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Superior responsibility and its application to the crime of genocide

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I hereby declare that this thesis is a result of my independent work. No material other than correctly cited references acknowledging original authors has been used.

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In Lezník, 22. 1. 2021

Michala Chadimová

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CONTENT

LIST OF ABBREVIATIONS

ACH	Appeals Chamber
ALC	Armée de Libération du Congo
AP I	Additional Protocol I to the 1949 Geneva Conventions
CAR	Central African Republic
ECCC	Extraordinary Chambers in the Courts of Cambodia
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal
MLC	Mouvement de Libération du Congo
PTCH	Pre-Trial Chamber
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TCH	Trial Chamber
UN	United Nations

INTRODUCTION

The treatment of special intent crimes, such as genocide, is one of the most controversial aspects of superior responsibility.[1] Superior responsibility is based on omission – the failure to prevent or punish the crimes of subordinates.[2] Thus, for a superior to be held liable under the superior responsibility doctrine, no active conduct on the part of the superior is required.[3] Depending on the circumstances, an omission by a superior in the form of failure to prevent or punish may occur intentionally, although it may also be the result of carelessness. On the other hand, the crime of genocide refers to specific or special intent – *dolus specialis*.[4] In relationship to genocide, special intent means that the perpetrator committed an act while clearly seeking to destroy a particular group, in whole or in part. In applying superior responsibility to the crime of genocide, it is mostly discussed whether superiors must themselves have had the necessary genocidal intent, or if they must merely have known that their subordinates possessed genocidal intent. In the latter case, a superior could be held liable for genocide even if they did not themselves have genocidal intent. However, other elements of superior responsibility create challenges while applying genocide. This study will address questions related to:

[1] The terms 'superior' and 'command' have been historically employed in different context, particularly to distinguish between a military superior - commander and a civilian superior. The term command responsibility gives a more accurate impression of the origin and purpose of the doctrine, whereas the term superior responsibility has been preferred during the last decade because of its neutrality, referring to both civilian and military superiors. The author uses term 'military commander' in a relation to the Rome Statute wording as abbreviation of the legal term 'military commander or person effectively acting as a military commander' unless otherwise stated.

[2] As opposed to a superior's responsibility for direct participation in the commission of a crime or ordering the commission of a crime. The author uses the term 'superior responsibility' only in reference to superior's responsibility for a failure to take measures (under Article 6(3) of the ICTR Statute, Article 7(3) of the ICTY Statute and Article 28 of the Rome Statute).

[3] If the author refers to a 'superior's responsibility for crimes', it is used as an abbreviation of 'superior's responsibility for his omission to prevent or punish crimes committed by his subordinates' unless otherwise stated. The author uses the term 'superior' as a gender-neutral pronoun. 'He' in a sense of general superior is an abbreviation of 'he or she'.

[4] At the beginning of development of the definition of genocide, no *mens rea* for the crime itself was discussed. Lemkin himself did not discuss the mental elements for genocide in a relation to individual criminal responsibility. However, he argued that not only should the principal perpetrators of genocide be held responsible, but also others directly or indirectly involved in its commission. Raphael Lemkin, *Axis Rule in Occupied Europe* (1944), p. 93.

- The applicability of a superiors *mens rea* to the crime of genocide, mainly requirements on the superior's special intent, superior's active duty to seek information and intent behind superior's taken measures to prevent and punish genocide,
- Applicability of superior-subordinate relationship and effective control to the crime of genocide, mainly the issue of unidentified subordinates and remoteness of the superior, and
- Applicability of the superior's failure to prevent and punish the crime of genocide, mainly relevance of the measures' effectiveness and successor superior responsibility.

This study aims to analyse in its complexity the relationship between the doctrine of superior responsibility and the *mens rea* for genocide. *In concreto*, the study aspires to answer a question on how the individual elements of superior responsibility are applied to genocide with a particular focus on the mental element. The mental element is the crucial point of interest as it arguably creates an open contradiction between requiring a special intent for genocide but holding a superior responsible when they 'had reason to know', 'should have known' or 'disregarded information which clearly indicated' that subordinates committed or are about to commit genocide. The study aims to provide an answer to the question whether special intent is required for the superior – a superior who is being held responsible based on their omission/failure to prevent or punish a special intent crime committed (or about to be committed) by his or her subordinates. This study is especially relevant as much of the application of the concept of superior responsibility by the International Criminal Court (ICC) has been on the rise since and the appearance of the first genocide charges in the *Al-Bashir* case. Moreover, superior responsibility in relation to the crime of genocide was recently discussed in the Case 002/02 at the Extraordinary Chambers in the Courts of Cambodia (ECCC). Superior responsibility is also often submitted by the Prosecution as an alternative form of responsibility. This alternative has fewer evidentiary roadblocks to prove a superior's omission than direct participation in the commission of the crime. Also, the situation in Myanmar, Syria and Iraq highlights the necessity of including responsibility of superiors in the discussion on the responsibility for genocide and the obligation of superiors to prevent and punish genocide.

Superior responsibility and the special intent required in the crime of genocide are well defined by international criminal tribunals and are often the subjects of discussion between academics. However, the unique relationship between superior responsibility and special intent crimes has not been analysed in a sufficiently comprehensive and complex fashion.[5] Some authors solely discuss the superior's special intent requirement but in a very limited extent or limit themselves to pointing out its contradictory nature.[6] Also, one of many presented challenges is the limited and in some cases ambiguous reasoning for the applicability of superior responsibility to the crime of genocide by the *ad hoc* tribunals followed by the uncertainty whether this case law can provide guidance to the applicability of superior responsibility to the crime of genocide under the Rome Statute. This study thus offers a complex analysis of the relationship between superior responsibility and genocide by focusing on the concept of superior responsibility and its nature.

RESEARCH QUESTION AND STRUCTURE

The main research question is how superior responsibility is, *in concreto,* applied to the crime of genocide. The author identified several defining points for the applicability of superior responsibility to genocide, including:

- Legal principles and Article 30 of the Rome Statute
- Nature of superior responsibility (mode of liability v. separate offense)
- Requirement of causality
- Negligence standard

[5] With some exceptions – see for example Patrick Shaun Wood, *Superior responsibility and crimes of specific intent: A disconnect in legal reasoning*? (University of Pretoria, 2013). Available online at: https://pdfs.semanticscholar.org/965e/08477a927b76c8a7635d1fa3b7b8d7d0f5f0.pdf
Joshua L. Root, 'Some other mens rea? The nature of command responsibility in the Rome Statute' (2013) 23(119) J Transnatl. L & Policy, p. 119-156.

[6] See for example William Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge: Cambridge University Press, 2000), p. 305 and 312. 'Unlike many war crimes, genocide requires the prosecution to establish the highest level of specific intent. But command responsibility is an offence of negligence, and exactly how a specific intent offence can be committed by negligence remains a paradox. […]. [I]t must be wrong in law to consider that genocide may be committed by a commander who is merely negligent.'.
The nexus between superior responsibility and special intent crimes is unfortunatelly not discussed in the newest and brilliant contribution on the modes of liability in international criminal law. Jackson Miles, 'Command responsibility' in: Jereme de Hemptime Robert Roth and Elies van Sliedregt (eds.), *Modes of liability in International Criminal Law* (Cambridge: Cambridge University Press, 2019).

In order to answer the main research question, the following issues have to be discussed:

(1)Do basic principles of criminal law have influence on the applicability of superior responsibility to the crime of genocide, mainly in respect to the superior's *mens rea*? If yes, under which conditions?

(2)Can the nature of superior responsibility offer guidance into its applicability to the crime of genocide? If yes, how does the nature of superior responsibility define its applicability to the crime of genocide.

The structure of the study is design to effectively answer the research question. The first chapter is devoted to superior responsibility and genocide and presents the theoretical background. The chapter starts with the historical development from the origins to the Rome Statute. Superior responsibility and genocide are presented with its elements under the Rome Statute and also Statutes of the *ad hoc* Tribunals, focusing on the non-contested elements. The aim of the first chapters is to present the necessary theoretical background for the later analysis of the interaction between superior responsibility and genocide.

In the second part, the author focuses on the defining points in the applicability of superior responsibility to the crime of genocide. Focus will be given to the fundamental principles of (international) criminal law, mainly requirement of the strict construction of the crimes, ban on analogy and *dubio pro reo* principle. In this chapter, it will be discussed whether these principles can provide substantial guidance for the applicability of the superior responsibility doctrine for the special intent crime. The chapter presents the importance of defining the nature of superior responsibility and shows how a different perception of superior responsibility could resolve the potential legal ambiguity. The author responds to the common criticism of holding a superior responsible for a genocide committed by their subordinates without superiors having had the special intent, *i.e.* that it weakens the relationship between the principal crime and the superior if the special intent is not required on the part of the superior. The causality requirement will be introduced as a safeguard securing the strong connection between the crime committed by subordinates (in this case genocide) and the responsibility of the superior in relation to the crime.

The third part reflects the development of superior responsibility and its elements in relation to genocide and its standing with the direct responsibility of commanders and

superiors for active participation in the crimes. It will mainly address the applicability of a superiors *mens rea* to the crime of genocide (including requirements on the superior's special intent, superior's active duty to seek information and intent behind superior's taken measures to prevent and punish genocide), applicability of superior-subordinate relationship and effective control to the crime of genocide (including the issue of unidentified subordinates and remoteness of the superior) and the applicability of the superior's failure to prevent and punish the crime of genocide, mainly relevance of the measures' effectiveness and successor superior responsibility. A separate issue discussed is Article 21 of the Rome Statute and the applicability of findings arising from analyses of Statutes of the *ad hoc* Tribunals and the case law to the proceedings at the ICC.

This study will also show different approaches demonstrated in the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Firstly, the author will analyse the case law of the ICTR and point out its rather ambiguous position(s). Subsequently the case law of the ICTY will be discussed. In the *Prosecutor* v. *Stakić* the Trial Chamber (TCH) found that it must be proven that a superior possessed the requisite special intent, whereas the Appeals Chamber (ACH) in the *Brđanin* case found no difficulty in convicting a superior of genocide based on a lower *mens rea*. Lastly, the Case 002/02 from the ECCC will be presented as the latest development in superior responsibility for special intent crimes. The chapter provides analysis of the Trial Chamber Judgment from November 2018 with a focus on the distinction between the *mens rea* requirement for the JCE and superior responsibility.

METHODOLOGY

The methodology used for this dissertation is based on traditional procedures. The author of this dissertation mainly employs analysis and synthesis of research questions.

The analysis starts with the wording of the Rome Statute and the other Statutes (mainly the ICTY Statute and the ICTR Statute), in order to determine whether it provides any guidance on the application of superior responsibility for genocide. Focus will be given to the fundamental principle of criminal law – in *dubio pro reo* – as it might understandably provide substantial guidance for the applicability of the superior responsibility doctrine for the special intent crime. Subsequently, the analysis of the superior responsibility and its nature will follow. The author will also present the importance of defining the nature of superior

responsibility and how a different perception of superior responsibility could solve the potential legal ambiguity created by the applicability of superior responsibility to special intent crimes.

The dissertation also provides an analysis of different approaches taken by international criminal tribunals, with a special focus on the jurisprudence of the ICTY, ICTR and the ECCC. The dissertation aims to analyse different decisions and judgments. By using qualitative research as a method of inquiry, this thesis critically analyses an application and interpretation of superior responsibility for the crime of genocide committed by the superior's subordinates. This dissertation evaluates legal challenges faced by international criminal tribunals, primarily the ICC, in using superior responsibility for genocide. Critical analysis will also focus on the possibility of the ICTY, ICTR and the ECCC case law being applied before the ICC.

The choice of judicial institutions in question is certainly a notable methodological issue. The author focuses on the applicability of her findings at the ICC, thus the elements of superior responsibility used for the analysis correspond to the wording of the Rome Statute. It is believed by the author that the ICC, as the only permanent international criminal court, will play a substantial role in holding superiors and commanders responsible under the superior responsibility doctrine. If not directly, the wording of the Rome Statute has been transmitted into several national penal laws and Statutes of mixed tribunals (Special Tribunal for Lebanon).[7] However, the case law of the ICC itself does not provide much guidance in the

[7] Art. 3 para 2 of the STL Statute: 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: (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.
As an example of national penal law provision, see Art. 418 of the Czech Penal Code: 'Section 418 Liability of a Superior (1) A military or another superior is criminally liable for the crime of Genocide (Section 400), Attack against humanity (Section 401), Preparation of offensive war (Section 406), Incitation of offensive war (Section 407), Use of forbidden means and methods of combat (Section 411), War cruelty (Section 412), Persecution of population (Section 413), Pillage in the area of military operations (Section 414), Abuse of internationally and state recognised symbols (Section 415), Abuse of flag and armistice (Section 416) Harming a conciliator (Section 417) committed by their subordinates, over whom they exercised their power and control, even out negligence, if he/she did not prevent them from committing such a criminal offence, failed to prevent the commission of such criminal offence, or failed to penalize them for the commission of such a criminal offence, or failed to refer them to the relevant authority for imposing such penalty.'

applicability of superior responsibility to special intent crimes. For this reason, the author looks at the case law of the ICTR, ICTY and the ECCC that has dealt with superior responsibility for genocide in multiple cases. Nevertheless, the research project is not meant to be a classical comparative study with the exclusive applicability of its findings to the ICC. The choice of the topic of this dissertation, as well as the choice of some of the cases examined, is influenced by the author's working experience at the Office of the Prosecutor at the ICC and the Office of the Co-Prosecutors at the ECCC.

APPLICABILITY OF *AD HOC* TRIBUNALS' CASE LAW AT THE ICC

The applicability of findings arising from the analyses of the Statutes of the *ad hoc* tribunals and the ad hoc tribunals' case law in the proceedings in the ICC is a critical issue due to the fact that there is no ICC case law that encompasses both superior responsibility and genocide. However, the case law of the *ad hoc* tribunals provides quite a colourful development into the applicability of superior responsibility in relation to genocide. This chapter aims to answer whether the findings of the *ad hoc* tribunals are applicable, and if yes, under which extent. In contrast to the *ad hoc* tribunals, Article 21 of the Rome Statute specifically sets out the applicable law for the Court. Article 21 of the Rome Statute of the International Criminal Court determines, according to its very wording, the applicable law. It reads as follows:

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on

grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

The Article lays out a clear hierarchy of sources of law to be applied. The Rome Statute indicates that, should the Statute and Elements of Crimes conflict in any way, the Statute prevails. The Court is only to turn to international law "in the second place" and "where appropriate." Judges are to turn to general principles of national law, only "failing that" and "as appropriate," as in, absent an answer in the Statute, the Elements of Crimes, and international law. The ACH in the *Lubanga* case discussed applicable law when determining whether the principle or doctrine of abuse of the process can be applied under the provisions of Article 21(1)(b) and 21(1)(c) of the Statute. The ACH concluded that particularly whether a matter is exhaustively dealt with by its text or that of the Rules of Procedure and Evidence, there is no room left for recourse to external sources of law. However, if the Statute is not exhaustive on the subject, abuse of process would find its place as an applicable principle of law under either sub-paragraphs (b) or (c) of paragraph 1 of article 21 of the Statute.[8]

The principles and rules of law as interpreted in previous Court's decisions may be applied but it is not compulsory. There is no hierarchy among the decisions of the ICC's three divisions as the use of precedent by the ICC does not suggest that the Appeals Chamber rulings are superior to those of other chambers.

When analysing the interaction between modes of liability and special intent crimes, *ad hoc* tribunals provided multiple cases where the interaction, to some extent, was analysed. Thus, the question whether the case law of ad hoc tribunal is applicable in the ICC must be address.

Article 21(1)(b) of the Statute provides a list of so-called external sources – applicable treaties and the principles and rules of international law which is to be understood as including the established principles of the international law of armed conflict. The decision of the ACH in the *Lubanga* case is a clear affirmation that the external sources of law are subsidiary sources of law and not additional sources of law, meaning that the application of the case law of the *ad hoc* tribunals forming principles and rules of international law is

[8] *Lubanga*, ICC, ICC-01/04-01/06, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, para. 34.

subjected to the existence of a gap in the Statute. To determine whether such a gap exists, the Court must first apply the applicable rules of interpretation, as provided for by the Statute and the Vienna Convention on the Law of Treaties. [9]

The relevance of the case law of the *ad hoc* tribunals in the ICC was first discussed by the PTCH II in 2005 in relation to the situation in Uganda. The PTCH held "As to the relevance of the case law of the ad hoc tribunals, the matter must be assessed against the provisions governing the law applicable before the Court. Article 21, paragraph 1, of the Statute mandates the Court apply its Statute, Elements of Crimes and Rules of Procedure and Evidence 'in the first place' and only 'in the second place' and 'where appropriate', 'applicable treaties and the principles and rules of international law, including established principles of the international law of armed conflict'. Law and practice of the *ad hoc* tribunals, which the Prosecutor refers to, cannot *per se* form a sufficient basis for importing it into the Court's procedural framework remedies other than those enshrined in the Statute." [10] In the *Bemba* case, PTCH I found that neither the Stature nor the Elements of Crimes provide for a definition of an international armed conflict and relied on the jurisprudence of the ICTY Appeals Chambers on the basis of Article 21(1)(b).[11] On the other hand, PTCH I refused to adopt the jurisprudence of the ICTY on modes of liability, especially the concept of joint criminal enterprise, taking into consideration the specific wording of Article 25(3) of the Statute.[12] Judge Wyngaert in her concurring opinion to the TCH's judgement in the *Chui* case argued that "Whereas ICTY Chambers have drawn on customary international law in order to interpret modes of liability under their Statute, it is highly doubtful that this can be done at the ICC."[13] She claimed that it is not appropriate to draw upon subsidiary sources of law, as defined in Articles 21(l)(b) and (c) of the Statute, to justify incorporating forms of criminal responsibility that go beyond the text of the Statute.[14]

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[9] *Ibid*.

[10] *Situation in Uganda*, ICC, ICC-02/04-01/05-60, Decision on the prosecutor's position on the decision of Pre-trial chamber II to redact factual descriptions of crimes from the warrants of arrest, motion for reconsideration, and motion for clarification, 28 October 2005, para. 19.

[11] *Bemba*, ICC, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 15 June 2009, para. 229.

[12] *Lubanga*, ICC, ICC/01/04-01/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (PTCH I), 29 January 2007, paras. 322-41.

[13] *Chui*, ICC, ICC-01/04-02/12, Judgement Pursuant to Article 74 of the Statute - Concurring Opinion of Judge Wyngaert, 18 December 2012, para. 9.

[14] *Ibid*.

In conclusion, the case law of *ad hoc* tribunals is in no sense binding on the Chambers at the ICC. However, if the Statute, Elements of Crimes and the Rules of the ICC are not definitive on the issue, principles and rules of international law may be applied. This means that the case law of *ad hoc* tribunals is not automatically applicable. The application should be subjected to detailed analysis of the case law addressing whether the case law forms principles and rules of international law. The case law of the *ad hoc* tribunals provides the only practical guidance to the treatment of special intent crimes in relation to superior responsibility. As Article 21(1)(b) of the Rome Statute provides for the possibility of the application of the case law of the *ad hoc* tribunals, the case law will be thoroughly analysed.

PART 1: OVERVIEW

1. CONCEPT OF SUPERIOR RESPONSIBILITY AND GENOCIDE IN INTERNATIONAL CRIMINAL LAW

Superior responsibility and genocide have been widely discussed among scholars and has also been extensively applied by various tribunals. Both concepts have a long history of being applied in the courtrooms, starting, in modern history, in Nuremberg. However, both concepts are widely discussed and are subject to some controversies. Needless to say, superior responsibility and genocide form important pillars of international criminal law. The aim of this chapter is to provide a basic but complex overview of its historical development and elements of superior responsibility and genocide.

1.1 SUPERIOR RESPONSIBILITY

1.1.1 Historical development

Superior responsibility has undergone a long historical development. To understand the existing laws, it is useful to start with an overview of its development. Therefore, this chapter provides a concise overview of the most important milestones in the development of the doctrine of superior responsibility. The historical overview is subdivided into five parts: the origins of the doctrine, the Tokyo trials, the Nuremberg trials, modern development and

contribution of the *ad hoc* tribunals and the International Criminal Court to the development of the doctrine.

Origins of the doctrine

The doctrine of superior responsibility has been developing since ancient times. Probably the first notion of superior responsibility can be traced back to the time of Sun-Tzu in 500BC. Sun-Tzu stressed upon the duty of the superior to control his subordinates but it is not known whether he intended to implement this as a legal basis for a case of a superior' s failure to control his or her subordinates.[15] An early document dealing with the superior responsibility doctrine in Europe proposing the consequences of superior responsibility is the Ordinance issued by Charles VII in 1439.[16] This Ordinance provided: 'Each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company…If he fails to do so or covers up the misdeed or delays in taking action, or if, because of his negligence or otherwise, the offender escapes investigation or punishment, the captain shall be responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been.'[17] The Ordinance legally confirmed that superiors should be held responsible for the subordinates' acts.

The first international codification of superior responsibility can be found in the IV Hague Convention (1907) negotiated at international peace conferences in the Hague in the Netherlands. Article 1 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the Hague Convention, stipulates that '[…] the laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps, fulfilling the following conditions […]' and one of the condition was that they are commanded by a person responsible for his subordinates..[18] Additionally, Article 43 of the Annex to the IV Hague

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[15] Hays Parks, 'Command Responsibility for War Crimes', (1973) 62(1*) Military Law Revie*w, p. 1 - 20. Ann B Chng, 'Evolution of the Command Responsibility Doctrine in Light of the Čelebići Decision of the ICTY'(1999) 25(1) *North Carolina Journal of International Law and Commercial Regulation*, p. 176.

[16] Max Markham, 'The Evolution of Command Responsibility in International Humanitarian' (2011) *Penn State Journal of International Affairs*, Stanford University, p. 51.

[17] Cited in Leslie Green, 'Superior Responsibility in International Humanitarian Law' (1995) 5 *Transnational and contemporary problems*, p. 321.

[18] Regulations respecting the Laws and Customs of War on land, Annex to the Hague IV, 18 October, 1907, Article 1. (Regulations, Annex to the Hague IV)

Convention requires that the 'authority of the legitimate power […] shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'[19] The articles preview responsibility of a superior but the provision itself does not specify an extent of superior responsibility.

At the conclusion of World War I, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties met at Versailles and recommended the establishment of an international tribunal. The Commission's report was truly a milestone: it was proposed for the first time in the history of international law that the criminal responsibility of a state was supplemented with the criminal responsibility of an individual, which was to be determined by an *ad hoc* international criminal tribunal. The Commission proposed that 'those 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' should be punished.[20] In fact, the proposal by the Commission was reflected in Article 227 of the Versailles Peace Treaty by which William II was subjected to 'public arraignment'. This provision was however never implemented.[21] As Cassese put it, the period immediately following the First World War was 'notable for numerous attempts to establish a variety of international criminal institutions, all of which ended in failure'.[22]

Tokyo Trial

One of the most cited superior responsibility cases and also the most controversial ones is the case of the Japanese General Tomoyuki Yamashita. The former General of the Fourteenth

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[19] Regulations, Annex to the Hague IV, Article 43.

[20] William H. Parks, 'Command Responsibility for War Crimes' (1973) 62(1) *Military Law Review*, p. 12.

[21] On February 3, 1920, the Allies submitted a list of 896 alleged war criminals they desired to try in accordance with Article 228 of the Versailles Treaty, this list was later reduced to 45 names. Of those convicted, only Major Benno Crusius was convicted on the basis of ordering the execution of wounded French prisoners of war and sentenced to two years confinement by the Supreme Court of the Reich at Leipzig.[21] Although no formal international tribunal was established, this was another milestone in the development of international individual criminal responsibility by declaring that '[A]all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of Staff, who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.' William H. Parks, 'Command Responsibility for War Crimes' (1973) 62(1) *Military Law Review*, p. 12.

[22] Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law*. 3rd ed. Oxford: Oxford University Press, 2013, p. 253.

Army Group of the Imperial Japanese Army that occupied the Philippines during the Second World War was arraigned before a United States Military Commission in 1945. The Yamashita trial affirmed the principle of individual accountability but also became the first trial to find a commanding officer criminally responsible without any direct evidence linking him to the crimes committed by his subordinates.[23]

It is important to note that Yamashita was neither charged with assisting in nor ordering crimes. During the opening arguments, the Prosecutor stated: "The record itself strongly supports the contention or conclusion that Yamashita not only permitted but ordered the commission of these atrocities. However, our case does not depend upon any direct orders from the accused. It is sufficient that we show that the accused permitted these atrocities." [24] Yamashita was charged with failing to discharge his duty as a superior to control the acts of his subordinates by permitting troops under his command to commit war crimes.[25] The Court rendered a verdict over Yamashita on 7 December 1945. The Court came to the decision, stating that it would be absurd to 'consider a superior a murderer or rapist because one of his soldiers committed a murder or a rape'. Nevertheless, the Court concluded that the violations of the law of war that occurred in the Philippines while Yamashita was in charge were 'not sporadic in nature'.[26] As a result, the Court believed that Yamashita failed to provide effective control of his troops as was required by the circumstances.[27]

Yamashita petitioned the Supreme Court of the Philippine Islands based on a lack of jurisdiction over the person and over the trial for the offence charged. This petition was denied.[28] The case was also brought before the Supreme Court of the United States and Yamashita petition was denied as well. Chief Justice Stone in the decision observed that the question is whether the law imposes on an army superior a duty to take such appropriate

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[23] Arthur Thomas O' Reilly, 'Superior responsibility: a call to realign doctrine with principles' (2004) 20(1) *American University International Law Review*, p. 192.

[24] United Nations War Crimes Commission. Law Reports of Trials of War Criminals. Vol. IV. London: HMSO, 1948, p. 84.

[25] The prosecution argued that the atrocities "were so notorious and so flagrant and so enormous, both as to the scope of their operation and as to the inhumanity, the bestiality involved, that they must have been known to the Accused if he were making any effort whatever to meet the responsibilities of his superiority or his position; and that if he did not know of those acts, notorious, widespread, repeated, constant as they were, it was simply because he took affirmative action not to know". United Nations War Crimes Commission. Law Reports of Trials of War Criminals. Vol. IV. London: HMSO, 1948.p. 17.

[26] *Law Reports*, Volume IV, p. 35.

[27] *Ibid.*

[28] *Law Reports*, Volume IV, p. 22.

measures as are within his power to control the troops under his authority for the prevention of crimes and whether he may be charged with personal responsibility for his failure to take such measures when violations result.[29] He argued that it is evident that the conduct of military operations by troops whose excesses are unrestrained by orders would almost certainly result in violations of the law of wars.[30] The judgment was followed by two dissenting judgments, including Justice Rutledge Mass who argued that the guilt should be imputed to individuals who knowingly have failed in taking action to prevent the wrongs done by others, having both the duty and the power to do so.[31]

Yamashita case was the first war crimes trial to find a commanding officer criminally responsible without any direct evidence linking him to the crimes committed by his subordinates.[32] One of the main critique' s of the Yamashita case was that Yamashita was in essence held liable – paradoxically – because of his lack of effective control over his subordinates.[33] As a result, superior responsibility was in this case interpreted as strict liability imposing responsibility on the superior without his personal dereliction of duty. On the other hand, the Judgment over Yamashita specifies that "[S]hould a superior issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood."[34] This is a plausible aspect of the Yamashita trial. It is a base for the clear distinction between direct responsibility as a responsibility for ordering etc. and indirect responsibility of superiors as a responsibility for a superior's failure, while both of them are found to be a crime.

The *Yamashita* decision must be understood in conjunction with the trial of Admiral Toyoda who was, under the doctrine of superior responsibility, prosecuted for the same incidents. During the trial, he explained the relations of superiority and subordination in the fights for the capital of the Philippines, thus casting doubt on the sentencing Yamashita.

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[29] *Law Reports*, Volume IV, p. 23.

[30] Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article I lays down as a condition which an armed force must fulfil in order to be accorded the rights of lawful belligerents, that it must be" superior by a person responsible for his subordinates."
Regulations, Annex to the Hague IV Article I.

[31] *Law Reports*, Volume IV, p. 53 – 55.

[32] Arthur Thomas O' Reilly, 'Superior responsibility: a call to realign doctrine with principles' (2004) 20(1) *American University International Law Review*, p. 78 – 81.

[33] See also Lael Richard L., ,The Yamashita Precedent: War Crimes and Command Responsibility'(1982) Wilmington, Del. Scholarly Resources , p. 95.

[34] *Law Reports*, Volume IV, p. 35.

During the Trial, Toyoda even pleaded guilty to issuing the order that "Manila should be defended to the very end".[35] In the light of the above, the decision of the Tokyo tribunal trying Toyoda is even more striking as the tribunal acquitted him as the only Japanese war criminal and totally ignored his direct responsibility for the order. Apart from the *Yamashita* and *Toyoda* case, superior responsibility was discussed during several other trials by the United States Military Commissions in the Far East. It was clearly established that a superior responsibility may arise in the absence of any direct proof of the giving of an order for the commission of crimes.[36] The tribunal expressly held that superior responsibility arises when a superior knew, or should by the exercise of ordinary diligence have learned of the commission of crimes.[37] On January 19, 1946, while the Supreme Court was deliberating the *Yamashita* case, MacArthur approved the Charter of the International Military Tribunal for the Far East (IMTFE), which generally followed the model set by the Nuremberg Trials.[38] The IMTFE judges addressed the issue of the superior responsibility, in a way that largely followed the decision of the High superior and Hostages cases (discussed below). An official or military superior would not be held responsible unless he either had knowledge that crimes were occurring and failed to 'take such steps as were within his power' to stop them or was 'at fault for having failed to acquire such knowledge'. The Tribunal made clear that a superior's fault requires proof of a personal dereliction of duty and clearly elaborated on the required superior's *mens rea* stating. The Tribunal distinguished two situations, a responsibility based on knowledge that such crimes were being committed, and having such knowledge they failed

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[35] Prévost, Maria, 'Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita' (1992) 14(3) *Human Rights Quarterly*, p. 330.

[36] For example - Shiyoku Kou was sentenced to death on 18th April, 1946, after being found guilty of "unlawfully and wilfully" disregarding, neglecting and failing to discharge his duties as Major-General and Lieutenant-General by " permitting and sanctioning " the commission of murder and other offences against prisoners of war and civilian internees. Yuicki Sakamoto was sentenced to life imprisonment on 13th February 1946 after being found guilty of a charge alleging that he "failed to discharge his duty as superior officer in that he permitted his subordinates to commit cruel and brutal atrocities." Cited in United Nations War Crimes Commission. Law Reports of Trials of War Criminals. Vol. IV. London: HMSO, 1948, p. 86.

[37] "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." Cited in William H. Major, 'Superior Responsibility for War Crimes' (1999) 25(3) *Military Law Review*, p. 62 and 72.

[38] Charter of the International Military Tribunal for the Far East art. 1, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (as amended Apr. 26, 1946), reprinted in Neil Boister and Robert Cryer, *Documents on The Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press, 2008).

to take such steps as were within their power to prevent the commission the crime and secondly, responsibility for failing to acquire such knowledge.[39]

The Nuremberg Trials

During the Nuremberg trial before the International Military Tribunal, the issue of superior responsibility had not been fully raised.[40] However, the Nuremberg trial was followed by the twelve trials for war crimes that the U.S. authorities held in their occupation zone in Germany in Nuremberg. The issue of a superior's responsibility for the crimes of subordinates was met in many cases.[41] The first case in which superior responsibility was raised was the *Pohl et al.* case against Oswald Pohl and 17 other SS officers employed by the SS Main Economic and Administrative Office. The main charge included their involvement and administration of the 'Final Solution'. In a liability for omission the tribunal referred explicitly to the Yamashita findings stating that the law of war imposes on a military officer in a position of superiority an affirmative duty to take steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war.[42] One of the accused in this trial, a battalion commander Tschentscher, was held not responsible for the murder of Jewish civilians and other non-combatants in Poland and the Ukraine by members of his commands at that time. The Tribunal found that he had no "actual knowledge" of these offences and participation of subordinates under his command was not of "sufficient magnitude or duration to constitute notice to the defendant". The Tribunal defined that in order to hold a superior responsible, he must at least have information that put him on notice that the crimes were committed, clearly opposing the concept of strict liability arguably introduced by the Yamashita case.[43] Another defendant in the *Pohl* et al. case, Karl Mummenthey, was held responsible for the mistreatment of prisoners by guards over whom he had control. The military tribunal stated the following: "Mummenthey's assertions that he did not know what was happening in the labour camps and enterprises under his jurisdiction

[39] IMTF Judgement, p. 30-31. https://www.loc.gov/rr/frd/Military_Law/pdf/Judgment-IMTFE-Vol-I-PartA.pdf

[40] The author makes a difference between the Nuremberg Trial before the International Military Tribunal and the twelve trials for war crimes the U.S. authorities held in their occupation zone in Germany in Nuremberg.

[41] The three presented cases were not the only ones but the most comprehensive on the command responsibility doctrine. Another case involving superior responsibility was the Brant et al. case. US v. Brant et al., *Law Reports*, Volume II, p. 171 – 300.

[42] *US v. Pohl et al.*. Law Reports, Volume V, p. 1011.

[43] *Ibid*, p. 1011-1015.

does not exonerate him. It was his duty to know."[44] The tribunal derived the *mens rea* from the position of the defendant and from his daily contact with the life in the camp. The fact that it was his duty to know implies that a superior must actively look for information suggesting the unlawful conduct of his subordinates. Mummenthey was not a military commander but was in charge of a company collaborating with the SS on extending and rebuilding concentration camps. By holding him responsible, the Tribunal confirmed the applicability of superior responsibility to civilian superiors for the very first time.

The second case referring to superior responsibility was the one brought against Wilhelm List and other German generals, generally known as the *Hostage* case. The tribunal answered the question as to whether or not the superior can excuse himself from responsibility when his actual knowledge cannot be proven. The Court did not require actual knowledge and rather applied a should-have known standard. The superior's responsibility can be based on reports received at his headquarters or sent there for his special benefit. Also, the Tribunal concluded that a superior will ordinarily 'not be permitted to deny knowledge of happenings within the area of his command while he is present therein'.[45] The Court was clearly seeking, contrary to the *Yamashita* decision, a balanced approach that held superiors to their duty of overseeing their troops while still taking into account the reality of war and combats.[46]

In another case, the *High superior* case, thirteen higher ranking German officials were charged with passing on to their subordinates' illegal orders they had received from their superiors or from Hitler himself. There was abundant evidence that the orders had led to the killings of tens of thousands of civilians. One of the accused, General von Leeb claimed that he was not aware of the atrocities and that they were different from the given orders. He also claimed that he took steps to prevent a repetition of the crimes. The Tribunal stated that to find a superior criminally responsible for the transmittal of such an order, the superior must have passed the order down the chain of command and the order must be one that appears criminal on the face of it, or one which he is shown to have known was criminal. It means that for the orders that were obviously criminal, no inquiry into the superior's state of mind was

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[44] *Ibid*, 1055.

[45] *US v. Wilhelm List et al*.. Law Reports, Volume VIII, p. 34 – 92.

[46] In response to the claim that some of the generals had in fact been absent from their headquarters, on leave or at the front, and had therefore been aware of what was happening in their subordinates units, the judges announced that superior will not ordinarily be held responsible unless he approved of the action taken when it later came to his. *US v. Wilhelm List et al*.. Law Reports, Volume VIII, p. 34 – 92.

necessary (direct superior responsibility). But for the orders that were lawful in form but resulted in widespread abuse and atrocities - the standards of what the superior knew - was applied by the judges. The tribunal referred to the criminality of superiors and stated that 'criminality does not attach to every individual in this chain of command from that fact alone' there must be a personal dereliction.[47] 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. The court rejected the notion that a superior could be held accountable without personal dereliction on his part, moreover such dereliction must be serious, rising to the level of criminal negligence. Unlike in the *Hostage* case, this tribunal did acknowledge the Supreme Court's decision but distinguished it. However, the distinction seems weak. It reasoned that Yamashita had full authority over his operations, whereas the situation in this case was completely different as the crimes 'were mainly committed at the instance of higher military and Reich authorities'.[48] This jurisprudence, as discussed, did not refine the *Yamashita* precedent, but developed the doctrine. In fact, the Tribunal in the High superior case clearly rejected the findings in the Yamashita case, while the Tribunal in the Hostage case opted for a should-have known standard.[49]

Modern development and ad hoc Tribunals

The doctrine of superior responsibility has gained widespread recognition since its application in the post second world war cases. Many of those cases contradicted or at least challenged the controversial application of superior responsibility in the *Yamashita* case. The first case followed the event from the Vietnamese war known as the Mai Lai Massacre case. The US Captain Ernest Medina was charged with responsibility for the massacre caused by his subordinates because he breached the duty to prevent the activities of his subordinates. Medina denied his actual knowledge and argued that he was not aware of the atrocities committed by his subordinates and as soon as he became aware of the killings, he ordered an immediate cease fire. This was an opportunity for the court to apply the Yamashita 'knew or

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[47] *US v.* von Leeb et al.. Law Reports , Volume XII, p. 69.

[48] Lael Richard L., 'The Yamashita Precedent: War Crimes and Command Responsibility'(1982) *Wilmington, Del. Scholarly Resources* , p. 308

[49] Kai Ambos, Superior Responsibility' in: Antonio Cassese, Paola Gaeta and Jones, John (eds.), *The Rome Statute of the International Criminal Court: a commentary* (Oxford: Oxford University Press, 2002), p. 828 – 829.

should have known' standard. However, the court elected to apply a more narrow approach of *mens rea* - actual knowledge theory of personal criminal responsibility for Captain Medina.[50] Judge Howard in issuing instructions to the military panel in the *Medina* trial refused to apply the Yamashita 'knew or should have known' standard. Howard explained, a superior is responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of wars. In 1971, Captain Medina was acquitted of all charges.[51]

Six years since Medina's acquittal, superior responsibility was brought as a provision in international treaty for the first time. Adopted in 1977, Article 86(2) of Additional Protocol I (AP I) to the Geneva Convention of 1949 creates a duty to repress grave breaches of international law, and imposing penal and disciplinary responsibility on a superior for any breaches committed by his or her subordinates. Article 86(2) AP I states: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."[52] Article 87 of the AP I contains more specific duties for military superiors.[53] Article 86(2) AP I identifies three elements of superior responsibility and thus laid the basis for later codification of the

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[50] The jury was instructed that in order to convict, they must find that Medina had actual knowledge that his troops were committing war crime. Smidt, Michael, '*Yamashita, Medina and Beyond: Superior Responsibility In Contemporary Military Operations'* (2000) 164(155) *Military Law Review*, Volume 164, p. 194.

[51] Waldemar Solf, 'A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy' (1972) 5 *Akron Law Review*, p. 56 – 58.

[52] Article 86(2) of Additional Protocol I to the Geneva Convention of 1949.

[53] "1. The High Contracting Parties and the Parties to the conflict shall require military superiors, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to the competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, superiors ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any superior 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." Article 87 of the Additional Protocol to the Geneva Convention of 1949.

doctrine and its further development by the tribunals. Although the codification in the AP I is strictly speaking applicable only in an international armed conflict, it may be applied, as a part of customary international law in a non-international armed conflict as well.[54]

The concept of superior responsibility has been extensively applied and developed by the ICTR and ICTY established in the 90's. Superior responsibility was discussed in several cases before the ICTR that was established by the Security Council in order to deal with the situation in Rwanda in 1994. Article 6(3) provides the basis for superior responsibility: 'The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she 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.' *Akayesu* case was the first case before the ICTR discussing superior responsibility. It is relatively surprising considering that Akayesu was not charged with responsibility under Article 6(3) of the Statute. Akayesu was found guilty of crimes against humanity and genocide based on Article 6(1), however the Chamber made several observations towards the superior responsibility doctrine. The Chamber held that it is appropriate to assess on a case-by-case basis that power of authority, in order to determine whether or not he had the power to take all the necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof. The Chamber also noted that the applicability of the doctrine to civilians remains contentious. [55]

To deal with the atrocities in the former Yugoslavia, the United Nations Security Council created the ICTY under the authority of Chapter VII of the United Nations Charter. The Statute of the ICTY was promulgated and Article 7 deals with superior responsibility. Article 7(3) states that '[T]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.'

The notorious and leading case is the *Prosecutor v. Mucić et al*, more known as the *Čelebići* case, after the camp where the crimes were committed. The case involved the

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[54] *Hadžihasanović/Kubura*, ICTY, IT-01-47-AR72, Decision on Interlocutory Appeal, 16 July 2003, para. 31.
[55] *Akayesu*, ICTR, ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 491.

prosecution of three former commanders and a prison guard of the *Čelebići* prison-camp where Bosnian Serbs were detained, tortured, and sometimes even killed. It was the first case before the ICTY dealing with superior responsibility, until then the accused were charged and convicted for direct participation in crimes under article 7(1) of the Statute. The TCH in *Čelebići* clearly formulated three elements that should be met before one can be held liable as a superior under article 7(3) of the Statute. Proof is required of, (i) the existence of a superior-subordinate relationship; (ii) that the superior knew or had reason to know that the subordinate was about to or had committed a crime; and (iii) that the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.[56] Applying these criteria, Mucić, the camp superior, was found guilty for eleven of the thirteen counts for crimes committed by his subordinates, by virtue of his position as *de facto* (and *de jure*) superior over the camp, as he possessed effective control over the subordinates.[57] The case confirmed that a superior may be held liable for failing to take measures that are outside of his formal competence if he has material possibility of preventing the atrocities. However, the Chamber clearly denied the concept of strict liability stating that a superior should not to be held liable for the crime of the subordinates where it was materially impossible to prevent them.[58] Delalić was acquitted on all charges as the initial TCH deemed him to have lacked the required command or control over the prison-camp and over the guards who worked there and therefore, he could not be held criminally responsible for their actions. It was stressed that a superior may be held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for "*failing to take measures to prevent or repress the unlawful conduct of his subordinates*".[59] In *Čelebići* , it was made clear that the superior or superior responsibility pursuant to Article 7(3) of the Statute is not a form of vicarious responsibility, nor is it direct responsibility for the acts of subordinates.[60]

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[56] *Mucić et al.,* ICTY, IT-96-21-T, TCH Judgment, 16 November 1998, para. 346. Confirmed on appeal; *Mucić et al.*, IT-96-21-A, ACH Judgment, 20 February 2001, paras. 189 –198, 225 –226, 238 – 239, 256, 263.

[57] Jennifer Rockoff, 'Prosecutor v. Zejnil Delalic (The Čelebići Case)' (2000) 16 *Military Law Review*, p. 172 – 176.

[58] Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005), p. 296 – 298.

[59] *Čelebići*, Appeal Chambers Judgement, para. 333.

[60] *Čelebići,* Appeal Chambers Judgement, para. 339.

Since the ICTR and the ICTY, other tribunals have been established; including ECCC, STL, SCSL etc. These international tribunals also contribute to this development with their statutes and their jurisprudence.

International Criminal Court

The latest development of the superior responsibility doctrine was brought by the ICC. As stated earlier, the future development of the doctrine is connected to the ICC and its Rome Statute. However, it was a long path before a permanent criminal court was established. Negotiations for the establishment of a permanent international court that would be responsible for trying the gravest breaches of humanitarian law date back to the 1950's. The efforts to establish the ICC re-began in 1995 with a United Nations General Assembly resolution convening the United Nations Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee).[61] In 1996, the Preparatory Committee gave its report to the General Assembly. Article C of the report provided that a superior takes responsibility for failure to exercise proper control where the superior either 'knew or owing to the widespread commission of the offences should have known' that the forces or subordinates were committing or intending to commit such crimes.

The ICC Statute was finally promulgated in 1998. Individual responsibility was provided in Article 25 of the Statute, and superior responsibility was promulgated under Article 28 of the Statute. The Article sets out the parameters how the ICC shall apply the doctrine of superior responsibility under which military commanders, persons effectively acting as military commanders and other superiors are held accountable in relation to the crimes undertaken by their subordinates. Article 28 of the Rome Statute covers two different forms of superior responsibility that require distinct treatment. Nevertheless, core elements are common for both forms. These core elements consist of superior-subordinate relationship, *mens rea* and *actus reus* - culpable omission.[62] It is for the first time that the constitutive elements of the doctrine are clearly and extensively laid down in a founding document, as opposed to the *ad hoc* international tribunals. The elements of superior responsibility as thusly

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[61] John Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Law making in the 21st Century' (1999) 11(361) *Pace International Review*, p. 361.

[62] Antonio Cassese, *International Criminal Law (*Oxford: Oxford University Press, 2003), p. 206. *Čelebići*, § 346, confirmed in appeal, *cf. Čelebići,* Appeals Chamber Judgment, paras. 189-198, 225-226, 238-239, 256, 263.

formulated may be regarded as an advance compared to other international documents.[63] The individual elements will be discussed in detail in the upcoming chapter.

The first opportunity for the ICC to thoroughly discuss superior responsibility appeared with the Bemba case. Jean-Pierre Bemba Gombo was the leader of the Mouvement de Libération du Congo (MLC), a rebel group turned political party. Bemba was also the Commander-in-Chief of the Armée de Libération du Congo (ALC). The MLC contingent of around 1,500 men was deployed by Bemba to CAR in 2002, in support of the former Central African Republic (CAR) President, Ange Félix Patassé. The MLC soldiers directed a widespread attack against the civilian population in the CAR during 2002-2003. The MLC soldiers committed many acts of pillaging, rape, and murder against civilians, and the violence was spread over a large geographical area. The first judgement on superior responsibility before the ICC was rendered in March 2016 in the *Bemba* case. Jean-Pierre Bemba Gombo was found guilty by the TCH as a person effectively acting as a military commander [Article 28(a) of the ICC Statute], who knew that the MLC forces under his effective authority and control were committing or about to commit the crimes charged. At the same time, as a commander, he failed to take all necessary and reasonable measures to prevent or repress the commission of crimes by his subordinates, or to submit the matter to the competent authorities.[64] This decision was overturned on appeal in 2018. The ACH concluded that Bemba in fact took all necessary and reasonable measures in his power to prevent and repress crimes committed by his subordinates in CAR. The decision was harshly criticized, even within the panel of the ACH, which decided the outcome by a narrow majority of 3/2.

[63] Mettraux, Guénaël, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009), p. 24-25.

[64] Jean-Pierre Bemba Gombo was found guilty, on 21 March 2016, of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging). He was sentenced, on 21 June 2016, to 18 years in imprison.

1.1.2 Overview of elements

Superior-Subordinate Relationship

The superior-subordinate relationship is in a simple term described as *de jure* or *de facto* hierarchal relationship between superior and subordinates. The hierarchal relationship is also often referred to as a chain of command.[65] In order to prove the establishment of a superior-subordinate relationship, the *de iure* or *de facto* hierarchal relationship (chain of command) must be accompanied by effective control. The relationship between the chain of command is presented in the *de iure* or *de facto* hierarchal relationship. The *de iure* superior-subordinate hierarchal relationship must always be accompanied by detailed evidence of effective control. On the other hand, the establishment of the *de facto* hierarchal relationship might be the outcome of effective control analysis.

The existence of a superior-subordinate relationship is the key element of superior responsibility, regardless of a superior's status. However, the Rome Statute distinguishes between military superiors and civilian superiors. For military commanders (the exact wording being "a military commander or person effectively acting as a military commander") the Statute states that a superior is responsible for the crimes committed "by forces under his or her effective command and control". In the case of civilian superiors or leaders (the exact wording being "with respect to superior and subordinate relationships not described in paragraph (a)") it adds that the crimes must have "concerned activities that were within the effective responsibility and control of the superior".[66] Article 28 of the Statute sets up different *mens rea* requirements for military and civilian superiors. Furthermore, Article 28(b)(ii) of the Statute mentions another requirement for civilian superiors – the civilian superior is responsible, if "the crimes concerned activities that were within the effective responsibility and control of the superior".[67]

Because of the two different regimes established in Article 28 of the Statute, following by different requirements for each, the distinction between a military and non-military

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[65] The term ‚chain of command' might cause confusion as a terminology of military law. However, in this study, it refers to the hierarchal relationship between superiors and subordinates, regardless of the superior's status.

[66] Article 28(a) and Article 28(b) of the Rome Statute

[67] *Ibid*.

superior becomes a critical issue.[68] Triffterer and Arnold describe that a military commander is generally a member of the armed forces who is assigned authority to issue direct orders to subordinates or to issue orders to subordinates through a chain of command.[69] In the *Bemba* case, the PTCH II interpreted the term 'military commander' as a *de jure* commander who is formally or legally appointed to carry out military functions, whereas a "person effectively acting as a military commander covers superiors not elected by law to carry out a military commander's role".[70] The PTCH II did not discuss the difference between military and military-like commanders in Article 28(a) and non-military superiors in Article 28(b), but limited its findings to the conclusion that Bemba falls within the ambit of the first category.[71]

The TCH III in the *Bemba* judgment provided further distinction between a military commander and a person effectively acting as a military commander. In this context, a military commander is usually part of the regular armed forces and such a commander appointed by and operates according to domestic laws. The TCH III used term '*de jure* military commander' for this category.[72] On the other hand, a person effectively acting as a military commander was described as an individual not formally or legally appointed as military commander, but effectively acting as a commander over the forces that committed the crimes.[73] The TCH III also emphasized that the term 'military commander or person effectively acting as a military commander' includes individuals who do not perform exclusively military functions.[74]

The superior must have effective control over the subordinate. To determine whether a superior has control over the subordinate an effective control test is applied by the ad hoc Tribunals.[75] At the ICC, the requirement of effective control is directly embodied in the

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[68] See for elements that distinguish military from non-military superiors for the purposes of Article 28 of the Rome Statute see Nora Karsten, 'Distinguishing Military and Non-military Superiors. Reflections on the Bemba Case at the ICC', (2009) 7(5) *Journal of International Criminal Justice*, p. 984

[69] Otto Triffterer and Roberta Arnold, 'Article 28' in: Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court. A commentary*. 3rd ed. (C. H. Beck: 2016), p. 1085.

[70] *Bemba*, ICC, ICC-01/05-01/08 424. Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTCH, 3 July 2009, para. 409. Hereinafter referred as to *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute.

[71] *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 406.

[72] *Bemba*, para. 176.

[73] *Ibid*, para. 177.

[74] *Ibid*, para. 177.

[75] Requirement of effective control is contained in the jurisprudence of the ICTY (and also other tribunals)

definition of superior responsibility. Effective control was firstly defined in the *Čelebići* case as "*the material ability to prevent and punish the commission of offences.*"[76] The ICTY and ICTR have repeatedly applied superior responsibility to superiors with *de facto* control over their subordinates.[77] In the *Akayesu* case, the very first case before the ICTR dealing with superior responsibility, the Chamber rejected one of the charges against Akayesu since the paramilitary unit could not be considered as his subordinates and therefore he could not control them effectively. The Chamber noted that it is appropriate to assess on a case by case basis the power of the superior and his authority.[78] The question may be whether the ICTY and ICTR require the same level of control for civilian and military superiors.[79] Noted by the ACH in the *Bagilishema* case, the effective control test applies to all superiors whether *de jure* or *de facto*, but also without distinguishing military and civilian subordinates.[80] However, the same ACH noted that it does not necessarily mean that effective control will be exercised by a civilian superior and by a military superior in the same way.[81] Civilian superiors cannot be held responsible for every crime perpetrated by individuals under their command, as they tend to have a broader range of responsibilities than their military commanders. Thus, "effective control" is defined slightly differently with respect to civilian superiors.[82] Furthermore, the

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Arthur Thomas O' Reilly, 'Superior responsibility: a call to realign doctrine with principles' (2004) 20(1) *American University International Law Review*, p. 78 – 81.

[76] *Čelebići,* para. 378.

[77] "Under Article 7(3), a superior or superior is . . . 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. The power or authority to prevent or to punish does not solely arise from de jure authority conferred through official appointment." *Čelebići* Appeals Chamber Judgment, para. 192.

"The Chamber must be prepared to look beyond the de jure powers enjoyed by the accused and consider the de facto authority he exercised." *Kayishema and Ruzindana*, ICTR, ICTR-95 1 –T, TCH judgment, 21 May 1999, para. 218.

"The relationship need not have been formalized and it is not necessarily determined by formal status alone." *Krnojelac*, ICTY, IT-97-25-T, TCH judgment, 15 March 2002, para. 93.

"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." *Musema*, ICTR, ICTR-96-13-A, TCH judgment, 27 January 2000, para. 141.

[78] *Akayesu*, Trial Chamber Judgment, para. 491.

[79] "A superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his de facto position of authority. . . ." *Čelebići*, para. 377.

"The Chamber finds that the application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one." *Kayishema*, para. 213.

[80] *Bagilishema*, ICTR, ICTR-95-1A-A ICTR, ACH judgment 3 July 2002, para. 50.

[81] *Bagilishema*, Appeals Chamber Judgment, paras. 52 - 55.

[82] "The concept of effective control for civilian superiors is different in that a civilian superior's sanctioning power must be interpreted broadly. It cannot be expected that civilian superiors will have disciplinary power

exercise of *de facto* authority must be accompanied by the "the trappings of the exercise of de jure authority".[83] In general, the possession of *de jure* power in itself may not be sufficient to manifest effective control of the superior over his subordinates. However, the Appeals Chamber in the *Čelebići* case surprisingly held that "a court may presume that possession of *de jure power prima facie* results in effective control unless proof to the contrary is produced".[84] Nevertheless as noted by the ACH in the *Hadzihasanovic* case the wording 'may presume' did not reverse the burden of proof but simply acknowledge that the possession of *de jure* authority constitutes a reasonable basis to believe that the superior has effective control over his subordinates. Thus, the burden of proving that the superior had effective control over his subordinates rests with the Prosecution.[85] Also the fact that the superior has an ability to give orders, is not by itself conclusive of whether that person exercised effective control over the perpetrator and that he may therefore be held responsible for failing to prevent or punish crimes committed by the perpetrator.[86]

Article 28 of the Statute explicitly requires the effective control of superiors (military and also civilian) over subordinates. Unlike the ad hoc tribunals' Statutes, the Rome Statute does not employ an umbrella term 'control' but uses three different terms –'effective command', 'effective control' and 'effective authority' depending on the status of the superior. For a military commander or person effectively acting as a military commander 'effective command and control, or effective authority and control' is required. For superiors other than military commanders or persons effectively acting as a military commander (non-military commanders), 'effective authority and control' is required over subordinates. In the *Bemba*

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over their subordinates equivalent to that of military superiors in an analogous superior position. For a finding that civilian superiors have effective control over their subordinates, it suffices that civilian superiors, through their position in the hierarchy, have the duty to report whenever crimes are committed, and that, in light of their position, the likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures is extant." *Brdjanin*, ICTY, IT-99-36-T, TCH judgment, 1 September 2004, para. 281.

[83] *Čelebići,* para. 43.

[84] "In general, the possession of de jure power in itself may not suffice for the finding of superior responsibility if it does not manifest in effective control, although a court may presume that possession of such power prima facie results in effective control unless proof to the contrary is produced." *Čelebići,* Appeals Chamber Judgement, para. 197.

[85] *Hadzihasanovič and Kubura,* ICTY, IT-01-47-A, ACH judgment, 22. 4. 2008, para. 21.

[86] *Kordic and Čerkez*, ICTY, IT-95-14/2-T, TCH judgment, 26 February 2001, paras. 416, 419 – 424. *Kayishema,* Trial Chamber Judgement, para 222. Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005), p. 296 -298.

case, the Court followed the concept of effective control given by the *ad hoc* tribunals – effective control is a manifestation of a superior-subordinate relationship between the superior and subordinates in a *de iure* or *de facto* hierarchal relationship and is mainly perceived as the material ability to prevent or punish the criminal conduct. [87]

Article 28(b) of the Statute provides an additional element for civilian command responsibility requiring that the subordinates' crimes must concern 'activities that were within the effective responsibility and control of the superior'. This new codification can be interpreted as proof of a greater degree of control over subordinates necessary to hold civilian leaders responsible.[88] On the other hand, more likely it simply clarifies that a civilian superior must have a similar degree of control as military superiors over subordinates in order to fulfil this element of superior responsibility.[89] Another potential explanation of Article 28(b) of the Statute, presented by G. Vetter, is that this provision simply embodies a causation element requirement. However, the language of Article 28(2)(b) of the Statute, especially the wording "crimes concerned activities", does not seem to fully express the idea of causation.[90] Another possible interpretation of the wording of Article 28(b) – activities that were within the effective responsibility and control of the superior – may be a limitation of the doctrine in relation to crimes committed by persons who are formally direct subordinates. However, the conclusion is not supported by the practice of the *ad hoc* tribunals and seems highly unlikely. A distinction between the phrases 'command and control' and 'authority and control' has been presented by academics. According to Ambos, the term 'control' is an umbrella term encompassing both command and authority.[91] Another interpretation provided by Fenrick, states that the term 'authority and control' is a broader concept than 'effective command and

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[87] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para 414-415 (footnotes omitted). Reference to *Čelebići,* Appeals Chamber Judgement, para. 256.

[88] In the *Bemba* case, it was stated that Article 28(b) applies to civilian leaders who "fall short" of the standard applied to military leaders. *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 406.

[89] "[T]he 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 superiors." *Čelabići,* para. 378.

[90] Greg Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court', (2000) 25(1) *Yale Journal International Law,* p. 119.

[91] Kai Ambos, 'Superior Responsibility' in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002), p. 857.

control'.[92] The PTCH II also stressed that the term 'effective command and control' applicable to military commanders, and the 'effective authority and control' applicable to civilian superiors, have "a close but distinct meaning".[93] The PTCH II also interpreted the term 'effective authority', which was used for the first time in a context of the superior responsibility doctrine and its codification. In this context, the PTCH II ruled that the term 'effective authority' may refer to the modality, manner or nature, according to which, a military or military-like commander exercises control over his forces or subordinates.[94] The PTCH II confirmed that the term 'effective command' reveals or reflects effective authority, using interpretation of the term 'command' which can be defined as "authority, especially over armed forces".[95] Also the usage of the disjunctive 'or' between the expressions 'effective command' and 'effective authority' refers to distinct meanings for both terms. The exact meaning of this conclusion made by the PTCH II is however unclear, so it is not certain whether this is just one of the possible interpretations.

The TCH III concurred with the PTCH II insofar as stating that the terms 'command' and 'authority' have "no substantial effect on the required level or standard of 'control',[96] but rather denote the modalities, manner, or nature in which a military commander or person acting as such exercises control over his or her forces".[97]

Mens Rea

Jurisprudence of the ICTY concurs, in accordance with customary law, that there are two standards of knowledge encompassed by the term "knew" - positive knowledge and constructive knowledge.[98] Positive knowledge may be the hardest type of *mens rea* to prove

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[92] William Fenrick,, 'Responsibility of Commanders and Other Superiors' in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court. Observer´s Notes, Article by Article*. 1st ed. (Baden-Baden: Nomos, 1999), p. 518.

[93] *Bemba*, PTCH, para. 413.

[94] *Ibid*.

[95] *Ibid*.

[96] *Bemba*, para. 181.

[97] *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, paras 412 - 416. *Bemba*, para. 181.

[98] *Čelebići,* Appeals Chamber Judgement, para. 241. *Čelebići,* para 386. *Aleksovski*, para 80. *Kordic*, para. 427. „The Prosecution asserts that the requisite *mens rea* under Article 7(3) may be established as follows: (1) actual knowledge established through direct evidence; or (2) actual knowledge established through circumstantial evidence, with a presumption of knowledge where the crimes of subordinates are a matter of public notoriety, are numerous, occur over a prolonged period, or in a wide geographical area; or (3) wanton disregard of, or

as it requires evidence establishing beyond reasonable doubt that the superior actually knew about the crimes committed (or about to be committed) by the subordinates. It can be regarded as the highest standard of knowledge. The second, imputed, form of *mens rea* - had reason to know - requires that the commander possessed some information which put him on notice of the likelihood of unlawful acts committed (will be commit) by his subordinates.[99] This depends on a question whether information was available to the superior which would have put him into the situation in which he knew about the crimes committed by his subordinates.[100] The Chambers of the *ad hoc* tribunals have had some difficulty interpreting and applying this type of *mens rea* to the superior responsibility. A number of indicia have been laid down which a TCH may take into account when determining whether a commander may be said to have had reason to know that crimes had been committed or were about to be committed by his subordinates, including the number, type and scope of illegal acts allegedly committed by his subordinates, the widespread and systematic occurrence of the acts, the modus operandi of similar illegal acts etc.[101] Especially the factor of a superior presence at the time is particularly significant. The Trial Chamber in the *Halilović* case emphasized that the more physically proximate the superior was to the commission of the crimes, the more likely it is that he had actual knowledge of such commission.[102] However, the conclusion that the commander knew or had reason to know must be established beyond reasonable doubt. It is not sufficient to simply demonstrate that the commander was aware that there was a risk that his subordinates would commit crimes.[103] In a conflict situation, risk is rampant and a realistic commander is always aware of the risk that things might go wrong. The TCH in the *Strugar* case required knowledge of a substantial likelihood of crimes by subordinates or a clear and strong risk of such a crime is one way to distinguish criminally culpable disregard from the ordinary risk that inheres in conflict situations. The ACH however ruled that

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failure to obtain, information of a general nature within the reasonable access of a commander indicating the likelihood of actual or prospective criminal conduct on the part of his subordinates." *Čelebići*, para. 379.

[99] *Kordic*, para. 437.

[100] *Čelebići,* Appeals Chamber Judgement, para. 241.

[101] Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005), p. 304 – 305.

[102] *Halilović,* para. 66.

[103] Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005), p. 305.

"sufficiently alarming information putting a superior on notice of the risk that the crimes might be committed by subordinates" suffices for liability.[104]

Perhaps most importantly, the jurisprudence has been fairly consistent in holding that the admonitory information does not need to be provided with specific details about unlawful subordinate conduct,[105] and that it need not to be sufficient in and of itself to compel the conclusion that such conduct had occurred, was occurring, or would occur.[106] The rulings indicating how suggestive of subordinate criminal conduct the admonitory information must be are often inconsistent with one another.[107] For example, the *Čelebići*, *Krnojelac*, *Jokic* and *Oric* Trial Chambers held that the admonitory information must provide "notice of risk of criminal conduct by indicating the need for additional investigation.[108] By contrast, the TCH in *Kordic* and *Cerkez, Limaj* and *Halilovic* appear to have articulated a higher standard when stated "the admonitory information must provide notice of the likelihood of subordinates' illegal acts".[109]

Following this principle, the TCH in the *Čelabici* addressed the *mens rea* requirement of superior responsibility, which is that: "he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crime or where he had in his possession information of a nature, which at the 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 committed or were about to be committed by his subordinates.*"*[110] The Trial Chamber, however, did set limits to the scope of indirect superior responsibility stating that no one can 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, respectively for failing to take such measures that are within his material possibility.[111] In the *Musema* case, the Trial Chamber examined the legislative history of the

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[104] Antonio Cassese, *International Criminal Law*. 2nd ed. (Oxford: Oxford University Press, 2008), p. 446 – 450.

[105] *Krnojelac*, ICTY, IT-97-25-A, ACH judgment, 17 September 2003, paras. 154 – 155.

[106] *Čelebići,* Appeals Chamber Judgement, para. 236.

[107] Gideon Boas et al. *Forms of Responsibility in International Criminal Law* (Cambridge: Cambridge University Press, 2007), p. 210-211.

[108] *Čelebići*, para. 383. *Oric*, para. 322. *Krnojelac*, para. 94. *Blagojevic and Jokic*, ICTY, IT-02-60-T, TCH judgment, 17 January 2005, para. 188.

[109] *Kordic*, para. 437. *Limaj*, para. 525. *Halilovic*, para. 68.

[110] *Čelebići*, para. 383.

[111] *Čelebići*, para. 383.

Additional Protocol and adopted a comparatively high *mens rea* requirement.[112] In contrast with the *Bagilishema* case where a reduced, negligence-type *mens rea* requirement was adopted.[113] As interpreted by ICTY judges, Art 7(3) of the ICTY Statute finds even the lowest form of culpability sufficient for the imputation of responsibility – a superior who fails to recognize the risk of a subordinate's delinquency.[114]

The Rome Statute radically differs from other statutes of international criminal tribunals when it comes to the mental element of superior responsibility. Article 28 of the Statute presents two separate standards for the mental element of superior responsibility: one for the military commander and the person effectively acting as a military commander and one for a superior other than a military commander or a person effectively acting as a military commander.

Article 28 establishes responsibility for a military commander or person effectively acting as a military commander when he '**knew** or, owing to the circumstances at the time, **should have known** that the forces were committing or about to commit such crimes' (emphasis added by the author). The responsibility of a civilian superior is established if he '**knew**, or **consciously disregarded information** which clearly indicated, that the subordinates were committing or about to commit such crimes' (emphasis added by the author). Triffterer explains that the *mens rea* for civilian superiors is intentionally set below the standard applicable to military commanders who have far more possibilities to establish knowledge on the conduct of their subordinates due to their position within a strictly hierarchical and organised structure.[115] For the military commander, the knowledge test is inspired by the *ad hoc* tribunals, i.e. actual knowledge (the accused knew) and constructive knowledge (the accused had a reason to know). On the other hand, the standard for non-military commanders introduced a new concept of *mens rea* that the accused "either knew, or consciously disregarded information" that clearly indicated that subordinates were committing or were about commit illegal acts.[116]

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[112] *Musema*, para. 131.

[113] *Bagilishema*, para. 46.

[114] *Blaskic*, paras 310 – 322. Contrary to *Čelebići*, paras. 388 – 389.
Mirjan Damaska, 'The Shadow Side of Command Responsibility' (2001) 49 *Yale Law School,* p. 463.

[115] Otto Triffterer and Roberta Arnold, 'Article 28' in: Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court. A commentary*. 3rd ed. (C. H. Beck: 2016), p. 1102.

[116] The Statute of the Special Tribunal for Lebanon adopts the Rome Statute provision on *mens rea* requirement for superior responsibility. Statute of the Special Tribunal for Lebanon, Agreement between the

The first standard of *mens rea*, i.e. actual knowledge (the accused knew), is set up for both military and civilian superiors. This *mens rea* standard is considered to be the same in all statutes; therefore the ICTY and ICTR jurisprudence offers some interpretation.[117] It has been established that actual knowledge can be proven by either direct or circumstantial evidence. In this context, it was held that "actual knowledge may be proven if, *a priori*, a military commander is part of an organized structure with established reporting systems."[118] In the *Bemba* decision, it was confirmed that the interpretation of actual knowledge provided by the *ad hoc* tribunals, can be instructive in making a determination about a superior's knowledge within the context of Article 28 of the Statute.[119] With respect to the actual knowledge of superiors, that forces or subordinates were committing or about to commit a crime, the PTCH II held that such knowledge cannot be presumed. This actual knowledge must be obtained by way of direct or circumstantial evidence.[120] The TCH III also held that a criteria or indicia of actual knowledge are relevant to the constructed knowledge analysis.[121] The constructive knowledge for the military commanders ('should have known') employed by the Rome Statute is defined in a different way than 'had reason to know' and deserves more attention as it is important in establishing whether negligence forms part of the superior responsibility (see Chapter 2.2.3).

On the other hand, a civilian superior can be held responsible only if it can be proven that he or she "knew, or consciously disregarded information, which clearly indicated that the subordinates were committing or about to commit" crimes. Civilian superiors are accorded a more generous mental element, requiring that they consciously disregarded information about crimes.[122] This new *mens rea* requirement might create difficulties to effectively prosecute non-military commanders. For the consciously disregarded information standard of *mens rea* a possession of information regarding the crimes committed by the subordinates, and more

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United Nations and the Lebanese Republic pursuant to Security Council Resolution 1664, 29 March 2006, Art. 3(2).

117 Otto Triffterer and Roberta Arnold, 'Article 28' in: Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court. A commentary*. 3rd ed. (C. H. Beck: 2016), p. 1099.

118 *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para 431. Citing *Hadžihasanović/Kubura,* para. 94.

119 *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, paras. 430-432.

120 *Ibid*, para. 430.

121 *Ibid*, para. 434.

122 Darryl Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution' (2012) 13(1) *Melbourne Journal of International Law,* p. 8.

importantly that the accused also chose not to consider and act upon it, must be proven.[123] This *mens rea* standard was used for the first time in the *Kayishema and Ruzindana* case, where the ICTR applied a different standard of *mens rea* to military and civilian superiors. In this case, the TCH used the consciously disregarded information standard to delineate the meaning of the 'had reason to known' standard for civilian superiors. In a comparison with a military commander, more active duty is imposed upon the superior to inform themselves of the activities. For a civilian superior it must be proven is that he either knew or consciously disregarded information which was clearly indicated or put him on notice that his subordinates had committed.[124] It must be shown not only that the superior had information in his possession regarding the actions of his subordinates, but that the superior consciously disregarded such information, in other words, that he chose not to consider or act upon it.[125] As the standard of consciously disregarded information is a new requirement and limited to non-military superiors, no jurisprudence is available to interpret this standard because in the *Bemba* case the Court examined only Article 28(a) of the Rome statute, i.e. application of superior responsibility to military commanders or persons acting as a military commander.

Actus Reus

The *actus reus* for superior responsibility is based on omission - the failure to prevent or punish the crimes of subordinates. The ad hoc tribunals' Statutes contain two distinct legal obligations.[126] The duty to prevent arises when the commander acquires actual 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.[127] A failure to take the necessary and reasonable measures to prevent an offence of which a superior knew or had reason to know cannot be cured simply by subsequently punishing the subordinate for the commission of the offence.[128] The *ad hoc* tribunals' case law voted for distinct obligations under the *actus reus* element of the superior responsibility doctrine.[129] Under this approach, a superior may be

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123 Brouwers, M. P. W. (eds) T*he Law of superior responsibility* (2012) Wolf Legal Publishers, p. 8-9.

124 *Kayishema/Ruzindana*, paras. 227-228.

125 Jamie Allan Williamson, 'Some considerations on command responsibility and criminal liability' (2008) 90(870) *International Review of the Red Cross*, p. 308.

126 *Blaškić,* Appeals Chamber Judgement, para. 83.

127 *Blaškić,* Appeals Chamber Judgement, para. 83. *Kordic*, paras. 445-446.

128 *Blaškić*, para 336. *Strugar*, IT-01-42-T, ICTY, TCH, 31. 1. 2005, para. 373.

129 *Orić*, paras. 325-326.

held responsible if he fails to prevent the crimes of subordinates or fails to punish such crimes committed by subordinates, or fails to do both. The duty to prevent and duty to punish are thus distinct and applicable in different times.[130] The distinction between these separate duties is also important for establishing a different causality requirement.

The question of whether a superior has failed to take all necessary and reasonable measures to prevent the commission of an offence or to punish the perpetrators thereof is intrinsically connected to the question of that superior's effective control. A superior will be liable for a failure to take such measures that are "within his material possibility".[131] A superior has to exercise all the measures possible under the circumstances.[132] Therefore, the question as to whether a superior had explicit legal capacity to take such measures may be irrelevant under certain circumstances if it is proven that he had the material ability to act.[133] The determination of what constitutes "necessary and reasonable measures" to prevent the commission of crimes or to punish the perpetrators is not a matter of substantive law but of evidence.[134] According to the jurisprudence of the ICTY, 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 has reason to know thereof.[135] 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 TCH notes, however, that only the "specific obligation" to prevent triggers criminal responsibility as provided for in Article 7(3) of the Statute.

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.[136] The superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process.[137] He has a duty to exercise all measures possible within the circumstances;[138] lack of

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[130] *Blaškić,* Appeals Chamber Judgment, para. 83. *Halilović*, para. 72.

[131] *Čelebići,* para. 395.

[132] *Krnojelac,* Trial Chamber Judgment, para. 95. The Trial Chamber in *Čelebići* stated that "lack of formal legal competence on the part of the commander will not necessarily preclude his criminal responsibility", *Čelebići*, para. 395.

[133] *Čelebići,* para. 395. *Kordic*, para. 443.

[134] *Blaškić,* Appeals Chamber Judgment, para. 72.

[135] *Kordic*, para. 447.

[136] *Kordic*, para. 446.

[137] *Kvocka*, IT-98-30/1-T, ICTY, TCH, 2. 10. 2001, para. 316.

formal legal competence on the part of the commander will not necessarily preclude his criminal responsibility.[139] The duty to punish includes at least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities.[140] A civilian superior does not normally dispose of the same powers to sanction subordinates as a military superior, therefore, as stated by the ICTY in the *Aleksovski* case the same power of sanction cannot be a requirement of superior responsibility for civilians.[141] In order that a commander should be reasonably expected to do, it is important to keep in mind the realities of conflict situations in framing the duties the criminal law implies, while not letting the practicalities of conflict be an excuse for everything.[142]

The Rome Statute sub-divides superior duties into three obligations: the duty to prevent, the duty to repress, and the duty to submit the matter to the competent authorities for investigation and prosecution. However, it does not appear that this formulation provides different duties than those set up in the Statutes of the *ad hoc* tribunals (duty to prevent and duty to punish).[143] The different wording just clarifies what has already been established in the case law of the *ad hoc* tribunals. The duty to repress and the duty to submit the matter to the competent authorities for investigation and prosecution had already been recognized as forming part of the duty to punish recognized by the *ad hoc* tribunals.[144]

The duty to prevent does not cause any interpretation problems as it refers to the same duty embodied in the Statutes of the *ad hoc* tribunals. Article 28 of the Statute does not define any specific measures required by the duty to prevent crimes. Nevertheless, according to the PTCH II in the *Bemba* case, the duty to prevent encompasses the duty to (i) ensure adequate training in international humanitarian law; (ii) to secure reports that all 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; and (iv) to take disciplinary measures to

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[138] *Krnojelac*, para. 95.
[139] *Čelebići*, para. 395.
[140] *Kordic*, para. 446.
[141] *Aleksovski*, paras. 69 – 77.
[142] Antonio Cassese, Paola Gaeta, John Jones. *The Rome Statute of the International Criminal Court: a commentary* (Oxford: Oxford University Press, 2002), p. 455.
[143] Mettraux, Guénaël, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009), p. 31.
[144] *Ibid*, p. 31-32.

prevent the commission of atrocities by the troops under the superior's command.[145] In this manner, the PTCH II referred to the ICTY jurisprudence – especially the *Strugar* and *Hadžihasanović/Kubura* cases.[146]

On the other hand, the duty to repress and the duty to submit deserve more attention. The duty to repress as set up in Article 28 of the Rome Statute encompasses two separate duties arising at two different stages of the commission of crimes.[147] Firstly, the duty to repress includes a duty to stop ongoing crimes. This includes the obligation to stop a possible chain effect, which may lead to other similar crimes. Secondly, the duty to repress includes an obligation to punish forces after the commission of crimes.[148] The duty to punish is thus embodied in the duty to repress (the superior themselves taking the necessary and reasonable measures to punish their forces) and the duty to submit the matter to the competent authorities, when the superior is not themselves in a position to take necessary and reasonable measures to punish they may be fulfilled in two different ways - either by the superior themselves taking the necessary and reasonable measures to punish their forces, or by referring the matter to the competent authorities. Thus, the duty to punish (which represents a part of the duty to repress) constitutes an alternative to the third duty mentioned under Article 28 of the Statute - a duty to submit the matter to the competent authorities, when the superior is not themselves in a position to take necessary and reasonable measures to punish.[149]

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[145] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para 438. See also Otto Triffterer and Roberta Arnold, 'Article 28' in: Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court. A commentary*. 3rd ed. (C. H. Beck: 2016), p. 1094-1095.

[146] *Štrugar,* para 374. *Hadžihasanovic,* para. 153.

[147] Otto Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Art. 28 Rome Statute?' (2002) 15(1) *Leiden Journal of International Law,* p. 201.

[148] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 439.

[149] *Ibid*, para 440. Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*. 2nd edition. (Oxford: Hart Publishing, 2008), p. 295. Different and less confusing distinction between the duties is proposed by Amnesty International: The duty to prevent relating to measures taken to prevent crimes that have not yet occurred. The duty to repress relating to measures to stop the commission of further crimes when crimes are being or have been committed (mentioning examples such as issuing orders to stop crimes, disciplining those responsible or withdrawing them from positions or locations where they are able to commit further criminal acts. The duty to submit the matter to the competent authorities for investigation and prosecution relating specifically to taking measures to ensure effective criminal accountability for crimes that have been committed. Making Sense of Command Responsibility. *Amnesty International. Opinion.* 8 October 2018. [online] [22-01-2019]. Available at: https://hrij.amnesty.nl/making-sense-of-command-responsibility-bemba/

Although the formulation "submit to the competent authorities" is new, it clearly corresponds to the "report" requirement mentioned in Article 87(1) of the AP I.[150]

The PTCH II did not provide any specific list of examples of duty to repress/submit as it did with the duty to prevent. The TCH stated that the duty to punish includes, at least, the obligation to investigate possible crimes in order to establish the facts.[151] According the TCH III, the duty to repress includes (i) alteration of the deployment of the troops, for example, to minimize contact with civilian populations; (ii) removal, replacement, or dismissal of officers and soldiers found to have committed or condoned any crimes committed; and/or (iii) shared relevant information with the state authorities or others and supported them in any efforts to investigate criminal allegations. The duty to punish (as part of the duty to repress) includes initiated genuine and full investigations into the commission of crimes, and properly tried and punished any soldiers alleged of having committed crimes.[152] This duty all together with the duty to submit the matter to the competent authorities aims at ensuring that offenders are brought to justice, in order to avoid impunity and to prevent future crimes.[153] The duty to submit to the competent authorities may include submitting reports of crimes to the national state authorities, authorities of other states or prosecutors of international criminal tribunals with jurisdiction requesting investigation and prosecution.[154] The term "competent authorities," should be interpreted in compliance with international human rights law, which requires that individuals suspected of a crime be given "a fair and public hearing by a competent, independent and impartial tribunal established by law. The duty includes providing all information in the superior's possession and full cooperation with the competent authorities during the investigation.

Under superior responsibility, it is necessary to prove that the superior failed to fulfil at least one of the three duties listed under Article 28 of the Statute. It has to be proven that the superior failed to prevent a crime, failed to repress crimes or failed to submit the matter to

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[150] Kai Ambos, ‚Superior Responsibility' in: Antonio Cassese, Paola Gaeta and Jones, John (eds.), *The Rome Statute of the International Criminal Court: a commentary* (Oxford: Oxford University Press, 2002), p. 862.

[151] *Bemba*, para. 208.

[152] *Bemba*, para. 729.

[153] *Bemba*, para. 209.

[154] On the issue of superiors affiliated with non-state groups and their obligation to submit reports of international crimes committed by subordinates to competent state or international authorities see Amicus Curiae – Amnesty International, 20 April 2009, https://www.icc-cpi.int/CourtRecords/CR2009_02766.PDF

the competent authorities for investigation and prosecution.[155] In the *Bemba* case, the PTCH II held that the three duties under Article 28 of the Statute arise at three different stages in the commission of crimes. Duty can arise before the commission of the crime, during or after the commission. In this context, a superior can 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.[156] The TCH III concluded that the duty to prevent encompasses the duty to stop crimes that are about to be committed or crimes that are being committed. It was clarified that the duty to prevent can arise before the commission of a crime but also during the commission.[157] The TCH III clarified that the notion of 'repress' overlaps the duty of prevention to a certain degree, particularly in terms of the duty to prevent crimes in progress and crimes which involve on-going elements being committed over an extended period.[158]

Some argue that the PTCH II suggests that the duties are alternative, rather than distinct obligations.[159] This argument is based on the PTCH II formulation stating that submitting the matter to the competent authorities "[…] remedies a situation where commanders do not have the ability to sanction their forces".[160] The author believes that it was not the intention of the PTCH to introduce the duties as an alternative obligation. Satisfying the 'submit duty' in a case of a superior's material inability to prevent and repress the crimes, including punishing the crimes themselves can indeed avail them of responsibility. To argue otherwise would be a flawless conceptualizing of superior responsibility and the mixed application of effective control requirement (as a part of the superior-subordinate element) and duties of the superior (as the *actus reus* element). However, a submission of a matter to the competent authorities does not absolve a superior of responsibility for a prior failure to prevent or repress if the superior had a material ability to take measures to prevent or repress the crimes.

The measures to prevent or repress the commission of the crimes by subordinates has to be necessary, reasonable and within the superior's power. The matter as to what can be

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[155] Article 28 of the Rome Statute. Although the Statute uses alternative language ("or") it is clear that failure to discharge any of these duties may attract criminal liability.

[156] *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 436.

[157] *Bemba*, para. 202.

[158] *Ibid*, paras. 205-206.

[159] Making Sense of Command Responsibility. *Amnesty International. Opinion.* 8. 10. 2018. [online] [22-01-2019]. Available at: https://hrij.amnesty.nl/making-sense-of-command-responsibility-bemba/

[160] *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 442.

considered necessary and reasonable measures within the superior's powers is connected to the requirements of effective control.[161] The PTCH II correctly noted 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".[162] Thus, the PTCH II expressly stated that the reasonable and necessary measures taken or the ones that should have been taken cannot be analysed separately, but this analysis must be done in connection to the effective control requirement - the material ability to take such measures. This was confirmed by the TCH III when the Chamber ruled that the duty of the commander to take all necessary and reasonable measures to prevent or repress the crimes committed by his forces "rests upon his possession of effective authority and control."[163] The term necessary and reasonable refers to measures within the superior's power that are capable of preventing and punishing the crimes in question in the circumstances which prevailed at the time.[164] In order to hold a superior responsible, it must be proved that he did not take specific and concrete measures that were available to him and which a reasonably diligent superior in comparable circumstances would have taken. In the view of the ACH in the *Bemba* case, those measures must be identified *in concreto*.[165]

1.2 GENOCIDE

Genocide stands together with war crimes and crimes against humanity as the core international crimes regarded as the most serious crimes that affect the whole international community.[166] Genocide is also the classic specific intent crime that encompasses the intent to destroy, in whole or in part, a national, ethnical, racial and religious group. A few other crimes also constitute specific intent crimes but are far less employed in international criminal prosecution.[167] The following chapters will introduce the origins and statutory development of

[161] Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*. 2nd *edition.* (Oxford: Hart Publishing, 2008), p. 301.

[162] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 443.

[163] *Bemba,* Trial Chamber Judgement, para. 199.

[164] Martha M. Bradley and Aniel de Beer, 'All Necessary and Reasonable Measures" – The *Bemba* Case and the Threshold for Command Responsibility' (2020) 20(2) *International Criminal Law Review*, p. 12.

[165] *Bemba*, Appeals Chamber Judgement, para. 7.

[166] The fourth core crime is a crime of aggression is defined in art. 8bis in the Rome Statute of the ICC adopted at the 2010 Review Conference in Kampala.

[167] Some examples of specific intent crimes include extermination ("intentional infliction of conditions of life (...) calculated to bring about the destruction of part of a population), torture ("intentional infliction of severe

the crime and its main elements, including a discussion on specificities of a specific genocidal act, the concept of protected groups and mens rea. As the mens rea is critical for the application of superior responsibility, the chapter will present a detailed analysis of the purpose-based and knowledge based approaches to the mental element of genocide. Similarly, the relevance of the applicability of *dolus eventualis* will be discussed.

1.2.1 Origins and statutory development

Even though the acts of genocide are not a modern invention, the term genocide was put forward by Raphael Lemkin in his book Axis rule in November 1944. He defined genocide as 'the destruction of a nation or an ethnic group'.[168] Although genocide was not yet codified as a separate crime during the Nuremberg trials, the term was used in the indictment at the Nuremberg International Military Tribunal (IMT). The defendants were charged with "[D]deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles and Gypsies."[169] This count of the indictment was connected to the murder and ill - treatment of the civilian populations in the occupied territory and was attached to a category of war crimes. The indictment links genocide to Art. 6(b) of the IMT Statute that embodies examples

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pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused"), forced pregnancy ("unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population"), persecution ("intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"), apartheid ("inhumane acts committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime"), and enforced disappearance of people ("arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of a State or a political organisation (...) with the intention of removing them from the protection of the law for a prolonged period of time").
No specific intent is connected to the crime of torture in the Rome Statute (Article 7(2)(e), ICC Elements of Crimes). Contrary, the ad hoc Tribunals held that in order to prove torture, it is necessary to show that the accused intentionally inflicted pain or suffering for a prohibited purpose. The ICC approach runs contrary the practice of *ad hoc* tribunals. Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law* (Springer, 2014), p. 136. See also Oona A. Hathaway, Aileen Nowlan, Julia Spiegel, 'Tortured Reasoning: The Intent to Torture Under International and Domestic Law'(2012) 52 *Virginia Journal of International Law* , p. 791-837.

[168] Raphael Lemkin, *Axis Rule in Occupied Europe* (1944), p. 79.

[169] Count Three of the Indictment, The Trial of German Major War Criminals, *Proceedings at Nuremberg* (1948), p. 22.

of war crimes. Surprisingly, it does not mention Art. 6(c) of the IMT Statute that contains crimes against humanity.[170] Nevertheless, the final judgment of the IMT, however, never explicitly used the term of genocide. On the other hand, in the subsequent US military tribunals in Nuremberg, the concept of genocide was not only used in the indictment but also employed in the final judgment in the *Einsatzgruppen* case.[171] Genocide was defined as criminal acts being a part of a larger conspiracy to systematically destroy entire groups yet still genocide was not used as a separate crime.[172]

Genocide was first recognized as a crime under international law by the United Nations General Assembly during its fifty-fifth plenary meeting on 11 December 1946, motivated in large part by Lemkin's lobbying. In this Resolution, genocide was defined as "a denial of the right to existence of entire human groups, as homicide is the denial of the right to life of an individual human being, such a denial of the right to existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations."[173]

In 1948, genocide was codified as an independent crime in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). The crime of genocide is defined in Article II of the Genocide Convention as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- Killing members of the group
- Causing serious bodily or mental harm to members of the group
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

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[170] Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8 August 1945.

[171] The term genocide was used in order to characterize the activities of the German troops in Poland and the Soviet Union. Amended indictment, 3 July 1947, *Einsatzgruppen* case, Law Reports of Trials of War Criminals, Vol. IV, p. 15–21.

[172] Amended indictment, 3 July 1947, *Einsatzgruppen* case, Law Reports of Trials of War Criminal, Vol. IV, pp. 15–21. For more information on Nuremberg Trials and genocide, see Hilary Earl, 'Prosecuting genocide before the Genocide Convention: Raphael Lemkin and the Nuremberg Trials, 1945–1949' (2013) 15(3) Journal of Genocide Research, p. 317-337; Kevin John Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011).

[173] UNGA Res 1/96 (11 December 1946) UN Doc A/RES/1/96.

- Imposing measures intended to prevent births within the group
- Forcibly transferring children of the group to another group.[174]

This definition forms the foundation of the legal requirements. Genocide is defined in the same terms as in the Genocide Convention in the Rome Statute of the International Criminal Court (Article 6), as well as in the statutes of other international and hybrid jurisdictions, namely in Article 2(2) of the ICTR Statute and Article 4(2) of the Statute of the ICTY. Nowadays, there is a widely accepted basis for the prosecution of the 'crime of crimes'. Apart from the definition of genocide in international treaties and national criminal codes, the International Court of Justice (ICJ) recognized the genocide prohibition as 'assuredly a peremptory norm of international law' (*jus cogens*) and an *erga omnes* obligation of states.[175]

1.2.2 Overview of elements

The crime of genocide consists of two basic elements. The first element is the specific *actus reus*, meaning that a conduct falls within one of the relevant categories of prohibited conducts listed in the Genocide Convention. The second element is the intent on the part of the perpetrator, including the intent to destroy, in whole or part, a national, ethnical, racial, or religious group (*dolus specialis*). The conditions are strictly cumulative. Ambos suggests that there are three elements of genocide, including general *mens rea* (governed by Article 30 of the Rome Statute) and *dolus specialis* attached to the *actus reus*. This however does not mean that a different or a new element is presented; it is a mere clarification that specific intent has to be proven alongside the general *mens rea* attached to the prohibited conduct.[176]

Actus reus

The legal definition of genocide includes five acts that can be classified as genocide if other conditions, most importantly special intent, are met. The Genocide Convention, as well as the *ad hoc* Tribunal Statutes and the Rome Statute provide the same acts:

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[174] UNGA Res 3/260 (9 December 1948) UN Doc A/RES/3/260, p. 277.

[175] ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Judgment, para. 31.

[176] Kai Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (Oxford University Press, 2014), p. 5-6.

- Killing members of the group
- Causing serious bodily or mental harm to members of the group
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- Imposing measures intended to prevent births within the group
- Forcibly transferring children of the group to another group

The list of acts is exhaustive and any other acts, which are not included in the list, are not genocide, even if the perpetrator satisfies other elements required for the genocide, such as the intent to destroy a protected group. [177]

The definition of genocide creates no requirements as regards the person of the perpetrator. Thus, everybody can commit genocide, from low-level executors to high-level perpetrators alike.[178] The ACH in the *Kayishema and Ruzindana* case expressly stated that 'genocide is not a crime that can only be committed by certain categories of person'. [179] Despite the fact that genocide is more likely committed by more perpetrators (for example as part of the joint criminal enterprise), genocide *per se* can be committed by one person. [180] .

In this regard, the discussion centred around whether a contextual requirement – existence of genocidal policy – is required for the crime of genocide. The early ICTY case law favoured this requirement. The TCH in the *Tadic* case stated that 'a policy must exist to commit these acts, it need not be the policy of a State' following a discussion that non-state actors' could be liable for committing genocide.[181] However, the following case expressly denied such a requirement.[182]

On the other hand, the ICC took a different approach. The elements of crime refer to 'the conduct which took place in the context of a manifest pattern of similar conduct' suggesting that the contextual element is a legal ingredient for the crime of genocide.[183] However, it is important to note that the Rome Statute is silent on the contextual element. On

[177] Interestingly, Art. 2 para 10 of the 1954 ILC Draft Code used the word 'including' to indicate an illustrative rather than an exhaustive list of genocidal acts. Draft Code of Offences against the Peace and Security of Mankind (1954), adopted by the International Law Commission at its sixth session, in 1954.
[178] *Kayishema and Ruzindana*, ICTR, ICTR-95 1-A, ACH judgment, 1 June 2001, para. 170.
[179] *Ibid*.
[180] Jelišić, IT-95-10-T, ICTY, TCH, 1999, para. 100.
[181] *Tadić*, ICTY, IT-94-1, TCH Judgment, 7 May 1997, para. 655.
[182] *Kayishema and Ruzindana*, Trial Chamber, 21 May 1999, para. 94. *Jelisić*, Appeals Chamber, 5 July 2001, para. 48.
[183] Elements of Crimes, Article 6.

top of that Article 9(3) of the Rome Statute expressly states that the Elements 'shall be consistent' with the Statute. As the aim of the Elements is to 'assist the Court in the interpretation and application' of Articles embodied in the crimes (Article 6, 7, 8 and 8bis), it is argued that the Elements cannot provide additional elements to the crimes on top of the elements required by the Statute.[184] The PTCH II in the *Bemba* case held that if the two documents are contradicted, the Statute prevails.[185] In a relation to the contextual element, the PTCH II in the *Al-Bashir* case held that 'according to this contextual element provided for in the Elements of Crimes, the conduct for which the suspect is allegedly responsible, must have taken place in the context of a manifest pattern of similar conduct directed against the targeted group or must have had such a nature so as to itself effect, the total or partial destruction of the targeted group. '[186] The majority went even further, holding that the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof.[187] The findings of the PTCH II can be interpreted as an introduction of a new element – or at least interpreting the Elements as containing an additional element. Also it can be interpreted as a tool to prove or at least support the existence of a special genocide intent. As the first option would cause inquiries whether such an interpretation is in violation of Article 9(3) of the Statute, the author believes that the findings of the PTCH should not be interpreted in a way that the contextual element creates an additional element that has to be separately proven. Some authors also suggest that it introduces a concept of realistic intent to destroy focusing on a relation between the 'individual' genocidal intent and a 'collective' genocidal intent. [188] Even if one would not agree with the findings of the ICC in the *Al-Bashir* case,[189] the existence of a genocidal policy

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[184] Ondrej Svacek, *Mezinárodní trestní soud (2005–2017) [International Criminal Court (2005-2017)]* (C. H. Beck, 2018), p. 44-45. To the contrary, Keefe sees this as an additional material element, nevertheless unlikely to make much of a difference but 'utterly misguided' from the point of view of legal principle. Roger O'Keefe, *International Criminal Law* (Oxford: OUP, 2015), p. 150.

[185] *Al-Bashir*, ICC, ICC-02/05-01/09-3, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (PTCH I), 4 March 2009, para. 128.

[186] *Ibid*, para. 123.

[187] *Ibid*.

[188] Ondrej Svacek, *Mezinárodní trestní soud (2005–2017) [International Criminal Court (2005-2017)]* (C. H. Beck, 2018), p. 44-45. Claus Kreß, 'The ICC's First Encounter with the Crime of Genocide' in: Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford : OUP, 2015), p. 674.

[189] Florian Jeßberger, 'The Definition of Genocide' in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford : OUP, 2009), p. 95.

or plan is important at the evidentiary level as it might serve to prove the perpetrator's *mens rea* and prove that genocidal acts have been committed as well.

SPECIFIC GENOCIDAL ACTS

Killing Members of the Group

The first genocidal act is conducted when a perpetrator intentionally causes the death of a person. The Elements of Crimes provide an explicit note that the term killed is interchangeable with 'caused death'. Originally, there had been confusion which was created by a different language version of the Genocide Convention and subsequently adopted to other documents. While the French version requires 'meutre de membres du groupe', the English one requires 'killing members of the group' suggesting a broader term than the French language version. The TCH in the *Akayesu* case favoured the French version since the English version is too general, including 'both intentional and unintentional homicides'. The Chamber concluded in light of the presumption of innocence and the need to apply the version more favourable to the accused that genocide requires that the death has been caused with the intention to do so.[190] Otherwise, there is little controversy regarding this conduct.

Causing Serious Bodily or Mental Harm to Members of the Group

In the *Akayesu* case, the TCH held that 'causing serious bodily or mental harm to members of the group' may include sexual violence as long as the special intent of the perpetrator is proved.[191] This judgment is remarkable not because classifying a rape as an act that causes the victim both mental and physical harm. The importance of the judgment lies in the assurance that a rape and sexual violence can be committed with the intent of destroying the relevant group and as such can be classified as genocide. It is notable that since the first decision classifying rape as genocide there has been very little follow-up in subsequent judgments.

The TCH in *Krstić* elaborated on caused harm explaining that 'serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment, or humiliation. It must be harm that results in a grave and long-

[190] *Akayesu*, ICTR, ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 500.
[191] *Ibid*, para. 731.

term disadvantage to a person's ability to lead a normal and constructive life.' [192] The *Bagilishema* TCH held that 'serious harm entails more than a minor impairment of mental or physical faculties, but it need not amount to permanent or irremediable harm'.[193] The seriousness of the caused harm is determined on a case-by-case basis.[194]

The Elements of Crimes attached to the Rome Statute include a footnote that the conduct causing serious bodily or mental harm 'may include, but is not necessarily included to, acts of torture, rape, sexual violence or inhumane or degrading treatment'.[195]

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

According to the Elements of Crimes attached to the Rome Statute, this conduct includes deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.[196] Contrary to the previous acts (killings and causing serious harm), this conduct does not require proof that a specific result – such as a death or serious harm – was attained.[197] Thus, there is no need to prove that the conditions inflicting on the group actually led to the death or serious bodily or mental harm of members of the protected group. As such, the conditions inflicted need not immediately kill any member of the group, but must be calculated to, ultimately, physically destroy the group.[198] The Prosecution in the *Kayishema* case argued that the genocidal act 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' applies to situations likely to cause death regardless of whether death actually occurs.[199]

This genocidal act bears a certain resemblance to the crime against humanity of extermination – another crime requiring a special intent. The crime of extermination requires no proof of intent to destroy the group to which the victim belongs. However, it must be

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[192] *Krstić*, ICTY, IT-98-33-T, TCH judgment, 2 August 2001, para. 513.

[193] *Bagilishema*, ICTR, ICTR-95-1A-T, TCH judgement, 7 June 2001, para. 59.

[194]See for example *Kayishema and Ruzindana*, No. ICTR-95-1-T, paras. 108–130; *Rutaganda*, ICTR, ICTR-96-3-T, TCH judgment, 6 December 1999, para. 51; *Musema*, ICTR, ICTR-96-13-A, TCH judgment 27 January 2000, para. 156; *Krstić,* ICTY, IT-98-33-T, TCH judgment, 2 August 2001, para. 513.

[195] Elements of Crimes, Art. 6(b), footnote 3.

[196] Elements of Crimes, Art. 6(c), footnote 5.

[197] See for example *Stakić*, ICTY, IT-97-24, TCH Judgment, 31 Jul 2003, para. 517 ('Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" under sub-paragraph (c) does not require proof of a result.

[198] *Akayesu*, para. 505.

[199] *Kayishema and Ruzindana*, No. ICTR-95-1-T, para. 114 and n. 56.

proved that the perpetrator intended to kill persons on a massive scale or to subject a large number of people to conditions of living that would lead to their death in a widespread or systematic manner.[200] As already discussed, the crime of genocide in a form of imposing conditions of life requires no proof of actual deaths. To the contrary, the crime of extermination requires proof of killings on a mass scale. Also, extermination does not require proof of any sort of discriminatory *mens rea.*[201]

Imposing Measures Intended to Prevent Births within the Group

The measures usually include forced sterilization of the sexes, sexual mutilation, forced birth control, separation of the sexes, and prohibition of marriage.[202] The imposed measures must only be intended to prevent births – respectively to deprive the victim of the ability to conceive. It is not necessary to establish that the perpetrator was successful in preventing birth within the group. This act also does not require proof that the measure taken to prevent births should result in any form of serious physical or mental harm for the victim, as opposed to the genocidal act of 'Causing Serious Bodily or Mental Harm to Members of the Group'. [203]

The TCH in *Akayesu* provided an example of imposed measures indented to prevent births pointing out that '[i]n patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group'.[204] The subsequent ICTY case law provides that the measures intended to prevent births within the group may be physical, but can also be mental (e.g. due to a trauma).[205]

Forcibly Transferring Children of the Group to Another Group

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[200] Munyakazi, ICTR, ICTR-97-36A-A, ACH judgment, 28 September 2011, para. 141.

[201] See for example *Vasiljević*, ICTY, IT-98-32, TCH Judgment, 29 November 2002, para. 228 where a reference to the IMT is made.

[202] Kai Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (Oxford University Press, 2014), p. 14.

[203] Guénaël Mettraux, *International Crimes: Law and Practice: Volume I: Genocide* (Oxford University Press, 2019), p. 280.

[204] *Akayesu*, para. 507.

[205] *Rutaganda*, ICTR, ICTR-96-3-T, TCH judgment, 6 December 1999, para. 53; *Popović et al.*, ICTY, IT-05-88-T, TCH Judgment, 10 June 2010, para. 818.

The last genocidal act is the most controversial one. Some scholars argue that this conduct leans towards a cultural genocide doctrine which is not generally accepted in ICL. It is argued that the non-physical forms of a group's existence are primarily protected under international human rights and minority rights law.[206] On the other hand, some argue that the removal of children from one community to another impacts on the group's ability to perpetuate itself physically and biologically and therefore it is more accurate to characterize this offence, like other genocidal offences, as being relevant to the intended physical or biological destruction of a group.[207]

Elements of Crimes attached to the Rome Statute provides that the term 'forcibly' is not restricted to the use of physical force, but may include threats of force or coercion, such as that caused by the fear of violence, duress, detention, psychological oppression, or abuse of power, against such person, persons, or another person, or by taking advantage of a coercive environment. The transferred children must come from the group which the perpetrators intend to destroy. However, the children need not be transferred to the perpetrator's group. It is enough that the children are transferred from the targeted group to another.[208]

CONCEPT OF PROTECTED GROUPS

The Genocide Convention and subsequent documents adopting the definition of the crime from the Genocide Convention protect four categories of groups, which are characterized by certain features common to their members: nationality, ethnicity, race, or religion. The crime of genocide thus pertains to the intended destruction in whole or in part of a group with a particular positive identity that is characterized by one or more of these features. It does not concern itself with the destruction of people lacking a distinctive identity, such as non-Serbs or non-Khmers.[209]

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[206] Kai Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (Oxford University Press, 2014), p. 15.

[207] Guénaël Mettraux, *International Crimes: Law and Practice: Volume I: Genocide* (Oxford University Press, 2019), p. 282.

[208] See ICC *Elements of Crimes*, art. 6(e)(4) (providing that the transfer was 'from that group [which the perpetrator intended to destroy in whole or in part] to another group').

[209] *Stakić*, ICTY, IT-97-24-A, ACH judgment, 22 March 2006, paras 16–27. See also Opinion of Judge Shahabuddeen challenging the view of the majority and positing that it is possible to define a group negatively. *Stakić*, ICTY, IT-97-24-A, Partly Dissenting Opinion of Judge Shahabuddeen, 22 March 2006, paras. 8-18. group. Similarly, *Jelisić,* ICTY, IT-95-10-T, Trial Chamber Judgment, 14 December 1999, para. 71.

It must be proved that a person was targeted due to a perceived membership in one of the protected groups. The TCH in the *Muhimana* case stated that '[…] the Prosecution also has the burden of proving either that the victim belongs to the targeted ethnic, racial, national, or religious group or that the perpetrator of the crime believed that the victim belonged to the group'.[210] To the contrary, it is not necessary to establish that the perpetrator was aware that the group in question was a protected group under the Genocide Convention. It is sufficient that the perpetrator was generally aware of the facts and circumstances upon which the characterization was made and the victims targeted.[211]

The perpetrator's intent must be directed towards the destruction of a group. Groups are defined by the individuals forming the group, thus the genocidal conduct in general is directed against individual members of the protected group. However, these individuals are not important per se; they are important only as members of the group to which they belong. They must be targeted because of their membership to the group.

Some subsections of the genocidal acts use the plural form 'members' as immediate victims of the genocidal act, e.g. 'killing member**s** of the group' (emphasis added by the author). However, this does not mean that there has to be more than two victims of the genocidal act in order to classify such a conduct as genocide. The *ad hoc* tribunal case repeatedly stated that it must be proven that a perpetrator intentionally 'killed one or more members of the group'.[212] This interpretation is predominantly unchallenged with few exceptions.[213]

However, as argued by scholars, it now appears too firmly accepted in practice to be reversed in the future.[214] The same interpretation requiring a damage caused only to one person would logically apply to the second ('causing serious bodily or mental harm to **members** of the group'), fourth ('imposing measures intended to prevent **births** within the

[210] *Muhimana*, ICTR, ICTR-95-1B, TCH judgment, 28 April 2005, para. 500.
[211] Guénaël Mettraux, *International Crimes: Law and Practice: Volume I: Genocide* (Oxford: OUP, 2019), p. 200.
[212] *Semanza*, ICTR, ICTR-97-20, TCH judgment, 15 May 2003, para. 319. Similarly *Stakić*, ICTY, IT-97-24, TCH judgment, 31 July 2003, para. 515.
[213] Antonio Cassese et al., *Cassese's International Criminal Law* (Oxford: OUP, 2013), p. 117.
[214] Claus Kreß, 'The ICC's First Encounter with the Crime of Genocide' in: Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: OUP, 2015), p. 686.

group') and fifth ('forcibly transferring **children** of the group to another group') of the genocide definition.[215]

The interpretation that killing one individual may suffice is explicitly confirmed in the Elements of Crimes to Article 6 of the Rome Statute. Article 6 of the Rome Statute, which points out that it is required, for instance, that the 'perpetrator killed one or more persons'. Even for the act of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', where the group itself is the target, it is sufficient when the measures are imposed upon one person.[216]

Mens rea

The crime of genocide has two separate mental elements, namely a general one what could be called 'general intent' and an additional special intent embodied in the wording "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[217] A general intent normally relates to all objective elements of the crime (*actus reus*). In the case of genocide, the general intent relates to the opening paragraph (the perpetrator must, for example, know that his actions target one of the protected groups) as well as to the acts listed as specific genocidal acts.[218] To the contrary, the 'intent to destroy' constitutes an additional subjective requirement that complements the general intent.

Special intent is a well-established criminal law concept which is required as a constitutive element of certain international crimes. The terms "special intent", "specific intent", and '*dolus specialis*' are used interchangeably in the jurisprudence of international courts and tribunals.[219] The special intent for genocide was firstly introduced in Article 2 of the Genocide Convention. The Convention itself does not address this element as 'special intent' but embodies this element in the wording 'genocide means any of the following acts committed with intent to destroy'. Similarly the statutes of the *ad hoc* tribunals, the Rome

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[215] Emphasis added by the author.

[216] William Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge: Cambridge University Press, 2000), p. 179.

[217] Otto Triffterer, 'Genocide, its particular intent to destroy in whole or in part the group as such' (2001) 14 Leiden Journal of International Law, p. 400.

[218] Kai Ambos, 'What does 'intent to destroy' in genocide mean?' (2009) 91 (876) *International Review of the Red Cross,* p. 837.

[219] William Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge: Cambridge University Press, 2000), p. 260.

Statute and the Elements of Crimes don't use the expression of 'special intent' but uses wording from the Genocide convention. When assessing a special intent, two different elements of the special intent can be distinguished. Firstly, it must be shown that the perpetrator wanted to destroy the group as such. Secondly, it must be proven that the perpetrator sought the destruction of the group because of its national, racial, ethnic, or religious characteristic.

As the *Akaeysu* case is the first case of the ICTR dealing with the genocide charges, it provides substantial analysis of special intent. The TCH in *Akaeysu* case defines the intent to destroy as "the clear intent to cause the offence"[220] or, in other words as the 'key element' of an intentional offence, which is "characterized by a psychological relationship between the physical result and the mental state of the perpetrator".[221] The subsequent case law of the *ad hoc* tribunals well defined the aspects of special intent in the relation to genocide. The TCH in the *Krstic* case clarified that the premeditation does not have to be in existence for a long time. It suffices when the intent to destroy is formulated at a later stage during the implementation of a military operation whose primary objective was totally unrelated to the fate of the protected group.[222]

The key case at the ICC containing genocidal charges is the *Al-Bashir* case. The *Al-Bashir* case presents the first opportunity for the ICC to discuss the crime of genocide and the special intent required. In 2008 the Prosecutor sought the issuance of arrest warrant for genocide, war crimes and crimes against humanity arguing that there is a reasonable ground to believe that Al-Bashir committed those crimes as an indirect perpetrator based on Article 25(3) of the Statute.[223] This case provides the opportunity to discuss the ICC approach to proving genocide intent.

It is interesting to explore a discussion on *dolus eventualis* in relation to direct perpetration of genocide (thus a situation not covered by the 'unless otherwise provided' formulation in Article 30 of the Rome Statute). The International Law Commission explicitly affirmed that *dolus eventualis* does not suffice for the crime of genocide by stating '[..] a

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[220] *Akayesu*, ICTR, ICTR-96-4-T, TCH judgment, 2 September 1998, para. 518.
[221] *Ibid*, para. 518.
[222] *Krstić*, ICTY, IT-98-33, TCH judgement, 2 August 2001, para. 572.
[223] *Al Bashir*, ICC, ICC-02/05-01/09, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (ACH judgment), 3 February 2010.

general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide.'[224] Van der Vyver argues that the 'intent to destroy' formulation only leaves scope for *dolus directus*.[225] In fact, special intent is an essential element of genocide and special intent is certainly a manifestation of *dolus directus*. However, as seen from the case law, *dolus directus of the second degree* leads to a conviction for genocide in several cases.[226] Piragoff argues that 'intent […] connotes some element, although only minimal, of desire or willingness to do the action, in light of an awareness of the relevant circumstances.[227] However, intent does not necessarily include a desire to bring about the consequences of the act. Greenwalt argues for the inclusion of *dolus directus of second degree* by employing a knowledge-based interpretation of *dolus specialis* – suggesting that genocide comprises of underlying acts that one knows leads to the destruction of the group or whose foreseeable or probable consequence is the destruction of the group.[228]

The International Law Commission explicitly affirmed that *dolus eventualis* does not suffice for the crime of genocide by stating '[..] a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide.'[229] However, some scholars are challenging this traditional view. Claus Kress argues that a low-level perpetrator must act with knowledge of the collective genocidal attack and with dolus eventualis as to the at least partial destruction of a protected group.[230] Otto Triffterer also opts for the application of dolus eventualis, a position which is mainly motivated by the difficulty to prove a special intent and hence to obtain convictions for

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[224] ILC, Report of the ILC on the Work of Its Forty-Eighth Session, A/CN.4/ SER.A/1996/Add. 1 (Part 2), Art. 17(5).

[225] Van der Vyver J. D.' 'The International Criminal Court and The Concept Of Mens Rea' (2004) *International and Comparative Law Review*, p. 71.

[226] *Akayesu*, ICTR, ICTR-96-4-T, TCH judgment, 2 September 1998, paras. 538-40, 543-44, 724. *Bagilishema*, ICTR, ICTR-95-1A-T, TCH judgement, 7 June 2001, para. 60.

[227] Donald K. Piragoff, 'Mental Element' in: Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Oxford: Hart Publishing,1999), p. 527-533.

[228]Alexander K.A. Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 *Columbia Law Review*, p. 2259-2288.

[229] ILC, Report of the ILC on the Work of Its Forty-Eighth Session, A/CN.4/ SER.A/1996/Add. 1 (Part 2), Art. 17(5).

[230] Claus Kress, 'The Darfur Report and genocidal intent', (2005) 3(3) *JICJ*, p. 572

genocide.[231] In the 2019 Appel Judgment in the *Karadžić* case, Judge de Prada in his dissent calls for adoption of a broader mental element of genocide, including *dolus eventualis*. He argues that 'the certainty of knowledge on the part of the accused that his acts or omissions were contributing to the collective destruction of a group' should be taken in account for proving a special genocidal intent. [232]

Nevertheless, the formulation of Article 30 of the Rome Statute 'unless otherwise provided' clearly states that other mental element standards may come into play and as such prevail over the general provisions in Article 30 of the Rome Statute. Proving a genocide intent constitute the most difficult problem relating to the crime of genocide. Direct evidence proving existence of genocidal intent is not available in most cases and thus the intent has to be deduced from numerous pieces. In practice, the courts do not require a finding of specific intent based solely on a direct evidence of mental state as this finding may instead be deduced from the complete set of facts and circumstances. Due to the existence of multiple theories of special intent, it can be argued that the applied theory influences whether the conviction will be entered.

PURPOSE-BASED V. KNOWLEDGE BASED APPROACH

In relation to the special intent crime for genocide, two approaches can be distinguished. The first approach is a purpose-based approach, which is focused on the genocidal intent as such and requires a demonstration that the outcome of the genocidal scheme was anticipated and willed by the perpetrator.[233] The second approach is a knowledge-based approach. There are different interpretations of the knowledge-based approach but the core element is the same – the existence of a plan or policy and the perpetrator's knowledge of the context in which the crime of genocide occurs.[234] Greenawalt advocates for a knowledge-based intent that requires

[231] Otto Triffterer, 'Genocide, its particular intent to destroy in whole or in part the group as such' (2001) 14 *Leiden Journal of International Law*, p. 405–406 ('much more difficult to be proven …').
[232] *Karadžić*, ICTY, IT-95-5/18-A, Partially Dissenting Opinion of Judge de Prada, 20 March 2019, para. 843.
[233] Kirsten J. Fisher, 'Purpose-based or knowledge-based intention for collective wrongdoing in international criminal law?'(2014) 10 (2) *International Journal of Law in Context*, p. 167-168.
[234] *Ibid*.

the perpetrator to know that their actions were contributing to a wider genocidal plan, some are of the view that it is sufficient that a collective goal effectively exists. [235]

A historic and literal interpretation of the term 'intent' in the context of Genocide Convention does not indicate any clear preference for a purpose-based or knowledge-based approach.[236] Cassese argues in favour of a knowledge-based approach when he describes the *dolus specialis* for genocide as an "aggravated intent that signifies the pursuance of a specific goal going beyond the result of the offender's conduct".[237] The knowledge based approach is also preferred by Greenawalt who suggests that such an approach would be better in a scenario when genocide is committed due to a superior's orders, extending thus the responsibility for genocide to those who may personally lack genocidal purpose, but who commit genocidal acts while having a full knowledge about the consequences of their actions. [238] Clearly, the selection of the preferred approach determines the practical applicability of several modes of liability. It does not mean that the purpose-based approach would be applicable only towards the direct perpetrators who personally committed genocide. Nevertheless, it is much easier to prove that a perpetrator who personally committed genocide sought and anticipated that their conduct will result in the commission of genocide. This might be evidentiary problematic in other cases – a responsibility for aiding and abetting, responsibility based on participation in the JCE and also superior responsibility.

Even though the core of the two approaches is settled, there has been no uniform use of intent in the *ad hoc* tribunals' case law.[239] The *ad hoc* tribunals' case law tends to apply the purpose-based approach. However, while acknowledging evidentiary difficulties, the argumentation often comes to stretch the purpose-based knowledge into a very wide horizon.

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[235] Claus Kreß, 'The Crime of Genocide under International Law' (2006) 6 International Criminal Law Review, 472-474. Similarly, Alexander K.A. Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 *Columbia Law Review*, p. 2283-2284.

[236] Otto Triffterer, 'Genocide, its particular intent to destroy in whole or in part the group as such', (2001) 14 *Leiden Journal of International Law*, p. 404. Alexander K.A. Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation'(1999) 99 *Columbia Law Review*, p. 2265 - 2266.
Ambos points out that a literal interpretation of Article 6 of the ICC Statute in French and Spanish version expresses purpose-based conduct. Kai Ambos, 'What does 'intent to destroy' in genocide mean?' (2009) 91 (876) *International Review of the Red Cross*, p. 847-848.

[237] Antonio Cassese, International Criminal Law. 2nd ed. (Oxford: Oxford University Press, 2008), p. 65

[238] Greenawalt K. Alexander K, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 *Columbia Law Review*, p. 2259-2294.

[239] Cryer, Robert, Friman, Hakan, Robinson, Darryl and Wilmshurst, Elizabeth (eds). *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), pp. 179–185

The TCH in the *Akayesu* case found that the special intent of a crime is the specific intention which demands that the perpetrator 'clearly seeks to produce the act they are charged with'.[240] Nevertheless, the TCH went on and cited a significant number of evidence which one could deduce special intent from. It also acknowledged the difficulties to prove, adding that in the absence of a confession from the accused, the intent 'can be inferred from a certain number of presumptions of the facts'.[241] The TCH provided examples of facts from which it is possible to deduce genocidal intent, including the 'scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups'. [242] It seems that the TCH basically argued for a purpose-based approach but with a loose evidentiary standard that resembles the knowledge-based approach. In fact, the TCH in the *Akayesu* case advance that special intent can be presumed largely by virtue of the fact that a perpetrator knew about an overall genocidal campaign, using a somehow even looser approach than a knowledge-based one.

The case law at the ICTY presents some clashes in special intent's interpretation between trial and the appeals chambers. The first collision may be seen in the *Jelisić* case. The TCH, while acknowledging difficulties to prove genocidal intent if the crimes committed are not widespread and if the crime charged is not backed by an organization or a system, held that Jelisić did not have the requisite intent. The TCH reached this conclusion despite the findings that he 'wanted to cleanse the place of Muslims', told the Muslim detainees in the Luka camp that 70% of them were to be killed and he claimed to have gone to the Luka camp to kill Muslims.[243] The TCH in *Jelisić* found that despite he obviously singled out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group and his acts were not the physical expression of an affirmed resolve to destroy in whole or in part a group as such.[244] However, the ACH disagreed and found that there is sufficient evidence to show Jelisić's intent to destroy the Muslim group.[245] Kirsten argues that it shows that while TCH clearly voted for the purpose-based approach, the ACH favoured a knowledge-based

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[240] Akayesu, ICTR, ICTR-96-4-T, TCH judgment, 2 September 1998, para. 516
[241] *Ibid*, para. 523.
[242] *Akayesu*, para. 523.
[243] *Jelisić,* ICTY, IT-95-10-T, Trial Chamber Judgment, 14 December 1999, para. 102.
[244] *Ibid*, paras. 106-107.
[245] *Jelisić,* ICTY, IT-95-10-A, Appeals Chamber Judgment, 5 July 2001, paras. 57-72.

interpretation.[246] It is clear that the ACH put more emphasis on the existence of a policy to kill Muslims and Jelisić pursuance of such a policy. The ACH made several remarks, while conducting analysis of Jelisić's intent, to the existence of policy and campaign.[247] While it is correct to see the ACH's argumentation leaning towards a knowledge-based approach, the key point in different findings of the TCH and the ACH is arguably in a perception of randomness. The TCH placed, contrary to the ACH, reliance on the randomness of the killing, citing examples of where he let some prisoners go, played Russian roulette for the life of another, and picked his victims not just off lists allegedly given to him by others, but according to his own whim.[248] The TCH regarded this 'randomness' as a key factor in the analysis of special intent, somehow overcoming findings that specifically confine his clear intention to kill Muslims. To the contrary, the ACH held that the acts showing 'randomness' in his actions should be seen as an aberration. Thus, the special intent cannot be automatically negated if the perpetrator's showing some signs of the randomness in the genocidal act. Randomness might be a factor indicating a lack of special intent, but it must be seen in entirety of all the evidence. Even though the clash between a purpose-based and a knowledge-based approach is not the key in the case, it is clearly seen that both chambers favoured a different approach.

A more obvious disagreement between the approaches to special intent can be found between the TCH and the ACH in the *Krstić* case. The TCH claimed that knowledge of the consequence of actions and the lasting impact of those actions upon a group was sufficient to demonstrate Krstić genocidal intent. The TCH explicitly held that Krstić 'must have known' that the military activities against Srebrenica were calculated to trigger a humanitarian crisis, eventually leading to the destruction of persons displaced to Srebrenica.[249] The TCH found that Krstić participated in the criminal plans to ethnically cleanse Srebrenica of all Muslim civilians and to kill the military-aged men of Srebrenica. He was ultimately found guilty of genocide by the TCH based on the concept of co-perpetrator in a JCE. The ACH, however, argued that mere knowledge of the consequences of actions is insufficient to demonstrate

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[246] Kirsten J. Fisher, 'Purpose-based or knowledge-based intention for collective wrongdoing in international criminal law?' (2014) *International Journal of Law in Context*, p. 168.

[247] ,[…][R]elentless campaign against the protected group[..]', para 71. […]the respondent believed himself to be following a plan sent down by superiors to eradicate the Muslims in Brcko […], para. 66.

[248] *Jelisić,* ICTY, IT-95-10-T, TCH judgment, 14 December 1999, para. 106.

[249] *Krstić*, ICTY, IT-98-33-T, TCH judgment, 2 August 2001, para. 335.

genocidal intent, explicitly stating that the knowledge on Krstić part alone cannot support an inference of genocidal intent.[250] The ACH denied that a knowledge-based interpretation of intent is justified for a conviction for genocide. According to this judgment, the perpetrator must himself have the intent to contribute to the genocide and desire the destruction of the targeted group. The ACH set aside the conviction for genocide based on a membership to the JCE and found Krstić guilty of aiding and abetting genocide.[251] This case presents the substance of the debate between the knowledge-based and the purpose-based approach. The TCH voted for the knowledge-based approach arguing that it suffices to prove the perpetrator's knowledge of collective genocidal intent – a collective goal to commit genocide. To the contrary, the ACH voted for the purpose-based approach according to which the perpetrator's intent has to mirror the collective goal in the form of a personal desire, aim, goal or purpose.

In 2016, the TCH held Karadžić responsible for genocide, finding that he had specific genocidal intent regarding the Srebrenica killings.[252] The TCH found that Karadžić was a participant in a JCE whose common purpose eventually evolved to encompass the agreement to kill all Bosnian adult males and to forcibly transfer women and children.[253] The TCH believed that Karadžić knew about the killings at Srebrenica due to his conversation he had with another official, Miroslav Deronjić.[254] The conversation does not explicitly mention the killing of detainees during the conversation, they spoke in code, referring to the detainees as 'goods' which had to be placed 'inside the warehouses before twelve tomorrow'. The Chamber further recalled that immediately after this conversation, Deronjić with another official discussed where the detainees were to be killed. The Chamber put emphasis on the fact that no discussion was made on whether the detainees were to be killed presuming that this has been already agreed upon. Finally, the Chamber drew Karadžić's special intent from 'his active involvement in overseeing the implementation of the plan to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys'.[255] When the TCH comes to explain what

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[250] *Krstić*, ICTY, IT-98-33-A, ACH judgment, 19 April 2004, para. 134.
[251] *Ibid*, para. 144.
[252] The special intent of physical perpetrators in regard to Srebrenica killings was based on the systematic and highly organized nature of the killings of every Bosnian Muslim able-bodied male. *Karadžić*, ICTY, IT-95-5/18-T, TCH judgment, 24 March 2016, para. 5669.
[253] *Karadžić*, ICTY, IT-95-5/18-T, TCH judgment, 24 March 2016, paras. 5741-98.
[254] *Ibid*, para. 5805.
[255] *Ibid*, para. 5811.

was his active involvement, the Chamber presented findings on his dissemination of 'false information about what happened in Srebrenica' and the fact he praised and rewarded the perpetrators of the killings.[256] Also, the TCH argued that his special intent can be seen in Karadžić's omission to prosecute the direct perpetrators after he had knowledge about the killings.[257]

As argued by Sterio, the TCH's approach to the intent requirement under the Genocide Convention and the customary law definition of genocide present an innovation.[258] It based its findings on Karadžić special intent on his knowledge about killings and his reluctance to do anything after he acquired knowledge about the killings. Also, the TCH's conclusion about his knowledge regarding the killings was based solely on indirect evidence. Indeed, the TCH's findings on Karadžić special intent are controversial. The most troubling part is the finding that he had actual knowledge about the killings as this is based on indirect evidence. It would be far more suitable and persuasive to argue that he had a constructive knowledge, i.e. he had reason to know about the killings which would be a basis for his superior responsibility as opposed to the TCH's preferred JCE.

However, the findings of the Chamber regarding Srebrenica seem strangely inconsistent looking at the findings of the TCH in regards of the incidents in the other parts of Bosnia and Herzegovina (municipalities). The prosecution claimed his responsibility based on the fact that he was informed of the killings, which was accepted by the TCH.[259] The TCH presented analyses of several Karadžić's speeches some of them describing the 'highway of hell' for Bosnian Muslims, and their "annihilation", "vanish[ing]", "elimination", and "extinction".[260] Nevertheless, the Chamber argued that it is not the only reasonable inference that speeches, statements and actions demonstrate Karadžić's intent to physically destroy a part of the Bosnian Muslim group in the provinces.[261] However, the same argument can be

[256] *Ibid*, para. 5813.
[257] *Ibid*, para. 5812.
[258] Milena Sterio, 'The Karadžić genocide conviction: inferences, intent, and the necessity to redefine genocide' (2017) 37 *Emory International Law Review*, p. 272.
[259] *Karadžić*, ICTY, IT-95-5/18-T, TCH judgment, 24 March 2016, paras. 3331-3363.
[260] *Ibid*, para. 2600.
[261] *Ibid*, paras. 2605 – 2625.

raised for the killings in Srebrenica – it could be argued that Karadžić only agreed to the removal of Bosniaks but not to their killing.[262]

The decision was confirmed on appeal in 2019 with Judge de Prada dissenting who pointed out that the purely purpose-based approach is almost unreachable and inapplicable for a non-principal perpetrator.[263] The *Karadžić* case shows the absurdity of demonstrating genocidal intent under the current legal standard. In relation to the Srebrenica killings, a conviction was achieved based on presumed knowledge, streaming from indirect evidence, and the abstraction of special intent from this knowledge extracting. While this line of reasoning still satisfies the strict approach of the purpose-based interpretation of special intent, it is clearly a significantly looser standard. To the contrary, in respect to the killings in the provinces, the acquittal for genocidal charges was reached despite *Karadžić*'s knowledge, supported by direct evidence, about the killings and existence of evidence supporting his special intent. This perfectly demonstrates the difficult battle under the current legal standard of genocide intent.

The *Mladić* case is closely linked to the *Karadžić* case, thus findings from the previous influenced the later. In relation to Srebrenica, the direct evidence of a physical perpetrators' special intent is missing; however, the Chamber argued that specific intent may be inferred from the surrounding facts and circumstances, including connections between physical perpetrators in terms of time, location and composition of their group.[264] In assessing *Mladić*'s special intent, while lacking direct evidence, the Chamber also took into consideration command and control units operating in and around Srebrenica.[265]

The only case so far available for analyses of the ICC's approach towards genocidal intent is the *Al-Bashir* case. As the Rome Statute does not specify any approach towards the interpretation of genocidal intent, it comes as no surprise that the PTCH conforms to the purpose-based approach. Nevertheless, it did not happen without any controversy. Firstly, the prosecution tried to introduce the knowledge-based approach by arguing that "[T]he conduct

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[262] Milena Sterio, 'The Karadžić genocide conviction: inferences, intent, and the necessity to redefine genocide' (2017) 37 *Emory International Law Review*, p. 292.
[263] *Karadžić*, ICTY, IT-95-5/18-A, Partially Dissenting Opinion of Judge de Prada, 20 March 2019, paras. 837-840
[264] *Mladić*, ICTY, IT-09-92-T, TCH judgment, 22 November 2017, para. 3440.
[265] *Ibid*, para. 5130.

took place in the context of a manifest pattern of similar conduct directed against each group and was a conduct that could itself effect such destruction' suggesting a knowledge-based approach."[266] The prosecution explained that while the existence of a plan or policy is not a legal requirement for establishing genocide, it is an important factor in proving specific intent.[267] As the direct evidence in relation to the special intent of Al-Bashir to commit genocide was missing, the prosecution listed several facts that presented the existence of special intent to commit genocide.[268] In assessing the prosecution's application, the PTCH correctly deconstructed the requisite *mens rea* of genocide into two elements: (i) a general subjective element that must cover any genocidal act provided for in Article 6(a) to 6(e) of the Statute, and which consists of Article 30 intent and knowledge requirement; and (ii) an additional subjective element, normally referred to as *dolus specialis* or specific intent, according to which any genocidal act must be carried out with the "intent to destroy in whole or in part" the targeted group.[269] However, the PTCH held that the adduced evidence fell short of demonstrating the existence of genocidal intent, which was "only one of several reasonable conclusions available on the Prosecution material".[270] The ACH reversed the PTCH's decision not to issue a warrant of arrest on genocidal charges in view of an erroneous standard invoked by the PTCH that is higher than the standard 'reasonable grounds to believe' embodied in Article 58(1)(a) of the Statute.[271] The PTCH subsequently decided that there were reasonable grounds to believe that Al-Bashir is criminally responsible for the crime of genocide and issued an arrest warrant.[272] Unfortunately, until this case goes further, no final conclusion on the ICC approach towards the applicability of the knowledge-based approach can be determined. It might be argued that the ACH did indirectly support the knowledge-based approach while hiding behind the standard of proof.

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[266] *Situation in Darfur - Sudan*, ICC, ICC-02/05 Public Redacted Version of the Prosecutor's Application under Article 58, 14 July 2008, para. 209.
[267] *Ibid*, para. 378.
[268] *Situation in Darfur - Sudan*, ICC, ICC-02/05 Public Redacted Version of the Prosecutor's Application under Article 58, 14 July 2008, paras. 364-400.
[269] *Al Bashir*, ICC, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), 4 March 2009, para. 139.
[270] *Ibid*, para. 159.
[271] *Al Bashir*, ICC, ICC-02/05-01/09-73, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (ACH judgment), 3 February 2010, para. 39.
[272] *Al Bashir*, ICC, ICC-02/05-01/09-95, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (PTCH I decision), 12 July 2010.

Reflecting on the case law, proving a special intent is always a challenging task. The case law is predominantly focused on proving the perpetrator's special intent and their personal desire to cause consequences. However, this is often proved by using indirect evidence and drawing interference from presumed knowledge. Adopting the enhanced knowledge-based approach, requiring proof of the existence of a 'genocidal context' and the perpetrator's knowledge that the crime is committed within this context would definitely better reflect the current modes of liability and address the evidentiary roadblock in most of the cases.[273] Similarly, the judiciary gymnastics seen in the *ad hoc* tribunals' case law, would have been avoided.

[273] See for example Fisher who emphases the importance of superior acting upon the knowledge. Kirsten J. Fisher, 'Purpose-based or knowledge-based intention for collective wrongdoing in international criminal law?' (2014) 10 (2) *International Journal of Law in Context*, p. 23. See also Katherine Goldsmith, 'The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach' (2010) 5 (3) *Genocide Studies and Prevention: An International Journal*.

PART 2: THEORY, LEGAL RULES AND THEIR CHALLENGES

2. DEFINING POINTS IN THE APPLICABILITY OF SUPERIOR RESPONSIBILITY TO GENOCIDE

This Chapter will present and analyse the defining points in the applicability of superior responsibility to genocide. As such, the goal is to identify what might help in defining the application of superior responsibility to genocide, with the main focus on the superior's *mens rea* requirement.

The suggested defining points are:

- General principles of international (criminal law), such as the requirement of a strict construction of the crimes, ban on analogy and the *in dubio pro reo* principle
- Article 30 of the Rome Statute
- Requirement of causality as a potential element of superior responsibility
- The nature of superior responsibility and its characterization as a mode of responsibility, a separate crime, or *sui generis* omission

2.1 GENERAL REMARKS

The Rome Statute and the Statutes of the *ad hoc* tribunals provide the definition and requirements for superior responsibility as well as genocide. However, these documents are silent on the interaction between superior responsibility and genocide. This comes as no surprise, as the general interaction between modes of liability and special intent crimes are not discussed and arguably the drafters did not anticipate any clashes in the requirements established for responsibility and crime. The Statutes also give no clear answer to the question of whether or not a superior can be convicted of genocide in cases where their *mens rea* is based on the constructive knowledge or how this situation should be treated differently than the situation when the superior has a direct knowledge of the crimes committed by the subordinates or even shares the subordinates' intent. However, the basic principles of criminal law, such as the *in dubio pro reo* principle, enshrined in Article 22 of the Rome Statute may provide powerful guidance into the applicability of superior responsibility to the crime of

genocide. Similarly, an analysis of Article 30 of the Rome Statute and its application to the dilemma of whether a special intent is required on the part of a superior is deemed to be necessary.

2.1.1 Legal Principles

As part of its guarantee of legality, the Rome Statute explicitly presents, unlike the *ad hoc* tribunals' Statutes, a set of legal principles applicable at the ICC proceedings. These principles include basic principles derived from national law. The legal principles are listed in Article 22 of the Rome Statute that reads as follow: "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In the case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."[274] Article 22(2) of the Statute contains three overlapping guarantees in an attempt to translate strict construction into a variety of legal languages. The first, crime definitions shall be strictly construed. The second, crime definitions shall not be extended by analogy. The third, ambiguities shall be interpreted in a favour of the defendants or would-be defendants (also known as the *in dubio pro reo* principle).

The rule of strict interpretation that is enshrined in Article 22(2) of the Rome Statute ensures that the judges will interpret the Statute narrowly and the criminal responsibility of that individual will be judged according to the legislation and nothing else. In the *Katanga* case, the TCH held that in line with Article 22(2), the Chamber cannot adopt a method of interpretation that might broaden the definition of the crimes and it is instead duty-bound to apply strictly the provisions which specifically proscribe only the conduct which the drafters expressly intended to criminalize.[275] It can be argued that by allowing a conviction based on superior responsibility without proving a superior's special intent, one is extending a definition of genocide and stripping down the core requirement of genocide. The question remains whether the drafters intended to apply superior responsibility to the crimes requiring a special intent, such as genocide. Probably, the drafters did not see that as a matter that needs

[274] Article 22 of the Rome Statute

[275] *Katanga*, ICC, ICC-01/04-01/07, TCH judgment, 7 March 2014, para. 52.

to be discussed and decided. With the doubts about whether the superior responsibility should be used for military commanders as well as civilian superiors, it is hard to imagine that the discussion on the applicability of superior responsibility to genocide had taken place.[276] At least, nothing in the official documents suggest otherwise.

In that line of reasoning, what methods of interpretation that would be in conformity with the principles derived from Article 22 of the Statute are available? As the Rome Statute is an international treaty, the Court has repeatedly held that guidance for interpretation can be found in the 1969 Vienna Convention on the Law of Treaties, respectively in its Article 31.[277] This Article provides guidance for interpretation that focuses on literal, contextual and teleological aspects of treaty interpretation. More specifically, the ACH in a reference to a situation in the DRC has held that: 'The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.'[278] The ACH endorsed interpretation based on the object and purpose of the treaty – the Rome Statute. As the object and purpose is a prosecution of, including safeguards for fair trial, international crimes, there is little doubt that a perpetrator in the position of a superior could not be held criminally responsible in relation to genocide.

The TCH in the *Katanga* case explicitly answers one of the burning question in relation to interpretation by explicitly stating that '[I]it should therefore not be considered that article 22(2) of the Statute from the outset takes precedence over the conventional method of treaty interpretation or only a part of the method.'[279] However, this is not the united view.

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[276] United Nations, A/CONF.183/13 (Vol.11), *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome*, 15 June -1 7 July 1998, Official Records, Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, p. 123, 136-138. See also Roy Lee, *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Result*. (Kluwer Law International, 1999), p. 125

[277] *Situation in the Democratic Republic of the Congo*, ICC, ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (ACH decision), 24 July 2006, para. 33; see also *Lubanga*, ICC, ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing (PTCH I), 8 November 2006, para. 8

[278] *Ibid*, para. 33.

[279] *Katanga*, ICC, ICC-01/04-01/07, TCH judgment, 7 March 2014, paras. 50-53.

Judge Wyngaert in the *Chui* case argues that Article 22(2) overrides the conventional methods of treaty interpretation, as defined in the Vienna Convention on the Law of Treaties, particularly the teleological method. She argues that for interpreting articles dealing with the criminal responsibility of individuals, the principles of strict construction and *in dubio pro reo* are paramount. Judge Wyngaert pointed out the express inclusion of the *in dubio pro reo* standard is a significant characteristic of the Statute. In her view, the principle is an essential safeguard to ensure both the necessary predictability and legal certainty that are essential for a system that is based on the rule of law. She notes that by including this principle, the drafters wanted to make sure that the Court could not engage in a kind of 'judicial creativity'.[280] Although this might sound like a radical proposition, it is more about setting up limits for the judges and prohibiting them from using analogy as a tool of law-making. This conclusion is supported by her subsequent remarks that the principle itself is an essential safeguard to ensure both the necessary predictability and legal certainty and that by including this principle, the drafters wanted to make sure that the Court could not engage in a kind of 'judicial creativity'.[281] It is clear that the ban on using analogy is closely connected to the methods of a text interpretation. It can be argued that the principle stemming from Article 22(2) of the Rome Statute aims at prohibiting an analogy as a tool of law-making. On the other hand, analogy can be used as a tool for interpretation to fill in gaps in the Statute.[282] As such, analogy used for filling up gaps in the Rome Statute would not be in conflict with a ban on analogy as set up in Article 22(2) of the Statute. It can be argued that a ban on analogy in the Rome Statute does not prevent its interpretation under the general treaty interpretation methods, namely the interpretation in light of the treaty's object and purpose. Similarly, the ban on analogy does not mean that general principles cannot be used in the determination of whether the conduct is punishable under the Rome Statute. Thus, the ban on the analogy principle enshrined in Article 22 of the Statute does not prohibit contextual reasoning inspired by statutory provisions or logical reasoning to fill gaps in the Statute.

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[280] *Chui*, ICC, ICC-01/04-02/12, Concurring Opinion of Judge Wyngaert, 18 December 2012, para. 18.

[281] *Ibid*, para. 9.

[282] Susan Lamb, 'Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law' in Antonio Cassese *et al*. (eds.), *The Rome Statute of the International Criminal Court* (Oxford University Press, Oxford, 2002), p. 752-753 . Bruce Broomhall, 'Article 22 – Nullum crimen sine lege', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*. 2nd ed. (C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2008), p. 725.

Principle *in dubio pro reo* is one of the fundamental principle of not only national but also international criminal law. The fundamental question is – what the applicability of this principle means for superior responsibility in relation to special intent crimes. More favourable to the accused superior would be that the prosecutor has to prove that the superior shares the special intent of his or her subordinates. The ICC had opportunity to discuss this principle in its very first case. The TCH in *Katanga* noted that Article 22(2) of the Statute must be taken into consideration when interpreting the rules of the Rome Statute as it prescribes that "any meaning from a broad interpretation that is to the detriment of the accused" shall be discarded.[283] The TCH noted that the principle *in dubio pro reo* is only applicable in cases of ambiguity and that it does not take precedence over the conventional method of interpretation according to Articles 31 and 32 of the VCLT.[284] In fact, this principle only entails that, where doubt cast by an equivocal term or phrase as to the exact meaning of a provision cannot be dispelled by the general rule or supplementary means of interpretation, it must be resolved in favour of the subject, in this case the accused, and not in favour of the drafter, who was unclear.

The same position has been taken by the PTCH in the *Al-Bashir* case, where the PTCH stated that the *in dubio pro reo* principle is applicable only in a cases of uncertainty.[285] However, what does it exactly mean for the applicability of superior responsibility to genocide? In fact, if there is an ambiguity in the application to superior responsibility to genocide, the principle would in fact mean that whenever there is a collision between individual elements of superior responsibility and genocide, the requirements that would benefit the accused would apply. For example, it would mean that in order to convict a superior based on the superior responsibility doctrine, the proof of special intent would be required on the part of the superior. The critical question is, whether the application of superior responsibility in respect to genocide is a case of uncertainty.

The applicability of superior responsibility to genocide, at least at the *ad hoc* tribunals, is a controversial one from the beginning. As discussed later in a separate chapter, tribunals were troubled to find a unified approach in the application of superior responsibility to genocide. One example for all includes the requirement of special intent on the part of the

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[283] *Katanga*, ICC, ICC-01/04-01/07, TCH judgment, 7 March 2014, para. 50

[284] *Ibid*, paras. 50-53.

[285] *Al-Bashir*, ICC, ICC-02/05-01/09-3, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (PTCH I), 4 March 2009, para. 156

superior. In the *Prosecutor* v. *Stakić* the TCH found that it must be proven that a superior possessed the requisite special intent, whereas the ACH in the *Brđanin* case found no difficulty in convicting a superior of genocide based on a lower *mens rea*. On the note of relation of specific intent crime such as genocide and superior responsibility, Ambos refers to it as a 'stunning contradiction'.[286] As mentioned above, the Rome Statute is silent on the issue and no relevant case law is so far available. However, being controversial or silent does not mean that the principle *in dubio pro reo* applies. Using a method of interpretation in order to interpret uncertainties in the Rome Statute, the following chapters will look into the nature of superior responsibility and inquire whether the nature of the concept itself can shed any light on the application of superior responsibility to genocide.

Using Article 22(2) of the Rome Statute as a defining point in the applicability of superior responsibility to genocide, one remaining question must be answered. In fact, a critical ambiguity in Article 22(2) itself is whether it applies only to the provisions of the Rome Statute setting out the crimes or whether these guarantees apply to forms of criminal responsibility as well. The uncertainty arises from the Article's wording that refers to 'the definition of the crime'. As such, an argument can certainly be made that modes of liability does not form a part of the crime's definition and therefore Article 22(2) is not applicable.[287] To the contrary, some authors argue that Articles and principles that have a direct impact on the application of Articles 6-8*bis* should be covered by Article 22(2).[288] It is not clear from the Rome Statute whether the drafter's intent was to treat modes of liability as part of the definition of the crime.[289] However, the applicability of Article 22(2) to the modes of liability can be found in the Court's decisions. In the *Chui* case, Judge Wyngaert in her concurring

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[286] Kai Ambos, ‚Superior Responsibility' in: Antonio Cassese, Paola Gaeta and Jones, John (eds.), *The Rome Statute of the International Criminal Court: a commentary* (Oxford: Oxford University Press, 2002), p. 823 and 852.

[287] Since Article 22(2) refers to the interpretation of crimes it is only applicable to Article 6-8 bis of the Rome Statute, which are Articles that contain the definitions of the crimes enlisted in Article 5. See Bruce Broomhall, 'Article 22 – Nullum crimen sine lege', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*. 2nd ed. (C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2008), p. 723-724.

[288] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), p. 410

[289] See Sadat and Jarrod proposing canons of construction for ICL and applying them to Article 25(3)'s forms of individual criminal responsibility, in particular the question whether Article 25(3) creates a hierarchy of responsibility and whether Article 25(3)(a) incorporates the "control of crime" theory of perpetration. Leila Nadya Sadat, Jarrod M. Jolly. 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot' (2014) 27 (755) *Leiden Journal of International Law*, p. 7.

opinion argued that Article 22 applies to the definition of criminal responsibility.[290] She argued that the PTCH invented the notion of indirect co-perpetration that goes beyond the terms of the Statute and as such is incompatible with Article 22 of the Statute. The PTCH II in the *Bemba* case referred to Article 22(2) of the Rome Statute on two occasions. Firstly, when making an inquiry whether Article 30 of the Statute encompasses the notion of *dolus eventualis* and secondly, when interpreting whether the chapeau of Article 28(a) includes an element of causality between a superior's dereliction of duty and the underlying crimes.[291] This study takes the view that Article 22(2) of the Statute is also applicable to the mode of liability due to its material impact on the application of crimes. Modes of liability and its interpretation can have a significant impact on the outcome of the proceedings, comparable to the interpretation of the substantive crimes. Due to its significant relevance, modes of liability and its interpretation should be covered by the basic principles enshrined in Article 22(2) of the Statute.[292]

While discussing legal principles and its relevance for study, another basic legal principle comes to the mind – the principle of individual criminal responsibility. It can be argued that applying superior responsibility to the crime of genocide may breach the principle of individual criminal responsibility under which an individual may be held responsible only for their own conduct (Article 7 of the ICTY Statute, Article 6 of the ICTR Statute and Article 25 of the ICC Statute). The author argues that such a claim is basically defeated by the wording of the Rome Statute that expressly states the position of superior responsibility as an addition to other grounds of criminal responsibility (Article 28, first sentence). It is also important to bear in mind that superior responsibility is a special form of responsibility typical of international criminal law and the superior is punished for their failure to discharge a duty to act (prevention and punishment). The superior is not held responsible for their participation in genocide but for their failure to prevent or punish genocide. However, there has been significant debate in international criminal law whether a superior can and should be held responsible for the principle crime (see Chapter 2.2.1). The author argues that the superior

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[290] *Chui*, ICC, ICC-01/04-02/12, Concurring Opinion of Judge Wyngaert, 18 December 2012, para. 18.
[291] *Bemba*, ICC, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (PTCH II), 15 June 2009, paras 369 and 423.
[292] See also Ondrej Svacek, *Mezinárodní trestní soud (2005–2017) [International Criminal Court (2005-2017)]* (C. H. Beck, 2018), p. 253.

should indeed be held responsible for their own failure to prevent or punish the crime and as such, it is fully consistent with the principle of individual criminal responsibility to hold them responsible based on superior responsibility.[293]

2.1.2 Article 30 of the Rome Statute

Unlike the Statutes of the *ad hoc* tribunals, the Rome Statute contains a general provision on the mental element. Article 30(1) provides that '[U]nless 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**'.[294] As such, this Article calls for intent and knowledge as opposed to Article 28 which satisfies responsibility by proving that the superior knew or should have known/consciously disregarded information. The issue is whether the interpretation of Article 30 of the Rome Statute can shed light on the applicability of superior responsibility to genocide. This provision clarifies that 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."[295] This definition of knowledge arguably covers *dolus directus* and *dolus indirectus* (*dolus directus* – second degree) only.[296] In terms of Article 30(1) of the ICC Statute, the requirement of "intent and knowledge" applies "[u]nless otherwise provided." This introductory phrase makes allowance for deviations from the general requirement of intent and knowledge. Regarding genocide, the mental element is detailed in the documents providing elements for the crimes. Article 6(c) of the Elements of the Crimes states: "Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving

[293] See also Volker Nerlich. The conclusions arrived at by V. Nerlich are essentially the same 'Superior Responsibility Under Article 28 ICC Statute. For What Exactly is the Superior Held Responsible?' (2007) 5(3) *Journal of International Criminal Justice*. 2007, p. 665-682.

[294] Emphasis added by the author.

[295] Article 30 of the Rome Statute.

[296] See Donald K. Piragoff, 'Mental Element' in: Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Oxford: Hart Publishing, 1999), p. 534. Van der Vyver J. D.' 'The International Criminal Court And The Concept Of Mens Rea' (2004) International and Comparative Law Review, p. 66.

genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis."[297]

Article 28 of the Rome Statute does not meet the general requirements of the 'intent and knowledge' standard from Article 30 of the Rome Statute. Specifically, the constructive knowledge assigned to the military commander ('should have known') and civilian superior ('consciously disregarded information') does not meet the standard established in Article 30 of the Statute. In such a situation the provision 'unless otherwise provided' will come into play and the mental element alternative of Article 28 of the Rome Statute 'should have known' and consciously disregarded information' would prevail. However this does not answer whether the higher threshold of specific intent related to the crime of genocide overrides the lower given to superior responsibility.

A discussion on the consequences of the phrase 'unless otherwise provided' arose for the first time in the *Lubanga* case in the context of co-perpetration and the war crime of conscripting or enlisting children under the age of fifteen years into the armed forces or groups or using them to participate actively in hostilities (furthermore only 'conscripting or enlisting children'). The Rome Statute does not provide any guidance on a perpetrator's state of mind in relation to the age limitation. However, the Elements of the Crimes state that it is only required that the perpetrator "knew or should have known that such a person or persons were under the age of 15 years."[298] The PTCH indeed observed that the Elements in relation to the use of child soldiers provides exceptions to the requirement of "intent and knowledge" under Article 30.[299] However, the PTCH held that the 'should have known' standard is not applicable in the current case because Lubanga's responsibility is based on the theory of co-perpetration which requires that all the co-perpetrators, including the suspect, be mutually aware of, and mutually accept, the likelihood that implementing the common plan would result in the realization of the objective elements of the crime.[300] The PTCH also added on that if direct responsibility as a sole perpetrator for the using of child soldiers would apply, the 'should have known' requirement would have been applicable in relation to determining the

[297] Article 6 (c) of the Elements of the Crimes
[298] Art. 8(2)(b)(xxvi), Elemnets of Crimes, para. 3.
[299] *Lubanga*, ICC, ICC-01/04-01/06-803, Decision of the confirmation of charges (PTCH I), 7 February 2007, para. 359.
[300] *Ibid*, para. 365.

age of the victims.[301] This finding of the PTCH was completely unnecessary because the Prosecution did not claim Lubanga's responsibility on the basis that "he should have known" that the individuals who were conscripted or enlisted, or who were used, were under the age of 15 years.[302] The TCH did not follow up this finding as it found it unnecessary in this case.[303] The PTCH in the Lubanga case overrode the express language of the Elements, without an explanation or providing any support for its finding. It is also unclear whether the PTCH reached this decision because the lower standard 'should have known' is provided in the Elements and not in the Rome Statute.[304] Speculatively, the PTCH's approach would negate all lower elements contained as a definition of crimes due to the elements of established responsibility, i. e. crimes that can be committed wantonly.[305]

This situation in the *Lubanga* case is different from the current discussion on superior responsibility and genocide in two aspects. Firstly, *mens rea* for superior responsibility and genocide is directly embodied in the Rome Statute, as opposed to the Elements that only assist the Court in the interpretation and application of the Rome Statute's provisions. Secondly, genocide arguably brings a higher *mens rea* requirement than superior responsibility, as opposed to conscripting or enlisting children that requires a lower *mens rea* requirement than co-perpetration. As the PTCH did not offer any explanation, one can only guess whether the preference for guiding the *mens rea* requirement was given to co-perpetration due to its position as a mode of liability or whether it was preferred in order to seal the higher *mens rea* requirement. However, a preference given to a higher *mens rea* in a situation of doubt would lead to a breach of the *in dubio pro reo* principle. Third, and mostly likely, option is that preference was given to the *mens rea* requirement of the mode of liability as it streams from the Rome Statute, as opposed to the *mens rea* requirement for the age of children stemming from the Elements. At the same time, this requirement might be derived also, very easily, from the Statute However, as the crime of genocide and its mental element is embodied

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[301] *Ibid*, para. 365, footnote 441.

[302] *Lubanga*, ICC, ICC-01/04-01/06-2748-Red, Prosecution's Closing Brief, 1 June 2011, para 72, footnote 123.

[303] *Lubanga*, ICC, ICC-01/04-01/06-2842, TCH judgment, 5 April 2012, para. 1015.

[304] See Schabas who argues that '[i]t would seem to be going too far to suggest that the Article 30 standard in the Statute could be amended if an exception is provided for in the Elements of Crimes. William Schabas, W Schabas, *Introduction to the International Criminal Court*. 3rd ed. (CUP 2007), p. 225. Similarly Kreß. Claus Kreß, 'The Crime of Genocide under International Law' (2006) 6 International Criminal Law Review, p. 485.

[305] Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. Article 8 para 2(a)(4) of the Statute.

directly in the definition of the crime in the Rome Statute. Thus, the discussion whether the wording 'unless otherwise provided' refers to the Rome Statute only or also to the provisions of the Elements is not relevant. If indeed this was the intention behind the PTCH decision, it provides no guidance for the relation between genocide and superior responsibility.

2.1.3 Interim conclusion

The applicability of superior responsibility to genocide is not governed by a specific provision in the Rome Statute (or *ad hoc* tribunals Statute). Thus, it cannot be argued that there is doubt cast by an equivocal term or phrase as to the exact meaning of a provision. However, it is not clear whether it is necessary to prove a superior's genocidal intent in order to be held responsible under the concept of superior responsibility. The author argues that in a situation when conventional methods of interpretation according to the Articles 31 and 32 of the VCLT fails to cast light on the applicability of superior responsibility to genocide committed by subordinates, the principle in *dubio pro reo* is activated. In such a scenario, the requirements or elements that would benefit the accused would apply, e.g. special intent would be required on the part of the superior in order to hold them responsible based on the superior responsibility doctrine. However, as there is no provision on the applicability of superior responsibility for genocide, the interpretation is pointed towards specific elements of superior responsibility and genocide. The interpretation will focus on the context and the light of object and purpose of superior responsibility – respectively nature of superior responsibility while bearing in mind the principle of the *in dubio pro reo* principle. The *in dubio pro reo* principle is applicable in a case of a persistent gap that cannot be overcome through the traditional means of treaty of interpretation. The author also claims that a principle of individual criminal responsibility does not prevent holding a superior responsible in relation to the crime of genocide committed by their subordinates. This line of argumentation streams from the nature of superior responsibility that will be discussed in the upcoming chapter.

The mental elements for genocide and superior responsibility are directly embodied in the wording of the Rome Statute and as such are not detailed, in respect to *mens rea*, in the Elements of Crimes. The individual provisions for the *mens rea* requirement for genocide and superior responsibility take precedent over the general provision in Article 30 of the Rome Statute. As such, it is plausible that while in general negligence and arguably *dolus eventualis* are not generally applicable in the proceedings at the ICC, the provision 'unless otherwise

provided' in Article 30 of the Rome Statute opens the door for their application in a superior responsibility case.

2.2 NATURE OF SUPERIOR RESPONSIBILITY

This chapter presents the importance of defining the nature of superior responsibility and shows how a different perception of superior responsibility could provide guidance into the applicability of superior responsibility to the crime of genocide. The chapter also addresses the criticism of weakening the relationship between the principal crime and the superior if the special intent is not required on the part of the superior. The author also critically assesses the claim that genocide resists the application of the doctrine of command responsibility.[306] The causality requirement is introduced as a safeguard to the strong connection between the crimes committed by subordinates, in this case genocide, and the responsibility of the superior in relation to the crime.

The nature of superior responsibility is far less clear than the direct participation in the crime. In the *Ntabakuze* case, the ACH Appeals Chamber observed that the Statute does not accord any "lesser" form of individual criminal responsibility to superior responsibility.[307] The ACH in the *Milošević* case also acknowledges that a conviction under Article 6(3) of the Statute may result in a lesser sentence as compared to that imposed in the context of an Article 6(1) conviction. However, the ACH stressed that superior responsibility is not to be seen as the a priori as less grave than criminal responsibility under Article 6(1) of the Statute.[308]

2.2.1 Mode of liability v. separate offense and consequences for sentencing

Discussions refer to superior responsibility as a mode of liability, a separate crime or *sui generis* responsibility. The aim of this chapter is to assert whether the nature of superior responsibility itself may provide a key for the treatment of superior responsibility in the case of genocide. Case law emanating from the aftermath of WWII tends to view superior

[306] William Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge: Cambridge University Press, 2000), p. 305 and 312.
[307] *Bagosora et al.* (Military I), ICTR, ICTR-98-41), ACH judgment, 8 May 2012, para. 299.
[308] *Milošević,* ICTY, IT-98-29/1, ACH judgement, 12 November 2009, para. 334. See also *Strugar*, ICTY, IT-01-42, ACH judgement, 17 July 2008, paras. 353-354.

responsibility as a mode of participation. The superiors were convicted for the principal crime committed by the subordinates. This concept was referred to as "acquiescence", and as such, the superiors were held responsible for the crimes committed by his subordinates, under the condition that superiors "have had knowledge and have been connected to such criminal acts, either by way of participation or criminal acquiescence".[309] Superior responsibility was understood as a way of participation in the subordinates' crime. In the *Yamashita* case, this responsibility shifted towards forms of strict liability.[310] In either case, the superior was charged and convicted for the principal crime.[311] Article 86(2) of AP I as well as the Statutes of *ad hoc* tribunals are silent as to the nature of superior responsibility. Similarly Article 28 of the Rome Statute, with the exception of the introductory sentence that states '[I]in addition to other grounds of criminal responsibility […]', clearly indicated that superior responsibility is indeed a form of responsibility as opposed to a separate offence.

The nature of superior responsibility has been subjected to a diverse academic discussion. Mettraux argues that a superior is not being held responsible for the crimes of subordinates, but responsible in respect of crimes committed by subordinates based on their own failure to act.[312] Root argues that the superior responsibility enshrined in Article 28 of the Rome Statute should be interpreted as a distinct crime.[313] However, treating superior responsibility as a distinct crime does not seem to be supported by the case law and consistent with customary international law. In Root's opinion, treating superior responsibility as a mode of liability would require "muddying" the heightened *mens rea* of specific intent crimes, or the superior responsibility could not be applied to specific intent crimes.[314] In applying superior responsibility to the crime of genocide, it is debated – and it is the central issue of

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[309] Nuremberg Trial of the United States v.Wilhelm von Leeb (the High Command trial), United Nations War Crimes Commission. Law Reports of Trials of War Criminals. Vol. X, XI. London: HMSO, 1948, p.517-520. See also the United States v.Wilhelm von List (the Hostage trial), United Nations War Crimes Commission. Law Reports of Trials of War Criminals. Vol. X, XI. London: HMSO, 1948 Vols X and XI, p. 1271.

[310] United Nations War Crimes Commission. Law Reports of Trials of War Criminals. Vol. IV. London: HMSO, 1947, Volume III, p. 18 – 22. Prévost, Maria, 'Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki, p. 330.

[311] Chantal. Meloni,'Command responsibility. Mode of liability for the Crimes of subordinates or separate offence of the superior' (2007) *Journal of International Criminal Justice*, p. 623.

[312] Mettraux, Guénaël, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009), p. 37-95.

[313] Joshua L. Root, 'Some other mens rea? The nature of command responsibility in the Rome Statute' (2013) 23(119) *J Transnatl. L & Policy*, p. 150-155.

[314] *Ibid*, p. 155.

this thesis – whether the superior must themselves have had the necessary genocidal intent, or if they must merely have known that their subordinates possessed genocidal intent. In the latter case, a superior could be held liable for genocide committed by their subordinates even if they did not themselves have a genocidal intent. For this reason, it is critical to explore the nature of the superior responsibility and answer the core question: what is a superior responsible for?

Table 3: Nature of superior responsibility

Depending on the nature of superior responsibility, several scenarios can be distinguished:

Superior responsibility regarded as	Explanation
Mode of responsibility	Responsibility for the principal crime
	Responsibility for the superior's omission (*sui generis* responsibility)
Separate offense	Art. 6(1) ICTR Statute, Art. 7(1) ICTY Statute + 'the crime of SR'[315]

The table presents the core of the debate on the nature of superior responsibility. Superior responsibility is mostly discussed as a mode of liability with the distinction between responsibility for the principal crime and responsibility for the superior's omission (*sui generis* responsibility). The third, and the least discussed, option is treating superior responsibility as a separate offence with a combination of individual criminal responsibility.[316] This would however be inapplicable in the ICC proceedings as the superior responsibility is clearly looked upon as a mode of liability (see discussion below). For its potential applicability in *ad hoc* tribunals, if you ignore the fact that superior responsibility is consistently applied as a mode of liability, it would create even more questions with regards to

[315] Not applicable for the ICC, see the text below.

[316] See Otto Triffterer, 'Command Responsibility' crimen sui generis or participation as ''otherwise provided'' in Article 28 of the Rome Statute?', in J. Arnold (ed.), Menschengerechtes Strafrecht, Festschrift fu«r Albin Eser (Munchen: Beck, 2005), p. 903.

the required *mens rea*, for example interaction between superior responsibility and JCE III. The main discussion is thus devoted to superior responsibility as a mode of liability while discussing its two options – responsibility for the principal crime and responsibility for the omission.

Ad hoc tribunals' approach

Starting with the ICTR, in the *Bagilishema* case, superior responsibility is treated as a form of liability of the superior's omission.[317] Similarly, on omission as a failure of the duty to prevent and/or punish, the *Mpambara* TCH 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."[318] The ICTR clearly applies superior responsibility as a mode of liability and a superior is being held responsible for their own failure as opposed for the principal crime. The ICTY case law, offers a more colourful development of the nature of a superior's responsibility. The early case law from the ICTY indicates that the superiors were in fact held responsible for the principal crime. This approach has been also given support by the Secretary-General's report relating to the ICTY Statute describing the superior responsibility as "imputed responsibility".[319] The TCH in the *Čelabići* case held that "[t]he type of individual criminal responsibility for the illegal acts of subordinates … is commonly referred to as 'command responsibility".[320] The Trial Chamber continued; "[t]hat military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law."[321] The TCH cited the Secretary General's Report in support of its conclusion. The Appeals Chamber in the *Čelabići* case also held that where a superior has effective control over his subordinates "he could be held responsible for the commission of the crimes if he failed to exercise such abilities of control".[322] The TCH in

[317] *Bagilishema*, ICTR, ICTR-95-1A-T, TCH judgement, 7 June 2001, paras. 896-897.
[318] *Mpambara*, ICTR, ICTR-01-65-T, TCH judgement, 11 September 2006, para. 25
[319] Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), S/25704.
[320] *Mucić et al.*, ICTY, IT-96-21-T, TCH Judgment, 16 November 1998, para. 331.
[321] *Ibid*, para. 333.
[322] *Mucić et al.*, IT-96-21-A, ACH Judgment, 20 February 2001, para. 198.

the *Aleksovski* case discussed the distinction between responsibility under Article 7(1) and Article 7(3) of the ICTY Statute. The TCH held that "[T]he doctrine of superior responsibility makes a superior responsible not for his acts sanctioned by Article 7(1) of the Statute but for his failure to act." However, it was still found that a superior is "held responsible for the acts of his subordinates" if he did not prevent the perpetration of the crimes of his subordinates or punish them for the crimes.[323]

The turning point can be seen in the conclusion of the TCH in the *Halilović* case. The TCH concluded that, up to that date, the superior had consistently been "responsible for the crimes of his subordinates.'[324] Nevertheless, the TCH reached a different conclusion and held that the superior is 'merely responsible for his neglect of duty'.[325] Furthermore, it was clarified that "a commander is not responsible as though he had committed the crime himself."[326] This was followed by the subsequent ICTY case law. The TCH in the *Hadzihasanović* case emphasised that superior responsibility "is the corollary of a commander's obligation to act".[327] As such, the TCH argued, that superior responsibility is a responsibility for an omission to prevent or punish crimes committed by his subordinates and the "responsibility is *sui generis* distinct from that defined in Article 7(1) of the Statute."[328] Another analysis concerning the nature of superior responsibility was provided in the *Orić* case. The Trial Chamber in the *Orić* case pointed out that finding a commander "responsible 'for the acts of his subordinates' [...] does not mean, however, that the superior shares the same responsibility as the subordinate who commits the crime [...], but that the superior bears responsibility for his own omission in failing to act. In this sense, the superior cannot be considered as if he had committed the crime himself, but merely for his neglect of duty".[329] This is the essential element distinct from responsibility under Article 7(1) of the ICTY Statute, and the TCH went to call the superior responsibility under Article 7(3) of the ICTY Statute as a responsibility *sui generis*. With this shift to *sui generis* form of

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[323] *Aleksovski*, ICTY, IT-95-14/1-T, TCH judgment, 25 June 1999, para. 67.
[324] *Halilović*, ICTY, IT-01-48, TCH judgement, 16 November 2005, para. 53
[325] *Ibid*, para. 293.
[326] *Ibid*, para. 54
[327] *Hadžihasanović/Kubura,* ICTY, IT-01-4, TCH judgment, 15 March 2006, para. 75.
[328] *Ibid.*
[329] *Orić,* ICTY, IT-03-68-T, TCH judgment, 30 June 2006, para. 293.

responsibility comes a change in formulation. The superior is not regarded as 'responsible for' but 'responsible in respect of' or 'with regard to' the crimes of the subordinates.[330]

The ICTY case law provides significant inside insight into the treatment of superior responsibility. Not only that since the *Halilović* case, the position of the tribunal is united but the judges provided quite a detailed reasoning why the superior responsibility should be treated as a responsibility of the superior's omission. Despite the fact that none of the cases where the Court has discussed the nature of the superior responsibility contained charges of genocide, the position of the *ad hoc* tribunals is clear.

ICC's approach

According to the wording of Article 28 of the Rome Statute, a superior "shall be criminally responsible for crimes within the jurisdiction of the Court' committed by his subordinates 'as a result' of his 'failure to exercise control properly". From a literal interpretation of this provision it follows that the superior is responsible for the principal crime committed by his subordinates.[331] The first sentence of Article 28 providing for superior responsibility says "[i]n addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court". This sentence is sometimes interpreted as that it "...does not substitute, but supplements all forms of participation as listed in Article 25(3). Article 28 thus extends the scope of individual criminal responsibility for perpetrators in the position of superiors."[332] The language chosen for Article 28 seems quite ambiguous. Some consider that what ICC Statute adopts is a "concept of superior responsibility as a form of liability for omission".[333] It is nevertheless often argued that the literal interpretation of Article 28 indicates that superior responsibility is rather meant to be a kind of imputed liability for the base crime resulting from a superior's omission.[334] Meloni agrees that from the literal reading of the Article 28 it follows that the superior is responsible for the principal crime committed

[330] 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: OUP, 2011), p. 388.

[331] Chantal. Meloni,'Command responsibility. Mode of liability for the Crimes of subordinates or separate offence of the superior' (2007) *Journal of International Criminal Justice*, p. 633.

[332] Otto Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Art. 28 Rome Statute?' (2002) 15(1) *Leiden Journal of International Law*, p.179-186.

[333]Michaela, Frulli, 'Exploring the applicability of command responsibility to private military contractors' (2010) 15(3) *Journal of Conflict & Security Law*, p. 452.

[334] Barrie Sander, ,Unraveling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence' (2010) 23(1) *Leiden Journal of International Law*, p. 132.

by their subordinates. However, she correctly argues that this approach would be in violation of the principle of individual and culpable criminal responsibility.[335]

In the *Gbagbo* case, the PTCH distinguished superior responsibility from modes of liability contained in Article 25 of the Rome Statute by pointing out their fundamental difference between liability for violation of duties in relation to crimes committed by others and liability for one's own crimes.[336] To the contrary, in the *Bemba* case, the PTCH concluded that "a superior may be held responsible for the prohibited conduct of his subordinates for failing to fulfil his duty".[337] The TCH expressly stated that „Article 28 provides for a mode of liability, through which superiors may be held criminally responsible for crimes within the jurisdiction of the Court committed by his or her subordinates."[338] It is clear that the ICC treats superior responsibility as a mode of liability. Unfortunately, stemming from the wording of Article 28,[339] the ICC took a stand in the *Bemba case* that such a responsibility is for the commission of the principal crime as opposed to the responsibility for the superior's omission. Nevertheless, the idea of superior responsibility being directly responsible for the "principal crime" is rightfully heavily criticized.[340]

The way superior responsibility is looked at should be reflected in sentencing. The determination of the sentence is primarily governed by Article 78 of the Rome Statute. According that Article, the Court must take into account the gravity of the crime and the individual circumstances of the convicted perpetrator. Rule 145 of the rules of Procedure and Evidence specifies that the sentence must reflect the culpability of the convicted perpetrator

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[335] Chantal. Meloni,'Command responsibility. Mode of liability for the Crimes of subordinates or separate offence of the superior' (2007) *Journal of International Criminal Justice*, p. 633.

[336] *Gbagbo*, ICC, ICC-02/11-01/11, Decision on the Confirmation of Charges (PTCH I),12 June 2014, paras. 264-265 (footnote omitted).

[337] *Bemba*, ICC, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (PTCH II), 15 June 200, para. 405.

[338] *Bemba*, ICC, ICC-01/05-01/08, TCH judgement, 21 March 2016, para. 171.

[339] According to the wording of first line of the article (in addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court), superior responsibility adds to "other grounds of criminal responsibility". These "other grounds of criminal responsibility" (hereinafter referred to as modes of participation) are specifically listed in Article 25. A wording of the first line of Article 8 of the Statute might suggest that command responsibility is another mode of liability.

[340] Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*. 2nd edition. (Oxford: Hart Publishing, 2008), p. 280; Chantal. Meloni,'Command responsibility. Mode of liability for the Crimes of subordinates or separate offence of the superior' (2007) *Journal of International Criminal Justice*, p. 633; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), p. 457; Volker Nerlich, 'Superior Responsibility under Article 28 ICC Statute' (2007) 5(5) *Journal of International Criminal Justice*, p. 665 – 682.

and provides a list of non-exhaustive factors that should be given consideration. The Rule 145 contains several factors that could be relevant to superior responsibility in relation to genocide, such as the nature of the unlawful behaviour, the degree of participation of the convicted person and the degree of the intent.

Meloni argues that the superior's sentence depends on various factors including the gravity of the subordinates' crime as the principal factors.[341] While she supports looking at the superior responsibility as a *sui generis* responsibility – responsibility for the omission, she describes sentencing as a contra argument against this theory. In the same way, the ACH in the *Ntabakuze* case held that '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)'.[342]

In regards to superior responsibility in relation to genocide several questions are raised. For example, if superior responsibility is treated as a separate crime, what sentence should be given to the perpetrator? If treated as a *sui generis* responsibility, how does sentencing affect the proven existence of a special intent of the superior? The easiest scenario is a situation when superior responsibility is treated as a mode of responsibility – responsibility for the principal crime. In that case, the sentence should be equivalent to the direct commission of the crime. Under this theory, the superior is responsible for the crime and thus the sentence should be equivalent. However, it does not count on different scenarios – whether the superior shares the special intent of the subordinates or not. Superior responsibility treated as a separate offence seems even less flexible in regards to sentencing. The only possibility would be to have a sentence generally determined by the founding documents regardless of what crime was committed by the subordinates. Not even this option allows for different scenarios – whether a superior shares the special intent of the subordinates or not but does not take into account the gravidity of the consequences of the superiors omission's. The third option presents treating superior responsibility as a *sui generis* liability. A different sentence would be in a place, depending on whether the superior shares the special intent of the direct perpetrators. If the superior shares the special intent of the direct perpetrators, their sentence would be equivalent to the crime of genocide. If the superior does

[341] Chantal. Meloni,'Command responsibility. Mode of liability for the Crimes of subordinates or separate offence of the superior' (2007) *Journal of International Criminal Justice*, p. 632.
[342] *Ntabakuze*, ICTR, ICTR-98-41A-A ACH Judgement, 8 May 2012, para. 302

not share the intent of the direct perpetrators, their sentence would be equivalent to murder or any other relevant crime (or to the crime that most resembles it).

Table 4: Recommendation for sentencing

Superior responsibility regarded as	Sentencing	
Responsibility for the principal crime	Equivalent to the direct commission of the crime	
Separate offense	? Suggestion: determined by the Statute generally regardless of what crime was committed by the subordinates	
Responsibility for the superior's omission (*sui generis* responsibility)	The superior shares the special intent of the direct perpetrators	equivalent to the crime of genocide
	The superior does not share the intent of the direct perpetrators	equivalent to murder or any other relevant crime

This table represents a recommendation for sentencing in a line with Article 78 of the Rome Statute and Rule 145 of the Rules and Procedure and Evidence, focusing on the nature of the unlawful behaviour, the degree of participation of the convicted person and the degree of the intent.

Interim conclusion

The author disagrees with treating superior responsibility as a mode of liability that would automatically opt out of the use of the responsibility for special intent crimes, as the distinction has to be made between requisite *mens rea* for the superior and for the subordinates. The prevailing academic opinion is that superior responsibility is a *sui generis* form of culpable omission which has no equivalence from any other responsibility in either domestic or international criminal law.[343] The author's suggestion is to treat superior

[343] Kai Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (Oxford University Press, 2014), p. 189-197; Chantal. Meloni,'Command responsibility. Mode of liability for the Crimes of subordinates or separate offence of the superior' (2007) *Journal of International Criminal Justice*, p.

responsibility as a *sui generis* responsibility for omission in respect of the subordinates' crimes that would not require a special intent on the part of the superior, but knowledge of the superior about the subordinates' intentions – special intent in a relation to special intent crimes. However, some authors argue that there would be too little connection between the conduct of the superior and the conduct of the subordinates if the relation would be limited to the superior's knowledge of their subordinates' intentions.[344] This is when the causality requirement should come into play.

The relation between a principal subordinates' crime and the responsibility of the superior should, in the author's proposition, be reflected in the sentencing.

	Scenario	Sentencing
Responsibility for the superior's omission (*sui generis* responsibility)	superior shares the special intent of the direct perpetrators	equivalent to the crime of genocide
	superior does not share the intent of the direct perpetrators	equivalent to murder or any other relevant crime

Superior responsibility should be regarded as a *sui generis* responsibility while distinguishing whether a superior shares the special intent of their subordinates (principal perpetrators). The requirement of special intent on the part of a superior, should not be determinative for the superior's culpability, but – as it was already argued – reflected in the sentencing.

2.2.2 Requirement of causality

The causality requirement arguably plays a significant role in defining the nature of superior responsibility. It could shed light on the nature of superior responsibility in a term whether the superior responsibility is regarded as a separate crime or modes of liability and how it is applied to special intent crimes. Also if causality and special intent of the superior is required

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191-207; Mettraux, Guénaël, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009), p. 37- 95.

[344] *Ibid*, p. 56.

for superior responsibility, it influences the applicability of superior responsibility to genocide as an additional element that would have to be proven. Proving causality in a scenario of superior responsibility and genocide committed by a superior's subordinates might be especially evidentiary challenging.

The requirement that a conduct of a person charged with a crime must be causally linked to this crime itself is a general and fundamental requirement of criminal law in most national systems.[345] As it is generally accepted that the requirement for justifying criminal punishment by the ICC is higher than for punishment within domestic legal systems, it is plausible that the general principles which limit the justifiable criminalization at the domestic level must apply at the international level as well.[346] However, in international criminal law it is rather unclear whether this causal requirement exists, and, if it does, under what extent and what it means in practice for the superior responsibility doctrine. Whilst some decisions of the ICTY suggest that this requirement does not apply, some have taken the opposite stance. Unfortunately, even the *Bemba* judgment did not offer explicit answers to all the questions about the causality requirement under superior responsibility. The opinions among academics vary as well. This all makes the causality requirement one of the more closely watched topics in international criminal law.

If causality would be required in both types of a superior's omission, a problem would occur in the case of failure to punish an isolated crime. This is a situation when a crime occurs, but the crime was not facilitated, encouraged or affected by any failure of the commander to prevent or punish. This scenario can arise only where a superior has adequately satisfied their preventive duties. If a superior breached his duty to prevent, then the contribution requirement would be met for a single crime and they could be held responsible for their omission. Another situation can occur where a superior knows or has reason to know that a crime (isolated) was committed, but fails to investigate, punish or refer the matter to the competent authorities and no further crimes occur. The superior has clearly failed in their responsibilities but has not contributed to or had an effect on the core crime. This could create a gap that would allow superiors to escape justice in such a scenario.[347]

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345 Andrew Ashworth, Jeremy Horder, *Principles of Criminal Law* (Oxford: OUP, 2009), p. 124.

346 This is reflected in Article 5 of the Rome Statute, which restricts the Court's mandate to the most serious crimes of concern to the international community as a whole.

347 See also James Stewart, 'The End of 'Modes of Liability' for International Crimes' 2012 (25) 1 *Leiden Journal of International Law*, p. 26-27.

The causality requirement plays a prevailing role in the context of omission liability and an extensive debate was sparked about whether a causal element is generally required within the superior responsibility doctrine. While in the *Čelabići* case it was held that superior responsibility does not require separate proof of a causal link between a superior's failure to act and the underlying crime, Article 28 stipulates that the crimes committed by subordinates are *a result of* the superior's failure to exercise proper control over them. The ICC's very first superior responsibility case shed some light on the causality requirement. The TCH in the Bemba case held that some level of causation is required.[348] On the other hand, the requirement of causality for failure to punish is not required by the majority of academic opinions.[349] Mettraux offers a solution, arguing that international criminal law demands proof of a causal relationship between the failure of the accused and the commission of the crimes by the subordinates (in regard to their duty to prevent crimes), and between their failure and the resulting impunity of the perpetrators (in regard to their duty to punish crimes).[350] In his view, the requirement of causality also applies to a situation where a superior is responsible for a failure to punish the crimes of subordinates, and such causality must be established between the conduct of the superior and the impunity of the perpetrators.[351] The author's view is that the opinion presented by Mettraux is the most appropriate solution for the causality requirement problem within superior responsibility. Arguably, in a case of continuous crimes, it might be enough to prove that the superior's failure increased the risk of the commission of subsequent crimes of their subordinates. The upcoming sub-chapters will present whether this suggestion corresponds with the *ad hoc* tribunals' findings and findings made in the *Bemba* case.

Ad hoc tribunals' approach

According to the interpretation of the ICTY Statute, only one alternative of omission— failure to prevent—requires a causal connection between the commander's omission and the commission of the subordinates' crimes for which they are held responsible, while the second

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348 *Bemba*, ICC, ICC-01/05-01/08, TCH judgement, 21 March 2016, paras. 211-213.

349 Erasmus Mayer, 'International Criminal Law, Causation and Responsibility' (2014) (14) 4/5 *International Criminal Law Review*, p. 863.

350 Guénaël Mettraux, *The Law of Command Responsibility* (Oxford: OUP, 2009), p. 82.

351 *Ibid*, p. 88-89.

alternative—failure to punish—does not.[352] Nevertheless, the jurisdiction of the ICTY in this matter is barely consistent, as will be elaborated below.

The rationale for rejecting a causality requirement in the failure to punish case was brought forth in the *Čelabići* case. The TCH pointed out that a superior cannot be held responsible for prior violations committed by subordinates if a causal nexus would be required between such violations and the superior's failure to punish those who committed them.[353] The TCH held that a causal connection cannot 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 main Chamber's argument was that the failure to punish cannot causally influence the crime which has already been committed.[354] Furthermore, the TCH explained that, while a causal connection between the failure of a superior to punish past crimes committed by subordinates and the commission of any such future crimes is not only possible but likely, no such causal link can possibly exist between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator for that same offence.[355]

On the other hand, the TCH held that "a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superiors' failure to take the measures within their power to prevent them."[356] This conclusion from the TCH opens the door for the application of the causality requirement for the duty to prevent. Nevertheless, in the same judgment, the Chamber stated that it had found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, and therefore concluded that "causation has not traditionally been postulated as *a condition sine que non* for the imposition of a responsibility put on superiors for their failure to prevent or punish offences committed by their subordinates."[357] The TCH went on to add, without offering any support for its proposition, that customary international law did not require proof of a causal relationship between the conduct of the accused and the crimes of his

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352 Erasmus Mayer, 'International Criminal Law, Causation and Responsibility' (2014) (14) 4/5 *International Criminal Law Review*, p. 863.

353 *Mucić* et al., ICTY, IT-96-21-T, TCH Judgment, 16 November 1998, para. 400.

354 *Ibid*.

355 *Ibid*, para. 400.

356 *Ibid*, para. 399.

357 *Ibid*, para. 398. Cited again in *Kordic and Čerkez*, ICTY, IT-95-14/2-T, TCH judgment, 26 February 2001, para. 447.

subordinates.[358] Controversially, this is regarded by some authors as a rejection of the causality requirement in both types of omission, failure to prevent but also for failure to punish.[359] Also, the subsequent jurisprudence of the ICTY stood by the denial of a causality requirement in both types of omissions. Many of these decisions are very limited and basically only refer to the findings of the ACH in the *Čelabići* case.[360] For example, in the *Blaškić* case, the ACH found that "the existence of causality between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes is not an element of command responsibility that requires proof by the Prosecution in all circumstances of a case".[361]

Even though there is no direct provision on bindingness of the ACH' judgements, the ACH in the *Aleksovski* case came to the conclusion that the construction of the Statute requires that the decision of the Appeals Chamber is binding on the Trial Chamber.[362] It means that the conclusion made by the ACH in the *Čelabići* case is binding on all TCH. Despite acknowledging the position of the ACH, the TCH in the *Hadžihasanović/Kubura* case came as close to reintroducing the requirement of causality, as the binding jurisprudence of the ACH would allow. The TCH went as far as stating that a causality requirement is necessary to hold a commander responsible as "command responsibility may be imposed only when there is a relevant and significant nexus between the crime and the responsibility of the superior accused of having failed in his duty to prevent".[363]

The ICTY case law on the causality requirement is far from being unambiguous and does not provide any clear guidance on how superior responsibility should be regarded in context of causality. Even though the *Čelabići* case arguably opened the door for the application of the causality requirement for the duty to prevent, some authors, and more

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358 The ACH in *Blaškić* noted that the *Čelabići* TCH's finding on that point did not cite any authority for the statement. *Blaškić*, ICTY, IT-95-14, ACH judgement, 29 July 2004, para. 76. The causality requirement was not subjected to the appeal in the *Čelabići* case.

359 Christine Bishai, 'Superior Responsibility, Inferior Sentencing: Sentencing Practice at the International Criminal Tribunals' (2013) 11(3) *Journal of International Human Rights*, p. 85.

360 *Blaškić*, ICTY, IT-95-14, ACH judgement, 29 July 2004, para. 77. See also *Kordić/Čerkez,* ICTY, IT-95-14/2-A, ACH judgment, 17 December 2014, para. 832. *Hadzihasanovič and Kubura*, ICTY, IT-01-47-A, ACH judgment, 22 April 2008, paras. 38-39.

361 *Blaškić*, ICTY, IT-95-14, ACH judgement, 29 July 2004, para. 77.

362 *Aleksovski*, ICTY, IT-95-14/1, ACH judgment, 24 March 2000, paras. 112-113.

363 *Hadžihasanović/Kubura,* ICTY, IT-01-4, TCH judgment, 15 March 2006, para. 192.

importantly subsequent ICTY case law, regarded this as a denial of the causality requirement for both types of duties: the duty to punish and the duty to prevent.

The ICC's Approach

Article 28(a) and (b) of the Rome Statute states that the superior is responsible for crimes which occur "as a result of his or her failure to exercise control properly" when he or she has failed to take the necessary and reasonable measures to prevent or to punish. This could indicate a need for a causal link between the superior's failure to act (prevent or punish) and the principal crime. Some authors even, without any hesitation, consider causation as a new element to superior responsibility introduced by the Rome Statute.[364] Arguably, according to some authors, the wording 'as a result of' does not necessarily indicate the necessity of causality. In many situations, the superior's failure is not *a condition sine qua non* for the commission of the underlying crime.[365] Ambos concludes that it suffices that the superior's failure to exercise control properly increased the risk for the underlying crime to be committed.[366]

Article 28 of the Statute was first interpreted by the ICC during a confirmation of the charges in the *Bemba* case. Superior responsibility was defined as a form of criminal responsibility based on a legal obligation to act. The PTCH II found that Article 28(a) of the Statute includes an element of causality between a superior's dereliction of duty and the underlying crimes.[367] Having determined that Bemba fell under the notion of a military or military-like commander, the Chamber limited itself to an analysis of the first paragraph of Article 28.

The PTCH II convincingly affirmed that there must be some form of causality between the superior's failure of supervision and the subordinates' underlying crimes. [368] The

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[364] , Alexandre Skander Galand, '*First Ruling on Command Responsibility before the ICC*', March 29, 2016. [2016-05-9]. Available from: http://blog.casematrixnetwork.org/toolkits/eventsnews/news/first-ruling-on-command-responsibility-before-the-icc/?doing_wp_cron=1462787049.3038020133972167968750.

[365] Otto Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Art. 28 Rome Statute?' (2002) 15(1) *Leiden Journal of International Law,* p. 179-205.

[366] Kai Ambos, ‚Superior Responsibility' in: Antonio Cassese, Paola Gaeta and Jones, John (eds.), The Rome Statute of the International Criminal Court: a commentary (Oxford: Oxford University Press, 2002), p. 860.

[367] *Bemba*, ICC, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (PTCH II), 15 June 2009, para. 423.

[368] *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, paras. 423-424.

judges nonetheless found that the failure to punish, being an inherent part of the prevention of future crimes, can have a causal impact on the commission of further crimes in the sense that the failure to take measures to punish is likely to increase the risk of the commission of further crimes in the future.[369] Despite that, the PTCH II held that the element of causality only relates to the commander's duty to prevent the commission of future crimes.[370]

Accordingly, the PTCH II examined the causality requirement in relation to the commander's duty to prevent the commission of the future crimes. The PTCH II presented "but for test" in the sense that, if not 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.[371] This "but for test", in law theory also referred to as *condition sine qua non* condition, was for the first time used by the TCH in the *Čelabići* case and the PTCH II in the *Bemba* case refers to this case.[372]

However, the PTCH II concluded that this level of causality requirement would be difficult to determine empirically. Therefore, the Chamber considered it 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.[373] As a result, the Chamber followed the theory of risk aggravation or increase according to which it suffices that the commander's non-intervention increased the risk of the commission of the subordinates' crimes. [374] This approach marks a flagrant departure from traditional causality.[375] However, the reasoning might lack some clarity in the hypothetical assessment of causality. In reaction to the decision of the PTCH II Chamber, some scholars argue that the

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[369] *Ibid*.

[370] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 424.

[371] *Ibid*, para. 425.

[372] "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 their powers to prevent them. In this situation, the superior may be considered to be causally linked to the offences, in that, but for their failure to fulfil their duty to act, the acts of their subordinates would not have been committed." *Mucić et al*., ICTY, IT-96-21-T, TCH Judgment, 16 November 1998, para. 399.

[373] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 425.

[374] "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". *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 425.

[375] Kai Ambos, 'Critical Issues in the Bemba Confirmation Decision' (2009) 22(4) *Leiden Journal of International Law*, p. 722.

hypothetical nature of the assessment should not be a decisive argument to reject the "but for test".[376]

Along with the PTCH II, the TCH III did not require the establishment of a "but for" causation between the "commander's omission and the crimes committed".[377] The TCH III did not expressly state whether this conclusion reacted only to the duty to prevent; however, based on the wording and the subsequent analysis of the Trial Chamber, it might be concluded that the TCH III only refers to the duty to prevent. While the PTCH II considered it sufficient to prove that the commander's omission "increased the risk of the commission of the crimes", the TCH III did not elaborate further on the requisite standard. The Trial Chamber only held that the causality requirement would be clearly satisfied "[…] when the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or a commander exercising control properly would have prevented the crimes."[378] The Chamber stressed that this standard is "higher than that required by law".[379] This may suggest that although the Chamber used the "but for test", the "increased risk test" suffices to establish the causality requirement between the superior's failure to prevent and the crime.

The causality requirement in the *Bemba* case led to a disagreement among the judges. Two of the three judges issued separate opinions, in which they presented a different view on this topic. Judge Steiner expressed her belief that the TCH failed to provide sufficient reasoning in its consideration on the interpretation of the wording "as a result of" and the causality requirement. Judge Steiner held that a causal link between the commander's failure to exercise control properly and the crimes is required, referring to the analysis of the decision of the PTCH II in the *Bemba* case.[380] Furthermore, she agreed with the conclusion of the PTCH II 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".[381] However, she noted that this increased risk test should be

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376 Triestino Mariniello, 'Crimes and Modes of Liability' in Triestino Mariniello (ed.), *The International Criminal Court in Search of Its Purpose and Identity* (London, NY: Routledge, 2015), p. 47.

377 *Bemba*, ICC, ICC-01/05-01/08, TCH judgement, 21 March 2016, para. 211.

378 *Ibid*, para. 213.

379 *Ibid.*

380 *Bemba*, ICC, ICC-01/05-01/08, Separate Opinion of Judge Sylvia Steiner (TCH judgment), 21 March 2016, para. 17.

381 *Ibid*, para. 23.

applied with the high probability assessment, so that "there is a high probability that, had the commander discharged his duties, the crime would have been prevented or it would have not been committed by the forces in the manner it was committed."[382]

Judge Ozaki concluded that a nexus between the commander's failure to exercise control properly and the commission of the crimes is required.[383] He supported this conclusion based on the object and purpose of the Statute. Furthermore, he went on to clarify that wording of "as a result of" indicates that "the standard adopted [is] more than a merely theoretical nexus to the crimes".[384] Judge Ozaki also favoured an assessment of whether the results were "reasonably foreseeable".[385] However, the causality requirement was not addressed by the ACH in the Judgment.

The causality requirement for superior responsibility was also briefly mentioned in the *Ntaganda* case. In its decision on confirmation of charges, the PTCH II held that "[t]he […] failures of Mr. Ntaganda increased the risk of the commission of crimes by UPC/FPLC members during the time-frame relevant to the charges."[386] However, it is not clear whether this means that the PTCH II requires the causality nexus, in the form of the "increased risk test", for the establishment of superior responsibility. The TCH held Ntaganda responsible as a direct perpetrator and indirect perpetrator, omitting findings on his responsibility as a commander under Article 28 of the Statute.[387]

Interim conclusion

Under the current approach of the ICTY, requirement of causality does not form an element of the superior responsibility doctrine. However, the approach of the ICC significantly differs. The ICC, based on its so-far available case law regarding this question and exact reading of Article 28 of the Statute, requires a causality requirement for failure to prevent in a form of 'increased risk test'. Even though it did not make any conclusion on the existence of such a requirement, it seems illogical to apply a different standard in regards to duty to punish. In the

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382 *Ibid*, para. 24.

383 *Bemba*, ICC, ICC-01/05-01/08, Separate Opinion of Judge Kuniko Ozaki (TCH judgment), 21 March 2016, para. 9.

384 *Ibid*, para. 23.

385 *Ibid.*

386 *Ntaganda*, ICC, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 July 2014, para. 174.

387 *Ntaganda*, ICC, ICC-01/04-02/06, TCH judgment (8 July 2019). See also *Ntaganda*, ICC, ICC-01/04-02/06, Public redacted version of "Prosecution's Closing Brief, 7 November 2018, paras. 389-413.

case of failure to punish, the Court should have applied a test suggested by Mettraux – finding a causality requirement between his failure and the resulting impunity of the perpetrators (in regard to his duty to punish crimes).

What does it exactly mean in the application of superior responsibility to genocide? First, in a case when a superior is being held responsible for their omission to prevent the commission of genocide, it must be proved that their failure increased the risk of the commission of the crimes. Looking at the measures at the superior's disposal to prevent crimes, the measures must be identified as potentially increasing the possibility to prevent the commission of genocide – and as such, failure to employ the measures brings the increased risk of the commission of the crime. For example, if a superior had at their disposal to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command and this measure would have been, at least partially effective, the causality requirement is satisfied. In any event, the measures would have to be also reasonable and necessary and effective control must be established between the superior and the subordinate. Second, in a case when a superior is being held responsible for his omission to repress or punish the commission of genocide, it must be proved that their failure increased the risk of the impunity of the crimes being committed by the perpetrators. As the ICC does not seem to require the strict 'but for' interpretation of the causality requirement, it does not have to be proven that due to a superior's omission the crimes go unpunished. It is enough if proven that the superior's omission increased the risk of the crimes going unpunished. Alternatively, in a case of continuous crimes, it is also enough to prove that the superior's failure increased a risk of the commission of the subsequent crimes of their subordinates. However, this alternative seems to be evidentiary more challenging. Similarly to the first scenario, the measure at the superior's disposal to repress and punish must be reasonable and necessary and effective control must be established between the superior and the subordinate. For example if a superior does not investigate and initiate disciplinary proceedings even though such a measure is at their disposal (a superior having the power to initiate disciplinary proceedings) and the measure would be in the scenario regarded as necessary in order to repress or punish the crimes and would be reasonable the causality requirement satisfied. Another example presents a superior who does not investigate and initiate disciplinary proceedings but an independent organ starts an investigation into the crimes committed. Also in this scenario, there has to be ascertained whether the superior had at their disposal the measures to repress and punish and whether such measures were necessary and reasonable

and whether their failure to take those measures contributed to – the increased risk of – impunity. This increased risk might be in a time delay in investigating the crimes, a lack of evidence as not being disclosed or not being collected at the time near to the commission of the crimes etc.

2.2.3 Superior responsibility: the dolus eventualis standard and negligence

While discussing the nature of superior responsibility, the author argues the special intent on the part of a superior is not a requirement for superior responsibility. Whether the special intent, the highest form of a perpetrators *mens rea*, is not required, the subsequent question arises – what is the required *mens rea* of the superior? This chapter looks into the possibility of negligence and the *dolus eventualis* standard establishing the superior responsibility. Negligence and its applicability to superior responsibility is one of the most controversial aspects of superior responsibility. While the prevailing opinion supports the notion of negligence for superior responsibility, the contradictory nature in relation to special intent crimes is emphasized. The author argues that similarly, the notion of *dolus eventualis* must be examined in relation to superior responsibility. The *dolus eventualis* plays a prevailing role for the civilian superiors under the ICC standard due to the higher threshold for their *mens rea*.

Dolus Eventualis

As the Rome Statute brought a different standard for civilian superiors and requires they 'clearly disregarded information', it is obvious that under the ICC standard for superior responsibility, negligence does not suffice as a responsibility for civilian superiors.[388] The new standard of 'consciously disregarding information' means that the superior was aware of a high probability of the existence of a fact but decided to turn a blind eye to the fact that their subordinates committed or were about to commit a crime.[389] Triffterer argues that Article 28(2) assigns a *dolus eventualis* or even recklessness standard for the civilian superiors.[390]

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[388] Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law The Case for a Unified Approach* (Oxford and Portland, Oregon: Hart publishing, 2013) , p. 414.
[389] Kai Ambos, ‚Superior Responsibility' in: Antonio Cassese, Paola Gaeta and Jones, John (eds.), *The Rome Statute of the International Criminal Court: a commentary* (Oxford: Oxford University Press, 2002), p. 870.
[390] Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*. 2nd edition. (Oxford: Hart Publishing, 2008), p. 638.

According to the general definition of *dolus eventualis*, the perpetrator foresees the possibility that the consequence of their act exceeds the goal they intended - whether legitimate or illegitimate - to another unlawful goal which they did not intend initially, but nevertheless performs the act, reconciling themselves with the consequences.[391] Thus, the distinction between negligence and *dolus eventualis* is that the negligent perpetrator is a person who fails to perceive a risk that they ought to perceive, whereas a perpetrator with *dolus eventualis* perceives or is conscious of the risk but disregards it.[392] The definition of *dolus eventualis* was also offered by the ICTY in the *Prlic* case. It was held that *dolus eventualis* is applicable when the perpetrator, without being certain that the result will take place and without intending the result, accepts the result.[393] In general, there is a common disagreement whether there is any difference between recklessness and *dolus eventualis*. Generally, those who believe there is a difference argue that *dolus eventualis* sets a 'higher threshold' than recklessness, because recklessness does not require as high a volitional component (the desire element).[394] This appears to be the position taken by the ICTY Trial Chamber in the *Stakic* case,[395] as well as the PTCH in the *Lubanga* case.[396] However, the PTCH in the *Bemba* case equates recklessness with *dolus* eventualis.[397]

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[391] Van der Vyver J. D.· 'The International Criminal Court And The Concept Of Mens Rea' (2004) *International and Comparative Law Review*, p. 62-63.

[392] David M Treiman, 'Recklessness and the Model Penal Code' (1981) 9 American Journal of Criminal Law p. 281-351.

[393] *Prlić* et al., ICTY, IT-04-74-T, TCH judgement, TCH judgment, 29 May 2013, para. 192.

[394] Ambos argues that recklessness is situated somewhere between *dolus eventualis* and conscious negligence: K Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 *Crim Law Forum*,p. 21. Similarly, Triffterer: Otto Triffterer, 'The New International Criminal Law: Its General Principles Establishing Individual Criminal Responsibility' in K Koufa (ed), *The New International Criminal Law* (Sakkoulas Publications 2003), p. 709; Ellies van Sliedregt, 'The Criminal Responsibility of Individuals for Violations of International Humanitarian Law', *TMC*, p. 46, who views recklessness as being 'broader' than dolus eventualis.

[395] Badar notes, the ICTY Trial Chamber has held that the common law concept of recklessness is not equivalent to the civil law concept of *dolus eventualis*, because of the lack of any volitional component for recklessness. Badar states that the Trial judgment in the *Stakić* case 'clearly shows that mere common law recklessness is not equivalent to the continental law *dolus eventualis*.' Mohamed Elewa Badar, 'Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (2006) 6 *Int'l Crim Law Review*, p. 313-332, citing *Stakić*, ICTY, IT-97-24, TCH judgment, 31 July 2003, para 642.

[396] *Lubanga*, ICC, ICC/01/04-01/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (PTCH I), 29 January 2007, ft. 438.

[397] *Bemba*, ICC, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (PTCH II), 15 June 2009, para. 357.

A great discussion sparkled at the ICC concerning if the Rome Statute includes the notion of *dolus eventualis*.[398] The PTCH in the *Lubanga* case ruled that Article 30 of the Rome Statute encompasses the three degrees of intent, namely, dolus of the first degree (*dolus directus*), dolus of the second degree (*dolus indirectus*) and *dolus eventualis*.[399] However, the findings of the PTCH in the *Lubanga* case were not followed by the subsequent cases. In the *Katanga* case, the PTCH stated that Article 30 includes *dolus directus*.[400] In the Bemba case, the PTCH held that Article 30 includes neither *dolus eventualis* nor recklessness.[401] Some authors argue that *dolus eventualis* is excluded from Article 30 of the Statute as – in this form of *mens rea* - a perpetrator is not aware, as required by Article 30(2)(b), that a certain consequence will occur in the ordinary course of events.[402] However, the 'unless otherwise provided' formulation in Article 30 of the Rome Statute clearly constitutes a possibility for theoretical inclusion of *dolus eventualis* for a superior responsibility.

Negligence standard

Negligence is generally defined as a failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances.[403] Negligence is characterized by the minimum or even total absence of any volitional (the element of desire) or cognition component (element of awareness). Civil law countries recognize two forms of negligence – conscious negligence (characterized by a low level of cognitive and volitional component) and unconscious negligence (characterized by a total absence of both components).[404]

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[398] See also Mohamed Elewa Badar, 'Dolus Eventualis and the Rome Statute Without It?' (2009) 12 *New Crim Law Review*, p. 455-6.

[399] *Lubanga*, ICC, ICC/01/04-01/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (PTCH I), 29 January 2007, para. 352

[400] *Katanga*, ICC, ICC-01/04-01/07-717, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (PTCH I), 14 October 2008, para. 331.

[401] *Bemba*, ICC, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (PTCH II), 15 June 2009, para. 369

[402] Kai Ambos, 'Critical Issues in the Bemba Confirmation Decision' (2009) 22(4) *Leiden Journal of International Law*.

[403] Legal Information Institute, Cornell Law School. Available online at: https://www.law.cornell.edu/wex/negligence

[404] See Sarah Finnin, 'Mental Elements under Article 30 of The Rome Statute of the International Criminal Court: A Comparative Analysis' (2012) 61(2) *The International and Comparative Law Quarterly* , p. 325-359

The prevailing opinion in scholarly work is that superior responsibility includes a notion of negligence. However, the notion of negligence in relation to superior responsibly has undergone significant criticism, partly due to its applicability to special intent crimes. Damaska remarked that a negligent omission has been transformed into the intentional criminality of the most serious nature and as such a superior who may not even have condoned the misdeeds of their subordinates is to be stigmatized in the same way as the intentional perpetrators of those misdeeds.[405] On the other hand Robinson argues that even negligence is not simply an "absence" of a mental state.[406] Following his new proposition, even the negligence conduct would display the superior's mental state. However, let us first take a look at the existence of negligence in superior responsibility.

Starting with the Nuremberg case law, the U.S. Military Tribunal in the *High Command* case held that responsibility for crimes does not attach to every individual in the chain of command but there must be a personal dereliction. It was argued that it can only occur where the act is directly traceable to a commander or where 'his failure to properly supervise his subordinates constitutes criminal negligence on his part'.[407] The notion of negligence can also be traced back to the International Military Tribunal for the Far East, which stated that: "[...] if 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."[408] The Commentary to Article 86 of the AP I establishes that 'not every case of negligence' is enough to establish the responsibility of a superior, it is required to establish negligence 'so serious that it is tantamount to malicious intent'. However, using the term 'malicious intent' in this context is very unfortunate. Especially when applying superior responsibility to special intent crimes, this interpretation of negligence causes some confusion as can be clearly seen in the *Akayesu* case.[409]

THE AD HOC TRIBUNALS'APPROACH

After a turn-around in the *Blaškić* case, the case law of the *ad hoc* tribunals denied the notion of negligence for superior responsibility. Firstly the TCH in the *Blaškić* case opened the door

[405] Mirjan Damaska, 'The Shadow Side of Command Responsibility' (2001) 49 *Yale Law School.*

[406] Darryl Robinson, A Justification of Command Responsibility, (2017) 28 *Criminal Law Forum,* p. 6-20.

[407] *United States v. Wilhelm von Leeb et al.* (the High Command case), United Nations War Crimes Commission. Law Reports of Trials of War Criminals. Vol. XI. London: HMSO, p. 543-544

[408] Tokyo Trial, Official Transcript, 4 November 1948, p. 48.

[409] See Chapter 3.1.1 – the *Akayesu* case.

for negligence by holding that the responsibility of a superior can be supported by the absence of knowledge about the subordinates' crimes that is the result of negligence in the discharge of the superior's duties.[410] To the contrary, the ACH in the *Bagilishema* case stated that negligence cannot form a base for superior responsibility. The ACH held that references to 'negligence' in the context of superior responsibility are likely to lead to confusion and it is better not to describe superior responsibility in terms of negligence at all. It was held that the 'had reason to know' standard is not equivalent to a notion of negligence.

Subsequent ICTY case law followed the findings made in the *Bagilishema* case and refused to interpret constructed knowledge (the 'had reason to know' standard) in terms of negligence. The ACH in the *Blaškić* case recalled that the ICTR Appeals Chamber has on a previous occasion rejected criminal negligence as a basis for liability in the context of command responsibility. The ACH 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.'[411] The *ad hoc* tribunals' jurisprudence clearly denied use of negligence as a basis of liability in the context of criminal responsibility.

ICC'S APPROACH

During drafting, the greatest division between the state representatives was caused by the *mens rea* requirement and whether the negligence element should be introduced to the responsibility.[412] This distinction in *mens rea* for military commander and civilian superior was inspired by a proposal from the US delegation. They argued that responsibility for military commanders is unique for including a negligence standard and as such, this should be reflected in the wording of the Statute. The commentators clearly accepted that 'should have known' standard includes negligence.[413] However, the mere negligence was rejected as too

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[410] *Blaškić*, ICTY, IT-95-14-T, THC judgement, 3 March 2000, para. 324.

[411] *Blaškić*, ICTY, IT-95-14, ACH judgement, 29 July 2004, para. 63.

[412] The wording between English and French version differs. The English version says "information which should have enabled them to conclude", and the French version, "des informations leur permettant de conclure", which means "information enabling them to conclude". The ICRC Commentary explains that French version is given a preference as it is broader and already includes the English 'should have known' wording.

[413] Proposal submitted by the United States (A/CONF.183/C.1/L.2) (emphasis added) reprinted in Cherif Bassiouni, *The Legislative History of the International Criminal Court: Summary Records of the 1998*

broad and commentators called for a case of 'serious' negligence that is 'tantamount to malicious intent'.[414] It is a clear reference to the Commentary in Article 86 of the AP I which provides that 'not every case of negligence' is enough to establish the responsibility of a superior, it is required to establish negligence 'so serious that it is tantamount to malicious intent'.

The concept of *mens rea* generally applied by the ICC has almost exclusively been adopted from the civil-law criminal justice systems.[415] It was already mentioned that Article 28 of the Rome Statute provides a different standard of constructed knowledge for military commanders ('should have known') than the Statutes of the *ad hoc* tribunals ('had reason to know'). In the *Bemba* case, the PTCH II concluded that Article 28(a) of the Statute encompasses two standards of the fault element: "[T]he first, which is encapsulated by the term 'knew', requires the existence of actual knowledge. [T]he second, which is covered by the term should have known, is in fact a form of negligence."[416] The PTCH II stated that the 'should have known' standard requires the superior to "have merely been negligent in failing to acquire knowledge" of his subordinates' illegal conduct.[417] The *Bemba* case stated that for a military commander or person effectively acting as a military commander, the term 'should have known' resembles a form of negligence.

The 'should have known' standard, as set up in the Rome Statute, differs from the standard used before the *ad hoc* tribunals. This is the most discussed element of the *mens rea* requirement in the *Bemba* case. Ambos argues that these two standards – had reason to know and should have known – are not substantively different, because both standards are inspired and rely on the *Hostage* case and AP I, taking into account the information which should have enabled superiors to conclude that such crimes were committed (or were about to be

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Diplomatic Conference (New York: Transnational Publishers, 2005) pp. 67-68. See also Brouwers, M. P. W. (eds). *The Law of superior Responsibility* (Wolf Legal Publishers, 2012), p. 8.

[414] Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, ICRC, Leiden: Martinus Nijhoff Publishers, 1987, p. 3541.

[415] Van der Vyver J. D.' 'The International Criminal Court And The Concept Of Mens Rea' (2004) *International and Comparative Law Review*, p. 3.

[416] *Bemba*, ICC, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (PTCH II), 15 June 2009, para. 429.

[417] *Ibid*, para. 432.

committed).[418] On the other hand, some authors argue that the 'should have known' standard differs from the 'had reason to know' and includes a stronger 'more restricted approach to the element of a military commander's discretion'.[419] When comparing the 'should have known' and 'had reason to know' standards, it is important to take note of the words "owing to the circumstances at the time". This phrase may help in the interpretation of a difference (if any) between 'should have know' and 'had reason to know' standards as argued by some scholars.[420] However, as it stands today, the interpretation of the 'should have known' standard is still undetermined and under scholastic debate.

In the *Bemba* case, the PTCH II referred to the ICTY jurisprudence but acknowledged a difference between the 'had reason to know' and 'should have known' standards.[421] The PTCH II concluded that the 'had reason to know' criterion embodied in the statutes of the ICTR, the ICTY and the SCSL sets a different standard from the 'should have known' standard under Article 28(a) of the Statute. However, despite such a difference, which the Chamber did not deem necessary to address, the criteria or indicia developed by the *ad hoc* tribunals to meet the standard of 'had reason to known' may also be useful when applying the 'should have known' requirement.[422] The PTCH II did not offer any further explanation. Ambos noted that the difference stated by the PTCH II without any further elaboration may have been a critical issue for the *Bemba* decision on the confirmation of the charges.[423] As

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[418] Kai Ambos, 'What does 'intent to destroy' in genocide mean?' (2009) 91 (876) *International Review of the Red Cross,* p. 866.

[419] Jan Alexander Knoops, 'The Transposition of Military Commander's Discretion onto International Criminal Responsibility for Military Commanders: An Increasing Legal-Political Dilemma within International Criminal Justice' in: Cherif Bassiouni et al. (ed.), *The Legal Regime of the ICC (*Leiden, Boston: Martinus Nijhoff, 2009), p. 710, 739-740.

[420] See Veter arguing that the clause "owing to the circumstances at the time" "probably makes the ICC standard closer to the ICTY standard than to the mythical „should have known" standard." Greg Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court', (2000) 25(1) *Yale Journal International Law*, p. 122. See also Ambos: "If one really wants to read a difference in these two standards considering that the „should have known" standard „goes one step below" the „had reason to know" standard, it would be the ICC"s task to employ a restrictive interpretation which brings the former in line with the latter." Kai Ambos, 'Critical Issues in the Bemba Confirmation Decision' (2009) 22(4) *Leiden Journal of International Law*, p. 722.

[421] *Bemba,* ICC, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (PTCH II), 15 June 2009, para. 434.

[422] *Ibid,* para. 434.

[423] Ambos points out that both of these standards ought to constitute a negligence standard and that it would be beneficial for the ICC to apply a restrictive interpretation of the *should have known* standard in order to bring it closer in line with the *had reason to know* standard. "If one really wants to read a difference in these two standards considering that the 'should have known' standard 'goes one step below' the 'had reason to

other critical issues emerged in the Bemba trial, the *mens rea* requirement had not become the hot debated issue. The TCH III did not elaborate on the 'should have known' standard beyond the argumentation in the decision of the confirmation of charges. The interpretation of the 'should have known' standard, as set up in Article 28(a) of the Rome Statute, is complicated and rather unclear. With regard to the different wording, it is not possible to take direct guidance from the jurisprudence provided by the *ad hoc* tribunals. The distinction between 'should have known' and 'had reason to know' also clearly refers to a separate question whether a superior is bound to actively search for the information (see Chapter 4.3).[424]

Most scholars argue that the constructive knowledge standard refers to the negligence standard.[425] Ambos argues that the 'should have known' standard clearly corresponds to the notion of negligence as understood in general criminal law. Ambos supports this conclusion by the US Model Penal Code which, as he argues, refers to negligence in the context of the 'should have known' standard.[426] Ambos noted that the 'had reason to know' and the 'should have known' standards essentially constitute negligence standards, as they clearly follow from the *travaux* of command responsibility provisions in the 1977 AP I. Ambos also refers to Article 86(2) of the AP I and its wording "information which should have enabled them to conclude".[427] Ambos argues that this formula was written "with negligence in mind".[428] Martinez argues that the notion 'should have known' corresponds to the language many municipal legal systems use in describing negligence-based liability.[429] Also Meloni argues that the 'should have known' standard of Article 28 Rome Statute may equate with negligence as a commander is not even required to have consciously disregarded information in that regard, as the civilian superior is, but can be held responsible for simply ignoring the situation

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know' standard, it would be the ICC's task to employ a restrictive interpretation which brings the former standard in line with the latter." Kai Ambos, 'Critical Issues in the Bemba Confirmation Decision' (2009) 22(4) *Leiden Journal of International Law*, p. 722.

[424] See Chapter 2.2.3.

[425] William Schabas, W Schabas, *Introduction to the International Criminal Court*. 3rd ed. (CUP 2007), 417–418. Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law The Case for a Unified Approach* (Oxford and Portland, Oregon: Hart publishing, 2013) , p. 412-413.

[426] *Ibid*, p. 866- 867.

[427] Kai Ambos, 'Critical Issues in the Bemba Confirmation Decision' (2009) 22(4) *Leiden Journal of International Law*, p. 722.

[428] *Ibid*.

[429] Jenny S. Martinez, 'Understanding Mens Rea in Command Responsibility FromYamashita to Blaškić and Beyond' (2007) 5 *Journal of International Criminal Justice*, p. 659.

of risk.[430] To the contrary, some authors argue that negligence should not be a base on superior responsibility. Damaska argues that a doctrine of superior responsibility in general should not include the negligence notion as "it appears inappropriate to associate an official superior with murderers, torturers, or rapists just because he negligently failed to realize that his subordinates are about to kill, torture or rape".[431] Negligence plays a role for establishing responsibility of a military commander or person effectively acting as a military commander under the ICC standard.

Interim conclusion

The *dolus eventualis* standard for superior responsibility receives far less attention than the notion of negligence. The *ad hoc* tribunals' case law voted strongly against the use of negligence for superior responsibility. To the contrary, the ICC in the *Bemba* case, working with the different wording of constructive knowledge, supported application of the negligence standard for the military commanders or person effectively acting as a military commander. The negligence standard is however refused for civilian superiors. Most academics support the notion of negligence in superior responsibility while acknowledging the contradiction when applied to special intent crimes, such as genocide.[432] However, there would be no contradiction if the special intent of the superior would be proved based on a knowledge-based approach or the special intent of the superior would not be required at all due to the fact that the superior is responsible for their own dereliction of duty, not the crime.

Table 1: Superior responsibility and the required mens rea

In the author's personal view, this table represents the compatibility of superior responsibility *dolus directus of the first degree*, *dolus directus of the second degree*, *dolus eventualis* and negligence and its applicability to military commanders and civilian subordinates with explanation and examples. The structure of the table regarding the dolus standard was taken from the *Lubanga* case.[433]

[430] Chantal Meloni, 'Command Responsibility in International Criminal Law', (2010) *T.M.C. Asser,* p. 185.
[431] Mirjan Damaska, 'The Shadow Side of Command Responsibility' (2001) 49 *Yale Law School,* p. 455-463.
[432] See Chapter 3.1 Scholarly discussion.
[433] *Lubanga*, ICC, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29. 1. 2007.

Superior responsibility	Explanation[434]	Applicable to military commander?	Applicable to civilian superior?	Example
Dolus directus of the first degree	consequences foreseen and desired	yes	yes	Superior knows about their soldiers killing civilians and wanted the civilians to be killed
Dolus directus of the second degree	the perpetrator foresees consequences other than those desired as a certainty (the perpetrator did not desire those secondary consequences)	yes	yes	Superior orders looting of a village and killing civilians occurs as a foreseen consequence while the superior knew that the killing of civilians would occur
Dolus eventualis	the perpetrator foresees consequences other than those desired as a possibility	yes	yes	Superior orders looting of a village and killing civilians occurs as a crime of opportunity and this is foreseen by the superior
Negligence - conscious	consequences not foreseen and not desired but aware of the risk	yes	no (condition of active conduct on the part of subordinates in the form of disregarding the information)	Superior's subordinates in violent environment killing civilians while the superior is being aware about the risk (based on information indicating the violent environment, hostile approach towards civilians etc.)
Negligence - unconscious	consequences not foreseen and not desired and not aware of the risk	no	no	Superior is not aware of the crimes and does not possess information that would trigger their duty to acquire more information

The table presents a general overview of superior responsibility applied to general crimes with the determination of which types of *dolus* or negligence can be applied. For a military commander or person effectively acting as a military commander, negligence suffices for meeting the superior responsibility requirement. On the other hand, the responsibility of civilian superiors, negligence does not suffice, and the responsibility has to be based on one of the types of *dolus*.

[434] Van der Vyver J. D.' 'The International Criminal Court And The Concept Of Mens Rea'(2004) *International and Comparative Law Review*, p. 62-63.

The third part of the study reflects the development of superior responsibility and its elements in relation to genocide and its standing with the direct responsibility of commanders and superiors for active participation in the crimes. The following chapters will mainly address the applicability of a superiors *mens rea* to the crime of genocide (including requirements on the superior's special intent, superior's active duty to seek information and intent behind superior's taken measures to prevent and punish genocide), applicability of superior-subordinate relationship and effective control to the crime of genocide (including the issue of unidentified subordinates and remoteness of the superior) and the applicability of the superior's failure to prevent and punish the crime of genocide, mainly relevance of the measures' effectiveness and successor superior responsibility.

Superior responsibility has a long history at the ad hoc tribunals' proceedings. However, its standing with the direct responsibility of commanders and superiors for active participation in the crimes caused some controversies and ambiguity. The TCH in the *Blaškić* case concluded that "it would 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."[435] Despite this statement, the TCH found General Blaškić guilty on most of the counts of the indictment as a cumulative conviction. In the *Kordić/Čerkez* case the same argument was used in relation to aiding and abetting a crime under international law.[436] These decisions stated that the two forms of responsibility are not compatible, but did not state which form should be given priority. The case law on this issue differs; in principle two approaches may be distinguished: discretion and subsidiarity.[437] Under the discretionary approach, the court has discretion to decide whether the accused will be convicted under the doctrine of superior responsibility or a different form defined in Article 7(1) of the ICTY Statute or Article 6(1) of the ICTR Statute. The discretionary approach was promoted by the Trial Chamber judgement in the *Krnojelac* case stating that "where the Prosecutor alleges both heads of responsibility within the one count, and the facts

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435 *Blaškić,* ICTY, IT-95-14-T, TCH, 3 March 2000, para. 337.

436 *Kordić/Čerkez*, para. 371.

437 Gideon Boas et al. *Forms of Responsibility in International Criminal Law* (Cambridge: Cambridge University Press, 2007), p. 397.

support a finding of responsibility under both heads of responsibility, the Trial Chamber has a discretion to choose which is the most appropriate head of responsibility under which to attach criminal responsibility to the Accused." [438] In the *Krnojelac* case, the Tribunal concluded that that the accused's participation in inhumane treatment is better defined as aiding and abetting a crime under international law, than a case of superior responsibility. The subsidiarity approach may be illustrated by the *Krstić* case, which was the first case where an individual was held responsible for the acts of genocide in Srebrenica. Despite the fact that the conduct of Krstić accomplished all elements of the doctrine of superior responsibility, the Tribunal did not convict him of genocide under Article 7(3) of the ICTY Statute, because the responsibility of the General was sufficiently covered by the participation in joint criminal enterprise derived from the first paragraph of the same Article. The TCH concluded that "responsibility under Article 7(3) is subsumed under Article 7(1)."[439]

The definite solution to this interpretative conflict was presented by the ACH in the *Blaškić* case in 2004; therefore, it is often referred to as the *Blaškić rule* (defined in paragraphs 86-93 of the judgement).[440] The conclusions of the ACH may be summarized as follows: (1) Article 7(1) and Article 7(3) define different forms of criminal responsibility; (2) a conviction for one count cannot be based on both forms; (3) if requirements are met for both direct and indirect responsibility, the Chamber is to convict the accused under Article 7(1) and the fact that the crime under international law was committed by a superior is to be considered as an aggravating circumstance in sentencing; (4) any differing conclusion must be considered an error in legal evaluation of the facts rendering the TCH judgement invalid.

The conclusion, which is increasingly accepted nowadays, is that the chambers will first deal with the direct form of responsibility under Article 7(1) even though the direct nature may be controversial in omissive aiding and abetting, and try to search for clues of this direct form of responsibility given that it is preferred over the indirect form of superior responsibility. The important contribution to the relationship of the two forms of responsibility was made by the TCH in the *Šainović* case, to a great extent reflecting the criticism of aiding and abetting by omission. The Chamber presented its own interpretation of the Blaškić rule saying that "the Appeals Chamber in the *Blaškić case* did not intend for a

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438 *Krnojelac*, ICTY, IT-97-25-T, TCH, 15. 3. 2002, para. 173.

439 *Krstić*, ICTY, IT-98-33-T, TCH, 2. 8. 2002, para. 605.

440 Gideon Boas et al. *Forms of Responsibility in International Criminal Law* (Cambridge: Cambridge University Press, 2007), p. 398.

form of omission liability arising out of Article 7(1) to take precedence over superior responsibility under Article 7(3)."[441] Furthermore, the ICTY stated that a preference should only be established for those manifestations of Article 7(1) forms of responsibility that involve the active advancement of a crime.[442] Otherwise, there is nothing to preclude invoking the doctrine of superior responsibility, which is also supported by the special status of this doctrine in international criminal law. It is only logical that the *ad hoc* tribunals gave preference to direct forms of responsibility over the traditional doctrine of superior responsibility (doubts still arise as to aiding and abetting by omission). In the former case, the actual participation of the perpetrator in criminal conduct is punished, with such conduct otherwise not taking place at all, or being more difficult without the superior's contribution. In the latter case, the superior is punished only for its failure to act, which is often incapable to forestall the crimes committed by subordinates. This is also confirmed by Article 28 of the ICC Statute, the first sentence of which reads "in addition to other grounds of criminal responsibility under this Statute", this clearly confirms that the superior responsibility for omissions is subsidiary in nature.[443]

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441 *Šainović et al.*, ICTY, IT-05-87-T, TCH, 26. February 2009, para. 79. Hereinafter referred to as *Šainović.*

442 *Ibid*, para. 79.

443 It has already been confirmed by the case law of the ICC. *Cf. Bemba*, ICC, ICC-01/05-01/08-424, PTCH II, 15. 6. 2009, para 342. The PTCH II ruled that "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".

3. SUPERIOR'S *MENS REA* IN RELATION TO GENOCIDE

The applicability of superior responsibility to the crime of genocide is mostly regarded through the lenses of the special intent requirement. It is absolutely right to highlight this element given the special nature of the crime of genocide and the nature of superior responsibility characterized by superior omission and including the notion of negligence and *dolus eventualis*. However, other elements should not be shielded from the discussion. Superior responsibility is a highly debated issue in international criminal law and contains some controversial aspects. Since the ad hoc tribunals' jurisprudence, proving effective control, identification of subordinates or the availability of information are ones of them. On the other hand, the *Bemba* case (re)-initiated the discussion on the remoteness of the superior and the superior's intent behind the taken measures. The *ad hoc* tribunals provide some case law that contains a combination of superior responsibility and genocide. It is interesting how the case law differs from the application of superior responsibility to any other crime, respectively a crime that does not require a proof of special intent. Similarly, the 'general' case law, the one not including the nexus between superior responsibility and genocide, may provide guidance for the applicability of superior responsibility to the crime of genocide.

This chapter is starting with the most burning aspect of superior responsibility in relation to genocide, the superior's *men rea*. The following part aims to analyse three areas:

- the 'requirement' of special intent on the part of a superior
- relevance of information available to superior – whether the constructed *mens rea* requirement contains the superior's duty to actively search for information about the subordinates' crimes
- and the relevance of the superior's intent behind the taken measures.

All three areas will be analysed in relation to genocide, while looking at the scholarly discussion and the ad hoc tribunals' case law – the ICTR and ICTY case law and also the *Bemba* case. Each chapter will end with a proposition on tackling the aspect in relation to genocide with a special focus on the applicability of superior responsibility for genocide before the ICC.

3.1. SUPERIOR'S INTENT TO DESTROY

Most authors limit discussion to pointing out the contradictory nature of special intent and superior responsibility. Scholars describe it as an 'incoherence',[444] 'conceptually awkward[445] or as an 'obvious tension'.[446] Ambos refers to the applicability of superior responsibility to genocide as a 'stunning contradiction'[447] and "logically only possible" if regarded as a liability for a superior's dereliction.[448] In that line of reasoning, Ambos and Bock recommend that a special intent should be required only for forms of commission which are similar to direct perpetration.[449]

Schabas rejects that superior responsibility should be used as an appropriate basis for a conviction of genocide of a commander who is negligent. He further argues that a special genocidal intent is not part of the superior's *mens rea* and as such, it must be proven only on the part of subordinates.[450] He also criticizes the application of superior responsibility to the crime of genocide the way it was applied in the *Karadžić* and *Mladić* case. He argues that if a superior bears a special intent, then complicity is a more suitable base for the responsibility of a superior as opposed to superior responsibility.[451]

On the other hand, Mettraux argues that a superior must share the special intent with their subordinates.[452] Root refuses the applicability of superior responsibility for special intent

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[444] 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: OUP, 2011), p. 397.

[445] Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP 2012), p. 205–207.

[446] Michael Karnavas, 'Forms of Perpetration' in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Routledge 2013), p. 97.

[447] Kai Ambos, ‚Superior Responsibility' in: Antonio Cassese, Paola Gaeta and Jones, John (eds.), *The Rome Statute of the International Criminal Court: a commentary* (Oxford: Oxford University Press, 2002), p. 823, 852.

[448] Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundation and general part* (Oxford University Press, 2012), p. 220-221, 231.

[449] Stefanie Bock, Kai Ambos, 'Individual Criminal Responsibility' in: Anne-Marie de Brouwer and Alette Smeulers (eds.), *The Elgar Companion to the International Criminal Tribunal for Rwanda* (Cheltenham UK, Edward Elgar Publishing, 2015, p. 20.

[450] William Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge: Cambridge University Press, 2000), p. 312. See also William Schabas, 'General Principles of Criminal Law in the International Criminal Court, Part III' (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice*, p. 417–418.

[451] William Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge: Cambridge University Press, 2000), p. 312.

[452] Mettraux, Guénaël, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009), p. 226-227.

crimes when a superior's responsibility is based on their negligence.[453] Another strong criticism comes from Nersessian who describes the applicability of superior responsibility to genocide as inconsistent with personal fault and fair labelling.[454] In the first part of this book, the author established that there is nothing that hinders the applicability of superior responsibility in relation to the crime of genocide and the superior's intent may be based on *dolus eventualis* and in some cases even negligence. The *ad hoc* tribunals had discussed a significant amount of cases including the notion of superior responsibility in relation to genocide and the *mens rea* requirement and it is worth taking a look at how the tribunals tackled the sensitive issue of superior's intent in relation to genocide.

3.1.1 ICTR case law

Development of the ICTR case law in relation to superior responsibility for a genocide committed by subordinates can be divided into three main categories. The first category is represented by the *Akayesu* case and its ambiguous findings that refers to the requirement of 'malicious intent' suggesting that a superior is required to have a special intent in order to be held responsible based on the superior responsibility doctrine. The second category is represented by so called cumulative convictions, presenting cumulative findings combining the applicability of direct responsibility pursuant Article 6(1) and superior responsibility pursuant Article 6(3) of the Statute. The third category is represented by the *Media* case and the subsequent case law that expressly stated that the superior does not have to share the same intent with the direct perpetrators.

The analysis has to start with the *Akayesu* case, as it presents the first possibility for the ICTR to elaborate on the crime of genocide. While discussing the individual criminal responsibility, the TCH took the opportunity and made the first analysis of Article 6(3) of the Statute and the requisite *mens rea*. Akayesu was the mayor of the Taba commune and he was charged for his involvement in criminal acts committed between 7 April and the end of June 1994 here. He was responsible for maintaining law and public order in the commune and he

[453] Joshua L. Root, 'Some other mens rea? The nature of command responsibility in the Rome Statute' (2013) 23(119) *J Transnatl. L & Policy*, p. 143.
[454] David L Nersessian, 'Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes' (2006) 30 *Fletcher Fletcher Forum of World Affairs*, p. 98.

had effective authority over the communal police.[455] Numerous Tutsi sought refuge in the Taba communal offices, where they were beaten and killed instead of being protected. In addition to the killings, numerous Tutsi women were submitted to sexual violence by the troops. They were mutilated and raped, often by more than one attacker and in public. Police officers armed with guns, as well as Akayesu himself, were reportedly present at some of these incidents.[456]

Although Akayesu was not convicted under the doctrine of superior responsibility in relation to genocide, the TCH made several interesting observations with respect to the doctrine and required *mens rea*.[457] The TCH made a distinction between participation in terms of Article 6(1) and 6(3) of the ICTR Statute, based on the requisite *mens rea*.[458] Article 6(1) governs the responsibility of a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime; whereas Article 6(3) applies the doctrine of superior responsibility. In applying Article 6(1) of the Statute, the TCH concluded that the superior 'does not need to act knowingly' and it suffices that he had *reason to know* that his subordinates committed the crime (or were about to commit the crime).[459] On the other hand, the TCH held that for conviction under the superior responsibility doctrine set out in Article 6(3), there has to be either "a malicious intent, or the negligence has to be so serious as to be tantamount to acquiescence or even malicious intent".[460]

However, the TCH's reasoning is rather confusing. The conclusion of the TCH was reached with direct reference to the same wording used in the Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 and Article 86 of the

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[455] *Akayesu*, ICTR, ICTR-96-4-T, TCH, 2 Septembre 1998, para. 704.
[456] *Akayesu*, ICTR, ICTR-96-4-T, TCH, 2 Septembre 1998, paras. 3-23.
[457] Akayesu was not even charged under Art. 6(3) of the Statute for the crime of genocide. With regard to Counts 13, 14 and 15 on sexual violence (Crimes against humanity and violations of Article 3 common to the Geneva Conventions), he was charged additionally, or alternatively, under Article 6(3) of the Statute. However, the TCH found that the criminal responsibility under Article 6(3) of the Statute cannot be considered as is no allegation in the Indictment that the Interahamwe, who are referred to as "armed local militia," were subordinates of the Accused. *Akayesu*, ICTR, ICTR-96-4-T, TCH, 2. 9. 1998, paras. 471 and 691.
[458] Article 6 of the ICTR Statute encompasses individual criminal responsibility. Article 6(1) governs responsibility for a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime, whereas Article 6(3) governs superior responsibility.
[459] *Akayesu*, ICTR, ICTR-96-4-T, TCH, 2. 9. 1998, para. 479.
[460] *Ibid*, para. 489.

Additional Protocol I.[461] Article 86 of the AP I imposes a responsibility upon the superiors if '[...] they knew, or had information which should have enabled them to conclude in the circumstances at the time [..]'. In the author's opinion, the Commentary on Article 86 of the AP I refers to the specification of constructive knowledge (as opposed to the actual knowledge) of the superior. The author's view is supported by the fact that there was clearly no consensus during the negotiation of the Additional Protocol on the extent of the term 'constructive knowledge'. Article 86 of the AP I underwent considerable changes during its drafting before the final version. Article 86 of the AP I refers to constructive knowledge as when a superior "[…] had information which should have enabled them to conclude in the circumstances at the time". This final version was preceded by wording such as "[…] should reasonably have known in the circumstances at the time" or "[…] should have known".[462] In this regard, the Commentary also clarifies that the formulation of constructive knowledge does not mean that it covers all cases of a superior's 'negligence' but it 'must be so serious that it is tantamount to malicious intent'.[463] Given the final wording of Article 86(2) of the AP I itself and taking account of the circumstance in which the term 'malicious intent' is being used in the Commentary, this interpretation of the TCH's conclusions as regards to special intent seems to be rather unsupported. This interpretation of required *mens rea* presented by the TCH in the *Akayesu* case, would present limitations on superior responsibility. As Akayesu was not convicted under superior responsibility for genocide, the conclusion behind the first genocide trial at the ICTY remains unclear in relation to a superior's intent. Most importantly, Akayesu was charged pursuant to Article 6(3) only in relation to the crimes against humanity and violations of Article 3 common to the Geneva Conventions not genocide.[464] The charges included rape, other inhumane acts and outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault. None of them being a crime generally regarded as a crime requiring a special intent element. Thus, it would be stretching the TCH's findings to interpret "malicious intent" as a requirement to prove a superior's special intent in relation to genocide or any other special intent crime.

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[461] *Ibid*, para. 488.

[462] Claude Pilloud (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, ICRC, 1987), p. 1012.

[463] *Ibid*.

[464] *Akayesu*, ICTR, ICTR-96-4-I, Amended indictment, 17 June 1997, Count 13-15.

As this is the first case where genocide and superior responsibility have been analysed, this case has a special relevance. However, the author argues that the mal-interpretation of the TCH's findings could have opened the door to the incorrect applicability of the doctrine. In the following cases, the *Kayishema case* and the *Musema* case, the application of superior responsibility with respect to the crime of genocide was mixed with direct participation based on Article 6(1).[465] Kayishema was the prefect of Kibuye and was held responsible for his involvement as a superior in the attacks against the Tutsi which occurred in that area from April to June 1994. He had both *de jure* authority and *de facto* control over the mayors, the gendarmerie and the local militia which took part in the attacks forming part of the genocide charges. However, the TCH also held Kayishema responsible for the same attacks based on his direct participation under Article 6(1) of the Statute.[466] Kayishema's special intent was identified through the number of victims at each crime site, persistent pattern of conduct and his utterances.[467] In relation to the attacks and events that happened in Mubuga church, it is not clear whether Kayishema's responsibility was solely based only on Article 6(3) of the Statute.[468] However, the author would argue that a cumulative conviction was entered even in relation to the Mugabe church crime site.

Musema was a director of the Gisovu Tea Factory with effective power over the employees of the factory. He had the authority to take reasonable measures to prevent the use of the Tea factory vehicles and property in the commission of the attacks against Tutsi, partly committed by the employees of the factory. The TCH held that despite his knowledge of the participation of the Gisovu Tea Factory employees in the attacks and their use of factory property in the commission of these attacks, he failed to take any measures to prevent or punish such participation.[469] However, the TCH also held Musema responsible for the same attacks based on his direct participation under Article 6(1) of the Statute. The TCH made an indepth analysis of Musema's intent in relation to individual attacks finding he had a special

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[465] For example, Kayishema convicted for genocide with cumulative findings on responsibility under Article 6(1) and (3) of the Statute. *Kayishema and Ruzindana,* ICTR, ICTR-95 1 –T, TCH judgment, 21 May 1999, paras. 554-596. Musema was convicted for genocide with cumulative findings on responsibility under Article 6(1) and (3) of the Statute. *Musema, ICTR*, ICTR-96-13-A, TCH judgment, 27 January 2000, para. 936.

[466] *Kayishema and Ruzindana*, ICTR, ICTR-95 1 –T, TCH judgment, 21 May 1999, para. 508.

[467] *Ibid*, paras. 531-540.

[468] *Ibid*, para. 473 versus para. 508, 505.

[469] *Musema, ICTR*, ICTR-96-13-A, TCH judgment, 27 January 2000, paras. 884-936.

intent to destroy the Tutsi ethnic group as such.[470] The special intent was derived from anti-Tutsi slogans used during the attacks (also directly used by Musema)[471], Musema acknowledgment that genocide directed against the Tutsis took place at the time of the events[472], and the large-scale of atrocities committed against the Tutsis in Rwanda.[473] However, the distinction between responsibility under Article 6(1) and Article 6(3) of the Statute and its required mens rea in relation to special intent was not made. The TCH referred to the *Akayesu* case, holding that it "reiterates its determination in the Akayesu Judgement, where it found that the requisite *mens rea* of any crime is the accused's criminal intent".[474] The reference to the Akayesu case was done in relation to superior responsibility in general, not in relation to special intent crimes. This supports the author's view in regards to the *Akayesu* case holding that the Chamber did not require the special intent of a superior but merely clarified the extent of the constructive knowledge. In the cumulative findings, the Court uses argumentation and an evidentiary basis for responsibility under both Article 6(1) and 6(3) of the Statute.[475] For this reason, the findings requiring special intent are not conclusive and do not serve as a proper argument for requiring a special intent for superior responsibility. The conviction based on both Article 6(1) and also 6(3) of the Statute, while containing evidence providing for a finding of special intent on the part of the accused, cannot be regarded as a requirement of special intent for a conviction for the crime of genocide under the doctrine of superior responsibility.

In the *Ntagerurra et al.* case, in relation to one event, Imanishimwe was found guilty of genocide only on the basis of superior responsibility. Imanishimwe had effective control over soldiers at the Karambo military camp in Cyangu who participated in the killings of Tutsi civilian refugees in the Gashirabwoba stadium.[476] The TCH concluded that there was not enough evidence to conclude that Imanishimwe was responsible for the deaths of these refugees. However, the TCH found that Imanishimwe knew or 'should have known' of the killings based on numerous indications, such as the presence of the refugees at the football

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[470] *Ibid*, para. 934.
[471] *Ibid*, paras. 932-933.
[472] *Ibid*, paras. 929-931.
[473] *Ibid*, paras. 928-929.
[474] *Musema, ICTR*, ICTR-96-13-A, TCH judgment, 27 January 2000, paras. 130-131.
[475] The cumulative convictions under Article 6(1)/7(1) and 6(3)/7(3) were later rejected by the Tribunals. See *Blaškić*, ICTY, IT-95-14-T, TCH judgment, 3 March 2000, para. 337.
[476] *Ntagerura*, ICTR, ICTR-99-46-T, TCH judgment, 25 February 2004, paras. 651-653.

field, his contact with his subordinate soldiers, and the size of the camp.[477] Nevertheless, the TCH did not explicitly rule on Imanishimwe's state of mind with regard to the killings on the football field. The Chamber limited its findings to his presence on the football field on 11 April 1994 (while the killing occurred on 12 April 1994), his awareness of refugees at the football field, and Imanishimwe's manipulation of a list of refugees and removal of sixteen Tutsis and one Hutu from the list.[478] While one could probably infer a genocidal intent based on these factors, the TCH did not explicitly rule on this issue.[479] As such, it is arguable if the special intent would be required by the TCH in this case.

The *Nahimana et al.* case (also known as the *Media* case) included three accused – Nahimana, Barayagwiza and Ngeze. Nahimana and Barayagwiza were founders of Rwanda's *Radio-Television Libre des Mille Collines (RTLM)* and Hassan Ngeze edited the *Kangura* newspaper. Both media were used for promoting extremist Hutu ideology, inciting hatred, and exhorting listeners and readers to murder Tutsis during the 1994 genocide in Rwanda. The change in the so far ambiguous findings by the Chambers of the ICTY was brought by the Appeals Chamber in the *Nahimana et al.* case. The ACH expressly stated that "it is not necessary for the superior to have had the same intent as the perpetrator of the criminal act".[480] The ACH held this while discussing Barayawiza's responsibility under Article 6(3) in relation to the acts of direct and public incitement to commit genocide allegedly committed by his subordinates. However, the ACH did not confront a different approach nor discussed the applicability of genocide pursuant Article 6(3) of the Statute in previous cases.

The subsequent case law of the ICTR has referred to the findings in the *Media* case. In the *Bagosora and Nsengiyumva* case, the ACH examined whether the TCH made an error when it was not establish that Nsengiyumva shared his subordinates' intent in relation to the genocide committed by the subordinates.[481] The ACH held that, for a conviction as a superior

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[477] The TCH used 'knew or should have known' standard as opposed to 'knew or had reason to know' enshrined in Article 6(3) of the ICTR Statute. *Ntagerura*, ICTR, ICTR-99-46-T, TCH judgment, 25 February 2004, paras. 653-657.

[478] *Ntagerura*, ICTR, ICTR-99-46-T, TCH judgment, 25 February 2004, para. 682.

[479] Subsequently, the ACH unanimously set aside the convictions entered against Imanishimwe under Article 6(3) for crimes perpetrated at the Gashirabwoba football field, as these crimes were not pleaded in the Bagambiki/Imanishimwe Indictment. *Ntagerura Case*, ICTR, ICTR-99-46-A, ACH judgment, 7 July 2006, paras. 164-165.

[480] *Nahimana et al.,* ICTR, ICTR-99-52-A, ACH judgment, 28 November 2007, para. 865.

[481] *Bagosora and Nsengiyumva Case*, ICTR, ICTR-98-41-A, ACH judgment, 14 December 2011, para. 384.

pursuant to Article 6(3) of the Statute, it is not necessary for an accused to have had the same intent as the perpetrator of the criminal act. The ACH was satisfied if it was proved that the superior knew or had reason to know that the subordinate was about to commit such an act or had done so. In this regards, the ACH made a reference to the *Media* case. The ACH concluded that it was not required to establish that Nsengiyumva shared his subordinates' intent to find that he could be held responsible as a superior. The ACH found that Nsengiyumva could be held liable as a superior without considering evidence suggesting that he might not have had special intent to commit genocide.

In the *Nyiramasuhuko* et al. (*Butare*) case, the TCH discussed the responsibility of Kanyabash, one of the accused, in relation to an attack on the Matyazo Clinic in late April 1994. Kanyabash was found responsible based on Article 6(3) of the Statute in relation to the attack. The TCH noted that the Indictment refers to Kanyabashi ordering the attack on the Clinic. However, the Prosecution did not charge him with ordering or another mode of responsibility under Article 6 (1) and analogically used responsibility under Article 6(3) of the Statute. Even the TCH referred to this as a 'serious omission on the part of the Prosecution'. However, this Prosecution's omission gives a perfect opportunity to discover the Chamber's approach towards the applicability of superior responsibility in a case of genocide. The Chamber found that he was not in a position of de jure authority but established his effective control over the soldiers on an '*ad hoc* or temporary basis' due to the fact that he ordered the Tutsis to be shot and the soldiers obeyed his orders. The Chamber expressly stated that 'he acted with genocidal intent'.[482] The Chamber concluded he 'failed to punish them for obeying his order to shoot' the Tutsi's at the Matyazo Clinic. This absurdity confirms that whenever the direct responsibility under Article 6(1) of the Statute is available it has preference over superior responsibility, which can come as an aggravating factor. The findings of the Chamber are not conclusive whether special intent is required on the part of the superior. Nevertheless, the Chamber had the urge to determine that he had the special intent and he 'acted' with such intent. As he was found responsible for his failure to punish, the correct interpretation of the Chamber's finding would be that his failure to punish was motivated by his special intent in a relation to the killings at the clinic. Although, indisputably, his responsibility should have been based on direct participation in the attack – ordering the attack – proving his superior

[482] *Nyiramasuhuko et al.* (Butare), ICTR, ICTR-98-42 TCH judgment, 4 June 2011, para. 5823

responsibility might be confused with the direct responsibility and evidentiary far less problematic than in different scenarios where the direct responsibility is inapplicable.

Looking at the ICTR case law, the strongest argumentation against requiring a special intent for superior responsibility is presented by the ACH in the *Nahimana* case. Due to the binding nature of the ACH decisions and judgments in the structure of the *ad hoc* Tribunals, the *Nahimana* approach can be seen as the overall ICTY approach for the application of genocide to superior responsibility. If the prosecution can establish the special intent of a superior while applying superior responsibility, it is a bonus that is not required by the law and by the judges of the tribunal.

3.1.2 ICTY case law

Following the ICTR case law, the ICTY entered many convictions on genocide charges. In relation to the nexus between superior responsibility and genocide the most relevant cases are *Stakić*, *Brđanin* and *Karadžić* as those cases draw a line on the genocidal intent requirement for superior responsibility. On the other hand, for example in the *Krstić* case, there is no unambiguous conclusion on the applicability of special intent to superior responsibility.

The first case including a discussion on the applicability of genocide to superior responsibility is the *Krstić* case. The Prosecution argued that Krstić acted as the deputy commander of the Drina Corps, one of the corps which constitutes the army of Republika Srpska and as such, he was involved in the organization of the troops who took part in the attack on Srebrenica. Krstić was held responsible under Article 7(1) of the Statute under the doctrine of the JCE I. However, the TCH found that he also fulfilled the elements for conviction under superior responsibility for the crime of genocide. The TCH argued that responsibility under Article 7(3) is subsumed under Article 7(1).[483] With regards to the special intent, the TCH found that "his intent to kill the men thus amounts to a genocidal intent to destroy the group in part".[484] However, the TCH also held that *mens rea* for superior responsibility was proved by evidence showing that he "had to have been aware of the genocidal objectives".[485] That reasoning of the TCH is at least ambiguous and probably

[483] *Krstić*, ICTY, IT-98-33, TCH judgement, 2 August 2001, para. 605.
[484] *Ibid*, para. 652.
[485] *Ibid*, para. 648.

suggests that special intent on part of the superior would not be required for the conviction under Article 7(3) of the Statute. The ACH reversed the decision of the TCH on his responsibility as a member of the JCE I due to lack of his special intent and instead the ACH entered a conviction based on his responsibility for aiding and abetting. His position as a superior, respectively requirements of superior responsibility were not discussed at the appeal.

The ICTY considered charges of superior responsibility involving genocide in its Rule 98bis Motion of acquittal in the S*takić* case. The TCH held that it flows from the unique nature of genocide that the *dolus specialis* of a superior is required for responsibility under Article 7(3).[486] Nevertheless, the difficulty in proving genocidal intent in omission, especially in relation to civilian superiors, was noted. However, in this situation, the TCH came to the conclusion that the evidence "allows for the conclusion of a reasonable trier of the fact" and thus Stakić in principle could be held responsible under Article 7(3) of the ICTY Statute. The TCH furthermore argues, with regards to a joint criminal enterprise, that a mode of liability cannot replace a core element of a crime. Moreover, the TCH added that in order to 'commit' genocide, the elements of that crime, including *dolus specialis* must be met. Although this argumentation was used in relation to a joint criminal enterprise, it seems that the TCH extended this to superior responsibility.[487] To the contrary, the TCH in its judgement concluded that it was not proved beyond a reasonable doubt that anyone, including any subordinates of *Stakić,* had the *dolus specialis*, thus Article 7(3) of the Statute is not applicable.[488] The TCH did not expressly state clearly whether the superior must himself possess specific intent and at the same time be aware of the specific intent of his or her subordinates. However, based on the TCH's argumentation, it seems that the specific intent on the part of the superior as well as his awareness of the specific intent of his or her subordinates is required.

The ACH in the *Brđanin case* disagreed and held that a superior need not possess specific intent. The ACH used comparison to JCE III and aiding and abetting as the other forms of liability for which the specific intent is not required on the part of the accused.[489] The ACH in regards to JCE III held that it is critical to distinguish the *mens rea* requirement of the

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[486] *Stakić*, ICTY, IT-97-24-T, Decision on Rule 98bis Motion for Judgement of Acquittal, 31. 10. 2002, para. 92.

[487] *Ibid*, paras. 92– 95.

[488] *Stakić*, ICTY, IT-97-24, TCH judgment, 31 July 2003, para. 559.

[489] *Brđanin*, ICTY, IT-99-36-A, Decision on interlocutory Appeal, 19 March 2004, para. 7.

crime of genocide with the mental requirement for the mode of liability.[490] Later on, this conclusion was extended to superior responsibility by the TCH. [491] The TCH in the *Brđanin* case provided further analysis by referring to the previous case law and statutory interpretation of the provision. The TCH referred to the *Ntagerurra et al.* case stating that "[this] case strongly supports the conclusion that a superior need not possess the specific intent in order to be held liable for genocide pursuant to the doctrine of superior criminal responsibility".[492] However, as analysed above, the *Ntagerurra et al.* case does not provide strong arguments for this conclusion. The TCH in *Brđanin case* held the superior only must have known or had reason to know of his or her subordinate's specific intent. It was correctly noted the necessity to distinguish between the *mens rea* required for the crimes perpetrated by the subordinates and that required for the superior.[493] The TCH also stressed that there is no inherent reason why, having verified that it applies to genocide, Article 7(3) should apply differently to the crime of genocide than to any other crime in the Statute.[494] The standpoint taken by the ACH in the

Decision on interlocutory Appeal and later repeated by the TCH in the *Brđanin case* provides an unambiguous rule that is later on applied in other cases at the ICTY. In the *Blagojević/Jokić* case the TCH came to the conclusion that: "[...] the *mens rea* required for superiors to be held responsible for genocide pursuant to Article 7(3) is that the superiors knew or had reason to know that their subordinates (1) were about to commit or had committed genocide and (2) that the subordinates possessed the requisite specific intent."[495] However from the formulation of TCH it is not clear whether it was only required that the subordinates should have the special intent or whether it was required that the superior knows about the special intent of his subordinates. However, what is clear is that the superior is not required to share such a special intent in order to be responsible on the basis of superior responsibility.

In the *Popović* case, the TCH found two accused not guilty in a relation to genocide due to their lack of genocide intent on their part and lack of awareness of the genocidal intent

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[490] *Ibid*, paras. 7–10.
[491] *Brđanin*, ICTY, IT-99-36-T, TCH judgment, 1 September 2004, para. 720.
[492] *Ibid*, para. 718.
[493] *Ibid*, para.720.
[494] *Ibid.*
[495] *Blagojević & Jokić,* ICTY, IT-02-60-T, TCH judgment, 17 January 2005, para. 686.

of others.[496] However, Borovčanin, one of the accused, was proved to have failed to have taken the necessary and reasonable measures required to punish the murder of the busload of Bosnian Muslim prisoners at the Kravica Warehouse. As such, the TCH held him responsible under Article 7(3) of the Statute for murder as a crime against humanity as well as for murder as a violation of the laws or customs of war.[497] The difference made in the classification between responsibility in relation to murder and genocide under superior responsibility was drawn by his awareness of genocidal intent of others.

The two most recent ICTY judgments containing discussion on the *mens rea* element under superior responsibility are the ones in the *Karadžić* and the *Mladić* case. In 2016, the TCH found that Karadžić failed in his duty to punish the perpetrators of the killings which occurred prior to the time when he joined the Srebrenica JCE on the evening of 13 July 1995. His genocidal intent was deemed proven based on the events from 13 July 1995 onward, when Karadžić specifically agreed to the killing aspect of the Srebrenica JCE. Thus Karadžić was held responsible under superior responsibility for genocide in relation to crimes committed before he had actually acquired genocidal intent. For the crimes committed after he acquired genocidal intent, he was held responsible under the JCE concept, as his genocidal intent was proven.[498] The TCH highlighted the difference in *mens rea* standard for the JCE and superior responsibility.

In relation to killings in the provinces, the TCH in the *Mladić* case found that some physical perpetrators had special intent to destroy a part of the protected group of Bosnian Muslims, but it does not establish, by drawing an inference, special intent of the JCE members, including Mladić.[499] However, it seems that the Chamber opened a door for using this as a proof of special intent when there is other evidence supporting findings of the JCE members or superiors. It would mean that knowledge of a superior regarding the physical perpetrators' special intent might contribute to the findings of the superior's special intent, while there is other supporting evidence – for example evidence that the superior did not react upon learning about the killings while knowing about the physical perpetrators' special intent. Nevertheless, the majority of the TCH (Judge Orie dissenting) found that the physical perpetrators of the killings in the provinces had an intent to destroy a part of the Bosnian

[496] *Popović et al.*, ICTY, IT-05-88-T, TCH Judgment, 10 June 2010, paras. 1589, 2081-2090.
[497] *Ibid*, paras. 1582 – 1583.
[498] *Karadžić*, ICTY, IT-95-5/18-T, TCH judgment, 24 March 2016, paras. 5849-5850.
[499] *Mladić*, ICTY, IT-09-92-T, TCH judgment, 22 November 2017, para. 4236.

Muslim group as such but they then found that this intention was not to destroy a substantial part of the group.[500] As the TCH found that Mladić had a special genocidal intent in relation to Srebrenica, he was held responsible based on the JCE and his superior responsibility was used as an aggravating aspect for sentencing.

3.1.3 ECCC case law

The case law of the Extraordinary Chambers in the Court of Cambodia (ECCC) provides the most recent development on the relation between genocide and superior responsibility. In 2018, the Trial Chamber in Case 002/02 found Nuon Chea guilty of genocide based on superior responsibility in relation to the ethnic Cham Muslim minority. The TCH made a clear distinction between the *mens rea* requirements for superior responsibility and joint criminal enterprise (JCE). The first genocidal conviction for the acts committed during the Democratic Kampuchea Regime was rendered on 18 November 2018. The TCH's judgment is the second of two against Nuon Chea and Khieu Samphan. The first, rendered by the Trial Chamber in Case 002/01 on 7 August 2014, convicted Nuon Chea and Khieu Samphan of crimes against humanity related to the forced movements of the Cambodian population and sentenced the defendants to life imprisonment. The sentences of life imprisonment in Case 002/01 were affirmed by the ACH on 23 November 2016.

The second judgement, issued in the Case 002/02, was related to four additional categories of crimes concerning: (1) the establishment and operation of forced labor cooperatives and worksites; (2) the establishment and operation of security centers and execution sites; (3) the targeting of specific religious, cultural, and political groups, including the Vietnamese and Cham Muslims; and (4) the regulation of marriage. Nuon Chea and Khieu Samphan were held responsible for genocide, crimes against humanity, and grave breaches of the Geneva Convention and sentenced to life imprisonment. The Trial Chamber merged the life sentences imposed in the *Case 002/01* and the *Case 002/02* to form a single life sentence.

The TCH in this ground breaking decision concluded that the Khmer Rouge regime implemented and executed a policy to target religious and racial groups, with the "intent to establish an atheistic and homogenous society without class divisions by abolishing all ethnic, national, religious, racial, class and cultural differences".[501] The TCH recognized that Nuon

[500] *Ibid*, paras. 3456-3526.
[501] *Case 002/02*, ECCC, 002/19-09-2007/ECCC/TC, Summary of the Judgment, 16 November 2018, para. 26.

Chea and Khieu Samphan were active members of the JCE formed by the senior leadership of the Khmer Rouge. One of the policies implemented in order to achieve the "common purpose" was the targeting of specific groups, including the Cham and Vietnamese, Buddhists and former Khmer Republic officials including both civil servants and military personnel and their families. The TCH found that Nuon Chea "shared the direct, discriminatory and specific intent of other JCE members" and thus was held responsible for committing genocide against Vietnamese ethnic groups through the JCE. On the other hand, the TCH did not find that Nuon Chea possess the genocidal intent in relation to killing members of the Cham ethnic and religious group. Nevertheless, Nuon Chea was held responsible for the crime of genocide by killing members of the Cham ethnic and religious group based on his superior responsibility. This decision deserves detailed analysis not only because this is the most recent development in the superior's responsibility in relation to genocide.

In relation to the genocide of Cham, the TCH expressly stated that "[it] was unable to identify or infer genocidal intent on the part of NUON Chea regarding the Cham, nor was the Chamber able to find beyond a reasonable doubt that NUON Chea knew that genocide was committed against the Cham".[502] However, the TCH stated that Nuon Chea at the very least had reason to know that genocide had been, or was about to be, committed against the Cham and thus can be convicted for the crime of genocide based on his superior responsibility.[503] Yet, the evidence supported a finding that Nuon Chea, along with Pol Pot, exercised ultimate decision-making authority to execute the genocidal policy and convicted him on this charge pursuant to the doctrine of superior responsibility. Thus, Nuon Chea was held responsible for the crime of genocide by killing members of the Cham ethnic and religious group based on his superior responsibility.[504] For the second accused, Khieu Samphan, the TCH concluded that he did not possess the same power within the regime to assist or facilitate the execution of the genocidal policy and declined to convict him for genocide against the Cham.[505]

In regard to the genocide of the Vietnamese, the TCH found sufficient evidence to conclude that Nuon Chea and Khieu Samphan, through the JCE, committed various crimes including genocide against the Vietnamese. The TCH also discussed Nuon Chea state of mind

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[502] *Case 02/002*, ECCC, 002/19-09-2007, TCH judgment, 16 November 2018, paras. 4155-4156. See also *Case 002/02*, ECCC, 002/19-09-2007/ECCC/TC , Summary of the Judgment, 16 November 2018, para. 50

[503] *Case 02/002*, ECCC, 002/19-09-2007, TCH judgment, 16 November 2018, para. 50.

[504] *Case 02/002*, ECCC, 002/19-09-2007, TCH judgment, 16 November 2018, para. 4200.

[505] *Ibid*, para. 4325

in relation to the genocide of the Vietnamese. For the crime of genocide by killing members of the Vietnamese ethnic through a joint criminal enterprise, the TCH required specific intent. The TCH found that Nuon Chea "shared the direct, discriminatory and specific intent of other JCE members" and thus was held responsible for committing genocide against the Vietnamese ethnic group through the JCE.[506] It is important to note that the TCH's findings were related only to the JCE I and this type of joint criminal enterprise is the less complicated when it comes to the *mens rea* requirement.[507] Respectively, the doubts are whether the JCE III requires the proving of the special intent of the participant to the joint criminal enterprise not the basic form of the JCE.

The distinction between mental element's requirement for the JCE III and superior responsibility is crucial. It comes with a surprise that the TCH discussed the distinction between Nuon Chea's state of mind in relation to the acts constituting a crime of genocide committed through the JCE and committed by his subordinates. An even greater surprise is that the TCH came up with the determinative demand for the accused's state of mind. The TCH was satisfied with the finding that Nuon Chea at the very least had reason to know that genocide had been, or was about to be, committed against the Cham and thus can be convicted for the crime of genocide based on his superior responsibility even without proving his genocidal intent. The case law of the *ad hoc* Tribunals did not provide, with the exception of the *Karadžić* case, the distinction between mental elements for superior and co-perpetrator participating in the joint criminal enterprise. Even though the *Karadžić* case in facts provides a factual distinction between the mental elements, the TCH did not expressly state this distinction and did not provide any reasoning. As such, the development in the *Case 002/02* is a crucial step for the applicability of superior responsibility to special intent crimes. It is regrettable that the TCH did not provide any contextual analysis why the special intent is required on the part of a JCE participant and not required for a superior.

Even though, the latest development brought by the TCH in the *Case 002/02* is a plausible step in the applicability of superior responsibility to special intent crimes as not requiring a special intent for the superior corresponds with the special nature of superior

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[506] *Ibid*, para. 4161.

[507] The TCH in Case 001 implicitly recognized that JCE I and II were part of customary international law in 1975-79 (the TCH cited the PTCH Decision to support its conclusion). However, the TCH declined to consider the customary status of JCE III, or to apply it. See *Case 001*, ECCC, 001/18-07-2007-ECCC/TC, TCH judgment, 26 July 2010.

responsibility. It is even more plausible that the TCH made a clear distinction between the requirements for mental elements for a superior and for a participant in the JCE.

3. 2 SUPERIOR'S MOTIVATION TO TAKE MEASURES

Although the *Bemba* case sparked a discussion on the issue, it is not the first occasion on which a superior's motivation was discussed. The ICTY has briefly mentioned it in the *Krstić* case. Krstić argued that he did not punish any subordinate who participated in the killings in the aftermath of the fall of Srebrenica due to the fear for his safety and that of his family. The TCH held, while discussing his responsibility for the genocide in Srebrenica that Krstić acted in solidarity with, rather than his fear of, the highest military and civilian echelons of the Republika Srpska.[508] The brief mention in this case also refers to the ability to take measures and how the ability to take measures can be influenced by fear.

In relation to a superior's motivation to the measures, several situations can be identified:
- the superior does not take measures to prevent and punish crimes committed by subordinates due to fear
- the superior doesn't take measures to prevent and punish crimes committed by subordinates due to an acceptance of the crimes (for example solidarity with or participation in a criminal enterprise)
- the superior acts in order to satisfy their duty to prevent or punish but their actions are not genuine.

A superior's omission to act that is caused by an acceptance of the crimes committed by the subordinates serves as evidentiary support elements of superior responsibility. On the other hand, a superior's omission caused by fear does not affect superior responsibility as long as it does not reach the requirements of Article 31 of the Rome Statute.

The question that arose in the *Bemba* case is whether a superior might still be held responsible when he takes some measures that are not genuine in nature and serves solely to cover up the situation. A great deal of discussion on the relevance of the intent behind

[508] *Krstić*, ICTY, IT-98-33, TCH judgement, 2 August 2001, para. 651

measures escalated in this case. The TCH III noted that the "[…] measures were primarily motivated by Mr Bemba's desire to counter public allegations and rehabilitate the public image of the MLC".[509] Moreover, the TCH concluded that motivation in withdrawing the troops was only political.[510] However, according the ACH, the TCH III erred because it took into consideration what is an irrelevant factor.[511] The ACH also held that it would have to be proved that Bemba purposively limited the mandates of the commissions and inquiries in order to attribute the insufficiency of the measures.[512] The TCH III appears to have lost sight of the fact that the measures taken by a commander cannot be faulted merely because of shortfalls in their execution.[513] And, it held that "the Trial Chamber's error in considering Mr Bemba's motivation had a material impact on the entirety of its findings on necessary and reasonable measures because it permeated the Trial Chamber's assessment of the measures that Mr Bemba had taken."[514] It seems that the ACH had squashed TCH's entire argumentation based on the prediction that some of the measures were not genuine.

There are several interesting remarks made by the dissenting judges in response to the assessment of a necessary and reasonable measure by the majority. The first issue is the relevance of motivation behind the commander's decision. The Dissenting Judges agreed that the motives of a commander are not always irrelevant to the assessment of "necessary and reasonable measures. However, the TCH III did not state, as the majority claims, that "these motivations were a factor 'aggravating' the failure to exercise his duties" and did not employ the concept of an "aggravated omission" assessed by the majority. Nothing in the TCH's judgment indicates that Bemba's motivations were a "key factor" in, or "significantly affected" the TCH's assessment of the measures that Bemba took.[515] The Dissenting Judges concluded that the majority has misinterpreted the TCH III findings to the motives of the commander.[516] It is clear, then, that the ACH understanding of the TCH's treatment of Bemba's motivations was critical to his acquittal. A basic rule about the adequateness of measures is that an adequate measure remains adequate no matter the commander's

[509] *Bemba*, ICC, ICC-01/05-01/08, TCH judgement, 21 March 2016, para. 728.
[510] *Ibid*, para. 730.
[511] *Ibid*, para. 179.
[512] *Ibid*, para. 181.
[513] *Ibid*, para. 180.
[514] *Ibid*, para. 191.
[515] *Ibid*, para. 178.
[516] *Bemba*, ICC, ICC-01/05-01/08-3636, Dissenting opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański (ACH judgment), 8 June 2019, paras. 70-78.

motivation in taking it. To the contrary, the commander's motivation in taking a measure may be relevant, as a matter of evidence, to the Court's determination of whether the measure was, in fact, genuine and thus adequate.[517] This is not questioned, as the majority and dissenting judges seems to agree on this.[518] The problematic aspect is in the majority's understanding of the TCH's treatment of Bemba's motivation. The key question is how the TCH III treated Bemba's motivations in its determination of whether he took all the necessary and reasonable measures and whether the ACH interpreted the findings in a different way. Firstly, the TCH III set out the measures Bemba had taken and which he should have taken.[519] Contrary to the majority findings, this analysis of the measures Bemba had taken and which he should have taken, seems to be done *in concreto*. The TCH III assessed that the taken measures were a "grossly inadequate response to the consistent information of widespread crimes committed by MLC soldiers in the CAR".[520] The majority of the appeal concluded that the 'Trial Chamber's preoccupation with Bemba's motivations appears to have colored its entire assessment of the measures that he took.' This is not convincing as the TCH III has conducted an assessment of the measures taken, and the subsequent assessment of measures that could have been taken. In the author's view, in accordance with the findings of the Dissenting Judges, the TCH III did not treat motivations as determinative. To the contrary, the majority's understanding of the TCH's treatment of Bemba's motivation seems out of step with the actual TCH's findings.

The dissenting judges also point out that the majority decision comes from losing sight of article 28 of the Rome Statute. The dissenting judges stressed that the manner the majority interpreted the requirement of a necessary and reasonable measure suggests that a commander is not responsible for his failures but for his actions.[521] The minority found that this is evident in criticizing the TCH III for failing to make findings as to whether he purposively limited the

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[517] Miles Jackson, Commanders' Motivations in Bemba. *EJIL: Talk! Blog of the European Journal of International Law.* 15. 7. 2018. [online] [27-01-2019]. Available at: https://www.ejiltalk.org/commanders-motivations-in-bemba/

[518] *Bemba*, ICC, ICC-01/05-01/08-3636, ACH judgment, 8 June 2019, para 176. *Bemba*, ICC, ICC-01/05-01/08-3636, Dissenting opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański (ACH judgment), 8 June 2019, para. 70.

[519] *Bemba*, ICC, ICC-01/05-01/08, TCH judgement, 21 March 2016, para. 719.

[520] *Ibid*, para. 727

[521] *Bemba*, ICC, ICC-01/05-01/08-3636, Dissenting opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański (ACH judgment), 8 June 2019, para. 45.

mandates of the commissions and inquiries that he had set up.[522] The dissenting judges held that Bemba failed to specify how the actual measures that he took or attempted to take to investigate MLC crimes on the CAR territory were affected by the limitations to which he alludes.[523] As such, according to the dissenting Judges, the TCH III reasonably assessed the evidence on this question and Bemba has not identified any error in the reasoning or conclusions of the TCH III such that would establish a misappreciation of the limitations of the MLC's jurisdiction and competence to investigate crimes in the CAR or Bemba's disciplinary authority over his troops.[524] The author suggests that this is more a question on the scope of the evidence analysed than a legal question. It seems rather unreasonable to require proof he purposively limited the mandates of the commissions and inquiries that he set up. As discussed above, the motives behind a superior's actions behind the measures taken, is not determinative but only one of the factors that can be used in the assessment. Thus, there is no requirement to prove that a superior purposively limited the mandates of the commissions and inquiries that he set up. However, for now, the majority of the ACH has chosen to argue differently.

3. 3 AVAILABILITY OF INFORMATION - ACTIVE DUTY ON THE PART OF A SUPERIOR

The second topic discussed within the *mens rea* requirement for the superior in relation to genocide is the relevance of the information available to a superior. This leads to the critical question whether the constructed *mens rea* requirement contains a superior's duty to actively search for information about a subordinates' crimes. Article 86 para 2 of the AP I expressly states a superior is responsible when he 'knew, or **had information** which should have enabled them to conclude in the circumstances at the time'.[525] The positive answer to whether a superior is required to actively search for information that would lead him to knowledge about the subordinates' crimes could cause another distinction between military commanders and civilian superiors at the ICC. The question is relevant with regards to constructive knowledge and only in the form of 'should have known' and 'had reason to know' standard. As outlined above, direct knowledge cannot be presumed and constructed knowledge for

[522] *Ibid*, para. 45.
[523] *Ibid*, paras. 60-61.
[524] *Ibid*, paras. 60-61.
[525] Emphases added by the author.

civilian superiors who 'consciously disregarded information' suggests that the information was in fact available to the superior.[526] As such, the discussion whether a superior is under a positive duty to search for information would be at the ICC relevant only for the military commanders. On the other hand, the discussion is relevant to all superiors under the *ad hoc* tribunals' Statutes.

Cassese notes that the ICC Statute employs a lower 'should have known' standard than the *ad hoc* tribunals. He argues, with reference to the Bemba PTCH decision that it contains an active duty on the part of the superior to take the necessary measures to secure the knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time of the commission of the crime. He also notes that such an approach to constructive knowledge was rejected by the *ad hoc* tribunals' case law as it would approach strict liability.[527] Bantekas argues that the negligence standard should be 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 by the ACH in the Blaškić case. He argues that the negligence standard should be ascribed to the application of a in respect of the 'had reason to know' or 'should have known' knowledge tests.[528] Similarly argues Meloni – in order to prove the 'should have known' standard in the actual case, it is crucial to establish that the superior 'would have been able to know about the crimes if he had discharged his duties of vigilance and control'.[529] Negligence should be used as a standard in a relation to the handling of the information as opposed to testing a superior's knowledge of subordinate criminality.

The question whether a superior is required to actively search for information was subjected to a great deal of discussion at the ICTY. The approach imposing a duty upon the superior to actively acquire information about whether subordinates have committed or are about to commit crimes was introduced by the TCH in the *Blaškić* case in 2000. According to the interpretation of the TCH, the requirement *had a reason to know* is also fulfilled when the superior fails to carry out his duty to actively search for information suggesting that his

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[526] Brouwers, M. P. W. (eds). *The Law of superior Responsibility*, Wolf Legal Publishers, 2012, pp. 8-9.

[527] Reference made to *Mucić et al.,* IT-96-21-A, ACH Judgment, 20 February 2001, para 226; *Bagilishema*, ICTR, ICTR-95-1A-A ICTR, ACH judgment, 3 July 2002, para. 37. Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law*. 3rd ed. Oxford: Oxford University Press, 2013, p. 190.

[528] Ilias Bantekas, *International Criminal Law*, Hart: 2010, p. 90.

[529] Chantal Meloni, 'Command Responsibility in International Criminal Law', (2010) *T.M.C. Asser*, p. 185.

subordinates commit or have committed criminal acts.[530] This approach is much stricter and imposes higher standards on the superior, namely to establish an effective reporting system. As noted by J. Fuchs "the standard applied by the Tribunal in the *Blaškić* case corresponds to the “should have known” standard".[531]

The TCH in the Čelebići case rejected to follow the interpretation presented in the *Blaškić* case. The TCH held 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.[532] The TCH in the Čelebići case identified the following indicia as being relevant in determining whether a superior possessed the requisite knowledge of offences committed or about to be committed by his subordinates: (i) The number of illegal acts; (ii) The type of illegal acts; (iii) The scope of illegal acts; (iv) The time during which the illegal acts occurred; (v) The number and type of troops involved; (vi) The logistics involved, if any; (vii) The geographical location of the acts; (viii) The widespread occurrence of the acts; (ix) The tactical tempo of operations; (x) The modus operandi of similar illegal acts; (xi) The officers and staff involved; and (xii) The location of the commander at the time.[533] The ACH in the *Čelabici* case agreed with the TCH. The ACH rejected a superior’s duty to actively search for information stating that "it comes close to the imposition of criminal liability on a strict or negligence basis".[534] The ACH concluded that the superior is only held criminally responsible for failing to take the necessary and reasonable measures to prevent or to punish, for example failure to commence an investigation, but not for failure to gather information suggesting that his subordinates commit or committed crimes under international law. Further, the ACH stated that “[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.”[535] The ACH also advanced on the type of such information, holding that the information does not

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[530] *Blaškić*, ICTY, IT-95-14-T, TCH judgment, 3 March 2000, paras. 309-332.

[531] Jiří, Fuchs. ‘Trestní odpovědnost velitelete za opomenutí v současném mezinárodním právu. [Criminal Responsibility of Superior for Omission in Current International Law] ’ *Trestni pravo* 6 , no. 12. p. 17.

[532] *Mucić et al.,* ICTY, IT-96-21-T, TCH Judgment, 16 November 1998, para. 393.

[533] *Ibid*, para. 386.

[534] *Mucić et al.,* IT-96-21-A, ACH Judgment, 20 February 2001, para. 226.

[535] *Ibid*, para. 226.

need to provide specific details about the unlawful act committed or about to be committed by his subordinates.[536] The ACH clearly denies what was put forward by the TCH in the *Blaškić* case and made it clear that it must be at least proved that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates.[537] However, the emphasis must be made on the significant distinction between the fact that the superior had information about the general situation 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 as the former cannot lead to the establishment of the required *mens rea*.

The ACH in the *Blaškić* case hold that there is no reason to depart from the findings of the ACH in the *Čelabići* case. Thus the standpoint of the ICTY is that a superior is criminally responsible only when he had information available to him which would put him on notice that crimes may be committed, and despite such information, failed to take measures. This approach of 'information in a superior's possession that puts him on notice' was also followed by the ICTR.

Both Chambers in the *Bagalishema* case concluded that a superior can be responsible only when having a possession of general information which put him on notice that his subordinates might commit crime.[538] The TCH formulated that responsibility arises when a superior has information which put him or her on notice of the risk of such offences by indicating the need for an additional investigation order to ascertain whether such offences were about to be committed, were being committed, or had been committed.[539] In his separate and dissenting opinion, Judge Guney agrees with the findings that the roadblock was not set up for a criminal purpose, however he argues that Bagilishema 'had sufficient reason to know' that the screening system instituted at the roadblock entailed possible risks for the Tutsi civilian population. The Judge discussed Bagilisheme omission to address the risks associated with the erection and running of the roadblock as a form of wilful negligence. [540] Interestingly, he does not address this omission under superior responsibility but Article 6(1)

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[536] *Ibid*, para. 238

[537] *Ibid*.

[538] *Bagilishema*, ICTR, ICTR-95-1A-A ICTR, ACH judgment, 3 July 2002, para. 21.

[539] *Bagilishema*, ICTR, ICTR-95-1A-T, TCH judgement, 7 June 2001, para. 46.

[540] *Bagilishema*, ICTR, ICTR-95-1A-T, Separate and Dissenting Opinion of Judge Mehmet Guney, 7 June 2001, para. 2.

of the Statute.[541] The ACH repeated some examples of general information which would put a superior on notice of crimes, such as the dangerous nature of a roadblock and its general purpose to identify and kill Tutsis or the criminal record of the superiors.[542] However, the information about a subordinate's criminal past is rather a low standard required for establishing superior responsibility.

However, the standard seems to significantly differ at the ICC. In discussing the elements of the war crime of using, conscripting or enlisting children, the PTCH I in the *Lubanga* case considered the jurisprudence of the two *ad hoc* Tribunals and concluded that the expression 'had reason to know' is stricter than the one of 'should have known' because the former 'does not criminalize the military superior's lack of due diligence to comply with their duty to be informed of their subordinates' activities'.[543] Rather the 'had reason to know' standard 'can be met only if military superiors have, at the very minimum, specific information available to them which is needed to start an investigation'.[544]

The PTCH II in the *Bemba* case clarified 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 the information at the time about the commission of the crime."[545] This would mean that a superior is required not only to take measures and act upon their knowledge about the crimes but actively search for such information. The time frame for such a duty is set by the PTCH II widely – before, during and after the commission of the crime which is deduced from the wording 'regardless of the availability of information on the commission of the crime'. A superior can thus be held responsible for their failure to secure the information after the commission of the crime even if they had not known about the crime when the crime took place.[546] However, this conclusion does not correspond with the conclusion of the ICTY.

Unfortunately, in the *Bemba* case the TCH III did not directly follow up on the findings made by the PTCH regarding the active duty to secure knowledge about the conduct

[541] *Ibid*, para. 6.
[542] *Bagilishema*, ICTR, ICTR-95-1A-A ICTR, ACH judgment, 3 July 2002, para. 42.
[543] *Lubanga*, ICC, ICC/01/04-01/06 , Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (PTCH I), 29 January 2007, fn. 439.
[544] *Ibid*.
[545] *Ibid*, para. 433.
[546] The rest of the elements would have to be satisfied, such as existence of effective control and failure to take all necessary and reasonable measures to prevent or punish the crimes. The discussion on the potential causality requirement would be interesting in this example. See Chapter 2.2.2.

of troops and to inquire. Despite this omission, the TCH III listed numbers of indicia suggesting that a commander had knowledge that their forces were committing or about to commit such crimes. One of the indicia suggesting the commander's knowledge is the notoriety of the illegal acts. The TCH clarified that notoriety of the illegal act can prove the required knowledge on the part of the commander if the illegal acts were reported in media coverage "[…] of which the accused was aware".[547] The TCH III added that such awareness may be established by evidence suggesting that a commander, based on these reports, "[…] took some kind of action".[548] The *mens rea* requirement was not the subject of the appeal. Thus, it can be argued that under the TCH's approach, in order to hold a commander responsible, the superior must be aware of information leading them to the conclusion that the crimes have been committed or about to be committed. Such information may have different forms and need not be directly implied by a written or spoken report on the conduct of the subordinates. Thus, whenever a superior has been in possession of information leading them to the conclusion that their subordinates committed or are committing crimes and decided not to act upon that, they might be held responsible for their failure to stop them or failure to punish the subordinates. Whenever a superior has been in possession of information that by itself does not lead them to that conclusion without further investigation, they cannot be held responsible under superior responsibility. This conclusion, whether directly intended by the TCH or not, would be consistent with the *ad hoc* tribunals' findings. The possibility of a superior's duty to actively search for information leading them to knowledge about the crime is not highly discussed by academics. Mostly the discussion is devoted whether superior responsibility refers to the notion of negligence (see chapter 2.2.3). Martinez argues that the notion corresponds to the language many municipal legal systems use in describing a negligence-based liability. In this line of argument she adds that the 'should have known' standard admits the possibility of a superior's duty to acquire information about the conduct of their subordinates.[549] She argues that this would impose a duty upon the superior to actively acquire information about whether subordinates have committed or are about to commit crimes. Mettraux argues that while the „had reason to know" standard requires proof that the accused possessed some information that should have allowed them to draw certain

[547] *Bemba*, ICC, ICC-01/05-01/08, TCH judgement, 21 March 2016, para. 193.
[548] *Ibid*.
[549] Jenny S. Martinez, 'Understanding Mens Rea in Command Responsibility From Yamashita to Blaškić and Beyond' (2007) 5 *Journal of International Criminal Justice*, p. 659.

conclusions as regards the commission of a crime or the risk thereof, the ICC standard goes one step below that standard and attributes knowledge based on a set of circumstances which, it is assumed, should have put the accused on notice of the commission of a crime or the risk thereof.[550] However, he disagrees with such an interpretation and calls on the ICC to interpret the "should have known" standard restrictively so as to mean that responsibility arises where the information available to the superior suggests that crimes were being or were about to be committed by his men. The ICC had, even though not directly, followed this suggestion and arguably concurred with the findings of the ICTY.

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.[551]

3. 4 CONCLUDING REMARKS

The *ad hoc* tribunals' case law has shown multiple convictions of a superior based on Article 6(3)/Article 7(3) of the ICTR/ICTY Statute for the crime of genocide. As presented, the *Akayesu* case can be hardly used for an argument that the ICTR had intended to require a special intent on the part of a superior. Similarly, the cumulative convictions (or cumulative findings combining the applicability of direct responsibility pursuant to Article 6(1) and superior responsibility pursuant Article 6(3)) cannot serve as a justification for requiring special intent even if the Chambers made findings on the special intent or even required a special intent. The change being brought by the ACH in the *Media* case is definitely a step in the right direction in order to define the relation between special intent crimes and responsibility of a superior pursuant to Article 6(3). Nevertheless, the ACH could have used the opportunity and provided further analysis. Considering the previous ambiguous applicability of superior responsibility for the crime of genocide, it was highly desirable. It is difficult to draw any clear conclusion on the applicability of superior responsibility in relation to genocide from the ICTR case law until the decision of the ACH in the Media case that expressly denied the requirement of a superior's special intent in relation to responsibility under Article 6(3) of the Statute. The ICTY case law provides several turning points. The reasoning of the TCH in the *Krstić* case suggests that only knowledge on behalf of the

[550] Mettraux, Guénaël, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009), p. 212.
[551] *Galic*, IT-98-29, TCH, para. 700.

superior about their subordinates' genocidal intention would be required. In the S*takić* case, the TCH held that it flows from the unique nature of genocide that the *dolus specialis* is required for responsibility under Article 7(3). The Chamber argued that a mode of liability cannot replace a core element of a crime and that in order to 'commit' genocide, the elements of that crime, including *dolus specialis* must be met. The ACH in *Brđanin* disagreed and held that a superior need not possess specific intent. This conclusion seems to be more rational and taking account of the specific nature of superior responsibility than findings in the S*takić* case. In the *Karadžić* case, the distinction between mental elements for the JCE and superior responsibility can be seen – as the genocidal intent of the superior is not required for the superior responsibility but it is for the conviction based on the JCE. Even though Karadžić and Mladić were held responsible in relation to genocide in Srebrenica under the JCE (with the noted exception for the events before 13 July 1995 when Karadžić's intent was not proven) given their genocidal intent. Superior responsibility was correctly used as an aggravating factor. The latest development in the discovery of the relationship between genocide and superior responsibility was made by the TCH of the ECCC in Case 002/02 that required a proof of genocidal intent on the part of a superior for the conviction based on the JCE and not for superior responsibility. Though an interesting development, it can be concluded that the case law (including the ICTR, ICTY and the ECCC case law) establishes that a superior does not have to share the genocidal intent of their subordinates.

Yet arguably the most discussed, the special intent of the superior is not the only challenging element arising from the *mens rea* requirement. The *Bemba* case initiated a discussion on the relevance of a superior's motivation to take measures that might determine the direction of potential cases including the connection between superior responsibility and genocide. In relation to a superior's motives, the author argues the motives behind a superior's actions, is not determinative but only one of the factors that can be used in the assessment.

4. A SUPERIOR'S EFFECTIVE CONTROL IN RELATION TO GENOCIDE

The effective control requirement in relation to genocide has been profoundly analysed by the *ad hoc* tribunals. The analysis did not solely focus on the genocide but reflected on the evidentiary roadblocks faced in the genocidal context. While the ICTR case law is focused on the effective control of civilian subordinates, the ICTY discusses mostly the effective control within military units.

In the *Popović* case, while discussing the responsibility for the Srebrenica genocide, the TCH distinguished a military concept of 'singleness of command' from the effective control test. In order to establish the superior-subordinate relationship, the ability to effectively control the subordinates is determinative. Such an ability to exercise control is not exclusively assigned to only one individual. The TCH argued, while discussing the military structure, that the effective control test is also applicable to individuals, who are not in the command of a particular unit, but ultimately had the ability to exercise the control.[552] The effective control requirement is connected to causality and reflects the successor superior responsibility that will be discussed in Chapter 6.2.

Another aspect of the effective control requirement that must be addressed is the responsibility for non-work related activities of a civilian superior. The main argument brought by Fenrick is that a civilian superior's ability to 'exercise control properly' is limited to work or work-related activities. [553] He argues that a civilian superior shall not be held liable for the misconduct of subordinates that occurred outside of working hours or which were not related to their working activities. Subordinates are within the effective responsibility and control of the superior while they are at work or while engaged in work related activities. Outside that, the activities undertaken by the subordinates are not generally considered to be under the control of the superior. This is considerably different from a military commander

[552] *Popović* et al., ICTY, IT-05-88-T, TCH Judgment, 10 June 2010, para. 2025.

[553] William J. Fenrick, *Responsibility of Commanders and Other Superiors* (1999), p. 521. Cited in Linnea Kortfalt, 'Article 28', in Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic Epublisher, 2017), p. 301.

who is considered to be on duty 24/7. He also added a distinction as to the kind of work and work-related activities by proposing an example of work that could result in the violation of international humanitarian work (such as taking care of interned civilians) and on the other hand workers in a paint factory, engaging in genocidal activates.[554] According Fenrick's findings a civilian superior to these workers in the paint factory could not be held responsible.

The difficulties arising from this interpretation of superior responsibility are clearly reflected in the *Musema* case. Musema, as a director of a tea factory, was held responsible in relation to the genocide committed by his employees. Clearly, the genocidal acts had nothing in common with the work at the factory, nevertheless the case reached a conviction under Article 6(3) of the Statute.[555] As he was also held responsible under Article 6(1) of the Statute, the findings in relation to his superior responsibility were highly influenced by his direct participation in the crime. Effective control also brought about a discussion of the significance of the remote location of the superior, detailed questions on the identification of subordinates and whether effective control can be proven through orders and influence.

4.1 PROVING EFFECTIVE CONTROL THROUGH ORDERS AND INFLUENCE

An interesting comparison to ordering when it comes to evidence was shown in the TCH in the *Kayishema* case. The TCH concluded that where it can be shown that the accused was the *de jure* or *de facto* superior and that pursuant to his orders the atrocities were committed, then it proves the existence of the effective control requirement that is needed in order to establish superior responsibility. The TCH explicitly stated if the accused ordered the alleged atrocities then it becomes unnecessary to consider whether he tried to prevent; and irrelevant whether he tried to punish.[556] Kayishema was held responsible for genocide under Article 6(1) and cumulatively in relation to genocide under Article 6(3) of the Statute. While this is one of the earlier cases at the ICTR that asserts cumulative convictions and Article 6(1) and (3) of the Statute, it also shows the evidentiary relation between ordering and superior responsibility. This Court's approach hasn't changed with the abolishment of cumulative conviction. In the

[554] *Ibid*.
[555] *Musema*, ICTR, ICTR-96-13-A, TCH judgment, 27 January 2000, para. 148.
[556] *Kayishema and Ruzindana*, ICTR, ICTR-95 1 –T, TCH judgment, 21 May 1999, para. 223.

Nyiramasuhuko et al. (Butare) case, the TCH made findings on effective control in relation to Préfet Nsabimana who, as found by the TCH, ordered the transfer of refugees and soldiers thereafter escorted the refugees to the École Évangeliste du Rwanda (EER). Refugees were abducted from the EER and killed in the woods near the EER school complex. Soldiers were also present at the EER and participated in the attacks and killings at or near the EER; they also raped women and young girls there. The Chamber held that Nsabimana did not have *de facto* authority over the soldiers in the sense that 'he either issued orders to or commanded soldiers who obeyed him'. The TCH concluded that Nsabimana requisitioned soldiers to provide security at various sites but that there is insufficient evidence that he maintained any control over how these soldiers carried out their tasks The Chamber concluded that '[N]notwithstanding his ability to request the use of and instruct soldiers', he did not exercise effective control over soldiers, in the sense of having the material ability to prevent or punish their criminal conduct.[557]

To the contrary, the majority of the ACH upheld Ntahobali's responsibility under Article 6(3) of the Statute in relation to genocide acts by the Interahamwe.[558] The ACH, upholding the findings of the TCH, concluded that he was only held liable as a superior for crimes committed by the Interahamwe who followed his orders. [559] Similarly, Nyiramasuhuko, another of the accused in the Butare case, was held responsible under the superior responsibility doctrine in relation to genocide acts committed by Interahamwe. Also in her case, the TCH, while looking at the effective control requirement, relied on Interahamwe's compliance with her orders to abduct, rape, and kill Tutsi refugees.[560]

This TCH's approach subsequently conferred by the ACH, raises two important legal questions – if the evidence arising from the ordering of the crime can be used for establishing the effective control and whether a compliance with orders is an indication of effective control or a necessary element of the effective control. In relation to the evidence, the ACH upheld an order as the proof of effective control.[561] The ACH recalled that indicators of effective control are more a matter of evidence than of substantive law and those indicators are limited to

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[557] *Nyiramasuhuko* et al. (Butare), ICTR, ICTR-98-42, TCH judgment, 24 June 2011, paras. 5918-24.
[558] *Nyiramasuhuko* et al. (Butare), ICTR, ICTR-98-42, ACH judgment, 14 December 2015, paras. 5884-86.
[559] *Ibid*, para. 1925, referring to *Nyiramasuhuko* et al. (Butare), ICTR, ICTR-98-42, TCH judgment, 24 June 2011, paras. 5884-5886.
[560] *Nyiramasuhuko* et al. (Butare), ICTR, ICTR-98-42, TCH judgment, 24 June 2011, para. 991.
[561] *Nyiramasuhuko* et al. (Butare), ICTR, ICTR-98-42, ACH judgment, 14 December 2015, paras. 995, 1005-1007.

showing that the accused had the power to prevent or punish.[562] Ntahobali and Nyiramasuhuko were ultimately found guilty for their direct participation in the crimes, under Article 6(1) of the Statute and superior responsibility was used as an aggravating factor. Their effective control was proven on the basis of their 'orders' issued to Interahamwe during attacks at the prefectural office and the fact that they were followed.[563] The Judge Lui dissented the ACH' majority decision arguing that Ntahobali did not have effective control over the Interahamwe at the prefectural office because the existence of effective control was based only on his orders to commit the crimes.

While the ACH highlighted that an order is no means an element for establishing superior responsibility, it can serve as an indicator of effective control. Both Chambers focused their findings on the fact that the accused issued the orders, some of them were followed and as a result of the orders, the crimes were committed. Clearly in this case, the element of responsiveness forms part of the effective control requirement.

A superior's ability to issue binding orders that are complied with by subordinates is one of the indicators of effective control generally relied upon in the jurisprudence of the Tribunal. On the other hand, the influence of the superior over the situation or perpetrators does not by itself indicate effective control. This aspect was discussed in the Bizimungu et al case. (also known as the Government II case) while assessing Mugenzi's responsibility for killings amounting to genocide in Kigali. The TCH acknowledge that he held discussions with the Interahamwe leadership that led to 'attempts to quell killings' in Kigali, particularly at roadblocks. However, the TCH held that while this reflects a degree of influence, using status in order to stop killings does not necessarily demonstrate the creation of a formal or informal hierarchical relationship or effective control over a group perpetrating the killings.[564] The same line of reasoning is followed by the general ICTY case law. For example in the *Halilović* case, the TCH made specific findings with regard to the resistance and disobedience to orders as an indication of the lack of effective control between Halilović and the direct perpetrators of the crimes.[565]

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[562] *Ibid*, para. 995.
[563] *Nyiramasuhuko* et al. (Butare), ICTR, ICTR-98-42, ACH judgment – Judge Lui dissenting opinion, 14 December 2015, para. 18.
[564] *Bizimungu* et al., ICTR, ICTR-99-50-T, TCH judgment, 30 September 2011, para. 1676.
[565] *Halilović*, ICTY, IT-01-48-A, ACH judgement, 16 October 2007, para. 207.

As already mentioned on numerous occasions, the ICC does not provide any case with the connection between superior responsibility and genocide. However, the *Bemba* case provides some guidance on how possible future cases including the applicability of superior responsibility in relation to genocide might be treated. The TCH III in the *Bemba* case concluded that 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. The TCH III found that Article 28 contains no requirement that a commander have sole or exclusive authority and control over the forces who committed the crimes.[566] Further, the effective control of one commander does not necessarily exclude effective control being exercised by another commander.[567] This conclusion was reached in the response to the Defence allegations that MLC troops were re-subordinated to the CAR authorities, and therefore, Bemba could not retain effective control over those forces.[568] It was also held by the TCH III that the perpetrators need to be identified at least to the extent necessary to assess the existence of the superior-subordinate relationship with the commander.[569] The TCH III identified some factors that may indicate a lack of effective control over forces, such as (i) the existence of a different exclusive authority over the forces in question; (ii) disregard or non-compliance with orders or instructions of the accused; or (iii) a weak or malfunctioning chain of command.[570] The TCH III determined that while Bemba was not in the CAR, he was able to issue operational orders directly via radios and satellite phones to commanders in that country and that at all times he maintained effective control over his troops deployed in that country's conflict.[571] Furthermore, the TCH III found that Bemba also maintained regular, direct contact with senior commanders in the field in the state of operations, and additionally received numerous detailed operations and intelligence reports.[572] The TCH III went on providing numerous

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[566] *Bemba,* ICC, ICC-01/05-01/08, TCH judgement, 21 March 2016, para. 185.
[567] *Ibid,* para. 185.
[568] *Ibid,* para 185-186. Reference to the Defence Closing Brief. *Bemba,* ICC, ICC-01/05-01/08-3121-Red, Defence Closing Brief, 22 April 2016, paras. 613-636, 675, 691, and 723.
[569] *Ibid,* para. 186.
[570] *Ibid,* para. 190.
[571] *Ibid*, para. 394, also para. 707.
[572] *Ibid*, para. 700.

factors indicating that Bemba maintained effective control.[573] In conclusion, it was held by the TCH III that Bemba had effective control over the troops in CAR.[574]

Since an issue of material criminal law considered before the ACH concerned only the question whether necessary and reasonable measures within Bemba´s power to prevent or repress the commission of crimes by his subordinates were taken, the only findings in relation to this matter can be found in the concurring separate opinion of Judge Eboe-Osuji. He says: 'First, he was found to have exercised 'primary disciplinary authority' over MLC troops. That was a finding correctly made to show that the primary disciplinary authority was not with the CAR military hierarchy. That the finding does not answer the question whether such primary disciplinary authority was necessarily effective upon its subjects.' It clarifies that a requirement of effective control – material ability to take measures includes not only a superior's material ability to take the measures but whether it has any impact on the superiors (effectiveness) – the core of the superior-subordinate relationship.

While the PTCH II and the TCH III clearly focused on Bemba's ability to take the measures, the ACH and mainly separate concurring opinion focused more on the effective outcome of the taken measures.[575] It means that while the PTCH II and THC III focus on the findings whether Bemba exercised disciplinary authority over the troops, the ACH looked whether such disciplinary authority was effective upon the subordinates. The ACH's analysis is thus chaotically mixed with the third element of superior responsibility – *actus reus* – failure of the superior to prevent or punish the crimes of subordinates. It is in the author's view that the existence of superior-subordinate relationship manifested by the effective control does not mean that measures forming material ability to prevent or punish the criminal conduct must have been effective upon the subordinates. The key element is the access of the superior to those measures (part of the effective control required) and whether those measures were taken (part of the *actus reus* inquire).

4.2 IDENTIFICATION OF SUBORDINATES

[573] *Ibid*, paras. 699-704.
[574] *Ibid*, para. 705.
[575] *Bemba*, ICC, ICC-01/05-01/08-3636, Concurring separate opinion of Judge Eboe-Osuji (ACH judgment), 8 June 2019, para. 260-261.

It is often an impossible evidentiary task to identify and prove the direct participation in genocidal acts. Alongside the same logic, it is often impossible for a superior to know identities of all of their subordinates who participated in the crime despite the existence of effective control. The ultimate goal and ideal situation for the prosecution is to have all the direct perpetrators – subordinates – identified by name. However, the realities of the context in which genocide occurs do prevent such findings. The *ad hoc* tribunals, in relation to genocide and also in relation to other crimes, had discussed this issue.

The TCH in the *Hategekimana* case discussed the identification of subordinates in relation to genocide to the military structure. Hategekimana was a lieutenant in the Rwandan Armed Forces and a commander of the Ngoma camp in Butare prefecture. He was held responsible under Article 6(1) of the Statute but his superior responsibility in relation to genocide committed by soldiers under his command at the Ngoma Camp, Interahamwe and armed civilians was an aggravating factor. The TCH noted that the direct perpetrators, for the purposes of superior responsibility, must be identified either by name or by category. It is sufficient to identify the physical perpetrators by category in relation to a particular crime site.[576]

Also, in the *Hadzihasanović* and later in the *Orić* case a question arose whether a superior can be held responsible for acts of unidentified subordinates. Neither of them was charged in relation to genocide but both cases provide a substantial contribution to the superior responsibility doctrine that is transferable to the crime of genocide. The Chamber in *Hadzihasanović* found the same as the TCH in the *Hategekimana* case. The ICTY concurred with the ICTR that it is indeed important to be able to identify the alleged perpetrators (subordinates) of the crimes nevertheless that does not mean that the perpetrators need to be identified exactly. A specification to which group the alleged perpetrators belonged seems to be sufficient.[577] The Chamber in the *Orić* case repeated the findings and held that affiliation to a unit or a group under the control of the superior is a sufficient identification of the subordinates.[578] There is also no question that a superior responsibility may be established

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[576] *Hategekimana*, ICTY, ICTR-00-55B-T, TCH judgment, 6 December 2010, para. 70.

[577] *Hadžihasanović/Kubura,* ICTY, IT-01-4, TCH judgment, 15 March 2006, para. 90.

[578] "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." *Orić*, ICTY, IT-03-68-T, TCH judgment, 30 June 2006, para. 315. The rulings in *Oric* case is interpreted as that a superior can be liable for crimes committed by an anonymous perpetrator as long as the perpetrator can

over indirect subordinates as long as the effective control between superior and the subordinate can be proved. The TCH in the *Popović* case, while discussing his responsibility in relation to genocide in Srebrenica, held the superior-subordinate relationship may be direct or indirect. Thus it doesn't matter whether a subordinate is immediately answerable to that superior or more remotely under his command.[579] The jurisprudence of the *ad hoc* tribunals well established that superior responsibility and effective control can also be evoked over indirect subordinates. [580]

The high ranking command officer may be held responsible for the crimes committed by the soldiers, as long as the chain of command is maintained and preserves effective control between the command and the soldiers. Similarly for a civilian leader as can be seen in the *Karadžić* case when convicted under 7(1) and 7(3) of the Statute in relation to genocide in Srebrenica.[581]

A person who commits the underlying crime has been traditionally referred to as a 'subordinate'. However, in Article 28(a) of the Rome Statute the subordinates are referred to as *forces* as opposed to Article 28(b), which also uses the traditional term 'subordinates'. The precise significance of the choice to use this term is not clear. According to Triffterer and Arnold, the term 'forces' ought to be interpreted along the lines of Article 43 of the AP I of 1977 and may thus signify the armed forces of a party to a conflict, i.e. all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.[582] In the *Bemba* confirmation decision terms 'forces' and 'subordinates' are used synonymously.[583]

The TCH III in the *Bemba* case also held that proof of a superior-subordinate relationship does not require the identification of the principal perpetrators by name. It is sufficient to identify the perpetrators by group or unit in relation to a particular crime site.[584] The TCH III, however, maintained that the perpetrators need to be identified at least to the extent necessary to assess the existence of the superior-subordinate relationship with the

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be identified by his/her affiliation to a group/unit. Elies van Sliedregt, Individual Criminal Responsibility in International Law (OUP 2012), p. 191 – 192.

[579] *Popović* et al., ICTY, IT-05-88-T, TCH Judgment, 10 June 2010, para. 2025.

[580] *Mucić* et al., IT-96-21-A, ACH Judgment, 20 February 2001, para. 252.

[581] *Karadžić*, ICTY, IT-95-5/18-T, TCH judgment, 24 March 2016.

[582] Otto Triffterer and Roberta Arnold, 'Article 28' in: Otto Triffterer and Kai Ambos (eds.), The Rome Statute of the International Criminal Court. A commentary. 3rd ed. (C. H. Beck: 2016), p. 1093.

[583] *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 428.

[584] *Bemba*, ICC, ICC-01/05-01/08, TCH judgement, 21 March 2016, para. 186.

superior. The exact identification of the individual subordinates by name may assist in this verification; however, it is not a legal requirement.[585] The TCH III also concluded that Article 28 of the Rome Statute does not require that the commander knew the identities of the specific subordinates who committed the crimes.[586] It can be argued that the ICC will follow the same reasoning for any potential cases including superior responsibility in relation to genocide and the exact identification, including name, won't be required in order to establish the superior-subordinate relationship.

The broad definition of subordinates enables the applicability of superior responsibility when the identification of individual perpetrators of the crime is evidentiary almost impossible. In particular, a superior can be held responsible only for the acts of those who are his/her immediate subordinates, but also those who are subordinates of subordinates, as long as they have effective control over these subordinates of their subordinates. Moreover, two or even more superiors can be held criminally responsible for the same crime committed by the same individual if effective control is established in every single relation between the superior and the subordinate who committed the crime.[587]

4.3 REMOTENESS OF THE SUPERIOR

As correctly noted by TCH in the *Bagilishema case* effective control is not a question of whether a superior had authority over a certain geographical area, but whether he or she had effective control over the individuals who allegedly committed the crimes.[588] Despite that, the location of the superior and the subordinates raises an intriguing question on the relevance of their remoteness. The ad hoc tribunals did not face this discussion as most of the superiors were either directly involved in the commission of crimes or nearby the location of the crimes committed, including repeated visits to the field. However, in the *Bemba* case, the discussion on the remoteness of a superior had a significant importance for the final decision. Article 28 of the Rome Statute does not contain a reference to the remote superior or commander and only a distinction is made between superiors is the one between military commander (or

[585] *Bemba*, ICC, ICC-01/05-01/08, TCH judgement, 21 March 2016, para. 186.
[586] *Ibid*, para. 194.
[587] See also *Aleksovski*, ICTY, IT-95-14/1-T, TCH judgment, 25 June 1999, para. 106.
[588] *Bagilishema*, ICTR, ICTR-95-1A-T, TCH judgement, 7 June 2001, para. 45.

person effectively acting as a military commander) and a civilian superior. However the discussion on the remoteness of a commander became a central issue in the *Bemba* case and ultimately his position as a remote commander led to his acquittal on appeal. As such, the remoteness of the commander calls for detailed analysis.

The remoteness of a commander could be a relevant factor in the determination of all three elements of superior responsibility. The remoteness could have an impact on a superior's material ability to exercise control over their troops (superior-subordinate relationship includes the satisfaction of the effective control requirement), their knowledge of the crimes (*mens rea*), and whether they took the necessary and reasonable measures (*actus reus*). A superior cannot satisfy the *actus reus* requirement – take the necessary and reasonable measures – if they have no material ability to exercise control over their troops. As such, it seems logical to the author to discuss the remoteness of the commander within the first element of superior responsibility. On the other hand, the ACH discussed the remoteness within the third element which caused unnecessary confusion between elements of superior responsibility and rendered the ACH's arguments unpersuasive.

Starting with the TCH III, it provided an extensive list of factors that indicates effective control or, on the other hand, indicates a lack of effective control but the term remote superior or commander have not been used in the analysis. Nevertheless, it is evident from the detailed analysis of the effective control requirement that Bemba's position as a remote commander was acknowledged by the Chamber.

On the other hand, the term 'remote commander' has been used repeatedly in the reasoning of the appeal judgment and the opinions.[589] The majority of the ACH expressed concerns regarding Bemba's remoteness and more importantly the TCH's limited analysis on this issue.[590] It held that "the Trial Chamber failed to appreciate that, as a remote commander, Mr Bemba was not part of the investigations and was not responsible for the results generated […]"[591] and "[…] Trial Chamber paid insufficient attention to the fact that the MLC troops were operating in a foreign country with the attendant difficulties on Mr Bemba's ability, as a remote commander, to take measures."[592] This failure of the TCH to assess limitations that

[589] *Bemba*, ICC, ICC-01/05-01/08-3636, ACH judgment, 8 June 2019, para. 191. See also *Ibid*, paras. 171, 189, 191, and 192.
[590] *Ibid*, paras. 171, 189, 191, 192.
[591] *Ibid*, para. 192.
[592] *Ibid*, para. 171.

Bemba would face in investigating and prosecuting crimes as a remote commander led ultimately the ACH to overturn his conviction by the TCH.[593] Nevertheless, the majority of the ACH itself fails to set out comprehensively those limitations or explain in detail why the TCH III had reached the wrong conclusion in this regard.

The ACH has limited its assessment to the failure to take all necessary and reasonable measures, however all majority judges have expressed opinions regarding remoteness of a commander in separate opinions.[594] Judge Eboe-Osuji in his concurring separate opinion correctly clarified that the findings of the ACH on the geographic remoteness of a commander should not be regarded as a factor that necessarily insulates the commander from criminal responsibility.[595]

He also discussed that taking some measures might be in fact an indication of the lack of effective control in other aspects or at least cannot serve as proof of the commander's effective control in all other aspects. Judge Eboe-Osuji illustrated this in the example of a commander withdrawing his troops – he argues that such a measure could have been a measure of last resort when every other measure has failed and as such it cannot be proof of the commander's effective control in all other respects.[596] That would mean that the commander might have an effective control in relation to withdrawing his subordinates but it does automatically mean that he had absolutely effective control over the subordinates in other aspects (especially and most importantly in relation to crimes committed by these subordinates). Or even, the effective control over withdrawing the subordinates might illustrates their lack of effective control in other aspects and this forcing the commander to use the withdrawing as a last resort.

Contrary to the majority of the ACH judgment, the dissenting opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański discussed in detail Bemba's effective control and whether the TCH III made a mistake in its assessment. The dissenting judges agreed with the TCH III finding that the indicators of effective control are more a matter of

[593] *Ibid*, para. 191.

[594] As the ACH found an error in the TCH's assessment herein, the ACH did not discuss the issue of effective control requirement any further. *Bemba*, ICC, ICC-01/05-01/08-3636, ACH judgment, 8 June 2019, para. 32.

[595] *Bemba*, ICC, ICC-01/05-01/08-3636, Concurring separate opinion of Judge Eboe-Osuji (ACH judgment), 8 June 2019, para 258. See also Karnavas comment in Miles Jackson, Geographical Remoteness in Bemba. EJIL: Talk! Blog of the European Journal of International Law. 30. 7. 2018. [online] [27-01-2019]. Available at: https://www.ejiltalk.org/geographical-remoteness-in-bemba/

[596] *Bemba*, ICC, ICC-01/05-01/08-3636, Concurring separate opinion of Judge Eboe-Osuji (ACH judgment), 8 June 2019, para. 259.

evidence than of substantive law. The analysis of the dissenting judges was limited to the extent whether it was not unreasonable for the TCH III to conclude that Bemba had effective control over the MLC troops in the CAR.[597] The Dissenting Judges noted that in a case concerning actors operating across international borders, the specificities of the particular case, such as the structure and functioning of the military groups involved, as well as the remoteness of the commander must be taken into account.[598] Nevertheless, this does not prevent the consideration of various relevant indicators of effective control, regardless of whether they are deemed as traditional or non-traditional. The dissenting judges also found that Bemba was sufficiently put on notice that his representation of MLC forces in external matters was a factor considered relevant to a finding of effective control. This conclusion is interesting as it indicates that the representation of the forces in external matters can be regarded as an indication of effective control only when the representative, the commander, has some knowledge about the consequences of the external representation. This requirement, however, does not seem to be supported by the jurisdiction of *ad hoc* tribunals.[599] The existence of the effective control was also supported by Bemba's authority to order the withdrawal of troops and as such, the dissenting judges agreed with the TCH III which "[…] deduced Mr Bemba's "authority to […] withdraw [the troops] at any given moment" from the fact that he actually gave such an order."[600]

The analysis of effective control in the *Bemba* Appeal is remarkable. The wording "remote commander" echoes through the ACH judgment and concurring separate opinion and separate opinion. There is no legal dispute among the majority and minority over the requirement for effective control between commander (or person effectively acting as a military commander) and subordinates. However, the majority (especially in concurring separate opinion and separate opinion) and minority differently interpreted factual evidence. For example, the withdrawal of the MLC troops is regarded as the proof of effective control between Bemba and the troops by Judge Sanji Mmasenono Monageng and Judge Piotr

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[597] *Bemba*, ICC, ICC-01/05-01/08-3636, Dissenting opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański (ACH judgment), 8 June 2019, para 182. See also *Bemba* Appeals Chamber Judgement, paras. 122-184.

[598] *Bemba*, ICC, ICC-01/05-01/08-3636, Dissenting opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański (ACH judgment), 8 June 2019, para. 127.

[599] *Kordić and Čerkez*, ICTY, IT-95-14/2-T, TCH, 26. 2. 2001, para 424. *Orić*, ICTY, IT-03-68-T, TCH, 30 June 2006, para. 312.

[600] *Bemba*, TCH, paras. 188 and 704.

Hofmański, on the other hand, according Judge Eboe-Osuji, it may not be determinative for effective control over the troops for other conduct apart from the withdrawal. Judges Van den Wyngaert and Morrison suggested that the concept of superior responsibility should not refer to the high-rank commanders, as it is out of their power to retain effective control over the direct perpetrators. In general, the majority seems to require a higher effective control over the troops which arguably might be due to Bemba's position as a remote commander.

Nevertheless, it seems that, in an exceptional unity of the ACH, judges found that a remote commander is a not a legal term. The author argues that the wording of remote commander points to the chain of command and effective control requirement. It is believed that there is no special or additional requirement for a remote commander to fulfil in order to prove the effective control requirement or to ascertain the chain of command. As long as the superior-subordinate relationship can be proven (*i.e.* the chain of command) and there is effective control between the superior and commander, the requirement is satisfied. It is important to note here that the existence of the superior-subordinate relationship and effective control is not precluded by the existence of international borders. The author believes that the position of remote commander cannot automatically opt out the establishment of the chain of command and effective control within the superior-subordinate, nor can call for proof of a more intensive effective control of the commander over the troops. Some authors even argue that a remote commander should be required to exercise an even higher level of supervision because of the risks involved. As much as this is relevant due to modern communications methods, it opens a question whether a superior is bound to actively search for information that would enable them to conclude that their subordinates committed or are about to commit crimes.

Looking at the *Bemba* case, the Court did not opt out from the possibility of superior responsibility for remote commanders. However, the majority of the ACH required an intensive effective control over the troops for the remote commander.[601] This requirement for higher or intensive effective control over the troops because of the remoteness of the commander is rather unsupported. The only distinction made between superiors in the Rome Statute is between a military commander (or person effectively acting as a military commander) and a civilian superior. The remoteness might be an indicia suggesting the lack of effective control (or missing chain of command) but this fact *per se* cannot opt out from the

[601] *Ibid*, para. 192.

possibility of retaining effective control. Also the remoteness of the commander can have limits on his or her ability to take necessary measures in order to prevent or repress the crimes committed by the subordinates and therefore such an ability must be examined separately.

Another issue that comes up during the *Bemba* case is the effect of a superior's remoteness in the assessment of reasonable measures. The remoteness of a commander is a relevant fact rather than the basis of a legal distinction. As correctly noted by Jackson, the assumption that the remoteness would have made responding more difficult cannot hold across the full range of measures assessed by the TCH III, for example the mandates of two investigative commissions to allegations of pillage.[602] Karnavas suggests that geography may play a role in the overall assessment of the facts and evidence into the determination of a commander's awareness and any failures to act. He suggests that this assessment, taking into account a proper context – geography being one of the factors – was missing from the TCH's analysis.[603] The author supports Karnavas's interpretation of the ACH judgment. There is nothing in the ACH judgment and attached separate opinions suggesting an interpretation supporting a distinction between requirements for reasonable and necessary measures for a remote commander and non-remote commander. It is not clear whether the majority has made a distinction between remote commander and commander present on the ground and whether there are different sets of requirements for both categories. The President's Separate Concurring Opinion suggests that the findings of the majority should be interpreted as a factor all of its own, which would not necessarily insulate perpetrators from criminal responsibility. The President presented that "[G]geographic remoteness is only a factor to be considered among other circumstances or peculiarities of a given case. It serves its greatest value in the assessment of what is reasonable as a measure to prevent or repress violations to submit them to competent authorities for investigation and prosecution."[604] From reading the decision in connection to dissenting judges' findings, it seems that no distinction between remote and a non-remote superior in relation to the assessment of measures was drawn nor contemplated

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[602] JACKSON, Miles. Geographical Remoteness in Bemba. *EJIL: Talk! Blog of the European Journal of International Law.* 30. 7. 2018. [online] [7-02-2019]. Available at: https://www.ejiltalk.org/geographical-remoteness-in-bemba/

[603] See comment of Karnavas in discussion. JACKSON, Miles. Geographical Remoteness in Bemba. *EJIL: Talk! Blog of the European Journal of International Law.* 30. 7. 2018. [online] [7-02-2019]. Available at: https://www.ejiltalk.org/geographical-remoteness-in-bemba/

[604] *Bemba*, ICC, ICC-01/05-01/08-3636, Separate Opinion of Judge Van den Wyngaert (ACH judgment), 8 June 2019, para. 258.

drawing.[605] However, the assessment of what is considered to be necessary and reasonable preventive measures for a particular superior has to be made on a case-by-case basis with regards to a superior's material ability to perform the measures

4.4 CONCLUDING REMARKS

Proving the existence of superior and subordinates governed by the effective control between who committed genocide is a challenging task. The jurisprudence of the *ad hoc* tribunals, especially the ICTR, provides several findings regarding effective control between superior and subordinates who committed the crime of genocide. The spotlight in the discussion enjoys the relevance of orders issued by the superior. By careful analysis of the case law, it can be conclude that a superior's ability to issue binding orders that are complied with by subordinates is one of the indicators of effective control generally relied upon in the jurisprudence of the Tribunal. However, it is important to note that the influence of the superior over the situation or perpetrators does not by itself indicate the effective control.

Another issue discussed in relation to superior-subordinate relationship is the identification of subordinates. It is not necessary to identify the subordinates who committed the crime by their names, the affiliation to the group committing the crime is sufficient. Such a broad definition of subordinates, that is also supported by the findings in the *Bemba* case, enables the applicability of superior responsibility when the identification of individual perpetrators of the crime is evidentiary almost impossible. Especially in relation to genocide, often a highly designed systematic plan involving several perpetrators who planned it, it is important to highlight that several superiors can have effective control over the same perpetrators – subordinates.

Lastly, in relation to effective control, the relevance of geographic location was discussed. It is clear that an effective control is not a question whether a superior had authority over a certain geographical area, but whether he or she had effective control over the individuals who allegedly committed the crimes. However, the *Bemba* case brought several doubts about the negative consequences of the commander being in a different location than superiors committing the crimes and its limitations on the superior's ability to prevent and

[605] See comment of Karnavas in discussion. JACKSON, Miles. Geographical Remoteness in Bemba. *EJIL: Talk! Blog of the European Journal of International Law.* 30. 7. 2018. [online] [7-02-2019]. Available at: https://www.ejiltalk.org/geographical-remoteness-in-bemba/

punish the crimes committed. The author argues that there should be no distinction between remote and non-remote superior in relation to the assessment of measures taken and as such a remote commander cannot be bound to provide less measures based purely on their actual location.

5. SUPERIOR'S FAILURE TO TAKE MEASURES IN RELATION TO GENOCIDE

The *ad hoc* tribunals have identified several measures as steps which a commander might be required to adopt with a view to prevent subordinates from committing genocide. The TCH in the *Bagilishema* case, while discussing his superior responsibility for genocide, noted that 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.[606] This might include suspension of subordinates allegedly involved in the crimes and opening an investigation into the alleged crimes even through another organ. The TCH was satisfied that Bagilishema took all measures to establish the rule of law, including various contacts with the gendarmerie commander of the area, local prosecutor over the alleged perpetrators of crimes and a committee established to deal with the recovery of property abandoned by displaced persons.[607]

In the *Bagosora* case, the TCH held that Bagosora failed in his duty to prevent the crimes because he in fact participated in them.[608]

5.1 EFFECTIVE MEASURES

In relation to the Srebrenica genocide, the TCH in the *Popović et al.* case acknowledged difficulties and the limited options of a superior in order to discharge his duty to punish crimes committed during an operation. In respect to Pandurević, commanding officer of the Zvornik Brigade, the TCH noted that normal avenues open to him were effectively unrealistic in the situation. In particular, it is evident that referring the matter to his direct superior or even to the Commander-in-Chief, Radovan Karadzić for investigation and punishment in the

[606] *Bagilishema*, ICTR, ICTR-95-1A-T, TCH judgement, 7 June 2001, para. 50.
[607] *Ibid*, para. 259.
[608] *Bagosora et al.* (Military I), ICTR, ICTR-98-41-T, TCH judgement, 18 December 2008.

usual manner was not possible when all of them were implicated in planning, ordering and executing these horrific crimes.[609]

The ACH in the *Krstić* case mentioned the effectiveness of potential measures in the assessment of a superior's failure to take measures in order to prevent or punish crimes committed by the subordinates. The ACH held that 'the most he could have done as a Commander was to report the use of his personnel and assets, in facilitating the killings, to the VRS Main Staff and to his superior, General Mladić, the very people who ordered the executions and were active participants in them. Further, although General Krstić could have tried to punish his subordinates for their participation in facilitating the executions, it is unlikely that he would have had the support of his superiors in doing so'.[610] The superior responsibility in relation to genocide was not challenged on the appeal but the ACH held explicitly that Article 7(1) of the Statute is more appropriate for his responsibility.[611]

In the *Bemba* case, the Court used repeatedly references to effective and adequate measures. Those are not legal terms and are nowhere to be found in the Rome Statute or the Elements. However, the TCH's finding on the measures taken by Bemba as 'grossly inadequate' had a critical impact on his conviction the same way the ACH's assessment of measures available to him as 'ineffective' on his acquittal. While the PTCH II and the TCH III clearly focused on Bemba's ability to take the measures, the ACH and mainly separate concurring opinion focused more on the effective outcome of the taken measures. It means that while the PTCH II and THC III focused, for example, on the findings whether Bemba exercised disciplinary authority over the troops, the ACH looked whether such disciplinary authority was effective upon the subordinates. The PTCH and TCH approach corresponds with the author's approach to start the analysis of superior responsibility with the first element – existence of superior-subordinate relationship including the effective control requirement. Even though analysis of effective control and measures taken by the superior are closely connected they must be taken as two separate elements. First, it must be assess whether a

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[609] *Popović* et al., ICTY, IT-05-88-T, TCH Judgment, 10 June 2010, para. 2056.

[610] *Krstić*, ICTY, IT-98-33, TCH judgement, 2 August 2001, para. 143, ft. 250.

[611] The TCH found Krstić guilty for genocide based on Article 7(1) of the Statute – under the JCE and also established his superior responsibility. However, the TCH held that 'where a commander participates in the commission of a crime through his subordinates, by "planning", "instigating" or "ordering" the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1)'. *Krstić*, ICTY, IT-98-33, TCH judgement, 2 August 2001, para. 605. The ACH upheld the conviction under Article 7(1) of the Statute but under aiding and abetting.

superior exercised effective control – did the superior have a material ability, for example, establish and exercise disciplinary authority over the troops. If answered affirmative, a subsequent question arises – did the superior in fact exercise that power over the troops meaning did the superior take any disciplinary measures over the troops? In an assessment of this, it must be asked whether the disciplinary measures were necessary and reasonable measures. As established above, necessary and reasonable measures refer to measures that a reasonable diligent superior would take in order to prevent and punish the crimes. If the reasonable and diligent superior concluded, with the information available to them, that such a measure would be ineffective they are bound to resort to any other measure within their material ability that would in fact be effective and would prevent and punish the crimes.

It is not a commander's duty to take each and every possible measure at his or her disposal. A commander may take into consideration the impact of measures to prevent or repress criminal behaviour on ongoing or planned operations and may choose the least disruptive measure as long as it can reasonably be expected that this measure will prevent or repress the crimes.[612]

The TCH III found that Bemba took "a few measures" in response to allegations of crimes committed by MLC troops in the CAR and those were all limited "[..] in mandate, execution, and/or results."[613] According the TCH III, the measures taken were inadequate and their inadequacy was "aggravated" by indications that they were not "genuine".[614] It clearly refers to the discussion on the superior's motive behind the measures but also leaves one wonders what is the relevance of inadequate measures.

More troubling and challenging is the approach of the PTCH that concluded that submitting the matter to competent authorities remedies a situation where commanders do not have the ability to sanction their forces, including "[…] circumstances where the superior **has the ability** to take measures, yet those measures **do not seem to be adequate**" (emphasis added by the author). [615] From the plain reading, the PTCH suggests that a superior is not bound to measures that they would deem as not adequate and would free themselves from the duty to punish by submitting the matter to the competent authorities. On the other hand, the TCH took the opposite approach – the obligation to submit the matter also arises where the

[612] *Ibid.*
[613] *Ibid*, paras. 719-720.
[614] *Ibid*, para. 727.
[615] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 442

commander has the ability to take certain measures in order to punish the superiors, but such measures would be inadequate.

5.2 SUCCESSOR SUPERIOR RESPONSIBILITY

Successor superior responsibility targets a question when the effective control of the superior must be proven. A superior can be held liable for crimes committed by their subordinates if at the time when the crimes were committed they had effective control over them. Arguably, they can also be held responsibility when the superior has the effective control when they are failing their responsibilities to prevent and punish. The successor superior responsibility doctrine tries to find an answer to a question of whether and if (under which condition) superiors can be held responsible for failing to punish crimes committed by their subordinates prior to taking command. The issue of successor superior responsibility has caused a great division between the chambers of the ICTY, and also between academics.[616] Unfortunately, the *Bemba* case did not offer a unanimous solution either.

Prior to an analysis of the ICTY case law and the *Bemba* case, we have to start with some general remarks about successor superior responsibility. A superior can generally be held responsible for crimes committed by their subordinates if they had sufficient knowledge about the crimes and failed to take any necessary measures to prevent such acts or to punish the perpetrators. International customary law formulated three core requirements for establishing such responsibility. In some instances, causality can be claimed as one of the requirements for establishing superior responsibility. Successor superior responsibility is closely connected to the causality requirement. If causality is accepted as a definitional feature, the question remains whether this requirement is satisfied when a successor superior fails to punish crimes committed by their subordinates before they took over the command over subordinates. If causality is not accepted as one of the requirements, the question would be more general—whether and under which circumstances can a superior be held responsible

[616] Barrie Sander, 'Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence' (2010) 23(1) *Leiden Journal of International Law*, p. 105-135. Carol. T. Fox. 'Closing a Loophole in Accountability for War Crimes: Successor Commanders Duty to Punish Known Past Offenses.' (2004) 55(2) *Western Reserve Law Review*, p. 443.

if the underlying crimes had been committed by their subordinates before they obtained command over them.

The importance of successor superior responsibility was recognized during the negotiation of the Rome Statute. Unfortunately, the issue of superior responsibility originating before that superior took up their post could not be considered because of time constraints.[617]

One of the documents for determining successor superior responsibility is the AP I of the Geneva Conventions. Article 86 of the Protocol states that a superior is responsible for failure to act against violations that he knows his subordinate was committing or was about to commit. A different wording is provided in Article 87 of the AP I, which states that a commander has the duty to act against violations that his subordinates are going to commit or have committed. The wording in Article 86 uses progressive and future verb phrases ("was committing or was about to commit"), suggesting that the duty to act does not include actions against past violations. That interpretation would have a limiting effect on a superior's duty to only punish crimes that they know are being committed at the moment or are about to be committed.

The very first reference to successor superior responsibility can be seen in the *Kunarac* case. The TCH concluded that for the responsibility of *ad hoc* or temporary commanders, "it must be shown that, at the time when the acts charged in the Indictment were committed, the culpable subordinates were under the effective control of the accused."[618] However, the question of whether the duty to punish extends to a successor commander was explicitly raised for the first time before the ICTY in the *Hadžihasanović & Kubura* case (see Chapter 2.4). This case has a significant importance within successor superior responsibility, thus a background of the cases should be examined. Kubura became the commander of the Army of the Republic of Bosnia and Herzegovina (ABiH) — 3rd Corps, 7th Muslim Mountain Brigade — on 1 April 1993. However, the charges brought against him contained crimes that were committed by the troops prior to his assignment on 1 April 1993. Kubura was charged with command responsibility for killings, the cruel treatment of prisoners, and the destruction and plunder of property. With the exception of the cruel treatment of prisoners at the Zenica Music School, the charges concern events that started and ended before Kubura became the

[617] Roy Lee, The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Result. (Kluwer Law International, 1999), p. 204.

[618] *Kunarac* et al., ICTY, IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 399.

commander of the troops involved in those events.[619] The indictment asserted that "Kubura knew or had reason to know about these crimes" and that "after he assumed command, he was under a duty to punish the perpetrators".[620] The TCH held that, in principle, a commander could be liable under the doctrine of command responsibility for crimes committed prior to the moment that the commander assumed command.[621]

Controversially, the ACH held that there must be perfect temporal coincidence between the time when the crime that forms the basis of the charge against the accused is committed, and the existence of the superior-subordinate relationship between the accused and the perpetrator.[622] The ACH emphasised the superior-subordinate relationship existing at the time the subordinate was committing or was going to commit a crime, and this was interpreted in such a way that the crimes committed by a subordinate in the past, prior to his superior's assumption of command or office, are excluded.[623] Thus crimes which, for instance, were committed prior to a superior's assumption of superiority could not, in principle, be charged against him under the heading of superior responsibility even if he learnt about them after assuming the command and decided not to act upon them.

The majority of the ACH observed that the practice of the Tribunal has been to not rely merely on a construction of the Statute but to ascertain the state of customary law at the time the crimes were committed. The ACH found that there is no practice, nor any evidence of *opinio juris* that would sustain the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander's assumption of command

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619 Under count 1, Kubura was charged with command responsibility for, among other events, the Dusina killings in the Zenica Municipality on 26 January 1993.44 On count 4, he was charged with command responsibility in connection with cruel treatment of prisoners by his subordinates at the Zenica Music School between about 26 January 1993 to at least January 1994 (count 4 includes a period of time commencing before but continuing after Kubura became the commander). Counts 5 and 6 charge him with command responsibility in connection with wanton destruction and plunder of property allegedly committed at, among others, Dusina in January 1993.

620 *Hadžihasanović*, ICTY, T-01-47-PT, Amended Indictment, 11 January 2002, para. 58.

621 *Hadžihasanović*, ICTY, IT-01-47-PT, Decision on joint challenge to jurisdiction, 12 November 2002, para. 202.

622 *Hadžihasanović,* Decision on Interlocutory Appeal, para 37-51. "The Appeals Chamber holds that an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the said accused assumed superior over that subordinate." *Hadžihasanović,* ICTY, IT-01-47-AR72, Decision on Interlocutory Appeal, 16 July 2003, para. 51.

623 For this interpretation the Appeals Chambers used the Article 6 of the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission at its forty-eighth session. *Hadžihasanović/Kubura*, ICTY, IT-01-47-AR72, Decision on Interlocutory Appeal, 16 July 2003, para. 49.

over that subordinate.[624] Further consideration was also given to the wording of Article 86(2) of the AP I, where the ACH argues that the language of this article envisions that breaches committed before the superior assumed command over the perpetrator are not included within its scope.[625] The ACH also made reference to the *Kuntze* case. The *Kuntze* case was a case tried by the Nuremberg Military Tribunals and according to the ACH it constitutes an indication that runs contrary to the existence of a customary rule establishing command responsibility for crimes committed before a superior's assumption of command. The consideration of the ACH of the relevance of the *Kuntze* case is weak and is provided mainly in a footnote.[626] Kuntze was held responsible for the assembly of Jews in concentration camps and the killing of one large group of Jews and gypsies. The military tribunal stated: "The foregoing evidence shows the collection of Jews in concentration camps and the killing of one large group of Jews and gypsies **shortly after the defendant assumed command** [emphasis added by author]… Nowhere in the reports is it shown that [Kuntze] acted to stop such unlawful practices. It is quite evident that he acquiesced in their performance when his duty was to intervene to prevent their recurrence."[627] Based on a fact that the Military tribunal in that case recognized a responsibility for failing to prevent the crimes after a commander has assumed command, the ACH deduced that the case constitutes an indication that command responsibility can arise only for crimes committed after a superior's assumption of command.

The ACH also justified its conclusion in the wording of Article 28 of the Rome Statute, which provides that a 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. Moreover, the ACH came to the conclusion that under the Rome Statute, command responsibility "can only exist if a commander knew or should have known that his subordinates were committing crimes, or were about to do so [and] it necessarily excludes criminal liability on the basis of crimes committed by a subordinate prior to an individual's assumption of command over that subordinate".[628]

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624 *Ibid*, para. 45.

625 *Ibid*, para. 47.

626 *Ibid*, para. 50, note 65.

627 United States v.Wilhelm von List (the Hostage trial), United Nations War Crimes Commission. Law Reports of Trials of War Criminals. Vol. X, XI. London: HMSO, 1948 Vols X and XI., p. 1230.

628 *Hadžihasanović*, Decision on Interlocutory Appeal, para. 46.

Nevertheless, a decision was made by a majority of three to two votes, with strong dissenting opinions from Judges Shahabudden and Hunt. The separate and dissenting opinions of Judge Hunt and partially dissenting opinion of Judge Shahabuddeen in the *Hadžihasanović* case are well argued and illustrated.[629] Judge Hunt pointed out that successor commanders' duty to punish falls within the customary international law principle of command criminal responsibility. Judge Hunt also made an observation on the references presented by the majority to Article 86(2) of the AP I, ILC Report on the work of its forty-eighth session (6 May–26 July 1996), Article 6 of the Draft Code of Crimes against the Peace and Security of Mankind and the *Kuntze* case.[630] According to Judge Hunt, these documents do not suggest that a superior does not have any criminal responsibility for failing to punish a subordinate for acts committed before the assumption of a command. The responsibility thus arises if the superior knows or has reason to know only that the acts had already been committed.[631] Judge Hunt correctly found that the Military tribunal in the *Kuntze* case did not make any reference to responsibility for crimes committed prior to the accused's assumption of command. The "indication" perceived by the majority of the ACH rests solely upon the absence in it of any reference. Such a line of reasoning would be valid only if Kuntze had been charged with responsibility arising from crimes committed before he assumed command. Nevertheless, this was not the case and even then mere silence would certainly be an uncertain foundation for such findings.[632]

In general, a superior has a duty to prevent the commission of crimes by their subordinates and to punish crimes that have already been committed. However, as the dissenting judges noted, the duty to prevent and the duty to punish are two separate duties, applicable at different times.[633] As a result, the duty to prevent can apply only to a superior

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[629] See also FOX, Carol. T. Fox. 'Closing a Loophole in Accountability for War Crimes: Successor Commanders Duty to Punish Known Past Offenses.' (2004) 55(2) *Western Reserve Law Review*, p. 489.

[630] *Hadžihasanović,* ICTY, IT-01-47-AR72, Opinion of Judge Hunt *(*Decision on Interlocutory Appeal), 16 July 2003, paras. 12-19.

[631] United States v.Wilhelm von List (the Hostage trial), United Nations War Crimes Commission. Law Reports of Trials of War Criminals. Vol. X, XI. London: HMSO, 1948 Vols X and XI., p. 1276-1277.

[632] *Hadžihasanović,* ICTY, IT-01-47-AR72, Opinion of Judge Hunt *(*Decision on Interlocutory Appeal), 16 July 2003, paras. 17-19.

[633] *Hadžihasanović,* ICTY, IT-01-47-AR72, Partially Dissenting Opinion of Judge Shahabuddeen *(*Decision on Interlocutory Appeal), 16 July 2003, para 14. *Hadžihasanović,* ICTY, IT-01-47-AR72, Opinion of Judge Hunt *(*Decision on Interlocutory Appeal), 16 July 2003, para. 23.

who was already in a superior position during the time that their subordinates were about to commit the crime. On the other hand, the duty to punish can be applicable only after the crime had been committed. The conclusion reached by the majority melds the duty to prevent and the duty to punish into the one duty.[634] According to Judge Hunt, this does not correspond with jurisprudence in which the duty to prevent was treated as separate from the duty to punish. That jurisprudence proceeds upon the basis that if the superior had reason to know in time to prevent, they committed an offence by failing to take steps to prevent, and they cannot make good by subsequently punishing their subordinates who committed the offences.[635] According Judge Hunt, a situation where a superior who (after assuming the superior position) knows or has reason to know that a person who has become his subordinate had committed a crime before he became that person's superior falls reasonably within that superior responsibility principle.[636] The reason for this is that the criminal responsibility of the superior is not regarded as a direct responsibility but a responsibility for the superior's omissions in failing to prevent or to punish the subordinate when he knew or had reason to know that he was about to commit acts amounting to a war crime or had already done so.[637]

Judge Shahabuddeen concluded that the denial of a successor commanders' duty to punish is "at odds with the idea of responsible command on which the principle of command responsibility rests".[638] Judge Shahabuddeen argued that the *Kuntze* judgement cannot be safely relied on as providing authority for command responsibility before he assumed his command, as the judgement suggests a certain fluidity in referring to the command responsibility doctrine (as opposed to direct responsibility).[639]

The superior responsibility doctrine, as set out in different texts may be subjected to any necessary interpretation by reference to the object and purpose of the provisions which

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para 23. The Trial Chamber in *Nuon Chea and Khieu Samphan* also viewed duty to prevent and duty to punish as separate duties, relating to different time period when effective control is required. *Case 02/002*, ECCC, 002/19-09-2007, TCH judgment, 16 November 2018, paras. 1017-1018.

634 *Hadžihasanović,* ICTY, IT-01-47-AR72, Opinion of Judge Hunt *(*Decision on Interlocutory Appeal), 16 July 2003, para. 23.

635 *Hadžihasanović,* ICTY, IT-01-47-AR72, Opinion of Judge Hunt *(*Decision on Interlocutory Appeal), 16 July 2003, para 23; *Blaškić,* para 336; *Kordić/Čerkez*, paras. 444-446.

636 *Hadžihasanović,* ICTY, IT-01-47-AR72, Opinion of Judge Hunt *(*Decision on Interlocutory Appeal), 16 July 2003, para. 8.

637 *Ibid*, para. 9.

638 *Hadžihasanović,* ICTY, IT-01-47-AR72, Partially Dissenting Opinion of Judge Shahabuddeen (Decision on Interlocutory Appeal), 16 July 2003, para. 14.

639 *Ibid*, paras. 3-7.

establish the doctrine.[640] According to Judge Shahabuddeen, the object and purpose of the doctrine includes the avoidance of future crimes by the subordinates of a new commander arising from the appearance of encouragement.[641] Judge Shahabuddeen added that the majority approach to this issue would create a serious gap in the system of protection if superior responsibility were to be applied only to the person who was in command at the time at which the offence was committed.[642]

There has been a debate as to whether there is evidence to support the assertion of the dissenting judges in the *Hadžihasanović* ACH case that customary international law does provide for a successor commander's duty to punish violations committed by his subordinates under a predecessor commander.[643] In the *Hadžihasanović* case, the ACH concluded, in reaction to the dissenting opinions of Judges Shahabuddeen and Hunt, that the "imposition of criminal liability must rest on a positive and solid foundation of a customary law principle. It falls to the distinguished dissenting Judges to show that such a foundation exists; it does not fall to the Appeals Chamber to demonstrate that it does not."[644]

In the *Orić* case, the TCH dissented to the *Hadžihasanović* appeals decision. The Trial Chamber itself was explicitly of the opinion that "for a superior's duty to punish, it should be immaterial whether he or she had assumed control over the relevant subordinates prior to their committing the crime".[645] The duty to prevent, on the opposite hand, calls for action by the superior prior to the commission of the crime, and thus "presupposes his power to control the conduct of his subordinates".[646] The TCH concluded that a superior certainly must have effective control at the time when measures of investigation and punishment were to be taken against them. Such a link, however, appears less essential if necessary at all with regard to the time at which the crime was committed. Nevertheless, the TCH had to follow the different interpretation which was taken by the ACH in the *Hadžihasanović* decision.[647]

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640 *Ibid*, paras. 11-12.

641 *Ibid*, para. 15.

642 *Ibid*, para. 23-24.

643 Carol. T. Fox. 'Closing a Loophole in Accountability for War Crimes: Successor Commanders Duty to Punish Known Past Offenses.' (2004) 55(2) *Western Reserve Law Review*, p. 465-491.

644 *Hadžihasanović/Kubura,* ICTY, IT-01-47-AR72, Decision on Interlocutory Appeal, 16 July 200, para 53.

645 *Orić,* ICTY, IT-03-68-T, TCH judgment, 30 June 2006, para. 335.

646 *Ibid.*

647 On binding effect of ACH decisions, see analysis of the ACH's conclusion in the *Aleksovski* case. *Aleksovski*, ICTY, IT-95-14/1, ACH judgment, 24 March 2000.

The TCH in the *Orić* case was explicitly of the view that "for a superior's duty to punish, it should be immaterial whether he or she had assumed control over the relevant subordinates prior to their committing the crime." However, considering that the ACH had taken a different approach in the *Hadžihasanović* Appeal Decision on Jurisdiction, the TCH found "itself bound to require that with regard to the duty to punish, 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." Subsequently, the ACH in the *Orić* case concluded that the *ratio decidendi* of its decisions is binding on trial chambers, and the TCH in the *Orić* case was therefore correct in following the precedent established in the *Hadžihasanović* appeals decision, even though it disagreed with it.[648] The ACH concluded that the superior-subordinate relation was not established prior to the time Orić assumed effective control, thus the Prosecution's challenge to the *ratio decidendi* of the *Hadžihasanović* appeals decision was without subject.[649]

In the *Orić* case, the ACH—with Judge Liu and Judge Schomburg's dissenting opinions—declined to address the *ratio decidendi* of the *Hadžihasanović* appeals decision. Judge Shahabuddeen appended a declaration to reiterate his disagreement with the *Hadžihasanović* appeals decision. By restating his previous (dissenting) position in the *Hadžihasanović* case, he expressed the view that a superior can be criminally liable for crimes committed by subordinates before he assumed command. He went as far as to discredit the *Hadžihasanović* findings by claiming that "there is a new majority of appellate thought"[650] and examined the possibility of reversing *Hadžihasanović* in accordance with the new majority. However, Judge Shahabuddeen came to the conclusion that since he was one of the two dissenting judges in the earlier case and the other has since demitted his office in the ICTY, a reversal should await such time when a more solid majority would share the views of

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[648] *Orić*, ICTY, IT-03-68-A, ACH Judgment, 3 July 2008, para. 164.

[649] *Ibid*, paras. 161-168.

[650] *Orić*, ICTY, IT-03-68-A, Declaration of Judge Shahabuddeen (ACH Judgment), 3 July 2008, para 3. See also In *Sesay et al.* case, in which the TCH stated that: "A 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 and punish. While in practice the superior will also often have effective control at the time that the subordinates commits or is about to commit a criminal act, this in itself is not required". Thus, according to the SCSL a commander can be held liable for a failure to punish subordinates for a crime that has occurred before he assumed effective control. *Sesay et al*., SCSL, SCSL-04-15-A, TCH, 26 October 2009, paras. 299-306.

those two judges.[651] Meanwhile, the findings of the ACH in the *Hadžihasanović* case continue to stand as part of the law of the Tribunal.

The reference to successor superior responsibility in relation to genocide can be found in the *Ndindiliyimana et al.* case. The TCH did not find Bizimungu guilty for crimes committed before he assumed command even though it was proven that he knew about them. The TCH cited the ACH's decision in the *Hadzihasanović* case must be a temporal coincidence between a superior's exercise of effective control, or lack thereof, and the time when the crimes in relation to which he is charged were committed.[652] However, the TCH expresses its disagreement with the findings made in the *Hadzihasanović* case

Successor superior responsibility was also defined by the ICC in the *Bemba* case. The PTCH established that there must be a temporal coincidence between the superior's detention of effective control and the criminal conduct of his or her subordinates. The judges acknowledged the existence of a minority opinion in the case law of the *ad hoc* tribunals, according to which it is sufficient that the superior had effective control over the perpetrators at the time at which the superior was said to have failed to exercise his or her powers to prevent or punish—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 required instead. However, the PTCH rejected this view on the basis of the language used by Article 28 of the Statute.[653] The Chamber argued on a provision that a subordinate's crime be committed as a result of his or her failure to exercise control properly, thus requiring that the superior had effective control at least when the crime was about to be committed.[654] In the Bemba case, the TCH did not elaborate on successor superior responsibility and only briefly analysed the respectively mentioned causality requirement.

5.3 CONCLUDING REMARKS

A superior is held responsible when they fail to take all necessary and reasonable measures to prevent or punish the crimes about to be committed or already committed by their subordinates. Article 28 of the Rome Statute explicitly says that a superior is responsible if he

[651] *Orić*, ICTY, IT-03-68-A, Declaration of Judge Shahabuddeen (ACH Judgment), 3 July 2008, para 8-15.
[652] *Ndindiliyimana* et al, ICTR, ICTR-00-56-T, 17 May 2011, paras. 1960.
[653] *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, paras. 418-419.
[654] *Ibid*, para. 419.

fails to take ‘all’ measures. However, does that mean that a superior is required/obliged to take all measures in his disposal even if he knows that the measures won’t have any effect? The ACH in the *Krstić* case mentioned the effectiveness of potential measures in the assessment of a superior’s failure to take measures in order to prevent or punish crimes committed by the subordinates. It seems that the ACH would not require such a measure that would be deemed ineffective in the context. A discussion on the adequateness of measures taken by a commander was brought by the Bemba case. Contrary to the suggestion of the TCH, the author argues that the superior therefore must have prevented or at least taken measures which appear to be in principle adequate to achieve such a result but is not obliged to take measures that are going to be clearly ineffective.

Superior responsibility encompasses two obligations: a duty to prevent the commission of crimes by superiors and a duty to punish subordinates for such crimes when they occur. This has not been principally challenged by the new wording in Article 28 of the Rome Statute. The duty to prevent and the duty to punish are two separate duties, applicable at different times. As a result, the duty to prevent the commission of crimes applies only to superiors who were already in a position of superiority at the time when their subordinates were about to commit the crime. On the other hand, the duty to punish can be applicable only after the crime had been committed. It’s the author’s view that the duty to punish should apply even to crimes that were committed before the assumption of command over subordinates who committed the crimes. The author agrees with the majority case law that there must be a temporal coincidence; however, the temporal coincidence should be between the time the superior had effective control over the perpetrator and the time at which the superior is said to have failed to punish, and not the time at which the crimes were committed.

CONCLUSION

The main purpose of this study has been to analyse the applicability of superior responsibility to the crime of genocide. Its main focus was given to the *mens rea* of a superior in relation to the crime of genocide committed by subordinates in order to determine whether a superior must have had genocidal intent.

It is clear that superior responsibility is based on a superior's failure to prevent or punish the crimes of the subordinates. It is the doctrine's unique nature that makes superior responsibility favoured by the Prosecution, at minimum, as the alternative responsibility of the direct commission. The value of this study is in its complexity, analysing the applicability of superior responsibility to genocide from the bottom up – starting with legal provisions in the founding documents, notably the Rome Statute, the basic principles of criminal law to the object and purpose of superior responsibility and the establishment of genocide – analysing the nature of superior responsibility and looking at the special genocidal intent and practise of the *ad hoc* Tribunals when it comes to applying superior responsibility to the crime of genocide. Lastly, the author discussed whether the applicability of aiding and abetting genocide may shed light on the applicability of superior responsibility to genocide.

In the analysis of basic criminal law principles, attention was given to the principle *in dubio pro reo*. This principle would essentially mean that a superior could be held responsible in relation to genocide committed by their subordinates only if his special intent is proven, as this situation would be the most favourable to the superior. However, the principle would be applied only if conventional methods of interpretation the applicability of superior responsibility to genocide fail. Due to this finding, the study continued with the analysis of the nature of superior responsibility and elements of superior responsibility and elements of genocide, mainly the *mens rea* requirement. The author suggests that the key issue in the question of treating special intent crimes within superior responsibility seems to be the nature of superior responsibility itself. The early ICTY case law treated superior responsibility as an imputed liability, holding superiors criminally responsible for the unlawful conduct of their subordinates. This approach was abandoned by the *Halilović* case, as it was correctly stated that superior responsibility is arises for the omission to prevent or punish crimes committed by subordinates. The language used in Article 28 of the Rome Statute seems quite ambiguous. However, in the *Bemba* case the TCH came to the conclusion that superior responsibility is a mode of liability through which superiors may be held criminally responsible for the crimes

committed by their subordinates. The author suggestion is to further treat superior responsibility as a *sui generis* responsibility for omission with respect to the subordinates' crimes, which would not require special intent on the part of the superior, but knowledge by the superior about the subordinates' intentions, i.e. special intent in relation to special intent crimes.

Furthermore, the author does not agree that in pursuing this scenario, there would be too little connection between the conduct of the superior and the conduct of subordinates if the relationship would be limited to the superior's knowledge of their subordinates' intentions. This connection should be safeguarded by the requirement of causality: causality between the conduct of the superior and the crimes committed by the subordinates. Causality should be required between the failure of the accused and the commission of crimes by subordinates (with regard to the duty to prevent the crimes), and between superior's failure and the resulting impunity of the perpetrators (in regards to superior's duty to punish the crimes). Although the existence of a causality requirement has not found support in the case law of the *ad hoc* tribunals, the wording of the Rome Statute and the *Bemb*a case strongly support the existence of such a requirement in relation to superior responsibility.

Looking at the applicability of superior responsibility to genocide at the ICC, there is currently no case providing an example. Contrary, there is a plenty of cases at the ICTR and the ICTY using superior responsibility in relation to genocide. The case law of these *ad hoc* tribunals is in no sense binding on the Chambers at the ICC. The case law of *ad hoc* tribunals could be used as an additional source of law whether the Statute, Elements of Crimes and the Rules of the ICC are not definitive on the issue and all means of interpretation fail.

The ICTR and ICTY case law contains multiple convictions of a superior based on Article 6(3)/Article 7(3) of the Statute on the crime of genocide. The early case law suggests (*Akayesu* case) or openly advocates (S*takić* case) a special intent on the part of the superior is required in order to be held responsible under the superior responsibility doctrine. However, those findings were disputed by the following cases where the superior's special intent was not regarded as a legal requirement for superior responsibility. It can be argued that in case law development, the ACH in the *Brđanin* case put forward a precedent that has been followed ever since. In 2018, the TCH in the Case 002/02 (ECCC) also held that a superior need not possess specific intent. However, it has never been properly explained and analysed why the superior need not possess specific intent. This is clearly not a rhetorical question given the ambiguous findings of the *ad hoc* Tribunals. The author agrees with the recent case

law that does not require a special intent on the part of a superior if they are being held responsible under the superior responsibility doctrine. However, this conclusion deserves more deep analysis and explanation than just a referral to the distinction that must be made between *mens rea* for the crime of genocide and the mental requirement of the mode of liability. This argument is correct, however, the author believes that this needs to be looked at more closely. A distinction between murder as a war crime/crimes against humanity (or any other crime that could serve the comparison) and genocide in relation to superior responsibility would lie in the knowledge of a superior about the genocidal intent of the subordinates committing the crime. When the subordinate is unaware about the special intent, they could not be held responsible under superior responsibility in respect to the crime of genocide.

The main research question of this study was as follows: 'whether the superior must themselves have had the necessary genocidal intent, or if they must merely have known that their subordinates possessed genocidal intent.' Special intent to commit genocide does not automatically mean that *dolus directus* is the only applicable type of intent in relation to the crime of genocide. It is nevertheless, the least problematic type of intent. The *dolus directus of* the first degree is an applicable type of intent for proving superior responsibility in relation to the crime of genocide because the superior directly shares the genocidal intent of the principal perpetrator – his or her subordinates. The *dolus directus* of the second degree comes when a superior did not primarily desire that genocide be committed but accepted it as secondary consequences of the subordinates' actions. This type of intent can be accepted in relation to superior responsibility, as the superior has the genocidal intent and the intent is proved through a knowledge-based approach. The *dolus eventualis* and negligence presents the troubled part of the superior responsibility application. In the author's view, even *dolus eventualis* is applicable for superior responsibility in relation to genocide. It is a situation when the superior foresees the act of genocide as a possibility but does not per se desire it. However, even this situation must meet elements of superior responsibility – it has to be proven that a superior knew or should have known (had reason to know) about the crime itself – i.e. the commission of genocide. Looking at the negligence standard, it is clearly not applicable for a civilian superior due to the different *mens rea* requirement in the Rome Statute. It can be applied to a military commander or person effectively acting as a military commander, but with a distinction in the sentencing as the superior does not share the genocidal intent of the subordinates.

Even though *mens rea* is the most controversial aspect of superior responsibility in relation to genocide, several other issues had risen in the practise. Discussing the superior-subordinate relation, the identification of subordinates has played a significant role in *ad hoc* tribunal cases. The ICTR and the ICTY has held that it is not necessary to identify the subordinates who committed the crime by their names. The affiliation to the group committing the crime is enough. This ad hoc tribunals' findings were repeated by the ICC in the *Bemba* case. This enables to pursue prosecution under superior responsibility standard in situations where the identification of individual perpetrators of the crime is evidentiary almost impossible. Evidentiary difficulties may arguably also arise when a superior is not present at the place where crimes are committed. Even though his presence is not viewed as a legal requirement, superior's remoteness played significant role in the *Bemba* case. Traditionally, effective control is not a question whether a superior had authority over a certain geographical area, but whether he or she had effective control over the individuals who allegedly committed the crimes. This did not stop the ACH in the *Bemba* case to present some arguably controversial finding that remoteness of the commander requires intensified effective control over superiors. The author argues that there should be no distinction between remote and non-remote superior in relation to the assessment of measures taken and as such a remote commander cannot be bound to provide less measures based purely on their actual location. As such the remoteness itself should not be interpreted in any way as creating *per se* demand for higher or intensive effective control over the troops.

Modes of liabilities under international criminal law is on-going evolving body. The individual elements and their applicability to the international crimes, including genocide, are being gradually analyzed and assess by various international bodies but also domestic courts. With new cases of international crimes being persuaded under principle of universal jurisdiction, developments will keep progressing. The *Bemba* case is arguably the most important development in the body of superior responsibility in the last few years, but it has left some issues unsolved. The author argues that for applicability of superior responsibility in a relation to genocide, or any other special intent crime, the key point is the nature of superior responsibility. As such, potential gaps and discrepancies in the applicability of superior responsibility to genocide should be filled with this bearing in mind.

ABSTRACT

This study provides analyses of the applicability of superior responsibility to the crime of genocide, with a focus on the *mens rea* of a superior. Superior responsibility is based on a superior's failure to prevent or punish the crimes of the subordinates. In applying superior responsibility to the crime of genocide, it is debated whether the superior must themselves have had the necessary genocidal intent, or if they must merely have known that their subordinates possessed genocidal intent. This study offers a complex analysis of superior responsibility in relation to genocide. The author discusses the legal provisions of the Rome Statute, the basic principles of criminal law (including in *dubio pro reo* principle). Nature of superior responsibility is analysed, including a discussion on the causality requirement. The practise of the *ad hoc* tribunals towards applicability of superior responsibility to the crime of genocide is provided, with references to selected elements of the interaction between superior responsibility and genocide.

SHRNUTÍ

Tato disertační práce poskytuje komplexní analýzu použitelnosti odpovědnosti nadřízeného vůči zločinu genocidy se zaměřením na požadavek *mens rea* nadřízeného. Odpovědnost je založena na omisivním jednání nadřízeného ve formě Nezabránění nebo nepotrestání zločinů spáchaných podřízenými. Při uplatňování odpovědnosti nadřízeného vůči zločinu genocidy je diskutováno, zda nadřízený sám Musel jednat se zvláštním úmyslem (genocidní cílem), nebo zda jen musí vědět, že jeho podřízení mají tento speciální úmysl. Tato studie nabízí komplexní analýzu odpovědnosti nadřízeného ve vztahu ke genocidě. Autorka rozebírá právní ustanovení Římského statutu, základní principy trestního práva (včetně principu *in dubio pro reo*), analyzuje samostatnou povahu odpovědnosti nadřízeného, včetně diskuse o požadavku na Příčinnou souvislost. Autorka představuje praxi *ad hoc* tribunálů aplikujících odpovědnost nadřízeného vůči genocidě.

KEYWORDS

Superior responsibility, command responsibility, genocide, special intent crime, Rome Statute, modes of liability

KLÍČOVÁ SLOVA

Odpovědnost nadřízeného, odpovědnost velitele, genocida, zločiny vyžadující kvalifikovaný úmysl, Římský statut, druh odpovědnosti

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