the crime at the time that there was an alleged failure in his duty to punish, it is not necessary that the effective control also existed at the time of the criminal act."⁴⁰⁹

⁴⁰⁶ ICTY, *Hadžihasanović and Kubura*, TC, Judgment, IT-01-47-T, 15 March 2006, para. 126.

⁴⁰⁷ ICTY, *Orić*, TC II, Judgment, Case No. IT-03-68-T, 30 June 2006, para. 335.

⁴⁰⁸ SCSL, *Sesay et al.*, TC I, Judgment, Case No. SCSL-04-15-T, 2 March 2009, para. 299 refers to ICTY, *Orić*, AC, Appeal Judgment, Case No. IT-03-68-A, 3 July 2008, Dissenting Opinion of Judge Liu, para. 2.

⁴⁰⁹ *Ibid.*, para. 306.

In *Taylor*, the SCSL Trial Chamber reversed the position taken in *Sesay et al.* Trial Judgement and instead followed the ICTY case law on the temporal nature of the duty to punish:

"The duty to punish only arises once a crime under the Statute has been committed. A superior is bound to conduct a meaningful investigation with a view to establish the facts, order or execute appropriate sanctions, or report the perpetrators to the competent authorities in case the superior lacks sanctioning powers. According to the ICTY Appeals Chamber, there is no support in customary international law for the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate."⁴¹⁰

On the minimum standard of the duty to punish, the ICTY Trial Chamber in *Kordić and Čerkez* held:

"The duty to punish includes at least an obligation to investigate possible crimes or have the matter investigated, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities."⁴¹¹

In *Kvočka et al.*, the ICTY Trial Chamber emphasised the latter point, while adding that a superior does not have to be the person who dispenses the punishment:

"The superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process. [...] material ability to punish, which is key to incurring liability as a commander for crimes committed by subordinates, may simply entail such things as 'submitting reports to the competent authorities in order for proper measures to be taken'.⁴¹²

The ICC Pre-Trial Chamber in the *Bemba* Confirmation of Charges Decision defined the two duties encompassed two ways of fulfilling it:

"The Chamber wishes to point out that the duty to punish requiring the superior to take the necessary measures to sanction the commission of crimes may be fulfilled in two different ways: either by the superior himself taking the necessary and reasonable measures to punish his forces, or, if he does not have the ability to do so, by referring the matter to the competent authorities. Thus, the duty to punish (as part of the duty to repress) constitutes an alternative to the third duty mentioned under Article 28(a)(ii), namely the duty to submit the matter to the

⁴¹⁰ SCSL, *Taylor, TC II, Judgement, Case No. SCSL-03-01-T, 18 May 2012*, para. 502.

⁴¹¹ ICTY, *Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001*, para. 446; similarly, a.o., in ICTY, *Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, para. 302; confirmed by ICTY, *Halilović, TC I, Judgement, Case No. IT-01-48-T, 16 November 2005*, para. 97; ICTY, *Blagojević and Jokić, TC I, Judgement, Case No. IT-02-60-T, 17 January 2005*, para. 793; ICTY, *Strugar, TC II, Judgement, Case No. IT-01-42-T, 31 January 2005*, para. 376; ICTY, *Limaj et al., TC II, Judgement, Case No. IT-03-66-T, 30 November 2005*, para. 529.

⁴¹² ICTY, *Kvočka et al., TC, Judgement, Case No. IT-98-30/1-T, 2 November 2001*, para. 316, with reference to ICTY, *Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, para. 302.

competent authorities, when the superior is not himself in a position to take necessary and reasonable measures to punish."⁴¹³

"Moreover, as explained later, the power of a superior, and thus the punitive measures available to him, will vary according to the circumstances of the case and, in particular, to his position in the chain of command. Accordingly, whether the duty to punish requires exercising his power to take measures himself or to submit the matter to the competent authorities will therefore depend on the facts of the case."⁴¹⁴

In the *Bemba* Judgement, the Trial Chamber found that Bemba himself was the competent authority to repress the crimes and did not sufficiently empower others to be considered as having submitted the matter to the competent authorities:

“as he had ultimate disciplinary authority over the MLC contingent in the CAR, Mr Bemba was the competent authority to investigate and prosecute the crimes. In such circumstances, where he failed to empower other MLC officials to fully and adequately investigate and prosecute allegations of crimes, he cannot be said to have submitted the matter to the competent authorities for investigation and prosecution.”⁴¹⁵

In *Fofana and Kondewa*, the SCSL Trial Chamber stated:

"The Chamber is of the opinion that the duty imposed on a superior to punish subordinate offenders includes the obligation to investigate the crime or to have the matter investigated to establish the facts in order to assist in the determination of the proper course of conduct to be adopted. The superior has the obligation to take active steps to ensure that the offender will be punished. The Chamber further takes the view that in order to discharge his obligation, the superior may exercise his own powers of sanction, or if he lacks such powers, report the offender to the competent authorities."⁴¹⁶

According to the ICTY Appeals Chamber in *Hadžihasanović and Kubura*, disciplinary measures may be sufficient to fulfil the duty to punish:

"It cannot be excluded that, in the circumstances of a case, the use of disciplinary measures will be sufficient to discharge a superior of his duty to punish crimes under Article 7(3) of the Statute. In other words, whether the measures taken were solely of a disciplinary nature, criminal, or a combination of both, cannot in itself

⁴¹³ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 440 (footnotes omitted).

⁴¹⁴ *Ibid.*, para. 441 (footnote omitted).

⁴¹⁵ ICC, *Bemba, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016*, para. 733 (footnote omitted)

⁴¹⁶ SCSL, *Fofana and Kondewa, TC I, Judgement, Case No. SCSL-04-14-T, 2 August 2007*, para. 249 (with reference to ICTY-jurisdiction).

be determinative of whether a superior discharged his duty to prevent or punish under Article 7(3) of the Statute."⁴¹⁷

In *Orić*, the Trial Chamber stated that the duty to punish commences only if, and when, the commission of a crime by a subordinate can be reasonably suspected. Moreover, it further summarised the appropriate standard to be applied in assessing the efforts to punish:

"[...] The superior has to order or execute appropriate sanctions or, if not yet able to do so, he or she must at least conduct an investigation and establish the facts in order to ensure that offenders under his or her effective control are brought to justice. The superior need not conduct the investigation or dispense the punishment in person, but he or she must at least ensure that the matter is investigated and transmit a report to the competent authorities for further investigation or sanction."⁴¹⁸

The Trial Chamber negated the requirement of a causal link between the superior's omission and the commission of crimes of subordinates, but held in this context, that:

"[...] if measures taken by the superior have in fact been successful in preventing or repressing relevant crimes of subordinates, this can serve as prima facie evidence that he did not fail in his duties."⁴¹⁹

On the duty to punish, the ICTR Appeals Chamber in *Bagosora and Nsengiyumva* stated:

"The Trial Chamber's finding that the perpetrators were not punished afterwards cannot in itself amount to a finding that Nsengiyumva failed to discharge his duty to take necessary and reasonable measures to punish the perpetrators of the crimes."⁴²⁰

The perpetrator failed to take the necessary and reasonable measures within his or her power to submit the matter to the competent authorities for investigation and prosecution

Keywords: Take Active Steps – Sham Investigation

⁴¹⁷ ICTY, *Hadžihasanović and Kubura, AC, Appeal Judgement, Case No. IT-01-47-A, 22 April 2008*, para. 33.

⁴¹⁸ ICTY, *Orić, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006*, para. 336 (emphasis added, footnotes omitted).

⁴¹⁹ *Ibid.*, para. 338.

⁴²⁰ ICTR, *Bagosora and Nsengiyumva, AC, Judgement, Case No. ICTR-98-41-A, 14 December 2011*, para. 234.

International Case Law

As a distinct, yet related duty, the ICC Pre-Trial Chamber in the *Bemba* Confirmation of Charges Decision considered the duty to submit the matter to the competent authorities for investigation and prosecution, and held:

"The duty to submit the matter to the competent authorities, like the duty to punish, arises after the commission of the crimes. Such a duty requires that the commander takes active steps in order to ensure that the perpetrators are brought to justice. It remedies a situation where commanders do not have the ability to sanction their forces. This includes circumstances where the superior has the ability to take measures, yet those measures do not seem to be adequate."⁴²¹

According to the *ad hoc* tribunals' jurisprudence, reporting crimes to the appropriate authorities may be sufficient to discharge the obligation to punish, whereas this depends on the circumstances of each case. In *Boškoski and Tarčulovski*, the ICTY Appeals Chamber gave an example of where such a report may not be sufficient:

"If, for instance, the superior knows that the appropriate authorities are not functioning or if he knows that a report was likely to trigger an investigation that was sham, such report would not be sufficient to fulfil the obligation to punish offending subordinates."⁴²²

If an accused reported crimes to appropriate authorities, but these authorities did not handle the case(s) properly, the ICTY Trial Chamber in *Popović et al.* held:

"Even if, in fact, the investigation undertaken was not satisfactory, if the failure of the investigating authorities was not attributable to the superior, and he or she did not know of their failure, or could not anticipate it at the time, the superior cannot be held responsible under Article 7(3). No further reporting or action is required in such a case."⁴²³

Similarly, the Trial Chamber held that a superior was not being required to report crimes,

"[...] when the most which could be done by a superior would be to report the illegal conduct of subordinates to the very persons who had ordered it."⁴²⁴

⁴²¹ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 442 (footnotes omitted).

⁴²² ICTY, *Boškoski and Tarčulovski, AC, Appeal Judgement, Case No. IT-04-82-A, 19 May 2010*, para. 234.

⁴²³ ICTY, *Popović et al., TC II, Judgement, Case No. IT-05-88-T, 10 June 2010*, para. 1046; with reference to ICTY, *Boškoski and Tarčulovski, TC II, Judgement, Case No. IT-04-82-T, 10 July 2008*, para. 536.

⁴²⁴ *Ibid.*, para. 1046; with reference to the ICTY, *Krnojelac, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002*, para. 127, which has not been challenged on appeal.

Publicists

Schabas describes how to identify necessary and reasonable measures as follows:

"The identification of what constitutes necessary and reasonable measures is to be made in light of what is within the 'material possibility' of the commander,⁴²⁵ bearing in mind 'the superior's degree of effective control over his forces at the time his duty arises. This suggests that what constitutes a reasonable and necessary measure will be assessed on the basis of the commander's *de jure* power as well as his *de facto* ability to take such measures.'^{426''427}

Nybondas summarises the ICTY case law on necessary and reasonable measures as follows:

"[...] The *Čelebići* Trial Chamber pointed out that a failure on the part of the superior cannot amount to strict liability, liability in all cases regardless of whether the superior in fact had a possibility to prevent or punish the crimes.⁴²⁸ The definition recognises that a superior can be expected to take the necessary and reasonable measures to prevent or punish crimes by his subordinates. Accordingly, in the opinion of the *Blaškić* Trial Chamber, 'it is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator.'⁴²⁹ It has also been recognised that a determination *in abstracto* of the meaning of the terms 'necessary' and 'reasonable' is not desirable and should be done separately for each case.^{430''431}

Sivakumaran emphasises that the measures depend on the other criteria necessary to establish command responsibility:

"[...] precisely what measures will be undertaken will depend on the material abilities of the superior. The obligation is only engaged as the superior in question has been established as having effective control over the relevant subordinate. The indicia pointing to this effective control will thus have an impact on the measures that were within the superior's powers."⁴³²

⁴²⁵ ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004*, para. 395.

⁴²⁶ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 443.

⁴²⁷ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 464.

⁴²⁸ ICTY, *Mucić et al. ("Čelebići"), TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, para. 383.

⁴²⁹ ICTY, *Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, para. 335.

⁴³⁰ ICTY, *Mucić et al. ("Čelebići"), TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, para. 394.

⁴³¹ Maria L. Nybondas, *Command Responsibility and Its Applicability to Civilian Superiors*, T.M.C. Asser Press, 2010, p. 34.

⁴³² Sandesh Sivakumaran, "Command Responsibility in Irregular Groups", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 5, p. 1141.

Similarly, Mettraux stresses that the measures are contingent on the scope of the superior's responsibilities and mandate:

"It may not be assumed from the fact that a superior had some responsibilities and the ensuing powers that he had all-encompassing responsibility. In fact, a superior could only be held criminally responsible for failing to adopt a measure that fell within the scope of his responsibilities and mandate. In the case of the accused Von Leeb, for instance, the Tribunal pointed out that the executive power with which he had been endowed limited his ability to issue orders—and thus his ability to exercise control and authority—in the field of 'operational' matters. By contrast, administrative matters were not under his responsibility, a fact relevant to both his state of mind and the measures which could be said to fall within the realm of his competence for the purpose of establishing whether he failed in his duties. The Court, therefore, concluded that he could not be held responsible in relation to matters which fell outside the scope of his responsibilities."⁴³³

With respect to the different kinds of measures required, Ambos cautions:

"[...] it would go too far to impose on superiors the duty to either discover or predict the conduct of their troops unless crimes are likely to occur."⁴³⁴

According to Jia:

"[...] Attempts to prevent or suppress, which fall short of the degree of diligence required by the attendant circumstances at the critical time, may not constitute a defence to criminal responsibility."⁴³⁵

Meloni claims that the superior can plead the 'objective impossible defence':

"[...] if he lacked the necessary powers to take the measures required in the actual case. To be granted as a valid defence, and so to exclude the superior's responsibility, it has to be established that it was an absolute and objective impossibility, thus not deriving from the superior's previous negligent behaviour. Indeed if the superior, by exercising his duty to control, did not adopt the proper standard of foreseeability and vigilance, and hence — through his own failure — he allowed a dangerous situation to develop, which then got completely out of his control, that superior could be considered responsible for the crimes committed. In this case the defendant could not successfully plead the defence of the 'objective impossibility to act'; the impossibility would not be objective but rather due to his negligent behaviour, consisting of not having discharged his primary duty to control his subordinates. In other words, the superior would be culpable."⁴³⁶

⁴³³ Guénaél Mettraux, *The Law of Command Responsibility*, Oxford University Press, 2009. p. 238 (footnotes omitted).

⁴³⁴ Kai Ambos, "Superior Responsibility", in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 863 (footnote omitted).

⁴³⁵ Bing Bing Jia, "The Doctrine of Command Responsibility: Current Problems", in *Yearbook of International Humanitarian Law*, 2000, vol. 3, p. 141.

⁴³⁶ Chantal Meloni, *Command Responsibility in International Criminal Law*, T.M.C. Asser, 2010, p. 172 (footnotes omitted).

With respect to when the duty to prevent arises, Bantekas explains:

"[...] The duty to prevent arises upon the preparation or planning of a crime, which suggests that the superior's duty at this stage is supervisory and disciplinary. A superior cannot be expected to foil every plan of his subordinates to commit a crime, but only those for which he has acquired information or for which he has reasonable grounds to suspect that a crime is about to be committed.⁴³⁷ The disciplinary component of the duty to prevent includes an obligation to maintain and impose general discipline, train one's troops on the laws of war and secure an effective reporting system. In cases where information exists that a crime is planned or is in progress the superior must issue and enforce orders to the contrary, protest against it and its protagonists, or criticise criminal action and/or insist before a superior authority that immediate action be taken.⁴³⁸ If all these measures are diligently performed and one's subordinates nonetheless engage in violations of humanitarian law their superior will bear no liability for their actions. Therefore, the duty to prevent should not be conceived as a general police duty, particularly taking in mind the additional combat functions of the superior, but rather as a supervisory and disciplinary duty. The other aspect of the duty to prevent concerns preventing the crime when it is in the process of being attempted. It should be emphasised that where a commander fails to discharge his duty to prevent subordinate criminality he cannot thereafter exonerate himself by punishing the culprits.⁴³⁹"⁴⁴⁰

Mettraux summarises the ICTY case law on the assessment of the measures to be taken to prevent as follows:

"According to the *Strugar* Trial Chamber, factors relevant to the Chamber's assessment include, but are not limited to, whether specific orders prohibiting or stopping the criminal activities were issued; what measures to secure the implementation of these orders were taken; what other measures were taken to secure that the unlawful acts were interrupted and whether these measures were reasonably sufficient in the specific circumstances; and, after the commission of the crime, what steps were taken to secure an adequate investigation and to bring the perpetrators to justice.⁴⁴¹

In all cases when superior responsibility charges are brought, measures relevant to assessing the criminal responsibility of the accused are limited to those which are 'feasible in all the circumstances and are "within his power"'."⁴⁴²"⁴⁴³

⁴³⁷ See ICTY, *Strugar, AC, Appeal Judgement, Case No. IT-01-42-A, 17 July 2008*, para. 83; ICTY, *Strugar, TC II, Judgement, Case No. IT-01-42-T, 31 January 2005*, para. 373.

⁴³⁸ ICTY, *Strugar, TC II, Judgement, Case No. IT-01-42-T, 31 January 2005*, para. 374.

⁴³⁹ ICTY, *Šainović et al., AC, Appeal Judgement, Case No. IT-05-87-A, 23 January 2014*, para. 116.

⁴⁴⁰ Ilias Bantekas, *International Criminal Law*, Hart, 2010, p. 93-94.

⁴⁴¹ ICTY, *Strugar, TC II, Judgement, Case No. IT-01-42-T, 31 January 2005*, para. 378.

⁴⁴² ICTY, *Krnjelac, TC II, Judgement, Case No. IT-97-25-T, 15 March 2002*, para. 95 [...]; ICTY, *Mucić et al. ("Čelebići"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 226.

⁴⁴³ Mettraux, 2009, p. 235.

Meloni recapitulates the ICC's understanding of the duty to repress as follows:

"The Pre-Trial Chamber [in *Bemba*] acknowledged that the duty to repress is a twofold concept, in the sense that it encompasses two different duties arising at two different stages of the commission of the crimes.⁴⁴⁴ 'First, the duty to repress includes a duty to stop ongoing crimes from continuing to be committed.'⁴⁴⁵ Here the duty in question would be equivalent to the duty 'to suppress' crimes, which was used in Article 87(1) Add. Prot. I to the Geneva Conventions.'⁴⁴⁶ In other words it would be the superior's duty to 'interrupt a possible chain effect, which may lead to other similar events'.⁴⁴⁷ In this first meaning the duty to repress can thus be substantially likened to the duty to prevent. Second, in the view of the judges, 'the duty to repress encompasses an obligation to punish forces after the commission of crimes.'⁴⁴⁸ Instead, the duty to submit the matter to the competent authorities comes into play only in those cases in which the superior did not possess other powers of intervention, and in particular the power to punish, typical of the military sphere.'⁴⁴⁹ The provision of the latter duty by Article 28 ICC Statute is an innovation compared to the previous norms on command responsibility [...]."⁴⁵⁰

Regarding disciplinary sanctions, Cryer et al. consider that:

"[...] There are certain circumstances in which the possibility that the duty to punish may be fulfilled by the use of disciplinary sanctions rather than criminal prosecutions 'cannot be excluded',⁴⁵¹ but, for international crimes, these will be rare:⁴⁵² What can be expected of irregular groups in regard to punishment is a further complicating factor, although not an insuperable one.⁴⁵³"⁴⁵⁴

Regarding the duty to submit to the competent authorities, Ambos notes:

"[...] the formulation 'submit to the competent authorities' is new; however, it corresponds in substance to the earlier 'report' requirement. It fills a gap in that it

⁴⁴⁴ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 439

[...].

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Ibid.*, [...].

⁴⁴⁸ *Ibid.*

⁴⁴⁹ Reference is made to all those superiors who do not possess the disciplinary powers necessary for taking a decision directly in order to punish the culprits of the breaches. The superior can thus only submit the matter to the competent authorities for action to be taken.

⁴⁵⁰ Meloni, 2010, p. 169.

⁴⁵¹ ICTY, *Hadžihasanović and Kubura, AC, Appeal Judgement, Case No. IT-01-47-A, 22 April 2008*, para. 33.

⁴⁵² *Ibid.*, paras. 149-55. As this case notes though, if matters are referred on, it will not always be determinative that those authorities do not take sufficient action.

⁴⁵³ See Sivakumaran, 2012, pp. 1144-1150 [...].

⁴⁵⁴ Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, p. 392.

formulates a specific duty for those superiors who have themselves no disciplinary powers to 'repress' a crime."⁴⁵⁵

Finally, with respect to the contemporaneity between the effective control and the failure to fulfil his/her duties, Schabas recaps the *ad hoc* tribunals' case law as follows:

"[...] Two views have emerged with respect to the requirement that the control be exercised at the time of the offence, with the majority view requiring effective control at the time of commission of the crime,⁴⁵⁶ with a minority of judges at the International Criminal Tribunal for the former Yugoslavia as well as a Trial Chamber of the Special Court for Sierra Leone taking the view that the 'superior must have had effective control over the perpetrator at the time at which the superior is said to have failed to exercise his powers to prevent or to punish.'⁴⁵⁷ Trial Chamber II considered that the suspect must have had effective control 'at least when the crimes were about to be committed'.⁴⁵⁸ It said the phrase 'as a result of his or her failure to exercise control properly over such forces...in Article 28(1), suggests that the superior was already in control before the crimes were committed.'⁴⁵⁹

⁴⁵⁵ Ambos, 2002, p. 862.

⁴⁵⁶ ICTY, Halilović, AC, Appeal Judgement, Case No. IT-01-48-A, 16 October 2007, para. 59; ICTR, Bagosora et al., TC I, Judgement, Case No. ICTR-98-41-T, 18 December 2008, para. 2012.

⁴⁵⁷ ICC, Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 418, citing ICTY, Orić, AC, Appeal Judgement, Case No. IT-03-68-A, 3 July 2008, Declaration of Judge Shahabuddeen; Partially Dissenting Opinion and Declaration of Judge Liu, 3 July 2008; SCSL, Sesay et al., TC I, Judgement, Case No. SCSL-04-15-T, 2 March 2009, para. 299.

⁴⁵⁸ *Ibid.*, para. 419.

⁴⁵⁹ Schabas, 2010, p. 461.

9. Mens Rea

The perpetrator either knew or owing to the circumstances at the time, should have known that the forces were committing or about to commit one or more of the crimes

The perpetrator knew that the forces were committing or about to commit the crime [OR]

Keywords: Circumstantial Evidence – Geographical Location of the Acts – Command Position – Deliberately Refrained from Obtaining the Information – Standard of Proof for Informal Types of Authority – Identity of the Direct Perpetrators

International Case Law

In some cases, it is possible that there is no direct evidence that the commander knew of the offences committed by his subordinates. With respect to the type of evidence that may be presented to prove the commander's knowledge, the ICTY Trial Chamber in *Mucić et al. ("Čelebići")* stated that:

"[...] in the absence of direct evidence of the superior's knowledge of the offences committed by his subordinates, such knowledge cannot be presumed, but must be established by way of circumstantial evidence. In determining whether a superior, despite pleas to the contrary, in fact must have possessed the requisite knowledge, the Trial Chamber may consider, inter alia, the following indicia [...]:

- (a) The number of illegal acts;
- (b) The type of illegal acts;
- (c) The scope of illegal acts;
- (d) The time during which the illegal acts occurred;
- (e) The number and type of troops involved;
- (f) The logistics involved, if any;

- (g) The geographical location of the acts;
- (h) The widespread occurrence of the acts;
- (i) The tactical tempo of operations;
- (j) The modus operandi of similar illegal acts;
- (k) The officers and staff involved;
- (l) The location of the commander at the time."⁴⁶⁰

In **Aleksovski**, the Trial Chamber developed the link between geographical locations of the acts and the knowledge of the superior that crimes were committed by his subordinates:

"The Trial Chamber deems however that an individual's superior position *per se* is a significant indicium that he had knowledge of the crimes committed by his subordinates. The weight to be given to that indicium however depends *inter alia* on the geographical and temporal circumstances. This means that the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them. Conversely, the commission of a crime in the immediate proximity of the place where the superior ordinarily carried out his duties would suffice to establish a significant indicium that he had knowledge of the crime, a fortiori if the crimes were repeatedly committed."⁴⁶¹

This was confirmed by the ICTR Trial Chamber, which specified in **Bagilishema** that:

"A significant indicium need not, of course, be a sufficient indicium. The final clause of the above excerpt [*Aleskovski*] indicates that other indicia (such as the *number* of illegal acts committed at the given location) may be necessary for the mental element to be established with sufficient certainty."⁴⁶²

With respect to the commander position towards his subordinates, the ICTY Trial Chamber in **Blaškić** held:

"[a]n individual's command position *per se* is a significant indicium that he knew about the crimes committed by his subordinates."⁴⁶³

⁴⁶⁰ ICTY, *Mucić et al. ("Čelebići")*, TC, Judgment, Case No. IT-96-21-T, 16 November 1998, para. 386.

⁴⁶¹ ICTY, *Aleksovski*, TC, Judgment, Case No. IT-95-14/1-T, 25 June 1999, para. 80; see also ICTY, *Naletilić and Martinović*, TC, Judgment, Case No. IT-98-34-T, 31 March 2003, para. 72; ICTY, *Stakić*, TC II, Judgment, Case No. IT-97-24-T, 31 July 2003, para. 460; where both Trial Chambers referred to ICTY, *Aleksovski*, TC, Judgment, Case No. IT-95-14/1-T, 25 June 1999, para. 80.

⁴⁶² ICTR, *Bagilishema*, TC I, Judgment, Case No. ICTR-95-1A-T, 7 June 2001, para. 968; confirmed in ICTR, *Ntagerura et al.*, TC III, Judgment, Case No. ICTR-99-46-T, 25 February 2004, para. 648.

⁴⁶³ ICTY, *Blaškić*, TC, Judgment, Case No. IT-95-14-T, 3 March 2000, para. 308; confirmed in ICTY, *Blaškić*, AC, Appeal Judgment, Case No. IT-95-14-A, 29 July 2004, paras. 54-57.

In **Orić**, the Trial Chamber clarified that:

"[...] such status is not to be understood as a conclusive criterion but must be supported by additional factors."⁴⁶⁴

In **Stakić**, the Trial Chambers held that:

"Knowledge may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so."⁴⁶⁵

In **Naletilić and Martinović**, the Trial Chamber concurred that:

"The fact that a military commander will most probably be part of an organised structure with reporting and monitoring systems can facilitate the showing of actual knowledge. For *de facto* commanders in more informal military structures and for civilian superiors the standard of proof is higher."⁴⁶⁶

This was confirmed by the Trial Chamber in the **Orić** Judgement:

"This may, in particular, imply that the threshold required to prove knowledge of a superior exercising more informal types of authority is higher than for those operating within a highly disciplined and formalised chain of command with established reporting and monitoring systems."⁴⁶⁷

The ICC Pre-Trial Chamber in the **Bemba** Confirmation of Charges Decision endorsed the factors retained by the *ad hoc* tribunals:

"In this regard, the Chamber considers that Article 28(a) of the Statute encompasses two standards of fault element. The first, which is encapsulated by the term 'knew', requires the existence of actual knowledge. [...]"⁴⁶⁸

"With respect to the suspect's actual knowledge that the forces or subordinates were committing or about to commit a crime, it is the view of the Chamber that such knowledge cannot be 'presumed'. [...]"⁴⁶⁹

"These factors include the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communication, the

⁴⁶⁴ ICTY, *Orić*, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006, para. 319.

⁴⁶⁵ ICTY, *Stakić*, TC II, Judgement, Case No. IT-97-24-T, 31 July 2003, para. 460; referring to ICTY, *Mucić et al. ("Čelebići")*, AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001, para. 226. Confirmed in ICTY, *Brđanin*, TC II, Judgement, Case No. IT-99-36-T, 1 September 2004, para. 278.

⁴⁶⁶ ICTY, *Naletilić and Martinović*, TC, Judgement, Case No. IT-98-34-T, 31 March 2003, para. 73.

⁴⁶⁷ ICTY, *Orić*, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006, para. 320.

⁴⁶⁸ ICC, *Bemba*, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 429.

⁴⁶⁹ *Ibid.*, para. 430.

modus operandi of similar acts, the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts. Actual knowledge may be also proven if, 'a priori, [a military commander] is part of an organised structure with established reporting and monitoring systems'. Thus, the Chamber considers that these factors are instructive in making a determination on a superior's knowledge within the context of Article 28 of the Statute."⁴⁷⁰

In *Karemera et al.*, the ICTR Trial Chamber used one of these criteria to conclude that the accused knew that the crimes were being committed:

"As discussed in the factual findings, the massacres and attacks committed by the Interahamwe, members of the Civil Defence Program, local officials who were part of the territorial administration, and administrative personnel in the Ministries controlled by the MRND, among others, were so widespread and public that it would have been impossible for Karemera to be unaware of them."⁴⁷¹

The SCSL Trial Chamber in *Taylor* summarised what was intended by actual knowledge:

"Actual knowledge may be defined as the awareness that the relevant crimes were committed or about to be committed."⁴⁷²

In the *Bemba* Judgement, the ICC Trial Chamber added a factor not noted by the Pre-Trial Chamber:

"the notoriety of illegal acts, such as whether they were reported in media coverage of which the accused was aware. Such awareness may be established by evidence suggesting that, as a result of these reports, the commander took some kind of action."⁴⁷³

The Trial Chamber also specified that:

"Article 28 does not require that the commander knew the identities of the specific individuals who committed the crimes. In addition, it is unnecessary to establish that the accused mastered every detail of each crime committed by the forces, an issue that becomes increasingly difficult as one goes up the military hierarchy."⁴⁷⁴

⁴⁷⁰ *Ibid.*, para. 431 (footnotes omitted).

⁴⁷¹ ICTR, *Karemera and Ngirumpatse, TC III, Judgement, Case No. ICTR-98-44-T, 2 February 2012*, para. 1530.

⁴⁷² SCSL, *Taylor, TC II, Judgement, Case No. SCSL-03-01-T, 18 May 2012*, para. 497.

⁴⁷³ ICC, *Bemba, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016*, para. 193.

⁴⁷⁴ *Ibid.*, para. 194.

The perpetrator should, owing to the circumstances at the time, have known that the forces were committing or about to commit the crime

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International Case Law

The "should have known" standard was established in the post-World War II trials. Commenting on the trial of the Japanese General **Yamashita** before a United States Military Commission in Manila,⁴⁷⁵ the United Nations War Crimes Commission stated that:

"[...] the crimes which were shown to have been committed by Yamashita's troops were so widespread, both in space and in time, that they could be regarded as providing either *prima facie* evidence that the accused knew of their perpetration, or evidence that he must have failed to fulfil a duty to discover the standard of conduct of his troops."⁴⁷⁶

The "should have known" standard can also be traced back to the International Military Tribunal for the Far East (IMTFE), which stated that:

"[...] if such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his office required or permitted him to take any action to prevent such crimes."⁴⁷⁷

In the **Toyoda** case, the IMTFE stated that:

"In the simplest language it may be said that this Tribunal believes the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must

⁴⁷⁵ *U.S.A. v Yamashita, United States Military Commission, Manila, 8 October-7 December 1945*; See also *In Re Yamashita*, 327 US 1, 14-16 (1945). This case was brought before the Supreme Court on petition for writ of habeas corpus, and unsuccessfully challenged the jurisdiction of the Military Commission in Manila.

⁴⁷⁶ *Trial of General Tomoyuki Yamashita, Vol. IV, Law Reports*, p. 82 (footnote and emphasis omitted).

⁴⁷⁷ Tokyo Trial, Official Transcript, 4 November 1948, pp. 48, 445.

be punished. In determining the guilt or innocence of an accused charged with dereliction of his duty as a commander, consideration must be given too many factors. The theory is simple, its application is not. [...] His guilt cannot be determined by whether he had operational command, administrative command, or both. If he knew, or should have known, by use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and punish the offenders, he was derelict in his duties. Only the degree of his guilt would remain."⁴⁷⁸

In the *Hostages* case held before a US Military Tribunal under Control Council Law No. 10, the tribunal rejected the defence of the accused General List that he had no knowledge of unlawful killings committed by his subordinates, stating that:

"A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area of his command. His responsibility is coextensive with his area of command. He is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence. Absence from headquarters cannot and does not relieve one from responsibility for acts committed in accordance with a policy he instituted or in which he acquiesced."⁴⁷⁹

The US Military Tribunal hearing the *High Command* case held that:

"Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence."⁴⁸⁰

Commenting on these cases, the ICTY Trial Chamber in *Čelebići* held that:

"[I]t is to be noted that the jurisprudence from the period immediately following the Second World War affirmed the existence of a duty of commanders to remain informed about the activities of their subordinates. Indeed, from a study of these decisions, the principle can be obtained that the absence of knowledge should not

⁴⁷⁸ U.S.A. v. *Soemu Toyoda*, Official Transcript of Record of Trial, 6 September 1949, p. 5006.

⁴⁷⁹ U.S.A. v. *Wilhelm List et al.*, in *Trials of War Criminals*, vol. XI, p. 1271.

⁴⁸⁰ U.S.A. v. *Wilhelm von Leeb et al.*, in *Trials of War Criminals*, vol. XI, pp. 543-544.

be considered a defence if, in the words of the Tokyo Judgement, the superior was 'at fault in having failed to acquire such knowledge'.⁴⁸¹

After reviewing the jurisprudence following World War II, the *Blaškić* Trial Chamber also concluded that:

"[A]fter World War II, a standard was established according to which a commander may be liable for crimes by his subordinates if 'he failed to exercise the means available to him to learn of the offence and, under the circumstances, he should have known and such failure to know constitutes criminal dereliction'.⁴⁸²

It has been questioned, how far Article 86(2) Additional Protocol I as part of customary law influences the interpretation of the "had reasons to know" standard.⁴⁸³ Contradictory views were expressed by the ICTY Trial Chambers in *Čelebići* and *Blaškić*. In *Čelebići*, the Trial Chamber concluded that:

"An interpretation of the terms of [Article 86(2) of Additional Protocol I] [...] leads to the conclusion [...] that a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates. This standard, which must be considered to reflect the position of customary law at the time of the offences alleged in the Indictment, is accordingly controlling for the construction of the *mens rea* standard established in Article 7(3). The Trial Chamber thus makes no finding as to the present content of customary law on this point. It may be noted, however, that the provision on the responsibility of military commanders in the Rome Statute of the International Criminal Court provides that a commander may be held criminally responsible for failure to act in situations where he knew or should have known of offences committed, or about to be committed, by forces under his effective command and control, or effective authority and control."⁴⁸⁴

⁴⁸¹ ICTY, *Mucić et al. ("Čelebići")*, *TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, para. 388; referring to the Tokyo Trial Official Transcript, 4 November 1948, pp. 48, 445.

⁴⁸² ICTY, *Blaškić*, *TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, para. 322; referring to W.H. Parks, "Command Responsibility for War Crimes", in *Military Law Review* 1973, vol. 62, no. 1, p. 90.

⁴⁸³ Article 86(2) provides that: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

⁴⁸⁴ ICTY, *Mucić et al. ("Čelebići")*, *TC, Judgement*, Case No. IT-96-21-T, 16 November 1998, para. 393 (emphasis added).

This was rejected by the Trial Chamber in the *Blaškić* Judgement:

"The pertinent question is this: was customary international law altered with the adoption of Additional Protocol I, in the sense that a commander can be held accountable for failure to act in response to crimes by his subordinates only if some specific information was in fact available to him which would provide notice of such offences? Based on the following analysis, the Trial Chamber is of the view that this is not so."⁴⁸⁵

The Trial Chamber concluded that:

"[...] if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties [...]."⁴⁸⁶

However, in *Čelebići*, the ICTY Appeals Chamber affirmed the position held by the Trial Judgement:

"The point here should not be that knowledge may be presumed if a person fails in his duty to obtain the relevant information of a crime, but that it may be presumed if he had the means to obtain the knowledge but deliberately refrained from doing so."⁴⁸⁷

The Appeals Chamber further confirmed that:

"[...] an assessment of the mental element required by Article 7(3) of the Statute should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question. Thus, as correctly held by the Trial Chamber, as the element of knowledge has to be proved in this type of cases, command responsibility is not a form of strict liability. A superior may only be held liable for the acts of his subordinates if it is shown that he 'knew or had reason to know' about them. The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability."⁴⁸⁸

The Appeals Chamber further specified:

"The Appeals Chamber upholds the interpretation given by the Trial Chamber to the standard 'had reason to know', that is, a superior will be criminally responsible

⁴⁸⁵ ICTY, *Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, para. 324.

⁴⁸⁶ *Ibid.*, para. 332.

⁴⁸⁷ ICTY, *Mucić et al. ("Čelebići"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 226.

⁴⁸⁸ *Ibid.*, para. 239.

through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates. This is consistent with the customary law standard of *mens rea* as existing at the time of the offences charged in the Indictment."⁴⁸⁹

In the ***Bagilishema*** case, the ICTR Appeals Chamber held that:

"The 'had reason to know' standard does not require that actual knowledge, either explicit or circumstantial, be established. Nor does it require that the Chamber be satisfied that the accused actually knew that crimes had been committed or were about to be committed. It merely requires that the Chamber be satisfied that the accused had 'some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates.'"⁴⁹⁰

Moreover, it found that:

"[...] pursuant to Article 6(3) of the Statute, the accused either 'knew' or 'had reason to know', whether such a state of knowledge is proved directly or circumstantially."⁴⁹¹

In *casu*, the Appeals Chamber in ***Bagilishema*** distinguished:

"[...] between the fact that the Accused had information about the general situation that prevailed in Rwanda at the time, and the fact that he had in his possession general information which put him on notice that his subordinates might commit crimes."⁴⁹²

Hereto, the ICTY Appeals Chamber Judgement in ***Krnjelac*** held that:

"[T]his information [the information in the superior's possession] does not need to provide specific information about unlawful acts committed or about to be committed. [...] In other words, and again using the above example of the crime of torture, in order to determine whether an accused 'had reason to know' that his subordinates had committed or were about to commit acts of torture, the Court must ascertain whether he had sufficiently alarming information (bearing in mind that, as set out above, such information need not be specific) to alert him to the risk of acts of torture being committed, that is of beatings being inflicted not arbitrarily but for one of the prohibited purposes of torture. Thus, it is not enough that an accused has sufficient information about beatings inflicted by his

⁴⁸⁹ *Ibid.*, para. 241.

⁴⁹⁰ ICTR, *Bagilishema, AC, Appeal Judgement, Case No. ICTR-95-1A-A, 3 July 2002*, para. 28. Confirmed in ICTR, *Nahimana et al., AC, Appeal Judgement, Case No. ICTR-99-52-A, 28 November 2007*, para. 791 and ICTR, *Bagilishema, AC, Appeal Judgement, Case No. ICTR-95-1A-A, 3 July 2002*, para. 42; with reference to ICTY, *Mucić et al. ("Čelebići"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 238.

⁴⁹¹ *Ibid.*, para. 37.

⁴⁹² *Ibid.*, para. 42.

subordinates; he must also have information – albeit general – which alerts him to the risk of beatings being inflicted for one of the purposes provided for in the prohibition against torture."⁴⁹³

Affirming the Appeals Chamber's interpretation in *Čelebići*, the Trial Chamber in the *Hadžihasanović and Kubura* Judgement held that:

"[A] superior may be held criminally responsible through the principles of superior responsibility only if specific information was available to him which would have put him on notice of offences committed or about to be committed by his subordinates. It is clear from the Appeals Chamber's finding that the mental element for 'had reason to know' is determined only by reference to the information in fact available to the superior and that it is sufficient for the information to be of a nature which, at least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were or were about to be committed. By adopting that interpretation, the Appeals Chamber rejected the stricter criteria of 'should have known', and held that a superior cannot be held criminally responsible for neglecting to acquire knowledge of the acts of subordinates, but only for failing to take the necessary and reasonable measures to prevent or to punish."⁴⁹⁴

Regarding the form of the information available, the Appeals Chamber in *Čelebići* held that:

"As to the form of the information available to him, it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system. This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge."⁴⁹⁵

The Trial Chamber in *Kvočka et al.* gave another example:

"The information available to the superior may be written or oral. It need not be explicit or specific, but it must be information – or the absence of information -- that would suggest the need to inquire further. Information that would make a superior suspicious that crimes might be committed includes past behaviour of subordinates or a history of mistreatment: [...] Similarly, if a superior has prior knowledge that women detained by male guards in detention facilities are likely to be subjected to sexual violence, that would put him on sufficient notice that extra measures are demanded in order to prevent such crimes."⁴⁹⁶

⁴⁹³ ICTY, *Krnjelac, AC, Appeal Judgement, Case No. IT-97-25-A, 17 September 2003*, paras. 154-155.

⁴⁹⁴ ICTY, *Hadžihasanović and Kubura, TC, Judgement, Case No. IT-01-47-T, 15 March 2006*, paras. 95-96.

⁴⁹⁵ ICTY, *Mucić et al. ("Čelebići"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 238.

⁴⁹⁶ ICTY, *Kvočka et al., TC, Judgement, Case No. IT-98-30/1-T, 2 November 2001*, paras. 317-318.

The Trial Chamber in *Šainović et al.* confirmed:

"An accused has 'reason to know' if he has information available to him putting him on notice of the need for additional investigation, in order to ascertain whether his subordinates were about to engage, were engaging, or had engaged in conduct constituting a crime or underlying offence under the Statute of the Tribunal. [...] It is not required that he actually acquainted himself with such information: it suffices that such information was available to him. [...] Furthermore, if an accused deliberately refrains from obtaining further information, despite having the means to do so, he may be considered to have had 'reason to know'. However, the accused's duty to investigate further only arises from the time at which admonitory information becomes available to him, and a failure to seek out such information in the first place will not, on its own, trigger liability under Article 7(3)."⁴⁹⁷

In the *Čelebići* case, the Appeals Chamber also held that:

"Finally, the relevant information only needs to have been provided or available to the superior, or in the Trial Chamber's words, 'in the possession of'. It is not required that he actually acquainted himself with the information. In the Appeals Chamber's view, an assessment of the mental element required by Article 7(3) of the Statute should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question. Thus, as correctly held by the Trial Chamber, as the element of knowledge has to be proved in this type of cases, command responsibility is not a form of strict liability. [...] The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability."⁴⁹⁸

In the *Krnjelac* Appeal Judgement the ICTY Appeals Chamber consented:

"The Appeals Chamber considers that the question for the Trial Chamber was not whether what was reported to Krnjelac was in fact true but whether the information he received from the detainees was enough to constitute 'alarming information' requiring him, as superior, to launch an investigation or make inquiries."⁴⁹⁹

In *Jokić ("Dubrovnik")*, the Appeals Chamber recalled:

"[...] that under the correct legal standard, sufficiently alarming information putting a superior on notice of the risk that crimes might subsequently be carried out by his subordinates and justifying further inquiry is sufficient to hold a superior liable under Article 7(3) of the Statute."⁵⁰⁰

⁴⁹⁷ ICTY, *Šainović et al.*, *TC, Judgement, Case No. IT-05-87-T*, 26 February 2009, para. 120.

⁴⁹⁸ ICTY, *Mucić et al. ("Čelebići")*, *AC, Appeal Judgement, Case No. IT-96-21-A*, 20 February 2001, para. 239.

⁴⁹⁹ ICTY, *Krnjelac*, *AC, Appeal Judgement, Case No. IT-97-25-A*, 17 September 2003, para. 59.

⁵⁰⁰ ICTY, *Jokić*, *AC, Appeal Judgement, Case No. IT-01-42/1-A*, 30 August 2005, para. 304.

In *Kordić and Čerkez*, the Trial Chamber held that:

"It appears clearly from the Appeals Chamber's findings that a superior may be regarded as having 'reason to know' if he is in possession of sufficient information to be on notice of the likelihood of subordinate illegal acts, i.e., if the information available is sufficient to justify further inquiry. The level of training, or the character traits or habits of the subordinates, are referred to by way of example as general factors which may put a superior on notice that subordinate crimes may be committed. The indicia listed in the United Nations Commission of Experts Report, referred to in the context of actual knowledge, could also be used in this context to determine whether knowledge of the underlying offences alleged could be imputed to an accused."⁵⁰¹

The Trial Chamber in *Orić* added:

"What is required though, beyond solely negligent ignorance, is the superior's factual awareness of information which, due to his position, should have provided a reason to avail himself or herself of further knowledge. Without any such subjective requirement, the alternative basis of superior criminal responsibility by having had 'reason to know' would be diminished into a purely objective one and, thus, run the risk of transgressing the borderline to 'strict liability.'⁵⁰²

As to the theory of negligence, the Appeals Chamber in *Blaškić* found that:

"[...] [T]he Appeals Chamber recalls that the ICTR Appeals Chamber has on a previous occasion rejected criminal negligence as a basis of liability in the context of command responsibility, and that it stated that 'it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law.' It expressed that 'references to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought....' The Appeals Chamber expressly endorses this view."⁵⁰³

To the term of "negligence" in this context, the Appeals Chamber found that:

"References to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought, as the Judgement of the Trial Chamber in the present case illustrates. The law imposes upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed, and to punish crimes which he knows or has reason to know had been committed, by subordinates over whom he has effective control. A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either

⁵⁰¹ ICTY, *Kordić and Čerkez*, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 437.

⁵⁰² ICTY, *Orić*, TC II, Judgement, Case No. IT-03-68-T, 30 June 2006, para. 324.

⁵⁰³ ICTY, *Blaškić*, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004, para. 63; with reference to ICTR, *Bagilishema*, AC, Appeal Judgement, Case No. ICTR-95-1A-A, 3 July 2002, para. 35.

by deliberately failing to perform them or by culpably or wilfully disregarding them."⁵⁰⁴

Recalling the criteria put forward in *Čelebići*, the Trial Chamber in *Dorđević* stated:

"A superior's knowledge of and failure to punish his subordinates' past offences is insufficient, in itself, to conclude that the superior knew that similar future offences would be committed by the same group of subordinates, yet this may, depending on the circumstances of the case, nevertheless constitute sufficiently alarming information to justify further inquiry under the "had reason to know" standard. If the superior deliberately refrains from obtaining further information, even though he had the means to do so, he may well be considered to have "had reason to know" of the crimes."⁵⁰⁵

More precisely, the SCSL Trial Chamber in *Taylor* defined the "should have known" requirement this way:

"In determining whether a superior "had reason to know", or imputed knowledge, that his or her subordinates were committing or about to commit a crime, it must be shown that specific information was available which would have put the superior on notice of crimes committed or about to be committed. The superior may not be held liable for failing to acquire such information in the first place. However, it suffices for the superior to be in possession of sufficient information, even general in nature, written or oral, of the likelihood of illegal acts by subordinates. The superior need only have notice of a risk that crimes might be carried out and there is no requirement that this be a strong risk or a substantial likelihood. It is clear from the case law referred to above that negligence is insufficient to attribute imputed knowledge, and that a superior cannot be held liable for having failed in his duty to obtain information in the first place. What is required is the superior's awareness of information which should have prompted him or her to acquire further knowledge. Responsibility pursuant to Article 6(3) of the Statute will attach when the superior remains wilfully blind to the information that is available to him."⁵⁰⁶

In the *Bemba* Confirmation of Charges Decision, however, the ICC Pre-Trial Chamber held that:

"The 'should have known standard requires the superior to 'ha[ve] merely been negligent in failing to acquire knowledge' of his subordinates' illegal conduct. [...] [I]t is the Chamber's view that the 'should have known' standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime. The drafting history of

⁵⁰⁴ *Ibid.*, para. 35.

⁵⁰⁵ ICTY, *Dorđević*, TC II, *Judgement*, Case No. IT-05-87/1-T, 23 February 2011, para. 1886.

⁵⁰⁶ SCSL, *Taylor*, TC II, *Judgement*, Case No. SCSL-03-01-T, 18 May 2012, paras. 498-499.

this provision reveals that it was the intent of the drafters to take a more stringent approach towards commanders and military-like commanders compared to other superiors that fall within the parameters of Article 28(b) of the Statute. This is justified by the nature and type of responsibility assigned to this category of superiors."⁵⁰⁷

The Pre-Trial Chamber also found that:

"[T]he 'had reason to know' criterion embodied in the Statutes of the ICTR, ICTY and SCSL sets a different standard to the 'should have known' standard under Article 28 (a) of the Statute. However, despite such a difference, which the Chamber does not deem necessary to address in the present decision, the criteria or indicia developed by the *ad hoc* tribunals to meet the standard of 'had reason to know' may also be useful when applying the 'should have known' requirement. [...] [T]he suspect may be considered to have known, if inter alia, and depending on the circumstances of each case: (i) he had general information to put him on notice of crimes committed by subordinates or of the possibility of occurrence of the unlawful acts; and (ii) such available information was sufficient to justify further inquiry or investigation. The Chamber also believes that failure to punish past crimes committed by the same group of subordinates may be an indication of future risk."⁵⁰⁸

In the *Brđanin* case, the Trial Chamber held that:

"It is therefore necessary to distinguish between the *mens rea* required for the crimes perpetrated by the subordinates and that required for the superior. [...] If the elements dictated by Article 7(3) are fulfilled, there is no reason why superiors should not be convicted pursuant to Article 7(3) for genocide; genocide is, after all, the crime with which the superiors associated themselves with, through the deliberate failure to carry out their duty to exercise control."⁵⁰⁹

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According to Martinez, by the end of the post-World War II trials:

"[...] a consensus had emerged that liability could be imposed for a leader's failure to act in the context of actual knowledge of crimes by subordinates; the finding of

⁵⁰⁷ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, paras. 432-433.

⁵⁰⁸ *Ibid.*, para. 434 (footnotes omitted).

⁵⁰⁹ ICTY, *Brđanin, TC II, Judgement, Case No. IT-99-36-T, 1 September 2004*, para. 720.

actual knowledge could be based on either express evidence of knowledge, or inferential proof of knowledge based on the widespread nature of the offences."⁵¹⁰

Ambos notes that two *mens rea* standards were maintained:

"[...] the tribunal in the *High Command* case clearly rejected *Yamashita*, applying instead a standard of positive knowledge, while the Tribunal in the *Hostage* case opted for a should-have-known standard based on the concrete information received by the superior."⁵¹¹

Martinez also points out to two *mens rea* standards:

"[...] Significantly, almost all of the [post-World War II trials] also suggested that, even in the absence of proof of actual knowledge, a culpable failure to obtain information about the conduct of subordinates might suffice. The scope of the latter category was still unclear, as to the scope of the duty to obtain information about subordinates, as to what level of awareness of risk was required to trigger the duty of investigation, and as to the attitude that must accompany a culpable failure to inquire. Some decisions had suggested 'negligence or supineness' might be enough while others had required a 'wanton, immoral disregard', and still others suggested that 'constructive' knowledge would be imputed to the commander where crimes were extremely widespread regardless of whether he had actual knowledge."⁵¹²

With respect to a presumption of knowledge due to a commander's position, Nybondas comments:

"[...] if there is no direct evidence of the knowledge, it may not be presumed but must be based on circumstantial evidence. However, the Trial Chamber in the *Aleksovski* Judgement held that, '[A]n individual's superior position per se is a significant indicium that he had knowledge of the crimes committed by his subordinates.'⁵¹³ This supports the view that although the superior position alone is not enough to prove the superior's actual knowledge of the crimes, the evidence that will have to be brought forward in order to prove superior responsibility may vary depending on the position of authority and level of responsibility of the superior.⁵¹⁴"⁵¹⁵

⁵¹⁰ Jenny S. Martinez, "Understanding Mens Rea in Command Responsibility From Yamashita to Blaškić and Beyond", in *Journal of International Criminal Justice*, 2007, 5, no. 3, p. 652.

⁵¹¹ Kai Ambos, "Superior Responsibility", in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 830 (footnote omitted).

⁵¹² Martinez, 2007, p. 652-653 (footnotes omitted).

⁵¹³ ICTY, *Aleksovski, TC, Judgement, Case No. IT-95-14/1-T, 25 June 1999*, para. 80.

⁵¹⁴ ICTY, *Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001*, para. 428.

⁵¹⁵ Maria L. Nybondas, *Command Responsibility and Its Applicability to Civilian Superiors*, T.M.C. Asser Press, 2010, p. 35.

Jia notes:

"[...] the plea of lack of knowledge will not automatically found a defence if the lack of knowledge was due to the commander deliberately refraining from acquiring such knowledge."⁵¹⁶

According to Arnold, the ICTY case law postulates that the commander is not under a duty to obtain information:

"The *Čelebići Case* clarified the status of customary law, holding that the *knew or should have known* test has been replaced by the *knew or had reason to know* test set forth in Article 86 Add, Prot. I of 1977.⁵¹⁷ This test no longer encompasses the liability of a commander for dereliction of duty to obtain information within his reasonable access.⁵¹⁸ This view, debated in *Blaškić*,⁵¹⁹ was later confirmed in the *Čelebići Appeal Judgement* and the *Kordić and Čerkez Case*.⁵²⁰ According to it, a superior is only liable if:

- 1) he had actual knowledge (established through direct⁵²¹ or circumstantial⁵²² evidence) that his subordinates were committing or about to commit crimes, or,
- 2) if he 'had reason to know' that crimes were being committed on the basis of information available to him and indicating the need for additional investigation.

The novelty is that the commander is no longer required to actively *search for* the information and that he shall only be liable for failure to acknowledge information *already available* to him.⁵²³⁵²⁴

Nevertheless, Ambos argues that:

"[...] the appeals decision [in *Čelebići*] considered a very low standard with regard to the kind of—available—information which is sufficient to trigger command responsibility. According to the Chamber it is, for example, sufficient that the superior had informations at her disposal 'that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to

⁵¹⁶ Bing Bing Jia, "The Doctrine of Command Responsibility: Current Problems", in *Yearbook of International Humanitarian Law*, 2000, vol. 3, p. 141.

⁵¹⁷ This provision is now part of customary law. ICTY, *Mucić et al. ("Čelebići")*, TC, Judgement, Case No. IT-96-21-T, 16 November 1998, paras. 383 and 390 and ICTY, *Blaškić*, TC, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 310.

⁵¹⁸ *Ibid.*, para. 393, confirmed ICTY, *Mucić et al. ("Čelebići")*, AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001, para. 224.

⁵¹⁹ ICTY, *Blaškić*, TC, Judgement, Case No. IT-95-14-T, 3 March 2000, paras. 314-332 (in particular, para. 324) [...].

⁵²⁰ Confirmed ICTY, *Mucić et al. ("Čelebići")*, AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001, para. 241 and ICTY, *Kordić and Čerkez*, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001, paras. 430 and 432 et seq.

⁵²¹ ICTY, *Mucić et al. ("Čelebići")*, TC, Judgement, Case No. IT-96-21-T, 16 November 1998, para. 386.

⁵²² *Ibid.*, and ICTY, *Kordić and Čerkez*, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 427 [...].

⁵²³ *Ibid.*, para. 383.

⁵²⁴ Roberta Arnold, "Article 28: Responsibility of Commanders and Other Superiors" in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, edited by Otto Triffterer, 795–843. Hart, 2007, p. 829-830.

being sent on a mission'.⁵²⁵ Thus, a superior must analyse the information at her disposal very thoroughly and take the necessary measures to prevent crimes from being committed.⁵²⁶ In conclusion, if the superior has properly fulfilled her duties but still does not know about the crimes committed by the subordinates, such ignorance cannot be held against her.⁵²⁷⁵²⁸

According to Gordy, recklessness has been discarded:

"[...] the Appeals Chamber [in *Blaškić*] rejected the Trial Chamber's standard for determining that the defendant was reckless, concluding instead that 'the knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law' [§ 41]. Rather, the person accused must be shown to have 'awareness of the substantial likelihood that a crime will be committed' [§ 42], to 'know that his acts form part of the criminal attack' [§ 127], and to have 'the power to prevent [or] punish' [§ 69]."⁵²⁹

Schabas describes the *ad hoc* tribunal case law on the *mens rea* standard as follows:

"Judges of the *ad hoc* tribunals have been wary of extending the doctrine to cases of what might be deemed pure negligence.⁵³⁰ In the *Čelebići* case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia dismissed an argument by the Prosecutor aimed at expanding the concept, noting that 'a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.'⁵³¹ Obviously sensitive to the charges of abuse that could result from an overly large construction, the Appeals Chamber said it 'would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability.'⁵³² Several of the Judgements testify to this judicial discomfort with respect to the outer limits of superior responsibility, and reveal concerns among

⁵²⁵ ICTY, *Mucić et al. ("Čelebići")*, AC, *Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 328.

⁵²⁶ *Ibid.*, paras. 325 et seq. (328-329), relying on the ICRC Commentary on the Protocols.

⁵²⁷ *Ibid.*, para. 332.

⁵²⁸ Ambos, 2002, p. 835.

⁵²⁹ Eric Gordy, "The Blaškić Trial: Politics, the Control of Information and Command Responsibility", in *Southeastern Europe*, 2012, vol. 36, no. 1, p. 80.

⁵³⁰ ICTR, *Bagilishema, AC, Appeal Judgement, Case No. ICTR-95-1A-A, 3 July 2002*, para. 35; ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004*, para. 63.

⁵³¹ ICTY, *Mucić et al. ("Čelebići")*, AC, *Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 241 (reference omitted). See also ICTY, *Galić, AC, Decision on Interlocutory Appeal Concerning Rule 92bis(c), Case No. IT-98-29-AR73.2, 7 June 2002*.

⁵³² *Ibid.*, para. 239.

the judges that a liberal interpretation may offend the *nullum crimen sine lege* principle.⁵³³⁵³⁴

With respect to gross negligence, Bantekas comments:

"The jurisprudence of the *ad hoc* tribunals also clearly stipulates that a commander is liable if put on notice of impending or existing subordinate criminality, which implies that if he was not put on notice in any manner then he is under no duty to go out and seek such indicia of criminality.⁵³⁵ This would constitute an impossible duty that international law cannot impose, especially under sanction of criminal liability. This then gives rise to the quest for an appropriate standard applicable under international law for failing to make the most of the information available. Given the duty of commanders to take notice in order to avert crimes, the standard for failing to make the most of available information must necessarily be a low one; that is, gross negligence. Gross negligence, however, is only employed to assess the commander's handling of the information or notice. It may not be used to test his knowledge of subordinate criminality, or as a basis of liability, as was expressly spelt out in the *Blaškić* Appeal Judgement.⁵³⁶ This is the meaning that should be ascribed to the application of a negligence standard in respect of the 'had reason to know' or 'should have known' knowledge tests.⁵³⁷⁵³⁸

Meloni argues that the 'should have known' standard of Article 28 Rome Statute may equate with negligence:

"The commander who, according to Article 28(a)(i), should have known about the actions of the armed forces under his control, therefore simply ignored the situation of risk (he is not even required to have consciously disregarded information in that regard). However, even though it was not deliberate such ignorance can be culpable, to the extent that it is the outcome of the violation of the superior's first duty to exercise control properly over his subordinates. In this sense even negligent ignorance of the crimes may be a source of responsibility for the superior (who will be accountable for his failure to take the necessary measures to prevent or punish the crimes that he negligently ignored). In order to prove the 'should have known' standard in the actual case, it is decisive to establish that the superior would have been able to know about the crimes if he had discharged his duties of vigilance and control. Consequently, if it is ascertained that, even though

⁵³³ See e.g., the views of Judge Bennouna in ICTY, *Krajišnik, TC, Separate Opinion of Judge Bennouna, Case No. IT-00-39, 22 September 2000*; see also ICTY, *Stakić, TC, Decision on Rules 98bis Motion for Judgement of Acquittal, Case No. IT-97-24-T, 31 October 2002*, para. 116. But, for a discussion on this point, see ICTY, *Hadžihasanović and Kubura, TC, Decision on Joint Challenge to Jurisdiction, Case No. IT-01-47-PT, 12 November 2002*.

⁵³⁴ William Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 2011, p. 234.

⁵³⁵ ICTY, *Mucić et al. ("Čelebići"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 226; ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004*, para. 62.

⁵³⁶ ICTY, *Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004*, para. 63[...].

⁵³⁷ ICC, *Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009*, para. 429 [...].

⁵³⁸ Ilias Bantekas, *International Criminal Law*, Hart, 2010, p. 90.

the superior had properly fulfilled his duty to control his subordinates, in any case he would not have been able to know about his subordinates' crimes, his ignorance of the crimes should not be deemed culpable."⁵³⁹

Cassese notes that the ICC Statute employs a lower 'should have known' standard than the *ad hoc* tribunals:

"[...] In *Bemba*, the Pre-Trial Chamber accepted that this formulation was a type of negligence (§ 429). This imposes an 'active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime' (§ 433). This standard was rejected by the ICTY and ICTR Appeals Chambers on the basis that it would approach negligence or strict liability (*Čelebići*, AC, § 226; *Bagilishema*, AC, § 37)."⁵⁴⁰

Moreover, according to Cassese, the commander must know that it is his/her subordinates that are involved in the commission of a crime:

"[...] Knowledge of the occurrence of a crime is insufficient; the superior must also know that his subordinates are involved (*Orić*, AC, § 50-60; *Bagilishema*, AC, § 42). However, the superior need not know the exact identity of the subordinates engaging in criminal conduct; it is sufficient that he knows the 'category' of the subordinates."⁵⁴¹⁵⁴²

Nerlich adds that the superior does not need to share the intent of the subordinate:

"[...] Where the base crime is genocide, the jurisprudence of the ICTY requires that the superior have knowledge of the genocidal intent of the subordinate."⁵⁴³ The jurisprudence of the ICTY does not require that the superior share the genocidal intent."⁵⁴⁴⁵⁴⁵

Similarly, Arnold explains the distinction between the superior and subordinate' *mens rea*:

"Unlike the principal perpetrator or the accomplice, the superior does not have to know all the details or the crimes planned to be committed. It is sufficient that he/she believed that one or more of his/her subordinates may commit one or more crimes encompassed by the ICC Statute. The "knew" or "should have known"

⁵³⁹ Chantal Meloni, *Command Responsibility in International Criminal Law*, T.M.C. Asser, 2010, p. 185 (footnotes omitted).

⁵⁴⁰ Antonio Cassese et al., *Cassese's International Criminal Law*, Oxford University Press, 2013, p. 190.

⁵⁴¹ ICTY, *Orić, AC, Appeal Judgement, Case No. IT-03-68-A, 3 July 2008*, para. 35; ICTY, *Hadžihasanović and Kubura, TC, Judgement, Case No. IT-01-47-T, 15 March 2006*, para. 490.

⁵⁴² Cassese et al., 2013, p. 190.

⁵⁴³ ICTY, *Blagojević and Jokić, TC I, Judgement, Case No. IT-02-60-T, 17 January 2005*, para. 686.

⁵⁴⁴ ICTY, *Brđanin, TC II, Judgement, Case No. IT-99-36-T, 1 September 2004*, paras. 717 et seq.

⁵⁴⁵ Volker Nerlich, "Superior Responsibility under Article 28 ICC Statute: For What Exactly Is the Superior Held Responsible?", in *Journal of International Criminal Justice*, 2007, vol. 5, no. 3, p. 672.

element is particular in that it requires only one of the two component elements of the *mens rea*, i.e. the intentional (*Wollen/vouloir/volere*) and knowledge (*Wissen/savoir/sapere*) sides, as known to civil law systems. It is not necessary that the superior shared the intent of the principal perpetrator. Mere knowledge, or failure to acquire knowledge where this would have been required by the circumstances, is per se enough. This kind of failure to acquire knowledge may constitute either unconscious negligence (*unbewusste Fahrlässigkeit/négligence inconsciente/negligenza inconsapevole*) or conscious negligence, i.e. recklessness (*bewusste Fahrlässigkeit/négligence consciente/negligenza consapevole*), too."⁵⁴⁶

⁵⁴⁶ Arnold, 2007, p. 837.

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Volker Nerlich, “Superior Responsibility under Article 28 ICC Statute For What Exactly Is the Superior Held Responsible?”, in *Journal of International Criminal Justice*, 2007, vol. 5, no. 3, pp. 668-669

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ICTY, *Orić, AC, Appeal Judgement, Case No. IT-03-68-A, 3 July 2008*, paras 21

5. Superior – Subordinate Status

The perpetrator was a military commander or a person effectively acting as a military commander

International Case Law

ICTY, *Mucić et al. ("Čelebići"), TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, para. 647, 354, 672

ICTY, *Aleksovski, TC, Judgement, Case No. IT-95-14/1-T, 25 June 1999*, para. 103, 67

ICTY, *Kunarac et al., TC, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001*, para. 398

ICTY, *Mucić et al. ("Čelebići"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001*, para. 193-195, 198

ICTY, Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 406, 419, 421, 424

ICTY, Naletilić and Martinović, TC, Judgement, Case No. IT-98-34-T, 31 March 2003, para. 67

ICTR, Kajelijeli, AC, Appeal Judgement, Case No. ICTR-98-44A-A, 23 May 2005, para. 85

ICTY, Halilović, TC I, Judgement, Case No. IT-01-48-T, 16 November 2005, para. 58

ICTR, Muvunyi, TC II, Judgement, Case No. ICTR-2000-55A-T, 12 September 2006, para. 51

ICC, Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 406, 410

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Sandesh Sivakumaran, “Command Responsibility in Irregular Groups”, in *Journal of International Criminal Justice*, 2012, vol. 10, no. 5, p. 1137

6. Control

The perpetrator had effective command and control, or effective authority and control over the forces that committed the crime

International Case Law

ICTY, *Mucić et al. ("Čelebići")*, TC, *Judgement, Case No. IT-96-21-T*, 16 November 1998, para. 370, 378

ICTR, *Kayishema and Ruzindana*, TC, *Judgement, Case No. Case No. ICTR-95-1-T*, 21 May 1999, para. 491-492

ICTY, *Aleksovski*, TC, *Judgement, Case No. IT-95-14/1-T*, 25 June 1999, para. 74, 76, 78,

ICTR, *Musema*, TC I, *Judgement, Case No. ICTR-96-13-A*, 27 January 2000, para. 141

ICTY, *Blaškić*, TC, *Judgement, Case No. IT-95-14-T*, 3 March 2000, para. 301-303

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ICTR, *Kayishema and Ruzindana*, AC, *Appeal Judgement*, 1 June 2001, para. 294

ICTY, *Kvočka et al.*, TC, *Judgement, IT-98-30/1-T*, 2 November 2001, para. 315

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ICTY, *Blaškić*, AC, *Appeal Judgement, Case No. IT-95-14-A*, 29 July 2004, par. 68-69

ICTY, *Strugar*, TC II, *Judgement, Case No. IT-01-42-T*, 31 January 2005, para. 362

ICTY, *Halilović*, TC I, *Judgement, Case No. IT-01-48-T*, 16 November 2005, para. 58-59

ICTY, *Orić*, TC II, *Judgement, Case No. IT-03-68-T*, 30 June 2006, para. 31

ICTR, *Ntagerura et al.*, AC, *Appeal Judgement*, 7 July 2006, para. 341

ICTY, *Mrkšić et al.*, TC II, *Judgement, Case No. IT-95-13/1-T*, 27 September 2007, para. 560

ICTY, *Halilović*, AC, *Appeal Judgement, Case No. IT-01-48-A*, 16 October 2007, para. 59. 210

ICTR, *Karera*, TC I, *Judgement, Case No. ICTR-01-74-T*, 7 December 2007, para. 564,

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ICTY, *Hadžihasanović and Kubura, TC, Judgement, IT-01-47-T, 15 March 2006*, para. 90

SCSL, *Brima et al., TC II, Judgement, Case No. SCSL-04-16-T, 20 June 2007*, para. 1655, 1872–1875

ICTY, Orić, AC, Appeal Judgement, Case No. IT-03-68-A, 3 July 2008, para. 39

ICTY, Karadžić, Third Amended Indictment, 27 February 2009, para 35

SCSL, Brima et al., TC II, Judgement, Case No. SCSL-04-16-T, 20 June 2007, para. 788

7. Causation

The crimes committed by the forces resulted from the perpetrator's failure to exercise control properly over forces

International Case Law

ICTY, Mucić et al. ("Čelebići"), TC, Judgement, Case No. IT-96-21-T, 16 November 1998, para. 398-400

ICTY, Blaškić, TC, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 303

ICTY, Kordić and Čerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 445

ICTR, Baqilishema, TC I, Judgement, Case No. ICTR-95-1A-T, 7 June 2001, para. 38

ICTY, Blaškić, AC, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004, para. 77

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Chantal Meloni, *Command Responsibility in International Criminal Law*, T.M.C. Asser, 2010, p. 176

Guénaél Mettraux, *The Law of Command Responsibility*, Oxford University Press, 2009, p. 263

8. Acts of Omission

The perpetrator failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution

International Case Law

US Military Commission Manila, *USA v. Yamashita*, Judgement, 8 October-7 December 1945

US Military Tribunal Nuremberg, *USA. v. Wilhelm von Leeb et al.*, *Judgement, 27 October 1948*, in *Law Reports of Trials of War Criminals, Volume XII*, pp. 74-75

ICTY, *Mucić et al. ("Čelebići")*, *TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, para. 377, 94-395

ICTR, *Kayishema and Ruzindana*, *TC, Judgement, Case No. Case No. ICTR-95-1-T, 21 May 1999*, para. 217

ICTY, *Aleksovski*, *TC, Judgement, Case No. IT-95-14/1-T, 25 June 1999*, para. 81

ICTY, *Blaškić*, *TC, Judgement, Case No. IT-95-14-T, 3 March 2000*, para. 336

ICTY, *Aleksovski*, *AC, Appeal Judgement, Case No. IT-95-14/1-A, 24 March 2000*, para. 73-74, 76

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ICTY, *Kvočka et al.*, *TC, Judgement, IT-98-30/1-T, 2 November 2001*, para. 316-317, 497-498

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- ICTR, Ntagerura et al., TC III, Judgement, Case No. ICTR-99-46-T, 25 February 2004, para. 630, 650
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- SCSL, Sesay et al., TC I, Judgement, Case No. SCSL-04-15-T, 2 March 2009, para. 299, 306, 314
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- ICTY, Boškoski and Tarčulovski, AC, Appeal Judgement, Case No. IT-04-82-A, 19 May 2010, para. 234
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9. Mens Rea

The perpetrator either knew or owing to the circumstances at the time, should have known that the forces were committing or about to commit one or more of the crimes

International Case Law

US Military Commission Manila, *USA v. Yamashita*, Judgement, 8 October-7 December 1945

IMTFE, *Araki et al., Judgement, Official Transcript, 4 November 1948*, p. 48, 445

US Military Tribunal Tokyo, *USA v. Soemu Toyoda*, 6 September 1949, Official Transcript of Record of Trial, p. 5006

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ICTY, *Blagojević and Jokić, TC I, Judgement, Case No. IT-02-60-T, 17 January 2005*, para. 68



I-DOC

Investigation
Documentation
System



DOCF

Database on Open
Case Files



CICD

Core International
Crimes Database



CJAD

Cooperation and
Judicial Assistance
Database



CLICC

Commentary on the
Law of the International
Criminal Court



CM

Case Matrix

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