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Superior Responsibility in International Criminal Law

Elements of the doctrine and its controversy

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

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In Prague, 29. 5. 2018

Michala Chadimova

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LIST OF ABBREVIATIONS

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

1. INTRODUCTION

This study is devoted to the superior responsibility doctrine under international criminal law with a focus on elements of superior responsibility and its controversial aspects, such as successor superior responsibility, requirement of causality and interaction with special intent crimes. Superior responsibility generally includes two different concepts of criminal responsibility. The first concept is direct responsibility when the superior is held liable for ordering unlawful acts whereas the second concept is imputed criminal responsibility. This thesis is devoted to the second concept.[1] The second concept is remarkable in several aspects, but mainly in criminalizing omission opposed ordinary criminal acts involving affirmative commission. Thus superior responsibility is addressing the culpability of superiors who fail to prevent or punish the commission of international crimes by subordinates under their command.

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 superior.[2] The *ad hoc* Tribunals mostly don't distinguish between responsibility of military superiors and other superiors, as opposed to Article 28 of the Rome Statute. Unless otherwise specified, the author employs the term superior responsibility to denote responsibility attaching to all superiors.

The first substantive Chapter after the Introduction analyzes a statutory development of superior responsibility in the Statutes of the International Criminal Tribunal for Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Extraordinary Chambers in the Courts of Cambodia (ECCC), Special Court for Sierra Leone (SCSL) and

[1] The clear distinction provided *Čelabići* 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." *Mucić et al.*, ICTY, IT-96-21-T, TCH, 16. 11. 1998, § 34. Hereinafter referred to as *Čelabići*.

[2] CRYER, Robert et al. *An Introduction to International Criminal Law and Procedure*. 2nd ed. New York: Cambridge University Press, 2014, p. 455.

Special Tribunal for Lebanon (STL) and the International Criminal Court (ICC). The primary case law of the ECCC, the SCSL and the STL is also introduced in this Chapter.

The following Chapter elaborates elements of superior responsibility - elements before the ICTR and elements before the ICTY. The analysis of the elements is based on an interpretation and wording of the Statutes but mostly on the available case law. The ICTR and ICTY provided extensive volume of case law for superior responsibility. Given the fact that the ICC case law is limited to Bemba case, the *ad hoc* tribunals contribute greatly to the knowledge about superior responsibility. Special attention is being paid to the ICTY case law and distinction to generation of the case law which enables better understanding of a relation between each judgment. Significant amount of judgments have been rendered by the *ad hoc* tribunals in cases involving the superior responsibility doctrine. Nevertheless, a systematic reading of the case law reveals some inconsistencies in the application of the doctrine. The author focuses on the inconsistencies of the *ad hoc* tribunals' case law.

The fourth Chapter elaborates elements of superior responsibility under the Rome Statute and presents the very first judgement of the ICC based on superior responsibility in *Bemba* case. The Rome Statute brought some major innovations compare to the Statutes of the *ad hoc* tribunals. The most radical change is probably the different requirement for mental element of superiors. Article 28 of the Rome Statute presents two separate standards for the mental element of superior responsibility: one for the military commander (and the person effectively acting as military commander) and one for civilian superiors. However, this is not the only change and the author reflects not only the wording of the Rome Statute but also on the findings from *Bemba* case. Getting to know the elements of superior responsibility will enable to deal with the problematic aspects of superior responsibility.

The fifth Chapter deals with the first controversial aspect of superior responsibility - successor superior responsibility. The author will try to find an answer to a question of whether (and if under which condition) superiors can be held responsible for failing to punish crimes committed by their subordinates prior to taking command. The issue of successor superior responsibility has not caused only a great division between chambers of the ICTY but also between academics.

The following Chapter seeks to identify whether the causal nexus is legal ingredient of superior responsibility. Extensive debate sparked in last decade about whether a causal element is generally required for superior responsibility. The author introduces different approaches taken by the ICTY and ICC, especially with reflex of *Bemba* case. The author focuses on the distinction between different duties of superior – duty to prevent and duty to

punish and will present a possible solution for treating causality requirement under the duty to punish.

The last Chapter analyzes the interaction between superior responsibility and special intent crimes, such as genocide. This thesis shows different approach, demonstrated on *ad hoc* tribunal's case law and further analyses whether other forms of international criminal responsibility could be used for interpretation of the relation between superior responsibility and special intent crimes. The author also presents the importance of defining nature of superior responsibility and how different perception of superior responsibility could solve potential legal ambiguity created by the Rome Statute.

Methodology used for this study is based on traditional procedures. The author mainly employs analysis and synthesis of research questions. The main research scope of this study focuses on identification of controversial aspects of superior responsibility. In order to provide a succinct overview of the elements of superior 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.

This thesis has special relevance and applicability value as the usage of superior responsibility by international criminal tribunals is on rise. The superior responsibility is often a subject for discussion between academics. However, the controversial aspects of the doctrines are not previously complexly analyzed. This study offers complex analysis of the elements of superior responsibility and its controversial aspects - successor superior responsibility, causality requirement and interaction with special intent crimes - focusing on the concept of superior responsibility and its nature.

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(2) of Additional Protocol I (AP I) to the Geneva Convention of 1949 was the first provision of the 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. Article 86(2) AP I states: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."[3] Article 87 of the AP I contains more specific duties for military superiors.[4] Article 86(2) AP I identifies three elements of superior responsibility and thus laid the basis for later codification of the doctrine and its further development by the tribunals. Although the codification is in the Protocol I - applicable only in international armed conflict, it may be applied, as a part of customary international law in non-international armed conflict as well.[5]

During drafting, the greatest division between the representatives to the Convention was caused upon the *mens rea* requirement for the subordinates and whether negligence element should be introduced to the responsibility. However, the negligence standard was rejected by the drafters as too broad.[6] As the wording between French and English version of the AP I differs, the ICRC Commentary explains that the information available to the

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

[4] "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.
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.

[5] *Hadžihasanović/Kubura*, ICTY, IT-01-47-AR72, Decision on Interlocutory Appeal, 16. 7. 2003, § 31.

[6] O'REILLY, Arthur Thomas. Superior responsibility: a call to realign doctrine with principles. *American University International Law Review*. 2004, vol. 20, no. 1, pp. 78 –81.

superiors should be such nature to "enable them to conclude rather than the information should have enabled them to conclude".[7]

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. Multiple *ad hoc* tribunals or hybrid tribunals have been established since 90's.

1.1 INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA

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 ICTY was promulgated and its Article 7 deals with superior responsibility. Article 7(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*."[8]

By conducting an analysis on ICTY case law concerning superior responsibility, we can detect three generation of cases.[9] The generations represent different approach of the ICTY towards superior responsibility doctrine. The first generation set up a basis for the doctrine. The first generation case law concerns ruling at the very first ICTY case, the *Prosecutor v. Mucić et al*, more known as the *Čelebići* case (named after the camp where the crimes were committed). The notorious and leading case in superior responsibility case involved the prosecution of three former commanders and a prison guard of the Čelebići prison-camp where Bosnian Serbs were detained, tortured, and sometimes killed.

[7] Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, ICRC, Leiden: Martinus Nijhoff Publishers, 1987, p. 1013.
[8] Article 7(3) of the ICTY Statute.
[9] SLIEDREGT, Elies. *Individual criminal responsibility in international criminal law*. Oxford: Oxford University Press, 2012, pp. 184 –185.

In this case, 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*".[10]

The TCH in *Čelebići* formulated three elements that should be met before one can be held responsible as a superior under Article 7(3) of the Statute, as follows:

(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.[11]

Applying these criteria, Mucić, the camp superior, was found guilty for crimes committed by his subordinates, by virtue of his position as *de facto* superior over the camp, as he possessed effective control over the subordinates. [12] The case confirmed that a superior may be held responsible 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 TCH extended the possibility of leader responsibility to civilians. The TCH, absolutely correctly, denied the concept of strict liability stating that a superior should not to be held responsible for the crime of the subordinates if it was materially impossible to prevent commission of such crimes or to punish them.[13] Delalić was acquitted on all charges as the TCH deemed him to have lacked the required command or control over the prison-camp and over the guards who worked there. In *Čelebici* case, it was made clear that the superior or superior responsibility pursuant to Article 7(3) of the Statute is not a form of "vicarious responsibility", nor is it direct responsibility for the acts of subordinates.[14] It was the first case before the ICTY dealing with indirect superior 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 *Hadžihasanović/Kubura*. In this case the question of successor superior responsibility was discussed as well as nature of superior responsibility, when it was made clear that superior responsibility can be identified

[10] *Čelabići*, § 333.
[11] *Čelabići*, § 346, confirmed in appeal; *Mucić at al*., ICTY, IT-96-21-A, ACH, 20. 2. 2001, §§ 189 –198, 225 – 226, 238 –239, 256, 263. Hereinafter referred to as *Čelabići,* Appeals Chamber Judgement.
[12] ROCKOFF, Jennifer. Prosecutor v. Zejnil Delalic (The Čelabići Case). *Military Law Review*. 2000, vol. 166, pp. 172 – 176.
[13] METTRAUX, Guénaël. *International Crimes and the Ad Hoc Tribunals*. Oxford: Oxford University Press, 2005, pp. 296 – 298. *Čelabići,* Appeals Chamber Judgement, § 333.
[14] *Čelabići,* §§ 333, 647.

as a mode of liability.[15] The third generation of case law can be seen in *Blagojević* and *Orić* cases and represent the latest decision of the ICTY concerning superior responsibility doctrine.[16]

The more detail analysis of the ICTY's case law will be provided in the Chapter XXX, dealing with the elements of the superior responsibility under the ICTY and ICTY.

1.2 INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

In order to deal with the situation in Rwanda in 1994, the Security Council established the International Criminal Tribunal for Rwanda.[17] 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*."[18]

Akayesu case was the first case before the ICTR dealing with superior responsibility. Akayesu was the mayor of Taba commune in Gitarama prefecture. He was charged with genocide, crimes against humanity, including rape and violations of the Geneva Convention. Akayesu argued that he had no part in the killings, and that he had been powerless to stop any crimes committed by his subordinates. 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.[19] Although Akayesu was not at the end convicted under the superior responsibility, the TCH made several interesting observations towards the doctrine and its application.

In *Kayishema and Ruzindana* case, *Nahimana* case and *Musema* case, the application of superior responsibility is mixed with the direct participation based on the Article 6(1) of the Statute and therefore makes it difficult to draw any conclusion for the superior

[15] *Hadžihasanović/Kubura*, ICTY, IT-01-47-T, ICTY, TCH, 15. 3. 2006, § 75.
[16] SLIEDREGT, E.: *supra*, 2012, pp. 184 – 185.
[17] UN Security Council, *Resolution 955 (1994).* Doc. S/RES/955 (1994). 8. 11. 1994.
[18] Article 6 para 3 of the ICTR Statute.
[19] *Akayesu*, ICTR, ICTR-96-4-T, TCH, 2. 9. 1998, § 491.

responsibility.[20] In *Ntagerurra et al.* case, in relation to one event, Imanishimwe was found guilty of genocide only on the basis of superior responsibility (see Chapter 7.1).[21]

The more detail analysis of the ICTR's case law will be provided in the Chapter 3, dealing with the elements of the superior responsibility under the ICTY and ICTY.

1.3 EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

1.3.1 Historical development

The Extraordinary Chambers in the Courts of Cambodia (ECCC) were established in order to bring to trial senior leaders and those most responsible for crimes committed under the Khmer Rouge regime. The ECCC started operating in 2006, following an agreement in 2003 between the Kingdom of Cambodia and the UN. This hybrid judicial organ, with strictly limited time jurisdiction, provides a unique approach to accountability for the mass atrocities committed between 17 April 1975 and 7 January 1979 in Cambodia.[22]

The negotiations between the UN and Cambodia to set up a special tribunal took a long time - from 1997 to 2007. The negotiations resulted in two key documents: The 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 (ECCC Statute) and the UN/Cambodia Agreement.[23] A historical analysis of negotiation and documents prior finalizing the ECCC Statute is necessary in order to understand statutory development of the doctrine.

In 1996, the Special Representative of the UN Secretary General for the Human Rights in Cambodia Thomas Hammarberg, opened up the question of the impunity of the Khmer Rouge leaders for crimes committed during the Khmer Rouge regime.[24] He brought up the issue to the UN Commission on Human Rights session in April 1997. The Commission on

[20] The cumulative convictions under Article 6(1)/7(1) and 6(3)/7(3) were later on rejected by the Tribunals. See e. g. *Blaškić*, ICTY, IT-95-14-T, TCH, 3. 3. 2000, § 337.

[21] *Ntagerurra et al.*, ICTY, ICTR-99-46, TCH, 25. 2. 2004, § 691.

[22] MEISENBERG, Simon. STEGMILLER Ignaz. Introduction: An Extraordinary Court. In: MEISENBERG, Simon, STEGMILLER Ignaz (*eds*). *The Extraordinary Chambers in the Courts of Cambodia Assessing their Contribution to International Criminal Law*. The Hague: T.M.C. Asser Press, 2016, pp. 1-2.

[23] Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea was signed by Deputy Prime Minister Sok An and United Nations Under-Secretary-General Hans Corell in Phnom Penh. HEDER, Steve. *A review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia*. London/Paris, 2011, p. 2.

[24] HAMMARBERG, Thomas. *Efforts to Established a Tribunal Against the Khmer Rouge Leaders: Discussion Between the Cambodian Government and the UN*, May 2001. Cited in BASSIOUNI, M. Cherif. *Introduction to International Criminal Law*. New York: Transnational Publisher, 2003, p. 549.

Human Rights Report included the "request the Secretary General […] to examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international law [...]".[25]

In June 1997, a letter from two Co-Prime Ministers (Hun Sen and Norodom Ranariddh) was sent to the Secretary-General asking for the UN assistance and the international community in bringing to justice those responsible for the crimes committed from 1975 to 1979.[26] This letter and its wording (similar efforts to respond to the genocide in Rwanda as was done in the Yugoslavia") was later used as prove that the Co-Prime Ministers had initially requested an international tribunal. However, Hun Sen later rejected such a proposition.[27]

In 1997, the UN Third Committee discussed the crimes committed during the Democratic Kampuchea Regime. The following paragraph was included in the 1997 Report of the Third Committee: "[…] Requests the Secretary-General to examine the request by the Cambodian authorities for assistance in responding to past serious violations of Cambodian and international law, including the possibility of the appointment, by the Secretary-General, of a group of experts to evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability.''[28] This Report was subsequently adopted by the General Assembly on 27 February 1998. Thus, finally after 19 years from overthrown of the Khmer Rouge, the General Assembly acknowledged that massive human rights violations that had occurred in Cambodia during period between 1975–1979.

In 1998, Kofi Annan appointed a Group of Experts to investigate the possibility of setting up a special tribunal.[29] After nine months of work, the Group of Experts for Cambodia issued a report detailing, among other issues, extent of individual responsibility.[30] In the Report, the issue of superior responsibility was discussed within the scope of personal

[25] Economic and Social Council, *Commission on human rights report on the fifty-third session (10 March-18 April 1997),* Doc. E/1997/23 E/CN.4/1997/150, 10. 3. – 18. 4. 1997. p. 27.
[26] UN General Assembly, *Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General.* Doc. A/51/930 S/1997/488 Annex, 24 June 1997.
UN General Assembly, *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135.* Doc. A/53/850 S/1999/231 Annex, 16. 3. 1999, §§ 80-83
[27] FAWTHROP, Tom. JARVIS, Helen. *Getting away with genocide*. London: Plutto Press, 2004, pp. 117-118.
[28] UN General Assembly, *The report of the Third Committee, Add. 2 on the Situation of Human Rights in Cambodia.* Doc. A/52/644/Ad.2, 27. 2. 1998.
[29] *Ibid*.
[30] UN General Assembly, *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135.* Doc. A/53/850 S/1999/231 Annex, 16. 3. 1999, §§ 80-83. Hereinafter referred to as UN General Assembly *Report.*

jurisdiction.[31] The Report emphasized that "international law has long recognized that persons are responsible for acts even if they did not directly commit them."[32] Paragraph 81 of the Report states that responsibility should apply not only to military commanders and civilian leaders who ordered atrocities, but also to those who "knew or should have known that atrocities were being committed or about to be committed by their subordinates and failed to prevent, stop or punish them."[33] The wording contains both the terms 'military commander' and 'civilian leaders'. Firstly, it seems that these terms were used as synonyms. Secondly, the suggested requirement for *mens rea* is 'knew or should have known' which is a requirement established for military commanders under the Rome Statute.[34] Nevertheless, in the final text of the ECCC Statute, a different level of *mens rea* 'knew or had reason to know' was introduced.

R. Zacklin, the Assistant Secretary-General for legal affairs, in his note to the Secretary-General Kofi Annan suggested that the personal jurisdiction of the tribunal should be defined to reach the major political and military leaders of the Khmer Rouge, as their responsibility for the crimes committed flows from their position as leaders and the principle of command responsibility.[35] This note, together with the Report, shows the intention to apply the superior responsibility towards non-military superiors as well as military commanders. On the other hand, there is absolutely no evidence that superior responsibility should not be applied towards civilian leaders. Nevertheless, the question arose whether the application of superior responsibility to civilian superiors (leaders of Democratic Kapuchea) meets the standard of *nullum crimen sine lege*. This question was subjected to the decision of the Court as the *nullum crimen sine lege* challenge was raised in Case 002.[36] This standard ensures that individuals can be held responsible only for acts that were criminal at the time of their commission. The concept of superior responsibility was a relatively new type of responsibility during the Khmer Rouge period with no settled case law apart from the after WW2 judgements from Nuremberg. Thus it was argued that superior responsibility in 70's applied only to military commanders, not civilian superiors. The ECCC had to deal with this

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31 UN General Assembly *Report*, Article 81.
32 *Ibid*, Article 80.
33 *Ibid*, Article 81.
34 *Ibid*.
35 ZACKLIN, Ralph. *Note to the Secretary-General: A mixed Tribunal for Cambodia*, 18. 7. 1999. Cited in HEDER, S.: *supra*, p. 27.
36 *Ieng Sary*, ECCC, 002/11-9-09-2007-ECCC/OCIJ(PTC 75), D427/1/6, 25. 10. 2010, §§ 103-135. Hereinafter referred to as *Ieng Sary* Appeal.

challenge in the very first case - Case 001 - as the accused possessed only civilian leadership.[37]

In 2001, the Cambodian National Assembly unanimously approved a draft of the ECCC Statute. The ECCC Statute had been approved by the Senate and the Constitutional Council and signed by King Norodom Sihanouk. In 2003, following more negotiations between Cambodia and the UN, the UN/Cambodia Agreement was signed by both parties. In 2004, an amendment of the ECCC Law was codified, ensuring that the ECCC Statute and the UN/Cambodia Agreement were consistent.[38]

1.3.2 ECCC STATUTE

Superior responsibility clause is embodied in Article 29 of The Law on the Establishment of the Extraordinary Chambers, commonly referred as the ECCC Statute. Article 29 of the ECCC Statute contains following provision: "[…]The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.[…]."[39] Unlike the *ad hoc* tribunals, a requirement of effective command and control was encompassed directly in the text of the Statute. This condition is the only substantive change from the ICTY's and the ICTR's formulations. Otherwise, the wording of Article 29 of the ECC Statute is identical to the corresponding provisions of superior responsibility in the Statutes of the ICTY and the ICTR. This different approach is explained by consistent jurisprudence on the effective control requirement made by the *ad hoc* tribunals over the past years.[40] Regrettable, the Statute does not comprise clarification on applicability of superior responsibility to non-military superiors.

Regarding the *mens rea* requirement, the ECCC Statute follows the practice of the *ad hoc* tribunals. Article 29 of the ECCC Statute establishes responsibility for superiors who knew or had reason to know that a subordinate was about to commit a crime or had done so.

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[37] *Kaing Guek Eav alias Duch*, ECCC, 001/18-07-2007- ECCC/TC, E188, 26. 7. 2010, § 549. Hereinafter referred to as *Duch*.

[38] Bassiouni, Ch.: *supra*, 2003, pp. 550-552.

[39] 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, 2001, as amended by NS/RKM/1004/006 (Oct. 27, 2004), Article 29. Hereinafter referred to as the ECCC Statute.

[40] *Ibid.*

The wording thus differs from wording of the Rome Statute, which requires a higher standard of *mens rea*. Also, the ECCC Statute does not distinguish a *mens rea* for military commanders and non-military superiors as this approach was introduced in the Rome Statute.

The wording of the ECCC Statute indicates that the drafters intended to use the interpretation of the doctrine provided by the *ad hoc* tribunals, mainly the ICTY and the ICTR, and their recent jurisprudence development.[41] As a result, the ECCC Statute embodies three elements articulated in the ICTY's and ICTR's jurisprudence to find superiors responsible through superior responsibility – superior/subordinate relation, defined by effective control, *mens rea* and *actus reus* in the form of a superior's omission to act (to prevent or to punish).

1.3.3 Case law

The ECCC law provides no applicable law, nor a hierarchy of law designed to offer any guidance on how to avoid conflicting interpretations. The applicability of the customary international law has been challenged in Ieng Sary's case. It was argued that the customary international law cannot be directly applicable because the ECCC is a domestic court and the customary international law is not directly applicable in domestic Cambodians courts.[42] The Office of the Co-Investigative Judges decided that the application of customary international law at the ECCC is a corollary from the finding that the ECCC contains characteristics of an international court applying international law.[43]

The ECCC has limited personal jurisdiction. Article 1 of the ECCC Statute says that only the "most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia" can be prosecuted by the ECCC.[44]

The ECCC has also limited temporal jurisdiction as it can only hear cases in which the alleged crimes occurred between the period from 17 April 1975 to 6 January 1979.[45] Thus, it means that alleged perpetrators can only be held responsible for crimes that were both committed and legally recognizable in this period. The main question arises whether superior responsibility, as set up in 1975, was part of the customary law during 1975-1979. The second question is whether the customary international law during 1975-1979 recognized the

[41] REHAN, Abeyratne. Superior Responsibility and the Principle of Legality at the ECCC. *The George Washington International Review*. 2012, vol. 44, p. 48.
[42] *Ieng Sary*, ECCC, 002/19-09-2007/ECCC/OCIJ, D388, 22. 7. 2010, §§ 2-29.
[43] *Ieng Sary*, ECCC, 002/19-09-2007/ECCC/OCIJ (PTC35), D97/13, 8. 12. 2009, § 21.
[44] ECCC Statute, Article 1.
[45] *Ibid.*

responsibility of civilian leaders. Nowadays, superior responsibility is well-established under customary international law, but in 1975 it was a relatively new doctrine under international law. The jurisprudence of the ECCC provided an overview on whether, and to what extent, superior responsibility was part of customary international law. Given to the limited personal jurisdiction of the ECCC applying to senior leaders and those most responsible only, the doctrine of superior responsibility is playing the important part in the prosecution's case.

CASE 001 (KAING GUEK EAV)

On 26 July 2010, the first judgement of the ECCC was rendered. Kaing Guek Eav, also known as 'Duch', was convicted for crimes against humanity and grave breaches of the 1949 Geneva Conventions. He was sentenced by the TCH to 35 years imprisonment. This sentence was changed to life imprisonment by the Supreme Court Chamber (SCC). The SCC granted the Co-Prosecutor's appeal, stating that the TCH had erred in the law by attaching insufficient weight to the gravity of Duch's crimes, aggravating circumstances, and that too much weight had been attached to mitigating circumstances.

Duch was the former Chairman of the Khmer Rouge S-21 Security Centre in Phnom Penh. As the chairman of the S-21 security centre, the biggest security centre in Cambodia during the Khmer Rouge period, he was in charge of interrogating perceived opponents of the Communist Party of Kampuchea from 1975 to 1979.[46] As the head of the interrogation unit, Dutch supervised interrogations and taught interrogation methods to the staff of the interrogation unit. Consistent evidence showed that Dutch permitted the use of torture during interrogations.[47] Following the completion of an interrogation, most of the time detainees were taken away and "smashed" in the Choeung Ek killing field.[48]

The TCH found Duch guilty on the basis of direct participation in crimes. Nevertheless, the TCH also dealt with superior responsibility. It was concluded that Duch cannot be convicted pursuant to a direct form of responsibility and superior responsibility at the same time. Instead, the TCH considered his superior position as an aggravating factor in sentencing.[49]

The TCH provided an analysis of the conditions for establishing superior responsibility. It was concluded that all conditions establishing the superior responsibility of

[46] *Duch,* § 125-130.
[47] *Duch*, § 127.
[48] *Ibid,* §§ 127-148. During the Khmer Rouge regime, the code name 'kam kam' was used, which could be translated as smash (*i.e.* executed).
[49] *Ibid*, § 539. This conclusion is in conformity with findings in the *Blaškić* case. *Blaškić,* § 337 and *Blaškić,* ICTY, IT-95-14-A, ACH, 29. 7. 2004, §§ 91-92.

Duch for crimes committed by his subordinates were fulfilled. Duch exercised effective control over the S-21 staff, he knew that his subordinates were committing crimes, and failed to take necessary or reasonable measures to prevent their actions or to punish perpetrators.[50] He was found criminally responsible without distinguishing between civilian and military superior responsibility. The TCH accepted superior responsibility for civilian leaders as a part of customary international law during 1975-1979. The main argument supporting this conclusion was made using post WW2 tribunals' jurisprudence and jurisprudence of *ad hoc* tribunals. In the view of the TCH in the *Duch* case, this jurisprudence indicates that during the period of 1975 to 1979, superior responsibility under customary international law was not confined to military commanders.[51] The TCH argued that the deciding distinction is the degree of control exercised over subordinates rather than the nature of his or her function.[52] Furthermore, the TCH held that superior responsibility may be based on both direct and indirect relationships of subordination, as long as effective control over can be proven.[53] The TCH ascertained that the principle of legality required forms of responsibility to be "sufficiently foreseeable and that the law providing for such liability was sufficiently accessible to the accused at the relevant time."[54] In this case, the TCH concluded that the forms of responsibility were sufficiently foreseeable and accessible to the accused.[55] Surprisingly, the defence did not challenge the application of superior responsibility to non-military superiors, thus the doctrine was not subjected to the appeal judgement in *Case 001*.[56]

Concerning the application of successor superior responsibility (see Chapter 5), this issue hasn't been yet raised before the ECCC. However, it might never be raised, as the prosecution in the *Duch* case decided to follow the majority in the *Hadžihasanović/Kubura* Decision. The Co-Prosecutors in the Final Trial Submission stated that "[A]an accused may possess either permanent or temporary 'effective control' over the perpetrator(s), but this must have existed at the time of the commission of the crime(s)."[57]

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50 *Ibid*, § 549.
51 *Ibid*, §§477-478.
52 *Ibid*, § 477.
53 *Ibid,* § 542.
54 *Ibid*, § 28 (quoting *Milutinović et al.,* ICTY, IT-05-87, ACH, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21. 5. 2003, § 38)
55 *Ibid*, § 474-476.
56 The Ieng Thirith Defence mentions the omission of raising this issue in Case 001. *Ieng Thirith,* ECCC, 002/19-09-2007-ECCC/OCIJ(PTCH145), D/427/2/1, 18. 10. 2010, § 83. Hereinafter referred to as *Ieng Thirith* Defence Appeal.
57 *Kaing Guek Eav alias Duch,* ECCC, 001/18-07-2007- ECCC/TC, E159/9, 11. 11. 2009, § 349.

Originally, four former Democratic Kampuchea leaders were part of *Case 002*. The Trial Chamber held the initial hearing in June 2011. Since then, *Case 002* has been severed into separate trials (*Case 002/01* and *Case 002/02*), each addressing a different section of the indictment. The proceedings against Ieng Sary were terminated on 14 March 2013, following his death. Ieng Thirith was indicted but later found unfit to stand trial due to her dementia and was separated from the case in November 2011. Nuon Chea, former Chairman of the Democratic Kampuchea National Assembly and Deputy Secretary of the Communist Party of Kampuchea, and Khieu Samphan, former Head of State of Democratic Kampuchea, are currently on trial in Case 002/02.

In 2010, Ieng Sary, Ieng Thirith and Nuon Chea appealed against the Co-Investigating Judges (OCJI) closing order involving superior responsibility as one of the forms of responsibility. In the closing order, the OCIJ held that superior responsibility existed in customary international law in 1975-1979[58] and that the "criminal responsibility of the superior applies at both military and to civilian superiors."[59] The *nullum crimen sine lege* challenge was made by using the argument that customary international law could not be applied as part of Cambodian law in 1975-1979.[60] Alternatively, the Defence argued that from 1975 to 1979 customary international law did not recognize superior responsibility as a basis of responsibility.[61] Nuon Chea Appeal's also specified that the modes of liability should be applied only in exclusive reference to modes of liability as recognized in the 1956 Penal Code.[62] Ieng Thirith in its Appeal, also submitted that superior responsibility between 1975 and 1979 could be prosecuted only in relation to war crimes, as in 1975-1979 there was no rule of customary international law allowing for the prosecution of superior responsibility for crimes against humanity.[63] Ieng Thirith also argued that the OCIJ failed established the existence of duty to act and its basis in domestic law.[64]

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58 *Nuon Chea, Khieu Samphan, Ieng Thirith, Ieng Sary,* ECCC, 002/19-09-2007/ECCC/OCIJ, D427, 15. 9. 2010, §§ 1307. Hereinafter referred to as *Nuon Chea*, Closing Order.

59 *Nuon Chea*, Closing Order, § 1558.

60 *Ieng Sary* Appeal, §§ 111-114.

61 *Ieng Sary* Appeal, §§ 283-302. *Nuon Chea, Khieu Samphan, Ieng Thirith, Ieng Sary*, ECCC, 002/19-09-2007/ECCC/OCIJ, *Ieng Thirith* Defence Appeal, §§ 84-89.

62 *Nuon Chea,* ECCC, 002/19-09-2007-ECCC/OCIJ(PTCH146), D427/3/1, 18. 10. 2010, §§ 26 and 38. Hereinafter referred to as *Nuon Chea* Appeal. All points were raised again in *Nuon Chea*, ECCC, 002/19-09-2007-ECCC/OCIJ(PTCH146), D427/3/11, 6. 12. 2010.

63 *Ieng Thirith* Appeal, §§ 90-92.

64 *Ibid*, § 93.

In Ieng Sary's Appeal, the application of superior responsibility to internal armed conflict was raised.[65] Only in Ieng Sary's Appeal the applicability to non-military superiors was raised, arguing that superior responsibility may only be applied to military commanders.[66] It was argued that superior responsibility may only be applied when causal link is proved between the superior's actions and the crimes of his subordinates as well as pre-existing legal duty to prevent and punish of the superior.[67] Another point raised in the Appeal was the applicability of superior responsibility to special intent crimes such as genocide.[68] It was argued that superior responsibility is inconsistent with specific intent crimes.[69] Analysis of the above mentioned challenges is crucial in understanding the concept of superior responsibility at the ECCC.

The PTCH, in a reaction to the Defence Appeals, ruled that in order to fall within the subject matter jurisdiction of the ECCC, modes of liability must "be provided for in the [ECCC law], explicitly or implicitly", and have been "recognized under Cambodian or international law between 17 April 1975 and 6 January 1979."[70] Subsequently, the PTCH explicitly ruled that superior responsibility was part of customary law in the period of 1975-1979.[71] Ieng Thirith's Appeal only challenged the customary international law basis for superior responsibility as a general matter and not whether it also applied to civilian superiors. As such, the PTCH interpreted the Ieng Thirith Appeal to challenge the existence of superior responsibility generally in customary law at the relevant time and not whether it also extended to civilian superiors.[72] According to the PTCH, the *Yamashita* case "serves as precedent" for the notion that a superior may be held criminally responsible under international law with respect to crimes committed by subordinates.[73] Furthermore, the PTCH upheld this conclusion by subsequent case law.[74] The PTCH concluded that an overview of judgments and decisions taken by different tribunals support the view that the doctrine also applied to non-military

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65 *Ieng Sary* Appeal, §§ 307-313.
66 *Ibid*, §§ 314-315.
67 *Ibid*, §§ 316-322.
68 *Ibid*, §§ 323-324.
69 *Ibid*. The Defence referred to Schabas who explains that "[i]n the case of genocide, for example, it is generally recognized that the mental element of the crime is one of specific intent. It is logically impossible to convict a person who is merely negligent of a crime of specific intent." However, for this conclusion we would have to agree that the superior responsibility is a notion of negligence. See Chapter 7.
70 *Nuon Chea, Khieu Samphan, Ieng Thirith, Ieng Sary*, ECCC, 002/19-09-2007/ECCC/OCIJ (PTC 145 and 146), D427/2/15, PTCH, 15. 2. 2011, §§ 87-107. Hereinafter referred to as *Nuon Chea and Ieng Thirith* Decision.
71 *Nuon Chea, Khieu Samphan, Ieng Thirith, Ieng Sary*, ECCC, 002/19-09-2007/ECCC/OCIJ (PTC75), D427/1/30, PTCH, 13. 1. 2011, § 460. Hereinafter referred to as *Ieng Sary* Decision.
72 *Nuon Chea and Ieng Thirith* Decision, §§ 87-107.
73 *Ibid*, § 199.
74 *Ibid*, §§ 188, 200-224.

superiors.[75] Regarding the applicability of superior responsibility for crimes against humanity, the PTCH concluded that the applicability base is provided by the customary international law. The PTCH used reference to the *High Command* case, the *Hostage* case, the *Medical* case and the *Ministries* case where the accused were held responsible under the superior responsibility doctrine not only with respect to war crimes, but also crimes against humanity.[76] In the Ieng Sary Appeal case, the PTCH came to the conclusion that the AP I adopted in 1977 (Articles 86 and 87), was only a declaration of the existing position and that jurisprudence from the Nuremberg-era tribunals clearly indicates that superior responsibility was not confined to military commanders during the 1975-1979 period. The same conclusion, regarding applicability to civilian superiors, was reached by the Trial Chamber in 002/01. It held that superior responsibility, applicable to both military and civilian superiors, was recognized in customary international law by 1975 and that inconsistency between two cases in a single state (inconsistency in the *mens rea* requirement in the *Yamashita* and *Medina*), without more, does not demonstrate that superior responsibility as a form of responsibility is not customary international law.[77] Unfortunately, the PTCH did not address the applicability of the doctrine to specific crimes such as genocide.[78]

The Trial Chamber convicted both Nuon Chea and Khieu Samphan on the basis of their participation in the JCE. Additionally, in relation to Nuon Chea, the TCH concluded that he (a) ordered the crimes and (b) exercised effective control over the Khmer Rouge cadres in such a way that he was responsible on the basis of superior responsibility. Nevertheless, the TCH found that it could only consider his superior position in the context of sentencing. In contrast to Nuon Chea, the Trial Chamber did not find that Khieu Samphan (as a member of various bodies within the CPK and the Democratic Kampuchea) had sufficient authority to exercise effective control over the perpetrators of the crimes. The TCH of Case 002/01 therefore distinguished between the responsibility of Nuon Chea and Khieu Samphan.[79] The TCH concluded that Nuon Chea exercised effective control over those members of the CPK and the military members who committed the crimes.[80] The TCH concluded that although

[75] *Ibid*, § 230.
[76] *Ibid*, §231.
[77] *Nuon Chea, Khieu Samphan,* ECCC, 002/19-09-2007/ECCC/TC, E313, 7. 8. 2014, § 719.
[78] *Ieng Sary* decision, §§ 418. It was held by the PTCH that this challenge by Defence is "mixed issues of fact and law and such issues of the contours of modes of liability, as opposed to their very existence, do not represent jurisdictional challenges." *Ieng Sary* decision, §§ 102.
[79] *Nuon Chea, Khieu Samphan,* §§ 1079-1080.
[80] *Ibid*, §§ 933-934, 1079.

Khieu Samphan was commander-in-chief of the armed forces, the evidence did not demonstrate that he had effective control over direct perpetrators.[81]

On 23 November 2016, the appeal judgement in the Case 002/01 was rendered. However, given the limited scope of review, the SCC did not bring any new light to the application of the superior responsibility doctrine at the ECCC.[82]

The path to justice and punishment of those responsible for war crimes and crimes against humanity committed during the Khmer Rouge regime was long and complicated. The negotiation between the UN and Cambodia to set up a special tribunal took started in 1997. However, it took another 10 years for the special hybrid judicial organ, with strictly limited time jurisdiction providing a unique approach to accountability for mass atrocities committed between 17 April 1975 and 7 January 1979, to be set up and start to operate.

Some problematic aspects of superior responsibility haven't been properly raised and discussed yet, such as the successor responsibility doctrine or superior responsibility for special intended crimes, such as genocide. Nevertheless, the investigation in *Case 003* was concluded[83] and in *Case 004/02* and *Case 004/03* the investigation continues.[84] Thus, superior responsibility, as one of the forms of responsibility, may become a role in the future proceedings.

1.4 SPECIAL TRIBUNAL FOR LEBANON

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;

[81] *Ibid*, §§ 1017-1022

[82] *Nuon Chea, Khieu Samphan*, ECCC, 002/19-09-2007/ECCC/SC, F36, 23. 10. 2016, §§ 1096-1101.

[83] On 14 November 2017 the Co-Prosecutors filed their Final Submissions in Case 003, concerning the investigation of Meas Muth. [online] [27-05-2018]. Available at: https://www.eccc.gov.kh

[84] On 22 February 2017, the Co-Investigating Judges dismissed the case against Im Chaem, finding she was not subject to the personal jurisdiction of the ECCC which means she was neither a senior leader nor otherwise one of the most responsible officials of the Khmer Rouge regime. On 20 July 2017, the International Co-Prosecutor filed the notice of Appeal against the Co-Investigating Judges' closing order to the Pre-Trial Chamber.
On 11 and 12 December 2017, the Pre-Trial Chamber held hearings in case 004/1 to hear the arguments of the parties before it issues its decision on the appeal. [online] [27-05-2018]. Available at: https://www.eccc.gov.kh

(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".[85]

The Special Tribunal for Lebanon (STL) bases its wording almost entirely on Article 28 of the Rome Statute. Any of the case at the STL does not involve charges based on the superior responsibility. However, the STL Appeals Chamber in *Ayyash* case dealt with the application of JCE III to special intent crime – terrorism. The ACH held the position that responsibility would not be appropriate to the special intent required for the crime of terrorism and "the better approach" would be to apply lower mode of liability, such as aiding and abetting rather than "pin on him the stigma of full perpetrator ship".[86] If we apply the reasoning of the ACH, superior responsibility would also not be appropriate to special intent crimes.

1.5 SPECIAL COURT OF SIERRA LEONE

Superior responsibility is enshrined in Article 6(3) of the Statute and it almost identical with the wording of the ICTY and ICTR Statutes and it reads: "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 **had** failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".[87]

In *Brima* case, the TCH held that a superior is responsible not for the principal crimes, but rather for what has been described as a neglect of duty to prevent or punish the perpetrators of serious crimes. Thus, the TCH in this case fully followed findings of the TCH in *Halilović* case.[88] The TCH in *Brima* case also held that responsibility of a superior is not limited to crimes committed by subordinates in person, but encompasses any modes of criminal liability proscribed in Article 6(1) of the Statute. As such, a superior can be held

[85] Article 3 (2) of the Statute of the Special Tribunal for Lebanon, May 30, 2007.
[86] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL, STL-11-01/I, ACH, 16. 2. 2011, § 249. ALAMUDDIN, Amal; NABIL, Nidal, Jurdi; TOLBERT David. *The Special Tribunal for Lebanon: Law and Practice*. Oxford: Oxford University Press, 2014, pp. 102 – 103.
[87] Article 6(3).UN Security Council, *Statute of the Special Court for Sierra Leone*, 16. 1. 2002. (emphasis pointing out the difference between ICTY and ICTR Statutes added by the author).
[88] *Brima et al.,*. SCSL-04-16-T, TCH, 20. 6. 2007, § 783. *Halilović*, IT-01-48-T, TCH, 16. 11. 2005, §§ 42-54.

responsible for failure to prevent or punish a crime which was planned, ordered, instigated or aided and abetted by subordinates.[89]

The TCH in *Fofana* and *Kondewa* case dealt with presumed knowledge and held that the *mens rea* requirement will only be satisfied if information was available to the superior and this information "would have put him on notice of offences committed by his subordinates or about to be committed by his subordinates".[90] According to the TCH, such information needs to compel the conclusion of the existence of such crimes.[91] The ACH in *Fofana* and *Kondewa* case, particularly in the Kondewa appeal dealt with the application of effective control test for the establishment of superior responsibility. The ACH confirmed finding of the TCH, and hold Kondewa responsible as a superior based on his *de jure* and *de facto* position of a superior.[92] Interesting are findings of both Chambers when it comes to the crime of terrorism and superior responsibility. The TCH and the ACH did not find Kondewa responsible for the crime of terrorism because it was concluded that the instruction given could not convey the specific intent to spread terror.[93] The ACH however also argued that "a reasonable tribunal of fact could have concluded that he had requisite knowledge that some crimes had been committed […], but he lacked knowledge of the acts of terrorism".[94] It is rather speculative whether the specific intent on behalf of Kondewa was required or whether knowledge about specific intent of the subordinates was sufficient.

The TCH in *Sesay et al.* case was confronted with the successor superior responsibility, respectively outgoing superior responsibility. One of the accused, Morris Kallon, was convicted for the crime of enslavement for the entire period between February and December 1998, even though his effective command ended in August 1998. [95] Nonetheless, this was reversed on appeal because the ACH found no sufficient reasoning for such an interpretation, other than the "continuous nature" of the crime of enslavement.[96]

1.6 INTERNATIONAL CRIMINAL COURT

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 1950's. 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

[89] *Brima et al.,*, § 783.
[90] *Fofana and Kandewa*, SCSL, SCSL-04-14-T, TCH, 2. 8. 2007, § 244.
[91] *Ibid.*
[92] Strong Partially dissenting opinion by Justice Kind, §§ 64-80.
[93] *Fofana and Kandewa*, SCSL, SCSL-04-14-A, ACH, §§ 376-379.
[94] *Ibid*, para 377.
[95] *Sesay et al.*, SCSL, SCSL-04-15-T, TCH, 25. 2. 2009, §§ 2141-2146.
[96] *Sesay et al.*, SCSL, SCSL-04-15-A, ACH, 26. 10. 2009, §§ 874-876.

criminal court is the 1951 Draft Statute for an International Criminal Court. However this draft merely stated the structure of the future 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.[97]

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).[98] In 1996, the Preparatory Committee gave its report to the General Assembly. In this report, it 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".[99] Some authors suggest that from the wording of the proposed draft can be seen that there was no agreement as to whether superior responsibility should be applicable to civilians at this stage.[100] The issue whether superior responsibility should be applied to civilian superiors as well was discussed during the Rome conference in 1998.[101] A broad majority held that it should also apply to civilian superiors.[102] A first draft produced by Canada and consolidated by the UK foresaw the same requirement for both categories of superiors. However, the United States raised a question whether civilian superiors would be in the same position as military commanders to prevent or repress the

[97] The Rome statute of the International Criminal Court – Overview. [online] [23-1-2015]. Available at: http://legal.un.org/icc/general/overview.htm .
BASSIOUNI, Cherif. *International Criminal Law: International Enforcement*, Volume 3, (Brill), 2008, p. 119 – 120.
[98] WASHBURN, John. The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century. *Pace International Review*, 1999, vol. 11, no. 361, p. 361.
[99] *Ibid*.
[100] WASHBURN, J.: *supra*, p. 362.
[101] LEE, Roy. *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Result*. Kluwer Law International, 1999, p. 125.
[102] Nevertheless, few delegations opposed to this proposition FENRICK, William. Article 28. In: TRIFFTERER, Otto. *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*. München: Beck, 2008, p. 831.

commission of crimes by their subordinates.[103] Although the possibilities of the "should have known" standard was discussed, no final decision has been reached yet at this stage.[104]

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.[105] Article 28 of the ICC Statute was 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.

(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

[103] *Ibid*.
[104] LEE, R.: *supra*, p. 192.
[105] TRIFFTERER, O.*:supra*, 2008, p. 279.

(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.[106] 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.[107]

[106] 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.

[107] TRIFFTERER, O.*: supra,* 2008, p. 280.
NERLICH, Volker. Superior Responsibility under Article 28 ICC Statute. *Journal of International Criminal Justice*, 2007, vol. 5, no. 5, pp. 665 – 682.

3. ELEMENTS OF SUPERIOR RESPONSIBILITY – ICTY AND ICTR

The TCH of the ICTY in the leading *Čelebici* case expressly formulated that a superior may be held criminally responsible for the acts of his subordinates whether the following three conditions are met:

1) an existence of a superior-subordinate relationship defined by the effective control between the superior or superior and the subordinates;

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

3) a failure of the superior to take the necessary and reasonable measures to prevent or stop the crime, or to punish the subordinates.[108]

Each of the requirements will be elaborated and analyzed separately using the ICTR and ICTY case law.

3.1 SUPERIOR-SUBORDINATE RELATIONSHIP

A superior position is a condition *sine qua non* for applicability of superior responsibility.[109] 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 superior and the subordinates – *de facto*.[110]

In *Hadzihasanović* and later also in *Orić* case a question arose whether a superior can be held responsible for acts of unidentified subordinates. The TCH in *Hadzihasanović* held

[108] *Čelabići,* § 346, confirmed in appeal *Čelabići* Appeals Chamber Judgement, §§ 189 - 198, 225 - 226, 238 - 239, 256, 263. These 3 basic elements establishing superior responsibility were also acknowledge by the ICTR in *Bagilishema*, ICTR, ICTR-95-1A-T, TCH, 7. 6. 2001, § 38.

[109] FROUVILLE, Olivier. *Droit International Penal, Modalites de participation a la commission de l'infraction*. Paris: A. Pedone, 2012, pp. 404 – 405.

[110] *Čelabići* Appeals Chamber Judgement, §§ 251 – 252. *Limaj et al*., ICTY, IT-03-66-T, TCH, 30. 11. 2005, § 522. *Kajelijeli*, ICTR, ICTR-98-44A-T, TCH, 1. 12. 2003, § 771.

"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."

Semanza, ICTR, ICTR-97-20-T-15-5-2003, ICTR, TCH, 15. 3. 2003, § 401.

"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*, §77.

that in order to establish a superior-subordinate relationship, the identification of subordinates is necessary. Nevertheless, as added by the same Chamber, that does not mean that the subordinates need to be identified exactly. A specification to which group the subordinates (alleged perpetrators) belonged seems to be sufficient.[111] The TCH in *Orić* case went even further and held that a superior may be held responsible for crimes committed by anonymous person.[112] 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.[113] This Chamber's finding has no support in relevant legal instruments.[114] 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.[115] 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.[116]

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.[117]

3.1.1 EFFECTIVE CONTROL

The superior must have effective control over the subordinate.[118] To determine whether a superior has sufficient control over the subordinate, effective control test is applied by the ICTY, ICTR and SCSL.[119] Effective control was firstly defined in *Čelabići* case as "*the material ability to prevent and punish the commission of offences.*"[120] The ICTY and ICTR

[111] *Hadzihasanović/Kubura*, § 90.
[112] "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." *Orić*, § 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, E.: *supra*, 2012, pp. 191 – 192.
[113] *Ibid.*
[114] 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.
[115] METTRAUX, G.: *supra*, 2009, p. 135.
[116] *Galić*, ICTY, IT-98-29, TCH, 5. 12. 2003, § 700.
[117] SLIEDREGT, E.: *supra*, 2012, pp. 192 – 193.
[118] Requirement of the effective control is contain in jurisprudence of the ICTY (and also other tribunals) O'REILLY, A. T.: *supra,* pp. 78 – 81.
[119] BROUWERS, M. P. W. (eds). *The Law of superior Responsibility*, Wolf Legal Publishers, 2012, p. 7.
[120] *Čelabići,* § 378.

have applied superior responsibility to superiors with *de facto* control over their subordinates as the relation does not have to be formalized.[121] In *Akayesu* case, the very first case before the ICTR dealing with superior responsibility, the TCH rejected one of the charges against Akayesu since member of a particular 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.[122]

The question may be whether the ICTY and ICTR require the same level of control for civilian and military superiors. [123] Noted by the ACH 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.[124] However, the Chamber also 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.[125] 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.[126] Furthermore, the exercise of *de facto* authority must be accompanied by the "the trappings of the exercise of de jure authority".[127] As correctly noted by TCH 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

[121] "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." *Čelabići* Appeals Chamber Judgment, § 192.
"The Chamber must be prepared to look beyond the de jure powers enjoyed by the accused and consider the de facto authority he exercised . . . ." *Kayishema/Ruzindana*, ICTR, ICTR-95 1 –T, TCH, 21. 5. 1999, § 218.
"The relationship need not have been formalized and it is not necessarily determined by formal status alone." *Krnojelac*, ICTY, IT-97-25-T, TCH, 15. 3. 2002, § 93.
"A civilian superior may be charged with superior responsibility only where he has effective control, be it *de jure* or merely *de facto*, over the persons committing violations of international humanitarian law." *Musema*, ICTR-96-13-A, TCH, 27. 12. 2000, § 141.
[122] *Akayesu*, § 491.
[123] "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. . . ." *Čelabići* , § 377.
"The Chamber finds that the application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one." *Kayishema*, § 213.
[124] *Bagilishema*, ICTR-95-1A-A ICTR, ACH, 3. 7. 2002, § 50.
[125] *Bagilishema*, Appeals Chamber Judgment, §§ 52-55.
[126] "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." *Brđanin*, ICTY, IT-99-36-T, TCH, 1. 9. 2004, § 281.
[127] *Čelebici,* § 43.

control over the individuals who allegedly committed the crimes.[128] 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 subordinates of subordinates, as long as he has effective control even over these subordinates of his subordinates.[129] 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.[130] 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.[131] 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.[132]

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 ACH in *Čelabići* 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".[133] Nevertheless as noted by the ACH in *Hadzihasanović* 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.[134] 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.[135]

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[128] *Bagilishema*, § 45.
[129] *Semanza*, § 400.
[130] *Aleksovski,* IT-95-14/1-T , ICTY, TCH, § 106.
Krnojelac, § 93. *Blaškić*, § 303.
[131] *Kunarac,* § 399.
[132] *Kunarac*, § 399 citing *Čelebić,* Appeals Chamber Judgement, §§ 197 – 198 and 256.
Halilović, § 61.
[133] "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." *Čelabići* Appeals Chamber Judgement, §§ 197.
[134] *Hadžihasanović/Kubura,* ICTY, IT-01-47-A, ACH, 22. 4. 2008, § 21.
[135] *Kordić and Čerkez,* ICTY, IT-95-14/2-T , TCH, 26. 2. 2001, §§ 416, 419 – 424. *Kayishema,* § 222. METTRAUX, G. : supra, 2005, pp. 296 -298.

In order to apply superior responsibility, it must also be proven that the superior either knew or had reason to know about the crimes committed or being or about to be committed by the subordinates. Jurisprudence of the ICTY concurs, in accordance with customary law, that the actual knowledge can be established through direct or circumstantial evidence.[136]

Actual knowledge is 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 standard of knowledge. 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.[137] In the *Čelebici* case, the TCH defined a non-exhaustive list of indicators that makes possible to infer the actual knowledge of the superior about the criminal conduct of his subordinates.[138] Actual knowledge may be also defined as the awareness that the relevant crimes were about to be committed.[139]

The second, imputed, form of *mens rea* - had reason to know - requires that the superior possessed some information which put him on notice of the likelihood of unlawful acts being committed by his subordinates.[140] 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.[141] 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.[142] The form in which the

[136] *Čelabići,* Appeals Chamber Judgement, § 241. *Čelabići,* § 386. *Aleksovski,* § 80. *Kordić,* § 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." *Čelabići*, § 379.
[137] *Halilović,* § 66.
[138] *Čelabići*, § 386.
[139] *Kordić*, § 427.
[140] *Kordić,* § 437.
[141] *Čelabići,* Appeals Chamber Judgement, § 241.
[142] KEITH, Kirsten. The Mens Rea of Superior Responsibility as Developed by ICTY Jurisprudence. *Leiden Journal of International Law*, 2001, vol. 14, p. 620.

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.[143]

A number of indicia have been laid down that may be taken into account when determining whether a superior may be said to have had reason to know that crimes had been committed or were about to be committed by his subordinates, including the number, type and scope of illegal acts allegedly committed by his subordinates, the widespread and systematic occurrence of the acts, the modus operandi of similar illegal acts etc.[144] The TCH in *Halilović* case emphasized that the more physically proximate the superior was to the commission of the crimes, the more likely it is that he had actual knowledge of such commission.[145] However, the conclusion that the superior knew or had reason to know must be established beyond reasonable doubt. It is not sufficient to simply demonstrate that the superior was aware that there was a risk that his subordinates would commit crimes.[146] In a conflict situation, risk is rampant and realistic commander is always aware of risk that things might go wrong. The TCH in *Štrugar* case required knowledge of a substantial likelihood of crimes by subordinates or a clear and strong risk of such a crime is one way to distinguish criminally culpable disregard from the ordinary risk that inheres in conflict situations. The ACH however ruled that "sufficiently alarming information putting a superior on notice of the risk that the crimes might be committed by subordinates suffices for liability.[147]

Perhaps most importantly, the jurisprudence has been fairly consistent in holding that the admonitory information does not need to provide specific details about unlawful subordinate conduct.[148] The information is sufficient as long as it compels the conclusion that such conduct had occurred, was occurring, or would occur.[149] In *Čelabići, Krnojelac, Jokic* and *Orić* case it was held that the admonitory information must provide "notice of risk of criminal conduct by indicating the need for additional investigation.[150] By contrast, in *Kordić* and *Čerkez, Limaj* and *Halilović* case, it appears that it was articulated a higher standard when

[143] *Aleksovski,* § 80.
[144] METTRAUX, G. : *supra*, 2005, pp. 304 –305.
[145] *Halilović,* § 66.
[146] METTRAUX, G.: *supra*, 2005, p. 305.
[147] CASSESE, Antonio. *International Criminal Law*. 2nd ed. Oxford: Oxford University Press, 2008, pp. 446 – 450.
[148] *Krnojelac,* ICTY, IT-97-25-A, ACH, 17. 9. 2003, §§ 154 – 155.
[149] *Čelabići,* Appeals Chamber Judgement, § 236.
[150] *Čelabići*, § 383. *Orić,* § 322. *Krnojelac,* § 94. *Blagojevic and Jokic*, IT-02-60-T, ICTY, TCH, 17. 1. 2005, § 188.

stated "the admonitory information must be provide notice of the likelihood of subordinates' illegal acts".[151]

Following this the TCH in *Čelabići* case addressed the *mens rea* requirement of superior responsibility as follows: "[…] 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."[152] The TCH basically concluded that it is not necessary that the information available to the superior implied an unambiguous conclusion about the crime being committed. It is sufficient that this information available to the superior will lead to the need to investigate suspicious conduct of the subordinates.

However, the TCH in *Blaškić* case came with a different conclusion. According to the TCH, the requirement 'had reason to know' is also satisfied when a superior fails to carry out his duty to actively search for information suggesting that his subordinates commit or have committed crimes.[153] It basically introduces a new obligation placed upon superiors - the superiors' duty to remain informed about the activities of his subordinates, to control his troops and to detect and prevent the commission of crimes. However, such an approach was rejected by the ACH in *Čelabići* case arguing that such a requirement would "[…] comes close to the imposition of criminal liability on a strict or negligence basis."[154] This was also confirmed by the ACH in *Blaškić* case.[155]

In *Musema* case, the TCH examined the legislative history of the AP I and adopted a comparatively high *mens rea* requirement.[156] In contrast with the *Bagilishema* case where a reduced, negligence-type *mens rea* requirement was adopted.[157]

[151] *Kordić,* § 437. *Limaj*, § 525. *Halilović*, § 68.
[152] *Čelabići* , § 383.
[153] *Blaškić*, §§ 309-332.
[154] *Čelabići,* Appeals Chamber Judgement, § 226.
[155] *Blaškić*, Appeals Chamber Judgement, § 64.
[156] *Musema*, § 131.
[157] *Bagilishema*, § 46.

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 for non-military superiors.[158] Article 7(3) of the Statute contains two distinct legal obligations.[159] The duty to prevent arises when the superior 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.[160] 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.[161]

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 responsible for a failure to take such measures that are "within his material possibility".[162] A superior has to exercise all the measures possible under the circumstances.[163] 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.[164] 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.[165] The TCH in *Čelabići* case also set limits to the scope of 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

[158] *Aleksovski*, §§ 69–77. AMBOS, Kai. Superior Responsibility. In: CASSESE, Antonio, GAETA, Paola, JONES, John R. W. D. *The Rome Statute of the International Criminal Court: a commentary.* Oxford: Oxford University Press, 2002, pp. 858 – 859.
[159] *Blaškić,* Appeals Chamber Judgement, § 83.
[160] *Blaškić,* Appeals Chamber Judgement, § 83. *Kordić*, §§ 445-446.
[161] *Blaškić*, § 336. *Strugar,* IT-01-42-T, ICTY, TCH, 31. 1. 2005, § 373.
[162] *Čelebići,* § 395.
[163] *Krnojelac,* § 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*, § 395.
[164] *Čelebići,* § 395. *Kordić*, § 443.
[165] *Blaškić*, Appeals Chamber Judgment, § 72.

powers, respectively for failing to take such measures that are within his material possibility.[166]

According to the jurisprudence of the ICTY, the duty to prevent should be understood as resting on a superior at any stage before the commission of a subordinate crime if he acquires knowledge that such a crime is being prepared or planned, or has reason to know thereof.[167] 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.

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.[168] The superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process.[169] He has a duty to exercise all measures possible within the circumstances;[170] lack of formal legal competence on the part of the commander will not necessarily preclude his criminal responsibility.[171] 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.[172]

[166] *Čelabići* , § 383.
[167] *Kordić,* § 447.
[168] *Kordić* , § 446.
[169] *Kvocka,* ICTY, IT-98-30/1-T, TCH, 2. 10. 2001, § 316.
[170] *Krnojelac,* § 95.
[171] *Čelabići*, § 395.
[172] *Kordić*, § 446.

4. ELEMENT OF SUPERIOR RESPONSIBILITY - ICC

Article 28 of the Rome Statute covers two different forms of superior responsibility that require distinct treatment. Nevertheless core elements are common for both forms. These core elements consist of superior-subordinate relationship, *mens rea* and *actus reus* - culpable omission.[173]

It is for the first time that the constitutive elements of the doctrine are clearly and extensively laid down in a founding document, as opposed to the *ad hoc* international tribunals. The elements of superior responsibility as thusly formulated may be regarded as an advance compared to other international documents.[174]

The first judgement on superior responsibility was rendered in March 2016 in the *Bemba* case. Jean-Pierre Bemba Gombo was the leader of the Mouvement de Libération du Congo (MLC), a rebel group turned political party. Bemba was also the Commander-in-Chief of the Armée de Libération du Congo (ALC). The MLC contingent of around 1,500 men was deployed by Bemba to CAR in 2002, in support of the former Central African Republic (CAR) President, Ange Félix Patassé. The MLC soldiers directed a widespread attack against the civilian population in the CAR during 2002-2003. The MLC soldiers committed many acts of pillaging, rape, and murder against civilians, and the violence was spread over a large geographical area. Jean-Pierre Bemba Gombo was found guilty as a person effectively acting as a military commander (Article 28(a) of the ICC Statute), who knew that the MLC forces under his effective authority and control were committing or about to commit the crimes charged. At the same time, as a commander, he failed to take all necessary and reasonable measures to prevent or repress the commission of crimes by his subordinates, or to submit the matter to the competent authorities.[175] A detailed description of the Court's conclusion in this case will be offered in each sub-chapter.

4.1 SUPERIOR-SUBORDINATE RELATIONSHIP

The Rome Statute distinguishes between military superiors and civilian superiors. For military commanders (exact wording being "a military commander or person effectively acting as a

[173] CASSESE, Antonio. *International Criminal Law.* Oxford: Oxford University Press, 2003, p. 206. *Čelabići*, § 346, confirmed in appeal, *cf. Čelabići,* Appeals Chamber Judgment, §§ 189-198, 225-226, 238-239, 256, 263.
[174] METTRAUX, G.: *supra*, 2009, pp. 24-25.
[175] Jean-Pierre Bemba Gombo was found guilty, on 21 March 2016, of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging). He was sentenced, on 21 June 2016, to 18 years of imprisonment.

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 (the exact wording being "with respect to superior and subordinate relationships not described in paragraph (a)*"*) it adds that the crimes must have "concerned activities that were within the effective responsibility and control of the superior".[176] Article 28 of the Statute sets up a different *mens rea* requirement for military and civilian superiors. Furthermore, Article 28(b)(ii) of the Statute mentions another requirement for civilian superiors—the civilian superior is responsible, if "the crimes concerned activities that were within the effective responsibility and control of the superior".[177]

Because of the two different regimes established in Article 28 of the Statute, the distinction between a military and non-military superior becomes a critical issue.[178] According the Rome Statute's commentary, a military commander is generally a member of the armed forces who is assigned authority to issue direct orders to subordinates or to issue orders to subordinates through a chain of command.[179] In the *Bemba* case, the PTCH II interpreted the term 'military commander' as a *de jure* commander who is formally or legally appointed to carry out military functions, whereas a "person effectively acting as military commander covers superiors not elected by law to carry out a military commander's role".[180] The PTCH II did not discuss the difference between military and military-like commanders in Article 28(a) and non-military superiors in Article 28(b), but limited its findings to the conclusion that Bemba falls within the ambit of the first category.[181]

A person who commits the underlying 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. According to Triffterer and Arnold, the term 'forces' ought to be interpreted along the lines of Article 43 of AP I of 1977 and may thus signify the armed forces of a party to a conflict, i.e. all organized armed forces, groups and

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

[177] *Ibid*.

[178] See for elements that distinguish military from non-military superiors for the purposes of Article 28 of the Rome Statute see KARSTEN, Nora. Distinguishing Military and Non-military Superiors. Reflections on the Bemba Case at the ICC. *Journal of International Criminal Justice*. 2009, vol. 7, no. 5, p. 984

[179] TRIFFTERER, Otto, ARNOLD, Roberta. Article 28. In: TRIFFTERER, Otto. AMBOS, Kai. The Rome Statute of the International Criminal Court. A commentary. 3rd ed., C. H. Beck: 2016, p. 1085.

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

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

units which are under a command responsible to that party for the conduct of its subordinates.[182] In the *Bemba* confirmation decision 'forces' and 'subordinates' are used synonymously.[183]

The TCH III in the *Bemba* judgment provided further distinction between a military commander and a person effectively acting as military commander. In this context, a military commander is usually part of the regular armed forces and such commander appointed by and operates according to domestic laws. The TCH III used term '*de jure* military commander' for this category.[184] On the other hand, a person effectively acting as a military commander was described as an individual not formally or legally appointed as military commander, but effectively acting as a commander over the forces that committed the crimes.[185] The TCH III also emphasized that the term 'military commander or person effectively acting as a military commander' includes individuals who do not perform exclusively military functions.[186]

Article 28 of the Statute explicitly requires the effective control of superiors (military and also civilian) over subordinates. For a military commander or person effectively acting as a military commander 'effective command and control, or effective authority and control' is required. For superiors other than military commanders or persons effectively acting as a military commander (non-military commanders), 'effective authority and control' is required over subordinates. Additionally, Article 28(b) of the Statute provides an element for civilian command responsibility requiring that the subordinates' crimes must concern 'activities that were within the effective responsibility and control of the superior'. This new codification can be interpreted as proof of a greater degree of control over subordinates necessary to hold civilian leaders responsible.[187] On the other hand, more likely it simply clarifies that a civilian superior must have a similar degree of control as military superiors over subordinates in order to fulfil this element of superior responsibility.[188] Furthermore, a civilian superior shall not be held liable for the misconduct of subordinates that occurred outside of working hours or which were not related to their working activities. Subordinates within the meaning of Article 28(b) of the Statute are, according to many scholars, only within the effective responsibility and control of the superior while they are at work or while engaged in work related activities.

[182] TRIFFTERER, O.; ARNOLD, R.: *supra*, p. 1093.
[183] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, § 428.
[184] *Bemba*, § 176.
[185] *Ibid*, § 177.
[186] *Ibid*, § 177.
[187] In the *Bemba* case, it was stated that Article 28(b) applies to civilian leaders who "fall short" of the standard applied to military leaders. *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, § 406.
[188] "[T]he doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military superiors." *Čelabići*, § 378.

Outside that, the activities undertaken by the subordinates are not generally considered to be under the control of the superior. This is considerably different from a military commander who is considered to be on duty 24/7.[189] Another potential explanation of Article 28(b) of the Statute, presented by G. Vetter, is that this provision simply embodies a causation element requirement. However, the language of Article 28(2)(b) of the Statute, especially "crimes concerned activities", does not seem to fully express the idea of causation.[190]

Another possible interpretation of the wording of Article 28(b)—activities that were within the effective responsibility and control of the superior—may be a limitation of the doctrine in relation to crimes committed by persons who are formally direct subordinates. However, the conclusion is not supported by the practice of the *ad hoc* tribunals and seems highly unlikely. The jurisprudence of the *ad hoc* tribunals well established that superior responsibility and effective control can also be evoked over indirect subordinates.[191]

A distinction between the phrases 'command and control' and 'authority and control' has been presented by academics. According to Ambos, the term 'control' is an umbrella term encompassing both command and authority.[192] Another interpretation provided by Fenrick, stands that the term 'authority and control' is broader concept than 'effective command and control'.[193]

In the *Bemba* case, the PTCH II followed the concept of effective control given by the *ad hoc* tribunals.[194] The PTCH II also stressed that the term 'effective command and control' applicable to military commanders, and the 'effective authority and control' applicable to civilian superiors, have "close but distinct meaning".[195] The PTCH II also interpreted the term 'effective authority', which was used for the first time in a context of the superior responsibility doctrine and its codification. In this context, the PTCH II ruled that the term 'effective authority' may refer to the modality, manner or nature, according to which, a military or military-like commander exercises control over his forces or subordinates.[196] The PTCH II confirmed that the term 'effective command' reveals or reflects effective authority,

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[189] TRIFFTERER, O.; ARNOLD, R.: *supra*, p. 1103.
[190] VETTER, Greg. Command Responsibility of Non-Military Superiors in the International Criminal Court. *Yale Journal International Law*. 2000, vol. 25, no. 1, p. 119. For more information on causality requirement, see Chapter 6.
[191] *Čelabići*, Appeals Chamber Judgment § 252. *Blaškić*, § 301.
[192] Ambos, K.: *supra*, 2002, p. 857.
[193] FENRICK, William J. Responsibility of Commanders and Other Superiors. In: TRIFFTERER, Otto. *Commentary on the Rome Statute of the International Criminal Court. Observer´s Notes, Article by Article*. 1st ed. Baden-Baden: Nomos, 1999, p. 518.
[194] *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, §§ 414-417.
[195] *Ibid*, § 413.
[196] *Ibid.*

using interpretation of the term 'command' which can be defined as "authority, especially over armed forces".[197] Also the usage of the disjunctive 'or' between the expressions 'effective command' and 'effective authority' refers to distinct meanings for both terms. The exact meaning of this conclusion made by the PTCH II is however unclear, so it is not certain whether this is just one of the possible interpretations. The TCH III concurred with the PTCH II insofar as stating that the terms 'command' and 'authority' have "no substantial effect on the required level or standard of 'control',[198] 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".[199] This may be seen from the expressed language which uses the words 'effective' and 'control' as a common denominator under both alternatives. The conclusion was supported by a review of the *travaux préparatoires* of the Statute, as it was acknowledged by some delegations that the addition of the term "effective authority and control" as an alternative to the existing text was "unnecessary and possibly confusing". This may also suggest that some of the drafters believed that the insertion of this expression did not add or provide a different meaning to the text.[200]

4.2 *MENS REA*

The Rome Statute radically differs from other statutes of international criminal tribunals when it comes to the mental element of superior responsibility. Article 28 of the Statute presents two separate standards for the mental element of superior responsibility: one for the military commander (the person effectively acting as military commander) and one for superiors other than military commanders or persons effectively acting as military commanders. This distinction was inspired by a proposal from the US delegation.[201]

For the military commander, the knowledge test is inspired by the *ad hoc* tribunals, i.e. actual knowledge (the accused knew) and constructive knowledge (the accused had a reason to know). Nevertheless, constructive knowledge employed by the Rome Statute is defined in different way than 'had reason o know' (see the analysis below). On the other hand, the standard for non-military commanders introduced a new concept of *mens rea* that the accused

[197] *Ibid.*
[198] *Bemba,* § 181.
[199] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, §§ 412 - 416. *Bemba*, § 181.
[200] *Bemba*, § 181. *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, § 412.
[201] BROUWERS, M. P. W.: *supra,* p. 8.

"either knew, or consciously disregarded information" that clearly indicated that subordinates were committing or were about commit illegal acts.[202]

The first standard of *mens rea*, i.e. actual knowledge (the accused knew), is set up for both military and civilian superiors. This *mens rea* standard is considered to be the same in all statutes; therefore the ICTY and ICTR jurisprudence offers some interpretation.[203] It has been established that actual knowledge can be proven by either direct or circumstantial evidence. In this context, it was held that "actual knowledge may be proven if, *a priori*, a military commander is part of an organized structure with established reporting systems."[204] In the *Bemba* decision, it was confirmed that the interpretation of actual knowledge provided by the *ad hoc* tribunals, can be instructive in making a determination about a superior's knowledge within the context of Article 28 of the Statute.[205] With respect to the actual knowledge of superiors, that forces or subordinates were committing or about to commit a crime, the PTCH II held that such knowledge cannot be presumed. This actual knowledge must be obtained by way of direct or circumstantial evidence.[206] The TCH III also held that a criteria or indicia of actual knowledge are relevant to the constructed knowledge analysis.[207]

The standard of constructive knowledge, as established for military commanders or persons effectively acting as military commanders in Article 28(a) of the Statute, deserves more attention. Article 28 of the Statute provides a different standard of constructed knowledge for military commanders (or persons effectively acting as a military commander). The 'should have known' standard, as set up in the Rome Statute, differs from standard used before the *ad hoc* tribunals. This is the most discussed element of the *mens rea* requirement in the *Bemba* case. The interpretation of the 'should have known' standard, as set up in Article 28(a) of the Rome Statute, is complicated and rather unclear. With regard to the different wording, it is not possible to take direct guidance from the jurisprudence provided by the *ad hoc* tribunals.

The first question is whether and how the 'should have known' standard, as set up in Article 28(a) of the Rome Statute, differs from the 'had reason to know' standard. Ambos argues that these two standards are not substantively different, because both standards are

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[202] The Statute of the Special Tribunal for Lebanon adopts the Rome Statute provision on *mens rea* requirement for superior responsibility. Statute of the Special Tribunal for Lebanon, Agreement between the United Nations and the Lebanese Republic pursuant to Security Council Resolution 1664, 29 March 2006, Art. 3(2).

[203] TRIFFTERER, O., ARNOLD, R..: *supra*, p.1099.

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

[205] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, §§ 430-432.

[206] *Ibid*, § 430.

[207] *Ibid*, § 434.

inspired and rely on the *Hostage* case and AP I, taking in account the information which should have enabled superiors to conclude that such crimes were committed (or were about to be committed).[208] On the other hand, some authors argue that the 'should have known' standard could perhaps be perceived as providing a more restricted approach to the element of a military commander's discretion and thus creates a weaker argument for military commanders to refute a criminal liability based upon superior responsibility.[209] Unlike a principal perpetrator or the accomplice, a superior does not have to know all the details of the crimes planned to be committed. It is sufficient that he believed that one or more of his subordinates may commit one or more crimes encompassed by the Rome Statute. It is not necessary that the superior shared the intent of the principal perpetrator. Mere knowledge, or failure to acquire knowledge where this would have been required by the circumstances, is enough *per se*. This kind of failure to acquire knowledge may constitute either unconscious negligence or conscious negligence, i.e. recklessness, too.[210]

When comparing the 'should have known' and 'had reason to know' 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.

In the *Bemba* case, the PTCH II referred to the ICTY jurisprudence but acknowledged a difference between the 'had reason to know' and 'should have known' standards.[211] The PTCH II concluded that 'had reason to know' criterion embodied in the statutes of the ICTR, ICTY and SCSL sets a different standard from the 'should have known' standard under Article 28(a) of the Statute. However, despite such a difference, which the Chamber did not deem necessary to address, the criteria or indicia developed by the *ad hoc* tribunals to meet the standard of 'had reason to known' may also be useful when applying the 'should have known' requirement.[212] However, the PTCH II did not offer any further explanation. Ambos noted that the difference stated by the PTCH II without any further elaboration may be a

[208] AMBOS, K.: *supra*, 2000, p. 866.
[209] KNOOPS, Jan Alexander. The Transposition of Military Commander's Discretion onto International Criminal Responsibility for Military Commanders: An Increasing Legal-Political Dilemma within International Criminal Justice. In: BASSIOUNI, Cherif *et al. The Legal Regime of the ICC*. Leiden, Boston: Martinus Nijhoff, 2009, pp. 710, 739-740.
[210] TRIFFTERER, O., ARNOLD, R.: *supra*, p. 1099.
[211] *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, § 434.
[212] *Ibid*, § 434.

critical issue for the *Bemba* decision on the confirmation of the charges.[213]According to the PTCH II, the 'should have known' standard requires the superior to "have merely been negligent in failing to acquire knowledge" of his subordinates' illegal conduct.[214] The TCH III did not elaborate on the 'should have known' standard beyond the argumentation in the decision of the confirmation of charges. The TCH III held that Article 28 does not require the commander to know the identities of the specific individuals who committed the crimes.[215]

The second question is whether constructed knowledge (the 'had reason to know' standard) can be interpreted as a notion for negligence. This is not only a theoretical question; it has a deep influence on the applicability of the superior responsibility doctrine, e.g. the application of superior responsibility to crime of genocide, a crime requiring special intent. While the *ad hoc* tribunals refused to interpret constructed knowledge (the 'had reason to know' standard) in terms of negligence, the conclusion on constructed knowledge introduced by Article 28(a) for military superiors is unclear.[216] Some scholars argue that the 'should have known' standard refers to the negligence standard. Ambos noted that the 'had reason to know' and the 'should have known' standards essentially constitute negligence standards, as they clearly follow from the *travaux* of command responsibility provisions in the 1977 AP I. Ambos also refers to Article 86(2) of the AP I and its wording "information which should have enabled them to conclude".[217] Ambos argues that this formula was written "with negligence in mind".[218] Furthermore, Ambos argues that the 'should have known' standard clearly corresponds to the notion of negligence as understood in general criminal law. Ambos supports this conclusion by the US Model Penal Code which, as he argues, refers to negligence in the context of the 'should have known' standard.[219] Jenny S. Martinez also argues that the notion corresponds to the language many municipal legal systems use in describing negligence-based liability. She went further on adding that the 'should have

[213] Ambos points out that both of these standards ought to constitute a negligence standard and that it would be beneficial for the ICC to apply a restrictive interpretation of the *should have known* standard in order to bring it closer in line with the *had reason to know* standard. "If one really wants to read a difference in these two standards considering that the 'should have known' standard 'goes one step below' the 'had reason to 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, KAI. Critical Issues in the Bemba Confirmation Decision. *Leiden Journal of International Law*. 2009, vol. 22, issue 4, p. 722.

[214] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, § 432.

[215] *Bemba,* §194.

[216] The ACH in the *Blaškić* case held that the only authoritative interpretation of constructed knowledge is that proposed in 1998 in the *Čelabići* case, where the Trial Chamber concluded that the superior is criminally responsible only when he knew of the fact that it is possible that crimes under international law may be committed, and despite such information, failed to launch investigation.

[217] AMBOS, K.: *supra*, 2009, p. 722.

[218] AMBOS, K.: *supra*, 2002, p. 867.

[219] *Ibid*, pp. 866- 867.

known' standard readily admits the possibility of a superior's duty to acquire information about the conduct of their subordinates (known as a duty of knowledge). This duty to take reasonable steps would impose a duty upon the superior to actively acquire information about whether subordinates have committed or are about to commit crimes.[220]

In the *Bemba* case, the PTCH II concluded that Article 28(a) of the Statute encompasses two standards of fault element: "[T]he first, which is encapsulated by the term 'knew', requires the existence of actual knowledge. [T]he second, which is covered by the term should have known, is in fact a form of negligence."[221] Furthermore, the PTCH II clarified that the 'should have known' standard requires more of an "active duty" on the part of the superior to take "the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime."[222] This conclusion does not correspond with the conclusion of the ICTY, as in the *Blaškić* case the ACH held that the only authoritative interpretation of constructed knowledge is that which was proposed in 1998, in the *Čelabići* case. In this case , the TCH concluded that a superior may only be responsible when he has information available that makes it possible to infer that his subordinates commit criminal acts. Unfortunately, in the *Bemba* case the TCH III did not follow up on findings made by the PTCH regarding active duty to secure knowledge about the conduct of troops and to inquire.

A civilian superior can be held responsible only if it can be proven that he or she "knew, or consciously disregarded information, which clearly indicated that the subordinates were committing or about to commit" these types of crimes. The new standard of 'consciously disregarding information' which is equated to wilful blindness, meaning that the superior was aware of a high probability of the existence of a fact but decided to turn a blind eye to the fact that his subordinates committed or were about to commit a crime.[223] On the other hand, Martinez argues that the notion is more evocative of recklessness standards.[224]

Civilian superiors are accorded a more generous mental element, requiring that they consciously disregarded information about crimes.[225] This new *mens rea* requirement might create difficulties to effectively prosecute non-military commanders. For the consciously

[220] MARTINEZ, Jenny S. Understanding Mens Rea in Command Responsibility FromYamashita to Blaškić and Beyond. *Journal of International Criminal Justice*. 2007, vol. 5, p. 659.
[221] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, § 429.
[222] *Ibid*, § 433.
[223] Fenrick, W.: *supra,* 2008, p. 299. AMBOS, K.: *supra,* 2002, p. 870.
[224] MARTINEZ, J. S.: *supra*, p. 659.
[225] ROBINSON, Darryl. How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution. *Melbourne Journal of International Law*. 2012, vol. 13, no. 1, p. 8.

disregarded information standard of *mens rea,* possession of information regarding the crimes committed by the subordinates, and more importantly that the accused also chose not to consider and act upon it, must be proven.[226] This *mens rea* standard was used for the first time in the *Kayishema and Ruzindana* case, where the ICTR applied a different standard of *mens rea* to military and civilian superiors. In this case, the TCH used the consciously disregarded information standard to delineate the meaning of the 'had reason to known' standard for civilian superiors. In the case of a military commander, more active duty is imposed upon the superior to inform themselves of the activities. Nevertheless, for a civilian superior what must be proven is that he or she either knew or consciously disregarded information which was clearly indicated or put him on notice that his subordinates had committed.[227]

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*. It must be shown not only that the superior had information in his possession regarding the actions of his subordinates, but that the superior consciously disregarded such information, in other words, that he chose not to consider or act upon it.[228] As the standard of consciously disregarded information is a new requirement and limited to non-military superiors, no jurisprudence is available to interpret this standard because in the *Bemba* case the Court examined only Article 28(a) of the Rome statute, i.e. application of superior responsibility to military commanders or persons acting as a military commander.

4.3 *ACTUS REUS*

The *ad hoc* case law voted for distinct obligations under the *actus reus* element of the superior responsibility doctrine.[229] Under this approach, a superior may be held responsible if he or she fails to prevent the crimes of subordinates or fails to punish such crimes committed by subordinates, or fails to do both. The duty to prevent and duty to punish are thus distinct and cumulative.[230] The distinction between these separate duties is also important for establishing a different causality requirement.

[226] BROUWERS, M. P. W.: *supra*, pp. 8-9.
[227] *Kayishema/Ruzindana*, §§ 227-228.
[228] WILLIAMSON, Jamie Allan. Some considerations on command responsibility and criminal liability. *International Review of the Red Cross*. 2008, vol. 90, no. 870, p. 308.
[229] *Orić*, §§ 325-326.
[230] *Blaškić,* Appeals Chamber Judgment, § 83. *Halilović*, § 72.

The Rome Statute sub-divides superior duties into three obligations: the duty to prevent, the duty to repress, and the duty to submit the matter to the competent authorities for investigation and prosecution. However, it does not appear that this formulation provides different duties than those set up in Statutes of the *ad hoc* tribunals.[231] The different wording just clarifies what has already been established in the case law of these tribunals. The duty to repress and the duty to submit the matter to the competent authorities for investigation and prosecution had already been recognized as forming part of the duty to punish.[232]

The duty to repress as set up in Article 28 of the Rome Statute thus encompasses two separate duties arising at two different stages of the commission of crimes.[233] 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.[234] 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 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.[235] Although the formulation "submit to the competent authorities" is new, it clearly corresponds to the "report" requirement mentioned in Article 87(1) of the AP I.[236]

Under superior responsibility, it is necessary to prove that the superior failed to fulfil at least one of the three duties listed under Article 28 of the Statute. It has to be proven that the superior failed to prevent a crime, failed to repress crimes or failed to submit the matter to the competent authorities for investigation and prosecution.[237] In the *Bemba* case, the PTCH II held that the three duties under Article 28 of the Statute arise at three different stages in the commission of crimes. Duty can arise before commission of the crime, during or after the commission. In this context, a superior can be held criminally responsible for one or more

[231] METTRAUX, G.: *supra*, 2009, p. 31.
[232] *Ibid*, pp. 31-32.
[233] TRIFFTERER, O.: *supra*, 2002, p. 201.
[234] *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, § 439.
[235] *Ibid*, § 440.
[236] AMBOS, K.: *supra*, 2002, p. 862.
[237] Article 28 of the Rome Statute. Although the Statute uses alternative language ("or") it is clear that failure to discharge any of these duties may attract criminal liability.

breaches of duty under Article 28(a) of the Statute, in relation to the same underlying crimes.[238]

The measures to prevent or repress the commission of the crimes by subordinates has to be necessary, reasonable and within the superior's power. To a certain extent, the matter as to what can be considered necessary and reasonable measures within the superior's powers is connected to the requirements of effective control requirement.[239] It was confirmed in the *Bemba* by the TCH III when the Chamber ruled that the duty of the commander to take all necessary and reasonable measures to prevent or repress the crimes committed by his forces "rests upon his possession of effective authority and control."[240] Despite the same wording for military and civilians superiors ("take all necessary and reasonable measures within his or her power"), some authors suggested different conditions when applied in a civilian context.[241]

Article 28 of the Statute does not define any specific measures required by the duty to prevent crimes. Nevertheless, in the *Bemba* case the PTCH II presented some factors that could be taken as such measures. According the PTCH II, the duty to prevent encompasses the duty to (i) ensure adequate training in international humanitarian law; (ii) to secure reports that all military actions were carried out in accordance with international law; (iii) to issue orders aiming at bringing the relevant practices into accord with the rules of war; and (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command.*[242]* In this manner, The PTCH II referred to the ICTY jurisprudence – especially the *Strugar* and *Hadžihasanović/Kubura* cases.[243]

The TCH III concluded that the duty to prevent encompasses the duty to stop crimes that are about to be committed or crimes that are being committed. It was clarified that the duty to prevent can arise before the commission of a crime but also during the commission.[244] In the *Bemba,* the TCH also noted that the statutes of the *ad hoc* tribunals do not make reference to a duty to 'repress' but use the terms 'to prevent or to punish'.[245] The TCH III clarified that the notion of 'repress' overlaps the duty of prevention to a certain degree,

[238] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, § 436.
[239] TRIFFTERER, O.: *supra*, 2008, p. 301.
[240] *Bemba,* Trial Chamber Judgement, § 199.
[241] TRIFFTERER, O.: *supra*, 2008, p. 301.
[242] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, § 438.
[243] *Štrugar*, § 374. *Hadžihasanovic*,, § 153.
[244] *Bemba,* § 202.
[245] *Ibid,* § 206.

particularly in terms of the duty to prevent crimes in progress and crimes which involve on-going elements being committed over an extended period.[246]

It can be concluded that despite the new wording of superiors' duties under Article 28, the Rome Statute does not actually provide different superior's duties than those established by the case law of *ad hoc* tribunals. The *ad hoc* Tribunals case law is applicable to some extent, as these categories mostly overlap the duties imposed on the superior. To what extent the *ad hoc* case will be applicable is uncertain, as the Court in the *Bemba* case did not further elaborate on the comparison of duties set up within the *ad hoc* tribunals and Article 28 of the Rome Statute. The TCH III has limited its findings to the conclusion that duty to 'repress' overlaps the duty to prevent to a certain degree.

[246] *Ibid*, §§ 205-206.

5. SUCCESSOR SUPERIOR RESPONSIBILITY

The successor superior responsibility tries to find an answer to a question of whether and if (under which condition) superiors can be held responsible for failing to prevent and punish crimes committed by their subordinates prior to taking command. The issue of successor superior responsibility has caused a great division between the Chambers of the ICTY, and also between academics.[247] Unfortunately, *Bemba* case did not offer a unanimous solution either.

Prior to an analysis of the ICTY case law and *Bemba* case, we have to start with some general remarks about successor superior responsibility. A superior can generally be held responsible for crimes committed by his subordinates if he had sufficient knowledge about the crimes and failed to take any necessary measures to prevent such acts or to punish the perpetrators. International customary law formulated three core requirements for establishing such responsibility. In some instances, causality can be claimed as one of the requirements for establishing superior responsibility. Successor superior responsibility is closely connected to the causality requirement. If causality is accepted as a definitional feature, the question remains whether this requirement is satisfied when a successor superior fails to punish crimes committed by his subordinates before he took over the command over subordinates.[248] If causality is not accepted as one of the requirements, the question would be more general—whether and under which circumstances can a superior be held responsible if the underlying crimes had been committed by his subordinates before he obtained command over them. The importance of successor superior responsibility was recognized during the negotiation of the Rome Statute. Unfortunately, the issue of superior responsibility originating before the superior took up his post could not be considered because of time constraints.[249]

One of the documents for analysis of successor superior responsibility is the AP I of the Geneva Conventions. Article 86 of the Protocol states that a superior is responsible for failure to act against violations that he knows his subordinate was committing or was about to commit. The different wording is provided in Article 87 of the AP I, which states that a commander has the duty to act against violations that his subordinates are going to commit or

[247] SANDER, Barrie. Unraveling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence. *Leiden Journal of International Law*. 2010, vol. 23, no. 1, pp. 105-135.

[248] FOX, Carol. T. Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offenses. *Case Western Reserve Law Review*. 2004, vol. 55, no. 2, p. 443.

[249] LEE, R.*: supra*, p. 204.

have committed. The wording in Article 86 uses progressive and future verb phrases ("was committing or was about to commit"), suggesting that the duty to act does not include actions against past violations. That interpretation would have a limiting effect on a superior's duty to punish only crimes that he knows are being committed at the moment or are about to be committed.

5.1 ICTY CASE LAW

The very first reference to successor superior responsibility can be seen in the *Kunarac et al.* case. The TCH concluded that for the responsibility of *ad hoc* or temporary superiors, "it must be shown that, at the time when the acts charged in the Indictment were committed, the culpable subordinates were under the effective control of the accused."[250] However, the question of whether the duty to punish extends to a successor superior was explicitly raised for the first time before the ICTY in the *Hadžihasanović/Kubura* case. This case has a significant importance for successor superior responsibility, thus a background of the cases should be examined. Kubura became the commander of the Army of the Republic of Bosnia and Herzegovina (ABiH) — 3rd Corps, 7th Muslim Mountain Brigade — on 1 April 1993. However, the charges brought against him contained crimes that were committed by the troops prior to his assignment on 1 April 1993. Kubura was charged with superior responsibility for killings, the cruel treatment of prisoners, and the destruction and plunder of property. With the exception of the cruel treatment of prisoners at the Zenica Music School, the charges concern events that started and ended before Kubura became the commander of the troops involved in those events.[251] The indictment asserted 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".[252] The TCH held that, in principle, a superior could be

[250] *Kunarac et al.*, ICTY, IT-96-23-T & IT-96-23/1-T, 22. 2. 2001, § 399.

[251] Under count 1, Kubura was charged with command responsibility for, among other events, the Dusina killings in the Zenica Municipality on 26 January 1993.44 On count 4, he was charged with command responsibility in connection with cruel treatment of prisoners by his subordinates at the Zenica Music School between about 26 January 1993 to at least January 1994 (count 4 includes a period of time commencing before but continuing after Kubura became the commander). Counts 5 and 6 charge him with command responsibility in connection with wanton destruction and plunder of property allegedly committed at, among others, Dusina in January 1993.

[252] *Hadžihasanović/Kubura*, ICTY, T-01-47-PT, Amended Indictment, 11. 1. 2002, § 58.

responsible under the doctrine of superior responsibility for crimes committed prior to the moment that the commander assumed command.[253]

Controversially, the ACH held that there must be perfect temporal coincidence between the time when the crime were committed, and the existence of the superior-subordinate relationship between the accused and the perpetrator.[254] The ACH 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 in such a way that the crimes committed by a subordinate in the past, prior to his superior's assumption of command or office, are excluded.[255] Thus crimes committed prior to a superior's assumption of superiority would not form basis for superior responsibility even if the superior learnt about them after assuming the command superior and decided to not act upon them.[256]

The majority of the ACH observed that practice of the Tribunal has been to not rely merely on a construction of the Statute but to ascertain the state of customary law at the time the crimes were committed. The ACH found that there is no practice, nor any evidence of *opinio juris* that would sustain the proposition that a superior can be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate.[257] Further consideration was also given to the wording of Article 86(2) of the AP I, where the ACH argues that the language of this article envisions that breaches committed before the superior assumed command over the perpetrator are not included within its scope.[258] The ACH also made reference to the *Kuntze* case. The *Kuntze* case was a case tried by the Nuremberg Military Tribunals and according to the ACH it constitutes an indication that runs contrary to the existence of a customary rule establishing superior responsibility for crimes committed before a superior's assumption of command. However, the argumentation of the ACH using *Kuntze* case is weak and is provided mainly in a footnote.[259] Kuntze was held responsible for the assembly of Jews in concentration camps and the killing of one large group of Jews and gypsies. The military tribunal stated: "The

[253] *Hadžihasanović/Kubura*, ICTY, IT-01-47-PT, Decision on joint challenge to jurisdiction, 12. 11. 2002, § 202.

[254] "The Appeals Chamber holds that an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the said accused assumed superior over that subordinate." *Hadžihasanović/Kubura,* Decision on Interlocutory Appeal, §§ 37-51.

[255] For this interpretation the Appeals Chambers used the Article 6 of the Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission at its forty-eighth session. *Hadžihasanović/Kubura,* Decision on Interlocutory Appeal, § 49.

[256] SWART, Bert. *The Legacy of the ICTY*. Oxford: Oxford University Press, 2011, pp. 385-389.

[257] *Hadžihasanović/Kubura*, Decision on Interlocutory Appeal, § 45.

[258] *Ibid,* § 47.

[259] *Ibid,* § 50, note 65.

foregoing evidence shows the collection of Jews in concentration camps and the killing of one large group of Jews and gypsies **shortly after the defendant assumed command** [emphasis added by author] […] Nowhere in the reports is it shown that [Kuntze] acted to stop such unlawful practices. It is quite evident that he acquiesced in their performance when his duty was to intervene to prevent their recurrence."[260] As such, the NMT in that case recognized a responsibility for failing to prevent the crimes after a commander has assumed command, the ACH deduced that it constitutes an indication that superior responsibility can arise only for crimes committed after a superior's assumption of command.

The ACH also justified its conclusion in the wording of Article 28 of the Rome Statute, which provides that a military commander or person either knew or, owing to the circumstances at the time, should have known that the forces *were committing or about to commit* such crimes. Moreover, the ACH came to the conclusion that under the Rome Statute, command responsibility "can only exist if a commander knew or should have known that his subordinates were committing crimes, or were about to do so [and] it necessarily excludes criminal liability on the basis of crimes committed by a subordinate prior to an individual's assumption of command over that subordinate".[261]

Nevertheless, a decision was made by a majority of three to two votes, with strong dissenting opinions from Judges Shahabudden and Hunt. The separate and dissenting opinions of Judge Hunt and partially dissenting opinion of Judge Shahabuddeen in the *Hadžihasanović/Kubura* case are well argued and illustrated.[262] Judge Hunt pointed out that successor commanders' duty to punish falls within the customary international law principle of command criminal responsibility.[263] Judge Hunt also made an observation on the references presented by majority to Article 86(2) of the AP I, ILC Report on the work of its forty-eighth session (6 May–26 July 1996), Article 6 of the Draft Code of Crimes against the Peace and Security of Mankind and the *Kuntze* case.[264] According to Judge Hunt, these documents do not suggest that a superior does not have any criminal responsibility for failing to punish a subordinate for acts committed before the assumption of a command. The

[260] *The United States of America vs. Wilhelm List et al*, p. 1230.
[261] *Hadžihasanović/Kubura*, Decision on Interlocutory Appeal, § 46.
[262] FOX, C. T.: *supra,* p. 489.
[263] *Hadžihasanović/Kubura*, Decision on Interlocutory Appeal, Separate and Partially Dissenting Opinion of Judge David Hunt, § 7. Hereinafter referred to as *Opinion of Judge Hunt*. Judge Hunt also argued that this conclusion can be drawn from military manuals of the UK and the US. Judge Hunt concluded that "the reason why military manuals have not expressly referred to the factual situation in question in this appeal is that the duty to punish in that situation is so obvious that no-one has ever seen the need to refer to it expressly." *Opinion of Judge Hunt,* § 12.
[264] *Opinion of Judge Hunt,* §§ 12-19.

responsibility thus arises if the superior knows or has reason to know only that the acts had already been committed.[265] Judge Hunt correctly found that the Military tribunal in the *Kuntze* case did not make any reference to responsibility for crimes committed prior to the accused's assumption of command. The "indication" perceived by the majority of the ACH rests solely upon the absence of any reference. Such a line of reasoning would be valid only if Kuntze had been charged with responsibility arising from crimes committed before he assumed command. Nevertheless, this was not that case and even then mere silence would be an uncertain foundation for such findings.[266]

In general, a superior has a duty to prevent the commission of crimes by his subordinates and to punish crimes that have already been committed. However, as the dissenting judges noted, the duty to prevent and the duty to punish are two separate duties, applicable at different times.[267] As a result, the duty to prevent can apply only to a superior who was already in a superior position during the time that his subordinates were about to commit the crime. On the other hand, the duty to punish can be applicable only after the crime had been committed. The conclusion reached by majority melts duty to prevent and duty to punish into one duty.[268] According to Judge Hunt, this does not correspond with previous jurisprudence in which the duty to prevent was treated as separate from the duty to punish. The jurisprudence proceeds upon the basis that if the superior had reason to know in time to prevent, he committed an offence by failing to take steps to prevent, and he cannot make good by subsequently punishing his subordinates who committed the offences.[269] According Judge Hunt, a situation where a superior who (after assuming the superior position) knows or has reason to know that a person who has become his subordinate had committed a crime before he became that person's superior falls reasonably within that superior responsibility principle.[270] 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

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[265] *The United States of America vs. Wilhelm List et al.,* pp. 1276-1277.
[266] *Opinion of Judge Hunt,* § 17-19.
[267] *Hadžihasanović/Kubura*, Decision on Interlocutory Appeal, Partially Dissenting Opinion of Judge Shahabuddeen, § 14. Hereinafter referred to as *Opinion of Judge Shahabuddeen. Opinion of Judge Hunt.,* § 23. The Trial Chamber in *Nuon Chea and Khieu Samphan* also viewed duty to prevent and duty to punish as separate duties, relating to different time period when effective control is required. *Nuon Chea, Khieu Samphan,* §§ 1017-1018.
[268] *Opinion of Judge Hunt*, § 23.
[269] *Opinion of Judge Hunt*, § 23; *Blaškić,* § 336; *Kordić/Čerkez*, §§ 444-446.
[270] *Opinion of Judge Hunt*, § 8.

prevent or to punish the subordinate when he knew or had reason to know that he was about to commit acts amounting to a war crime or had already done so.[271]

Judge Shahabuddeen concluded that the denial of successor commanders' duty to punish is "at odds with the idea of responsible command on which the principle of command responsibility rests".[272] Judge Shahabuddeen argued that the *Kuntze* judgement cannot be safely relied on as providing authority for command responsibility before he assumed his command, as the judgement suggests certain fluidity in referring to the command responsibility doctrine (as opposed to direct responsibility).[273]

The superior responsibility doctrine, as set out in different texts may be subjected to any necessary interpretation by reference to the object and purpose of the provisions which establish the doctrine.[274] According to Judge Shahabuddeen, the object and purpose of the doctrine includes the avoidance of future crimes by the subordinates of a new commander arising from the appearance of encouragement.[275] Judge Shahabuddeen added that the majority approach to this issue would create a serious gap in the system of protection if superior responsibility were to be applied only to the person who was in superior at the time at which the offence was committed.[276]

There has been a debate as to whether there is evidence to support the assertion of the dissenting judges in the *Hadžihasanović/Kubura* case that customary international law does provide for a successor commander's duty to punish violations committed by his subordinates under a predecessor commander.[277] In the *Hadžihasanović/Kubura* case, the ACH concluded, in reaction to the dissenting opinions of Judges Shahabuddeen and Hunt, that the "imposition of criminal liability must rest on a positive and solid foundation of a customary law principle. It falls to the distinguished dissenting Judges to show that such a foundation exists; it does not fall to the ACH to demonstrate that it does not."[278]

In the *Orić* case, the TCH dissented to the *Hadžihasanović/Kubura* appeals decision. The Trial Chamber itself was explicitly of the opinion that "for a superior's duty to punish, it should be immaterial whether he or she had assumed control over the relevant subordinates

[271] *Ibid*, § 9.
[272] *Opinion of Judge Shahabuddeen,* § 14.
[273] *Opinion of Judge Shahabuddeen,,* §§ 3-7.
[274] *Ibid,* §§ 11-12.
[275] *Ibid,* § 15.
[276] *Ibid,* §§ 23-24.
[277] FOX, C. T.: *supra,* pp. 465-491.
[278] *Hadžihasanović/Kubura*, Decision on Interlocutory Appeal, § 53.

prior to their committing the crime".[279] The duty to prevent, on the opposite hand, calls for action by the superior prior to the commission of the crime, and thus "presupposes his power to control the conduct of his subordinates".[280] The TCH concluded that a superior certainly must have effective control at the time when measures of investigation and punishment were to be taken against them. Such a link, however, appears less essential if necessary at all with regard to the time at which the crime was committed.[281] Nevertheless, the TCH had to follow the different interpretation which was taken by the ACH in the *Hadžihasanović/Kubura* decision.[282]

In the *Orić* case, the ACH [283] concluded that the *ratio decidendi* of its decisions is binding on trial chambers, and the TCH in the *Orić* case was therefore correct in following the precedent established in the *Hadžihasanović/Kubura* appeals decision, even though it disagreed with it.[284] The ACH concluded that the superior-subordinate relation was not established prior to the time Orić assumed effective control, thus the Prosecution's challenge to the *ratio decidendi* of the *Hadžihasanović/Kubura* appeals decision was without subject.[285]

In the *Orić* case, the ACH—with Judge Liu and Judge Schomburg's dissenting opinions—declined to address the *ratio decidendi* of the *Hadžihasanović/Kubura* appeals decision.[286] Judge Shahabuddeen appended a declaration to reiterate his disagreement with the *Hadžihasanović/Kubura* appeals decision. By restating his previous (dissenting) position in the *Hadžihasanović/Kubura* 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 to discredit the *Hadžihasanović/Kubura* findings by claiming that "there is a new majority of appellate thought"[287] and examined the possibility of reversing *Hadžihasanović/Kubura* in

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279 *Orić*, § 335.

280 *Ibid.*

281 *Ibid*.

282 On binding effect of ACH decisions, see analysis of the ACH's conclusion in the *Aleksovski*, § 131.

283 The TCH 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 ACH had taken a different approach in the Hadzihasanovic Appeal Decision on Jurisdiction, the TCH found "itself bound to require that with regard to the duty to punish, the superior must have had control over the perpetrators of a relevant crime both at the time of its commission and at the time that measures to punish were to be taken." *Orić*, Appeals Chamber Judgment, §164.

284 *Orić*, Appeals Chamber Judgment, § 164.

285 *Ibid*, §§ 161-168.

286 *Separate and Partially Dissenting Opinion of Judge Schomburg, Partially Dissenting Opinion and Declaration Of Judge Liu*. *Orić*, Appeals Chamber Judgment. See Chapter 2.1.

287 *Declaration of Judge Shahabuddeen, Orić*, Appeals Chamber Judgment, § 3. However, this conclusion was not followed by the Special Court for Sierra Leone. In *Sesay et al.* case, the ACH 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

accordance with the new majority. However, Judge Shahabuddeen came to the conclusion that since he was one of the two dissenting judges in the earlier case and the other has since demitted his office in the ICTY, a reversal should await such time when a more solid majority would share the views of those two judges.[288] Meanwhile, the findings of the ACH in the *Hadžihasanović/Kubura* case continue to stand as part of the law of the Tribunal.

5.2 ICC CASE LAW

Successor superior responsibility was also defined by the ICC in the *Bemba* case. The PTCH 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 acknowledged the existence of a minority opinion in the case law of the *ad hoc* tribunals, according to which it is sufficient that the superior had effective control over the perpetrators at the time at which the superior was said to have failed to exercise his or her powers to prevent or punish—regardless of whether he or she had the control at the time of the commission of the crime, as the majority of the ICTY jurisprudence required instead. However, the PTCH rejected this view on the basis of the language used by Article 28 of the Statute.[289] The Chamber argued on a provision that a subordinate's crime be committed as a result of his or her failure to exercise control properly, thus requiring that the superior had effective control at least when the crime was about to be committed.[290] In the Bemba case, the TCH did not elaborate on successor superior responsibility and only briefly analysed the respectively mentioned causality requirement (see following Chapter).

In conclusion, superior responsibility encompasses two obligations: a duty to prevent commission of crimes by superiors and a duty to punish subordinates for such crimes when they occur. Nevertheless, the duty to prevent and the duty to punish are two separate duties, applicable at different times. As a result, the duty to prevent the commission of crimes applies only to superiors who were already in a position of superiority at the time when their subordinates were about to commit the crime. On the other hand, the duty to punish can be applicable only after the crime had been committed. It's the author's view that the duty to

required". Thus, according to the SCSL a commander can be held liable for a failure to punish subordinates for a crime that has occurred before he assumed effective control. *Sesay et al*., Appeals Chamber Judgement, §§ 299-306.

[288] *Opinion of Judge Shahabuddeen*, §§ 8-15.

[289] *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, §§ 418-419.

[290] *Ibid*, § 419.

punish should apply even to crimes that were committed before the assumption of command over subordinates who committed the crimes. The author agrees with the majority case law that there must be a temporal coincidence; however, the temporal coincidence should be between the time the superior had effective control over the perpetrator and the time at which the superior is said to have failed to punish, and not the time at which the crimes were committed.

6. REQUIREMENT OF CAUSALITY

The requirement that a conduct of a person charged with a crime must be causally linked to this crime itself is a general and fundamental requirement of criminal law in most national systems.[291] 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.[292] However, in international criminal law is rather unclear whether this causal requirement exists, and, if it does, under what extent and what it means in practice for superior responsibility doctrine. Whilst some decisions of the ICTY suggest that this requirement does not apply, some have taken the opposite stance. Unfortunately, even the *Bemba* judgment did not offer answers to all questions about the causality requirement under superior responsibility. The opinions among academics vary as well. This all makes the causality requirement one of the more closely watched topics in international criminal law.

If causality would be required in both types of omission, a problem would occur in the case of failure to punish an isolated crime. This is a situation when a crime occurs, but the crime was not facilitated, encouraged or affected by any failure of the commander to prevent or punish. This scenario can arise only where a superior has adequately satisfied his preventive duties.[293] If a superior breached his duty to prevent, then the contribution requirement would be met for the single crime and he could be held responsible for his omission. Another situation can occur where a superior knows or has reason to know that a crime (isolated) was committed, but fails to investigate, punish or refer the matter to the competent authorities and no further crimes occur. The superior has clearly failed in their responsibilities, but has not contributed to or had an effect on the core crime. This could create a gap that would allow superiors to escape justice in such a scenario.[294]

The causality requirement plays a prevailing role in the context of omission liability. Extensive debate was sparked about whether a causal element is generally required within the superior responsibility doctrine. While in *Čelabići* case was held that superior responsibility

[291] ASHWORTH, Andrew, HORDER, Jeremy. *Principles of Criminal Law*. Oxford: Oxford University Press, 2009, p. 124.

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

[293] ROBINSON, D.: *supra*, p. 18

[294] STEWART, James. The End of 'Modes of Liability' for International Crimes. *Leiden Journal of International Law*. 2012, vol. 25, issue 1, pp. 26-27.

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.[295] On the other hand, the requirement of causality for failure to punish is not required by the majority of academic opinions.[296] In the ICC's very first superior responsibility case, this problem was not solved as the reasoning was very limited. However, the TCH held that some level of causation requirement is required.[297] Mettraux offers a solution, arguing that international criminal law demands proof of a causal relationship between the failure of the accused and the commission of 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 duty to punish crimes).[298] In his view, the requirement of causality also applies to a situation where a superior is responsible for a failure to punish crimes of subordinates, and such causality must be established between the conduct of the superior and the impunity of the perpetrators.[299] The author's view is that the opinion presented by Mettraux is one of the best solutions for the causality requirement problem within superior responsibility. However, this position does not correspond with the current case law of the *ad hoc* tribunals and the findings of in *Bemba* case.

6.1 ICTY JURISPRUDENCE ON THE 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 he is held responsible, while the second alternative—failure to punish—does not.[300] Nevertheless, the jurisdiction of the ICTY in this matter is barely consistent, as will be elaborated below.

The rationale for rejecting a causality requirement in the failure to punish case was brought forth in the *Čelabići* case. The TCH pointed out that a superior cannot be held responsible for prior violations committed by subordinates if a causal nexus would be required between such violations and the superior's failure to punish those who committed

[295] SWART, B.: *supra*, p. 392.
[296] MAYR, Erasmus. International Criminal Law, Causation and Responsibility. *International Criminal Law Review*. 2014, vol. 14, issue 4/5, p. 863.
[297] *Bemba*, §§ 211-213.
[298] METTRAUX, G.: *supra*, 2009, p. 82.
[299] *Ibid*, pp. 88-89.
[300] MAYR, E.: *supra*, p. 863.

them.[301] The TCH held that a causal connection cannot possibly exist between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence.[302] The main Chamber's argument was that failure to punish cannot causally influence the crime which has already been committed.[303] Furthermore, the TCH explained that, while a causal connection between the failure of a superior to punish past crimes committed by subordinates and the commission of any such future crimes is not only possible but likely, no such causal link can possibly exist between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator for that same offence.[304]

On the other hand, the TCH held that "a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superiors' failure to take the measures within his power to prevent them."[305] This conclusion from the TCH opens a door for the application of causality requirement for the duty to prevent.

Nevertheless, in the same judgment, the Chamber stated that it had found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, and therefore concluded that "causation has not traditionally been postulated as *a condition sine que non* for the imposition a responsibility on superiors for their failure to prevent or punish offences committed by their subordinates."[306] The TCH went on to add, without offering any support for its proposition, that customary international law did not require proof of a causal relationship between the conduct of the accused and the crimes of his subordinates.[307] Controversially, this is regarded by some authors as a rejection of the causality requirement in both types of omission, failure to prevent but also for failure to punish.[308] Also, the subsequent jurisprudence of the ICTY stood by the denial of a causality requirement in both types of omissions.[309]

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[301] *Čelabići*, § 400.
[302] *Ibid*.
[303] Mayr, E.: *supra*, p. 863.
[304] *Čelabići*, § 400.
[305] *Ibid*, § 399.
[306] *Ibid*, § 398. Cited again in *Kordić/Čerkez,* § 447.
[307] The ACH in *Blaškić* noted that the *Čelabići* TCH's finding on that point did not cite any authority for the statement. *Blaškić,* Appeals Chamber Judgment, § 76. The causality requirement was not subjected to the appeal. *Čelabići* Appeals Chamber Judgment.
[308] BISHAI, Christine. Superior Responsibility, Inferior Sentencing: Sentencing Practice at the International Criminal Tribunals. *Journal of International Human Rights*. 2013, vol. 11, issue 3, p. 85.
[309] The ACH 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." *Blaškić,* Appeals Chamber Judgment, § 77. Repeated in *Kordić/Čerkez,* ICTY, IT-95-14/2-A, ACH, 17. 12. 2014, § 832.

In later judgments, the ICTY adopted the view that causality is not required for superior responsibility.[310] Many of these decisions are very limited and basically only refer to the findings of the ACH in the *Čelabići* case.[311] For example, in the *Blaškić* case, the ACH found that "the existence of causality between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes is not an element of command responsibility that requires proof by the Prosecution in all circumstances of a case".[312]

Even though there is no direct provision on bindingness of the ACH' judgements, the ACH in the *Aleksovski* case came to the conclusion that the construction of the Statute requires that the decision of the Appeals Chamber is binding on Trial Chamber.[313] It means that the conclusion made by the ACH in the *Čelabići* case is binding all TCH.

Despite acknowledging the position of the ACH, the TCH in the *Hadžihasanović/Kubura* case came as close to reintroducing the requirement of causality, as the binding jurisprudence of the ACH would allow. The TCH went as far as stating that a causality requirement is necessary to hold a commander responsible as "command responsibility may be imposed only when there is a relevant and significant nexus between the crime and the responsibility of the superior accused of having failed in his duty to prevent".[314]

6.2 ICC'S APPROACH

Article 28(a) and (b) of the Rome Statute states that the superior is responsible for crimes which occur "as a result of his or her failure to exercise control properly" when he or she has failed to take the necessary and reasonable measures to prevent or to punish. This could indicate a need for a causal link between the superior's failure to act (prevent or punish) and the principal crime. Some authors even, without any hesitation, consider causation as a new element to superior responsibility introduced by the Rome Statute.[315] Arguably, according to

[310] DAMASKA, Mirjan. The shadow side of command responsibility. *American Journal of Comparative Law*. 2001, vol. 49, no. 455, p. 461.

[311] The decision made by the ACH in *Blaškić* appeal is binding for trial chambers and ACH itself followed its reasoning in following decision. *Blaškić,* Appeals Chamber Judgment, § 77. *Hadžihasanović/Kubura,* Appeal Chamber Judgment, §§ 38-39. *Kordić/Čerkez,* Appeals Chamber Judgment, §§ 830-832.

[312] *Blaškić,* Appeals Chamber Judgment, § 77.

[313] *Aleksovski*, Appeals Judgement, §§ 112-113.

[314] *Hadžihasanović/Kubura,* § 192.

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

some authors, the wording 'as a result of' does not necessarily indicate the necessity of causality. In many situations, the superior's failure is not *a condition sine qua non* for the commission of the underlying crime.[316] Ambos concludes that it suffices that the superior's failure to exercise control properly increased the risk for the underlying crime to be committed.[317]

Article 28 of the Statute was first interpreted by the ICC during a confirmation of the charges in the *Bemba* case. Superior responsibility was defined as a form of criminal responsibility based on a legal obligation to act. The PTCH II found that Article 28(a) of the Statute includes an element of causality between a superior's dereliction of duty and the underlying crimes.[318] Having determined that Bemba fell under the notion of a military or military-like commander, the Chamber limited itself to an analysis of the first paragraph of Article 28.

The PTCH II convincingly affirmed that there must be some form of causality between the superior's failure of supervision and the subordinates' underlying crimes.[319] However, the Chamber concluded that "a failure to comply with the duties to repress or submit the matter to the competent authorities arise during or after the commission of crimes". Thus, the Chamber held that the causality requirement only relates to the commander's duty to prevent the commission of future crimes. The judges nonetheless found that the failure to punish, being an inherent part of the prevention of future crimes, can have a causal impact on the commission of further crimes in the sense that the failure to take measures to punish is likely to increase the risk of commission of further crimes in the future.[320]

Accordingly, the PTCH II examined the causality requirement in relation to the commander's duty to prevent the commission of the future crimes. The PTCH II presented "but for test" in the sense that, if not for the superior's failure to fulfil his duty to take reasonable and necessary measures to prevent crimes, those crimes would not have been committed by his forces.[321] This "but for test", in law theory also referred to as *condition sine*

[316] TRIFFTERER, O.: *supra*, 2002, p. 179-205.
[317] AMBOS, K.: *supra*, 2002, p. 860. "It is sufficient that the superior's failure of supervision increases the risk that the subordinates commit certain crimes".
[318] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, § 423.
[319] AMBOS, K.: *supra*, 2009, p. 721.
[320] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, § 424. *Hadžihasanović/Kubura,* Appeal Chamber Judgment, § 267.
[321] *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, § 425.

qua non condition, was used by the TCH in the *Čelabići* case and the PTCH II in the *Bemba* case refers to this case.[322]

However, the PTCH II concluded that this level of causality requirement would be difficult to determine empirically. Therefore, the Chamber considered it only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under Article 28(a) of the Statute.[323] As a result, the Chamber followed the theory of risk aggravation or increase according to which it suffices that the commander's non-intervention increased the risk of the commission of the subordinates' crimes.[324] This approach marks a flagrant departure from traditional causality.[325] However, the reasoning might lack some clarity in the hypothetical assessment of causality. In reaction to the decision of the PTCH II Chamber, some scholars argue that the hypothetical nature of the assessment should not be a decisive argument to reject the "but for test".[326]

Along with the PTCH II, the TCH III did not require the establishment of a "but for" causation between the "commander's omission and the crimes committed".[327] The TCH III did not expressly state whether this conclusion reacted only to the duty to prevent; however, based on the wording and the subsequent analysis of the Trial Chamber, it might be concluded that the TCH III only refers to the duty to prevent. While the PTCH II considered it sufficient to prove that the commander's omission "increased the risk of the commission of the crimes", the TCH III did not elaborate further on the requisite standard. The Trial Chamber only held that the causality requirement would be clearly satisfied "[…] when the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would have prevented the crimes."[328] The Chamber stressed that this standard is "higher than that required by law".[329]

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[322] "In fact, a recognition of a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior's failure to take the measures within his powers to prevent them. In this situation, the superior may be considered to be causally linked to the offences, in that, but for his failure to fulfill his duty to act, the acts of his subordinates would not have been committed." *Čelabići*, § 399.

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

[324] "It is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under article 28(a) of the Statute". *Bemba,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, § 425.

[325] AMBOS, K.: *supra,* 2009, p. 722.

[326] MARINIELLO, Triestino (*ed.*). *The International Criminal Court in Search of Its Purpose and Identity*. London, NY: Routledge, 2015, p. 47.

[327] *Bemba*, § 211.

[328] *Bemba,* § 213.

[329] *Ibid,* § 213.

This may suggest that although the Chamber used the "but for test", the "increased risk test" suffices to establish the causality requirement between superior's failure to prevent and the crime.

The causality requirement in the *Bemba* case led to a disagreement among the judges. Two of the three judges issued separate opinions, in which they presented different view on this topic. Judge Steiner expressed her belief that the TCH failed to provide sufficient reasoning in its consideration on the interpretation of the wording "as a result of" and the causality requirement. Judge Steiner held that a causal link between the commander's failure to exercise control properly and the crimes is required, referring to the analysis of the decision of the PTCH II in the *Bemba* case.[330] Furthermore, she agreed with the conclusion of the PTCH II that "it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under article 28(a) of the Statute".[331] However, she noted that this increased risk test should be applied with high probability assessment, so that "there is a high probability that, had the commander discharged his duties, the crime would have been prevented or it would have not been committed by the forces in the manner it was committed."[332]

Judge Ozaki concluded that a nexus between the commander's failure to exercise control properly and the commission of the crimes is required.[333] He supported this conclusion based on the object and purpose of the Statute. Furthermore, he went on to clarify that wording of "as a result of" indicates that "the standard adopted [is] more than a merely theoretical nexus to the crimes".[334] Judge Ozaki also favoured an assessment of whether the results were "reasonably foreseeable".[335]

The causality requirement for superior responsibility was also briefly mentioned in the *Ntaganda* case. In its decision on confirmation of charges, the PTCH II held that "[t]he […] failures of Mr. Ntaganda increased the risk of the commission of crimes by UPC/FPLC members during the time-frame relevant to the charges."[336] However, it is not clear whether this means that the PTCH II requires the causality nexus, in form of the "increased risk test", for the establishment of superior responsibility.

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330 *Separate Opinion of Judge Sylvia Steiner, Bemba*, §17.
331 *Ibid*, § 23.
332 *Ibid*, § 24.
333 *Separate Opinion of Judge Kuniko Ozaki, Bemba*, § 9.
334 *Ibid*, § 23.
335 *Ibid.*
336 *Ntaganda*, ICC, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9. 7. 2014, §174.

The causality requirement is one of the controversial aspects of the superior responsibility doctrine. Arguably, in *Čelabići* casethe TCH opened a door for the application of the causality requirement for the duty to prevent, some authors, and more importantly subsequent ICTY case law, regarded this as a denial of the causality requirement for both types of duties: the duty to punish and the duty to prevent. The PTCH II and also the TCH III in the *Bemba* case concluded that the causality requirement has to be established between a superior's failure to prevent and the crime. Whereas the PTCH II used the "increased risk test", the TCH III used the "but for test". However, in the *Bemba* case the TCH III concluded that the "but for test" is actually a higher standard than required by the law of the Rome Statute. Furthermore, two concurring opinions were rendered in the *Bemba* case, presenting a different assessment of the causality requirement test. While Judge Steiner affirmed that the degree of risk required should be that of a high probability, Judge Ozaki favoured 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.

7. SPECIAL INTENT CRIMES

The treatment of special intent crimes, such as genocide, is another controversial aspect of superior responsibility. This Chapter will analyse *mens rea* requirement for a superior in relation to the special intent crimes committed by his subordinates. Superior responsibility is based on omission – a failure to prevent or punish the crimes of his subordinates. Thus for superior being held responsible under the superior responsibility doctrine, no active conduct is required. Depending on the circumstances, an omission of the superior in the form of failure to prevent or punish may occur intentionally, although it may also be the result of negligence. On the other hand, there are special intent crimes that require a proof of special *mens rea*. For example in relation to genocide, the special intent means the perpetrator commits an act while clearly seeking to destroy the particular group, in whole or in part. In applying superior responsibility to the special intent crimes, it is debated whether the superior must himself have the necessary special intent, or if he must merely know that his subordinates possessed special intent.

7.1 ICTR CASE LAW

In *Akayesu* case, the ICTR had to deal for the very first with the question of special intent for genocide in relation to superior responsibility. Although Akayesu was not at the end convicted under the superior responsibility, the TCH made several interesting observations towards the doctrine and its application to genocide. The TCH made a distinction between participation in terms of Article 6(1) and 6(3) of the ICTR Statute based on the requisite *mens rea*.[337] Article 6(1) of the Statute governs responsibility for a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime whereas Article 6(3) governs superior responsibility. In comparison to Article 6(1) of the Statute, the TCH concluded that the superior "does not need to act knowingly" and it suffices that he had reason to know that his subordinates committed the crime (or are about to commit).[338] On the other hand, the TCH held that for conviction under the superior responsibility doctrine, there has to be malicious intent, or, at least, the negligence has to be

[337] Article 6 of the ICTR Statute encompasses individual criminal responsibility. Article 6(1) governs responsibility for a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime whereas Article 6(3) governs superior responsibility.
[338] *Akayesu*, ICTR, ICTR-96-4-T, TCH, 2. 9. 1998, § 479.

so serious as to be tantamount to acquiescence or even malicious intent.[339] However, the reasoning is rather confusing.

The conclusion of the TCH was reach upon the direct reference and same wording in the Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 and its Article 86 of the Additional Protocol I.[340] Article 86 of the AP I impose a responsibility upon the superiors whether '[...]they knew, or had information which should have enabled them to conclude in the circumstances at the time [..]'. In the author's view, the Commentary on the Article 86 of the AP I refers to the specification of the constructed knowledge (as opposed by the actual knowledge) of the superior.

The author's view is supported by a fact, that there was clearly no consensus during the negotiation of the Additional Protocol I on the extent of the constructed knowledge. The Article 86 of the AP I underwent considerable change during the drafting and the final version refers to constructed knowledge as when a superior "knew, or had information which should have enabled them to conclude in the circumstances at the time". This final version was preceded by wording such as "if they knew or should reasonably have known in the circumstances at the time" or "knew or should have known".[341] Given to the wording of Article 86(2) of the AP I itself, the interpretation of the TCH's conclusion as requiring the special intent seems to be rather unsupported. Thus, the conclusion in the Commentary, and presented by the TCH in the current case, could present limitations for superior responsibility incurred by constructed knowledge by the superior not requiring a special intent on behalf of the superior. However, as Akayesu was not convicted for a crime of genocide based on Article 6(3) of the ICTR Statute, the intention of the TCH remains unclear.

In *Kayishema and Ruzindana* case, *Nahimana* case and *Musema*, the application of superior responsibility towards the genocide is mixed with the direct participation based on the Article 6(1).[342] The ICTR used argumentation and evidentiary basis for responsibility under 6(1) and also 6(3) of the ICTR Statute. For this reason, the finding requiring the special intent are not exclusive and does not serve as a proper argument for requiring a special intent for the superior responsibility.[343] The conviction based on 6(1) and also 6(3) of the Statute

[339] *Ibid*, § 489.
[340] *Ibid*, § 488.
[341] PILLOUD, Claude *et al. Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: ICRC, 1987, p. 1012.
[342] The cumulative convictions under Article 6(1)/7(1) and 6(3)/7(3) were later on rejected by the Tribunals. See e. g. *Blaškić*, § 337.
[343] *Kayishema/Ruzindana*. *Nahimana at al.,* ICTR, ICTR-99-52, ACH, 28.11. 2007; *Musema,*ICTR, ICTR-96-13, ACH, 16.11. 2001.

while having the evidence providing the special intent of the accused cannot be regarded as the requirement for the conviction for the crime of genocide under the superior responsibility.

In *Ntagerurra et al.* case, in relation to one event, Imanishimwe was found guilty of genocide only on the basis of superior responsibility. The TCH concluded that there was not enough evidence that Imanishimwe ordered killing of the refugees at the Gashirabwoba football field but he knew or 'should have known' of the killings based on numerous of indications as the presence of the refugees at the football field, his contact with his subordinate soldiers and the size of the camp.[344] Nevertheless, the TCH did not explicitly rule on the Imanishimwe state of mind towards the killings on the football field. The Chamber limited its findings for his presence on the football field on 11 April 1994 (while the killing occurred on 12 April 1994), his awareness of refugees at the football field and Imanishimwe's manipulation with the list of the refugees and removing sixteen Tutsis and one Hutu from the list. Even these factors could probably infer genocidal intent, the TCH did not explicitly rule upon this and thus it seems that the special intent wasn't required by the TCH in this case.

The ICTR case law has shown multiple conviction of a superior based on Article 6(3) of the Statute for the crime of genocide. It is difficult to draw any conclusions from the case law since the superior responsibility is mostly mixed with direct responsibility under Article 6(1) of the ICTR Statute. Only in *Akayesu* case, the TCH came close to introducing a requirement of the 'malicious intent' in relation to conviction for genocide based on superior responsibility. Given the non-compelling argumentation and reference to the Article 86 of the AP I, it cannot be that easily argued that the TCH actually required special intent for conviction under the superior responsibility. Imanishimwe in *Ntagerurra et al.* case was convicted for a crime of genocide solely on the basis of superior responsibility without specifically requiring genocidal intent on his behalf. In conclusion, the ICTR case law can support the argument that special intent is not required for a superior.

7.2 ICTY CASE LAW

PROSECUTOR V. KRSTIĆ

Although Krstić was not held responsible under Article 7(3) of the Statute, the TCH found that he also fulfilled the elements for conviction under superior responsibility for the crime of genocide. The TCH stated that it would not enter a conviction under superior responsibility

[344] The TCH used ‚knew or should have known' standard as opposed to ‚knew or had reason to know' enshrined in Article 6(3] of the ICTR Statute. *Ntagerurra et al.*, § 691.

and rather use direct responsibility (Article 7(1) of the ICTY Statute). With regards to the special intent, the TCH found that "his intent to kill the men thus amounts to a genocidial intent to destroy the group in part".[345] However, the TCH also held that *mens rea* for superior responsibility was proved by evidence showing that he "had to have been aware of the genocidial objectives".[346] That reasoning of the TCH suggest that special intent on part of the superior would not be required for the conviction under Article 7(3) of the Statute.

PROSECUTOR V. STAKIĆ

The ICTY considered charges of superior responsibility involving genocide in its Rule 98bis Motion of acquittal in the S*takić* case. The TCH held that it flows from the unique nature of genocide that the *dolus specialis* of a superior is required for responsibility under Article 7(3).[347] Nevertheless, the difficulty in proving genocidal intent in omission, especially in relation to civilian superiors, was noted. However, in this situation, the TCH came to the conclusion that the evidence "allows for the conclusion of a reasonable trier of the fact" and Stakić in principle could be held responsible under Article 7(3) of the ICTY Statute. The TCH furthermore argues, with regards to joint criminal enterprise, that a mode of liability cannot replace a core element of a crime. Moreover, the TCH added that in order to 'commit' genocide, the elements of that crime, including *dolus specialis* must be met. Although this argumentation was used in relation to joint criminal enterprise, it seems that the TCH extended this to superior responsibility.[348]

Contrary, the TCH in its judgement concluded that it was not proved beyond reasonable doubt that anyone, including any subordinates of *Stakić,* had the *dolus specialis*, thus Article 7(3) of the Statute cannot is not applicable.[349] The TCH did not expressly stated clear whether the superior must himself possess specific intent and at the same time be aware of the specific intent of his or her subordinates. However, based on the TCH's argumentation, it seems that the specific intent on the part of the superior as well as his awareness of the specific intent of his or her subordinates is required.

[345] *Krstić*, ICTY, IT-98-33-T, TCH, 2. 8. 2002, § 652.
[346] *Ibid*, § 648.
[347] *Stakić*, ICTY, IT-97-24-T, Decision on Rule 98bis Motion for Judgement of Acquittal, 31. 10. 2002, § 92.
[348] *Ibid*, § 92– 95.
[349] *Stakić*, ICTY, IT-97-24-T, TCH II, 31. 7. 2003, § 559.

The ACH in *Brđanin case* disagreed and held that a superior need not possess specific intent. The ACH used comparison to JCE III and aiding and abetting as the other forms of liability for which the specific intent is not required on the part of the accused.[350] The ACH in regards to JCE III held that it is critical to distinguish the *mens rea* requirement of the crime of genocide with the mental requirement for the mode of liability.[351] Later on, this conclusion was extended to superior responsibility by the TCH. [352] The TCH in *Brđanin* case provided further analysis by referring to the previous case law and statutory interpretation of the provision. The TCH referred to *Ntagerurra et al.* case stating that "[this] case strongly supports the conclusion that a superior need not possess the specific intent in order to be held liable for genocide pursuant to the doctrine of superior criminal responsibility".[353] However, as analysed above, the *Ntagerurra et al.* case does not provide strong arguments for this conclusion. The TCH in *Brđanin case* held the superior only must have known or had reason to know of his or her subordinate's specific intent. It was correctly noted the necessity to distinguish between the *mens rea* required for the crimes perpetrated by the subordinates and that required for the superior.[354] The TCH stressed that there is no inherent reason why, having verified that it applies to genocide, Article 7(3) should apply differently to the crime of genocide than to any other crime in the Statute.[355]

The *ad hoc* case law has shown multiple conviction of a superior based on Article 6(3)/Article 7(3) of the ICTR/ICTR Statute for the crime of genocide. In the *Akayesu* case, a requirement of the "malicious intent" in relation to conviction for genocide based on superior responsibility was introduced. Given the non-compelling argumentation of the TCH and reference to the Article 86 of the AP, it cannot be that easily argued that the TCH actually required special intent for conviction under the superior responsibility. Moreover, Imanishimwe in *Ntagerurra et al.* case was convicted for a crime of genocide solemnly on the basis of superior responsibility without specifically requiring genocidial intent on his behalf. The reasoning of the TCH in *Krstić* case suggests that only knowledge on behalf of the superior about his subordinates' genocidial intention would be required. In S*takić* case, the TCH held that it flows from the unique nature of genocide that the *dolus specialis* is required

[350] *Brđanin*, IT-99-36-A, Decision on interlocutory Appeal , ACH, 19. 3. 2004, § 7.
[351] *Ibid*, § 7–10.
[352] *Brđanin*, §720.
[353] *Ibid*, §718.
[354] *Ibid*, §720.
[355] *Ibid.*

for responsibility under Article 7(3). The Chamber argued that a mode of liability cannot replace a core element of a crime and that in order to 'commit' genocide, the elements of that crime, including *dolus specialis* must be met. The ACH in *Brđanin* disagreed and held that a superior need not possess specific intent. This conclusion seems to be more rational and taking account specific nature of superior responsibility than findings in S*takić* case.

PROSECUTOR V. BLAGOJEVIĆ/ JOKIĆ

The special intent was not required in *Blagojević/Jokić* case. The TCH came to the conclusion that: "[...] the *mens rea* required for superiors to be held responsible for genocide pursuant to Article 7(3) is that superiors knew or had reason to know that their subordinates (1) were about to commit or had committed genocide and (2) that the subordinates possessed the requisite specific intent.".[356] However from the formulation of TCH it is not clear whether it was only required that the subordinates should have the special intent or whether it was required that the superior knows about the special intent of his subordinates. However, clear is that the superior is not required to share such a special intent in order to be responsible on the basis of superior responsibility.

As the finding of the *ad hoc* tribunals are quite ambiguous, the treatment of special intent crimes under complicity in genocide and aiding and abetting genocide will be discussed.

7.3 RELATION TO COMPLICITY IN GENOCIDE AND AIDING AND ABETTING GENOCIDE

For better understanding of relation between superior responsibility and special intent crimes, the comparison to complicity, as well as to aiding and abeting and special inent crimes seems to be approprite to analyze. In order to do that, the distinction between superior responsibility and complicity and aiding and abeting has to be made. This is not a easy task giving the fact that most of the *ad hoc* tribunal case does not make a difference beetween complicity and aiding and abeting.

[356] *Blagojević & Jokić,* § 686.

7.3.1 COMPLICITY IN GENOCIDE

The term complicity has gain wide attention with confusing conclusion.[357] It is because the term complicity can also encompassess different forms of conduct such as a planning, insigating, ordering or aidinng and abetting.[358] These notions are included in Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR that deals with individual criminal responsibility.[359] On the other hand, complicity in genocide is formulated as a separate provision in both, ICTY and ICTR, Statute within the crime of genocide.[360] The core question remains whether the special intent is required for the complicity in genocide or aiding and abetting to special intent crime and how it is relevent for superior responsibility.

The question on relation of complicity in genocide and aiding and abetting to special intent crime has provoked different treatment at the *ad hoc* tribunals and also a great academic discussion. For the first time, the TCH in *Akayesu* case tried to offer a solution, arguing that complicity in genocide is a substantive crime marked by different requirements from aiding and abetting as a mode of participation in genocide.[214] One of the different requirements was *mens rea* for the crime of complicity in genocide. The TCH argued that for adding and abetting, special intent is required. On the other hand, the same requirement is not needed for complicity.[361]

Contrary, the TCH in *Musema*, did not require a special intent for aiding or abetting to the crime of genocide, stating that the only intent required is to knowingly aid or abet one or more person to commit the crime of genocide. However, the TCH in *Semanza* seems to require special intent for complicity in genocide as stipulated in Article 2(3)(e) of the ICTR Statute.[362] The ACH in *Krstić* case concluded that term complicity may encompass conduct broader than that of aiding and abetting.[363] The ACH also suggested that complicity in

[357] This sub-chapter deals only with ad hoc tribunals‘ treatment of complicity in genocide. The Rome Statute does not provide a different treatment for complicity in genocide.

[358] *Tadić*, ICTY, IT-94-1, 7. 5. 1997, TCH, §§ 674 and 688. AKSENOVA, Marina. *Complicity in International Criminal Law*. Oxford: Hart, 2016, p. 86.

[359] Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

[360] Article 4(3)(e) of the ICTY Statute; Article 2(3)(e) of the ICTR Statute.
The following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide.

[361] *Akayesu*, § 485.

[362] *Semanza*, ICTR-97-20, TCH, 20. 5. 2005, § 435.

[363] *Krstić* ICTY, IT-98-33-A, ACH,19. 4. 2004, §139.

genocide, where it prohibits conduct broader than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group.[364]

Conclusively the case law on complicity in genocide under the *ad hoc* tribunals is not consistent and rather confusing. Rather than going into the greater details of the discussion on the relation and difference of the two concepts, the relevance to the superior responsibility should be made. The difference between direct and indirect superior responsibility is clear-cut. However, it is more difficult to define the relationship between superior responsibility and complicity in genocide under international law. Especially regarding the fact that the complicity in genocide itself is controversial point. We can conclude with two posibble scenarios. The first one is following conclusion of the *Akayesu* case. The complicity in genocide as a crime itself may be relevant if we came to the conclusion that superior responsibility may be regarded as a crime itself. In this case, the conlusion of the Akayesu case could be followed, stating that no special intent is required.[365] For the second possible scenario presents the option of complicity in genocide as mode of liability. When treating the complicity in genocide as a mode of liability, the similarity with superior responsibility is its secondary nature. The distinction between superior responsibility and complicity is that the superior bears responsibility for his own culpable omission while responsibility for the crime of complicit to genocide is derivative in nature and necessarily stems from the criminal conduct of the accomplice.

7.3.2 AIDING AND ABETTING

OMISSION FORM OF AIDING AND ABETTING

Givin to the complexity and diversity of the *mens rea* requirement for aiding and abetting genocide, it may be difficult to provide clear guidance on treating special intent crimes within superior responsibility. However, aiding and abetting has some common characteristics with superior responsibility making it important to analyze.[366] What makes aiding and abetting especially interesting is the responsibility for omission. This issue has been introduced by the ICTY in *Blaškić* case. In *Blaškić*, the ACH explicitly raised the possibility that an omission could found aiding and abetting liability but did not rule on it.[367] The ACH stated that the *actus reus* of aiding and abetting may be perpetrated through an omission, "provided […] that

[364] *Ibid*, §142.
[365] *Akayesu*, §§ 485 and 488.
[366] SVAČEK Ondřej. CHADIMOVA, Michala. PROCHAZKOVA, Ivana. *Superior responsibility in international criminal law*. Praha: Leges, 2017, pp. 32–39.
[367] *Blaškić*, Appeals Chamber Judgement, § 663.

it was coupled with the requisite *mens rea*."[368] This conclusion has been repeated in *Mrkšić* case, when the ACH explicitly stated that aiding and abetting by omission is a recognized mode of liability under the Tribunals'jurisdiction.[369]

However, there are still doubts as to the aiding and abetting as a form of responsibility under international law by omission. Some scholars believe that aiding and abetting by omission does not exist as a form of responsibility for crime under international criminal law.[370] In 2006, the ICTR in *Mpambara,* stated that "other examples of aiding and abetting through failure to act are not to be easily found in the annals of the *ad hoc* Tribunals."[371] Nevertheless, the findings of the ACH in *Mrkšić* case renderred in 2010, are the most detailed application of aiding and abetting by omission before the *ad hoc* tribunals. The ACH's findings confirmed a possibility of omision form for aiding and abetting.

MENS REA FOR AIDING AND ABETTING

When it comes to the *mens rea* requirement for aiding and abetting special intent crimes, opinions significantly differ. The ICTR in *Akayesu* case concluded that aiding and abetting genocide requires the specific intent.[372] After the Akayesu case, the *ad hoc* tribunals appear to no longer distinguish between one who aids and abets the crime of genocide and one who commits the crime of complicity in genocide.[373] In *Krstić* case, the TCH held that aiding and abetting genocide overlaps with complicity to genocide. However, the TCH did not offer any solution when it comes to the *mens rea* requirement for aiding and abetting genocide or complicity to genocide and rather held Krstić, in view of his *mens rea*, responsible as a principal perpetrator of genocide.[374] However, the ACH disagreed and found Krstić responsible not as a principal co-perpetrator but as aider and abettor.[375] As such, the ACH provided analysis on distinction between complicity and aiding and abetting, as well as the

[368] *Ibid.*
[369] *Mrkšić et al.*, ICTY, IT-95-13/1-A, ACH, 5. 5. 2009, § 135.
[370] BOAS, G. *et al. Forms of Responsibility in International Criminal Law*. Cambridge: Cambridge University Press, 2007, p. 315.
[371] *Mpambara*, ICTR, 2001-65-1, TCH, 12. 9. 2006, § 23.
[372] *Akayesu*, § 485; see also VAN DEN HERIK, Larissa. VAN SLIEDREGT, Elies. Ten Years Later, the Rwanda Tribunal Still Faces Legal Complexities: Some Comments on the Vagueness of the Indictment, Complicity in Genocide, and the Nexus Requirement for War Crimes, *Leiden Journal of International Law*, Vol. 17, 2004, pp. 537–545.
[373] See, e.g., *Karemera et al.*, ICTR, ICTR-98-44-T, Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, TCH, 18. 5. 2006.
[374] The unification of two different provisions was also confirmed by the ACH in *Krstić* stated that "the two provisions [Article 7(1) and Article 4(3)] may be reconciled, because the terms 'complicity' and 'accomplice' may encompass conduct broader than that of aiding and abetting". *Krstić*, Appeals Chamber Judgement, § 139.
[375] *Krstić,* Appeals Chamber Judgement, §144.

mens rea requirement for aiding and abetting genocide. It was held that for liability of aiding and abetting, the person need only possess knowledge of the principal perpetrator's specific genocidal intent.[376] The TCH in *Semanza* case even seem to use complicity and aiding and abetting interchangeably while requiring special intent.[377]

The detailed analysis of required *mens rea* was provided in *Furundzija* case. The TCH referred to the post-Second World War cases and the International Law Commission's Draft code on crimes and offences against mankind.[378] Based on analysis of these documents, the TCH held that that aiding and abetting genocide does not requires the specific intent. Instead, the clear requirement is to have knowledge that the conduct of aider or abettor will assist the perpetrator in the commission of the crime.[379] The conclusion from *Furundzija* case was followed in *Aleksovski* case and *Vasiljevic* case.[380]

The TCH in *Blaškić* case also held that the aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's state of mind.[381] However, the ACH held that "wilful failure may incur" criminal responsibility pursuant to Article 7(1) of the Statute in the absence of a positive act.[382] Even thouht the wording "wilful failure" suggest intent of the aider or abbetor, the ACH held that the knowledge, rather than purpose, was the criterion for establishing *mens rea*.[383] Contrary, the wording of the Rome Statute when it comes to aiding and abetting differs.[384] It has been confirmed in *Mbarushimana* case that the mere knowledge is not sufficient for aiding and abetting responsibility to arise.[385]

However, none of these previously mentioned cases dealt with ommission form of aiding and abetting in relation to the specific intent crimes. In the *Mrkšić* case, Šljivančanin was convicted by the Trial Chamber of aiding and abetting torture by omission. The TCH concluded that Šljivančanin is responsible for the torture at Ovčara farm because "despite having witnessed the mistreatment of prisoners of war at Ovčara and being aware of similar and worse previous acts, [he] made no effort to prevent the continuing commission of crimes

[376] *Ibid*, §142.
[377] *Semanza*, § 435.
[378] *Furundžija,* ICTY, IT-95-17/1, TCH, 10. 12. 1998, §§ 236–249.
[379] *Ibid*, § 245.
[380] *Aleksovski*, ICTY, IT-95-14/1, ACH, 24. 3. 2000, § 162. *Vasiljević,* § 71. *Furundžija*, § 245
[381] *Blaškić*, § 286.
[382] *Blaškić,* Appeals Chamber Judgement, § 663.
[383] *Blaškić,* Appeals Chamber Judgement, §49. *Vasiljević*, ICTY, IT-98-32-A, ACH, 25. 2. 2004, § 102.
[384] SCHABAS, William. *The International Criminal Court: A Commentary on the Rome Statute*. 2nd ed. Oxford: Oxford University Press, 2016, p. 578.
[385] *Mbarushimana*, ICC, ICC-01/04-01/10-465, PTCH I, 16. 12. 2011, § 274

[…].[386] The TCH came to the conclusion that when he was later on aware of the mistreatment of the prisoners, he was under a duty to prevent the further commission of the crimes and made no effort to do so. He was convicted for aiding and abetting to torture without any analysis of his special intent in relation to the torture. This suggests that the TCH did not require a special intent on the part of the aider or abetter commiting a special intent crime.

The ICTY case law on the relation of special intent crimes and aiding and abetting is more settled than on superior responsibility and genocide. In *Blaškić* case was concluded that the aider or abettor must be aware of the special genocidal intent, but need not share. The conclusion that mere knowledge of genocidial intent is sufficient was continuously followed in other cases. Even though, there are some doubts as to the aiding and abetting as a form of responsibility under international law by omission, the applicability of special intent crime in relation to aiding and abetting was analyzed in *Mrkšić* case, suggesting that the special intent was not required. Contrary, the very limited ICC case law requires more than mere knowledge of genocidal intent.

RELATION TO SUPERIOR RESPONSIBILITY

When trying to identify differences between the aiding and abetting and superior responsibility, it was held by the ICTY that "responsibility for aiding and abetting resembles superior responsibility."[387] Due to the similarities of both concepts, it is hard to established clear difference between superior responsibility and ading an abetting comitted by ommission.[388] However, there are few points that should gain some attention. Firstly, the difference may form a different requirement for *mens rea*. While the supervisor knew or have reason to know about the unlawful behavior of the subordinate, aider or abetter had as his very purpose the facilitation of the commission of genocide. Secondly, the a factor of differentiation may, inter alia, be the degree of influence of the superior in committing the crime committed by him.[389] If a deliberate omission occurs in a situation where the crime of subordinates becomes more concrete or it is already committed, it is possible to speak of the responsibility for aiding the crime of the subordinates. The case law of the ICTY introduced “subsantial contribution” requirement for the responsibility under the provision of aiding and

[386] *Mrkšić et al.*, ICTY, IT-95-13/1, TCH, 27. 9. 2007, § 667.
[387] *Blaškić,* Appeals Chamber Judgement, § 664.
[388] For more detailed analysis: SVACEK, O.: *supra*, pp. 32–39.
[389] *Blaškić,* Appeals Chamber Judgement, § 664.

abetting.[390] The causality requirement between failure of the superior and commission of the crime by the subordinates is more complicated. Thirdly, superior responsibility is built on pure omission and the superior is being held responsible for his own conduct, not the result. On the other hand, (omissive) aiding and abetting is described as commission by omission, which means that the aider or abettor is ultimately responisible for the result, not his own conduct. [391]

In *Kordić/Čerkez* case, the TCH stated that superior responsiility and aiding and abetting are not compatible, but did not state which form should be given priority .[392] The solution was presented by the ACH in the *Blaškić* case. The ACH held that a conviction for one count cannot be based on both concepts and if requirements are met for both, the conviction should be based on direct responsibility. The fact that the requirements for conviction under the superior responsibility are met shall be considered as an aggravating circumstance in sentencing.[393]

Although substantial differences have been identified between aiding and abetting and superior responsibility, aiding and abetting seems to be the most comparable responsibility to superior responsibility. The main difference between those two is that a person whose responsibility is aring from aiding and abetting, is ultimately responsible for the result.

7.4 NATURE OF THE SUPERIOR RESPONSIBILITY

The author of this study suggest that the key point to the question of treating special intent crimes within the superior responsibility seems to be the nature of superior responsibility itself. As has been shown above, superior responsibility differs from aiding and abetting and also the complicity in genocide. However some similarities have been found and the comparison to aiding and abetting seems most fruitful.

There is no confusion about aiding and abetting representing mode of liability under the international criminal law. Nevertheless, the position of superior responsibility is far less clear. When comparing superior responsibility to aiding and abetting, the distinction was

[390] *Mrkšić* Appeals Chamber Judgement. §155. *Gotovina et al*., ICTY, IT-06-90-A, ACH, 6. 11. 2012, § 149. Followed by the ICTR in *Nzabonimana,* ICTR, ICTR-98-44D-A, ACH, 29. 9. 2014, § 146.

[391] "The aider and abettor "will . . . be responsible for all that naturally results from the commission of the act in question." *Tadić*, § 692.

[392] *Kordić/Čerkez*, ICTY, IT-95-14/2, TCH 26. 2. 2001, § 371.

[393] *Blaškić*, Appeals Chamber Judgement, § 86-93.

made that superior is being held for his or her own failure. This is however a conclusion that wasn't reached immediately. Case law emanating from the aftermath of WWII tends to view superior responsibility as a mode of participation and the superiors were convicted for the principal crime committed by the subordinates. This concept was referred to as "acquiescence", and as such, the superiors were held responsible for the crimes committed by his subordinates, under the condition that superior "have had knowledge and to have been connected to such criminal acts, either by way of participation or criminal acquiescence".[394] Superior responsibility was understood as a way of participation in the subordinates' crime. In *Yamashita* case, this responsibility shifted towards forms strict liability.[395] In either case, the superior was charged and convicted for the principal crime.[396]

Article 86(2) of AP I as well as the Statutes of *ad hoc* tribunals are silent as to the nature of superior responsibility. Article 28 of the Rome Statute raises more questions than offering answer to the nature of superior responsibility.

7.4.1 *AD HOC* TRIBUNALS' APPROACH

The early case law from the ICTY indicates that the superiors were in fact held responsible for the principal crime. This approach has been also given support by the Secretary-General's report relating to ICTY Statute describing the superior responsibility as "imputed responsibility".[397] The TCH in *Čelabići* case held that "[t]he type of individual criminal responsibility for the illegal acts of subordinates … is commonly referred to as 'command responsibility".[398] The Trial Chamber continued; "[t]hat military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law."[399] The TCH cited the Secretary General's Report in support of its conclusion. The Appeals Chamber in *Čelabići* case also held that where a superior has effective control over his subordinates "he could be held responsible for the commission of

[394] Nuremberg Trial of the United States v.Wilhelm von Leeb (the High Command trial), in Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. XI (Buffalo: Hein, 1997), p.517-520. See also U.S. v.Wilhelm von List (the Hostage trial), Vols X and XI, p. 1271.
[395] United Nations War Crimes Commission. *Law Reports of trials of war criminals*. (London: H.M.S.O.), 1947, Volume III, pp. 18 – 22. 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.
[396] MELONI, Chantal. Command responsibility. Mode of liability for the Crimes of subordinates or seperate offence of the superior, *Journal of International Criminal Justice*, 2007, p. 623.
[397] Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), S/25704.
[398] *Čelabići*, § 331.
[399] *Čelabići*, § 333.

the crimes if he failed to exercise such abilities of control".[400] The TCH in *Aleksovski* case discussed the distinction between responsibility under Article 7(1) and Article 7(3) of the ICTY Statute. The TCH concluded that "[T]he doctrine of superior responsibility makes a superior responsible not for his acts sanctioned by Article 7(1) of the Statute but for his failure to act." However, it was still found that a superior is "held responsible for the acts of his subordinates" if he did not prevent the perpetration of the crimes of his subordinates or punish them for the crimes.[401]

The turn point can be seen in conclusion of the TCH in the *Halilović* case. The TCH concluded that, up to that date, the superior had consistently been "responsible for the crimes of his subordinates.'[402] Nevertheless, the TCH reached a different conclusion and held that the superior is 'merely responsible for his neglect of duty'.[403] Furthermore, it was clarified that "a commander is not responsible as though he had committed the crime himself."[404] This was followed in subsequent ICTY case law. The TCH in *Hadzihasanović* emphasised that superior responsibility "is the corollary of a commander's obligation to act".[405] As such, TCH argued, that superior responsibility is responsibility for an omission to prevent or punish crimes committed by his subordinates and the "responsibility is *sui generis* distinct from that defined in Article 7(1) of the Statute." [406] Another analysis concerning the nature of superior responsibility was provided in *Orić* case. The Trial Chamber in *Orić* case pointed out that finding commander "responsible 'for the acts of his subordinates' [...] does not mean, however, that the superior shares the same responsibility as the subordinate who commits the crime [...], but that the superior bears responsibility for his own omission in failing to act. In this sense, the superior cannot be considered as if he had committed the crime himself, but merely for his neglect of duty". [407] This is the essential element distinct from responsibility under Article 7(1) of the ICTY Statute, and the TCH went to call the superior responsibility under Article 7(3) of the ICTY Statute as a responsibility *sui generis*.

[400] *Čelabići.* Appeals Chamber Judgement. § 198.
[401] *Aleksovski*, ICTY, IT-95-14/1-T, TCH, 25. 6. 1999, § 67.
[402] *Halilović*, § 53
[403] *Ibid*, § 293.
[404] *Ibid*, § 54
[405] *Hadžihasanović/Kubura*, § 75.
[406] *Ibid.*
[407] *Orić,* ICTY, IT-03-68-T, TCH, 30. 6. 2006, § 293.

7.4.2 ROME STATUTE

According to the wording of Article 28 of the Rome Statute, a superior "shall be criminally responsible for crimes within the jurisdiction of the Court' committed by his subordinates 'as a result' of his 'failure to exercise control properly". From a literal interpretation of this provision it follows that the superior is responsible for the principal crime committed by his subordinates.[408] The first sentence of Article 28 providing for superior responsibility says "[i]n addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court". This sentence is sometimes interpreted as that it "...does not substitute, but supplements all forms of participation as listed in Article 25(3). Article 28 thus extends the scope of individual criminal responsibility for perpetrators in the position of superiors."[409]The language chosen for Article 28 seems quite ambiguous. Some consider that what ICC Statute adopts is a "concept of superior responsibility as a form of liability for omission".[410] It is nevertheless often argued that literal interpretation of Article 28 indicates that superior responsibility is rather meant to be kind of imputed liability for the base crime resulting from superior's omission.[411] The *Bemba* case, the PTCH concluded that "a superior may be held responsible for prohibited conduct of his subordinates for failing to fulfil his duty".[412] However, the PTCH went on, adding that superior responsibility can be better understood "when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act".[413] The TCH expressly stated that „Article 28 provides for a mode of liability, through which superiors may be held criminally responsible for crimes within the jurisdiction of the Court committed by his or her subordinates."[414]

7.4.3 *SUI GENERIS* OMISSION AND REQUIREMENT OF CAUSALITY

The nature of superior responsibility has been subjected to a diverse academic discussion. Mettraux argues that a superior is not being held responsible for the crimes of subordinates, but responsibility in respect of crimes committed by subordinates based on his own failure to

[408] MELONI, Ch.: *supra*, p. 633.
[409] TRIFFTERER, Otto. Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Art. 28 Rome Statute? *Leiden Journal of International Law*. 2002, vol. 15, no. 1, pp.179-186.
[410] FRULLI, Michaela. Exploring the applicability of command responsibility to private military contractors. *Journal of Conflict & Security Law*, vol. 15, no. 3, 2010, p. 452.
[411] SANDER, B.: *supra*, p. 132.
[412] *Bemba*, ICC, ICC-01/05-01/08-424, PTCH II, 15. 6. 2009, § 405.
[413] *Ibid*.
[414] *Bemba*, ICC, ICC-01/05-01/08-3343, TCH III, 21. 3. 2016, § 171.

act.[415] Root argues that superior responsibility enshrined in Article 28 of the Rome Statute should be interpreted as a distinct crime. However, treating superior responsibility as a distinct crime does not seem to be supported by the case law and consistent with customary international law. In Root's opinion, treating superior responsibility as a mode of liability would require to "muddy" the heightened *mens rea* of specific intent crimes, or the superior responsibility could not be applied to specific intent crimes.[416] The author disagrees that treating superior responsibility as a mode of liability would automatically opt out the use of the responsibility for special intent crimes, as the distinction have to be made between requisite *mens rea* for superior and for the subordinates. The prevailing academic opinion is that superior responsibility is a *sui generis* form of culpable omission which has no equivalence from any other responsibility in either domestic or international criminal law.[417] The author's suggestions is to treat superior responsibility as *sui generis* responsibility for omission in respect of subordinates' crimes that would not require a special intent on part of the superior, but knowledge of the superior about subordinates' intentions – special intent in a relation to special intent crimes.

However, some authors argue that if the there would be too little connection between the conduct of the superior and the conduct of subordinates if the relation would be limited to the superior's knowledge of his subordinates' intentions.[418] This is when the causality requirement should come into play. The requirement of causality between the failure of superior and principal crimes should ensure the strong connection between the conduct of the superior and the crimes committed by the subordinates. The causality should be required 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 duty to punish crimes). Although, the existence of causality requirement has not found its support in case law of ad hoc tribunals, the working of the Rome Statute and Bemba case strongly support the existence of such requirement in relation to superior responsibility.[419]

[415] METTRAUX, G.: *supra*, 2009, pp. 37- 95.
[416] JOSHUA L. ROOT. Some other men's rea? The nature of command responsibility in the Rome Statute, *J Transnatl. L & Policy*, 2013, vol. 23, issue 119, p. 155.
[417] AMBOS, Kai. *Treatise on International Criminal Law. Volume I: Foundations and General Part*. Oxford: Oxford University Press, 2013, pp. 189-197; MELONI, Ch.: *supra*, pp. 191-207; METTRAUX, G.: *supra*, pp. 37- 95.
[418] For example METTRAUX, G.: *supra*, pp. 56.
[419] SVAČEK, O.: *supra*, p. 100-110.

8. CONCLUSION

This thesis was devoted to the superior responsibility doctrine under international criminal law with a focus on elements of superior responsibility and its controversial aspects, such as successor superior responsibility, requirement of causality and interaction with special intent crimes. Author has started this thesis with 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 controversial aspects of superior responsibility - successor superior responsibility, requirement of causality and interaction with special intent crimes.

In the first 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, SCSL and STL with major focuses on the ICC. The author extensively presents statutory development of superior responsibility with the case law at the ECCC due to current lack of comprehensive analysis and also author's working experience at the OCP-ECCC.

The second and third chapter was devoted to the elements of superior responsibility. 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 superior 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. 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 different level of *mens rea* requirement.

There are more aspects of superior responsibility that are controversial; however the author paid special attention to the successor superior doctrine, causality requirement and

interaction with special intent crimes and examined them separately. Starting with the successor superior doctrine, it is important to realize that the duty to prevent and duty to punish are two separate duties, applicable at different times. The ACH in the *Hadžihasanović/Kubura* case held that there must be perfect temporal coincidence between the time when the crime has been committed, and the existence of the superior-subordinate relationship between the accused and the perpetrator. It's in author's view that the duty to punish should apply even to crimes that were committed before assumption of command over subordinates who committed the crimes (conclusion that was also reached by dissenting Judge Hunt and partial dissenting Judge Shahabuddeen in the *Hadžihasanović/Kubura* case in appeal proceedings and also by the TCH in *Orić* case). The author agrees with the majority of case law as far as stating that there must be a temporal coincidence. However this temporal coincidence should be 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 punish not the time at which the crimes were committed.

Following Chapter presents causality requirement for superior responsibility. In last decade a debate sparked about whether a causal element is generally required for superior responsibility from failure to punish. The Rome Statute brought a new requirement that the principal crime has to be committed as *a result of* the superior's failure. However there is no unity amongst scholars whether this enshrined causality requirement under the Rome Statute. Also the case law of *ad hoc* tribunals is not absolutely consistent. Although the TCH in *Čelabići* case, arguably, opened a door for application of causality requirement on duty to prevent, some authors and more importantly subsequent ICTY case law regarded this as a denial of causality requirement in both types of duties – duty to punish but also duty to prevent. The different development on the causality requirement can be seen in *Hadžihasanović/Kubura* case. The TCH in this case went as far as stating that a causality requirement is necessary to hold a commander responsible and the command responsibility may be imposed only when there is a relevant and significant nexus between the crime and the responsibility of the superior accused of having failed in his duty to prevent. The PTCH II and also the TCH III in Bemba case concluded that causality requirement is has to be established between superior's failure to prevent and the crime, but found no unity on the specific degree that is required.

In the last chapter, the author pointed out rather ambiguous standpoint at the case law of the ICTR and the ICTY for the interaction between superior responsibility and special intent crimes. In *Stakić* case the TCH found that it must be proved that a superior possessed

the requisite special intent, whereas the ACH in *Brđanin* case found no difficulty in conviction a superior of genocide based on lower *mens rea*. The author suggested that the key point to the question of treating special intent crimes within the superior responsibility seems to be the nature of superior responsibility itself. The proposed solution is to treat superior responsibility *sui generis* form of culpable omission which has no equivalence from any other responsibility in either domestic or international criminal law. The author's suggestions is to treat superior responsibility as *sui generis* responsibility for omission in respect of subordinates' crimes that would not require a special intent on part of the superior, but knowledge of the superior about subordinates' intentions – special intent in a relation to special intent crimes. Furthermore, the author disagrees that there would be too little connection between the conduct of the superior and the conduct of subordinates if the relation would be limited to the superior's knowledge of his subordinates' intentions. This connection should be safeguard by the requirement of causality – causality between the conduct of the superior and the crimes committed by the subordinates.

A significant amount of judgments have been rendered by international judicial organs 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 thesis provided comprehensive analysis on elements of superior responsibility and its controversial aspects, such as successor superior responsibility, requirement of causality and interaction with special intent crimes. As such, the analysis is fully applicable in practice and it increases the value of this thesis.

ABSTRACT

This thesis analyses superior responsibility under international criminal law with a focus on elements of superior responsibility and its controversial aspects, such as successor superior responsibility, requirement of causality and interaction with special intent crimes. A significant amount of judgments have been rendered by international judicial organs 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 thesis provided comprehensive analysis on elements of superior responsibility and its controversial aspects, such as successor superior responsibility, requirement of causality and interaction with special intent crimes. As such, the analysis is fully applicable in practice and it increases the value of this thesis.

SHRNUTÍ

Tato práce představuje analýzu odpovědnosti nadřízeného v mezinárodním trestním právu se zaměřením na prvky nadřazené odpovědnosti a její kontroverzní aspekty, jako je nástupnická odpovědnost nadřízeného, požadavek kauzality a vzájemný vztah odpovědnosti nadřízeného a zločinu dle mezinárodního práva vyžadující kvalifikovaný úmysl. V rámci mezinárodních trestních tribunálů bylo vydáno značné množství rozsudků v případech týkajících se doktríny odpovědnosti nadřízeného. Nicméně systematické čtení jednotlivých případů odkrývá nesrovnalosti v uplatňování odpovědnosti nadřízeného. Tato práce poskytuje komplexní analýzu prvků odpovědnosti nadřízeného a třech hlavních kontroverzních aspektů. To umožňuje přímou aplikovatelnost nálezů této práce a tato přímá aplikovatelnost zvyšuje znatelně hodnotu celé práce.

KEYWORDS

Superior responsibility, command responsibility, elements of superior responsibility, successor superior responsibility, causality requirement, special intent crimes

KLÍČOVÁ SLOVA

Odpovědnost nadřízeného, odpovědnost velitele, složky odpovědnosti nadřízeného, nástupnická odpovědnost nadřízeného, požadavek kauzality, zločiny vyžadující kvalifikovaný úmysl

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