PALACKÝ UNIVESITY OLOMOUC

Univerzita Palackého v Olomouci

LAW FACULTY

Právnická fakulta

Doctrine of Superior Responsibility with Particular Focus on Causality Requirement

Michala Chadimova

Diploma thesis

Diplomová práce

Olomouc

2016

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.

Prohlašuji, že jsem diplomovou práci na téma *Doctrine of Superior Responsibility with Particular Focus on Causality Requirement* vypracovala samostatně a citovala všechny použité zdroje.

In Phnom Penh, 7. 6. 2016

Michala Chadimova

Acknowledgment

I would like to sincerely thank to the supervisor of my master thesis, JUDr. Ondřej Svaček, Ph.D., LL.M., for his invaluable approach and professional guidance during creation of this thesis.

Poděkování

Na tomto místě bych ráda poděkovala vedoucímu diplomové práce, JUDr. Ondřeji Svačkovi, Ph.D., LL.M., za jeho neocenitelný přístup a jeho odborné vedení mé diplomové práce.

Who knows the crime, and is able and bound to prevent it but fails to do so, himself commits a crime.

Hugo Grotius[1]

[1] H. Grotius, de jure Belli ac Pacis 1615; cited in SLIEDREGT, Elies. *Individual criminal responsibility in international criminal law*, p. 184.

Table of contents

Introduction 6

1. Historical development of the superior responsibility 9

1. 1 Early developments 9

1. 2 Tokyo Trials 13

1. 3 Nuremberg Trials 18

1. 4 Superior responsibility after World War II (The Mai Lai Massacre) 21

2. Statutory development of superior responsibility 23

2. 1 ICTY 24

2. 2 ICTR 26

2. 3 ECCC 27

2. 4 STL 28

2. 5 ICC 29

3. Elements of superior responsibility – ICTY and ICTR 32

3. 1 Superior-subordinate relationship 32

3. 1. 1 Effective control 34

3. 2 *Mens Rea* 36

3. 2. 1 Actual knowledge 36

3. 2. 2 „Had reason to know" 37

3. 3 Culpable omission (*Actus reus*) 39

3. 3. 1 Necessary and reasonable measures 40

3. 3. 2 Failure to prevent 40

3. 3. 3 Failure to punish 41

4. Element of superior responsibility - ICC 42

4. 1 Superior-subordinate relationship 42

4. 1. 2 Effective control 43

4. 2 *Mens rea* 45

4. 2. 1 Actual knowledge 46

4. 2. 2 "Should have known" 46

4. 2. 3 Consciously disregarded information 48

4. 3 Culpable omission 48

4. 3. 1 Necessary and reasonable measures 49
4. 3. 2 Failure to prevent 49
4. 3. 3 Failure to repress 50
5. Requirement of causality for superior responsibility 51
5. 1 The question of causality 51
5. 2 ICTY jurisprudence on a causality requirement 52
5. 3 ICC approach 54
5. 4 Problem of successor superior 56
Conclusion 62
Abstract 64
Keywords 64
Shrnutí 65
Klíčová slova 65
Index of authorities 66
International Documents 71
Jurisprudence 72

Introduction

This study is devoted to the superior responsibility doctrine under international criminal law with a focus on elements of superior responsibility and a development of causality requirement in the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC). Superior responsibility is a doctrine of international criminal law addressing the culpability of superiors who fail to prevent or punish the commission of international crimes by subordinates under their command. This doctrine is remarkable in several aspects, but mainly in criminalizing omission opposed ordinary criminal acts involving affirmative commission.[2]

First chapter of this study is going to deal with historical development of the doctrine, with main focus on the Nuremberg Trials and the Tokyo Trials. The historical development of the doctrine is very broad and it is not intention of this study to deal with detailed development, nevertheless the author considered important to encompass it in order to better understand a concept of the doctrine. Second chapter is dealing with a statutory development of superior responsibility in the Statutes of the ICTY, ICTR, Extraordinary Chambers in the Courts of Cambodia (ECCC) and Special Tribunal for Lebanon (STL) and its primarily case law on a command responsibility.[3] Following chapters are the core of this study. The third and fourth chapter elaborates elements of superior responsibility in two lines – elements before the ICTY and elements before the ICC – based on an interpretation and wording of the Statutes but mostly on a case law of the ICTY and ICC. The elements of superior responsibility are not the same under these Statutes. Getting to know the elements of superior responsibility will enable to deal with the last chapter of this study - a development of causality requirement under the superior responsibility doctrine. Extensive debate sparked in

[2] Command responsibility includes two different concepts of criminal responsibility. The first concept is direct responsibility (the commander is held liable for ordering unlawful acts) whereas the second concept is imputed criminal responsibility. In this study the author is devoting command responsibility to the second concept.
The clear distinction provided *Celabici* judgment: „The distinct legal character of the two types of superior responsibility must be noted. While the criminal liability of a superior for positive acts follows from general principles of accomplice liability, as set out in the discussion of Article 7(1) above, the criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act. As is most clearly evidenced in the case of military commanders by article 87 of Additional Protocol I, international law imposes an affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility under Article 7(3) of the Statute.“ *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Judgment *(Celabici TJ)*, 16 November 1998, para 34.

[3] Special attention is going to be pay to the ICTY case law and distinction to generation of the case law which enables better understanding of a relation between each judgments.

last decade about whether a causal element is generally required for superior responsibility from failure to punish. The author will introduce different approaches taken by the ICTY and ICC, especially with reflex of the latest ICC judgment.

Significant amount of judgments have been rendered by international judicial organs in cases involving the superior responsibility doctrine. Nevertheless, a systematic reading of the case law reveals some inconsistencies in the application of the doctrine, especially in a case law of the ICTY.[4] Dealing with jurisprudence of the ICC on command responsibility issue, the *Bemba* judgment is mainly employed as this is the very first judgment on this matter.[5]

The terms "superior" and "command" have sometimes been used interchangeably as labels for a form of responsibility in international criminal law, but have also been 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.[6] Superior responsibility at the *ad hoc* Tribunals, as well as before the ECCC is understood as *de facto* superior responsibility and civilian superior responsibility and the jurisprudence of the tribunals has applied the superior status to those in the military including paramilitary organizations as well as civilian organizations,[7] whereas Article 28 of the Rome

[4] E. g. inconstancy in ICTY jurisprudence on a successor superior or causality requirement.
Inconstancy is not only a problem of the ICTY jurisprudence but also the ICTR. Schabas, in his book on genocide, claims that "[the ICTR's] decisions on superior responsibility in genocide indicate a profound judicial malaise with the entire concept.
SCHABAS, William. *Genocide in International Law: The Crimes of Crimes*, (Cambridge: Cambridge University Press, 2000), p. 309.

[5] *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-334, Trial Judgment *(Bemba TJ)*, 21 March 2016

[6] AMBOS, Kai. Superior Responsibility. In CASSESE, Antonio et al., *The Rome Statute of the International Criminal Court: A Commentary*, Volume 1, (Oxford: Oxford University Press, 2002), p. 144. (AMBOS, *Superior Responsibility*)
The reference to "superiors" is sufficiently broad to cover military superiors or other civilian authorities who are in a similar position of superior and exercise a similar degree of control with respect to their subordinates. This approach was supported by multiple decisions - by the ICTR in *Akayesu* case or *Museama* Case.
WILSON, Tamfuh Y. N.. *Procedural Developments at the International Criminal Tribunal for Rwanda*, The Law & Practice of International Courts and Tribunals, Volume 10, Issue 2, 2011, p. 364.
Contrary Cryer who claims that these terms are synonyms: "the terms command and superior are functionally synonyms, although the former is sometimes taken as limited to military personnel. It need not be."
CRYER, Robert et all., *An Introduction to International Criminal Law and Procedure*, (Cambridge: Cambridge University Press, 2014), p. 455.

[7] Case Matrix Network. *International Criminal Law Guidelines: Command Responsibility*, January 2016. Available at:

Statute distinguish between the liability of military superiors and other superiors. Unless otherwise specified, the author employs the term superior responsibility to denote responsibility attaching to all superiors.

In order to provide a succinct overview of the elements of command responsibility, the research method is largely comparative. A large amount of the ICTY and ICC judgments, articles and books of leading academics has been collected and assessed. Selectivity has been necessary in order to maintain a succinct, rather than exhaustive collection.

<https://www.casematrixnetwork.org/fileadmin/documents/reports/CMN_ICL_Guidelines_Command_Responsibility_En.pdf>, 1. 2. 2016.

1. Historical development of the superior responsibility

1. 1 Early developments

The doctrine of superior responsibility has been developing since ancient times.[8] Although early codification of rules governing armed conflicts was seen in the 19th century, probably the first superior responsibility reference can be traced back to the time of Sun-Tzu in 500BC.[9] Sun-Tzu stressed upon the duty of the superior to control his subordinates but it is not known whether it was intended to implicate this as a legal basis for a case of superior' s failure to control his or her subordinates.[10] An early document dealing with the superior responsibility doctrine in Europe is the Ordinance issued by Charles VII in 1439.[11] This French Law actually, probably for the first in history, deals with the consequences of the superior responsibility.[12] 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.*"[13] The Ordinance legally confirmed that superiors should be held responsible for the subordinates' acts. [14] Another milestone for the doctrine of superior responsibility is the 17th century. Hugo Grotius formulated a view of superior responsibility as follows "*the State or the Superior Powers are accountable for the crime of a*

---

[8] BASSIOUNI, Cherif. MANIKAS, Peter. *The Law of the International Criminal Tribunal for the Former Yugoslavia*, (New York: Transnational Publishers, 1996) p. 350 − 351.

[9] PARKS, Hays. *Command Responsibility For War Crimes*, Military Law Review, Volume 62, Issue 1, 1973, p. 1 - 20. (PARKS, *Command Responsibility*)

[10] Sun Tzu, The art of War 9 - L. Giles trans. 1944 cited in: CHNG, Ann B. *Evolution of the Command Responsibility Doctrine in Light of the Celabici Decision of the ICTY*. North Carolina Journal of International Law and Commercial Regulation, Vol. 25/1, 1999, p. 176. Also PARKS, *Command Responsibility* …, p. 1 - 20.

11 MARKHAM, Max. *The Evolution of Command Responsibility in International Humanitarian*, Penn State Journal of International Affairs, Stanford University, Fall 2011, p. 51. Available at: <https://psujia.files.wordpress.com/2012/04/the-evolution-of-command-responsibility-in-international-humanitarian-law.pdf>, 4. 11. 2015.

[12] PARKS W. Hays. *Command Responsibility For War Crimes*, Military Law Review, Volume 62, Issue 1, 1973, p. 3 – 5. (PARKS, *Command responsibility*)

13 GREEN, Leslie. *Superior Responsibility in International Humanitarian Law*, Transnational and contemporary problems, Volume 5, 1995, p. 321. (GREEN, *Superior Responsibility*)

14 LEVINE, James D. The Doctrine of Superior Responsibility and Its Application to Superior Civilian Leadership: Does the International Criminal Court has the Correct Standard? Military Law Review, Volume 193, Issue 3, 2007, p. 55.

subject, if they know of it and do not prevent it when they could and should prevent it"[15] although it is not sure what Grotius meant by "the State or the Superior Powers". Nevertheless, with high probability, it does not refer individual responsibility.[16] Grotius also declared that '*a community, or its rulers, may be held responsible for the crime of a subject if they knew it do not prevent it when they could and should prevent it*' but his statement seems to have been at the level of national responsibility rather than liability of military superiors.[17] The first international attempt to hold a superior officer liable for his acts committed during conflict was toward Napoleon.[18]

The mentions about superior responsibility before the First World War on a national level are various. Among others, the mention could be also traced in the Articles of War issued by Gustavo's Adolphus of Sweden in 1621,[19] in the Massachusetts Articles of War,[20] or in the American Articles of War.[21]

First international codification on the liability of higher authority for breaching humanitarian international law can be found in the IV Hague Convention negotiated at international peace conferences at The Hague in the Netherlands.[22] Article 3 states that: *"belligerent party which violates the provisions of the said Regulations, shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.*"[23] This Article seems to have dealt with state responsibility rather than individual responsibility for using wording "belligerent party".[24]

---

[15] GROTIUS Hugo. The Law of war and peace, book 2, chapter 21, sec. 2 (Francis W. Kelsey trans., Carnegie Endowment ed. 1925).

[16] PARKS, *Command responsibility*, p. 4.

[17] GREEN, Superior Responsibility p. 4

BISCHOFF, L. J., BOAS, G., REID, N. L. *Forms of responsibility in international criminal law*, (Cambridge: Cambridge University Press, 2007), p. 145. (BOAS, *Forms of responsibility*)

[18] BURNETT, Weston D.. *Superior Responsibility and a Case Study of the Criminal Responsibility of Israeli Military superiors for the Pogrom at Shatila and Sabra*. Military Law Review, Volume 107, 1985, p. 79.

[19] "No Colonell or Captain shall superior his soldiers to do any unlawful thing; which who so does, shall be punished according to the discretion of the Judges."

GREEN, *Superior Responsibility*, p. 321.

[20] "Every Officer superioring… shall keep good order, and to the utmost of his power, redress all such abuses or disorder which may be committed by any Officer or a Soldier under his superior; if upon complaint made to him…the said superior, who shall refuse or admit to see Justice done this offender, or offenders, and reparations made to the party or parties injured, as soon as the ordered by General Court-Martial, in such manner as if he himself had committed the crimes or disorders complained of. GREEN, *Superior Responsibility*, p. 321. Articles of War, Provisional Congress of Massachusetts Bay, April 5, 1775.

[21] GREEN, *Superior Responsibility*, p. 321.

[22] PARKS, *Command responsibility*, p. 10 – 11.

[23] Laws and customs of War on Land, 18 October, 1907, Article 3 (Hague IV)

[24] KELSEN, Hans. *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, Volume 31, Issue 5, 1943, p. 553

However, it is has to be noted that 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 'to be superior by a person responsible for his subordinates".*[25] The article mentions the duty of superiors on the premise that a superior has to take responsibility for the conducts of his subordinates. However this pro vision does not specify an extent of superior responsibility. Article 43 of the Annex to the IV Hague Convention requires that the superior of a force occupying enemy territory, "*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*."[26] The principle stated in this Article may be considered to have been evidence of customary international law on duties and responsibilities of superiors.[27] In addition to that, Article 54 of the 1916 Articles of War focused on the responsibility of superior and provided that a superior had a duty of insuring "*to the utmost of his power, redress of all abuses and disorders which may be committed by an officer or soldier under his superior*".[28]

At the conclusion of World War I, an international "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 Versailles Treaty demanded the trial of persons accused of violating the laws of war by international military tribunals.[29]

---

[25] 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)

[26] Hague IV, Article 43.

[27] ABEYRATNE, Reha. T*he Application of Superior Responsibility to Civilian Leaders*, 1975 – 79. Harvard Law School, 2010, p. 13 – 14.

Oxford Reports on International Criminal Law, (Hostage Case, United States v List (Wilhelm) and ors, Trial Judgment, Case No 7, (1948) 8 LRTWC 34, (1948) 7 LRTWC 444, (1948) 11 LRTWC 1230, (1948) 11 TWC 757, (1948) 15 ILR 632, ICL 491 (US 1948), 19th February 1948, Nuremberg Military Tribunal [NMT])
http://opil.ouplaw.com/view/10.1093/law:icl/491us48.case.1/law-icl-491us48, 10. 1. 2016

28 Revision of The Articles of War 1912-1920, Articles of War 1916, Article 54.

[29] Article 227 -228 of Treaty of Peace With Germany (Treaty Of Versailles), Treaty and protocol signed at Versailles June 28, 1919; protocol signed by Germany at Paris January 10, 1920.

Article 227 The' Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan. In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed. The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.

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 latex reduced to 45 names. Of those convicted, only Major Benno Crusius was convicted on the basis of command responsibility - he was found guilty by the Supreme Court of the Reich at Leipzig of ordering the execution of wounded French prisoners of war and sentenced to two years confinement.[30] Although no international tribunal was established, this was another milestone in a development of the doctrine by declaring that „*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.*“[31]

In 1942, the United Nations War Crime Commission was established by the Declaration of St James to address the problems of the prosecution and punishment of war criminals.[32] The issue of superior responsibility was discussed thoroughly.[33] A sub-committee established by the Commission in December 1944 to look at the issue of individual criminal responsibility concluded that given the considerable powers of the German Ministerial Council for the Defence of the Reich, and the evidence that numerous crimes were perpetrated upon its orders, its individuals were to be considered prima facie criminally responsible for acts committed by their subordinates.[34] Nevertheless, The Nuremberg

---

Article 228 The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies. The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

[30] PARKS, *Command responsibility*, p. 13 – 14.

[31] PARKS, *Command responsibility*, p. 12.

[32] Though the information compiled by the Commission used by many governments in subsequent prosecutions of war criminals, it was not binding over the Nuremberg Trial and the Tokyo Trial.
HENDIN, Stuart E.. *Superior Responsibility and Superior Orders in the Twentieth Century - A Century of Evolution*, Murdoch University Electronic journal of Law, Volume 10, 2003, para 38 – 40. Available at: <http://www.murdoch.edu.au/elaw/>, 2. 10. 2015. (HENDIN, Superior responsibility …)

[33] HENDIN, *Superior responsibility*…, para 38.
The resolution of St. James Agreement. 12 June 1941. Available at: <http://www.yale.edu/lawweb/avalon/imt/imtjames.htm>, 2. 10. 2015.

[34] History of the UNWCC: Chapter 6 - The Establishment and Organization of the United Nations War Crimes Commission, *The United Nations War Crimes Commission, History of the United Nations War Crimes Commissions and the Development of the Laws of War*, (London: H.M. Stationery Office), 1948, p. 269. Available at: <http://www.cisd.soas.ac.uk/documents/un-war-crimes-project-history-of-the-unwcc,52439517> Also SHANE, Darcy. *Collective responsibility and accountability under international law*, (Brill: Transnational Publishers), 2007, p. 300.

Charter[35], Control Council Law No. 10[36] (governing subsequent trials of lower-level Nazi war criminals in Europe), neither the Charter of the International Military Tribunal for the Far East[37] did not contain explicit provisions on the responsibility of superiors for acts by their subordinates.

Notwithstanding, the doctrine was developed and applied in several cases, including the Hostage case, the German High superior case, the Pohl case, the trial of General Yamashita and the trial of Admiral Toyoda.[38] Many authors see the born of the command responsibility doctrine in the Yamashita trial as at that time the command responsibility doctrine did not form part of existing customary international law.[39] Subsequently, according Charles Garraway, the doctrine of command responsibility was fully accepted as an integral part of international law (referring to the cold war period), based on incorporation of the command responsibility principles derived from Yamashita case to the British and United states manual.[40]

1. 2 Tokyo Trials

What is commonly referred as Tokyo trial/trials is actually series of trials taking place in Tokyo, Japan, and elsewhere in East Asia from 1945 to 1951.[41] These trials can be divided into two sets. The one was series of trials before the International Military Tribunal for the Far

---

[35] Charter of the International Military Tribunal, Nuremberg Trial Proceedings Vol. 1. Available at: <http://avalon.law.yale.edu/imt/imtconst.asp>.

[36] Control Council Law No. 10 Punishment of persons guilty of War Crimes, Crimes Against Peace and Against Humanity. Available at: < http://avalon.law.yale.edu/imt/imt10.asp>.

[37] International Military Tribunal for the Far East Charter (IMTFE Charter).
BOISTER, Neil, CRYER Robert. *Documents on the International Military Tribunal - Charter, Indictment and Judgments*, (Oxford: Oxford published), 2008, p. 7-11

[38] MARTINEZ, Jenny. S.. *Understanding Mens Rea in superior Responsibility: From Yamashita to Blaskic and Beyond*, International Criminal Justice, Volume 5, Issue 3, July 2007, p. 638.
HIROM, Sato. *The Execution of Illegal Orders and International Criminal Responsibility*, (Berlin: Springer), 2011, p. 15 - 101.

[39] METTRAUX, Guénaël. *International Crimes and the Ad Hoc Tribunals*, (Oxford University Press, Oxford, 2005, p. 5 - 6. (METTRAUX, *International crimes*)

[40] GARRAWAY, Charles. The doctrine of Command responsibility In BASSIOUNI, Cherif al. *The Legal regime of the ICC*, (Leiden; Boston: Martinus Nijhoff), 2009, p. 710.

[41] Sometimes "Tokyo Trial" refers just to proceeding before IMTFE.
BURNHAM, Sedgwick James. The trial within: negotiating justice at the International Military Tribunal for the Far East, 1946-1948, (Vancouver: University of British Columbia Library), 2012.

East (IMTFE) in Tokyo between 1946 and 1948 and another set of proceedings by *ad hoc*, unilateral Allied military commissions throughout the Far East during 1945–1951.[42]

One of the most cited post Second World War superior responsibility cases and also the most controversial ones is the case of the Japanese General Tomoyuki Yamashita. Former General of the Fourteenth Army Group of the Imperial Japanese Army that occupied the Philippines during Second World War was arraigned before a United States Military Commission[43]. The Yamashita trial affirmed the principle of individual accountability for crimes against international law advanced the Nuremberg trials.[44] However, it was also the first international war crimes trial to find a commanding officer criminally responsible without any direct evidence linking him to the crimes committed by his subordinates.[45]

It is important to note that Yamashita was neither charged with approving nor ordering crimes. During the ensuing argument, 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.*" [46] Yamashita was charged with failing to discharge his duty as superior to control the acts of members of his superior by permitting troops under his superior to commit war crimes. This case has been very controversial because the prosecution failed to prove the actual knowledge of Yamashita. The essence of the Prosecution case was that he knew or must have known of, and thus permitted, the widespread crimes committed by his subordinates. The defence argued that the General should not be punished just for his status of the superior as he did not show any fault on his part and there was no proof the he even knew of his subordinates' crimes.[47] The defence also specifies that "*the Accused is not charged with having done*

---

[42] KAUFMAN, Zachary D.. *Transitional Justice For Tōjō's Japan: The United States Role in the Establishment of the International Military Tribunal For The Far East And Other Transitional Justice Mechanisms For Japan After World War II*, Emory International Law Review, Volume 27, Issue 2, 2013 p. 756.

[43] United States Military Commission established under, and subject to, the provisions of the Pacific Regulations of 24th September, 1945, Governing the Trial of War Criminals. These regulations were superseded almost immediately after the Yamashita trial by the "Regulations Governing the Trials of Accused War Criminals" of 5th December.

United Nations War Crimes Commission. *Law Reports of trials of war criminals*. (London: H.M.S.O.), 1947, Volume III, p. 105. (*Law Reports*)

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

[45] O'REILLY, *Superior responsibility*, p. 78 – 81.

[46] *Law Reports*, Volume IV, p. 84.

[47] LAEL, Richard L.. *The Yamashita Precedent: War Crimes and superior Responsibility*, (Wilmington, Del. : Scholarly Resources), 1982, p. 80 – 82. (LAEL, *The Yamashita Precedent)*

something or having failed to do something, but solely with having been something."[48] Than Defence argued that then it could be also claim, by virtue of that fact alone, that he was guilty of every crime committed by every soldier assigned to his superior.[49] The pleadings before the Commission did not allege that Yamashita ordered, authorized or that he even had any knowledge of the commission of any of the alleged atrocities.[50] Without such an allegation, it was submitted by the Defence, the cause must be dismissed as not stating an offence under the Laws of War.[51]

In response to the defence's argument, 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 superior 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*".[52] 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 superior a murderer or rapist because one of his soldiers commit a murder or rape*." Nevertheless, the Court concluded that the violations of the law of war that occurred in the Philippines while Yamashita superiority were "*not sporadic in nature*". As a result, the Court believed that "*Yamashita failed to provide effective control of his troops as was required by the circumstances*."[53]

Five of the Counsel who had defended Yamashita addressed to the Appointing Authority and to General MacArthur as Confirming Authority, a request that the verdict of guilty be disapproved, and as an alternative a recommendation for clemency. They submitted that even that the atrocities were not sporadic in nature but were supervised by Japanese officers, these supervised actions were scattered over the entire area of the Philippine Islands and there was no evidence that the officers who were responsible reported these acts to General Yamashita. Thus it did not bring to a conclusion that Yamashita had ordered or directed the commission or that he had any knowledge that such act had been or were being

[48] Cited in LAEL, *The Yamashita Precedent*, p. 82.
[49] *Law Reports*, Volume IV, p. 15.
[50] Even documented that he personally ordered the summary execution of 2000 Filipinos in Manila suspected of being guerrillas and gave various orders relating to destroying segments of the population that were pro-American. PARKS, W. Hays. *A Few Tools in the Prosecution of War Crimes*. Military Law Review, Volume 149, Issue 73 – 74, 1995, p. 89.
[51] *Law Reports*, Volume IV, p. 12.
[52] LAEL, *The Yamashita Precedent*, p. 83.
[53] LAEL, *The Yamashita Precedent*, p. 95.

committed.[54] This plea was rejected by the Appointing and Confirming Authorities and the findings of the Military Commission confirmed.[55]

Yamashita petitioned the Supreme Court of the Philippine Islands based on a lack of had jurisdiction over the person and over the trial for the offence charged. This petition was denied.[56] 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 of War imposes on an army superior a duty to take such appropriate measures as are within his power to control the troops under his superior for the prevention of the specified acts which are violations of the Law of War and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result*."[57] He argued that it is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders would almost certainly result in violations of law of wars.[58] The Judgment was followed by two dissenting judgment. Justice Rutledge Mass arguing that the quilt should not be imputed to individuals where the person is not shown actively to have participated in knowingly to have failed in taking action to prevent the wrongs done by others, having both the duty and the power to do so.[59] Justice Murphy, in his dissent, stated that atrocities have *a dangerous tendency to call forth primitive impulse of vengeance and retaliation among the victimized people* and that the Yamashita's conviction is *based on standards created unilaterally by the victors, rather than on standards evinced from international law.*[60] Despite all the discrepancies Yamashita was executed on 23rd February, 1946.[61] One of the main critique' s point of Yamashita case was that Yamashita was in essence held liable – paradoxically – because of his lack of effective control over his subordinates.[62]

---

[54] BUEHRIG, Edward H. *The Case of General Yamashita, by A. Frank Reel*. Indiana Law Journal, Volume 25, Issue 3, Article 13, 1950, p. 408 – 409.
[55] LAEL, *The Yamashita Precedent*, p. 97.
[56] *Law Reports*, Volume IV, p. 22.
[57] *Law Reports*, Volume IV, p. 23.
[58] 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 fulfill 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.
[59] *Law Reports*, Volume IV, p. 53 – 55.
[60] Cited in O'REILLY. *Superior responsibility*, p. 77.
[61] *Law Reports*, Volume IV, p. 75.
[62] CASSESE, Antonio. *International Criminal Law: Cases and Commentary*. (Oxford: Oxford University Press), 2011, p. 422-431. (CASSESE, *International Criminal Law)*

Apart from Yamashita case, it was clearly established, during trials by United States Military Commissions in the Far East, that a superior responsibility may arise in the absence of any direct proof of the giving of an order for the commission of crimes.[63] In Toyoda case, the principle of superior responsibility was explained as follows: "*the principle of superior responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a superior and must be punished*."[64] Controversially, this approach seems to be not consistent with the Yamashita case as rejecting strict liability theory.[65]

On January 19, 1946, while the Supreme Court was deliberating Yamashita case, MacArthur issued a special proclamation ordering the establishment of an International Military Tribunal for the Far East (IMTFE). On the same day, he also approved the Charter of the International Military Tribunal for the Far East (CIMTFE), which prescribed its formation, the crimes in a consideration, and how the tribunal should function.[66] The Charter generally followed the model set by the Nuremberg Trials. On April 25, in accordance with the provisions of Article 7 of the CIMTFE, the original Rules of Procedure of the International Military Tribunal for the Far East with amendments were promulgated. 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

---

[63] For example - Shiyoku Kou was sentenced to death on 18th April, 1946, after being found guilty of" unlawfully and willfully" 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 life imprisonment on 13th February, 1946 after being found guilty on a charge alleging that he "failed to discharge his duty as superioring Officer in that he permitted members of his' superior to commit cruel and brutal atrocities." *Law Reports*, Volume IV, p. 86.

[64] As for the *mens rea* criteria: "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."
Citing in MAJOR, William H.. *Superior Responsibility for War Crimes*, Military Law Review, Volume 25, Issue 3, 1999, p. 62 and 72.

[65] PRÉVOST, Maria. *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita.* Human Rights Quarterly, Volume 14, Issue 3, 1992, p. 330.

[66] Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589,
4 Bevans 20 (as amended Apr. 26, 1946, 4 Bevans 27), reprinted in BOISTER, Neil. CRYER, Robert. *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, (Oxford: Oxford University Press), 2008. (IMTFE Charter)

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 "negligence" on the part of the official: a personal dereliction of duty. It is not enough, it said, for the official to show that he "*accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those, to the frequency of reports of such crimes, or to any other assurances were true or untrue*."[67] Superior responsibility was further extended to government arguing for a type of collective responsibility.[68]

One of the unique aspects of the Tokyo trials is that the notions of direct responsibility and indirect responsibility of superiors were clearly distinguished, and both of them were found to be a crime.[69] It should be noted that the Tokyo Trial lasted from April 1946 until November 1948, which means that the Yamashita case was completed in 1946 before the Tokyo Trial delivered its judgment. The "should have known" standard introduced in Yamashita was instantly affirmed in Tokyo. The Tokyo jurisprudence was confirmed by British, Canadian, Australian and Chinese war crimes trials as documented by the UNWCC.[70] It is important to note that later the United States disregarded the precedent of the Yamashita case as seen in the Mai Lai Massacre case.

1. 3 Nuremberg Trials[71]

During the Nuremberg trial before the International Military Tribunal, the issue of superior responsibility had not been fully raised. While the final Judgment, includes no general comment on superior responsibility, it does consider *"…the facts concerning each of the accused in order to determine whether he was personally responsible for issuing, or participating in the issuance of, or knowing of their illegality forwarded any orders resulting*

[67] Ryan, Allan A. *Yamashita's Ghost: War Crimes, MacArthur's Justice, and superior Accountability*. (Lawrence, Kan: University Press of Kansas), 2012, p. 310 – 311.
[68] The Tokyo judgment, *Law Reports*, Vol. I., p. 30.
[69] E.g. Yamashita trial - The Judgment of the Commission over Yamashita "Should a superior issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood. The Rules of Land Warfare, Field Manual 27 – 10, United States Army, are clear on these points." *Law Reports*, Volume IV, p. 35.
[70] AMBOS, *Superior Responsibility*, p. 823.
[71] 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.

in the commission of a crime against peace, war crimes, or crimes against humanity - that is to say, the offences over which the Tribunal possessed jurisdiction."[72]

The Nuremberg trial was followed by the twelve trials for war crimes 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.[73] The first case in which superior responsibility was raised was *Pohl at all* case. In a liability for omission the tribunal referred explicitly to Yamashita findings within.[74] Apart from that the doctrine was extended to civilians superiors as well.[75] The second one brought against Wilhelm List and other German generals was concerning events in the Balkan. It is often called the *Hostage* case because its primary focus on the German practice of taking civilians hostage to deter local partisans from killing German soldiers, and executing the hostages in reprisal when such killings occurred. The Generals were charged with murdering thousands of civilians from Greece, Yugoslavia, Norway, and Albania during the occupation of these countries. The tribunal answered the question as to whether or not the superior can excuse himself from responsibility when he did not have actual knowledge: "*an army superior will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his superior while he is present therein*".[76] Thus actual knowledge was not required and a should-have known standard was applied instead. 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 a two-part rule. "As *to the events occurring in his absence resulting from orders, directions, or a general prescribed policy formulated by him, a military superior will be held responsible in the absence of special circumstances. The superior will not ordinarily be held responsible unless he approved of the action taken when it later came to his knowledge*". The Tribunal was clearly seeking, contrary to *Yamashita* decision (the final decision made no reference to the Supreme Court decision in *Yamashita*

[72] GREEN, Leslie. *War Crimes, Crimes against Humanity, and Command Responsibility*, Naval War College Review, Volume 50, Issue Spring, 1997, p. 32.

[73] These three cases were not the only ones but the most comprehensive on the command responsibility doctrine. E. g. US v. Brant et al. case also recognized the superior responsibility of civilians. Us v. Brant et al. (the Medical case), *Law Reports*, Volume II, pp. 171 – 300.

[74] "The law of war imposes on a military officer in a position of superior an affirmative duty to take steps as are within his power and appropriate to the circumstances to control those under his superior for the prevention of acts which are violations of the law of war". US v. Pohl at all (case 4). *Law Reports*, Volume V, p. 1011.

[75] AMBOS, *Superior Responsibility*, p. 828 – 829.

[76] Law Reports, Volume VIII, p. 34 – 92.

case), a balanced approach that held superiors to their duty of overseeing their troops while still taking into account the reality of war and combats.[77]

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 crimes. The Tribunal stated that to find superior criminally responsible for the transmittal of such an order, he must have passed the order to the chain of superior and the order must be one that is criminal upon its face, 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 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 criminality of superiors and stated that "*criminality does not attach to every individual in this chain of superior from that fact alone*" there must be a personal dereliction.[78] 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*".[79]

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 findings in Yamashita, while the Tribunal in Hostage case opted for a should-have known standard with different perspective thought.[80]

---

[77] LAEL, *The Yamashita Precedent*, p. 306 – 307.
[78] *Law Reports*, Volume XII, p. 69.
[79] LAEL, *The Yamashita Precedent*, p. 308
[80] AMBOS, *Superior Responsibility*, p. 828 – 829.

1. 4 Superior responsibility after World War II (The Mai Lai Massacre)

Mai Lai is a village in South Vietnam where hundreds of civilians were slaughtered by US soldiers during Vietnam War. Second Lieutenant Calley was charged with direct involvement in the atrocities in the village. In addition, United States Captain Ernest Medina, Calley's immediate superior, was charged with failure to control the subordinates. Medina was charged with responsibility for the massacre caused by his subordinates because he breached the duty to prevent the activities of his subordinates where the atrocities were happening. 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 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.[81] Judge Howard in issuing instructions to the military panel in *Medina* trial refused to apply the Yamashita "*knew or should have known*" standard. The jury was instructed that in order to convict, they must find that Medina had actual knowledge that his troops were committing war crime.[82] Furthermore, 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. While there were some questions as to what standard should apply and although there are certainly those

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

[82] „In order to find the accused guilty of this offense, you must be satisfied by legal and competent evidence beyond a reasonable doubt, of the following four elements of that offense:
(1) That an unknown number of unidentified Vietnamese persons, not less than 100, are dead;
(2) That their deaths resulted from the omission of the accused in failing to exercise control over subordinates subject to his command after having gained knowledge that his subordinates were killing noncombatants, in or around My Lai (4), Quang Ngai Provence, Republic of Vietnam, on or about 16 March 1968;
(3) That this omission constituted culpable negligence; and (4) That the killing of the unknown number of unidentified Vietnamese persons, not less than 100, by subordinates of the accused and under his command, was unlawful."
United States v. Medina, C.M. 427162 (1971), cited in SMIDT, Michael. *Yamashita, Medina and Beyond: Superior Responsibility In Contemporary Military Operations*. Military Law Review, Volume 164, Issue 155, 2000, p. 194. (SMIDT, *Yamashita, Medina and Beyond)*

critical of the judge's interpretation of the law and instructions to the jury, Captain Medina was acquitted of all charges.[83]

[83] However, even if the Yamashita standard had been applied in the Medina trial, Captain Medina would likely have been acquitted. It would be likely concluded that there was insufficient evidence to establish that Medina "knew or should have known" of the atrocities at My Lai. The "should have known" standard is primarily linked to time. Where reports are received over time or where large numbers of crimes are committed by large numbers of subordinates, creating a basis of constructive notice, it is reasonable to say that the superior should have known. In Yamashita, the atrocities were widespread and systematic, occurring over several months. The crimes in My Lai, on the other hand, although certainly horrendous, all took place at one location within a matter of hours. Because all the crimes occurred in one place and time, it would be difficult to conclude that he should have known. SMIDT, *Yamashita, Medina and Beyond*, p. 186 – 201.

2. Statutory development of superior responsibility

The doctrine of superior responsibility has gained widespread recognition since its application in the Yamashita trial. Adopted in 1977, Article 86 of Additional Protocol to the Geneva Convention of 1949 was the first international treaty to codify the doctrine of superior responsibility, creating a duty to repress grave breaches of international law, and imposing penal and disciplinary responsibility on superior for any breaches committed by his or her subordinates. It is important to notice that these articles do not directly address individuals: it establishes obligations to States.[84]

The Article 86 para 2 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."*[85] During drafting, the representatives to the Convention objected mostly to the imposition of liability for a failure to act where the *mens rea* is negligence (the wording clearly indicates that the *mens rea* requirement is met where superiors "had information that should have enabled them to conclude" that a subordinate was committing or had committed a breach).[86] This Article established not only the command responsibility but also the parallel responsibility of the subordinates.[87]

The "should have known" standard was rejected by the drafters as too broad. The standard of "knew, or had information that should have enabled them to conclude in the circumstances at the time" was a higher standard of constructive knowledge. Article 87 of the Additional Protocol contains more specific duties for military superiors.[88] In the light of the

[84] BROUWERS, M. P. W.. *The Law of superior Responsibility*, Wolf Legal Publishers, 2012, p. 4 – 5.
BANTEKAS, Ilias. *The Contemporary Law of Superior Responsibility*, The American Journal of International Law, Volume 93, Issue 3, 1999, p. 574.

[85] Article 86 para 2 of the Additional Protocol to the Geneva Convention of 1949.

[86] O'REILLY. *Superior responsibility*, p. 78 – 81.

[87] This must be stressed out since, taken together, Article 85 seems to imply an exclusive responsibility of the superiors. However the phrase "was committed" by a subordinate, that Article 86 (2) explicitly refers to a breach of the Conventions by subordinates. Thus the subordinate is directly responsible as an immediate perpetrator.
AMBOS, *Superior Responsibility*, p. 838.

[88] 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 superior and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

above, the first Additional Protocol to the Geneva Conventions marks a fundamental step towards the definitive recognition of the doctrine of superior responsibility in international law. The concept of superior responsibility has been further developed by the various international tribunals. These international tribunals contribute to this development with their statutes and their jurisprudence. Between 1993 and 2000, the Statutes establishing the ICTY, ICTR, the Special Panels in East Timor, SCSL adopted the same substantive text, allocating criminal responsibility to Superiors. On the other hand, the text of the ECCC Statute and the STL Statute slightly differs from others.

2.1 ICTY

To deal with the atrocities in the former Yugoslavia, the United Nations Security Council created the International Criminal Tribunal for the Former Yugoslavia under the authority of Chapter VII of the United Nations Charter. The Statute of the International Criminal Tribunal for former Yugoslavia was promulgated and Article 7 deals with superior responsibility. Article 7 para 2 states: "*The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.*" Article 7 para 3 states that "*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.*"

By conducting an analysis on ICTY case law concerning superior responsibility, we can detect three generation of case.[89] These generations represent different approach of the ICTY towards superior responsibility doctrine. The first generation set up a basis for the doctrine while second generation presents different approach and distance (in some aspects)

---

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 superior 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.

[89] SLIEDREGT, Elies. *Individual criminal responsibility in international criminal law*, (Oxford: Oxford University Press), 2012, p. 184 – 185. (SLIEDREGT, *Individual criminal responsibility*)

from the first generation. The first generation case law concerns ruling in the first ICTY case the *Prosecutor v. Mucic et al*, more known as the *Celebici* case (after the camp where the crimes were committed). The notorious and leading case in command responsibility case involved the prosecution of three former commanders and a prison guard of the *Celebici* prison-camp where Bosnian Serbs were detained, tortured, and sometimes killed. The Trial Chamber in *Celebici* 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.[90] Applying these criteria, Mucic, 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[91], as he possessed effective control over the subordinates[92]. 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. It should be noted that the Trial Chamber extended the possibility of leader responsibility to civilians. 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.[93] Delalic was acquitted on all charges as the initial Trial Chamber 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*".[94] In *Celebici* 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.[95] It was the first case before the ICTY dealing with indirect superior

[90] *Celabici TJ*, para. 346, confirmed in appeal; *Prosecutor v Delalić at al*.,IT-96-21-A, Appeal Chambers *(Celabici AJ)*, 20 February 2001, para 189 –198, 225 –226, 238 – 239, 256, 263.
[91] ROCKOFF, Jennifer. *Prosecutor v. Zejnil Delalic (The Celebici Case)*, Military Law Review, Volume 166, 2000, p. 172 – 176.
[92] Ibid. para 775.
[93] METTRAUX, *International crimes*, p. 296 – 298.
[94] *Celabici AJ*, para 333.
[95] *Celabici AJ*, para 339.

responsibility, until then the accused were charged and convicted for direct participation in crimes under article 7(1) of the Statute.

The second generation of case law started with ruling in *Hadzihasanovic*. In this case the question of successor superior responsibility was discussed as well as nature of command responsibility, when it was made clear that command responsibility can be identified as a mode of liability and as separate offence - as failure to act. The third generation of case law can be seen in *Blagojevic* and *Oric* cases and represent the latest decision of the ICTY concerning superior responsibility doctrine.[96]

2. 2 ICTR

In order to deal with the situation in Rwanda in 1994, the Security Council promulgated the Statute of the International Criminal Tribunal for Rwanda, and established the International Criminal Tribunal for Rwanda. Article 6 para 2 of the ICTR provides: "T*he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment*." Article 6 para 3, similarly as The Statute of the ICTY, provides: "*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 ICTY dealing with superior responsibility. Akayesu was not a military person and was charged with genocide, crimes against humanity, including rape and violations of the Geneva Convention. Akayesu's defence team argued that Akayesu had no part in the killings, and that he had been powerless to stop any crimes committed by his subordinates. He was found guilty of crime against humanity and genocide. 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 necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.[97]

[96] SLIEDREGT, *Individual criminal responsibility*, p. 184 – 185.
[97] *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber Judgement, 2 September 1998, para 491.

2. 3 ECCC

In establishing the ECCC, the Government of Cambodia combined the ICC's requirement of effective superior and control into the text of its Statute. Article 29 of the ECCC Statute states: "*The fact that crimes were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective superior and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators".*[98]

This formulation is similar to the corresponding provisions of superior responsibility in the statutes of the ICTY and the ICTR. The inclusion of the phrases "effective superior" and "control over the subordinate" in the ECCC Statute is the only substantive changes from the ICTY's and the ICTR's formulations. This wording reflects international jurisprudential developments that made clear that effective control over a subordinate is one of the three elements that must be established to find a superior liable for the acts of a subordinate under superior responsibility. [99] The wording of the Statute indicates that the drafters intended for superior responsibility to be interpreted at the way as it has been interpreted before the ICTY and ICTR. As a result, the ECCC requires proof of the three elements articulated in the ICTY's and ICTR's jurisprudence to find superiors liable through superior responsibility.[100]

The first judgement was rendered over Duch who served as civilian director of the S-21 Prison Camp. He was found criminally responsible for the acts of those under his command, without distinguishing between civilian and military superiors - the Trial Chamber implicitly accepted that superior responsibility for civilian leaders was part of customary international law during 1975-1979.[101] In the case 002 the *nullum crimen* challenge was made by using argument that from 1975 to 1979 customary international law did not recognize superior responsibility as a basis of liability. The PTC decisions[102] explicitly ruled that

[98] Article 29 of the ECCC Statute.

[99] Article 29 of the ECCC Statute.

[100] REHAN, Abeyratne. *Superior Responsibility and the Principle of Legality at the ECCC*, The George Washington International Review, Volume 44, p. 48.

[101] *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/TC, Trial Chamber Judgement, 26 July 2010.

[102] *Prosecutor v. Ieng Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011. *Prosecution v. Ieng Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011.

superior responsibility applied to civilian superiors during 1975-1979. The PTC relied primarily on the jurisprudence of the tribunals at Nuremberg - both the International Military Tribunal and the tribunals created by Control Council Law No. 10 - and Tokyo to conclude that superior responsibility applied to civilian Khmer Rouge leaders (surprisingly the PTC did not rely on Additional Protocol I). The TC in 002/01 case also concluded that superior responsibility, applicable to both military and civilian superiors, was recognized in customary international law by 1975 and held that inconsistency between two cases in a single state (inconsistency in *mens rea* requirement in Yamashita and Medina), without more, does not demonstrate that superior responsibility as a mode of liability is not customary international law.[103]

2. 4 STL

According to Article 3 (2) of the Statute of the Special Tribunal for Lebanon superior shall be criminally responsible for any of the crimes (set forth in article 2 of the 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".[104]

The STL Appeals Chamber in the recent decision held the position that superior/superior responsibility would not be appropriate to the special intent required for the crime of terrorism and "the better approach" would be to treat the superior and aide and abettor rather than "pin on him the stigma of full perpetrator ship. It is different approach than

[103] *Prosecutor v. Nuon Chea, Khieu Samphan*, Case No. 002/19-09-2007-ECCC/TC, Trial Chamber Judgement, 7 August 2014, para 719.
[104] Article 3 (2) of the Statute of the Special Tribunal for Lebanon, May 30, 2007.

taken by ICTY, which has held persons responsible for special intent crimes on the basis of superior responsibility.[105]

2. 5 ICC

Negotiations for the establishment of a permanent international court that would be responsible for trying the gravest breaches of humanitarian and war law date back to the 1950s. The International Law Commission asked a rapporteur to draft a statute for an international criminal court in March 1950. The first official document on an international criminal court would be the 1951 Draft Statute for an International Criminal Court. However this draft merely stated the structure of an international criminal court. The Revised Draft Statute for an International Criminal Court was issued in 1953, which did not refer to issues of superior responsibility.[106]

The efforts to establish an international criminal court 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).[107] In 1996, the Preparatory Committee gave its report to the General Assembly. In this report was recommended that official capacity of the accused should not free him from responsibility, and direct responsibility of individuals was discussed with regards to superior responsibility, Article C of the report provided that a superior takes responsibility for failure to exercise proper control where "*(a) The superior either knew or owing to the widespread commission of the offences should have known should have known that the forces subordinates were committing or intending to commit such crimes; and (b) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or punish the perpetrators thereof*". Some authors suggest that from the wording of the proposed draft can be seen that there was no agreement as to whether superior

---

[105] ALAMUDDIN, Amal; NABIL, Nidal, Jurdi; TOLBERT David. *The Special Tribunal for Lebanon: Law and Practice*, (Oxford: Oxford University Press), p. 102 – 103.
Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I, 16 February 2011.

[106] The Rome statute of the International Criminal Court – Overview. http://legal.un.org/icc/general/overview.htm, 23. 1. 2015.
BASSIOUNI, Cherif. *International Criminal Law: International Enforcement*, Volume 3, (Brill), 2008, p. 119 – 120.

[107] WASHBURN, John. *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, Pace International Review, Volume 11, Issue 361, 1999, p. 361. (WASHBURN, *The Negotiations*)

responsibility should be applicable to civilians at this stage.[108] The issue whether command responsibility should be applied to civilian commanders as well was discussed during the Rome conference in 1998.[109] A broad majority held that it should apply to civilian commanders as well.[110] A first draft produced by Canada and consolidated by the UK foresaw the same requirement for both categories. However the United States raised a question whether civilian superiors would be in the same position as military commanders to prevent or repress the commission of crimes by their subordinates.[111] Although the possibilities of the "should have known" standard was discussed, no final decision has been reached yet at this stage.[112]

The ICC Statute was finally promulgated in 1998. Individual responsibility was promulgated in Article 25 of the Statute, and superior responsibility was promulgated under Article 28 of the Statute. This 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 for the crimes undertaken by their subordinates.[113] Article 28 of the ICC Statute finally promulgated as follows:

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

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

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

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

---

[108] WASHBURN, *The Negotiations*, p. 362.

[109] LEE, *The ICC*, p. 125.

[110] Nevertheless, few delegations opposed to this proposition. FENRICK W., "Article 28", in: TRIFFTERER, Otto. *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*, (München, Germany: Beck; Portland, Or: Hart), 2008, p. 831. (TRIFFTERER, *Commentary*)

[111] TRIFFTERER, Commentary, 831.

[112] LEE, Roy. *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Result*, (Kluwer Law International), 1999, p. 192. (LEE, *The ICC*)

[113] TRIFFTERER, *Commentary*, p. 279.

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

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

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

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

The interpretation of Article 28 suggests that the superior should be responsible for the crimes committed by his subordinates.[114] Nevertheless, the idea that superior responsibility should give rise to direct responsible for the "principal crime" under the theory of commission by omission, has been heavily criticized.[115]

[114] 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.

[115] TRIFFTERER, *Commentary*, p. 280.

NERLICH, Volker. *Superior Responsibility under Article 28 ICC Statute*, Journal of International Criminal Justice, Volume 5, Issue 3, 2007, p. 665 – 682.

3. Elements of superior responsibility – ICTY and ICTR

The Trial Chamber of the ICTY in the leading *Celebici* case formulated a rule providing that a superior may be held criminally responsible for the acts of his subordinates whether the following three conditions are met:

1) existence of a superior-subordinate relationship of effective control between the superior or superior and the alleged principal offenders;

2) knowledge of the accused that the crime was about to be, was being, or had been committed; and

3) failure of the accused to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator.[116]

In *Oric* case, the Trial Chamber added a fourth element 4) a subordinate commits a crime under international law.[117]

3. 1 Superior-subordinate relationship

A superior position is a condition *sine qua non* for applicability of superior responsibility. The three aspects of superior-subordinate relationship can be identified – a nature and extent of this superior-subordinate relationship, requirement of effective control (and also extend of this effective control) and a problem of successor commander responsibility (this element is going to be elaborate in the last chapter – causality requirement as its closely connected to it).[118] To be held criminally responsible as a superior a person must be in a position of authority. Such an authority position may be created by law - a relationship between a superior and its subordinates *de jure*, or a relation created by factual and personal factors connecting the accused superior and the perpetrators – *de facto*.[119]

---

[116] *Celabici TJ*, para. 346, confirmed in appeal *Celabici AJ*, para 189 - 198, 225 - 226, 238 - 239, 256, 263. These 3 basic elements establishing superior responsibility were also acknowledge by the ICTR in *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber Judgment, 7 June 2001, para. 38. (*Bagilishema TJ)*

[117] *Prosecutor v. Naser Orić*, IT-03-68-T, Trial Chambre Judgement (*Orić TJ*), 30 June 2006, para 294.

[118] FROUVILLE, Olivier. *Droit International Penal, Modalites de participation a la commission de l'infraction*, (Paris: A. Pedone), p. 404 – 405.

[119] *Celabici AJ*, para 251 – 252. *Prosecutor v. Limaj et al*., IT-03-66-T, Trial Chamber Judgement, 30 November 2005, para 522. (*Limaj TJ*)

Prosecutor v. Kajelijeli, ICTR-98-44A-T, Trial Chambers Judgment, 1 December 2003, para 771.

"Depending on the circumstances, a superior with superior responsibility under Article 7(3) may be a colonel superioring a brigade, a corporal superioring a platoon or even a rankles individual superioring a small group of

In *Hadzihasanovic* and later also in *Oric* case a question arose whether a superior can be held responsible for acts of unidentified subordinates. The Chamber in *Hadzihasanovic* held that to establish a superior-subordinate relationship, is important to be able to identify the alleged perpetrators (subordinates) of the crimes. Nevertheless, as explained by the same Chamber, 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.[120] The Chamber in *Oric* case went even further and held that a superior may be held responsible for crimes committed by anonymous person.[121] This creates a danger on an interpretation that the link between superiors and subordinates can be loosening while the punishment is still based on this relation between them.[122] This Chamber's finding has no support in relevant legal instruments. [123] This interpretation does not even support the wording of Article 7 (3) of the Statute as this Article requires a special close link between a superior and subordinate.[124] 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.[125]

---

men." *Prosecutor v. Kunarac at al.*, IT-96-23-T& IT-96-23/1-T , Trial Chamber Judgment (*Kunarac TJ*), para 398.

"A superior-subordinate relationship requires a formal or informal hierarchical relationship where a superior is senior to a subordinate. The relationship is not limited to a strict military superior style structure."
Prosecutor v. Semanza, ICTR-97-20-T-15-5-2003, Trial Chamber Judgment, 15 May 2003, para 401. (*Semanza TJ)*

"The Chamber does find it proved that, "In Rwanda, the bourgmestre is the most powerful figure in the commune. His de facto authority in the area is significantly greater than that which is conferred upon him de jure". *Akayesu TJ*, para. 77.

[120] *Prosecutor v. Hadzihasanović, Kubura*, IT-01-47-T 689/21623 BIS D689 - 1/21623 BIS 05/12/2006, Trial Chamber Judgment (*Hadzihasanović TJ*), para 90.

[121] "With respect to the Defence's submission requiring the "identification of the person(s) who committed the crimes",897 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." *Oric TJ*, 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 be identified by his/her affiliation to a group/unit. SLIEDREGT, *Individual criminal responsibility*. 191 – 192.

[122] SLIEDREGT, *Individual criminal responsibility*. 191 – 192.

[123] Such as Article 86 of Additional Protocol I, ILC draft, the United Nations Darfur report etc.

METTRAUX, Guénaël. *The Law of Command Responsibility*, (Oxford: Oxford University Press), 2009, p. 135. (METTRAUX, *The law of CR*)

[124] METTRAUX, *The law of CR*, p. 135.

[125] *Prosecutor v. Stanislav Galic*, IT-98-29, Trial Chamber Judgment, para. 700.

In conclusion, to be held criminally responsible the accused must be in a superior-subordinate relationship with those who are alleged commit the crimes or to have been about to commit a crime and this relation must be governed by effective control.[126]

3. 1. 1 Effective control

The superior must have effective control over the subordinate.[127] To determine whether a superior has control over the subordinate effective control test is applied by the ICTY, ICTR and SCSL.[128] Effective control was firstly defined in *Celabici* case as "*the material ability to prevent and punish the commission of offences.*"[129] The ICTY and ICTR have applied superior responsibility to superiors with *de facto* control over their subordinates as the relation need not have be formalized.[130] In *Akayesu* case, the very first case before 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 superior and his authority.[131]

The question may be whether the ICTY and ICTR require the same level of control of civilian and military superiors liable under superior responsibility[132] Noted by the Appeals

---

[126] SLIEDREGT, *Individual criminal responsibility*, p. 192 – 193.

[127] Requirement of the effective control is contain in jurisprudence of the ICTY (and also other tribunals) O'REILLY, *Superior responsibility*, p.78 – 81.

[128] BROUWERS, M. P. W.. *The law of command responsibility*, (Wolf Legal Publishers), 2012, p. 7. (BROUWERS, *The law of CR*)

[129] *Celebici TJ*, para 378.

[130] "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." *Celebici AJ*, 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 . . . ." *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber Judgment, ICTR-95 1 –T, 21 May 1999, para 218. (*Kayishema TJ)*

"The relationship need not have been formalized and it is not necessarily determined by formal status alone." *Prosecutor v. Milorad Krnojelac*, IT-97-25-T, Trial Chamber Judgement, 15 March 2002, para 93. (*Krnojelac TJ*)

"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." *Prosecutor v. Musema*, ICTR-96-13-A, Trial Chamber Judgment, 27 January 2000, para. 141. (*Musema TJ*)

[131] *Akayesu TJ*, para 491.

[132] "A superior, whether military R or civilian, may be held liable under the principle of superior responsibility on the basis of his de facto position of authority. . . ." *Celabici TJ*, 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 TJ*, para 213.

Chamber in *Bagilishema* case, the effective control test applies to all superiors whether *de jure* or *de facto*, but also without distinguishing military and civilian subordinates.[133] However, the same Appeals Chamber noted that it is does not necessarily mean that effective control will be exercised by a civilian superior and by a military superior in the same way.[134] 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.[135] Furthermore, the exercise of *de facto* authority must be accompanied by the "the trappings of the exercise of de jure authority".[136] As correctly noted by Trial Chamber in *Bagilishema case* the effective control in 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.[137] In particular, a superior cannot be held responsible only for the acts of those who are his/her immediate subordinates, but also those who are are subordinates of subordinates, as long as he has effective control even over these subordinates of his subordinates.[138] Moreover, two or even more superiors can be held criminally responsible for the same crime committed by the same individual if the effective control is establish in every single relation between the superior and the subordinate who committed the crime.[139] The subordination and control need not have been permanent. A superior can be held liable for crimes committed by his temporally subordinates if at the time when the crimes were committed, he had effective control over them.[140] In *Kunarac* case was held that it must be shown that at the time when the acts were committed, subordinates were under the effective control of the superior.[141]

---

[133] *Prosecutor v. Bagilishema*, ICTR-95-1A-A ICTR, Appeals Chamber Judgment, 3 July 2002, para 50. (*Bagilishema AJ)*

[134] *Bagilishema AJ*, para 52 - 55.

[135] "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 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." *Prosecutor v. Brdjanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para 281.

[136] *Celebici TJ*, para. 43.

[137] *Bagilishema TJ*, para. 45.

[138] *Semanza TJ*, para 400.

[139] *Prosecutor v. Aleksovski,* IT-95-14/1-T , Trial Chamber Judgment, para 106
(*Aleksovski TJ). Krnojelac TJ*, para 93. Blaskic TJ, para 303.

[140] *Kunarac TJ*, para 399.

[141] *Kunarac TJ*, para 399 citing *Čelebići AJ,* para 197 – 198 and 256.

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 *Celabici* case surprisingly hold that "a court may presume that possession of *de jure power prima facie* results in effective control unless proof to the contrary is produced".[142] Nevertheless as noted by the Appeals Chamber in *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.[143] 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.[144]

3. 2 *Mens Rea*

3. 2. 1 Actual knowledge

In order to apply command responsibility, it must also be proven that the superior either had superior knew or had reason to know that his or her subordinates were committing, or were about to commit crimes. 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.[145]

Positive knowledge may be the hardest type of *mens rea* to prove as it requires evidence establishing beyond reasonable doubt that the superior actually knew about crimes committed (or about to be committed) by subordinates. It can be regarded as the highest

---

Prosecutor v. Halilovic, IT-01-48-T , Trial Chamber Judgment, 16 November 2005, para 61. (*Halilovic TJ)*

[142] "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." *Celabici AJ*, para. 197.

[143] *Prosecutor v. Hadzihasanovič and Kubura*, IT-01-47-A, Appeal Chambers Judgment, 22April 2008, para. 21. (*Hadzihasanovič AJ)*

[144] *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T , Trial Chamber Judgment, para 416, 419 – 424. *(Kordic TJ). Kayishema TJ*, para 222. METTRAUX, *International Crimes*, p. 296 -298.

[145]*Celabici AJ*, para. 241. *Celabici* TJ, para. 386. *Aleksovski TJ*, para. 80. *Kordic TJ*, 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 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." *Celabici* TJ, para. 379.

standard of knowledge. The second type of actual knowledge is constructed knowledge. This standard relies on circumstantial evidence to establish beyond reasonable doubt that the accused had knowledge of the crimes committed or about to be committed. It is essentially a "must have known" standard. In other word it means that in light of the circumstantial evidence there is no other logical hypothesis other than that the accused must have known of the crimes.[146] A superior's knowledge can be established through direct or circumstantial evidence, such as the scope of the illegal acts, and the period of time and geographical location in which they occurred.[147] The form in which the information is received or knowledge is acquired is unimportant so long, presumably, as it is sufficient to make that person aware in the relevant sense.[148] Actual knowledge may be also defined as the awareness that the relevant crimes were about to be committed.[149]

For a crime of genocide, the special intent is required based on *Blagojevic* and *Jokic* Trial Judgment – the TC stated that superior has to have knowledge of the genocidal intent of the subordinate.[150] On the other hand, thee jurisprudence of the ICTY does not require that the superior share the genocidal intent (but the superior must have known or had reason to know that his subordinates had the required specific intent).[151]

3. 2. 2 „Had reason to know"

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 commits (will be commit) by his subordinates.[152] 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.[153] 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 Trial Chamber may take into account when determining whether a commander may be said to have had reason to

[146] KEITH, Kirsten. *The Mens Rea of Superior Responsibility as Developed by ICTY Jurisprudence*. Leiden Journal of International Law, Volume 14, 2001, p. 620.
[147] *Halilović TJ*, para 66.
[148] *Aleksovski TJ*, para 80.
[149] *Kordic* TJ, para 427.
[150] *Blagojevic TJ*, para 686.
[151] *Prosecutor v. Brnanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para 719 – 720.
[152] *Kordic TJ*, para 437.
[153] *Celabici AJ*, para 241.

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.[154] Especially the factor of a superior at the time is particularly significant. The Trial Chamber in *Halilovic* Trial Judgment 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.[155] 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.[156] In a conflict situation, risk is rampant and realistic commander is always aware of risk that things might go wrong. The Trial Chamber in 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 Appeals Chamber however ruled that "sufficiently alarming information putting a superior on notice of the risk that the crimes might be committed by subordinates suffices for liability.[157]

Perhaps most importantly, the jurisprudence has been fairly consistent in holding that the admonitory information need not to be provided specific details about unlawful subordinate conduct,[158] 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.[159]

The rulings indicating how suggestive of subordinate criminal conduct the admonitory information must be are often inconsistent with one another.[160] For example, the *Celabici*, *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.[161] By contrast, the Trial Chambers in *Kordic* and *Cerkez*, *Limaj* and *Halilovic* appear to have articulated a higher standard when stated "the admonitory information must be provide notice

[154] METTRAUX, *International Crimes,* p. 304 – 305.
[155] *Halilovic TJ,* para 66
[156] METTRAUX, *International Crimes,* p. 305.
[157] CASSESE, *International Criminal Law,* p. 446 – 450.
[158] *Prosecutor v. Krnojelac,* IT-97-25-A, Appeals Chamber Judgment, 17 September 2003, para 154 – 155.
[159] *Celabici AJ,* para 236.
[160] BOAS, *Forms of responsibility,* p. 210 – 211.
[161] *Celabici TJ,* para 383. *Oric TJ,* para 322. *Krnojelac TJ,* para 94.
Prosecutor v. Blagojevic and Jokic, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para 188. (*Blagojevic TJ)*

of the likelihood of subordinates' illegal acts".[162] Following this principle, the Chamber 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."*[163] 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.[164] In *Musema* case, the Trial Chamber examined the legislative history of the Additional Protocol and adopted a comparatively high *mens rea* requirement.[165] In contrast with the *Bagilishema* case where a reduced, negligence-tupe *mens rea* requirement was adopted.[166] As interpreted by ICTY judges, paragraph 3 finds even the lowest form of culpability sufficient for the imputation of responsibility – a superior who fails to recognize the risk of subordinate's delinquency.[167]

3. 3 Culpable omission (*Actus reus*)

The *actus reus* for superior responsibility is based on omission - the failure to prevent or punish the crimes of subordinates. A civilian superior does not normally obsess the same powers to sanction subordinates as military superior, therefore, as stated by the ICTY in *Aleksovski* case the same power of sanction cannot be a requirement of superior responsibility for civilians.[168] In order what a commander should be reasonably expected to do, it is

[162] *Kordic TJ*, para 437. *Limaj TJ*, para 525. Halilovic TJ, para 68.
[163] *Celabici TJ* , para 383.
[164] *Celabici TJ, para* 383.
[165] *Musema TJ*, para 131.
[166] *Bagilishema TJ*, para 46.
[167] *Blaskic TJ*, para 310 – 322. Contrary to *Celabici TJ*, para 388 – 389.
DAMASKA, Mirjan. *The Shadow Side of Command Responsibility*, Yale Law School, Volume 49, 2001, p. 463. (DAMASKA, *The Shadow Side* …)
[168] *Aleksovski TJ*, para 69 – 77.
AMBOS, *Superior Responsibility*, p. 858 – 859.

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.[169]

Article 7(3) of the Statute contains two distinct legal obligations.[170] 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.[171] 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.[172]

3. 3. 1 Necessary and reasonable measures

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".[173] A superior has to exercise all the measures possible under the circumstances.[174] 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.[175] 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.[176]

3. 3. 2 Failure to prevent

According to the jurisprudence of the Tribunal, 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

---

[169] CASSESE, *International Criminal Law*, p. 455.
[170] *Blaskic AJ*, para 83.
[171] *Blaskic AJ*, para 83. *Kordic TJ*, para 445-446.
[172] *Blaškić TJ*, para 336. *Prosecutor v. Strugar*, IT-01-42-T, Trial Chamber Judgment, 31 January 2005, para 373.
[173] *Čelebići TJ*, para 395.
[174] *Krnojelac TJ*, 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 TJ*, para 395.
[175] *Čelebići TJ*, para 395. *Kordic TJ*, para 443.
[176] *Blaskic AJ*, para 72.

know thereof.[177] The duty to prevent may be seen to include both a "general obligation" and a "specific obligation" to prevent crimes within the jurisdiction of the Tribunal. The Trial Chamber notes, however, that only the "specific obligation" to prevent triggers criminal responsibility as provided for in Article 7(3) of the Statute.

3. 3. 3 Failure to punish

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.[178] The superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process.[179] He has a duty to exercise all measures possible within the circumstances;[180] lack of formal legal competence on the part of the commander will not necessarily preclude his criminal responsibility.[181] 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.[182]

[177] *Kordic TJ*, para. 447.
[178] *Kordic TJ*, para. 446.
[179] *Prosecutor v. Kvocka*, IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, para. 316.
[180] *Krnojelac TJ*, para. 95.
[181] *Celebici TJ*, para. 395.
[182] *Kordic TJ*, para. 446.

4. Element of superior responsibility - ICC

The Article 28 of the Rome Statute covers two different forms of superior responsibility that require distinct treatment. Nevertheless core elements are common for both types of responsibility covered by the Article 28 of the Rome Statute. These core elements consist of superior-subordinate relationship, *mens rea* and culpable omission.[183]

4. 1 Superior-subordinate relationship

The Rome Statute distinguishes between military superiors and civilian superiors. For the military commanders (exact wording "*a military commander or person effectively acting as a military*") the Statute states that a superior is responsible for the crimes committed by "*forces under his or her effective superior and control*," in the case of civilian superiors or leaders ("*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*."[184] The Article 28 of the Rome Statute sets up different *mens rea* requirement for military and for civilian superior. Furthermore, Article 28 (b) (ii) 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*".

Because of those two different regimes set up in Article 28 of the Rome Statute, the distinction between military and non-military superior becomes a critical issue.[185] According the Rome Statute commentary, a military commander can be generally a member of the armed forces who is formally assigned authority to issue direct orders to subordinates or to issue orders to subordinates through a chain-of-command.[186] The PTC in *Bemba* case interpreted the term military commander as *de jure* commander who is formally or legally appointed to carry out military functions, whereas a "*person effectively acting as military commander covers superiors not elected by law to carry out a military commander's role*".[187] The PTC did not discuss the difference between military and military-like commanders in Article 28(a)

[183] CASSESE, Antonio. *International Criminal Law, (*Oxford: Oxford University Press, 2003), p. 206.
[184] Rome Statute, Article 28(a) and Article 28(b).
[185] KARSTEN, Nora. *Distinguishing Military and Non-military Superiors. Reflections on the Bemba Case at the ICC.* Journal of International Criminal Justice, Volume 7, Issue 5, p. 984. (KARSTEN, *Distinguishing* …)
Elements that distinguish military from non-military superiors for the purposes of Article 28 of the Rome Statute - KARSTEN, *Distinguishing* …, p. 992.
[186] TRIFFTERER, Commentary, p. 281.
[187] *Bemba decision*, para 409.

and non-military superiors in Article 28(b), but limited its finding to conclusion that Bemba falls within the ambit of the first category.[188]

The person who commits the "principal crime" has been traditionally referred as a "subordinate". However, in Article 28(a) 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.[189] In the *Bemba* confirmation decision forces and subordinates synonymously.[190] The TC in Bemba judgment provided further distinction between military commander and person effectively acting as military commander. In this context, military commander is usually part of the regular armed forces and such commander se appointed by and operate according to domestic laws. The TC used term *de jure* military commander for this category.[191] On the other hand, person effectively acting as military commander was described as an individual not formally or legally appointed as military commanders, but effectively acting as commanders over the forces that committed the crimes.[192] The TC also emphases that the term "military commander or person effectively acting as a military commander" includes individuals who do not perform exclusively military functions.[193]

4. 1. 2 Effective control

Article 28 of the Rome Statute explicitly requires the effective control of superiors (military and also civilian) over his/her subordinates. For a military commander or person effectively acting as a military the term „*effective command and control, or effective authority and control*" and for civilian superiors „*effective authority and control*" is required over the subordinates. Additionally the Article 28(b) of the Statute provides an additional element for a 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 a proof of a greater degree of control over subordinates to hold civilian

[188] *Bemba decision*, para 406.
[189] TRIFFTERER, Commentary, p. 281.
[190] *Bemba decision*, para 428. TRIFFTERER, Commentary, p. 281.
[191] *Bemba judgment*, para 176.
[192] *Bemba judgment*, para 177.
[193] *Bemba judgment*, para 177.

leaders liable,[194] nevertheless more likely it simply just clarifies that civilian superior must have a similar degree of control as military superiors over subordinates to fulfill this element of superior responsibility.[195] In this context, it may seem that the extent of the doctrine concerning indirect subordinates has, to some extent, been limited by the clause "*as a result of his failure to exercise control properly*" and "*activities that were within the effective responsibility and control of the superior*" in article 28(b).[196] A distinction between the phrases "command and control" or "authority and control" a have been presented by academics. According to Ambos, a term "control" is an umbrella term encompassing both command and authority.[197] Another interpretation provided Fenrik, explaining that the term "authority and control" is broader concept than "effective command and control".[198]

The PTC in *Bemba* case followed the concept of effective control given by *ad hoc* tribunal.[199] The PT Chamber also stressed out that the term "effective command and control" applicable to military commanders, and the "effective authority and control" applicable to civilian superiors, have "close but distinct meaning". The PTC also interpreted the term "effective authority" which was used for the first time in a context of superior responsibility doctrine and its codification. The PTC 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*".[200] However, the usage of the disjunctive "or" between the expressions "effective command" and "effective authority" reveres to a distinct meanings of both terms. In this context, the PTC ruled that the term effective authority may refer to the modality, manner or nature, according to which, a military or military-like commander exercise control over his forces or subordinates.[201]

---

[194] In Bemba decision was stated that Article 28(b) applies to civilian leaders who "fall short" of the standard applied to military leaders. *Prosecutor v. Bemba*, ICC-01/05-01/08. Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para 406. (*Bemba decision*)

[195] "The doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military superiors." *Celebici TJ*, para 378. Another potential explanation of article 28 (b), presented by Vetter, is that this provision simply embodies a causation element requirement. However, a causation element requirement can be more seen in a provision "as a result of his or her failure „ which is simile to military and civilian superior not the „within the effective responsibility and control of the superior" clausule. VETTER, Greg. *Command Responsibility of Non-Military Superiors in the International Criminal Court*, Yale Journal International Law, Volume 25, Issue, 89 – 95, 2000, 119.

[196] TRIFFTERER, Commentary, p. 259.

[197] AMBOS, *Command responsibility*, p. 857.

[198] Cited in AMBOS, *Command responsibility*, p. 857.

[199] *Bemba decision*, para 414 – 417.

[200] *Bemba decision*, para 413.

[201] *Bemba decision*, para 413.

The Trial Chamber concurred with the PTC that the terms command and authority have "*no substantial effect on the required level or standard of 'control'*", 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.[202]

4. 2 *Mens rea*

The Rome Statute radically differs from other Statutes of international criminal tribunals, when it comes to the mental element of command responsibility. Article 28 of thee Rome Statute presents two separate standards for mental element of command responsibility - one for military commander (person effectively acting as military commander) and one for other superiors then military commanders or person effectively acting as military commander. This distinction was inspired by a proposal from the US delegation, whose fundamental objective was to introduce distinct *mens rea* requirements for military and civilian responsibility.[203] For the military commander the knowledge test is the same as under the *ad hoc* tribunals (the accused knew or had reason to know), opposing the standard for non-military commanders when the standard by the Rome Statute is that the accused either knew, or consciously disregarded information that clearly indicated that subordinates were committing or were about commit illegal acts. This new *mens rea* requirement might create difficulties to effectively prosecute non-military commanders as a possession of information regarding the illegal acts has to be proved, but also that the accused chose not to consider or to act upon it.[204] The mental element for military commanders is similar to, but arguably slightly different from, "had reason to know" standard set up in the ICTY Statute. Civilian superiors are accorded a more generous mental element, requiring that they "consciously disregarded" information about crimes.[205]

The Rome Statute gives no clear answer to the question of whether or not a military commander can be convicted of genocide in cases where the element of fault on his or her

[202] *Bemba decision*, para 412 - 416. *Bemba judgment*, para 181.
[203] BROUWERS, *The law of CR*, p. 8.
[204] BROUWERS, *The law of CR*, p. 8 - 9.
[205] ROBINSON, Darryl. *How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution.* Melbourne Journal of International Law, Volume 13, Issue 1, 2012, p. 8. (ROBINSON, *How CR…*)

part is confined to a negligent neglect to control the conduct of the troops under his or her command.[206]

4. 2. 1 Actual knowledge

The first standard of *mens rea* - actual knowledge - is considered to be the same in all Statutes, therefore the ICTY and ICTR jurisprudence offer some interpretation.[207] It has been settled 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*."[208]

In the *Bemba* confirmation decision, it was confirmed that the interpretation of actual knowledge provided in the *ad hoc* tribunals, also is applicable with respect of article 28(a)(i).[209] With respect to the actual knowledge of superiors that the forces or subordinates were committing or about to commit a crime, the PTC held that such knowledge cannot be presumed. This actual knowledge must be obtained by way of direct or circumstantial evidence.[210] The TC held that a criteria or indicia of actual knowledge are also relevant to the "should have known" mental element.[211]

4. 2. 2 "Should have known"

The "should have known" standard set up in Article 28(a)(i) of the Rome Statute is much more complicated than actual knowledge standard. With regard to different wording, it is not possible to take direct guidance from the jurisprudence provided in *ad hoc* tribunals. The reason for this being that *ad hoc* tribunal Statutes provide "reason to know" standard, which generally is considered to be much higher than the "should have known" standard.[212] In

---

[206] D. VAN DER VYVER, Johan. *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*. University of Miami International and Comparative Law Review, Volume 12, p. 60.

[207] TRIFFTERER, Commentary, p. 287.

[208] *Bemba decision*, para 431. Citing *Hadzihasanovic TJ*, para 94.

[209] *Bemba decision*, para 431 – 432.

[210] *Bemba decision*, para 430.

[211] *Bemba decision*, para 54. The TC gave modified the legal characterization of the facts so as to consider in the same mode of responsibility the alternate form of knowledge contained in Article 28(a)(i), namely that owing to the circumstances at the time, the Accused 'should have known' that the forces under his effective command and control or under his effective authority and control, as the case may be, were committing or about to commit the crimes included in the charges confirmed. *Prosecutor v. Bemba,* ICC-01/05-01/08-2324Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, , Trial Chamber Decision, 21 September 2012.

[212] TRIFFTERER, *Commentary*, p. 287.

any case, under the "should have know" standard,[213] the superior is responsible for being negligent in failing to acquire knowledge of his subordinate's conduct.[214] According some authors, the "should have known" standard could perhaps be perceived as providing for more restricted approach on the element of military commander's discretion and thus creating a less strong argument for military commanders to refute a criminal liability based upon superior responsibility.[215] When comparing these standards, it is important to make note of the words "owing to the circumstances at the time". This phrase may help in the interpretation of bridging the possible gap between the concepts. However, as it stands today, the interpretation of the "should have known" - standard is still undetermined and under scholastic debate.

The PTC in Bemba case referred to the ICTY jurisprudence but acknowledged a difference between the "had reason to know" and the "should have known".[216] However the PTC did not offer any further explanation. Ambos noted that the difference stated by the PTC without any further elaboration may be a critical issue of the Bemba decision on the confirmation of the charges.[217]According the PTC, the „should have known"standard requires the superior to "*have merely been negligent in failing to acquire knowledge*" of his subordinates' illegal conduct.[218]

The TC did not elaborate „should have known"standard above the fading in the decision of the confirmation of charges. The TC held that Article 28 does not require that the commander knew the identities of the specific individuals who committed the crimes.[219]

---

[213] Ambos noted that both formulations essentially constitute negligence standards as it clearly follows from the travaux of the command responsibility provisions since the 1976 Additional Protocol I to the Four Geneva Conventions of 1949. While, for example, the UN Secretary General's Report about the establishment of the ICTY describes the 'had reason to know' standard as 'criminal negligence', the US Model Penal Code refers to 'should have known' in the context of negligence. AMBOS, *Critical Issues*, p. 722.

[214] MARINIELLO, Triestino ed... The *International Criminal Court in Search of Its Purpose and Identity*, (London, NY: Routledge), 2015, p. 48.

[215] KNOOPS, Jan Alexander. Military Commander's discretion and criminal Responsibility. In BASSIOUNI, Cherifet al. *The Legal regime of the ICC*, (Leiden; Boston: Martinus Nijhoff), 2009, p. 710. p. 739 - 740.

[216] *Bemba decision*, para 432.

[217] 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 "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 know' standard, it would be the ICC's task to employ a restrictive interpretation which brings the former standard in line with the latter."AMBOS, *Critical Issues*, p. 722.

[218] *Bemba decision*, para 432.

[219] *Bemba judgment*, para 194.

4. 2. 3 Consciously disregarded information

A civilian superior can be held responsible only if it can be proved that he „*knew, or consciously disregarded information, which clearly indicated that the subordinates were committing or about to commit*" these types of crimes. The new standard of "*consciously disregarding information which clearly indicated*" is equated to "willful blindness" which means that the superior is aware of a high probability of the existence of a fact but he decides to "turn a blind eye" to the fact that his subordinates committed or were about to commit a crime. As such, it can be also explained as something between "actual knowledge" and "recklessness", defined as "consciously disregarding a risk".[220] The new formulation in the Rome Statute introduces additional elements that must be met to establish that a non-military superior had the requisite *mens rea* to be held liable through command responsibility. It must be shown not only that the superior had information in his possession regarding acts of his subordinates, but that the superior consciously disregarded such information, in other words, that he chose not to consider or act upon it.[221]

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.

4. 3 Culpable omission

In order to find the suspect responsible under command responsibility, it is necessary to prove that the superior failed at least to fulfill one of the three duties listed under article 28 of the Statute. It has to proven that the superior failed to prevent crime, failed to repress crimes or failed submit the matter to the competent authorities for investigation and prosecution.[222] The PTC in Bemba case held that the three duties under Article 28 of the Statute arise at three different stages in the commission of crimes. The duty can arise before committing the crime (prevent), during (repress) or after (submit the matter to the competent authorities for investigation and prosecution).[223] In this context, a superior can be held

[220] TRIFFTERER, *Commentary*, p. 299.

[221] WILLIAMSON, Jamie Allan. *Some considerations on command responsibility and criminal liability. International review of the Red Cross*, Volume 90,Issue 870, 2008, p. 308.

[222] Article 28 of the Rome Statute.

[223] Although the Statute uses alternative language ("or") it is clear that failure to discharge any of these duties may attract criminal liability. *Bemba judgment*, para 201.

criminally responsible for one or more breaches of duty under Article 28(a) of the Statute in relation to the same underlying crimes.[224]

4. 3. 1 Necessary and reasonable measures

The measures to prevent or repress the commission of the crimes by the subordinates, has to be necessary, reasonable and within the superiors power. To a certain extent, the matter as to what can be considered necessary and reasonable measures within the superiors powers, is connected to the requirements of effective control, namely requirement that "as a result of his or her failure to exercise control properly" and "activities that were within the effective responsibility and control of the superior".[225] It was held by the TC in *Bemba* 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*."[226] Despite the same wording for military and civilians superiors, some authors suggested that different conditions when applied in a civilian context.[227]

4. 3. 2 Failure to prevent

Article 28 of the Statute does not define the specific measures required by the duty to prevent crimes. The PTC in Bemba case presented some factors that could be taken as such measures:" (i) to 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; (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command."[228] The PTC referred to the ICTY jurisprudence – especially to *Strugar* case and *Hadzihasanovic* case.[229]

[224] *Bemba decision*, para 436.
[225] TRIFFTERER, *Commentary*, p. 301.
[226] *Bemba judgment*, para 199.
[227] TRIFFTERER, *Commentary*, p. 301.
[228] *Bemba decision*, para 438.
[229] *Strugar TJ*, para. 374. *Hadzihasanovic TJ*, para 153.

4. 3. 3 Failure to repress

The duty to repress as set up in the Article 28 of the Rome Statute encompasses two separate duties arising at two different stages of the commission of crimes.[230] 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.[231] The duty to punish may be fulfilled in two different ways - either by the superior himself taking the necessary and reasonable measures to punish his 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 Rome Statute - a duty to submit the matter to the competent authorities, when the superior is not himself in a position to take necessary and reasonable measures to punish.[232]

The TC in *Bemba* noted that the statutes of the *ad hoc* tribunals do not make reference to a duty to "repress"; but using the terms "to prevent or to punish". The TC did not furthermore elaborate this issue.[233]

[230] TRIFFTERER, Otto. *Causality, A Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute*?, Leiden Journal of International Law, Volume 15, 2002, p. 201. (TRIFFTERER, *Causality…)*
[231] *Bemba decision*, para 439.
[232] *Bemba decision*, para 440.
[233] *Bemba judgment*, para 206.

5. Requirement of causality for superior responsibility

5. 1 The question of causality

A requirement that a conduct of a person charged with a crime must be causally linked to this crime itself is general and fundamental requirement of criminal law in most of the national systems.[234] 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 justifiable criminalization on the domestic level must apply at the international level as well. [235] However, in international criminal law is rather unclear whether this causal requirement exists and if, under which extend and what it means in a practice for command responsibility doctrine. Whilst some decisions of the ICTY suggest that this requirement does not apply, some have taken the opposite stance. Unfortunately, even the most recent *Bemba* judgment did not offer answers to all questions about causality requirement under superior responsibility doctrine. The opinion between academic is very distinct as well. This all makes from a causality requirement one of the recent debate topics in international criminal law.

Causality requirement plays prevailing role in the context of omission liability. Extensive debate sparked about whether a causal element is generally required within superior responsibility doctrine. While in *Celabici* was held that a 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.[236] On the other hand, the requirement of causality for failure to punish is by majority opinion of academics not required.[237] In the very first ICC superior's responsibility case, this problem was not solved as the reasoning was limited to the failure to prevent. However the when was confirmed that some level of causation requirement is required. A solution offers. Mettraux while explaining that the international criminal law demands proof of a causal relationship between the failure of the accused and the commission of crimes by subordinates (in regard to his duty to prevent crimes) and between his failure and the resulting impunity of the perpetrators (in regard to his

[234]ASHWORTH, Andrew. HORDER, Jeremy. *Principles of Criminal Law*, (Oxford: Oxford University press), 2009, p. 124.

[235] This is reflected in Article 5 (1) of the Rome Statute, which restricts the Court's mandate "*to the most serious crimes of concern to the international community as a whole*".

[236] SWART, *The legacy…*,p. 392.

[237] MAYR, Erasmus. *International Criminal Law, Causation and Responsibility.* International Criminal Law Review, Volume 14, Issue 4/5, 2014, p. 863. (MAYR, *ICL, Causation* …)

duty to punish crimes).[238] In his view the requirement of causality also applies to a situation when a superior is responsible for a "failure to punish" crimes of subordinates and such causality must be established one between the conduct of the superior, on the one hand, and the impunity of the perpetrators, on the other.[239] The author's view is that the opinion presented by Mettraux is one of the best solutions for a causality requirement problem within superior responsibility.

5. 2 ICTY jurisprudence on a causality requirement

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 she is held responsible, while the second alternative - failure to punish - does not.[240] Nevertheless, the jurisdiction of ICTY in this matter is barely consistent, as going to be elaborate below.

The rationale for rejecting a causality requirement in the 'failure to punish' case was brought out in the *Celebici* case. The TC pointed out that a superior cannot be held responsible for prior violations committed by subordinates if a causal nexus was required between such violations and the superior's failure to punish those who committed them.[241] On the other hand, the Trial Chamber held that "a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior's' failure to take the measures within his power to prevent them."[242] The TC 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. [243] The main Chamber's argument was that failure to punish cannot causally influence the crime which has already been committed. [244] The TC furthermore explains that while a causal connection between the failure of a commander to punish past crimes committed by subordinates and the commission of any such future crimes is not only possible but likely, no such casual link can possibly exist between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence.[245]

---

[238] METTRAUX, *International crimes*, p. 82.
[239] METTRAUX, *International crimes*, p. 88 – 89.
[240] MAYR, *ICL, Causation* …, p. 863.
[241] *Celabici TJ*, para 397.
[242] *Celabici TJ*, para 399.
[243] *Celabici TJ*, para 400
[244] MAYR, *ICL, Causation* …, p.863.
[245] *Celabici TJ*, para. 400.

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 a responsibility on superiors for their failure to prevent or punish offences committed by their subordinates.[246] The TC 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 subordinates.[247] Controversially, this is regarded by some authors as a denial of a causality requirement in both types of omission - failure to prevent but also for failure to punish[248] and also subsequent jurisprudence of the ICTY stood by the denial of causality requirement in both types of omissions.[249]

Subsequent judgments from the ICTY have adopted the view that the causality does not constitute an element to be established to prove superior responsibility.[250] Many of these decisions however limited to the finding of denying of existence causality requirement in customary international law by the appeal chamber in *Celabici* case.[251] For example in *Blaskic*, the Appeals Chamber 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".[252]

Despite acknowledging the position of the Appeal chamber of the ICTY, a TC in *Hadzihasanovic* came as close to reintroducing the requirement of causality as the binding jurisprudence of the AC would allow. The TC went as far as stating that a causality requirement is necessary to hold a commander responsible as "*command responsibility may*

---

[246] *Celabici TJ*, para 398. Cited again in *Kordic TJ*, para 447.

[247] The AC in *Blaskic* noted that the Celabici Trial Chamber' s finding on that point does not cited any authority for the statement. *Blaskic AJ*, par 76.

[248] BISHAI, Christine. S*uperior Responsibility, Inferior Sentencing: Sentencing Practice at the International Criminal Tribunals*. Journal of International Human Rights, Volume 11, Issue 3, 2013, p. 85.

[249] The Appeals Chamber found that it does not consider "that the existence of causality between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes is an element of command responsibility that requires proof by the Prosecution in all circumstances of a case. *Blaskic AJ*, para. 77.
Reapeted in *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Appeals Chamber Judgment, 17 December 2004, para 832. (*Kordic AJ*)

[250] DAMASKA, *The Shadow Side* …, p. 461.

[251] The decision made by the Appeals Chamber in Blaskic appeal is binding for trial chambers and Appeal Chambers itself followed her reasoning in future decisions as well. *Blaskic AJ*, para 77. *Hadzihasanovic AJ*, para 38 – 39. *Kordic AJ*, pars 830 – 832.

[252] *Blaskic AJ*, para. 77.

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."[253]

If the causality would be required in both types of omission, a problem would occur in a 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 the commander has adequately satisfied her preventive duties.[254] If a commander breached its duty to prevent, then the contribution requirement would be met for the single crime and he could be held liable in relation to that crime. Another situation will occur when the commander knows or has reason to know that a crime (isolated) was committed, but fails to investigate, punish or refer the matter to competent authorities and no further crimes occur. The commander has clearly failed in its responsibilities but has not contributed to or had an effect on the core crime. This could create a 'gap' that will allow commanders to escape justice in such a scenario.[255]

5. 3 ICC approach

Article 28(a) and (b) of the Rome Statute states that the commander 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 of a causal link between the superior's failure to act (prevent or punish) and the principal crime. Some authors even, without any hesitations, consider causation as a new element to superior responsibility introduced by the Rome Statute.[256]

While the inserted „as a result…" could easily be read as applying to both the „failure to prevent" and also the „failure to punish" case, the argument from *Celebici*, that responsibility from failure to punish could not require causal influence, was taken by many to establish conclusively that this clause could only apply to the 'failure to prevent' alternative.[257] Arguably, by some authors, this does not necessarily mean the necessity of a causality as in many situations it cannot be required the superior's failure to be *a condition sine qua non* for

[253] *Hadzihasanovic TC*, para 192.
[254] ROBINSON, *How CR.*.., p. 18
[255] STEWART, James. *The End of 'Modes of Liability' for International Crimes.* Leiden Journal of International Law, Volume 25, 2012, p. 179.
[256] SKANDER GALAND, Alexandre. *First Ruling on Command Responsibility before the ICC*. March 29, 2016. Available at: <http://blog.casematrixnetwork.org/toolkits/eventsnews/news/first-ruling-on-command-responsibility-before-the-icc/?doing_wp_cron=1462787049.3038020133972167968750>, 9. 5. 2016.
[257] The opposite view is defended by Darryl Robinson. ROBINSON, *How CR.*.., p. 7.

the commission of the base crime. [258] Rather, it suffices that the superior's failure to exercise control properly increased the risk that the base crime was committed. [259] Nevertheless, some authors claim that this provision clearly express a requirement of causality even for a failure to punish type of omission.[260]

Article 28 of the Statute has been firstly interpreted by the ICC PT Chamber during a confirmation of charges. The superior responsibility was defined as a form of criminal responsibility based on a legal obligation to act. The PT Chamber found that article 28(a) of the Statute includes an element of causality between a superior's dereliction of duty and the underlying crimes.[261] Having determined that Bemba fell under the notion of military or military-like commander, the Chamber limited itself to the analysis of the first paragraph of Article 28. Firstly, the Chamber states that 'there is no direct causal link that needs to be established'.[262] On the other hand, the Chamber convincingly affirms that there must be some form of causality between the superior's failure of supervision and the subordinates' underlying crimes.[263] The element of causality as such was only referred to the commander's duty to prevent the commission of the future crimes. [264] The judges nonetheless found that the failure to punish, being an inherent part of the prevention of future crimes, would be in a way causal vis-à-vis the subordinate's crimes, in the sense that the failure to take measures to punish the culprits it likely to increase the risk of commission of further crimes in the future. Having consider that the effect of an omission cannot be empirically determined with certainty and thus there is no direct causal link that needs to be established between the superior's omission and the crime committed by his subordinates, the Chamber found that the because a condition sine qua non causality requirement would be impossible to fulfill with regard to a conduct of omission, it was only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order for the causality nexus to be fulfilled.[265] In the result, the Chamber follows the theory of risk aggravation or increase according to which it suffices that the commander's non-intervention increased the

[258] TRIFFTERER, *Causality…*, p. 179 – 205.
[259] "It is sufficient that the superior's failure of supervision increases the risk that the subordinates commit certain crimes". AMBOS, *Superior Responsibility*, p. 860.
[260] ROBINSON, *How CR…*,, p. 5.
[261] *Bemba Decision*, para. 423.
[262] *Bemba Decision*, para. 425.
[263] AMBOS, Kai. *Critical Issues in the Bemba Confirmation Decision*, Leiden Journal of International Law Volume 22, 2009, p. 721. (AMBOS, *Critical Issues.*…)
[264] *Bemba Decision*, para. 423.
[265] *Bemba Decision*, para 425.

risk of the commission of the subordinates' crimes.[266] This approach is something completely different from traditional causality theory.[267] However, the reasoning might lack some clarity on the hypothetical assessment of causality. In reaction to the decision of the PT chamber, some view appeared that, the hypothetical nature of the assessment shall not be the decisive argument to adopt the "risk incensement test" and reject the "but for test".[268]

Concurring with the PTC, TC III did not require the establishment of a "but for" causation between the commander's omission and the crimes committed.[269] While the PTC considered that it was sufficient to prove that the commander's omission "increased the risk of the commission of the crimes"[270], TC III did not further elaborate on the requisite standard other than saying that the nexus requirement "*would clearly be satisfied when it is established that the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would have prevented the crimes*".[271] The Chamber stressed that this standard is "higher than that required by law".[272] The causality requirement in Bemba case rose to disagreement amongst the judges. Two of the three judges issued a concurring opinion, in which they presented different view on this topic. While Judge Steiner affirmed that the degree of risk required should be that of a "high probability", Judge Ozaki favored an assessment of whether the results were „reasonably foreseeable".

As the defence is expected to appeal the decision, further clarification on this point is expected.[273]

5. 4 Problem of successor superior

If accepting a causality requirement, another problem will arise in a case of a successor superior. The issue of successor superior responsibility has caused a great division

[266] "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, para 425.
[267] AMBOS, *Critical Issues…*, p.. 722.
[268] MARINIELLO, Triestino ed... The *International Criminal Court in Search of Its Purpose and Identity*, (London, NY: Routledge), 2015, p. 47.
[269] *Bemba TJ*, para. 211.
[270] *Bemba decision*, para. 211.
[271] *Bemba TJ*, para 213.
[272] *Bemba TJ*, para. 213.
[273] SKANDER GALAND, Alexandre. *First Ruling on Command Responsibility before the ICC*. March 29, 2016. Available at: <http://blog.casematrixnetwork.org/toolkits/eventsnews/news/first-ruling-on-command-responsibility-before-the-icc/?doing_wp_cron=1462787049.3038020133972167968750>, 9. 5. 2016.

between chambers of the ICTY but also between academics.[274] The *Bemba* case did not offer unanimous solution as well. The question is whether the causality requirement (that the conduct of a person charged with a crime must be causally linked to this crime itself) is fulfilled when a successor superior fails to punish crimes committed by his subordinates before he took over the command over this subordinates and before these crimes happened.[275]

The particular issue of whether the duty to punish extends to a successor commander was explicitly raised for the first time before the ICTY in *Hadzihasanovic* and *Kubura* case (*Hadzihasanic case*). Kubura was charged with command responsibility for killings, cruel treatment of prisoners, and wanton destruction and plunder of property but several of the charges originally brought against him "*concern events that started and ended before Kubura became the commander of the troops allegedly involved in those events*."[276] The indictment asserts that "*Kubura knew or had reason to know about these crimes*," and that "*after he assumed command, he was under the duty to punish the perpetrators*".[277] The TC held that in principle, a commander could be held responsible for failure to punish violations committed by his subordinates under a predecessor commander.[278] Controversially, the AC in *Hadzhisanovic* case (decision was taken by a majority of three votes to two, with strong dissenting opinions from Judges Shahabudden and Hunt) 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.[279] The Appeals Chamber made an emphasis on the superior-subordinate relationship existing at the time the subordinate was committing or was going to commit a crime and this was interpreted as that the crimes committed by a subordinate in the past, prior to his superior's assumption of superior, are excluded.[280] Thus

---

[274] SANDER, Barrie. *Unraveling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence*, Leiden Journal of International Law, Volume 23, Issue 01, 2010, p. 105 – 135.

[275] FOX, Carol T.. *Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offenses*, Case Western Reserve Law Review, Volume 55, Issue 443, 2004, p. 443. (FOX, *Closing a Loophole…*)

[276] *Prosecutor v. Hadzhisanovic*, IT 01-47-AR72. Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003. (*Hadzihasanic decision*)

[277] *Prosecutor v. Hadzihasanovic*, T-01-47-PT, Amended Indictment, 11 January 2002, para 58.

[278] *Prosecutor v. Hadzihasanovic*, IT-01-47-T202, Decision Pursuant to Rule 72(E) as to Validity of Appeal, 21 February 2003, para 202.

[279] *Hadzihasanic decision*, 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." *Hadzihasanic decision*, para 51.

[280] 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. *Hadzihasanic decision*, para 49.

crimes which, for instance, were committed prior to a superior's assumption of superior could not, in principle, be charged against him under that heading even he learns about them on assuming superior and decides to do nothing about them.[281] The majority of the Appeals Chamber observed that "*it has always been the approach of this Tribunal not to rely merely on a construction of the Statute to establish the applicable law on criminal responsibility, but to ascertain the state of customary law in force at the time the crimes were committe*d" and that "*in this particular case, no practice can be found, nor is there 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 over that subordinate*.“[282] There has been a debate whether there is an evidence to support the assertion of the Prosecutor and the dissenting judges in the *Hadzihasanovic* Appeals Chamber that customary international law does provide for a successor commander's duty to punish violations committed by his subordinates under a predecessor commander.[283]

The separate and dissenting opinions of Judge Hunt and Judge Shahabuddeen in the *Hadzihasanovic* case are well argued and well illustrated.[284] Judge Hunt pointed out that successor commanders' duty to punish "*reasonably falls within" the customary international law principle of command criminal responsibility*“ [285] while Judge Shahabuddeen concluded that denial of successor commanders' duty to punish is "*at odds with the idea of responsible command on which the principle of command responsibility rests*“.[286]

Both dissenting judges held that a superior had a duty to prevent the committing of war crimes by those under his superior and to punish them for such offences when they occurred.[287] In effect, these were two separate duties, applicable at different times. As a result of this we have to came to a conclusion that the duty to prevent the commitment can apply only to someone who was already in a position of superior at the time that his subordinates were about to commit the offence in question whether the duty to punish, on the other hand, could only be applicable after the crime had been committed. A consequence of the interpretation of the majority is that the anchoring of the duty to punish in the existence of the

[281] SWART, *The legacy…*,p. 385 - 389.
[282] *Hadzihasanic decision*, para 44 – 45.
[283] FOX, *Closing a Loophole…*, p. 465 – 491.
[284] FOX, *Closing a Loophole…*, p. 489.
[285] Separate and Partially Dissenting Opinion of Judge David Hunt, Superior Responsibility Appeal, *Hadzihasanovic.* **(***Opinion of Judge Hunt*) para 18 and 22.
[286] Partially Dissenting Opinion of Judge Shahabuddeen, Superior Responsibility Appeal, *Hadzihasanovic, para* 14. (*Opinion of Judge Shahabuddeen*)
[287] *Opinion of Judge Hunt. Opinion of Judge Shahabuddeen.*

superior-subordinate relationship at the time when the subordinate was committing or was about to commit such acts necessarily melds the duty to prevent and the duty to punish into the one duty.[288] This does not correspond with the jurisprudence, in which the duty to prevent has been treated as quite separate from the duty to punish. That jurisprudence proceeds upon the basis that, if the superior had reason to know in time to prevent, he commits an offence by failing to take steps to prevent, and he cannot make good that failure by subsequently punishing his subordinates who committed the offences. That was held by, for example, the Trial Chamber in the *Blaskic* Judgment,[289] and the TC in the *Kordic* Judgment.[290] The duty to punish, it was said, arises after the crime has been committed because the superior had been given reason to know only after that commission. According the Judge Hunt a situation of a superior who (after assuming superior) 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.[291] The reason for this is that the criminal responsibility of the superior is not regarded as a direct responsibility but a responsibility for 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 done so.[292] Judge Shahabuddeen added that the majority approach to this issue will create a serious gap in the system of protection if superior responsibility applied only to the person who was in superior at the time at which the offence was committed.[293]

There must indeed be a temporal coincidence, but it is done between the time at which the superior had effective control over the perpetrator and the time at which the superior is said to have failed to exercise his powers (to prevent or punish), not the time at which the crimes were committed as suggested by the AC in *Hadzhisanovic* case.[294]

In *Oric* case[295] the AC came close to revisiting the *Hadzihasanovic* Appeal Decision. Appeals Chamber concluded the *ratio decidendi* of its decisions is binding on Trial Chambers

[288] *Opinion of Judge Hunt*, para 23.
[289] *Blaskic TJ*, para 336.
[290] *Kordic TJ*, para 444 – 446.
[291] *Opinion of Judge Hunt*, para 8.
[292] *Opinion of Judge Hunt*, para 9.
[293] *Opinion of Judge Shahabuddeen*, para 28.
[294] METTRAUX, *International Crimes*, p. 301.
[295] The Trial Chamber itself 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 Appeals Chamber had taken a different approach in the Hadzihasanovic Appeal Decision on Jurisdiction, the Trial Chamber "founding 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

and the Trial Chamber in *Oric* case was therefore correct in following the precedent established in the *Hadzihasanovic* Appeal Decision, even though it disagreed with it.[296] The Appeal Chamber concluded that at the particular time the superior-subordinate relation was not established and then subsequently the Chamber failed to discuss the validity of the *ratio decidendi* of its decision in *Hadzihasanovic* case. [297] The Appeals Chamber, with Judge Liu and Judge Schomburg dissenting opinions, declines to address the *ratio decidendi* of the *Hadzihasanovic* Appeal Decision on Jurisdiction.[298] Judge Shahabuddeen appended a declaration to reiterate his disagreement with the *Hadzihasanovic* Appeal Decision. By restating his previous (dissenting) position in the *Hadzihasanovic* case, he expressed the view that a superior can be criminally liable for crimes committed by subordinates before he assumed superior. He went as far as discrediting the *Hadzihasanovic* findings by claiming that "there is a new majority of appellate thought".[299]

In *Sesay et al.* case, the Trial Chamber 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".[300] Thus, according to the SCTL a commander can be held liable for a failure to punish subordinates for a crime that has occurred before he assumed effective control.[301]

The successor superior responsibility was also defined by ICC Chamber in *Bemba* case. The Pre-Trial Chamber established that there must be temporal coincidence between the superior's detention of effective control and the criminal conduct of his or her subordinates. The judges acknowledge 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 is sad 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 instead required), but

---

commission and at the time that measures to punish were to be taken." *Prosecutor v. Oric*, IT-03-68-A, Appeals Chamber Judgment, 3 July 2008, para 164. (*Oric AJ*)

[296] *Oric AJ*, para 164.

[297] *Oric AJ*, para 161 - 168.

[298] Separate and Partially Dissenting Opinion of Judge Schomburg, Partially Dissenting Opinion and Declaration Of Judge Liu

[299] Declaration of Judge Shahabuddeen, para 3.

[300] *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Trial Judgment, 26 October 2009, para 299. (*Sesay TJ*)

[301] *Sesay TJ*, para 306.

they rejected it on the basis of the language used by Article 28 of the Statute. The Chamber argumented by 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.[302]

[302] *Bemba decision*, para 419.

Conclusion

This study was devoted to the superior responsibility doctrine under international criminal law. Author has divided this study into five major segments (chapters), starting with historical development and statutory development of the superior responsibility, continuing with elements of the doctrine as were presented by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) and concluded with a development of causality requirement under the doctrine.

The first chapter dealt with historical development of the doctrine from first reference that can be traced back to the time of Sun-Tzu in 500BC to the trial of the Mai Lai Massacre in 70' s. Author especially focused on the period of the Second World War and the Nuremberg and Tokyo Trials. This period is very important as the judgments render by these tribunals are used to interpret the doctrine and its finding are still used in modern practice of international criminal tribunals. This is also the period when the first inconsistency appeared, concretely between finding in *Yamashita* case and *Medina* case. Author presented different findings of these cases with focused on *Yamashita* case, as this case is regarded by many academics as the first decision on command responsibility doctrine.

In the second chapter, the author presented statutory development of the doctrine, starting from the Article 86 of Additional Protocol to the Geneva Convention of 1949 that was adopted in 1977 as the very first international treaty to codify the doctrine of superior responsibility, creating a duty to repress grave breaches of international law, and imposing penal and disciplinary responsibility on superior for any breaches. Furthermore, the author presented the Statutes of the ICTY, ICTR, ECCC, and STL with major focuses ICC. Different approach of the ECCC Statute and the STL Statute that slightly differ from others Statutes was discussed. The core of this study presented elements of the command responsibility doctrine. Elements of the doctrine were presented in two different chapters, based on different approach of the ICTY and ICC. The way of presenting of these elements depended closely on the sources, as for the ICTY there is significant amount of jurisprudence but for the ICC, there is only the *Bemba* case that deals with command responsibility doctrine. Author closely described the core elements of the doctrine, same for the ICTY and also ICC, as the existence of a superior-subordinate relationship (as well as effective control between the superior or superior and the alleged principal offenders), knowledge of the accused that the crime was about to be, was being, or had been committed; and failure of the accused to take the

necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator.[303] New approach taken by the ICC, as established in the Statute, was also presented in a case of division of military commanders and civilian superiors and *mens rea* requirement. Last chapter dealt with most controversial part of the superior doctrine – a causality for superior responsibility. Especially, in last decade a debate sparked about whether a causal element is generally required for superior responsibility from failure to punish. Author presented importance of this requirement and different views taken by the ICTY – controversy between different Chambers of the ICTY, ICC approach – by interpretation of the Statute and *Bemba* judgment. In conclusion, the author present different academic view and express the possible solution.

A significant amount of judgments have been rendered by international judicial organs (mainly by the ICTY) in cases involving the superior responsibility doctrine. The case law is primarily source of information about the doctrine; nevertheless a systematic reading of the case law reveals some inconsistencies in the application of the doctrine. This year a long-expected judgment in *Bemba* case was rendered and became first ICC judgment on the superior responsibility doctrine. Nevertheless, not even *Bemba* judgment brought answers to all question rose under this doctrine.

Author aims to continue in this study and closely elaborate the ECCC approach of the superior responsibility doctrine.

[303] *Celabici TJ*, para. 346, confirmed in appeal *Celabici AJ*, para 189 – 198, 225 – 226, 238 – 239, 256, 263. These 3 basic elements establishing superior responsibility were also acknowledge by the ICTR in *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber Judgment, 7 June 2001, para 38. (*Bagilishema TJ)*

Abstract

This thesis is concerned with issues of superior responsibility doctrine under international criminal law with a focus on elements of superior responsibility and a development of causality requirement in the case law of the ICTY and ICC. First chapters of this study elaborates historical development of the doctrine, with main focus on the Nuremberg Trials and the Tokyo Trials and statutory development of superior responsibility in the Statutes of the ICTY, ICTR, ECCC and STL and its primarily case law on a command responsibility. Following chapters deal with elements of superior responsibility before the ICTY and elements before the ICC and a development of causality requirement under the superior responsibility doctrine with focused on recent *Bemba* judgement.

Keywords

Superior responsibility, command responsibility, elements of superior responsibility, Bemba judgement, causality requirement

Shrnutí

Tato diplomová práce se zabývá problematikou odpovědnosti nadřízeného v mezinárodním trestním právu se zaměřením na její složky a vývoj kauzality dle judikatury Mezinárodního trestního tribunálu pro bývalou Jugoslávii (ICTY) a Mezinárodního trestního soudu (ICC). První kapitoly pojednávají o vývoji doktríny odpovědnosti nadřízeného, se zaměřením na Norimberský a Tokijský tribunál a zakotvení doktríny ve Statutech ICTY, Mezinárodního trestního tribunálu pro Rwandu (ICTR), Mimořádných soudních senátů v Kambodži (ECCC) a Zvláštního tribunálu pro Libanon (STL) a nejdůležitější judikatury těchto soudních orgánů v rámci této doktríny. Následující kapitoly pojednávají o složkách odpovědnosti nadřízeného před ICTY a ICC a o vývoji požadavku kauzality se zaměřením na nejnovější rozhodnutí v případu *Bemba*.

Klíčová slova

Odpovědnost nadřízeného, odpovědnost velitele, složky odpovědnosti velitele, rozhodnutí ve věci *Bemba*, kauzalita

Bibliography

Index of authorities

- ABEYRATNE, Reha. *The Application of Superior Responsibility to Civilian Leaders*, 1975 – 79. Harvard Law School, 2010.
- ALAMUDDIN, Amal; NABIL, Nidal, Jurdi; TOLBERT David. *The Special Tribunal for Lebanon: Law and Practice*, (Oxford: Oxford University Press).
- AMBOS, Kai. *Critical Issues in the Bemba Confirmation Decision*, Leiden Journal of International Law Volume 22, 2009.
- AMBOS, Kai. Superior Responsibility. In CASSESE, Antonio et al., *The Rome Statute of the International Criminal Court: A Commentary*, Volume 1, (Oxford: Oxford University Press, 2002).
- ASHWORTH, Andrew. HORDER, Jeremy. *Principles of Criminal Law*, (Oxford: Oxford University press), 2009.
- BANTEKAS, Ilias. *The Contemporary Law of Superior Responsibility*, The American Journal of International Law, Volume 93, Issue 3, 1999.
- BASSIOUNI, *Cherif. International Criminal Law: International Enforcement*, Volume 3, (Brill), 2008).
- BASSIOUNI, Cherif. MANIKAS, Peter. *The Law of the International Criminal Tribunal for the Former Yugoslavia*, (New York: Transnational Publishers, 1996).
- BISCHOFF, L. J., BOAS, G., REID, N. L. *Forms of responsibility in international criminal law*, (Cambridge: Cambridge University Press, 2007).
- BISHAI, Christine. S*uperior Responsibility, Inferior Sentencing: Sentencing Practice at the International Criminal Tribunals*. Journal of International Human Rights, Volume 11, Issue 3, 2013.
- BOISTER, Neil, CRYER Robert. *Documents on the International Military Tribunal - Charter, Indictment and Judgments*, (Oxford: Oxford published), 2008.
- BROUWERS, M. P. W.. *The law of command responsibility*, (Wolf Legal Publishers), 2012.
- BUEHRIG, Edward H. *The Case of General Yamashita, by A. Frank Reel*. Indiana Law Journal, Volume 25, Issue 3, Article 13, 1950.

- BURNETT, Weston D.. *Superior Responsibility and a Case Study of the Criminal Responsibility of Israeli Military superiors for the Pogrom at Shatila and Sabra*, Military Law Review, Volume 107, 1985.
- BURNHAM, Sedgwick James. *The trial within: negotiating justice at the International Military Tribunal for the Far East, 1946-1948,* (Vancouver: University of British Columbia Library), 2012.
- Case Matrix Network. International Criminal Law Guidelines: Command Responsibility, January 2016. Available at: <https://www.casematrixnetwork.org/fileadmin/documents/reports/CMN_ICL_Guidelines_Command_Responsibility_En.pdf>.
- CASSESE, Antonio. *International Criminal Law, (*Oxford: Oxford University Press, 2003).
- CASSESE, Antonio. *International Criminal Law: Cases and Commentary*. (Oxford: Oxford University Press), 2011.
- CHING, Ann B. *Evolution of the Command Responsibility Doctrine in Light of the Celabici Decision of the ICTY*. North Carolina Journal of International Law and Commercial Regulation, Vol. 25/1, 1999.
- CRYER, Robert et all., *An Introduction to International Criminal Law and Procedure*, (Cambridge: Cambridge University Press, 2014).
- DAMASKA, Mirjan. *The shadow side of command responsibility, The Shadow Side of Command Responsibility*, American Journal of Comparative Law , Volume 49, Issue 455, 2001.
- D. VAN DER VYVER, Johan. *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*. University of Miami International and Comparative Law Review, Volume 12.
- FROUVILLE, Olivier. *Droit International Penal, Modalites de participation a la commission de l'infraction*, (Paris: A.Pedone).
- FOX, Carol T.. *Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offenses*, Case Western Reserve Law Review, Volume 55, Issue 443, 2004.
- GARRAWAY, Charles. The doctrine of Command responsibility In BASSIOUNI, Cherifet al. *The Legal regime of the ICC*, (Leiden; Boston: Martinus Nijhoff), 2009.

- GREEN, Leslie. *Superior Responsibility in International Humanitarian Law*. 5 Transnational and contemporary problems, 1995.
- GREEN, Leslie. *War Crimes, Crimes Against Humanity, and Command Responsibility*, Naval War College Review, Volume 50, Issue Spring, 1997.
- GROTIUS Hugo. *The Law of war and peace*, book 2, chapter 21, sec. 2 (Francis W. Kelsey trans., Carnegie Endowment ed. 1925).
- HENDIN, Stuart E.. *Superior Responsibility and Superior Orders in the Twentieth Century - A Century of Evolution*, Murdoch University Electronic journal of Law, Volume 10, 2003, para 38 – 40. Available at: < http://www.murdoch.edu.au/elaw/>.
- HIROM, Sato. *The Execution of Illegal Orders and International Criminal Responsibility*, (Berlin: Springer), 2011.
- KAUFMAN, Zachary D.. *Transitional Justice For Tōjō's Japan: The United States Role in the Establishment of the International Military Tribunal For The Far East And Other Transitional Justice Mechanisms For Japan After World War II*, Emory International Law Review, Volume 27, Issue 2, 2013.
- KEITH, Kirsten. *The Mens Rea of Superior Responsibility as Developed by ICTY Jurisprudence*. Leiden Journal of International Law, Volume 14, 2001.
- KELSEN, Hans. *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, Volume 31, Issue 5, 1943.
- KNOOPS, Jan Alexander. Military Commander's discretion and criminal Responsibility. In BASSIOUNI, Cherifet al. *The Legal regime of the ICC*, (Leiden; Boston: Martinus Nijhoff), 2009.
- LAEL, Richard L.. *The Yamashita Precedent: War Crimes and superior Responsibility*, (Wilmington, Del.: Scholarly Resources), 1982.
- LEE, Roy. *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Result*, (Kluwer Law International), 1999.
- LEVINE, James D. *The Doctrine of Superior Responsibility and Its Application to Superior Civilian Leadership: Does the International Criminal Court Has the Correct Standard?* Military Law Review, Volume 193, Issue 3, 2007.
- MAJOR, William H.. *Superior Responsibility for War Crimes*, Military Law Review, Volume 25, Issue 3, 1999.
- MARINIELLO, Triestino ed... The *International Criminal Court in Search of Its Purpose and Identity*, (London, NY: Routledge), 2015.

- MARKHAM, Max. The Evolution of Command Responsibility in International Humanitarian. Penn State Journal of International Affairs, Stanford University, Fall 2011, p. 51. Available at:<https://psujia.files.wordpress.com/2012/04/the-evolution-of-command-responsibility-in-international-humanitarian-law.pdf>.
- MARTINEZ, Jenny. S.. *Understanding Mens Rea in superior Responsibility: From Yamashita to Blaskic and Beyond*, International Criminal Justice, Volume 5, Issue 3, July 2007.
- MAYR, Erasmus. *International Criminal Law, Causation and Responsibility*. International Criminal Law Review, Volume 14, Issue 4/5, 2014.
- MELONI, Chantal. *Command responsibility. Mode of liability for the Crimes of subordinates or seperate offence of the superior*, Journal of International Criminal Justice, 2007.
- METTRAUX, Guénaël. *International Crimes and the Ad Hoc Tribunals*, (Oxford University Press, Oxford, 2005.
- METTRAUX, Guénaël. *The Law of Command Responsibility*, (Oxford: Oxford University Press), 2009.
- NERLICH, Volker. *Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible*? Journal of International Criminal Justice, Volume 5, Issue 665, 2007.
- O' REILLY, Arthur Thomas. *Superior responsibility: a call to realign doctrine with principles*, American University International Law Review, Volume 20, Issue 1, 2004, p. 192.
- PARKS W. Hays. *Command Responsibility for War Crimes*, Military Law Review, Volume 62, Issue 1, 1973.
- PARKS, W. Hays. *A Few Tools in the Prosecution of War Crimes*. Military Law Review, Volume 149, Issue 73 – 74, 1995.
- PRÉVOST, Maria. Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita. Human Rights Quarterly, Volume 14, Issue 3, 1992.
- REHAN, Abeyratne. *Superior Responsibility and the Principle of Legality at the ECCC*, The George Washington International Review, Volume 44.
- ROBINSON, Darryl. *How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution.* Melbourne Journal of International Law, Volume 13, Issue 1, 2012.

- ROCKOFF, Jennifer. *Prosecutor v. Zejnil Delalic (The Celebici Case)*, Military Law Review, Volume 166, 2000.
- Ryan, Allan A. *Yamashita's Ghost: War Crimes, MacArthur's Justice, and superior Accountability*. (Lawrence, Kan: University Press of Kansas), 2012.
- SANDER, Barrie. *Unraveling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence,* Leiden Journal of International Law, Volume 23, Issue 01, 2010.
- SCHABAS, William. *Canadian Implementing Legislation for the Rome Statute*, YIHL, Volume 3, Issue 342 2000.
- SCHABAS, William. *Genocide in International Law: The Crimes of Crimes*, (Cambridge: Cambridge University Press, 2000).
- SLIEDREGT, Elies. *Individual criminal responsibility in international criminal law*, (Oxford: Oxford University Press), 2012.
- SMIDT, Michael. *Yamashita, Medina and Beyond: Superior Responsibility In Contemporary Military Operations*. Military Law Review, Volume 164, Issue 155, 2000.
- SMIDT, Michael. *Yamashita, Medina and Beyond: Superior Responsibility In Contemporary Military Operations*. Military Law Review, Volume 164, Issue 155, 2000.
- SOLF, Waldemar. *A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy*. Akron Law Review, Volume 5, 1972.
- STEWART, James. *The End of 'Modes of Liability' for International Crimes.* Leiden Journal of International Law, Volume 25, 2012.
- SWART, Bert et al.. *The legacy of the ICTY*, (Oxford: Oxford scholarship Online), 2011.
- TRIFFTERER, Otto. *Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?* Leiden Journal of International Law, Volume 15, 2002.
- TRIFFTERER, Otto. *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*, (München, Germany: Beck; Portland, Or.: Hart), 2008.
- United Nations War Crimes Commission. *Law Reports of trials of war criminals*. (London: H.M.S.O.), 1947, Volume III (*Law Reports*).

- VETTER, Greg. *Command Responsibility of Non-Military Superiors in the International Criminal Court*, Yale Journal International Law, Volume 25, Issue, 89 – 95, 2000.
- WASHBURN, John. *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, Pace International Review, Volume 11, Issue 361, 1999.
- WILLIAMSON, Jamie Allan. *Some considerations on command responsibility and criminal liability. International review of the Red Cross*, Volume 90,Issue 870, 2008.
- WILSON, Tamfuh Y. N.. *Procedural Developments at the International Criminal Tribunal for Rwanda*, The Law & Practice of International Courts and Tribunals, Volume 10, Issue 2, 2011.
- SKANDER GALAND, Alexandre. *First Ruling on Command Responsibility before the ICC*. March 29, 2016. Available at: <http://blog.casematrixnetwork.org/toolkits/eventsnews/news/first-ruling-on-command-responsibility-before-the-icc/?doing_wp_cron=1462787049.3038020133972167968750>, 9. 5. 2016.

International Documents

- 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, 4 Bevans 27).
- Charter of the International Military Tribunal, Nuremberg Trial Proceedings Vol. 1. Available at: <http://avalon.law.yale.edu/imt/imtconst.asp>.
- Control Council Law No. 10 Punishment of persons guilty of War Crimes, Crimes Against Peace and Against Humanity. Available at: <http://avalon.law.yale.edu/imt/imt10.asp>.
- Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended by NS/RKM/1004/006, 27 October 2004.
- Laws and customs of War on Land, 18 October, 1907 (Hague IV).
- 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.

- 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).
- Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.
- Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994
- Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993.
- Statute of the Special Tribunal for Lebanon, 29 March 2006.

Jurisprudence

- *Prosecutor v. Aleksovski*, IT-95-14/1-T, Trial Chamber Judgment.
- *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Appeals Chamber Judgment, 3 July 2002.
- *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber Judgment, 7 June 2001.
- *Prosecutor v. Bemba*, ICC-01/05-01/08. Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute.
- *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/TC, Trial Chamber Judgement, 26 July 2010.
- *Prosecutor v. Ieng Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011.
- *Prosecution v. Ieng Thirith*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011.
- *Prosecutor v. Nuon Chea, Khieu Samphan*, Case No. 002/19-09-2007-ECCC/TC, Trial Chamber Judgement, 7 August 2014.
- *Prosecutor v. Bemba*, ICC-01/05-01/08-2324, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, Trial Chamber Decision, 21 September 2012.
- *Prosecutor v. Bemba*, ICC-01/05-01/08-334, Trial Judgment, 21 March 2016.
- *Prosecutor v. Blagojevic and Jokic*, IT-02-60-T, Trial Chamber Judgment, 17 January 2005.
- *Prosecutor v. Brdjanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004.

- *Prosecutor v. Brnanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004.
- *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Judgment, 16 November 1998.
- *Prosecutor v. Galic*, IT-98-29, Trial Chamber Judgment, 5 December 2003.
- *Prosecutor v. Hadzihasanovič and Kubura*, IT-01-47-A, Appeal Chambers Judgment, 22 April 2008.
- *Prosecutor v. Hadžihasanovic and Kubura*, IT-01-47-T 689/21623 BIS D689 - 1/21623 BIS 05/12/2006, Trial Chamber Judgment.
- *Prosecutor v. Hadzhisanovic*, IT 01-47-AR72. Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003.
- *Prosecutor v. Hadzihasanovic*, T-01-47-PT, Amended Indictment, 11 January 2002.
- *Prosecutor v. Hadzihasanovic*, IT-01-47-T202, Decision Pursuant to Rule 72(E) as to Validity of Appeal, 21 February 2003.
- *Prosecutor v. Juvénal Kajelijeli*, ICTR-98-44A-T, Trial Chamber Judgment, 1 December 2003.
- *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber Judgment, ICTR-95 1 –T, 21 May 1999.
- *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Appeals Chamber Judgment, 17 December 2004.
- *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Trial Chamber Judgment.
- *Prosecutor v. Krnojelac*, IT-97-25-A, Appeals Chamber Judgment, 17 September 2003.
- *Prosecutor v. Kunarac at al.*, IT-96-23-T& IT-96-23/1-T , Trial Chamber Judgment.
- *Prosecutor v. Kvocka*, IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001.
- *Prosecutor v. Limaj et al*., IT-03-66-T, Trial Chamber Judgment, 30 November 2005.
- *Prosecutor v. Milorad Krnojelac*, IT-97-25-T, Trial Chamber Judgment, 15 March 2002.
- *Prosecutor v. Musema*, ICTR-96-13-A, Trial Chamber Judgment, 27 January 2000.
- *Prosecutor v. Orić*, IT-03-68-T, Trial Chamber Judgment, 30 June 2006.
- *Prosecutor v. Semanza*, ICTR-97-20-T-15-5-2003, Trial Chamber Judgment, 15 May 2003.
- *Prosecutor v. Sesay et al*., SCSL-04-15-A, Trial Judgment, 26 October 2009.
- *Prosecutor v. Strugar*, IT-01-42-T, Trial Chamber Judgment, 31 January 2005.
- *Prosecutor v. Delalić at al*.,IT-96-21-A, Appeal Chambers, 20 February 2001.