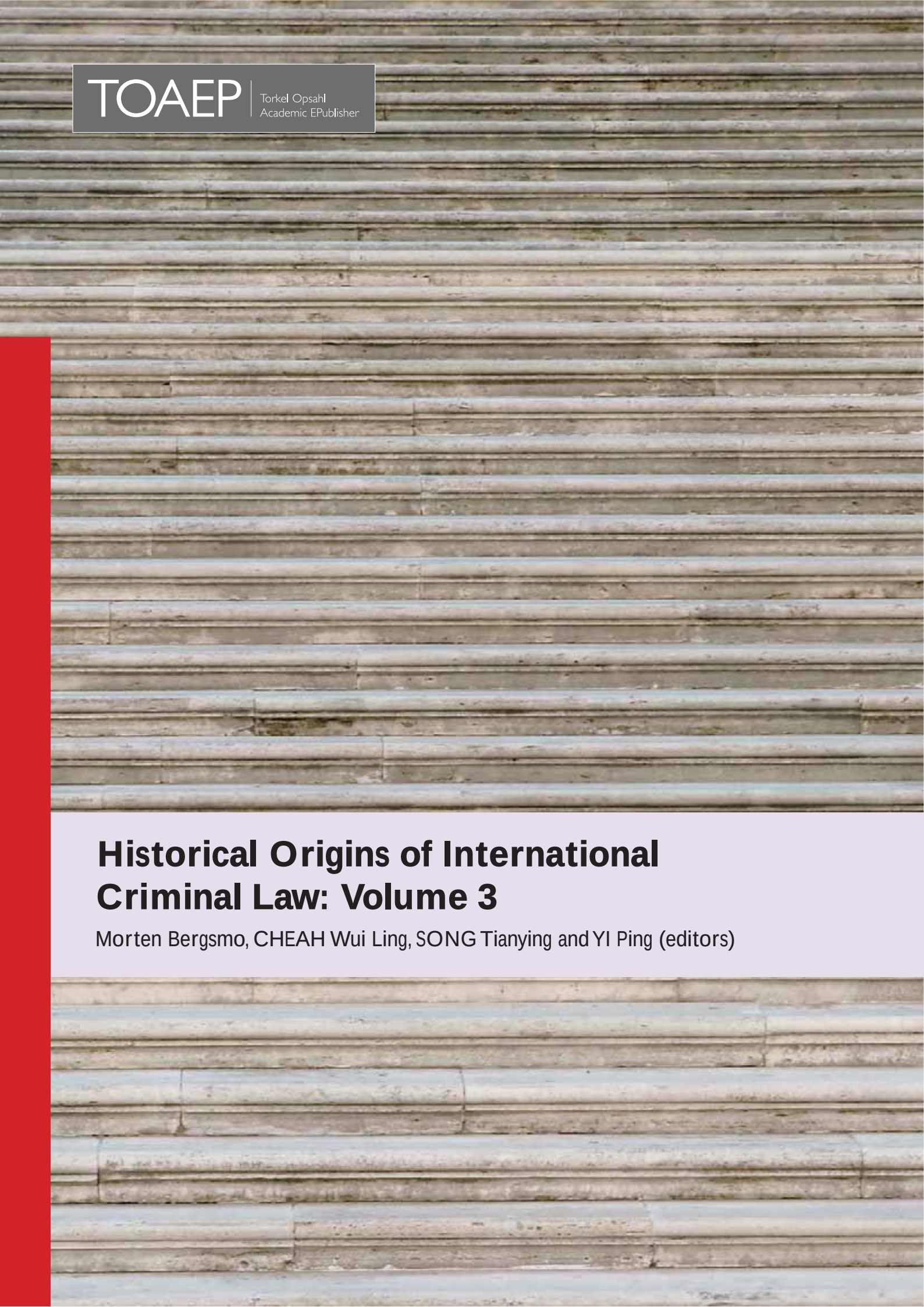

Historical Origins of International Criminal Law: Volume 3

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17

The Evolution of Command Responsibility in International Criminal Law

Chantal Meloni*

17.1. Overview of the Principle of Individual Criminal Responsibility for Mass Crimes

The effective attribution of criminal responsibility to individuals involved in the commission of heinous mass crimes – such as those that come under the jurisdiction of the International Criminal Court ('ICC') – is one of the challenges that the international community has had to contend with for the last 60 years, if not longer.[1] Notwithstanding the enormous difficulties relating to the "macro-criminal" dimension of international crimes, it soon became clear that only the timely attribution of individual criminal responsibility to those implicated at various levels in the commission of the crimes could be an effective reaction to the massive violations of human rights.[2] It was also immediately evident that the need to bring single individuals to justice was particularly important with regard to those oc-

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1 Hans Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals", in *California Law Review*, 1943, vol. 31, no. 5, p. 533–71.

2 Gerhard Werle, "Menschenrechtsschutz durch Völkerstrafrecht", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1997, vol. 109, no. 4, p. 822.

cupying positions of authority, the "most senior leaders", in other words those with powers of command.

Nowadays it is generally recognised that one of the most effective means for ensuring the promotion of and compliance with international (humanitarian) law lies in bringing to justice those military and political leaders who are normally behind the commission of genocides, crimes against humanity and war crimes.[3] However, the practical difficulties in bringing to trial high-ranking individuals are never easy to overcome at the political and judicial level.

After the First World War, with the signing of the Treaty of Versailles, there was already a first attempt to incriminate a head of state, namely the German Kaiser Wilhelm II of Hohenzollern, as the commander-in-chief for the crimes committed during the war by the German army.[4] It was proposed to put him on trial before a (international) tribunal managed by the Allied powers, while the trials of the other individuals accused of war crimes were assigned to the jurisdiction of the German Supreme Court sitting in Leipzig. As it is well known, the indictment of the Kaiser remained on paper only because the Netherlands refused to extradite him, and out of hundreds of suspects contained in the original list of other individuals only 12 were finally put on trial in Leipzig.[5] However, the importance of what happened after the First World War should not be underestimated. The report presented by the Commission on the Responsibility of the Authors of the War[6] and the Treaty of Versailles marked a significant step towards the recognition of the criminal responsibility of

[3] International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Milan Martić*, Trial Chamber, Decision, IT-95-11, 8 March 1996, para. 21.

[4] Treaty of Peace between the Allied and Associated Powers and Germany, 28 June 1919, Arts. 227–28 ('Versailles Treaty') (https://www.legal-tools.org/doc/a64206/). On the Treaty of Versailles after the First World War and the attempt to establish an international tribunal see, among others, Heiko Albrecht, *Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert*, Nomos, Baden-Baden, 1999, pp. 28 ff.

[5] On the Leipzig trials, see the interesting testimony by Claud Mullins, *The Leipzig Trials: An Account of the War Criminals' Trial and A Study of German Mentality*, H.F. & G. Witherby, London, 1921.

[6] The Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties was established with the task of investigating the responsibilities for the international law violations and crimes committed during the war. Report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919, Pamphlet No. 32, Division of International Law, Carnegie Endowment for International Peace, Washington, DC, reprinted in *American Journal of International Law*, 1920, vol. 14, no. 1, pp. 95–154.

individuals under international law. It was also the first recognition of the irrelevance of immunities and official positions for the commission of international crimes. It is notable that some of the first references to the command responsibility doctrine can already be found at that time. Within the commission of inquiry some delegations proposed to proceed against the "highly placed enemies" on the basis of the so-called doctrine of abstention pursuant to which who "ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war" was liable for punishment.[7]

Surely the times were not ready for all this. The American and the Japanese representatives strongly opposed this proposal. If, on the one hand they admitted the possibility of trying highly placed enemies for their commissive behaviour (as a matter of principle), on the other they rejected the possibility of holding someone responsible for war crimes on the mere basis of his omission.[8] In fact it is only after the Second World War, with the jurisprudence of the Nuremberg and Tokyo Tribunals, that the principle of individual criminal responsibility received explicit recognition in international law. International criminal law began to develop on these premises and it is within this framework that the command responsibility doctrine was finally established as a fundamental tool to attribute crimes to the upper echelons.

7 Weston D. Burnett, "Command Responsibility and A Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra", in *Military Law Review*, 1985, vol. 107, p. 82. See also W.H. Parks, "Command Responsibility for War Crimes", in *Military Law Review*, 1973, vol. 62, pp. 12 ff.

8 In particular, the American representatives' reservation was very clearly articulated: "It is one thing to punish a person who committed, or possessing the authority, ordered others to commit an act constituting a crime; it is quite another thing to punish a person who failed to prevent, to put an end to, or to repress violations of the laws or customs of war. In one case the individual acts or orders to act, and in doing so committs a positive offence [sic]. In the other he is to be punished for the acts of others without proof being given that he knew of the commission of the acts in question or that, knowing them, he could have prevented the commission". Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, Annex II, 4 April 1919, reprinted in *American Journal of International Law*, 1920, vol. 14, p. 127.

17.2. Development of the Command Responsibility Doctrine in International Criminal Law

As Mirjan Damaška once wrote, command responsibility is an "umbrella term".[9] In a broad sense, it indicates a series of ways in which an individual in a position of command can be considered responsible for the actions of his subordinates. In its broadest meaning, the term indicates the responsibility of the commander who fails to fulfil his duties as a military superior. This kind of responsibility is not limited to the failure of the commander to exercise control properly over his troops; it can also be triggered, for example, by exposing the troops under his command to excessive and unnecessary risks.[10] Pursuant to such a responsibility – which can be of various natures, although it is normally disciplinary – the military commander may be punished irrespective of the behaviour of his soldiers, and in particular irrespective of their commission of any crime.[11]

In the strictest sense, command responsibility indicates instead the criminal responsibility of the superior for the crimes committed by his subordinates.[12] The expression was used originally in the military context and eventually also expanded to the non-military field. In this regard, the expression *superior responsibility* is more appropriate, as it also includes individuals in non-military positions.[13]

17.2.1. The Military Origins

The origins of command responsibility are indeed very remote. Scholars have identified the first example of command responsibility in some provisions contained in what is considered to be the most ancient military treatise of the world, *The Art of War* by Sun Tzu, a Chinese military man-

9 Mirjan Damaška, "The Shadow Side of Command Responsibility", in *American Journal of Comparative Law*, 2001, vol. 49, no. 3, p. 455.

10 *Ibid*.

11 Kai Ambos, "Superior Responsibility", in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 823 ff.

12 For a more thorough analysis of the notion and its different meanings, see Chantal Meloni, *Command Responsibility in International Law*, TMC Asser, The Hague, 2010, pp. 1 ff.

13 Although less precise than superior responsibility, command responsibility, which is commonly used in scholarly works and jurisprudence, is also used throughout this chapter to indicate the responsibility both of military commanders and civilian superiors for the crimes committed by their subordinates.

ual dating back to 500 BCE. It provided that: "When troops flee, are insubordinate, distressed, collapse in disorder or are routed, it is the fault of the general"; "If the words of command are not clear and distinct, if orders are not thoroughly understood, the general is to blame".[14] The responsibility of the commander for his troops has been recognised ever since in the various military manuals at the domestic level, which does not mean that the commander was criminally responsible for the subordinates' illegal actions. It was rather a form of disciplinary military responsibility for breaching his duties as a military superior.[15]

The modern doctrine of command responsibility under international law has its roots in the principle of "responsible command".[16] This is a fundamental principle of humanitarian law that requires that an army be commanded by a person responsible for his subordinates.[17] The Fourth Hague Convention on the Laws and Customs of War on Land of 1907 already recognised that those who have the power of command in an army are responsible for the violations committed by the forces under their command.[18]

Both command responsibility and the principle of responsible command aim to promote and ensure compliance with the rules of international (humanitarian) law,[19] but the two notions are distinct.[20] In con-

14 Parks, 1973, pp. 3–4, see *supra* note 7.

15 Leslie Green, "Command Responsibility in International Humanitarian Law", in *Transnational Law and Contemporary Problems*, 1995, vol. 5, no. 2, p. 319.

16 On the origins of the doctrine, see A. B. Ching, "Evolution of the command responsibility doctrine in light of the Čelebići decision of the International Criminal Tribunal for the Former Yugoslavia, in *North Carolina Journal of International Law & Commercial Regulation*, 1999, pp. 167 ff. See also Guénaël Mettraux, *The Law of Command Responsibility*, Oxford University Press, Oxford, 2009.

17 See William J. Fenrick, "Article 28 – Responsibility of Commanders and other Superiors", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 1st ed., Nomos, Baden-Baden, 1999, p. 516.

18 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 (https://www.legal-tools.org/doc/fa0161/). See Parks, 1973, pp. 11 ff., *supra* note 7; and Ilias Bantekas, "The Contemporary Law of Superior Responsibility", in *American Journal of International Law*, 1999, vol. 93, no. 3, p. 573.

19 ICTY, *Prosecutor v. Enver Hadžihasanović et al.*, Trial Chamber, Decision on Joint Challenge to Jurisdiction, IT-01-47, 12 November 2002, para. 66 (https://www.legal-tools.org/doc/c46fc0/).

20 See, on the point, Boris Burghardt, *Die Vorgesetztenverantwortlichkeit im völkerrechtlichen Straftatsystem*, Berliner Wissenschafts-Verlag, Berlin, 2008, pp. 80 ff.

trast to command responsibility, the principle of responsible command does not entail *per se* any form of punishment or liability. The two perspectives are complementary: the one regards the duties that are entailed in the idea of command, whereas the other concerns the liability that arises from the breach of those duties. Therefore one can say that "command responsibility is the most effective method by which International Criminal Law can enforce responsible command".[21]

17.2.2. The Tokyo Trial and the Yamashita Trial

Eventually this doctrine developed further and it is no longer confined to the military field. Nowadays there is no doubt that command responsibility extends also to non-military superiors with respect to the commission of international crimes.[22] There were already some precedents in the application of this doctrine to non-military superiors in the jurisprudence after the Second World War. In particular, the International Military Tribunal for the Far East ('IMTFE') in the Tokyo Trial[23] resorted to a form of liability for omission in order to convict the members of the Japanese government for the war crimes committed by the Japanese army. These convictions were strongly criticised as forms of collective or strict liability, where the personal guilt of the defendants was not properly established.[24] At the same time, however, there is a positive legacy of the Tokyo Trial, in that the IMTFE established the existence of duties of preven-

[21] ICTY, *Prosecutor v. Enver Hadžihasanović et al.*, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, IT-01-47, 16 July 2003, para. 16 ('Hadžihasanović case') (https://www.legal-tools.org/doc/608f09/). See also Mettraux, 2009, p. 55, *supra* note 16.

[22] For more details, see Meloni, 2010, pp. 159 ff., *supra* note 12.

[23] The Tribunal was formed on 19 January 1946 by means of a Special Proclamation to Establish an International Military Tribunal for the Far East by the Supreme Allied Commander in the Far East, General Douglas MacArthur (https://www.legal-tools.org/doc/242328/). See Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, Oxford, 2008.

[24] Notable in this regard is the vibrant dissenting opinion of the Dutch Judge, B.V.A. Röling. International Military Tribunal for the Far East ('IMTFE'), *United States of America et al. v. Araki Sadao et al.*, Opinion of Mr. Justice Roling Member for the Netherlands, 12 November 1948 (https://www.legal-tools.org/doc/fb16ff/), reprinted in B.V.A. Röling and C.F. Ruter (eds.), *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946–12 November 1948*, Amsterdam University Press, Amsterdam, 1977, pp. 1043–1148.

tion (of international crimes) analogous to those of military commanders, directed specifically at political leaders and members of the government.[25]

Much criticism has also been brought against the conviction of General Yamashita Tomoyuki who was sentenced to death by an American military court set up by order of General Douglas MacArthur in 1945 for massacres committed against Filipino civilians by his troops.[26] Yamashita, it was said, was not convicted for having done something but for "having been something". In fact the charges against him were not that he had ordered the crimes committed but that he failed to prevent them from being committed.[27] The biggest problem in this case was that Yamashita's knowledge of the crimes was not properly proved.[28] His conviction was based upon a sort of imputed knowledge. The judges affirmed that he "must have known of the crimes". In fact, the reasoning of the judges was that the crimes were so extensive and widespread that they must either have been wilfully permitted by the accused or secretly ordered.[29] Nevertheless, the importance of the case lies in the fact that for the first time a military commander had been made accountable for the crimes committed by his subordinates on the sole basis of his failure to discharge his military duty to control his troops.

The US Supreme Court, before which the case was heard immediately after Yamashita's conviction by the military court,[30] established the principle that an army commander has a legal duty to take appropriate

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25 In this sense, see W.J. Fenrick, "Some international Law Problems Related to the Prosecutions before the International Criminal Tribunal for the Former Yugoslavia", in *Duke Journal of Comparative & International Law*, 1995, vol. 6, pp. 103–25.

26 Among the many works that refer to the Yamashita case as one of the most important precedents on command responsibility, see Burnett, 1985, pp. 71 ff., *supra* note 7; Green, 1995, pp. 329 ff., *supra* note 15; Matthew Lippman, "The Uncertain Contours of Command Responsibility", in *Tulsa Journal of Comparative and International Law*, 2001, vol. 9, pp. 4 ff; Andrew D. Mitchell, "Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes", in *Sydney Law Review*, 2000, vol. 22, no. 3, pp. 384–85; Parks, 1973, pp. 22 ff., see *supra* note 7; M.L. Smidt, "Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations", in *Military Law Review*, 2000, vol. 164, pp. 155 ff.

27 The phrase is from Harry E. Clarke, Yamashita's defence counsel, commenting on the charge. See Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility*, Scholarly Resources, Wilmington, DE, 1982.

28 For more analysis on this point, see Meloni, 2010, pp. 46 ff., *supra* note 12.

29 Parks, 1973, pp. 30 ff., see *supra* note 7. See also Burnett, 1985, pp. 92–94, *supra* note 7.

30 US Supreme Court, *In Re Yamashita*, 327 US 1, 16 1946, 4 February 1946, in *Law Reports*, vol. IV, pp. 38 ff.

measures to prevent the violations of the laws of war and that he may be charged with personal responsibility for his failure to take such measures when violations result. Referring to the provisions of Articles 1 and 43 of the Regulations annexed to the Fourth Hague Convention of 1907, of Article 19 of the Tenth Hague Convention and of Article 26 of the Geneva Red Cross Convention of 1929, the judges affirmed the principle that a commander has the duty to control his subordinates' conduct, ensuring that they respect the law, and that violation of this duty is a violation of the laws of war. This principle, as we shall see, was to become the foundation for numerous other trials in the period after the Second World War and beyond.

17.2.3. The Nuremberg Trial and the Subsequent Proceedings

At Nuremberg there was no need to resort to command responsibility as a mode of liability based on omission, given the abundance of evidence of the criminal orders (and thus of commission) set by the Nazis. In fact, neither the Charter of the International Military Tribunal ('IMT Charter')[31] nor Control Council Law No. 10[32] contained any specific provisions on command responsibility. Nevertheless, some provisions referring to the "duty of superiors" were included in the regulations adopted by the single states with the aim of providing homogeneous rules for holding the trials (against German war criminals) before their domestic courts.[33]

Among the so-called subsequent proceedings held by US Military Tribunals in Nuremberg from 1947 to 1949 we can find some relevant cases involving the command responsibility of German war criminals, all of them regarding military commanders. In particular, the *High Command* trial[34] and the *Hostage* trial[35] were of the utmost importance for the devel-

[31] Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the Prosecution and Punishment of Major War Criminals of the European Axis ('IMT Charter') (http://www.legal-tools.org/doc/64ffdd/).

[32] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945 (http://www.legal-tools.org/doc/ffda62/). Control Council Law No. 10 was adopted by the major Allied powers – the United States, Britain, France and Soviet Union – after Germany's unconditional surrender.

[33] For further discussion, see Smidt, 2000, pp. 155 ff., *supra* note 26.

[34] Military Government for Germany, USA, United States of America v. Wilhelm von Leeb et al., Judgment, 28 October 1948, in Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, October 1946–April 1949, vol. 11, US

opment of the doctrine because they rejected the standard of strict liability which had been adopted in *Yamashita*. More precisely, the American judges set the following standard for command responsibility to be established:

> There must be a personal dereliction. That can occur only where the act is directly traceable to him [the commander] 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. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.[36]

In short, these cases are important because they clarified that there must be "personal neglect", "knowledge" or "acquiescence" by the commander in order to hold him criminally responsible for the crimes of the subordinates that he failed to properly supervise. As we can note, it was not yet a full elaboration of the command responsibility doctrine as intended today, but the premises were already set after the Second World War for this responsibility to be further developed.

17.2.4. The Cold War and the First Codification of Command Responsibility

The period of the Cold War – the years between the end of the Second World War in 1945 and the fall of the Berlin Wall in 1989 – was not particularly significant with regard to the development of international criminal law in general and for the doctrine of command responsibility in particular. Command responsibility had an echo in some important national proceedings. It was raised in the Adolf Eichmann trial, which was held

Government Printing Office, Washington, DC, 1949, pp. 512 ff. ('High Command case') (https://www.legal-tools.org/doc/c340d7/). See also Parks, 1973, pp. 38–58, *supra* note 7; and Burnett, 1985, pp. 99–109, *supra* note 7.

35 Military Government for Germany, USA, United States v. Wilhelm List et al., Judgment, 19 February 1948, in Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, October 1946–April 1949, vol. 11, US Government Printing Office, Washington, DC, 1949, pp. 1230–1319 (https://www.legal-tools.org/doc/b05aa4/). See Parks, 1973, pp. 58–64, *supra* note 7; and Burnett, 1985, pp. 109–14, *supra* note 7.

36 High Command case, pp. 543–44, see *supra* note 34, quoted in Parks, 1973, p. 43, see *supra* note 7.

before the Israeli District Court in Jerusalem and before the Israeli Supreme Court in 1961–1962.[37] Eichmann, in his position as the chief of the Gestapo in Berlin, was the person responsible for the implementation of the "final solution", the Nazi plan for the extermination of the Jews. He was therefore convicted – and sentenced to death – on the basis of his commissive responsibilities rather than on command responsibility *stricto sensu*.[38]

Superior responsibility did play a role during and following the Vietnam War, with US soldiers tried on the basis of the American Uniform Code of Military Justice.[39] In particular, the command responsibility doctrine was debated and applied in the case against Lieutenant William Calley and his superior Captain Ernest Medina, and against Major General Samuel Koster for the massacre at Mỹ Lai.[40]

At the international level, however, the situation of political tension brought the projects regarding the codification of international criminal law and the creation of a permanent international criminal law court substantially to a standstill, even though these projects had been warmly supported at the international level in the wake of the indignation and emotion over the horrors of the Second World War. In any case, neither the first Draft Codes of the Offences against the Peace and Security of Mankind nor the Draft Statute for an International Criminal Law, drawn up by the International Law Commission ('ILC') between 1950 and 1954, contained any provisions dedicated to command responsibility.[41] Neither the

[37] The Judgments in English of the Israeli District Court and Supreme Court against Eichmann are published in *International Law Reports*, vol. 36, 1968, pp. 18–276 and 277–344.

[38] On the Eichmann trial, see the testimony by Hanna Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Viking Press, New York, 1963. For the relevant criminal law aspects of the trial, see Kai Ambos, *Der allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung*, Dunkler & Humblot, Berlin, 2001, pp. 182–90.

[39] See Burnett, 1985, p. 121, *supra* note 7. In any case these were mostly disciplinary procedures.

[40] See William V. O'Brien, "The Law of War, Command Responsibility and Vietnam", in *Georgetown Law Journal*, 1972, vol. 60, pp. 605 ff. See also Parks, 1973, pp. 1 ff., *supra* note 7; William G. Eckardt, "Command Criminal Responsibility: A Plea for A Workable Standard", in *Military Law Review*, 1982, vol. 97, pp. 1 ff.; Burnett, 1985, p. 71 ff., *supra* note 7; Green, 1995, pp. 319 ff., *supra* note 15; Lippman, 2001, pp. 1 ff., *supra* note 26.

[41] For a complete documentary reconstruction of the works of the International Law Commission, see M. Cherif Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History*, Transnational Publishers, Ardsley, NY, 1998. For a comparison of

Genocide Convention of 1948 nor the four Geneva Conventions of 1949 contained any provision on command responsibility. This absence is indicative of the fact that at the time no agreement had been reached at the international level over the notion and formulation of the doctrine.

As a matter of fact the first international instrument that codified command responsibility was the 1977 Additional Protocol I to the 1949 Geneva Conventions. Notably, the provision of Article 86 already contained *in nuce* all the elements of the current doctrine:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility [...] if they knew or had information which should have enabled them to conclude that he was committing [...] such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[42]

As outlined by the commentary drawn up by the International Committee of the Red Cross, three elements have to be fulfilled for a superior to be responsible for an omission in relation to a crime committed by a subordinate:

a) The superior concerned must be the superior of that subordinate;

b) The superior knew, or had information, which should have enabled him to conclude that a breach was being committed or was going to be committed;

c) The superior did not take the measures within his power to prevent it.[43]

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the criminal law principles contained in the three Draft Codes presented by the ILC, in 1954, 1991 and 1996, see Ambos, 2001, pp. 443 ff., *supra* note 38.

42 Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Art. 86 ('Additional Protocol I') (http://www.legal-tools.org/doc/d9328a/). The two Additional Protocols of 1977 to the four Geneva Conventions of 1949 were the outcome of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, established by the Swiss Government, depositary of the Geneva Conventions, in 1974. Additional Protocol I, which came into force on 7 December 1978, is applicable to the international armed conflicts involving the state parties that have ratified the Geneva Conventions and the Protocol (*id.*, Art. 1).

43 Jean de Preux, "Article 87: Duty of Commanders", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977*

These elements have to be analysed in connection with the provision of the following Article 87,[44] containing the duties of the military commander at the basis of command responsibility.[45] From the combined provision of the two norms it emerges that the commander who knows about the crimes being committed has the duty to take such steps in order to prevent and, where necessary and appropriate, to punish the breaches of the Convention or of the Protocol committed by his subordinates. Each commander therefore has in the first place the *duty to prevent* the breaches and stop their occurrence (to suppress). If the breaches have already been committed, in the second place he has the *duty to punish* them (which can simply mean that the superior has the *duty to report* the crimes to the competent authorities). As a measure aimed at preventing or suppressing breaches of humanitarian law, Article 87(2) of Additional Protocol I also provides for the duty of the commander to ensure that members of the armed forces under his command are aware of their obligations under the Conventions of Geneva and their Protocols. This duty of commanders is to be "commensurate with their level of responsibility".[46]

What emerges clearly from these provisions is the functional idea inspiring the whole doctrine of command responsibility, namely that military commanders are in the best position to guarantee respect for humanitarian law, for example by imposing respect for discipline on their soldiers, limiting the unjustified use of force, and ensuring an accurate flow of information and an adequate system of reporting. The concept of responsible command finds its full expression in the work of the drafters of the Protocol, who recognised the primary role of military commanders in pursuing the effective implementation of Geneva law.[47] Commanders are thus regarded as an instrumental tool – at the national and international levels – in the prevention of the commission of war crimes. To this aim,

to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1987, pp. 1012–13.

44 Additional Protocol I, Art. 87(1), see *supra* note 42, reads as follows: "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, when necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol".

45 See, in this regard, de Preux, 1987, pp. 1019 ff., *supra* note 43.

46 Ibid.

47 *Ibid.*, p. 1022.

they are charged with precise duties of control and prevention, and corresponding responsibilities, in case these duties are breached.

In light of the above, Additional Protocol I marks a fundamental step towards the definitive recognition of the doctrine of command responsibility in international law. Although it is debated whether Additional Protocol I as a whole has achieved customary law status,[48] this seems certain with regard to Article 86(2), which, as the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ('ICTY') also confirmed,[49] may be recognised as a rule of international customary law.[50] Notwithstanding the fact that Article 86 generically refers to "superiors", because the following Article 87 expressly addresses only military commanders – by specifying their duties – these provisions are mainly interpreted as applicable only to the military field.[51]

17.2.5. The *Ad hoc* Tribunals and the Implementation of Superior Responsibility outside the Military Field

With the fall of the Berlin Wall, the changed political climate at the beginning of the 1990s allowed a renaissance of the international criminal justice projects that had long been at a standstill. In particular, the United Nations Security Council created two subsidiary organs on the basis of Chapter VII of the UN Charter as measures "to maintain and restore international peace and international security".[52] With resolution 827 of 25 May 1993 the Security Council set up the ICTY for the purpose of judging those responsible for crimes committed during the 1990s Balkans con-

48 On the customary law status of the Additional Protocols, see Christopher Greenwood, *Essays on War in International Law*, Cameron May, London, 2006, pp. 179 ff.

49 ICTY, *Prosecutor v. Zejnil Delalić et al*., Appeals Chamber, Judgment, IT-96-21, 20 February 2001, paras. 195, 231 ('Čelebići case') (https://www.legal-tools.org/doc/051554/); ICTY, *Prosecutor v. Dario Kordić and Mario* Čerkez, Trial Chamber, Judgment, IT-95-14/2, 26 February 2001, para. 441 ('Kordić case') (http://www.legal-tools.org/doc/d4fedd/).

50 Burghardt, 2008, pp. 42, 77 and 85 ff., see *supra* note 20.

51 See Fenrick, 1995, pp. 119–20, *supra* note 25. Contra Michael Bothe, Karl J. Partsch and Waldemar Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague 1982, pp. 523 ff. In the latter's view Additional Protocol I, Art. 86, which is directed at military commanders, could be extended to civilian superiors if these exercise a power over their subordinates that is substantially analogous to that of a military commander.

52 Charter of the United Nations and Statute of the International Court of Justice, 26 June 1945, Art. 39 ff.

flict.[53] With resolution 955 of 8 November 1994 the International Criminal Tribunal for Rwanda ('ICTR') was established, with jurisdiction over the genocide perpetrated in Rwanda in 1994.[54]

According to the Statutes of the *ad hoc* Tribunals[55] a person is to be considered individually responsible for a crime under the jurisdiction of the Tribunals – war crimes, crimes against humanity or genocide – if he or she planned, instigated, ordered or committed it, or if s/he otherwise aided and abetted in its planning, preparation or execution.[56] Moreover, both Article 7(3) of the ICTY Statute and Article 6(3) of the ICTR Statute expressly provided for superior responsibility in the following terms:

> The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

As we can note, these provisions referred generally to the "superior". As a matter of fact, at the outset of their activity the *ad hoc* Tribunals had to decide whether command responsibility could apply also to civilians or not. After some uncertainty, the judges acknowledged the applicability of the doctrine to civilian superiors; indeed, there is now abundant jurisprudence on this point, produced by both Tribunals.[57] In particular it

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53 UN Security Council Resolution 827, Adopted 22 February 1993, UN doc. S/RES/827 (1993) (https://www.legal-tools.org/doc/dc079b/) to which the Statute of the International Tribunal for the former Yugoslavia is annexed ('ICTY Statute') (https://www.legal-tools.org/doc/b4f63b/).

54 UN Security Council resolution 955, Adopted 8 November 1994, UN doc. S/RES/955 (1994) (https://www.legal-tools.org/doc/f5ef47/) to which the Statute of the International Tribunal for Rwanda is annexed ('ICTR Statute') (http://www.legal-tools.org/doc/8732d6/).

55 The Statutes of the ICTY and ICTR are substantially identical, as the latter is built on the model of the former, apart from some differences in the definition of the crimes which were dictated by the necessity to take into account the different situations under the jurisdiction of the Tribunals. Therefore, generally, what holds true for the ICTY Statute is implied as being valid also for the provisions of the ICTR Statute.

56 ICTY Statute, Art. 7(1), see *supra* note 53 and ICTR Statute, Art. 6(1), see *supra* note 54.

57 More thoroughly on the jurisprudence of the *ad hoc* Tribunals, see Meloni, 2010, pp. 77 ff; in particular on the differences regarding the non-military superiors, pp. 128–31, see *supra* note 12.

is worth mentioning the so-called *Čelebići* case before the ICTY,[58] which set for the first time the distinctive elements of command responsibility and more broadly of "superior responsibility" as a mode of criminal liability in international criminal law. However, the jurisprudence of the *ad hoc* Tribunals also reveals the difficulties in applying this mode of liability outside the military field.

The first problem relates to the verification of the subordination relationship outside the military sphere. In the jurisprudence of the *ad hoc* Tribunals it is in fact not clear whether the requirements and the degree of responsibility with regard to a civilian superior are the same as those of a military commander.[59] Several civilian superiors, in particular politicians, were charged before the ICTR and convicted for superior responsibility. In this regard, the judges found that the evidence necessary for establishing a civilian superior's possession of effective authority (and control) can be different from the military commander standard.[60] Paradigmatic of these differences and of the difficulties in proving the civilian superior's effective authority and control was the *Kordić* case before the ICTY.[61] Kordić was a politician at the regional level in central Bosnia, who had been charged under Article 7(3) of the ICTY Statute for the crimes committed against the Bosnian Muslims in the region of the Lašva Valley in 1992 and 1993. According to the judges, he enjoyed "tremendous influence and power" in his territory. However, the Tribunal did not accept the prosecutor's argument that the defendant possessed *de facto* control over the armed forces that committed the crimes and therefore acquitted Kordić of his responsibility under Article 7(3).[62] Fundamental was the distinction introduced by the judges between "effective control" and "substantial influence" that the defendant exercised over the perpetrators of the crimes: unlike the power of control, substantial influence (even if "tremendous", as in this case) is not sufficient for ascribing responsibility for omission to the superior, in particular if the person concerned is a civilian.[63]

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58 ICTY, *Prosecutor v. Zejnil Delalić et al*., Trial Chamber, Judgment, IT-96-21, 16 November 1998, para. 356 ('Čelebići case') (http://www.legal-tools.org/doc/d09556/).

59 Čelebići case, Appeals Chamber, Judgment, para. 240, see *supra* note 49.

60 ICTR, *Prosecutor v. Ignace Bagilishema*, Appeals Chamber, Judgment, ICTR-95-1A, 3 July 2002, paras. 50 ff. (https://www.legal-tools.org/doc/ebc505/).

61 Maria Nybondas, "Civilian Superior Responsibility in the *Kordić* Case", in *Netherlands International Law Review*, 2003, vol. 50, no. 1, pp. 59 ff.

62 Kordić case, Trial Chamber, Judgment, see *supra* note 49.

63 *Ibid*., para. 413. Several other ICTY and ICTR judgments consistently followed this view.

Moreover, another problem emerges with regard to the content of the measures required by the jurisprudence for a civilian superior to prevent or punish the crimes of the subordinates.[64] As for the duty to prevent, while in the military field a superior can directly intervene in the course of action of his subordinates, normally disposing of disciplinary powers and having the power to issue binding orders, the same generally does not hold true for civilian superiors. Therefore the preventative measures in the civilian context will be integrated mostly by means of protesting or reporting (to the competent authorities). In fact, the differences between military commanders and civilian superiors become even greater with regard to the duty to punish. Indeed, there is normally no power to sanction outside the military sphere. This was affirmed in the *Aleksovski* case:

> Although the power to sanction is the indissociable corollary of the power to issue orders within the military hierarchy, it does not apply to the civilian authorities. It cannot be expected that a civilian authority will have a disciplinary power over subordinates equivalent to that of the military authorities in an analogous command position. To require a civilian authority to have sanctioning powers similar to those of a member of the military would so limit the scope of the doctrine of superior authority that it would hardly be applicable to civilian authorities.[65]

Thus it is clear that the measures that a civilian superior can adopt are normally weaker than the corresponding ones in the military field. The risk that, notwithstanding the measures adopted, the crime is nevertheless committed and the culprits not punished is higher in this respect, even if the superior took all possible (available) measures.

Finally, with regard to the mental element of superior responsibility, it is interesting to note that, even if the *ad hoc* Tribunals' Statutes did not introduce any difference in the standard required for military and civilian superior, some judgments did in fact introduce such a difference, taking the ICC Statute provision as a point of reference in this regard.[66]

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64 See for instance ICTY, *Prosecutor v. Zlatko Aleksovski*, Trial Chamber, Judgment, IT-95-14/1, 25 June 1999, para. 78 (http://www.legal-tools.org/doc/52d982/).

65 *Ibid*.

66 ICTR, *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Trial Chamber Judgment, ICTR-95-1, 21 May 1999, paras. 227-228 (https://www.legal-tools.org/doc/0811c9/).

17.3. Article 28 of the ICC Statute

The applicability of command responsibility to non-military superiors has been made explicit for the first time in a written provision by the drafters of the Rome Statute of the International Criminal Court ('ICC Statute') of 1998.[67] Article 28 dictates similar but not identical rules for military commanders – or others effectively acting as military commanders – and for civilian superiors. Article 28 of the ICC Statute is divided into two parts. While subsection (a) concerns military commanders, or those who effectively act as such, subsection (b) deals with the responsibility of civilian superiors, identified in a residual way *vis-à-vis* the provision subsection (a). Such a provision is the result of a proposal put forward by the United States delegation, which considered it correct to provide for a separate rule to take into account the difference between the powers of control of a military commander and those of a civilian superior. The latter indeed was thought to enjoy a lesser degree of control and influence over his or her subordinates.[68]

Both forms of superior responsibility are built on common elements, but there are also significant differences, most prominently with regard to the knowledge requirement, that is, the mental element. Whereas in order to be held responsible it is required that the military commander either knew, or owing to the circumstances at the time should have known, that his/her subordinated forces were committing or about to commit such crimes, for the civilian superior it is required that he/she either knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes. Moreover, in the case of a non-military superior, the crimes must concern activities that were within the effective responsibility and control of the superior.

By means of Article 28, the drafters of the ICC Statute have provided for a far more complete and detailed provision on superior responsibility than all previous instruments, requiring a very precise establishment of its constitutive elements. However, and despite the *ad hoc* Tribunals' extensive jurisprudence, many issues regarding the doctrine of command responsibility are still open for interpretation. In fact, the application of this form of liability is not yet clear, which might explain to a certain ex-

[67] Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002, United Nations Treaty Series, vol. 2187, No. 38544 ('ICC Statute').

[68] See in this regard, Ambos, 2002, pp. 848 ff., see *supra* note 11.

tent why the ICC only resorted once to this mode of liability during the first 12 years of its activity.

This is not the place for a detailed analysis of each individual element of command responsibility under Article 28 of the ICC Statute.[69] Yet some brief observations can be made on the *Bemba* case, the first proceedings dealing with command responsibility before the ICC, which is going to be very significant for the evolution of this doctrine in international criminal law.

17.3.1. The First Case Before the ICC: *Bemba*

The first (and so far only) interpretation of Article 28 of the ICC Statute was in the context of the decision confirming the charges against Jean-Pierre Bemba Gombo of 15 June 2009.[70] Originally, the prosecutor had charged the suspect with criminal responsibility as a co-perpetrator under Article 25(3)(a) of the ICC Statute.[71] However, following a request by the Chamber in this sense,[72] the prosecutor submitted an amended charging document where the responsibility of Bemba for the alleged crimes was framed "in the alternative" as command or superior responsibility under Article 28(a) or (b) of the ICC Statute. As a result of the three-day hearing,[73] Bemba was set to stand trial for murder, rape and pillaging, as war crimes and crimes against humanity, due to his alleged responsibility as a commander. The trial started in November 2010 and the Trial Chamber

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69 For an extensive analysis on the point, see Meloni, 2010, p. 139, *supra* note 12.

70 ICC, Situation in Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 15 June 2009 ('Bemba case') (https://www.legal-tools.org/doc/07965c/).

71 On the concept of co-perpetration before the ICC, and more generally on Article 25(3)(a) of the ICC Statute, see Gerhard Werle, "Individual Criminal Responsibility in Article 25 ICC Statute", in *Journal of International Criminal Justice*, 2007, vol. 5, no. 4, p. 953. See also Stefano Manacorda and Chantal Meloni, "Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?", in *Journal of International Criminal Justice*, 2011, vol. 9, no. 1, p. 159.

72 "It appears to the Chamber that the legal characterisation of the facts of the case [might] amount to a different mode of liability under Article 28 of the Statute". See ICC, Situation in Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, ICC-01/05-01/08-388, 3 March 2009, para. 46 ('Bemba case') (http://www.legal-tools.org/doc/81d7a9/).

73 The confirmation of charges hearing against Bemba was held from 12 to 15 January 2009.

Judgment was not yet out at the time of writing. In the decision confirming the charges, Bemba was described as the *de jure* commander-in-chief of the political-military Mouvement de Libération du Congo ('MLC') in Central African Republic. To reach this conclusion, the Pre-Trial Chamber judges considered that Bemba had the following powers: to issue orders that were complied with; to appoint, promote, dismiss, arrest, detain and release other MLC commanders; and, to ultimately prevent and repress the commission of crimes. Bemba was believed to have retained his effective authority and control over MLC troops throughout the military intervention in Central African Republic, having the material ability to contact his commander of operations and to make the decision to withdraw his troops from the field. The judges found sufficient evidence to believe – for the purpose of the confirmation of charges – that the accused knew that MLC troops were committing or were about to commit crimes,[74] and that he failed to take all necessary and reasonable measures within his power to prevent or repress the commission of crimes because "he disregarded the scale and gravity of crimes and opted for measures that were not reasonably proportionate to those crimes".[75]

Article 28 of the ICC Statute has been interpreted by the ICC Pre-Trial Chamber as a form of criminal responsibility based on a legal obligation to act, which is composed of very specific elements, in part different for the military and for the non-military superior. Having determined that Bemba fell under the notion of military or military-like commander, the Chamber limited itself to the analysis of the first paragraph of Article 28.[76] The judges held that the category of military-like commanders may encompass superiors who have control over irregular forces, such as rebel groups, paramilitary units, including armed resistance movements and militias structured in military hierarchy and having a chain of command. Thus, the expressions *effective command and control* and *effective authority and control* are to be interpreted as alternatives having the same meaning but referring to distinct groups of commanders. While command is applicable to *de jure* military commanders (*stricto sensu*), authority refers to military-like or *de facto* commanders. In this sense, the words *command* and *authority* were interpreted not to imply a different standard of

[74] Bemba case, Decision, para. 489, see *supra* note 70. This paragraph lists the factors from which the Chamber derived Bemba's actual knowledge about the occurrence of the crimes.

[75] *Ibid*., para. 495.

[76] *Ibid*., para. 407.

control. The ICC judges referred to ICTY case law to define the concept of "effective control", which lies at the very heart of the doctrine of command responsibility. Following the *ad hoc* Tribunals' definition, the notion of effective control was described as the material ability to prevent and punish the commission of the offences. The Chamber also listed several factors that can indicate the existence of the superior-subordinate relationship.[77]

With regard to *successor command responsibility* – one of the controversial issues before the ICTY[78] – the ICC Chamber correctly established that there must be temporal coincidence between the superior's detention of effective control and the criminal conduct of his subordinates. The judges acknowledged the existence of a minority opinion in the case law of the *ad hoc* Tribunals. According to this minority opinion, it is sufficient that the superior had effective control over the perpetrators at the time at which the superior is said to have failed to exercise his or her powers to prevent or to punish[79] (regardless of whether he or she had the control at the time of the commission of the crime, as the majority of the ICTY jurisprudence instead requested), but they rejected it on the basis of the language used by Article 28 of the ICC Statute. Indeed the provision at issue requires that the subordinates' crimes be committed "as a result of his or her failure to exercise control properly", thus requiring that the suspect had effective control "*at least* when the crimes were about to be committed".[80]

As for the element of causality – another strongly debated issue before the *ad hoc* Tribunals[81] – the Chamber interpreted Article 28 as requiring a causal link between the superior's dereliction of duty and the under-

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77 *Ibid*., paras. 415–17.

78 ICTY, *Prosecutor v. Enver Hadžihasanović et al.*, Trial Chamber, Judgment, IT-01-47, 15 March 2006, para. 199 (http://www.legal-tools.org/doc/8f515a/), and Hadžihasanović case, Appeals Chamber, Decision on Interlocutory Appeal, para. 55, see *supra* note 21.

79 Reference is made to ICTY, *Prosecutor v. Naser Orić*, Appeals Chamber, Judgment, Declaration of Judge Shahabudden and Partially Dissenting Opinion and Declaration of Judge Liu, IT-03-68, 3 July 2008, paras. 65–85 ('Orić case') (http://www.legal-tools.org/doc/e053a4/).

80 Bemba case, Decision, para. 419, see *supra* note 70.

81 Čelebići case, Trial Chamber, Judgment, paras. 398–99, see *supra* note 58. See, in doctrine, Otto Triffterer, "Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?", in *Leiden Journal of International Law*, 2002, vol. 15, no. 1, pp. 179 ff.

lying crimes.[82] The element of causality as such was only referred to the commander's duty to prevent the commission of future crimes. The judges nonetheless found that the failure to punish, being an inherent part of the prevention of future crimes, would be in a way causal *vis-à-vis* the subordinates' crimes, in the sense that the failure to take measures to punish the culprits is likely to increase the risk of commission of further crimes in the future.[83] Having considered that "the effect of an omission cannot be empirically determined with certainty" and thus that "there is no direct causal link that needs to be established between the superior's omission and the crime committed by subordinates",[84] the Chamber found that because a *conditio sine qua non* causality requirement (or "but for test") would be impossible to fulfil with regard to a conduct of omission, it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order for the causality nexus to be fulfilled.[85] However, the reasoning of the judges lacks some clarity as to the assessment of causality, which is surely hypothetical in cases of omission, but is actually hypothetical also with regard to commission. The hypothetical nature of the assessment shall thus not be the decisive argument to adopt the "risk increasement test" and reject the "but for test".[86]

Regarding the mental element of command responsibility, the Chamber clarified that strict liability is not admitted under Article 28 of the ICC Statute. Two standards of culpability are possible for military commanders: actual knowledge ("knew") or negligence ("should have known"). Actual knowledge cannot be presumed but can be obtained by

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82 Bemba case, Decision, para. 423, see *supra* note 70.

83 Reference is made in the *Bemba* decision to similar findings contained in the ICTY jurisprudence, and in particular in the *Hadžihasanović* case. However, as we have already clarified on other occasions, this finding is tricky because tends to confuse the responsibility of the superior for the subordinates' crimes that *have already been committed* with the *risk of commission of future crimes*. It shall be recalled that no responsibility arises pursuant to the command responsibility doctrine for the mere lack of control of the superior over the subordinates, as long as the crimes are not actually committed. See Meloni, 2010, pp. 165–67, *supra* note 12.

84 Bemba case, Decision, para. 425, see *supra* note 70.

85 *Ibid.*, para. 426: "To find a military commander or a person acting as a military commander responsible for the crimes committed by his forces, the Prosecutor must demonstrate that his failure to exercise his duty to prevent crimes inreased the risk that the forces would commit these crimes".

86 On the point see Kai Ambos, "Critical Issues in the *Bemba* Confirmation Decision", in *Leiden Journal of International Law*, 2009, vol. 22, no. pp. 721–22.

way of direct or circumstantial evidence, as decided by the *ad hoc* Tribunals. The Chamber, however, oddly noted that the knowledge required respectively under Article 30(3) and Article 28(a) of the ICC Statute would be different, since the former is applicable to the forms of participation as provided for in Article 25 of the Statute, while, under Article 28, the commander *does not participate* in the commission of the crime.[87] This finding is unconvincing. Regardless of whether command responsibility is considered to be a form of participation in the subordinates' crimes or a distinct mode of liability, it is unclear why the cognitive element, knowledge, under Article 30 of the ICC Statute should be different from knowledge under Article 28 of the ICC Statute.[88] More convincingly, in our view, it can be argued that it is not the knowledge but rather its object (also called *mental object*) that is different under the two provisions: in the case of Article 30 the mental object is the crime as such, whereas under Article 28 what the superior needs to know is the criminal conduct of his or her subordinates.[89]

In order to define the "should have known standard" the ICC judges referred again to ICTY jurisprudence.[90] The Chamber acknowledged that a difference exists between the "had reason to know" and the "should have known" standard, but unfortunately did not consider it necessary to elaborate any further. In any case, what emerges clearly is that under the should have known standard the superior is found to be *negligent* in failing to acquire knowledge of his subordinates' illegal conduct. In the view of the Court, the should have known standard requires "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 of the commission of the crimes".[91] However, among the *indicia* relevant for the determination of this negligence standard, the Chamber mentioned the same circumstances which were also mentioned with reference to the proof of actual knowledge

87 Bemba case, Decision, para. 479, see *supra* note 70.

88 Ambos, 2009, pp. 719–21, see *supra* note 86.

89 Meloni, 2010, p. 188, see *supra* note 12.

90 In particular reference is made to the *Blaškić* case, see Bemba case, Decision, para. 432, *supra* note 70.

91 *Ibid*., para. 433.

through circumstantial evidence.[92] This practice of referring to the same factors to establish the actual knowledge or the *negligent* ignorance – typical of the ICTY jurisprudence[93] – risks confusing distinct *mens rea* standards, obliterating any differences that may exist.

Another debatable finding of the *Bemba* decision is the Chamber's consideration of the superior's failure to punish the subordinates' past crimes as an indication of the risk of commission of future crimes, thus warranting the conclusion that the superior knew or at least should have known about the crimes.[94]

With regard to the conduct element of command responsibility, the Chamber considered that the three duties arise for the superior at different stages:

a) before the commission of the crime(s) the superior has the duty to prevent them;
b) during their commission he has the duty to repress the crimes; and
c) after the crimes have been committed the superior has the duty to punish or submit the matter to the competent authorities.

The Chamber further observed that the duty to repress encompasses the duty to stop ongoing crimes and the duty to punish the forces after the commission of crimes.[95] In turn, the duty to punish is an alternative to the duty to refer the matter to the competent authorities. In the first case the superior has the power himself to take the necessary measures, while in the second case the superior does not have the ability to do so and can, therefore, only submit the matter to the competent authorities.

The powers also vary according to the position of the superior in the chain of command. From this schema the judges drew the conclusion that "a failure to fulfil one of these duties is itself a separate crime under Article 28(a) of the Statute" and therefore that a military commander can be

92 Such circumstances are: 1) that the superior had general information to put him on notice of crimes committed or of the possibility of occurrence of unlawful acts; and 2) that such available information was sufficient to justify further inquiry. *Ibid*., para. 434.

93 Meloni, 2010, p. 114, see *supra* note 12.

94 Reference was made to the Special Court for Sierra Leone, specifically SCSL, *Prosecutor v. Augustine Gbao et al*., Trial Chamber, Judgment, 04-15-T, 2 March 2009, para. 311 (https://www.legal-tools.org/doc/7f05b7/).

95 ICC, Bemba Decision, para. 439, see *supra* note 70.

held responsible for one or more breaches of duty under Article 28(a) in relation to the same underlying offence.[96] The Chamber correctly held that a failure to prevent the crimes could not be cured by fulfilling the subsequent duty to repress or submit the matter to the competent authorities. However, to impose cumulative convictions on the same superior for the same subordinates' crimes on the basis of the different duties is not convincing from two points of view: first, because such a notion is inconsistent with an understanding of command responsibility as a mode of liability (as it actually is under Article 28 and as the Court confirmed in this decision); and second, because it does not appear to be respectful of the criminal law principles on concurrence of offences.[97]

With regard to the possible overlapping of Articles 25(3) and 28 of the ICC Statute, the first jurisprudence of the ICC excluded the possibility of trying an individual for the same facts under both modes of liability. In the *Bemba* case, the amended charging document submitted to the Pre-Trial Chamber by the prosecutor charged the suspect "primarily" with criminal responsibility as a co-perpetrator under Article 25(3)(a) or "in the alternative" under command or superior responsibility as provided by Article 28(a) or (b) of the Statute.[98]

At the outset of their reasoning, the judges found that in order to establish the responsibility of the suspect, Article 28 represents an alternative to Article 25, thus excluding the possibility of cumulative charges (and of cumulative convictions) under different modes of liability for the same crimes. This position is to be welcomed, especially in light of the rights of the defence, which were often neglected by the *ad hoc* Tribunals' practice of cumulative and imprecise charges at the indictment stage. Moreover, the ICC Pre-Trial judges clearly affirmed that an assessment of the responsibility under Article 28 should only be secondary to an assessment of responsibility under Article 25. If there were evidence of any active involvement of the suspect in the commission of the crimes, the charges against him should be brought under the latter provision rather

96 *Ibid*., para. 436.

97 On the *concursus delictorum*, see Ambos, 2009, p. 723, *supra* note 86.

98 See ICC, Situation in Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Office of the Prosecutor, Annex 3 to "Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence", ICC-01/05-01/08-395-Anx3, 30 March 2009 (http://www.legal-tools.org/doc/d7f72e/).

than under Article 28.[99] In sum, it emerges that command responsibility and responsibility for commission regarding the same defendant for the same facts are never cumulative. This conclusion, along with the circumstance that the elements of command responsibility under Article 28 are not easy to prove at trial, already indicates that, similarly to what happened before the ICTY with the joint criminal enterprise doctrine,[100] command responsibility before the ICC will be often absorbed into a form of liability covered by Article 25(3) of the ICC Statute.

17.4. Difficulties in the Interpretation of the Command Responsibility Doctrine

From the standpoint of criminal law command responsibility presents a number of problems. Many of the elements composing this form or responsibility are still not clear and subject to debate. To a certain extent, this is not surprising since this doctrine is a genuine creation of international criminal law and traces its origin through the process and evolution of international law.[101] By contrast, the forms of commission and modes of participation for international crimes normally originate from related concepts known in domestic criminal law. The difficulties relating to the interpretation of command responsibility are also due to the fact that we are dealing with a form of liability that incriminates not an action but a failure to act. Responsibility for omission has always been a very critical issue in penal law: one thing is to punish a person for what she did, quite another is to punish him/her for something that she did not do. In particular, not every system acknowledges the principle that omitting to prevent a criminal event under certain conditions can amount to its commission.[102]

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99 *Ibid*., para. 342: "An examination of Mr. Jean-Pierre Bemba's alleged criminal responsibility under Article 28 of the 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-perpetrator within the meaning of Article 25(3)(a) of the Statute for the crimes set out in the Amended DCC (document containing the charges)". See also *id*., paras. 402–3.

100 Indeed charges brought under the joint criminal enterprise doctrine are generally easier to proof. See Mark J. Osiel, "Modes of Participation in Mass Atrocity", in *Cornell International Law Journal*, vol. 38, no. 3, 2005, p. 793.

101 In this sense, Ambos, 2001, p. 667, see *supra* note 38; Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd ed., Oxford University Press, Oxford, p. 221.

102 See the thorough study by Michael Duttwiler, "Liability for Omission in International Criminal Law", in *International Criminal Law Review*, 2006, vol. 6, no. 1, pp. 1–61.

17.4.1. Responsibility for Omission and the Duty to Act of the Superior

The problem clearly emerged during the negotiations for the adoption of the ICC Statute. The Draft Statute for the International Criminal Court presented at the Diplomatic Conference contained a provision dedicated expressly to general responsibility for omission.[103] The old Article 28 of the Draft provided that the criminal conduct relevant for the purposes of responsibility for crimes within the competence of the Court could assume the features both of an action and of an omission, thus establishing the equivalence between the superior's failure to prevent a crime that he had the legal duty to prevent and its commission.[104] However, this provision was eliminated during the negotiations, as it was impossible to reach an agreement between the various delegations, in particular on account of the firm opposition of the French delegation whose legal system does not envisage any equivalence clause between criminal action and omission.[105] Thus the only rule left in the ICC Statute regarding liability for failure to act is the actual Article 28, specifically dictated for command responsibility.

Nevertheless, what clearly emerges out of those legal systems that do recognise liability for omission as a general principle of their criminal legal order is that liability by omission can only be triggered by the failure to prevent something when under a duty to do so.[106] It is necessary to stress this last point, which is unfortunately often forgotten in the legal analysis and sometimes also in the judgments. Indeed, no one can be held responsible for something that he or she did not do, unless he or she was under a legal obligation to do it. Of course, this holds true also with regard to command responsibility. Therefore the first thing in assessing whether an individual can be held responsible under this doctrine is to verify whether he or she was under a legal duty to do what he or she omit-

[103] On the previous projects on the issue, among which was the Siracusa Draft of 1996, see Kerstin Weltz, Die Unterlassungshaftung im Völkerstrafrecht: eine rechtsvergleichende Untersuchung des französischen, US-amerikanischen und deutschen Rechts, Iuscrim, Freiburg im Breisgau, 2004, pp. 230–32.

[104] Draft Statute for the International Criminal Court, Art. 28, 14 April 1998, UN doc. A/CONF.183/2/Add.1.

[105] Weltz, 2004, pp. 237 ff., see *supra* note 103.

[106] For more analysis on the issue of responsibility for omission in international criminal law, see Meloni, 2010, pp. 220 ff., *supra* note 12.

ted to do, specifically to prevent or punish the crimes of the subordinates. This requirement is contained in the so-called first element of command responsibility, namely in the superior–subordination relationship. By properly verifying whether the person at issue was in fact a "superior" or a "commander" the assessment that the person was under a legal obligation to prevent the illegal behaviour of his subordinate can be satisfied.[107]

It is undisputed in jurisprudence that "the absence of a formal appointment is not fatal to a finding of command responsibility".[108] On the other hand, the possession of *de jure* authority is not sufficient. As affirmed by the ICTY judges in *Čelebići*: "The formal status of superior or the formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach".[109] The problem that the judges had to face was clear: in the context of the former Yugoslavia, where the formal structures of command had broken down and new, improvised informal structures had been established, the possession of *de facto* powers which were not formally recognised was the rule and not the exception. Thus, the jurisprudence of the ICTY defined the concept of superior in a factual rather than formal manner, making this element dependent on the defendant's *de facto* ability to act. In a nutshell, it was said that it is a superior the one who has effective control over the subordinates. At the same time, the effective control was defined as the ability to prevent or punish the crimes committed by the perpetrators. This created a loop that often resulted in the impossibility of establishing the existence of the superior–subordinate relationship and ultimately of command responsibility.[110]

On the contrary, the duty to act – deriving from the position of superior – and the proof of the material ability to act – of the superior – should be kept separate. Only when it is established that the person was a superior (*de jure* or *de facto*) can his or her ability to act be verified.[111] Thus it is important to emphasise that the superior has to have had both

[107] For a full elaboration on the point, see *ibid*, pp. 154 ff.

[108] Čelebići case, Appeals Chamber, Judgment, para. 197, see *supra* note 49.

[109] *Ibid*., paras. 206, 251.

[110] For a more thorough analysis of the ICTY jurisprudence, Burghardt, 2008, pp. 112–80, see *supra* note 20.

[111] For a more in-depth analysis, see Meloni, 2010, pp. 94 ff., *supra* note 12. With regard to this jurisprudence, which considers the doctrine of command responsibility applicable also in the absence of a pre-existing duty to act, see also Mettraux, 2009, pp. 48–51, *supra* note 16.

the legal duty and the material possibility to prevent or punish the crimes. It is correct to say that a superior is a person who – in a hierarchical relationship (which can be *de jure* or *de facto*) – has a position of command or authority that gives him or her effective control over the behaviour of other individuals. It is not the other way around. In fact a person who has the material ability to prevent or punish, and therefore effective control over the behaviour of other individuals, is not necessarily a superior (for the sake of the applicability of the command responsibility doctrine), because he can lack the duty to act.

Effective control is a necessary requirement that must be proved both for *de jure* and for *de facto* commanders.[112] Thus, for example, if several chains of command exist, responsibility is to be attributed to the superior who actually exercised the powers to command and control over those who committed the crimes. This is now clear in the ICC Statute that uses the expressions "effective command and control" and "effective authority and control", where authority is to be intended as the normative analogy of command outside the military field.[113]

If command is the typical military power to issue compelling orders, authority can be defined as the power of a superior to issue instructions to subordinates in pursuance of a certain activity. In this context it means something not as strong and as absolute as command. Therefore, while command is the typical and connoting element of the superior–subordinate relationship pertaining to formally appointed military commanders, authority refers to those who lack the official qualification of military commanders but effectively act as such.

Article 28(b) of the ICC Statute introduces a further requirement in order for command responsibility to attach to civilian superiors, namely that the underlying crimes committed by the subordinate "concerned activities that were within the effective responsibility and control of the superior". Hence outside the military field, besides the existence of a relationship of subordination between the superior and the perpetrator of the crime, a further connection is required between the superior and the specific activity in whose sphere the crime was committed. This requirement seems appropriate in a context where the sources of the legal duty to act

[112] See, among many, Orić case, Appeals Chamber, Judgment, para. 91, *supra* note 78.

[113] Specifically on the application of command responsibility to civilian superiors, Nybondas, 2003, pp. 59 ff., see *supra* note 61.

of the superior are less easily identifiable and have a weaker foundation than in the military sector.

17.5. Possible Evolution of Command Responsibility: A Proposal to Clarify and Distinguish the Basic Forms of Command Responsibility

As already noted, the application of command responsibility at the judicial level is still subject to critical questions. Here we can just mention some of the major issues: Does the superior need to share the same intent of the subordinates with regard to the crimes committed by them and, if not, what exactly is he requested to know? Is a causal nexus required between the failure to act of the superior and the crime of the subordinate? Can a superior be responsible for the crimes committed by the subordinates before he assumed control over them? In our view, most of these issues can be reduced to one, namely to the uncertain nature of command responsibility. In other words, the question is whether we are dealing with a form of responsibility pursuant to which the superior is held accountable for the subordinates' crimes (thus war crimes, crimes against humanity, genocide) as he had participated in their commission or, instead, whether the superior is responsible of a specific offence of dereliction of duty.

For instance, to request a causal nexus between the omission of the superior and the subordinates' crime would be consistent with an understanding of command responsibility as a mode of liability pursuant to which the superior is made answerable for the crimes of his subordinates and convicted for those very crimes. In contrast, causality would not be required if the superior is held responsible only for his failure to act, namely for his dereliction of duty.

The issue is surely a most complicated one and it is beyond the scope of this chapter to analyse it in great detail. But the matter is very concrete and not at all abstract, as the jurisprudence of the ICTY shows. Indicative of the practical consequences of framing command responsibility as a separate crime, rather than as mode of liability, was the *Orić* case before the ICTY. In that case the judges convicted the accused – a former commander of the Srebrenica armed forces – to two years' imprisonment, instead of the 18 years requested by the prosecutor, for failure to prevent the crimes committed by his soldiers. In the words of the prosecutor, the "two years' sentence is manifestly inadequate because it is based on a fundamental error in the nature of Orić's criminal responsibility by classi-

fying Orić's crimes as a failure to discharge his duty as a superior, rather than as a mode of liability".[114] To be clear: Orić was not convicted for war crimes, as his subordinates were, but for a separate crime of dereliction of duty.[115]

The ICC of course does not have to follow the jurisprudence of the *ad hoc* Tribunals. As we have seen, the language adopted by the drafters of the ICC Statute is much more precise and the incipit of Article 28 makes it clear that command responsibility is considered a mode of liability and not as introducing a separate offence of the superior. Nevertheless, difficulties also arise from the formulation of Article 28 of the ICC Statute if interpreted as a mode of liability pursuant to which the superior is made responsible for the crimes of his subordinates. Hypothetically, would it be correct to make a commander accountable for the war crimes committed by his soldiers that he inculpably ignored and could not prevent but that he subsequently failed to punish? Even if we do not want to define the nature of command responsibility we cannot escape from the following question: For what exactly is the superior to be punished? In the end, it is a matter of rules of attribution of criminal responsibility. Indeed no one can be blamed for a crime unless that crime is attributable to him or her. Now the question is: How and when can a crime be attributed to someone?

General principles of criminal law provide for the criteria at both the subjective and objective levels in order to hold someone responsible for a crime. There is not always agreement among scholars on such criteria, but at least the minimal standards are clear. At the subjective level it is clear that (international) criminal law refuses strict liability. This means that a mental element is required (in the form of intent or in exceptional cases of negligence) and that the possibility of holding someone responsible for crimes committed by others shall be excluded unless there is a personal culpability that makes that individual accountable for that specific crime. Now, for the purpose of command responsibility the possible *mens rea* of the superior can be quite different.

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[114] See ICTY, *Prosecutor v. Naser Orić*, Prosecution Appeal Brief, IT-03-68, 16 October 2006, paras. 152 ff.

[115] This issue is thoroughly dealt with in 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, pp. 619–37.

The ICC Statute provides that a military or military-like commander be responsible if he or she "knew or owing the circumstances at the time should have known that the forces were committing or about to commit such crimes". With regard to civilian superiors the ICC Statute sets a higher standard requiring that the superior "knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes". This means that we can have a whole spectrum of different cases, ranging from the gravest scenario, where the superior knew and intentionally omitted to take action, to the commander who ignored the crimes but should have known about them and therefore negligently failed to act, passing from the reckless superior who disregarded the information.

Similarly, with regard to the conduct of the superior, this can take very different contours. The superior in fact is required to take all of the necessary and reasonable measures within his or her power in order to prevent/repress or submit the matter to the competent authorities. The aim of the measures will change, of course, depending on the moment when the superior acquires knowledge of the risk of commission of crimes by his subordinates. A superior who knew and had the possibility to prevent a crime will not be considered to have discharged his or her duty by punishing *ex post* the culprits. The conduct must in any case be culpable. This means that if the superior did not have the material possibility to prevent or repress the commission of the crimes he cannot be responsible. The ICC Statute explicitly endorses this requirement in that it speaks of "necessary and reasonable measures within his or her power".

Therefore, in determining what the superior is to be held accountable for, it is erroneous to consider command responsibility to be a unitary form of responsibility. Indeed, around a central corpus of common elements there are at least four different basic forms of responsibility which can be differentiated on the basis of their objective and subjective elements. We have cases of 1) intentional failure to prevent or 2) of negligent failure to prevent, and cases of 3) intentional failure to punish or of 4) negligent failure to punish (where *punish* is intended to include both repress and submit the matter to the authorities).

Although the ICC Statute regulates all of the previously mentioned forms of command responsibility in a single provision, each of these forms should be considered separately because of their very different features and requirements. As a matter of fact, the forms of command responsibility regarding the superior's intentional or negligent failure to

punish present a completely different structure to those concerning the failure to prevent. In these cases the superior's failure to take the necessary and reasonable measures clearly follows the commission of the crime by the subordinates. Thus no causal nexus can exist between the failure to act of the superior and the underlying crime. At most a link can be established, and in fact is required by the norm ("as a result"), between the superior's failure to exercise control properly and the subordinates' commission of the crimes but structurally the subordinates' crime cannot be linked to the failure to exercise the duty to punish.

We reach an opposite conclusion if we take into account the failure to prevent. The intentional failure to prevent a crime resembles a form of complicity, where the superior participates in the crimes of his subordinates.

In sum, it can be said that command responsibility is not a specific crime of omission nor is it a form of participation in the subordinates' crimes. It is indeed a mode of criminal liability for international offences, which can imply different consequences depending on the features of each case. The situation of a superior who knew about the crimes in time, had the possibility of preventing them and intentionally decided not to take any action is completely different from the one of the superior who ignored the fact that subordinates were committing the crimes, had no possibility of preventing them but then negligently failed to act in order to punish them. Such differences require distinct treatments, including at the stage of sentencing, given the incomparable gravity of the one situation *vis-à-vis* the other. This methodology is, in our view, necessary if we want to reconcile command responsibility with the fundamental principles of individual and culpable responsibility, which are at the base of every liberal and democratic criminal system, including the international one.

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