



The
University
Of
Sheffield.

**Utilising the International Criminal Law Doctrine of Command Responsibility
to Establish State Responsibility**

Alasdair M Morrison

A thesis submitted in partial fulfilment of the requirements for the degree of
Doctor of Philosophy

The University of Sheffield
Faculty of Social Sciences
School of Law

17 May 2021

Abstract

This thesis takes forward the application of the concurrence between individual responsibility and state responsibility in international law identified by Nollkaemper who noted that the findings with respect to individual criminal responsibility in international criminal law may be utilised in subsequent cases concerning state responsibility. Currently the emphasis is primarily on the utilisation of international criminal law to establish the individual criminal responsibility of actors in systemic international crimes. Although international criminal law has developed various methodologies in order to address such crimes the focus on the individual perpetrator does not adequately reflect the true nature of system criminality.

Despite the limited role of international responsibility with respect to such international crimes and the limited trial mechanisms available with respect to proceedings on an interstate basis the combination of the determination of state responsibility and individual criminal responsibility can serve to more adequately represent the true face of system criminality. In the *Bosnia Genocide* case the International Court of Justice relied almost exclusively on the evidence obtained in the course of criminal proceedings before the International Criminal Tribunal for the former Yugoslavia in its establishment of state responsibility. In that instance the provisions of the Genocide Convention with respect to state and individual responsibility were mirrored enabling the Court to readily apply the evidence which it received.

This study is concerned with responsibility, both individual criminal responsibility and state responsibility. It seeks to align command responsibility and state responsibility, linked as both are by their common purpose of the protection of the international community addressing state responsibility with respect to serious breaches of peremptory norms as a result of system criminality. As a unique form of criminal responsibility founded in and interpreted through the principle of state responsibility the processes by which command responsibility is established reflecting those utilised to establish state responsibility. This relationship provides both a theoretical and practical basis for the establishment of state responsibility for international crimes concerning state armed forces.

List of Contents

Abstract	page i
Table of Contents	pages ii-iv
	Page Nos.
Chapters	
1. A Legal Response to System Criminality in the International Community	1 - 16
1.1 Introduction – The Rationale	1
1.2 Relationship Between State Responsibility and Individual Criminal Responsibility	3
1.3 Visualising the Thesis as a Whole	7
1.3.1 Aims and Objectives	7
1.3.2 Research Questions	7
1.3.3 Literature Review	8
1.3.4 Methodology	13
1.3.5 Originality	14
1.4 Chapter Structure	14
2. Responsible Command: The Foundation and Delineator of Command Responsibility Doctrine	17 - 44
2.1 Introduction	17
2.2 The Emergence of Responsible Command and Command Responsibility	18
2.2.1 The Commander as Place Holder and then as Guarantor	19
2.3 The Process of Historical Development of Responsible Command from Hague to the World War I War Crimes Trials	22
2.4 War Crimes Trial Post WWII Command Responsibility and Responsible Command	25
2.5 Post War Developments – Doctrine and Principle	32
2.5.1 Additional Protocol I 1977 and the Principle	33

2.5.2	The Ad Hoc International Criminal Tribunals and Responsible Command	35
2.5.3	The International Criminal Court and Utilisation of the Principle	39
2.6	Conclusion	43
3.	The Evolution of Command Responsibility Doctrine: From Responsible Command to Codification	45 - 68
3.1	Introduction	45
3.2	Establishing a Concept for a New Form of Omission Liability	46
3.3.1	Post World War II Command Responsibility Prosecutions	48
3.3.2	The Trial of General Yamashita – Based on a Form of Objective Responsibility	49
3.3.3	Development of the Doctrine – <i>High Command</i> and <i>Hostage</i> Cases	51
3.3.4	The Tokyo Trials – Senior Commanders and Politicians	58
3.3.5	The Trial of Admiral Toyoda	61
3.3	Codifying Customary International Law	63
3.4	Conclusion	66
4.	The Development of Command Responsibility Doctrine in the Ad Hoc International Criminal Tribunals	69 - 89
4.1	Introduction	69
4.2	Command Responsibility in the Ad Hoc Tribunals	70
4.2.1	The Commission of an Underlying Crime	72
4.2.2	Superior Subordinate Relationship and Effective Control	77
4.2.3	Mens Rea – The Requirements of Knowledge	81
4.2.4	Failure to Take Necessary and Reasonable Measures	84
4.3	The Causal Link or the Cheshire Cat	85
4.4	Conclusion	89
5.	Command Responsibility Under the Rome Statute of the International Criminal Court	90 - 111

5.1	Introduction	90
5.2	Aspects of the Conventional Doctrine	92
5.2.1	The Underlying Offence	92
5.2.2	Superior Subordinate Relationship	96
5.2.3	Effective Control	98
5.2.4	Knowledge and Constructive Knowledge	101
5.3	Further Aspects of the Conventional Doctrine	104
5.3.1	The general and Specific Duties to Exercise Control	104
5.3.2	Prevent, Repress and Submit the Matter to the Competent Authorities	105
5.3.3	The Requirement for Causation	107
5.3.4	Issues From the Appeal	109
5.4	Conclusion	109
6.	Establishing State Responsibility	112 - 123
6.1	Introduction	112
6.2	Establishing the Criteria for Attribution	112
6.3	Attribution	113
6.3.1	State Organs	114
6.3.2	State Agents	116
6.4	Due Diligence	121
6.5	Conclusion	122
7.	Utilising Command Responsibility in the Establishment of State Responsibility ...	125 - 148
7.1	Introduction	124
7.2	Development of Concurrence Between Individual and State Responsibility Regimes	125
7.3	System Criminality	128
7.4	Concurrence Between International Criminal Responsibility and Aggravated State Responsibility in Judicial Proceedings	131

7.5 The Role of Secondary Norms in the Establishment of Concurrent Responsibility	134
7.6 Attribution, Prevention, Repression and Due Diligence	136
7.7 Differences and Similarities in Criminal and Aggravated State Responsibility	142
7.8 Utilising Command Responsibility Doctrine to Establish State Responsibility	146
8. Conclusion	149 - 154
8.1. Introduction	149
8.2 Background	149
8.3 Structure of Study	150
8.4 Contribution of Thesis	153
8.5 Recommendations for Future Applications and Research	153
Appendix 1 - Bibliography	155 - 167

I, the author, confirm that the Thesis is my own work. I am aware of the University's Guidance on the Use of Unfair Means (www.sheffield.ac.uk/ssid/unfair-means). This work has not previously been presented for an award at this, or any other, university.

Please ensure that any publications arising from the thesis are acknowledged in this section.

MAIN BODY OF THE THESIS/CHAPTERS FOLLOWS

A LEGAL RESPONSE TO SYSTEM CRIMINALITY IN THE INTERNATIONAL COMMUNITY

1.1 INTRODUCTION - THE RATIONALE

This thesis proposes the utilisation of the international criminal law doctrine of command responsibility to assist in appropriate cases in the establishment of state responsibility for system criminality in armed conflict where the state is actively concerned or acquiesces in the commission of international crimes.

The First and Second World Wars were waged between states by their armed forces with the widespread atrocities that marked these conflicts being committed by these forces. These international armed conflicts were largely superseded by modern armed conflicts waged by non-state armed groups against a backdrop of failed and failing states from the Balkans to the multiple conflicts in Africa. The relationships between these groups and the respective states in which these conflicts have been waged, or third-party states supporting one or other faction are frequently ill-defined. Such criminality has been shown to still continue to occur, as illustrated in the current such conflict between Russia and Ukraine following the Russian invasion, marked by widely reported allegations of mass atrocities against the civilian population.

The response to such criminality has been mixed. The conflicts associated with the breakup of the former Yugoslavia led to widespread prosecutions of perpetrators in the ad hoc international criminal tribunal established by the United Nations Security Council and to a very rare instance of an interstate case addressing state involvement in systemic crime, the *Bosnia Genocide* case Judgment of 2007.¹

To explain in more detail, international criminal law provides for individual criminal responsibility on the part of those who commit international crimes.² States incur international

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Bosnia Genocide* case Judgment).

² Rome Statute of the International Criminal Court (last amended 2010) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (ICC Statute); Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press 2005) 35, side bar 97-98.

responsibility if an act or omission which constitutes a breach of their international obligations is attributed to them.³

The evolution of these two regimes has followed different paths. International criminal law has developed an increasingly sophisticated substantive and procedural structure⁴ to effectively allocate and determine individual criminal responsibility. In contrast the state responsibility regime has been developed as a set of general principles or ‘trans-substantive rules’⁵ applicable to all areas of law in the absence of a specific applicable treaty regime.⁶

This study is concerned in particular with serious breaches of peremptory norms under article 40 DASR.⁷ These include those crimes listed in the ICC Statute.⁸

The concurrence between the two forms of responsibility - state and individual responsibility- regarding the crime of aggression was illustrated in the ICJ *Bosnia Genocide* case Judgment⁹ in which the Court relied to a great extent on the evidence, rulings, and decisions from previous ICTY trials regarding the same events in order to assess the responsibility of Serbia.¹⁰

The thesis seeks to provide an answer to the mismatch between the identified dominant part played by collective entities, such as the state, in such crimes and the current focus on individual criminal responsibility under international criminal law.¹¹

³ International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ November 2001 UN Doc A/56/10 (DASR) 43-365; *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3.

⁴ Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008) 3; Gideon Boas, James L. Bischoff and Natalie L. Reid, *International Criminal Law Practitioner Library Vol 1, Forms of Responsibility in International Criminal Law* (CUP 2007) 1.

⁵ David D Caron, ‘The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority’ 96 AJIL (2002) 857, 871; Marja Lehto, *Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism beyond Violent Acts* (Brill Nijhoff 2009) 201.

⁶ Daniel Bodansky and John R Crook, ‘Symposium: The ILC’s State Responsibility Articles, Introduction and Overview’ 96 AJIL (2002) 779, ‘[t]he secondary rules of state responsibility [...] are ‘rigorously general ...in character’ (footnote omitted).

⁷ DASR (n 3) art 40, 112-113.

⁸ ICC Statute (n 2) art 5.

⁹ *Bosnia Genocide* case Judgment (n 1) 132-134, paras 217-224.

¹⁰ *Prosecutor v Krstic* (Judgment) ICTY-98-33 (2 August 2001); *Prosecutor v Krstic* (Appeals Judgment) ICTY-98-33-A (19 April 2004); *Prosecutor v Blagojevic and Jokic* (Judgment) ICTY-02-60-T (17 January 2005).

¹¹ Andre Nollkaemper, ‘Introduction’ in Andre Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (CUP 2009) 1.

1.2 RELATIONSHIP BETWEEN STATE RESPONSIBILITY AND INDIVIDUAL CRIMINAL RESPONSIBILITY

The existence of the international community has arisen through the identification and the establishment of fundamental common interests of that community which are then given a higher priority than the interests of individual member states.¹² It has been proposed that international law has developed mechanisms with respect to doctrine and substantive law in response to the absence of organisational authority to protect the interests of the international community. The most significant examples of this development are obligations erga omnes and the concept of jus cogens, conceptually closely linked and connected with the international community as a whole

The importance attached to preservation of international peace and security and the suffering resulting from historically the two world wars and more recently widespread internal armed conflict have played key roles in the establishment of a system of collective security and with respect to the development of international criminal law and the modern law on state responsibility.

The process of development of the two international law regimes has, as noted, been marked by increasing diversification at both the substantive and institutional levels.¹³ They are, however, generally regarded as complimentary, linked at the level of primary obligations.¹⁴ Aggravated state responsibility arises when there is a serious breach by a state of an obligation under a peremptory norm of international law which overlap with international crimes giving rise to individual criminal responsibility.¹⁵ It is this element of state responsibility that is particularly focussed on in this study when considering the relationship between state and individual responsibility as both aggravated state responsibility and individual criminal liability originate in serious breaches of obligations owed to the international community as a whole and enable concurrent responsibility.

¹² Bruno Simma and Andreas Paulus, 'The International Community: Facing the Challenge of Globalization' (1998) 9 EJIL 266, 268.

¹³ Lehto (n 5).

¹⁴ Beatrice L. Bonafe, *The Relationship Between State and Individual Responsibility for International Crimes* (Martinus Nijhoff Publishers 2009) 253.

¹⁵ Andre Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 Int'l & Comp LQ 615, 627.

Although international criminal law is concerned with individual criminal responsibility of natural persons the context within which it operates differs from that of domestic criminal law in its greater concerns with system criminality.¹⁶ The term 'system criminality' is used in the sense proposed by Kelman¹⁷ namely:

Crimes that take place, not in opposition to the authorities, but under explicit instructions from the authorities to engage in these acts, or in an environment in which such acts are implicitly sponsored, expected, or at least tolerated by the authorities.

Thus, despite the emphasis placed on individual responsibility, states play a leading role as collective entities in the commission of the core international crimes. The international criminal law concept and doctrines used to address such crimes, involving not only direct but also various forms of indirect perpetration, necessarily include modes of liability and objectified responsibility and in certain cases acquiescence which reflect the organisational structure of the commission of such criminality. Nonetheless, international criminal law ultimately addresses the responsibility of individual natural persons, even if international criminal tribunals have regard to the wider context within which systemic crimes are committed. It is thus questionable whether criminal law can establish a comprehensive picture of the structures and processes through which system crimes are committed in isolation. For this reason, it is necessary to additionally establish the role of the state as such to achieve a fuller understanding of legal responsibility, rather than as disconnected regimes, and this is particularly so at the level of secondary obligations relating to responsibility. The secondary rules imposing consequences on states and individuals for breaches of primary obligations differ in important respects from each other.

State responsibility has been described as a general law of wrongs.¹⁸ Article 1 DASR 2001 establishes the basic principle behind the Articles that: 'every international wrongful act of a State entails the international responsibility of that state.'¹⁹

The DASR do not address the content of the primary obligations under international law whose breach gives rise to international responsibility. Article 2 sets out the well-established customary international law principle that a state incurs responsibility for an internationally

¹⁶ Elies van Sliedregt, 'System Criminality at the ICTY' in Andre Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (CUP 2009) 183.

¹⁷ Herbert C Kelman, 'The Policy Context of International Crimes' in Andre Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (CUP 2009) 26,27.

¹⁸ James Crawford and Simon Olleson, 'The Nature and Forms of International Responsibility' in Malcolm Evans (ed), *International Law* (2nd edn, OUP 2006) 451, 454.

¹⁹ DASR (n 3) art 1.

wrongful act when 'conduct consisting of an action or omission is attributable to the state under international law; and constitutes a breach of an international obligation of the state.'

The resultant product has been described as rigorously abstract and general with the distinction drawn between primary and secondary obligations and the allocation of issues such as attribution and fault being regarded by some commentators as debatable.²⁰ In the absence, however, of a subsequent Convention, and indeed perhaps counterintuitively because of it the DASR have been widely referred to by states, in judicial and arbitral practice and are generally regarded as authoritative.

What can be said, however, is that if attribution is established it has the effect of establishing direct responsibility on the part of the state for acts committed by individuals attributable to it and these then establish responsibility on the part of the state. At the level of primary norms, the underlying norms are fundamentally the same for state and individual

Academic debate on whether a finding of individual criminal responsibility was required before there could be a finding of State responsibility was resolved by the ICJ in the *Bosnia Genocide* case when the court held that this was not a sine qua non.²¹ Although this determination is in accord with the duality of the two systems, nonetheless the Court then placed great weight on the findings of the ICTY in order to establish whether genocide had been committed, before considering whether it could be attributed to Serbia, as a State. It is difficult to see how this could be otherwise, as a criminal tribunal is necessarily in a better position to hear contested matters of evidence regarding complex crimes than the ICJ. If the process adopted in this case will represent future practice, then the consequences will, as discussed subsequently, require careful consideration.²²

Academic studies regarding the complementary nature of the individual criminal responsibility and State responsibility regimes have discussed a 'clear trend [...] pointing to a substantial similarity in the establishment of the facts entailing State and individual responsibility for collective crimes.'²³ It is not, however, enough to determine apparent factual similarities in the primary and secondary obligations, it is also necessary to establish conceptual connections. Responsibility with its accompanying duties serves as a focal point in establishing the effectiveness of both state responsibility and international criminal law

²⁰ Bodansky and Cook (n 6) 781.

²¹ *Bosnia Genocide* case Judgment (n 1) paras 180-182.

²² E. Cannizzaro, 'Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ' (2007) 1 *Eur J Legal Stud* 42; A Gattini, 'Evidentiary Issues in the ICJs Genocide Judgment' (2007) 5 *JICJ* 889; Antonio Cassese 'On the use of Criminal Law Notions in Determining State Responsibility for Genocide' 5 *JICJ* (2007) 875.

²³ Bonafe, *The Relationship Between State and Individual Responsibility* (n 14) 252.

with the principle of responsible command based in state responsibility and serving as the foundation for the criminal law doctrine of command responsibility. The doctrine of command responsibility thus become the subject matter of this thesis upon which the link between individual criminal responsibility and state responsibility can be constructed.

As has been said, it has its roots in the principle of responsible command. Responsible command as a fundamental principle of international humanitarian law requires that commanders act responsibly, ensure troops under their command are subject to a system of internal discipline, are properly organised and most significantly observe international humanitarian law.²⁴ The principle originates in the responsibility of states for their forces' conduct in international armed conflict and has served as the foundation and then as a key element in the development of the individual criminal responsibility doctrine of command responsibility. Both the principle and doctrine can be viewed as legal 'enforcement mechanisms' centred around the role of the commander. The relationship between the two originated in the commander's capacity as a placeholder under the Fourth Hague Convention respecting the Laws and Customs of War on Land 1907 and Annexed Regulations, and then subsequently as a guarantor, with the development of command responsibility doctrine as a mode of liability under international criminal law.²⁵

Originating as a doctrine of criminal responsibility in the post-war trials and developed within the context of the attempts to attribute responsibility for international crimes to the military leadership of the Japanese and German armed forces, the doctrine uniquely originated in the international rather than the domestic forum. The doctrine is additionally a unique form of responsibility for failure to act when under a duty to do so.

The customary international law form of command responsibility doctrine was based on limited post war precedent and developed by the judges of the ad hoc tribunals in response to the circumstances faced by them primarily in non-international armed conflicts following the breakdown of society within the state.²⁶

The subsequent development of a conventional form of the doctrine under the Rome Statute of the International Criminal Court has been marked by the introduction of a negligence standard of knowledge for military commanders similar to that which was applied in some of

²⁴ *Prosecutor v Hadzihasanovic et al* (Decision on Joint Challenge to Jurisdiction) ICTY-01-47-PT (12 November 2002) ('*Hadzihasanovic* TC Decision on Jurisdiction') para 66.

²⁵ 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land 18 October 1907 UKTS 9 (1910) Cd 5030 (Hague Convention IV and Annexed Regulations); Guenael Mettraux, *The Law of Command Responsibility* (OUP 2009) 54-55

²⁶ Robert Cryer, 'The Ad Hoc Tribunals and the Law of Command Responsibility: A Quiet Earthquake' in Sean Darcy and Joseph Powderley (eds), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) 160.

the post war trials. This standard differs from the 'had reason to know' standard introduced under Additional Protocol I 1977²⁷ and applied under the ad hoc tribunals' jurisprudence.

It is proposed that the process of development of command responsibility doctrine founded as it is in the principle of responsible command has resulted in the development of conceptually similar forms of responsibility in the case of individual and state responsibility something which will be explain in this thesis.

1.3 VISUALISING THE THESIS AS A WHOLE

1.3.1 AIMS AND OBJECTIVES

The aim of this thesis is to address the issue of responsibility for systemic crimes in a holistic manner by utilising the international criminal law doctrine of command responsibility to establish State responsibility. This approach contributes to the understanding of the relationship between individual criminal responsibility under command responsibility with respect to systemic crime and aggravated state responsibility. In practical terms, it assists in the establishment of a coherent process under which the evidence gathered in the fact-finding process under the criminal process can be assessed in a structured fashion with respect to state responsibility.

1.3.2 RESEARCH QUESTIONS

In order to achieve this research aim the main research question that this thesis addresses is the following: how the international criminal law doctrine of command responsibility can be utilised to establish state responsibility. In order to answer this question the following research questions require to be addressed, namely (1) what is the relationship between the principle of responsible command as an international obligation of a state and command

²⁷ Protocols Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 & 609 (Additional Protocol I and II 1977).

responsibility an international criminal law doctrine (2) how do the elements of command responsibility align with the elements of state responsibility and (3) how does the alignment of international criminal law and state responsibility contribute to a comprehensive concept of responsibility.

1.3.3 LITERATURE REVIEW

Beginning in the early years of this century and following hard upon the establishment of the ad hoc international criminal tribunals and the foundation of the International Criminal Court has been a continuing level of academic debate regarding the focus of the international community on international criminal law and the prosecution and punishment of individuals for international crimes on the basis of their individual criminal responsibility.²⁸ Differing approaches have been suggested to improve on the current position. Academic commentators have proposed that a coordinated approach requires to be developed between the individual criminal responsibility and state responsibility regimes to address the issues which have been identified as a result of the current focus with respect international crimes. That is those offences which are recognised as international crimes under customary international law, otherwise referred to as the 'core crimes' with the exception of the crime of aggression which does not fall within the terms of this study. There is a further qualification in that certain of the international crimes may be committed in isolation by individuals. This study is concerned with systemic crimes that is when international crimes are committed as part of a state plan or policy or as part of the large- scale commission of such crimes by the state.

It has been suggested that the utilisation of the state responsibility regime can provide an additional range of remedies that can more effectively address the prevention and suppress those systemic crimes which endanger the interests of the international community as a whole.²⁹ At the same time there have been proposals that focussing criminal proceedings at the role of senior politicians and commanders at the ad hoc tribunals and in the ICC could provide a more effective deterrent than the prosecution of those responsible for the direct

²⁸ Mark Osiel, 'The Banality of Good: Aligning Incentives against Mass Atrocity' (2005) 105 Colum L Rev 1751; Allison Marston Danner and Jenny S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 Calif Law Rev 77, 77-79; Marina Spinedi, 'State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datur?' (2002) 13 EJIL 895, 897.

²⁹A Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes' (2010) 8 Santa Clara J Int'l L 313; I Scobbie, 'Assumptions and presuppositions: state responsibility for system crimes' in Andre Nollkaemper and Harmen van der Wilt (eds) *System Criminality International Law* (CUP 2009).

perpetration of offences who are normally low in the state or entity hierarchy.³⁰ As Ambos noted the doctrines discussed had the:

common aim of attributing individual crimes committed within the framework of the system, organization or enterprise to its *leadership*, to its 'masterminds', leaving the destiny of low-level executors and mid-level officials in the hands of national criminal justice systems.³¹

The consensus however appears to be that nonetheless such a focus on senior level individuals within the state or other entity does not properly engage with the context in which a number of individuals participating, potentially on a large scale, and which are properly addressed at the level of the state on the basis of the critical role played by states in the commission of mass atrocities. As Nollkaemper has commented in his edited study of system criminality the prosecution of Milosevic on the basis of his individual criminal responsibility did not reflect the role of Serbia as a state in these mass atrocities.³²

The approach adopted in this review will be to consider the limitations of the individual regimes with respect to effectively addressing the issue of systemic criminality at the level of the state. Next, the current proposals for addressing system criminality and shared responsibility will be reviewed. Finally, there will be a discussion regarding the limitations of these approaches with regard to the effective disposal of systemic crime and this study's approach will be placed in the context of the literature.

Since the statement by the Nuremberg tribunal that

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced [..]³³

the focus with respect to international crimes has been on the prosecution of individuals. Such prosecutions do not address the roles which the system may play with regard to collective crimes either actively or through acquiescence in their commission.³⁴ In contrast to individual criminality within society such crimes do not reflect the actions of individuals but rather the result of the actions of collectives, either at the level of society or the state.

It is certainly the case that, as addressed elsewhere in this chapter, that the structure of international crime reflects its frequently systemic nature, nonetheless the resultant criminal responsibility is focussed on the individual rather than at the level of the system. An accurate description would be to state that the systemic level is of relevance with respect to the

³⁰ K Ambos, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 JICJ 159.

³¹ *ibid* 183.

³² Nollkaemper, 'Introduction' (n 11) 3.

³³ *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 Am J Int'l L 172,221.

³⁴ Gordon A Christenson, 'Attributing Acts of Omission to the State' (1991) 12 Mich J Int'l L 312.

jurisdiction of the tribunals and now the ICC but that the principles of individual responsibility do not directly affect that level. As White has identified the responses to the role of collective entities such as states and non-state armed groups are undeveloped in contrast to those of individual criminal responsibility under international criminal law.³⁵

The collective entities concerned in the commission of systemic crimes may take a variety of forms ranging as noted above from states, which are the original bearers of legal personality through to the basic structure of such non-state armed groups as the KLA operating in Kosovo during the disintegration of the former Yugoslavia. In view of the doctrinal context within which this study is being conducted and the restriction of legal responsibility to those entities which possess juridical personality this study is restricted to system criminality concerning the state as proposed by Roling.

Wider issues also affect the ability of individual criminal responsibility to satisfactorily address system criminality, namely, the applicability of the principles of culpability and legality under a liberal system of criminal law,³⁶ selectivity³⁷ and the continued existence in practical terms of immunity for many individuals through their states not being a party to the ICC.³⁸

This section discusses state responsibility with respect to systemic crimes as previously noted the position when for the purposes of this thesis the state orders, encourages, permits or tolerates the widespread or systematic commission of international crimes.

State responsibility is certainly not criminal and arguably neither does accord entirely with civil responsibility under domestic law. A finding of state responsibility for a wrongful act under article 2 DASR specifies that there has been an internationally wrongful act when conduct is attributable to that state which amounts to a breach of its international legal obligations. Attribution is the process of attaching an action or omission to a state.

Scobbie notes that the attribution of responsibility for systemic crime includes the determination of the unlawful conduct, prevention of its repetition, the vindication and confirmation of fundamental norms the entities implicated, whether as perpetrators or injured parties.³⁹ Although DASR seeks to introduce a communitarian framework in order to move

³⁵ Nigel D White, 'Responses of political organs to crimes by states' in Andre Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (CUP 2009) 314.

³⁶ DE Robinson, 'Exploring justice in extreme cases: Criminal law theory and international criminal law,' (PhD thesis, University of Leiden 2020).

³⁷ R Cryer, *Prosecuting International Crimes-Selectivity in the international Criminal Law Regime* (CUP 2005) 193.

³⁸ Dapo Akande, 'International Law, Immunities and the International Criminal Court' (2004) 98 AJIL 407,421.

³⁹ Scobbie (n 29) 271.

beyond the traditional bilateral structure which characterised the relationship between states it is a process markedly weaker than that proposed with respect to the former concept of state crimes under the old draft article 19 in the previous DASR. Here the requirement for consensual jurisdiction creates difficulties in the case of a state which refuses to participate in an ICJ case.

Nonetheless, due to the consequences which potentially result from serious breaches of peremptory norms these include potentially rights for injured or interested states in terms of articles 42 and 48 respectively to submit a claim or invoke responsibility.

Nollkaemper has noted that states have preferred to keep their responses with respect to serious breaches of peremptory norms of international law distinct from the law of state responsibility. He records that the position of the United States is that responsibility with respect to such issues is better left to the Security Council.⁴⁰

As a result of the limitations of both regimes some commentators have suggested the establishment of a relationship between the two regimes. The role for the state responsibility regime would provide additional tools as set out above and address more appropriately the issue of systemic crimes addressing the role of states in these.

Nollkaemper developed the concept of concurrence between state and individual responsibility noting then that there was a concurrence between state and individual responsibility as they existed separately and mutually supported each other. This specifically addressed the dual attribution of both state and individual responsibility for a limited number of acts, the so-called international crimes that in view of the seriousness threshold trigger the consequences under article 41 DASR⁴¹. He then also subsequently proposed an additional proposal to address systemic criminality on the basis of individual criminal responsibility. Under this second proposal he suggested that systemic criminality could be addressed through the prosecution of the senior military or political leadership for their involvement in such criminality on the basis of one of the forms of leadership responsibility with the resultant removal of those individuals on conviction impacting on systemic criminality.⁴²

Bonafe in her wide-ranging study regarding the relationship between aggravated state and individual responsibility for systemic crimes noted that the establishment of leadership responsibility under command responsibility and JCE involved the utilisation of a particular methodology concerning the establishment of the wider context before the individual

⁴⁰ Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility' (n 15) 626-627.

⁴¹ *ibid* 618-619.

⁴² Nollkaemper, 'Systemic Effects of International Responsibility' (n 28) 328-329.

responsibility of the leader figure was addressed. In this process she noted, the procedure was similar to that used in the identification of aggravated state responsibility as the same context was at the base of both forms of responsibility.⁴³ The establishment of the collective commission of international crimes fell to be undertaken as part of the factual process essential to the establishment of both forms of responsibility.⁴⁴

She subsequently in the conclusion to her monograph proposed that the principal result of her analysis was that aggravated state responsibility and individual criminal liability in these circumstances were to be viewed through a unitary legal framework. She suggested that a concurrent approach utilising the unity of state and individual responsibility could be utilised to address international crimes.⁴⁵ This proposed structure was of interest to me as the basis for a possible approach to the utilisation of concurrence between command responsibility a form of international criminal responsibility which I had been reviewing.

As noted at the outset of this review the majority of commentators have addressed responsibility within the context of individual criminal or state responsibility. Command responsibility has been viewed as an important form of criminal responsibility which is of value in the addressing of systemic criminality where evidence is lacking to support direct responsibility on the part of the commander for the underlying crimes committed by their subordinates. Studies of command responsibility originating with Hays Parks seminal study in 1973⁴⁶ have been directed almost entirely at the review of the elements of this unique form of criminal responsibility founded in the international humanitarian law principle of responsible command.⁴⁷ Much debate took place as to whether it was to be regarded as a sui generis form of responsibility together with the question of the existence or otherwise of a requirement for the establishment of a causal link. The doctrine is now the subject of further assessment on the basis of whether in view of its relationship with responsible command it is to be regarded as compatible with the principle of personal culpability.⁴⁸

The review of the potential issue of these forms of responsibility concurrently led to an article by NL Reid addressing the doctrine as the 'missing link' between state and individual responsibility. Bonafe makes a brief reference to this paper, noting that the author proposes

⁴³ Bonafe, *The Relationship Between State and Individual Responsibility* (n 14) 190.

⁴⁴ *ibid.*

⁴⁵ *ibid.* 254.

⁴⁶ William H Parks, 'Command Responsibility for War Crimes' (1973) 62 *Mil Law Rev* 1; LC Green, 'Command Responsibility in International Humanitarian Law' (1995) 5 *Transnat'l L & Contemp Probs* 319; Ilias Bantekas, *Principles of direct and superior responsibility in international humanitarian law* (MUP 2002).

⁴⁷ Cryer, *Prosecuting International Crimes* (n 37); Mettraux (n25); Chantal Meloni, *Command Responsibility in International Humanitarian Law* (TMC Asser Press 2010); Maria L Nybondas, *Command Responsibility and its Applicability to Civilian Superiors* (TMC Asser Press 2010).

⁴⁸ Mirjan Damaska, 'The Shadow Side of Command Responsibility' (2001) 49 *Am J Comp L* 455.

that command responsibility is a mode of liability which may be utilised to reconcile individual and state responsibility.⁴⁹ The author noted that one attempt to reconcile the conceptual chasm between state and individual responsibility had been the proposed draft article 19 under the previous DASR had proved unsuccessful.⁵⁰ The proposal remains an interesting introduction to the approach adopted in this study. In practice the proposed structure put forward by Bonafe has been a more direct influence on the approach adopted. No further work appears to have been carried out by Reid on this specific topic from a review of the published articles written or contributed to by her.

1.3.4 METHODOLOGY

The methodology adopted with regard to this thesis is doctrinal. Primary and secondary data will be examined, analysed, interpreted and reinterpreted. This will include cases in the post Second World War war-crimes tribunals, the ad hoc international tribunals and other courts established under UN Mandates and the International Criminal Court. It will also include Advisory and contentious cases before the International Court of Justice and international arbitrations. International legal instruments, treaties and protocols will be assessed. Literature on state responsibility and criminal responsibility will be reviewed and critically analysed. Existing research on the relationship between international criminal law and State responsibility will be reviewed and applied to the consideration of these judgments and instruments. This method is appropriate and supports the aims of the thesis which are to identify, describe, analyse and interpret relevant law, provide a systematic analysis of the interface of state responsibility and criminal responsibility and present a normative framework where command responsibility and state responsibility interact. A doctrinal method is also appropriate to identify the theoretical underlining and command responsibility and state responsibility.

At the same time the thesis adopts a comparative research methodology. Comparisons are made between different jurisdictions (national and international), between the jurisprudence of different courts, for example the ad hoc tribunals and the International Criminal Court and

⁴⁹ Bonafe, *The Relationship Between State and Individual Responsibility* (n 14) 173 fn 10. Both forms of responsibility originated from the same duty to prevent and punish international crimes hence the establishment of one would also establish the other. See further discussion on overall control and effective control standards 201-202.

⁵⁰ N L Reid, 'Bridging the Conceptual Chasm: Superior Responsibility as the missing Link between State and individual Responsibility under International Law' (2005) 18 LJIL 795. She proposed the two regimes used the same model for assessment of responsibility and that both regimes originated in the same negative primary obligations establishing parallel obligations.

between criminal and state responsibility regimes. The aim of this comparative analysis is to identify elements of divergence and convergence.

1.3.5 ORIGINALITY

The nature of aggravated state responsibility under DASR has been the subject of considerable academic attention in recent years. Similarly, the issue of international criminal responsibility has been the subject of extensive academic study against the backdrop of the work of the ad hoc international criminal tribunals and latterly the International Criminal Court. Originating particularly from the ICJ *Genocide* case Judgment of 2007⁵¹ there was some limited interest in the overlap between the two regimes. The question of the role of collective entities has been the subject of sustained research in the form of shared responsibility. However, there has been a gap in the systematic consideration of the relationship and points of concurrence between command responsibility and state responsibility. The thesis fills this gap at a doctrinal and practical level, at a doctrinal level it identifies the aims of state and criminal responsibility and how the aims of command responsibility and its source that of responsible command relate to the aims of state responsibility. It then identifies elements of both regimes which can underpin such concurrence of responsibility. At a practical level it establishes a coherent and cross-fertilised framework of responsibility which can affectively deal with issues of systemic criminality. In this regard the thesis makes a significant new intellectual contribution to our body of knowledge and understanding of the relationship between individual criminal responsibility, and state responsibility with respect to such criminality arising from their common purpose of the protection of the international community as a whole.

1.4 CHAPTER STRUCTURE

Chapter 2

This chapter deals with the source of the criminal law doctrine of command responsibility, which is the principle of responsible command, It reviews responsible command as a fundamental principle of international humanitarian law which requires that commanders act

⁵¹ *Bosnia Genocide* case Judgment (n 1).

responsibly, ensure that the troops under their command are properly organised, subject to a system of internal discipline and observe international humanitarian law. Of particular importance in the context of this study is its role linking that responsibility of states for the conduct of their forces in international armed conflict and the foundation and then development of command responsibility. Both the principle and the doctrine can be viewed as enforcement mechanisms for international humanitarian law centred around the role of the commander and through the commander the state. The commander serves as a placeholder for the state under the principle of responsible command and as a guarantor with respect to command responsibility doctrine.

CHAPTER 3

This chapter focuses on command responsibility as a criminal law doctrine and analyses the normative foundations of the doctrine from its origins in the principle of responsible command in the Regulations annexed to Hague Convention IV 1907⁵² to its codification in Additional Protocol I 1977⁵³ within the wider context of the development of individual criminal responsibility. The relationship between the principle of responsible command as an international obligation of a belligerent party derived from the general duties of a commander to ensure observance of the laws of armed conflict and the doctrine of command responsibility developed as the mechanism for the enforcement of the requirements of this obligation through the individual criminal responsibility of the commander is analysed.

CHAPTER 4

This chapter analyses the criminalisation of command responsibility in the ad hoc international criminal tribunals. Notwithstanding the process of development of the doctrine the chapter identifies significant areas of uncertainty with respect to the doctrine. The first issue relates to the nature of the doctrine as a form of criminal responsibility with a vigorous challenge to the dominant theory. The second relates to the attempts by the ad hoc tribunals to broaden the reach of the doctrine through changes to the nature of the underlying crime and the role of the subordinate.

CHAPTER 5

In approaching the conventional form of the doctrine under the Rome Statute⁵⁴ the first section of the chapter addresses the requirement for an underlying crime committed by a subordinate,

⁵² Hague Convention IV and Annexed Regulations (n 25).

⁵³ Additional Protocol I 1977 (n 27).

⁵⁴ ICC Statute (n 2).

the superior subordinate relationship and the requirement for effective control and knowledge. The following section addresses the existence of a general and specific duty to exercise control on the part of the commander, the obligation to prevent repress and submit matters to higher authority and the issue of causation. The final section examines the issues raised by the Appeals Chamber in the Appeal Judgment which overturned the conviction of Bemba Gombo on the basis of command responsibility insofar as they affect the issues with which this study is concerned.⁵⁵

CHAPTER 6

This chapter commences with consideration of the nature and aims of State responsibility. Thereafter, the theoretical aspects of State responsibility concerning the process of attribution and the issue of indirect responsibility through the violation of the due diligence obligation are analysed. The basis of the doctrine of attribution through the establishment of a causal link between a State and its de jure or de facto organs on the principle of agency is discussed. The bases of attribution under articles 4 to 11 of the Articles of State Responsibility and with particular reference to the grounds under articles 8 to 11 are analysed.

CHAPTER 7

This chapter seeks to bring together the two strands of this research through critical analysis. The links between the two regimes at the level of primary obligations are considered both in respect of the primary rules imposing obligations on States and the primary obligations establishing criminal liability in respect of core crimes under international law. The process of attribution used in the establishment of State responsibility and in respect of the violation of the due diligence obligation and the process of attribution in respect of systemic crimes is then reviewed.

CHAPTER 8 CONCLUSION.

This synthesises the arguments, sets up and frames the research conclusions and characterises the theoretical contribution made by the work. Finally, it identifies the application of the methodology proposed in applicable cases in the determination of state responsibility in international arbitration and in cases before the ICJ

⁵⁵ *Prosecutor v Bemba Gombo* (Appeal Judgment) ICC-01/05-01/08-A (8 June 2018)

CHAPTER 2

RESPONSIBLE COMMAND: THE FOUNDATION AND DELINEATOR OF COMMAND RESPONSIBILITY DOCTRINE

2.1 INTRODUCTION

Responsible command is a fundamental principle of international humanitarian law which requires that commanders act responsibly, ensure that the troops under their command are properly organised, subject to a system of internal discipline and observe international humanitarian law. Of particular importance in the context of this study is its role linking that responsibility of states for the conduct of their forces in international armed conflict and the foundation and then development of command responsibility. Both the principle and the doctrine can be viewed as enforcement mechanisms for international humanitarian law centred around the role of the commander. The commander serves as a placeholder for the state under the principle of responsible command and as a guarantor with respect to command responsibility doctrine.

This chapter will utilise an overview of the literature, international treaties and the case law of the post war and ad hoc international tribunals and the International Criminal Court in its examination of the relationship between and the content of the principle and the doctrine.

The chapter is structured as follows.

The first section is concerned with the emergence of the principle of responsible command and command responsibility as an international criminal law doctrine at a conceptual level.

The following section addresses the process of historical development from Hague Convention IV 1907 on the Laws and Customs of War on Land⁵⁶ to the war crimes trials following the Second World War and the interaction between principle and doctrine.

The final section considers the codification of responsible command and command responsibility doctrine and the continue interaction between principle and doctrine in the ad hoc international criminal tribunal's jurisprudence and the International Criminal Court.

⁵⁶ Hague Convention IV and Annexed Regulations (n 25).

2.2 THE EMERGENCE OF RESPONSIBLE COMMAND AND COMMAND RESPONSIBILITY

The principle of responsible command is generally taken as originating in international law in the Regulations annexed to the Hague Convention IV 1907.⁵⁷ Its subsequent development as a principle of international humanitarian law reflects what has been described as the 'dynamic and evolutionary interpretation of treaties' in this area of international law.⁵⁸

In 1907 the concept of individual criminal responsibility under international law lay in the future. It was on states that international obligations lay and only state responsibility was engaged for breaches of international law. A state as the sole juridical person under the late 19th century necessarily acted through its organs or agents, of which its armed forces were an example, however their conduct was solely attributable to the state or subject to consideration under that state's domestic law, with one limited binary exception in the event of war crimes where they might be tried by the enemy state in the case of capture during war under that states domestic system.

The Regulations annexed to Hague Convention IV are generally agreed to form part of the Convention, this being intended to 'revise the general laws and customs of war.'⁵⁹ They had a dual function, being intended both to define the obligations of the contracting states and to form the basis of national instructions to be issued by them to their military forces.⁶⁰

Article 1 of the Regulations provides that to be accorded belligerent status in international armed conflict a force, whether national army, militia or volunteers required to 'be commanded by a person responsible for his subordinates.' The normative importance of the provision was with respect to the affording of belligerent status to the force. Reference to the 1899 Conference travaux preparatoires indicate it was linked to the need Martens identified for organised and disciplined forces capable of observing international humanitarian law.⁶¹ Two other provisions are, however, also frequently referred to as addressing the concept of

⁵⁷ Hague Convention IV and Annexed Regulations (n 25) regs art 1; There is, however, considerable overlap with Hague Convention II and its Annex: Regulations concerning the Laws and Customs of War on Land.

⁵⁸ Ilias Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law' (2006) 6 Int'l Crim Law Rev 121, 122.

⁵⁹ Hague Convention IV and Annexed Regulations (n 25) preamble, para 3.

⁶⁰ *ibid* art 1.

⁶¹ JB Scott, *The Proceedings of the Hague Peace Conferences: Translations of the Official Texts* vol 2 (OUP 1921) 547.

responsible command. These can be addressed briefly. Article 43 of these Regulations requires an occupying power's forces to exercise due diligence in maintaining public order 'while at the same time observing so far as possible the laws in force in the country'. As the commander of military forces in a belligerent occupation would represent his state this may be regarded as representing an aspect of responsible command although the state is the occupying power. Meanwhile, article 3 of the Convention narrates that a belligerent should be responsible for all acts committed by persons forming part of its armed forces. There was some support from contemporary commentators for the current view that this provision established a general obligation on states to conduct armed conflict in accordance with international humanitarian law.⁶² In origin it was rather narrower being intended as the basis for compensation for the civilian population caused through the private acts of members of the armed forces. None of these provisions made any reference to any form of individual criminal responsibility under international law on the part of the commander the 'person responsible for his subordinates.' He was shielded by the state along with other state organs from international legal responsibility.

2.2.1 THE COMMANDER AS PLACE HOLDER AND THEN AS GUARANTOR

The Hague Convention and its associated Regulations addressed in terms the requirements to be met by states for the granting of belligerent status to their armed forces, militias, and volunteers. The commander in terms of article 1 of the Hague Regulations can be seen as a place holder for his respective state as a juridical personality. He personifies the state with respect to its responsibility to the control of the behaviour of its troops and the observance of international humanitarian law. Any element of obligation under the principle of responsible command imposed upon the commander was as yet limited and represented a question of military professional standards.

This proposition is supported by the allusion by General Douglas MacArthur to the principle of responsible command being as 'immutable and as standardized as the most matured and

⁶² See Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces' (1991) 40 Int'l & Comp LQ 827, 833-5; regarding the acceptance of responsibility under the Convention for unauthorised actions of members of the armed forces; see also George B Davis, 'Amelioration of the Laws of War on Land' (1908) 2 AJIL 63,74; a contemporary commentator who read the provision more broadly.

irrefragable of social codes', a description which if on the cusp of being outdated in 1946 can be said to represent the position in the Edwardian period.⁶³

Eckhardt, a US military officer and commentator, has similarly proposed that before the Second World War '[...] standards for commanders were practical articulation (sic) of the accepted practice of military professionals.'⁶⁴

In view of these analyses by experienced military practitioners', aspects of Hart's analysis of the foundations of a legal system and the concepts of responsibility and retribution may assist in analysing the development of the principle of responsible command and its relationship with its enforcement mechanism in command responsibility doctrine.⁶⁵

In considering the origins of responsible command as a matter of professional military practice it is necessary to identify the nature of the responsibility. In reviewing the nature of responsibility Hart observed that the term carried several meanings which can be classified under a number of headings. Amongst those he addressed was 'role responsibility', which he described as arising:

whenever a person occupies a distinctive place or office in a social organisation, to which specific duties are attached to provide for the welfare of others or to advance in some specific way the aims of purposes of the organisation [...]. Such duties are a person's responsibilities.⁶⁶

This accords with the situation discussed above where the general responsibilities of command require a commander to exercise command, utilising the resources made available to him by his superiors, to whom he is accountable, to conduct effective military operations.⁶⁷ The component elements of responsible command are essential in order for a military force of any size to conduct sustained military operations.

In terms of Hart's analysis rules may be regarded as giving rise to obligations primarily when there is serious social pressure for conformity, but also in two other cases. First, in the case of those duties or responsibilities which arise in the case of role responsibility, as with the military commander. Secondly, whether the conduct required involves conflict between obligation and duty or self-interest.⁶⁸ These rules are referred to by Hart as primary rules of

⁶³ Confirmation of finding and sentence by Gen MacArthur in the case of Gen Yamashita 7 February 1946.

⁶⁴ William G Eckhardt, 'Command Criminal Responsibility: A Plea for a Workable Standard' (1982) 97 Mil L Rev 1,3.

⁶⁵ HLA Hart, *Punishment and Responsibility* (1st edn Clarendon Press 1968).

⁶⁶ *ibid* 210, 211-212.

⁶⁷ Land Warfare Development Centre, *Land Operations* (AC 71940, Army Doctrine Publication 2017) ('LWC *Land Operations* ') chap 9; Nybondas (n 47) 54.

⁶⁸ HLA Hart, *The Concept of Law*, (1st edn, Clarendon Press 1975) 84-85.

obligation being distinguishable by social pressure and the sacrifice of self-interest which they entail. He proposes that when society has advanced so that there are both legal rules and other social rules some of the latter may be widely applicable within society, to sub-groups within it or to specific individuals fulfilling certain roles. This analysis bears a close correspondence to the comments above regarding the origins of command responsibility in social obligations.

It required the initial recognition of the duty of the commander to control his troops in international law in order for the next step of individual criminal responsibility to be applied in the event of his failure to meet that standard.

Despite the changes in the nature and character of warfare down the years the requirement for effective command and control has always been an essential element of responsible command in order to enable armed forces '[t]o conduct their operations in accordance with the laws and customs of war.'⁶⁹ Its absence is marked by the existence of armed bands incapable of conducting structured engagements and sustained military operations in pursuit of political objectives while at the same time respecting international humanitarian law. Its vital importance is that it unites and directs all the other military functions carried on within the force under the commander. The ultimate test of effective command and control always has been the conduct of large-scale military operations in armed conflict.⁷⁰ It is a necessary feature that the commander has knowledge of the actions of his subordinates and of events affecting his force so he can make informed decisions and exercise control and direction over his forces and operations and ensure that his subordinates respect international humanitarian law.

The imposition of the requirement for effective control carries with it the requirement for a system of internal discipline. The exercise of military command is a forceful activity by which a commander imposes his will upon his subordinates and some form of disciplinary structure more or less formal in its nature is required if this is to be applied in a rational and lawful rather than arbitrary manner.⁷¹ This is in turn necessary to fulfil the condition referred to above that a force must conduct its operations in accordance with 'the laws and customs of war'.⁷² The application of this last requirement can be viewed as the manifestation of what has subsequently been identified as the preventative function of the principle of responsible

⁶⁹ Hague Convention IV and Annexed Regulations (n 25) regs art 1.

⁷⁰ Michael L Smidt 'Yamashita, Medina and beyond: Command Responsibility in Contemporary Military Operations' (2000) 164 Mil Law Rev 155, 163-164.

⁷¹ Personal observation of Timor Leste Defence Force, previously FALANTIL, 2003; Bantekas (n 46) 70.

⁷² Hague Convention IV and Annexed Regulations (n 25) regs art 1.

command.⁷³ It is on this basis that responsible command has been described as giving rise to an affirmative duty on commanders to ensure their subordinates conduct their operations in accordance with international humanitarian law.⁷⁴ Without the part played by commanders there would be little prospect of international humanitarian law being observed. In the event that there is an imminent risk of a breach of IHL by his subordinates he is required to take the appropriate action within his power to prevent this. The failure to punish is connected to but is distinct from the obligation to prevent, existing necessarily following the commission of a crime. It forms a secondary element in the obligation imposed on a commander to ensure the troops under his command respect international humanitarian law.

2.3 THE PROCESS OF HISTORICAL DEVELOPMENT OF RESPONSIBLE COMMAND FROM HAGUE TO THE WORLD WAR II WAR CRIMES TRIALS

The extension of the application of responsible command beyond the army to militia and volunteer corps in the Hague Regulations represented a development in international humanitarian law intended to extend humanitarian protection to citizens resisting invasion through the affording of belligerent status to such forces. The enforcement of internal discipline and the observance of international humanitarian law represented the application of a familiar model established in the national armies of the parties to the Convention.⁷⁵ This process was necessary in order to ensure respect of international humanitarian law by the forces that participated in an armed conflict. Familiarity with the principle of responsible command as custom on the part of state armed forces provides an explanation for the otherwise surprisingly limited extent of the discussion concerning its content in the course of the Hague Peace Conferences and the lack of coverage of the subject in the text of the regulations themselves.

There was, however, a potentially significant issue with respect to the issue of the recognition of militia and volunteer forces as lawful combatants. As was said, command in military doctrine is generally described in terms of the authority vested in an individual as a commander over their subordinates by higher authority and by law. It has been described in

⁷³ LWC *Land Operations* (n 67) Chap 6, para 6-04.

⁷⁴ *Prosecutor v Delalic et al* (Judgement) ICTY-96-21-T (16 November 1998) (*Celebici Judgement*) para 334, '[I]nternational law imposes an affirmative duty on superiors to prevent persons under their command from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility under Article 7(3) of the Statute.'

⁷⁵ War Office, *Manual of Military Law* (6th edn, HMSO 1914) 239, para 22, '[i]t is taken for granted that all members of the army as a matter of course will comply with the four conditions [...].'

British military doctrine as establishing 'a legal and constitutional status.'⁷⁶ Such a de jure commander is accountable to higher authority with a liability and an obligation to answer for the use of the authority and resources assigned to him. Responsibility represents the professional obligation held by the commander who ultimately has always taken responsibility for success or failure of the operation.⁷⁷ In addition to that formal authority it should be added that command authority also rests on the additional critical element of personal authority dependent on character and professional ability. In the case of de facto commanders their authority lacks the formal basis present in the case of de jure commanders. Their authority is dependent solely on the structure of effective control established over the members of the group by their leader.

If the militia and volunteer corps addressed in article 1 of the Hague Regulations did not formally form part of the state armed forces but their commander held a military commission from the state this could be regarded as establishing the necessary relationship with higher authority.⁷⁸ What, however, of the case of a commander elected by members of the force? It is proposed that the Hague Regulations implicitly required that such a commander must necessarily be answerable to a state which was a belligerent party in the conflict for a private party may not participate in an international armed conflict as a lawful combatant. The provision can, it is suggested, be regarded as a historical precursor of the position adopted in article 43 of Additional Protocol 1 1977 regarding the armed forces of a party to the conflict.⁷⁹

The subsequent development of the principle of responsible command has occurred against the background of the commission of systemic crimes in the course of the twentieth and twenty-first centuries. In seeking to establish the content of the historical concept of responsible command under the Hague Convention regard has to be had to the Victorian and Edwardian periods and contemporary perceptions. The contemporary UK Manual of Military Law commented that war crimes primarily represented isolated acts of individual wrongdoing in contrast to the systemic crimes to which commanders would subsequently be linked by the doctrine of command responsibility.⁸⁰ That the perception even then did not reflect the reality of warfare as illustrated in the Franco-Prussian and Boer Wars together

⁷⁶ LWC *Land Operations* (n 67) para 6-04.

⁷⁷ Parks (n 46) 102, quoting Joffre's reply to the question as to whether he or his subordinate Foch had won the battle of the Marne, '[I]f it had been lost I know who would have lost it'.

⁷⁸ Hague Convention IV and Annexed Regulations (n 25) regs art 1.

⁷⁹ Additional Protocol I 1977 (n 26) art 43.

⁸⁰ War Office (n 75) 244, para 52, 'such charges as have been proved have almost invariably been shown to have been the deeds of subordinates who have acted through ignorance or excess of zeal; they have more and more rarely been deliberate acts.'

with other military campaigns of the late 19th and early 20th centuries does not affect its existence. It required recognition of the realities of modern warfare and an appreciation of the consequential commission of war crimes to bring demand for individual criminal responsibility on the part of members of the armed forces and potentially politicians.

That situation appeared to have arisen following the end of the First World War with the perception amongst the allies that Germany and the Central Powers had waged a war of aggression and committed widespread and deliberate violations of international humanitarian law.

This, together with the scale of the military defeat, established the circumstances in which the possibility of individual criminal responsibility could be considered with respect to senior German military commanders and politicians.

The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, established as part of the post-war Versailles Treaty mechanism, outlined the basis for criminal responsibility for failure to prevent, put an end to or repress, breaches of international humanitarian law.⁸¹ The report in its final form is influenced by the American delegation acknowledged the requirement for the existence of a duty to act. The report despite the resemblance of elements to the principle of responsible command does not specifically refer to the principle in its text. In practice this was clearly the source of the proposed doctrine in view of the obligations imposed on the commander.

A difficulty exists, however, with regard to the application of the principle of responsible command to civilian superiors. The Hague Regulations were intended to be adopted by the states parties as instructions to their armed forces and accordingly were silent regarding the potential responsibility of the civilian authorities. The language of the Report indicates an early recognition by its authors of the situation. It concludes its discussion of the responsibility of both civilian and military authorities by holding that they were 'cognizant of and could at least have mitigated the barbarities committed during the course of the war'. This suggests limited application of the principle to the civilian authorities restricted to those who exercised authority and control of the armed forces in a fashion similar to military commanders. Nonetheless, from the perspective of the immediate topic it did establish a theoretical construct for the existence of an affirmative duty on the part primarily of military commanders to ensure compliance with international humanitarian law by their subordinates with consequential criminal responsibility in the event of failure to comply with the obligation.

⁸¹ Harry M Rhea, 'The Commission on the Responsibility of the Authors of the War and Enforcement of Penalties and its Contribution to International Criminal Justice after World War II' (2014) 25 CrimLF 147; Miniechiro Adatci, 'Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties' (1920) 14 AJIL 95.

The elements of the affirmative duty laid upon these commanders can be identified as ensuring that their subordinates comply with the laws or customs of war, and the prevention, or if the offence had already taken place, repression of violations of these norms.⁸²

This analysis is, however, theoretical as prosecutions on the basis envisaged did not in fact occur. It was to be another quarter-century before the principle was first utilised as the source for what was to become known as the doctrine of command responsibility.

2.4 WAR CRIMES TRIALS POST WWII COMMAND RESPONSIBILITY AND RESPONSIBLE COMMAND

The first prosecutions on the basis of command responsibility based on the affirmative responsibility of military commanders and to a limited extent civilian superiors to prevent or punish the crimes of their subordinates took place following the Second World War. The foundational trial of General Yamashita was followed by subsequent cases which clarified both the emergent doctrine and the principle of responsible command under international humanitarian law.⁸³ They were also marked by inconsistent positions on the necessary mens rea for liability.

The Military Commission which tried General Yamashita founded the criminal responsibility of the accused under command responsibility in the principle of responsible command with their famous statement, concluding in their judgment that,

[c]learly assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander the murderer or rapist because one of his soldiers commits a murder or rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable for the lawless acts of his troops, depending upon the nature and the circumstances surrounding them.⁸⁴

⁸² Adatci (n 80) 121, the Commission proposed that charges should be brought against 'All authorities, civil or military, belonging to enemy countries, however high their position may have been without distinction of rank, including the heads of states, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war.'

⁸³ *United States v General Yamashita*, and *In re Yamashita*, Law Reports of Trials of War Criminals UNWCC Vol IV (HMSO 1948) (*US v Yamasihita*) 1 ; *United States v Wilhelm von Leeb et al (High Command case)* United States Military Tribunal Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 Vol XI (US Government Printing Office 1950) Judgment 462.

⁸⁴ *US v Yamasihita* (n 83) 35.

The US Supreme Court in their judgment in the case confirmed that a commander was under an affirmative duty to control the troops under his command to prevent breaches of international law of the basis in particular of articles 1 and 43 of the 1907 Hague Regulations.⁸⁵ The majority then held that ‘the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.’⁸⁶ The *Yamashita* case has given rise to extensive academic debate regarding the basis on which General Yamashita was convicted. Its true significance however lies, it is proposed, in the identification of the existence of an obligation upon a commander to control the actions of his subordinates to ensure that they respected international humanitarian law. Although the references cited refer to prevention of violation of international humanitarian law in view of their relation to the trial and conviction of General Yamashita it is clear that punishment is also a requisite in the event of the commission of breaches of international humanitarian law by the forces in question.

The Supreme Court did not address whether the principle of responsible command had achieved customary status, simply stating that the ‘provisions plainly imposed [...] an affirmative duty to take such measures as were within [the accused’s] power [...]’.⁸⁷ The issue was subsequently resolved by the finding of the Nuremberg International Military Tribunal that by 1939 Hague Convention IV of 1907 represented customary international law.

The most immediate consequence of this finding was to resolve the issue of the basis of the affirmative duty which the US Supreme Court had identified as being imposed on commanders to prevent and by implication punish crimes by their subordinates.

The adoption of this position additionally enabled subsequent international military tribunals to apply military practice to flesh out the contours of the principle and hence those of command responsibility doctrine.

In addition to the *Yamashita* case, other post World War II war crimes trials made significant findings with regard to the principle of responsible command, in particular the *High*

⁸⁵ *ibid* 16.

⁸⁶ *US v Yamashita* (n83) 15, citing Articles 1 and 43 of the Regulations Annexed to Hague Convention IV 1907, Article 19 of Hague Convention X 1907 and Article 26 of the 1929 Geneva ‘Wounded and Sick’ Convention.

⁸⁷ *US v Yamashita* (n 83) 44.

*Command*⁸⁸ and *Hostage*⁸⁹ cases tried before American military tribunals under Control Council Law No 10 in Nuremberg.

The *High Command* and *Hostage* trial judgments are recognised as of particular importance with regard to the development of command responsibility doctrine. Their significance lies with regard to the identification of the critical distinction between the general responsibility of command and those specific responsibilities where failure to fulfil the duties incumbent upon a commander would give rise to criminal responsibility under the doctrine of command responsibility. In the *High Command* case the Tribunal identified that while the concepts were related, the principle of responsible command and the doctrine of command responsibility which focused on the breach of the duties imposed upon the commander remained distinct from each other.⁹⁰

However, notwithstanding the difference in emphasis between the two concepts they have together served as enforcement mechanisms with respect to international humanitarian law.⁹¹ In the late nineteenth and early twentieth centuries when the principle of responsible command was first identified as a condition for recognition as a lawful belligerent the content of the principle in international law had been vague with no clear indication as to the nature of the responsibility or that its breach would result in any form of criminal or international sanction of any sort. As Hays Parks has commented, 'the concept of command responsibility- and the commensurate duty of a commander to control his troops- was developed along two paths [...] until delineated by the post- World War II tribunals.'⁹²

In their jurisprudence the post war military tribunals established that responsibility for an omission is dependent upon the existence of a pre-existing legal duty on a commander as guarantor to act to prevent and punish the crimes of his subordinates.⁹³ The commander's status as guarantor is based on a duty to act on their part which is said to justify the moral equivalence drawn between action and in the case of command responsibility omission. That status derives from his responsibility for his command and his subordinates. As a

⁸⁸ *High Command* case (n 83) 462.

⁸⁹ *United States v Wilhelm List et al (Hostage case)* Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 Vol XI (US Government Printing Office 1950) Judgment 1230.

⁹⁰ *High Command* case Judgment (n 83) 543.

⁹¹ Mettraux (n 25) 54-55.

⁹² Parks (n 46) 2.

⁹³ Meloni *Command Responsibility in International Humanitarian Law* (n 47) 220-224; Ambos, 'Joint Criminal Enterprise' (n 30) 176.

consequence, the commander has obligations to monitor and control the actions of his subordinates to ensure their compliance with international humanitarian law⁹⁴.

The mens rea requirement after the uncertainty surrounding the *Yamashita* judgment was a focus for development in the doctrine although with a continuing degree of uncertainty with respect to the issue of knowledge. Both tribunals addressed the requirement of knowledge in contrast to the *Yamashita* proceedings uncertain standard. The *High Command* tribunal established a standard of actual knowledge on the part of the commander holding that he would normally be expected to be aware of events in his command but making allowance for the scale of the operations.⁹⁵ The tribunal in the *Hostages* case, drawing on the principle of responsible command, broadened the mens rea element in that they accepted imputed knowledge on the part of a commander as the basis for criminal responsibility, concluding that an army commander would not normally be allowed to deny knowledge of events within his command.⁹⁶

In their reasoned judgments the two tribunals addressed in particular the differing responsibilities of operational and executive commanders (occupation commanders), the distinction between commanders and staff officers, whether delegation of responsibility could take place and the importance of knowledge.

The *High Command* judgment recognised that the authority of a commander in the German Army was restricted by the state, whose agent he was.⁹⁷ Nonetheless, there were established responsibilities which could not be avoided by him in view of the occupying state's safety in the occupied territory.⁹⁸ International humanitarian law through the principle of responsible command established responsibility under the Hague Regulations, representing customary international law, to ensure public order and general obligations had supplemented by domestic law. Accordingly, the occupation commanders incurred responsibilities under international law to take action to protect the civilian population in the occupied territory in the absence of any official directives limiting their executive authority within their area of responsibility.

⁹⁴ Kai Ambos 'Command responsibility and *Organisationsherrschaft*: ways of attributing international crimes to the 'most responsible' in Andre Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (CUP 2009) 127, 132.

⁹⁵ *High Command* case (n 83) 543.

⁹⁶ *Hostage* case (n 89) 1259.

⁹⁷ *High Command* case (n 83) 544, '[I]t must be borne in mind that a military commander, whether it be of an occupied territory or otherwise, is subject both to the orders of his military superiors and the state itself as to both his jurisdiction and functions.'

⁹⁸ *ibid*, 'It cannot be said that he exercises the power by which a civilian population is subject to his invading army while at the same time the State which he represents may come into the area which he holds and subject the population to murder of its citizens and to other inhuman treatment.'

In contrast the authority of operational commanders was limited by the requirements for the existence of a relationship of subordination and the existence of a chain of command linking them to the crimes committed by their subordinates. This distinction impacted as will be discussed subsequently upon the codification of the responsible command principle in Additional Protocol 1 and on the view expressed in the Commentary with respect to this Protocol that the concept of the superior 'should be seen in terms of a hierarchy encompassing the concept of control.'⁹⁹

What then of the question of the application of the principle of responsible command to staff officers and in particular the chief of staff? The standard applied was, that '[c]ommand authority and responsibility for its exercise rest definitively upon his commander.'¹⁰⁰The military tribunals jurisprudence recognised that the chief of staff could exercise considerable influence.¹⁰¹ It has also been proposed that staff officers by virtue of their position as members of the commander's staff possess authority. That is certainly the case, however, all staff officer's authority and influence is derivative in its nature, and not the result of the possession of command authority on their part.¹⁰²

In addition to the post war trials in Europe the International Military Tribunal for the Far East ('the Tokyo Tribunal') tried the most prominent of the former Japanese military leaders. The Tokyo Tribunal adopted a similar methodology to their counterparts in Europe.¹⁰³ In doing so they assessed the personal responsibility of the officer concerned. Concerned as they were with the ill treatment of the civilian population in the territories occupied by the Japanese and the ill treatment of allied prisoners of war they focussed primarily on the responsibility for the treatment of detainees and PW. Where individuals were identified as responsible the Tribunal considered whether they had fulfilled their obligations to establish suitable arrangements for them and then a continuing obligation of supervision. Knowledge was necessary although liability could result based on constructive as well as actual knowledge as in the *Hostage* case.

Although this study is primarily concerned with military commanders' reference will be made on occasion to the application of command responsibility doctrine to their civilian counterparts where this serves to illustrate an issue arising with respect to either the

⁹⁹ Additional Protocol I 1977 (n 27) art 87, C Pilloud et al (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Commentary on the Additional Protocols of 8 June 1977)* (Martinus Nijhoff Publishers 1987)

¹⁰⁰ *High Command* case (n 83) 81.

¹⁰¹ *ibid* 514.

¹⁰² Bantekas (n 46) 80.

¹⁰³ International Military Tribunal for the Far East Judgment of 4 November 1948 <https://werle.rewi.hu-berlin.de/tokio.pdf> accessed 12 June 2020.

principle of responsible command or command responsibility doctrine. As well as the post war trials of senior officers on the basis of command responsibility a limited number of civilians were also tried in Europe and the Far East on the basis of command responsibility, or as it is sometimes termed in relation to civilian superiors, superior responsibility. The Hague Regulations were regarded by the post war tribunals as having achieved customary international law status concerning the responsibilities of military commanders in the conduct of international armed conflict.¹⁰⁴ The post- World War I Committee on the Responsibility of the Authors of the War had included politicians amongst those against whom they proposed charges. There was, however, a link between them and the senior military commanders who had also been considered for prosecution in that both categories of individuals had been concerned with the initial aggression and the subsequent direction of the war. The *Roechling* and *Flick* cases¹⁰⁵ were among a number of trials of German businessmen as a result of their war crimes, primarily in connection with their commercial activities associated with their use of forced labour. Measured against the application of the principle of responsible command their prosecution on the basis of command responsibility is another illustration of the questionable application of command responsibility doctrine. Any politician at Cabinet level who remained in government having knowledge of the ill-treatment of prisoners was regarded as having assumed personal criminal responsibility for any such ill treatment. The extent to which this form of collective cabinet responsibility can be reconciled with the principle of responsible command is arguable. The purpose of responsible command is to ensure compliance with international humanitarian law, ensuring this protection requires commanders or in this case civilian superiors to take preventative measures as a result of the effective control exercised over subordinates. Here, however, ministers who did not have portfolios relating to the armed forces, such as the former Japanese Foreign Ministers Koki Hirota and Mamoru Shigemitsu were held to have incurred individual criminal responsibility through their awareness of the ill treatment of protected persons which they drew to the attention of those directly responsible but continued in office having failed to resolve these issues.¹⁰⁶

A significant element in the importance of the post-war war crimes tribunals judgements was the identification of the distinction between the general responsibility of command and those

¹⁰⁴ Judicial Decisions involving Questions of International Law-International Military Tribunal (Nuremberg) Judgment and Sentences (1947) 41 AJIL 172, 248-249

¹⁰⁵ *United States of America v Friedrich Flick et al (The Flick case)* Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10 Vol VI (US Government Printing Office Washington 1952) Opinion and Judgment 1187; *United States of America v Hermann Roechling (The Roechling case)* Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10 (US Government Printing Office Washington 1952) Vol XIV Appendix B Judgment 1075, Judgment on Appeal 1097.

¹⁰⁶ International Military Tribunal for the Far East Judgment of 4 November 1948 (n 103); See N Boister and R Cryer, *The Tokyo International Military Tribunal A Reappraisal* (1st edn OUP 2008) 234-236.

specific responsibilities where failure to fulfil the duties incumbent upon a commander would give rise to command responsibility. In the late 19th and early 20th centuries when the principle of responsible command was first identified in international treaties as a condition for recognition as a lawful belligerent the content of the principle had been vague

The process of prosecution on the basis of command responsibility doctrine necessarily required that the principle of responsible command in international humanitarian law, be refined and its elements defined to establish the obligations upon which command responsibility doctrine is based. The finding by the International Military Tribunal that the Convention now represented customary international law was followed by subsequent tribunals concerned with the adjudication of cases of command responsibility.¹⁰⁷ This position enabled the tribunals to look at military practice in establishing a customary international humanitarian law definition of the principle. It has been proposed that the Hague Regulations through their intended application as a code for application by the armed forces of the state parties to Hague Convention IV assisted in their identification by the tribunals as customary international law, widening the potential application of command responsibility doctrine founded in the principle of responsible command.¹⁰⁸

The role responsibility of commander was derived from customary practice prior to their statement in international humanitarian law treaties and their establishment as legal standards under international humanitarian law. The post-war war crimes trials represented the point at which role responsibility under the international humanitarian law principle of responsible command became regarded as a legal responsibility.¹⁰⁹ Under this analysis breach of the specific obligations to prevent and punish then gave rise to criminal responsibility on the basis of command responsibility. Failure to fulfil other aspects of the concept might be viewed as discreditable or could give rise to disciplinary or other criminal charges, but not on the basis of command responsibility.

It has been proposed that this process represents the transition from what Hart described as role responsibility to liability responsibility.¹¹⁰ Under this analysis the source of command responsibility, the principle of responsible command, is to be regarded as originally representing a social rule. Under Hart's conceptual structure certain social rules in view of

¹⁰⁷ *High Command* case (n 83) 472.

¹⁰⁸ Kalshoven (n 62) 833.

¹⁰⁹ Parks (n 46) 2; Nybondas (n 47) 58; *Prosecutor v Halilovic* (Judgment) ICTY-01-48-T (16 November 2005) para 42, 'The concept of command responsibility as a form of individual criminal responsibility emerged in the post-World War II era in national war crimes legislation, as well as in some post-World War II case law. Prior to this the responsibility of commanders in international law had been connected with the responsibility of states to ensure compliance with the laws of war.'

¹¹⁰ Nybondas (n 47) 50-57.

their importance are regarded as moral rules, which if breached will result in the imposition of social censure. Certain failures on the part of a commander to carry out his obligations under the general responsibility of command will result in moral censure. Such rules can be regarded as falling within the category of primary rules. Where such role responsibility gives rise to legal responsibility it is proposed that the failure to meet the obligation can give rise to criminal responsibility, in this case liability under command responsibility doctrine.¹¹¹ This process was appositely illustrated in the post-World War 2 *High Command* case in which the military tribunal concluded its legal analysis of the circumstances giving rise to criminal responsibility by finding that ‘for a defendant to be held criminally responsible, there must be a breach of some moral obligation fixed by international law[...].’¹¹²

It was on the basis of this theoretical structure with its emphasis on the preventative role of the superior that subsequent codification of the duty of commanders to control their subordinates and the associated command responsibility doctrine was taken forward in articles 86 and 87 of Additional Protocol I after a lapse of some 30 years.

2.5 POST WAR DEVELOPMENTS-DOCTRINE AND PRINCIPLE

The war crimes trials in the immediate post-war period were not followed by further significant prosecutions in the years following the war. The years following the end of World War II were marked by an absence of developments with regard to international criminal law generally and certainly with respect to command responsibility doctrine in particular although the principle of responsible command was applied in the wider context of the general development of international humanitarian law.

The 1949 Geneva Conventions despite their general importance in the development of international humanitarian law did not make reference to command responsibility. The application of the principle of responsible command can, however, be seen in the requirement for humane treatment of civilians and combatants rendered hors de combat in hostilities and the prohibition of war crimes committed in the course of the internal armed conflict under Common Article 3. The concept of sustained military operations inherent in the provisions reference to ‘armed conflict not of an international character’ assumes the existence of an organised military force, which in turn is also predicated on responsible

¹¹¹ *ibid* 53.

¹¹² *High Command* case (n 83) 510.

command.¹¹³ The Commentary discussing the article noted the proposition put forward in the course of the travaux préparatoires regarding possible criteria for the establishment of such non-international armed conflicts that insurgents should possess ‘an organized military force, an authority responsible for its acts, acting within a determinate territory’ and critically, ‘having the means of respecting and ensuring respect for the Convention.’¹¹⁴ This provision represented a new sphere of application for the principle which had previously been limited in application to international armed conflict in line with the introduction of humanitarian standards to non-international armed conflict. This did not, however, conflict with the application of responsible command as a fundamental principle of international humanitarian law any more than the appropriate extension of the other fundamental principles to this form of armed conflict.

2.5.1 ADDITIONAL PROTOCOL I 1977 AND THE PRINCIPLE

The situation changed with Additional Protocol 1 of 1977 which for the first time in an international instrument directly addressed command responsibility doctrine. Article 87, ‘Duty of Commanders’, sought to codify the elements of the principle of responsible command as established in the post war trials. The United States introduced the amendment which became article 87 at the Diplomatic Conference. This identified the nature and the justification for responsible command, namely that implementation of international humanitarian law, specifically Additional Protocol 1 and the Geneva Conventions, was dependent upon commanders and that ‘[w]ithout their conscientious supervision, general legal requirements were unlikely to be effective.’¹¹⁵

The reference to commanders was clearly intended to apply to commanders at all levels in the chain of command from the general officer in command to section commanders. It has been correctly proposed that this position illustrates the concern under international law with effective control rather than formal appointments, reflecting the practical application of command and control in the armed forces. In the case of the armed forces of the States Parties, at whom the Protocol was primarily directed, de jure command is founded on the

¹¹³ See *Prosecutor v Hadzihasanovic et al* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) ICTY-01-47-AR72 (16 July 2003) (*Hadzihasanovic* Article 7(3) AC Decision) paras 15 & 16.

¹¹⁴ JS Pictet ‘*Geneva Convention relative to the Treatment of Prisoners of War: Commentary*’ (ICRC 1960) art 3; See *Hadzihasanovic* Article 7(3) AC Decision (n 111) para 15.

¹¹⁵ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Vol IX CDDH/I/SR 50, para 68.

combination of formal and personal authority derived from leadership with command deriving from that formal authority. The exercise of effective control is, however, essential as the post war tribunals' jurisprudence had identified.

The article extends the principle of responsible command beyond troops under commanders' direct command to include 'other persons under their control.' The concept of superiority has been interpreted broadly being seen in terms of a hierarchy encompassing the concept of control.¹¹⁶ As will be discussed further when addressing the application of the principle of responsible command in the ad hoc criminal tribunals' jurisprudence this analysis has had a foundational role in their development of their concept of the de facto superior. In the context of AP I, the Commentary confirms that it was primarily directed in accordance with the existing customary international law at the occupation commander. In contrast his operational counterparts concern was the conduct of his subordinates in the chain of command.¹¹⁷ Attached troops are in a command relationship with the operational commander to whom they are attached but this does not include disciplinary command which remains the responsibility of the attached force and its parent formation.¹¹⁸

In addition to its role in Additional Protocol I responsible command also forms one of the objective criteria to determine whether a conflict had reached the level of intensity required for the application of article 1 of Additional Protocol II. As the Commentary notes the ability to implement the Protocol was the fundamental criterion which lay behind the other elements of the definition of this threshold.¹¹⁹ This represents a significant extension of the principle beyond international armed conflict with which the principle had hitherto been linked, illustrating that dynamic evolution of international humanitarian law alluded to in the introduction to this chapter.¹²⁰ This extension, together with the reading adopted in the Commentary, interpreting that article as incorporating the same elements as article 87, mediated by article 43 of Additional Protocol 1, subsequently played a critical role in the extension in the ad hoc international tribunal's jurisprudence of the doctrine of command responsibility to non-international armed conflicts.¹²¹

The post-war war crimes trials had played a foundational role in the development of the principle of responsible command and the parallel establishment of the doctrine of command

¹¹⁶ Additional Protocol 1 1977 (n 27) art 87; Commentary on the Additional Protocols of 8 June 1977 (n 99) para 3555.

¹¹⁷ Commentary on the Additional Protocols of 8 June 1977 (n 99) para 3554.

¹¹⁸ *ibid* para 3555.

¹¹⁹ Additional Protocol II (n 27); Commentary on the Additional Protocols of 8 June 1977 (n 99) para 4470.

¹²⁰ *ibid*, para 4450. See Official Records of the Diplomatic Conference (n113) Vol VIII 201 ff, CDDH/II/SR 22, paras 1- 42. Note the Spanish delegation proposition that responsible command should be defined.

¹²¹ *Hadzihasanovic*, Art 7(3) AC Decision (n 113) para 18.

responsibility. Despite this work and the subsequent clarification of elements of the principle in article 87 of Additional Protocol I the picture was still by no means clear and gaps in the jurisprudence remained. As had been the case with their predecessors the ad hoc international criminal tribunals jurisprudence utilised the principle both as the source of command responsibility doctrine and in the establishment of its boundaries. This section will review the relevant jurisprudence.

2.5.2 THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS AND RESPONSIBLE COMMAND

The ad hoc tribunals in their jurisprudence from the *Celebici* case onwards affirmed the relationship between the principle of responsible command and the doctrine of command responsibility.¹²² Both principle and doctrine were identified as sharing a common purpose, namely, 'to promote and ensure compliance with the rules of international humanitarian law.'¹²³ The elements of the principle of responsible command, establishing a general duty on the part of a commander, to act responsibly, to provide an organisational structure and to ensure that subordinates observe international humanitarian law which had been identified in the post war jurisprudence and in Additional Protocol I were affirmed.¹²⁴

The concept of de facto superior authority has been described as representing one of the most significant developments in the doctrine of command responsibility in the ad hoc tribunals' jurisprudence in response to the changes in armed conflict. It clearly illustrates an instance of the principle of responsible command being applied in the establishment of the boundaries of the doctrine.¹²⁵ With the adoption of a purposive basis by the tribunals for the application of the doctrine, based on effective control, it represents a significant broadening of the existing concept of indirect subordination which was utilised as its basis.

The *Celebici* case Appeals Chamber confirmed that the standard of effective control as established in article 87(3) of Additional Protocol I could be regarded as customary.¹²⁶ They affirmed that the term 'superior' included an individual occupying a de facto position of

¹²² *Celebici* case Judgment (n 74) paras 334-8; *Prosecutor v Halilovic* Judgment (n 109) para 39.

¹²³ *Hadzihasanovic* TC Decision on Jurisdiction (n24) para 66.

¹²⁴ *ibid.*

¹²⁵ *Prosecutor v Delalic et al* (Appeal Judgement) ICTY-96-21-A (20 February 2001) (*Celebici* Case Appeal Judgment) para 193.

¹²⁶ *ibid* para 195.

authority. The Trial Chamber had founded their analysis on the reference to the use of the 'superior' in article 86 with article 87 establishing that the obligation of a commander to exercise responsible command extended beyond direct subordinates to 'other persons under his control' under the concept of 'indirect subordination' described in the Commentary to the Additional Protocols.¹²⁷

While a position of authority was necessary to incur responsibility under the principle of responsible command the factor that determined responsibility was the possession of effective control. In contrast, however, to the analysis adopted in the ad hoc tribunals jurisprudence it is arguable that a clearer analytical basis for the application of responsible command to de facto commanders would have lain in article 1 the Hague Regulations in which the principle was applied to de facto commanders of irregular forces.¹²⁸ This does appear representative of the rather cursory approach adopted on occasions by the ad hoc international tribunals with respect to legal analysis.¹²⁹

In contrast to the concept of de facto superior authority the issue of the application of the principle to civilian superiors was uncertain prior to the ad hoc tribunals jurisprudence and represents a further instance of the dynamic evolution of the principle. The *Celebici* Trial Chamber concluded that responsibility under article 7(3) was not intended to be limited to military commanders but extended to politicians and other civilian superiors.¹³⁰ This analysis was supported primarily by the precedents afforded by the findings of the Tokyo Tribunal with respect to the responsibility of Japanese civilian political leaders¹³¹ This approach accords with the purposive interpretation of the general principles of customary international law developed in the post-War war crimes trials which formed the basis of the tribunal's analysis. As discussed earlier the application of command responsibility by the Tokyo Tribunal with respect to Japanese politicians was, however, questionable in its disregard of the principle of responsible command in defining the limits of the doctrine. It would arguably to have been better to distinguish between the cases and actively apply the principle of responsible command to a greater extent in the interpretation and extension of the doctrine

Responsible command was specifically applied as an interpretive tool in the controversial *Hadzihasanovic* case in which questions arose with respect to the development of

¹²⁷ *Celebici Case* Judgement (n 74) para 371; see Commentary on the Additional Protocols of 8 June 1977 (n 99).

¹²⁸ Hague Convention IV and Annexed Regulations (n 25) art 1.

¹²⁹ Cryer, 'The Ad Hoc Tribunals and the Law of Command Responsibility' (n 25) 162.

¹³⁰ *Celebici case* Judgment (n 73) para 356.

¹³¹ *ibid* paras 356-358. The tribunal additionally referred to the trials of German industrialists at paras 359-60 and paras 361-2.

international criminal law generally and command responsibility in particular.¹³² The first concerned the applicability of command responsibility doctrine in non-international armed conflict and the second the issue of successor superior responsibility. The decision is noteworthy for the Chamber's classic statement of the relationship between the concept of responsible command and command responsibility:

[...] the concept of responsible command looks to the duties comprised in the idea of command, whereas that of command responsibility looks at liability flowing from breach of those duties. But, as the foregoing shows, the elements of command responsibility are derived from the elements of responsible command.¹³³

In their analysis the Appeals Chamber first noted the general principle that an established principle could be extended to address a new situation if it reasonably fell within its application. Applying this to the first question before them they concluded that as customary international law recognised that war crimes could be committed by member of an organised military force in the course of an international armed conflict it necessarily recognised that command responsibility could apply.¹³⁴

The majority of the Chamber, however, rejected the applicability of this principle to the issue of successor superior responsibility holding that this would modify the law.¹³⁵ The judges respective positions appear to have tied to their fundamentally differing views of the nature of command responsibility. The issue arose again in the *Oric* case when the Trial Chamber questioned the majority view in *Hadzihasanovic*, concluding in their trial judgement that it should be immaterial whether a commander had assumed command before or after the commission of a crime.¹³⁶

In this section the concern is with the extent to which the positions adopted regarding the responsibility of subsequent commanders can be regarded as flowing from the principle of responsible command. As was said, article 87 of Additional Protocol I codifying to some extent the principle of responsible command incorporates the specific duty of commanders to prevent and where necessary to suppress and to report to competent authorities breaches of international humanitarian law. The primary task of a commander in terms of the principle of responsible command is to prevent violations of international humanitarian law with

¹³² *Hadzihasanovic* Art 7(3) Decision (n 112).

¹³³ *ibid* para 22.

¹³⁴ *Hadzihasanovic* Art 7(3) decision (n 112) paras 11-31.

¹³⁵ *ibid* para 55.

¹³⁶ *Prosecutor v Oric* (Judgment) ICTY-03-68-T (30 June 2006) paras 326-327 & 335.

punishment as a secondary responsibility.¹³⁷ However, as Judge Meron concluded on behalf of the majority in the *Hadzihasanovic* Article 7(3) Decision the two duties represent separable obligations, 'each [...] coterminous with the commanders tenure.'¹³⁸ The application of the principle of responsible command to command responsibility requires that at the time when the relevant offences were committed those responsible were under the effective control of the commander concerned. The Appeal Chamber's decision has been criticised as applying the general principle that an established principle could be extended to address a new situation if it reasonably fell within its application to the first issue under consideration and choosing not to apply it to the second.¹³⁹ The issue is surely, however, how far a matter falls within the margin of interpretation of an existing principle and what seeks to extend an interpretation beyond the point of elasticity.

Ruling on the first issue which faced the Court in the *Hadzihasanovic* Article 7(3) AC Decision Judge Meron noted, 'it is evident that there cannot be an organized military force save on the basis of responsible command.'¹⁴⁰ The principle leads to command responsibility, as the Court then went on to say, but the principle is not only the source of command responsibility doctrine but also an interpretive guide with respect to command responsibility and its boundaries. Although successor superior responsibility does not fall within the doctrine the principle is applicable. The obligations imposed on a commander under the principle of responsible command to ensure that their subordinates comply with international humanitarian law apply to their successor. Although successor superior responsibility is inapplicable, they are bound to investigate allegations and report these to the appropriate authorities for investigation and trial.¹⁴¹ It is accordingly erroneous on the part of the dissenting judges to propose that in the absence of successor superior responsibility crimes committed by subordinates under previous commanders would go unpunished.

Finally, in this context are the so called 'third generation cases'¹⁴² in which the ad hoc tribunals sought to extend the boundaries of command responsibility doctrine through a purposive interpretation of the doctrine with respect to article 7(3) with the term 'commission' and 'subordinate' being given a broad interpretation. It has been proposed that the adoption

¹³⁷ Elies van Sliedregt, 'Command Responsibility at the ICTY-Three Generations of Case-Law and still Ambiguity' in Bert Swart, Alexander Zahar and Goran Sluter (eds) *The Legacy of the International Criminal Tribunal for the former Yugoslavia* (1st edn, OUP 2011) 386.

¹³⁸ *Hadzihasanovic* Article 7(3) Decision (n 112) para 55.

¹³⁹ Cryer, 'The Ad Hoc Tribunals and the Law of Command Responsibility' (n 25) 167.

¹⁴⁰ *Hadzihasanovic* Article 7(3) AC Decision (n 112) para 16.

¹⁴¹ United Kingdom Ministry of Defence (JSP) 830 *Manual of Service Law* Vol 1 (Dandy Publishers 2021) Chap 3 Part 1 'Jurisdiction as to person' paras 1-3-5 to 1-3-7; van Sliedregt, *Command Responsibility at the ICTY* (n137) 386.

¹⁴² van Sliedregt, 'Command Responsibility at the ICTY' (n137) 380.

of this interpretation was intended to loosen the linkage between superiors and culpable subordinates to enable the prosecution of those commanders more remote from the direct participants than in the 'first generation' cases such as the foundational *Celebici* Case.

If the primary task of commanders under the principle of responsible command is to prevent violations of international humanitarian law this requires preventative measures which commanders are in a position to take as a result of the effective control which they exercise over their subordinates. As the *Halilovic* Trial Chamber observed

a commander who possesses effective control over the actions of his subordinates is duty bound to ensure that they act within the dictates of international humanitarian law and that the laws and customs of war are thereby respected.¹⁴³

Although it is generally accepted that the principle extends beyond those in a vertical chain of command to other persons under his control it is necessary that the commander can ensure compliance. The underlying modes of liability as stated in Article 7(1) properly include the execution as well as the planning and preparation of a crime by those individuals.¹⁴⁴ The position adopted in the third generation of cases under which the direct perpetrator does not require to be under the effective control of the commander in some form of hierarchical structure potentially stretches that responsibility so that it can no longer be regarded as deriving from the principle of responsible command. As one prominent commentator has noted the answer is dependent upon the view adopted of the nature of command responsibility. In the event that command responsibility is interpreted as a separate offence rather than a mode of liability the link between the perpetrator and the superior could be loosened.¹⁴⁵

2.5.3 THE INTERNATIONAL CRIMINAL COURT -THE UTILISATION OF THE PRINCIPLE

As the ad hoc tribunals work drew to an end the *Bemba Gombo* case represented the first concluded trial before the International Criminal Court on the basis of command responsibility.¹⁴⁶ It still represents the sole trial on the basis of article 28 of the Rome Statute followed by his subsequent acquittal by the Appeals Chamber.¹⁴⁷ Article 28 of the Rome

¹⁴³ Prosecutor v *Halilovic* Judgment (n 109) para 39.

¹⁴⁴ Prosecutor v *Oric* Judgment (n 135) para 328.

¹⁴⁵ van Sliedregt, 'Command Responsibility at the ICTY' (n 137) 389.

¹⁴⁶ Prosecutor v *Bemba Gombo* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08-3343 21 March 2016).

¹⁴⁷ Prosecutor v *Bemba Gombo* Appeal Judgment (n 55).

Statute is a complex and detailed provision establishing a bifurcated standard of responsibility for military commanders and civilian superiors.¹⁴⁸ Despite the underlying commonality between the two forms of command responsibility doctrine the doctrine under the Rome Statute differs significantly in some of its elements from its customary law counterpart. At the same time the structure of article 28 serves to resolve matters that gave rise to issues addressed in the preceding section

In addition, although the jurisprudence on command responsibility doctrine in the ICC is necessarily limited, and one may expect additional analysis of the elements of the doctrine in subsequent proceedings, the structure of the doctrine under article 28 leaves less room for judicial development of the sort seen in the ad hoc tribunals' jurisprudence.

Clearly, while the principle is both the source and an interpretive guide in determining the boundaries of the latter differences in the elements or the application of the doctrine do not necessarily impact on the principle.

As in the discussion regarding the customary international law form of the doctrine the focus in this section of this chapter will be on the elements of the provision concerning the responsibility of a military commander or a person effectively acting as such. Article 28 has a significant impact with regard to civilian superiors, however, discussion of civilian superior responsibility in the context of this study will be limited to the extent that it is relevant to the discussion of command responsibility to the commander or de facto commander.

Article 28 for the first time expressly provides for the application of command responsibility to civilian superiors in terms of article 28(b). The provision also resolves the issue of the application of the principle of responsible command to such superiors, discussed in the context of the ad hoc tribunals' jurisprudence, providing a clear legal basis for the extension of the duty to exercise control over their subordinates in order to ensure their compliance with humanitarian law standards. In the ad hoc tribunals' jurisprudence, the majority of the command responsibility cases concerning civilian superiors arguably concerned individuals who were performing military functions, indeed has been proposed that it was only in such circumstances that command responsibility with respect to civilian superiors was applicable. By contrast the *Bemba Gombo* Judgment confirms that a military commander or person effectively acting in that capacity does not require to perform an exclusively military role bringing civilian superiors performing military functions within article 28(a).¹⁴⁹

¹⁴⁸ Meloni, *Command Responsibility in International Humanitarian Law* (n 47) 144-145; van Slieidregt, *Command Responsibility at the ICTY* (n 136) 392-393.

¹⁴⁹ *Bemba Gombo* Judgment (n 146) 83.

While the ad hoc tribunals relied on judge made law to extend criminal responsibility to de facto superiors' article 28 specifically confirms the application of command responsibility to de facto military commanders and indeed de facto civilian superiors. This was addressed briefly in the course of the *Bemba Gombo* Judgment, being addressed at greater length in the Decision on the Confirmation of Charges by the Pre-Trial Chamber, in which the de facto status of such commanders was confirmed as according with the ad hoc tribunals established jurisprudence.¹⁵⁰

The differing content of the principle of responsible command and command responsibility doctrine despite their close links is apparent in the establishment of diverging responsibility standards for military commanders and civilian superiors. Of considerable significance from the perspective of the doctrine this introduction of differing standards does not in itself impact upon the principle. Responsible command aims to ensure compliance with humanitarian standards through properly organised structures and the application of differing standards for commanders and civilian superiors does not affect this.¹⁵¹

The Trial Chamber's conviction of Bemba Gombo on the basis of article 28(a) of the Rome Statute of crimes against humanity and war crimes as a person effectively acting as a military commander and exercising effective control over the MLC troops under his command was reversed by the Appeals Chamber on 8th June 2018.¹⁵²

This study is restricted to the third ground of appeal, namely the accused's argument that the Trial Chamber had erred in finding that the accused was responsible as a commander under article 28 (a) of the ICC Statute for crimes committed by the troops under his command during the CAR operation from 2002 to 2003.

Article 28(a)(ii) establishes that a military commander or person effectively acting as such is required 'to take all necessary and reasonable measures within his or her power to prevent or repress' the commission of offences by forces under his effective command and control 'or to submit the matter to the competent authorities for investigation and prosecution.'

The acquittal has been the subject of widespread, and at times heated, discussion with regard to the impact that this will have with respect to future prosecutions on the basis of command responsibility under article 28 of the ICC Statute. For the purposes of this study, I will concentrate on three issues with respect to the question of when a commander has

¹⁵⁰ *ibid* para 177; *Prosecutor v Bemba Gombo* (Decision on Confirmation of Charges) ICC-01/05-01/08-424 (15 June 2009) paras 408-409.

¹⁵¹ *Prosecutor v Bemba Gombo* Judgment (n 146) para 172.

¹⁵² *Prosecutor v Bemba Gombo* Appeal Judgment (n 55).

fulfilled his duty to take all necessary and reasonable measures within his power under this provision. The first concerns the approach adopted by the Trial Chamber to the question of what was 'reasonable and necessary' in the circumstances by listing measures that Bemba Gombo could have taken in response. The second is with respect to the contentious issue of the relevance of the motivation of the commander in the action which he took in assessing his response.

It has been proposed that an example of when command responsibility could arise outside of armed conflict would be if army units committed crimes against humanity in the course of ethnic cleansing against a background of violence that has arguably not yet reached the threshold to be regarded as a non- international armed conflict.¹⁵³ Can the position of the majority in the *Hadzihasanovic* Article 7(3) AC Decision that 'It is evident that there cannot be an organized military force save on the principle of responsible command' with the corollary, '[i]t is responsible command which leads to command responsibility' be read across so that the principle applies in such circumstances?

This would represent a departure from the existing jurisprudence, but it is possible to propose that there is some justification for the application of the principle of responsible command outside the parameters of armed conflict. The primary preventative function of a commander is accepted as existing prior to the commencement of armed conflict.¹⁵⁴ Responsible command is, however, an international humanitarian law principle and as such is applicable only in the context of armed conflict, whether international or non- international. In certain circumstances the existence or otherwise of an armed conflict, particularly a non- international armed conflict as opposed to internal disturbances may be blurred. In this situation arguably a Common Article 3 non- international armed conflict may exist, in which case responsible command may apply. It is not, however, to be regarded as having a further general application to core crimes clearly committed outside an armed conflict. In such a situation it can certainly be said that the principle has served as the historical source of the doctrine and has shaped its development but is not directly applicable as a tool for its interpretation. The application of the doctrine and the principle would no longer coincide.

¹⁵³ Mettraux (n 25) 271.

¹⁵⁴ Commentary on the Additional Protocols of 8 June 1977 (n99) para 3564; see also *Prosecutor v Bemba Gombo* Judgment (n 146) (Separate Opinion of Judge Kuniko Ozaki) ICC-01/05-01/08-3343-AnnXII (21 March 2016) paras 12-17.

2.6 CONCLUSION

The initial appearance of responsible command as a principle of international humanitarian law occurred within the context of the structure of early twentieth century state responsibility. While states continue to be the primary subjects of international law then they were the sole objects of international obligations and were solely responsible for compliance with international law. As remains the case, the state as a juridical person acted through its organs, including its armed forces in the context of international armed conflict with their conduct attributable to the state.

Hague Convention IV represented an early treaty intended to establish humanitarian standards in international armed conflicts. The normative importance of the provision which introduced the concept of responsible command concerned the granting of belligerent status to the force concerned. Breach of the provision could potentially result in international responsibility on the part of the State concerned. What then was a vague concept in international law founded in professional military practice in state armed forces has been the subject of dynamic evolution to respond to the threats that have arisen in international armed conflict, particularly with respect to the commission of systemic crimes.

Such a commander initially represented a placeholder for his state in the context of its international responsibility under article 1 of the Hague Regulations. The exercise of command and control as an element of the principle carried with it the requirement for a system of internal discipline. Along with the ability to conduct sustained military operations this represents a necessary prerequisite to ensure that a force conducts its operations in armed conflict in accordance with international humanitarian law. Such responsibility was based on social rules within a national context utilised for the establishment in international law of belligerent status.

The widespread and systemic crimes committed in the Second World War led to the identification of the requirement for individual criminal responsibility. In addition to the direct responsibility of a commander for having ordered the commission of war crimes by his subordinates it also became a requirement to address omission liability on the part of commanders through their failure to prevent or punish the crimes of their subordinates.

The recognition of the affirmative responsibility of commanders was accompanied by the establishment of the role of the commander as guarantor and the appearance of command responsibility doctrine as a form of international individual criminal responsibility. This

individual criminal responsibility was founded on the breach of the enforcement obligations with respect to international humanitarian law imposed on commanders under responsible command.

Accordingly, the old domestic structure of command was transposed into international humanitarian law with the relevant factors for international humanitarian law being identified. This required that the force under command was hierarchically structured, subject to a system of internal discipline and observed international humanitarian law. The commander required to exercise effective control over his command in order to ensure that these requirements were met and the force was capable of conducting sustained military operations. Knowledge both of his troops and the operations being conducted by them is central to the entire process.

As command responsibility doctrine has developed and continues to develop further the principle of responsible command will continue to maintain its importance both as an enforcement mechanism in itself and as a mechanism in the interpretation of command responsibility doctrine. This process can be observed in the development of the concept of the de facto commander and the civilian superior.

THE EVOLUTION OF COMMAND RESPONSIBILITY DOCTRINE: FROM RESPONSIBLE COMMAND TO CODIFICATION

3.1 INTRODUCTION

The previous chapter examined the international humanitarian law principle of responsible command and reviewed the role played by the concept in the foundation and interpretation of command responsibility doctrine.

This chapter now considers the customary law development of command responsibility as a form of individual criminal responsibility up to its codification in Additional Protocol I.

Command responsibility as an international criminal law doctrine is unique in its development in international law on the basis of a fundamental international humanitarian law principle. It establishes criminal responsibility on the part of the commander for their failure to prevent or punish the crimes of their subordinates. As a creature of international law its structure has latterly been described as challenging fundamental concepts of international criminal law, nonetheless that same structure linking back to its origins in international humanitarian law offers the opportunity to utilise it in establishing concurrence between state and individual responsibility. In order to establish this process it is necessary to explore this form of individual criminal responsibility. More precisely in view of the nature of the origins and development of development of command responsibility as a customary international law doctrine it is necessary to examine the early stages of the development of this individual criminal responsibility doctrine as it emerged from the principle of responsible command to establish the links between the doctrine and state responsibility.

The first section of this chapter will address the early evolution of the elements of the doctrine commencing with the work of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties as part of the Versailles Treaty process in establishing a theoretical basis for the structure of this form of omission responsibility.

The next section will then review the establishment of command responsibility as an international criminal responsibility doctrine, addressing the trial of General Yamashita¹⁵⁵, the *High Command*¹⁵⁶ and *Hostage*¹⁵⁷ cases and finally the Tokyo IMT prosecutions.¹⁵⁸

The final section will assess the approach adopted to the codification of the customary doctrine in Additional Protocol I of 1977 to the 1949 Geneva Conventions.¹⁵⁹

3.2 ESTABLISHING A CONCEPT FOR A NEW FORM OF OMISSION LIABILITY

The reality of widespread violations of international humanitarian law by Germany and its allies during WWI, led to consideration of possible criminal charges against their senior officers and politicians. This resulted in the first proposal of prosecution on the basis of individual criminal responsibility under international law. It also led to a proposed charge on the basis of responsibility for an omission in the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties in 1919.¹⁶⁰ The Report recommended a single inter-allied tribunal should prosecute both politicians and military commanders, however, high their rank:

Who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war (it being understood that no such abstention should constitute a defence for the actual perpetrators).¹⁶¹

In its final form this doctrine of negative liability owed much to the American delegation's concerns over the nature of the proposed form of liability set out in earlier versions of the Report. As they had stated in their Memorandum of Reservations:

¹⁵⁵ *US v Yamashita* (n 83).

¹⁵⁶ *High Command* case (n 83).

¹⁵⁷ *Hostage* case (n 89).

¹⁵⁸ International Military Tribunal for the Far East

¹⁵⁹ Additional Protocol I (n 27) arts 86 and 87.

¹⁶⁰ *Adatci* (n 80) 95.

¹⁶¹ *ibid* 121.

Neither knowledge of commission nor ability to prevent is alone sufficient. The duty or obligation to act is essential. They must exist in conjunction, and a standard of liability which does not include them all is to be rejected.¹⁶²

Their concerns also extended to the proposed inter-allied tribunal as in their view prosecutions should take place before national tribunals established by individual states in order to try accused individuals for offences directed against that state and its population or property.¹⁶³ Despite the ultimate absence of prosecutions the doctrine of abstention criminality can be seen to have reflected the elements of command responsibility. The proposal represents the point at which commanders were potentially identified as guarantors exercising control over their subordinates accordingly establishing criminal responsibility for failure to act. Although outside the terms of this study it is also noteworthy in identifying the potential application of such a doctrine beyond the sphere of the military commander to include civilian politicians who had been involved in the direction of the war.

The inclusion of a knowledge requirement mirroring the mental element for direct responsibility avoids the subsequent criticism of the basis on which General Yamashita was convicted at the end of WW2. Actual knowledge was deemed necessary. This gives rise to the issue regarding the extent to which a commander is expected to maintain awareness of the conduct of his subordinates in terms of the principle of responsible command. At the same time it avoided the subsequent debate on the use of imputed knowledge as in the influential post-Second World War *Hostage Case* in which a 'should have known' standard was applied.¹⁶⁴

The requirements laid upon the commander are to prevent, take measures to prevent, put an end to or to repress breaches of the laws and customs of war.¹⁶⁵ Prevention and taking measures to prevent are obviously directed at future conduct, while the reference to putting an end to concerns continuing conduct. Use of the term 'repress' has given rise to debate as to its meaning both in the context of Additional Protocol I and the ICC Statute. The accepted assigned meaning of suppression in Additional Protocol I is used in a similar context in both settings and would appear applicable with regard to ongoing offences, namely prevention.¹⁶⁶

¹⁶² *ibid* 127 'Memorandum of Reservations presented by the Representatives of the United States to the Report of the Commission on Responsibilities'. Annex II, 4 April 1919; Earlier versions of the Report had not included the phrase 'with knowledge thereof and with power to intervene' in the proposed omissive liability.

¹⁶³ *ibid* 142.

¹⁶⁴ *Hostage case* (n 89) 1259.

¹⁶⁵ The term 'laws and customs of war' along with the 'law of war' was used prior to the introduction of the modern term 'international humanitarian law.'

¹⁶⁶ *Bemba Gombo Confirmation Decision* (n 150) para 439.

The other usage in relation to past offences would appear to include the investigation and punishment of violations of international humanitarian law.¹⁶⁷

Finally, there is a causal link between the potential responsibility arising from the commander's failure and the commission of crimes by his subordinates with respect to his duty to prevent the commission of an offence against the laws and customs of war with respect to the proposed form of liability. The commander to incur command responsibility is an individual who possesses both actual knowledge and the power to intervene but abstains from preventing the violation of the laws and customs of war by his subordinate. He could have accordingly by an action on his part have prevented the commission of the underlying offence. As will be discussed further subsequently the causal link would appear to be logically limited to the primary aim of prevention rather than the secondary purpose of punishment.

The outcome of the work of the Commission on Responsibilities was that the outline of the elements of command responsibility doctrine had been identified, the question now was how would the doctrine be developed in practice?

3.2.1 THE POST WORLD WAR II COMMAND RESPONSIBILITY PROSECUTIONS

As in the First World War, it was the catalogue of atrocities committed by the defeated enemy states during the Second World War and the complete defeat of these states that drove the development of international criminal law and the first prosecutions on the basis of individual criminal responsibility. In this climate superior responsibility made the crossover from a theoretical basis for criminal liability to an international criminal law doctrine.

Reflecting to some extent the work of their predecessors the UN War Crimes Commission in 1944 proposed the establishment of a United Nations War Crimes Court to try those military personnel and civilians from the defeated states who had:

Committed, or attempted to commit, or has ordered, caused, aided, abetted or incited another person to commit, or has by his failure to fulfil a duty incumbent on him has himself committed an offence against the laws and customs of war.¹⁶⁸

¹⁶⁷ *ibid.*

¹⁶⁸ Ricardo J Alfaro, 'Report on the Question of International Criminal Jurisdiction' Yearbook of the International Law Commission Vol II (1950) UN Doc A/CN.4/15 and Corr.1.

This draft provision clearly extended the potential responsibility of commanders beyond direct participation in an offence to include omissive responsibility similar to that proposed some three decades earlier. As with its proposed predecessor it was not however ultimately established. For reasons of speed and utility it was determined that a series of military tribunals would try the accused rather than establishing the proposed UN War Crimes Court.

The Nuremberg IMT Statute did not contain any reference to command responsibility, all the accused were charged with having taken a direct part in the crimes of which they were accused. The Far East IMT Statute as with its European counterpart did not make any reference to command responsibility. The Allied Control Council Law No 10 authorising prosecutions of lesser war criminals in Germany by the occupying powers included as a ground for criminal responsibility that an accused had taken a 'consenting part' in the commission of war crimes.¹⁶⁹ It has been suggested that the reference to 'a consenting part' in Control Council Order No 10 describing forms of responsibility of commanders could be regarded as including 'tacit approval' of perpetrators crimes and would suggest an element of knowledge on a commanders part¹⁷⁰. An alternative reading has, however, been proposed that a 'consenting part' is indicative rather of complicity.¹⁷¹

The picture can be said to be confused, particularly as the subsequent trials based on early forms of command responsibility generally refer to acquiescence.

3.2.2 THE TRIAL OF GENERAL YAMASHITA – BASED ON A FORM OF OBJECTIVE RESPONSIBILITY?

The early development of command responsibility doctrine in international criminal law was the product of the case law of the war crimes tribunals in Europe and the Far East and in these the elements of the new form of criminal responsibility varied particularly with respect to the mens rea issue. As a result of domestic US considerations, the first of the major war crimes trials to involve the issue of command responsibility, or at least omissive liability, was not before the Nuremberg or Tokyo Tribunals nor under the subsequent trials at Nuremberg

¹⁶⁹ Control Council Law No 10 Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) Art 121(2).

¹⁷⁰ Smidt (n 70)175-6

¹⁷¹ William A Schabas, 'Enforcing international humanitarian law: Catching the accomplices' (2001) 83 IRRC 439

under Allied Control Council Law No 10 but before a United States Military Commission established by General MacArthur without legally qualified members.

The trial of General Yamashita before a US Military Commission was the first of the major post World War II war crimes trials, and the first significant case in which the accused was convicted on the basis of a form of command responsibility. It has been described as one of the most famous of the post-war war crimes trials as well as one of the most controversial.¹⁷² General Yamashita had operational command of the Japanese Army and attached forces in the Philippines from October 1944 until the Japanese surrender on 3 September 1945. During this period, he also acted as occupation commander.

The charge against him was that he had 'unlawfully disregarded and failed to discharge his duty as a commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes [...] and he [...] thereby violated the law of war.'¹⁷³ The trial concluded on 7 December 1945 with his conviction.

The Military Commission in its judgment held:

Where murder and rape and vicious revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.¹⁷⁴

The case subsequently came before the United States Supreme Court on a *habeas corpus* application. The Chief Justice in giving the majority opinion, with two dissenting judgments, set out the fundamental issue:

[...] whether the Law of War imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the Law of War and [...] whether he may be charged with personal responsibility for his failure to take such measures when violations result.¹⁷⁵

He concluded that such an affirmative duty did exist and was recognised, and its breach penalised under the US disciplinary code.¹⁷⁶

¹⁷² 'Parks (n 46) 22; Ann Marie Prevost, 'Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita' [1992] HumRtsQ 303 ff; Beatrice L Bonafe, 'Finding a Proper Role for Command Responsibility' [2007] JICJ 605 fn14; Jenny S Martinez, 'Understanding Mens Rea in Command Responsibility' [2007] 5 JICJ 648-649; Meloni *Command Responsibility in International Law* (n 47) 42 n 49; *US v Yamashita* (n 83).

¹⁷³ *US v Yamashita* (n 83) 3,4.

¹⁷⁴ *ibid* 34, 35.

¹⁷⁵ *ibid* 43.

¹⁷⁶ *ibid* 44.

The circumstances of this, the first prosecution on the basis of command responsibility, have given rise to extensive academic debate primarily with respect to the issue of mens rea which was not directly addressed. In subsequent cases either actual knowledge of the commission of crimes by the commander's subordinates or constructive knowledge or breach of the obligation to acquire knowledge of the underlying crimes was identified as the mens rea for the offence. The military commission simply confirmed that criminal responsibility arose if a commander breached the obligations which were incumbent upon him to control his troops but did not then carry out the analytical process which had been undertaken by the Commission on the Responsibility of the Authors of the War following World War I to establish the elements of this form of omission liability. One distinguished commentator considers that there was an implication that some level of knowledge was required but from the wording of the military commission's statement they might either have concluded that he had actual knowledge or 'must have known' of the offences.¹⁷⁷ Nonetheless despite the many justified criticisms of the case its real significance lies in the fact that through the Supreme Court ruling in the habeas corpus application by General Yamashita it established that a commander is under an affirmative duty to take the necessary steps within his material ability to prevent and punish breaches of international humanitarian law by his subordinates and that failure will incur criminal responsibility.¹⁷⁸ Subsequent war crimes trials built on this finding to establish the elements of the doctrine of command responsibility, although the development of the doctrine through the case law of differing tribunals produced what has been described as 'an anarchy of sometimes contradictory precedents.'¹⁷⁹

3.2.3 DEVELOPMENT OF THE DOCTRINE - '*HIGH COMMAND*' AND '*HOSTAGE*' CASES

The trials of the most senior German leaders before the Nuremberg International Military Tribunal had little direct impact on the development of superior responsibility doctrine. Those accused were active participants and were convicted on that basis although the tribunal did refer in several of the judgments to liabilities based on their omission to prevent crimes of which they were aware.

¹⁷⁷ Smidt (n 70) 181.

¹⁷⁸ Parks (n 46) 37; Bing Bing Jia, 'The Doctrine of Command Responsibility Revisited', (2004) 3 Chinese JIL 10; Mettraux, (n 25) 8.

¹⁷⁹ Mettraux (n 25) 8.

In sharp contrast were two of the cases conducted under Control Council Order No 10, the *High Command* case and the *Hostage* case in which high ranking German officers were charged with Crimes against Peace, War Crimes, Crimes against Humanity and Conspiracy to commit such crimes in connection with the German Army operations on the Eastern Front.

¹⁸⁰ Much of the first case concerned the responsibility of these senior officers for the implementation of Hitler's Commissar Order, which directed the execution of all captured Russian commissars and the Barbarossa Jurisdiction Order, concerning treatment of guerrillas and reprisals against the civilian population.¹⁸¹ The trial was complicated by the operation of parallel command chains and questions regarding criminal responsibility for the transmission of orders issued by the High Command as well as the commission of war crimes by other bodies, such as the Einsatzgruppen operating in their respective areas of responsibility.

As noted in the preceding chapter the Tribunal engaged in an analysis of the principle of responsible command as they considered the individual responsibility of the accused. This necessarily included both the refining of the elements of the principle and of command responsibility as an associated doctrine in order to respond to the circumstances with which they were faced. In their judgement the Tribunal extensively analysed command responsibility and the issue of knowledge before applying the results of this analysis to the individual cases of the accused. They explicitly rejected an objective liability standard ruling that criminal responsibility was dependant on actual knowledge on the part of the accused, 'a personal act voluntarily done with knowledge of its inherent criminality under international law.'¹⁸² Commanders were entitled to assume that their subordinates would carry out their responsibilities in accordance with the law. In other words, a commander was not under an obligation to proactively investigate the conduct of his subordinates without having been put on notice. Criminality was not dependent simply upon the existence of the command relationship but was dependent upon personal failure to perform the duty laid upon the commander in question. The Tribunal held.

There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes

¹⁸⁰ *High Command* case (n 83); *Hostage* case (n 89).

¹⁸¹ *High Command* case (n 83)1054-1085, regarding the Commissar Order and 1112-1113, with respect to the Barbarossa Jurisdiction Order.

¹⁸² *High Command* case (n 83) 510.

criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.¹⁸³

Whether in the case of actual knowledge, the mens rea standard applied in this case it was appropriate to refer to criminal negligence on the part of the accused is questionable. In the case of actual knowledge, it is generally held that this involves intent with gross negligence arising in the case where the commander should have known of the commission of crimes by his subordinates. This latter standard did not arise in this case.

The Tribunal distinguished the Yamashita case. They did so, first, on the ground that he had possessed unrestricted authority and, secondly, because in the *High Command Case* the majority of the charges related to crimes committed on the direction of higher authority both military and political. A de jure commander is subject both to the orders of his military superiors and the state itself as to his jurisdiction and functions.¹⁸⁴ Having recognised that under the principle of responsible command an occupation commander is responsible to higher authority and his duties are determined by the domestic law of the respective state they then imposed an important qualification, namely that he was always subject to the overriding obligations imposed under international law:

[H]e has certain responsibilities which he cannot set aside or ignore by reason of activities of his own State within his area. He is the instrument by which the occupancy exists [...] It cannot be said that he exercises the power by which a civilian population is subject to his invading army while at the same time the State which he represents may come into the area which he holds and subject the population to murder of its citizens and to other inhuman treatment.¹⁸⁵

Nonetheless as the Tribunal emphasised, 'the occupying commander must have knowledge of those offences and acquiesce or participate or criminally neglect to interfere in their commission and [...] the offences committed must be patently criminal.'¹⁸⁶

It emerges from the above that the Tribunal in dealing with the position of the occupation commander plainly based this on the general principle of responsible command as established under article I of the Hague Regulations, and then went on to consider the specific duties imposed on such commanders under article 43 of the Regulations. One of the most important aspects of the trial is the establishment of certain fundamental standards that

¹⁸³ *ibid* 542-543, 'Any other interpretation of International Law would go far beyond the basic principles of criminal law as known to civilised nations.'

¹⁸⁴ *ibid* 544.

¹⁸⁵ *High Command case* (n 83) 544.

¹⁸⁶ *ibid* 545.

a commander must fulfil, even though he is a state organ, and that state is as an entity responsible for systemic crimes within the area of occupation.

As discussed in the preceding chapter the Tribunal held that knowledge without the authority and duty to act did not result in command responsibility, distinguishing the position of staff officers from commanders. responsibility of a commander for the actions of his subordinates and the more limited basis on which a staff officer could incur criminal responsibility.

Neither members of the staff generally nor the Chief of Staff were, however, mere ciphers and could incur responsibility through actions taken on their initiative.¹⁸⁷ Here perhaps, possibly lies the key to reconciling the findings of the Tokyo Tribunal with regard to the criminal responsibility of General Muto, Chief of Staff to General Yamashita, who was convicted on the basis of what were described as powers of influence not amounting to formal powers of command with the findings of this and the tribunal in the *Hostage* case.

These general findings were then applied by the Tribunal in their judgement regarding Field Marshal von Leeb. He was acquitted of responsibility for the dissemination and enforcement of the Commissar Order by his subordinate units, the Tribunal finding that he had 'opposed it in every way short of open and defiant refusal to obey it.'¹⁸⁸ He was, however, convicted on the basis of his direct responsibility for the transmittal and application of the Barbarossa Jurisdiction Order.¹⁸⁹

In conclusion then in the *High Command* case Tribunal rejected the possibility of objective responsibility based solely on subordination. There required to be a personal failure to meet the obligations imposed on the commander under responsible command to prevent or punish crimes committed by their subordinates, actual knowledge, and acquiescence. Additionally, the Tribunal recognised that command responsibility was dependent on the possession of command authority contrasting the position of commanders with that of their staff who acted on behalf of the commander and accordingly would not normally incur responsibility save in limited circumstances on a direct basis.

Turning then to the *Hostage* case along with the *High Command* case one of the foundational command responsibility cases the Tribunal here applied a different, wider mens rea standard, going beyond actual knowledge. In this trial Field Marshal Wilhelm List and

¹⁸⁷ *ibid* 515, '[T]he responsibility allowed a chief of staff to issue orders and directives in the name of his commander varied widely and his independent powers for exercising initiative therefore also varied widely in practice. The field for personal initiative as to other staff officers also varied widely. That such a field did exist, however, is apparent from the testimony of the various defendants who held staff positions.'

¹⁸⁸ *ibid* 557.

¹⁸⁹ *High Command* case (n 83) 563.

other senior officers were charged with war crimes and crimes against humanity based on their responsibility for crimes committed by troops under their command during the occupation of Greece, Yugoslavia, Albania and Norway. These crimes mainly consisted of reprisal killings and wanton destruction of property.¹⁹⁰

Although the tribunal in that case largely concurred with the views of the tribunal in the *High Command* case they concluded that it was the duty of an occupation commander to maintain law and order, and to protect the civilian population and their property.¹⁹¹ Such a commander incurred responsibility for crimes committed not only by those within his direct chain of command but also by other units operating within his jurisdiction.¹⁹² As occupation commanders they had the responsibility for the maintenance of peace and order and the prevention of crime. They had received regular reports informing them of these units' activities.¹⁹³

The Tribunal distinguished between an operational commander and a commander in occupied territories as far as the requirement of a superior-subordinate relationship is concerned. For the former, '[t]he matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command.'¹⁹⁴ In the case of the commander of an occupying force however, direct subordination was not the test. Such a commander's responsibility arose not only with regard to the actions of those who were directly subordinate to him, but also those over whom he had indirect control within his area of responsibility through the extended form of responsible command applied under article 43 of the Hague Regulations 1907.¹⁹⁵ His responsibility extended therefore not only in respect of national units outside his chain of command but also in respect of local inhabitants. 'His responsibility is general and not limited to a control of units directly under his command.'¹⁹⁶

In contrast to the tribunal in the *High Command* case which had required actual knowledge on the part of a superior of his subordinates' criminal conduct the *Hostage* case tribunal

¹⁹⁰ *Hostage* case (n 89) 759 ff.

¹⁹¹ *ibid* 1256.

¹⁹² *ibid*. The tribunal concluded, 'The commanding general of occupied territory, having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself was responsible for the crime and that he is thereby absolved from responsibility.'

¹⁹³ *ibid*.

¹⁹⁴ *Hostage* case (n 89).1260

¹⁹⁵ *ibid* 1256.

¹⁹⁶ *ibid* 1260.

widened the knowledge requirement to include imputed knowledge, the 'should have known' standard.¹⁹⁷

In line with this distinction, the tribunal concluded that in the case of a commander of occupied territory who, 'fails to require and obtain complete information, the dereliction of duty rest upon him and he is in no position to plead his own dereliction as a defence.' Similarly, 'absence from headquarters cannot and does not relieve on from responsibility for acts committed in accordance with a policy he instituted or in which he acquiesced.'¹⁹⁸The Tribunal accordingly convicted Field Marshal List in respect of his command responsibility for the extensive reprisal killings which were carried out while he was a commander of occupied territory finding that '[h]is failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility.'¹⁹⁹ Although it was accepted that many of the executions were carried out by units over which he did not have tactical command, he could not escape responsibility as commanding general of occupied territory and his indirect responsibility for units outwith his chain of command operating within his area of responsibility.²⁰⁰

The Tribunal, as with their counterparts in the *High Command* case, distinguished the position of a commander from that of a staff officer including the commander's chief of staff, as far as criminal responsibility for subordinates' crimes is concerned.²⁰¹ The Tribunal then went on to distinguish between knowledge as an element of command responsibility and simple knowledge without command authority. They concluded that 'mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law. He must be one who orders, abets, or takes a consenting part in the crime.'²⁰² On that basis, Lieutenant General Foertsch who held that appointment with respect to a series of commanders from 1941 to 1944 was acquitted.

As with the *High Command* case tribunal the *Hostage Case* Tribunal clarified the elements of the doctrine which had been established in principle in the *Yamashita* Case. Direct subordination was not of the same importance for occupation commanders as their operational

¹⁹⁷ *ibid.* The tribunal concluded, 'An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein.'

¹⁹⁸ *ibid* 1271.

¹⁹⁹ *Ibid* 1272.

²⁰⁰ *Ibid.* The tribunal concluded that '[h]e cannot escape responsibility by a claim of want of authority. The authority is inherent in his position as commanding general of occupied territory. The primary responsibility for the prevention and punishment of crime lies with the commanding general; a responsibility from which he cannot escape by denying his authority over the perpetrators.'

²⁰¹ *Hostage* case Judgment (n 89) 1282.

²⁰² *ibid* 1286.

counterparts. Their responsibility extended to the activities of all those operating within their jurisdiction. More controversially and based on the standards of operational efficiency typical of German formations, the tribunal widened the mens rea standard to include constructive as well as active knowledge.

In addition to the *High Command* and *Hostage Cases* there were other trials under Control Council Order No 10 regarding civilian superiors, two of the more significant being the *Roechling* and the *Flick Cases*.²⁰³ As indicated previously this study is concerned with command responsibility doctrine as applicable to military commanders in armed conflict. Reference to civilian superiors is therefore limited and only as justified in relation to the analysis of the doctrine. Two civilian cases which were tried on the basis of command responsibility are discussed here in that they illustrate the boundaries outside which command responsibility doctrine is of questionable application.

Hermann Roechling was chairman of the Reich Association Iron and General Director of the Stahlwerke Voelklingen and was tried along with other members of the Group's senior management with regards to the execution of the forced labour programme involving foreign workers, their allocation and their brutal ill-treatment in order to force them to work. He played a leading role in the general implementation of the forced labour programme.²⁰⁴ The tribunal considered that it was Roechling's duty to keep himself informed about the treatment of the deportees. In view of his status as chairman of the RVE and General Director of the Stahlwerke Voelklingen he had sufficient authority to intervene and at least mitigate the abuses which he observed during his repeated inspection visits.²⁰⁵

This contrasts with the finding of the Tribunal in the *Flick Case*. This case also concerned charges arising out of the forced labour programme and their employment under inhuman conditions.²⁰⁶

The tribunal found that the accused had no control over the administration of the forced labour programme which was under detailed State supervision. They had only limited access to the prisoner of war labour camps and the concentration camp labour camps which were controlled and supervised by the SS.²⁰⁷ Furthermore the tribunal noted that the prosecution accepted

²⁰³ *Celebici case* Judgment (n 73) para 360; *France v Hermann Roechling et al*, Trial Judgment 25 January 1949 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, Vol XIV (US Government Printing Office 1952) 1075 on; *United States v Friedrich Flick et al*, Trial Judgment 22 December 1947, Trials of War Criminals before the Nuremberg Military Tribunals, (US Government Printing Office 1952) Vol VI, 1187; UNWCC Commentary in Law Reports of Trials of War Criminals, Vol IX, p54 suggests that the *Flick case* appears to be one of command responsibility.

²⁰⁴ *Roechling case* Judgment (n 47) 1132.

²⁰⁵ *ibid*.

²⁰⁶ *Flick Case* Judgment (n47) 1194 - 1195.

²⁰⁷ *ibid* 1196.

that the manufacturers were operating under compulsion.²⁰⁸ Accordingly, the defence of necessity was applied except with regard to the actions of one of the company's managers to increase production of railway wagons and to obtain Russian prisoners of war to manufacture these. The tribunal considered that this action with the knowledge and approval of Flick was not taken as a result of compulsion but with the aim of keeping the plant in full production.²⁰⁹

There is clearly a distinction to be drawn on the evidence between the leading part played by Roechling in the forced labour programme and the apparently unwilling participation of the accused in the Flick case. It does appear questionable, however, as to whether Roechling should not rather be regarded as having directly participated in the crimes with which he was charged rather than on the basis of command responsibility. The case appears to have considerable similarities to the situation in the trials of the leading war criminals before the IMT where the accused had also willingly participated in leadership roles involving systemic criminality with any failure to act being viewed as a minor element in contrast to their positive involvement in these crimes.

As regards the Flick conviction although the United Nations Commentary refers to the Flick conviction as apparently being based on superior responsibility, in view of the circumstances he arguably should rather be regarded as having been an accessory.

3.2.4 THE TOKYO TRIALS - SENIOR COMMANDERS AND POLITICIANS

The International Military Tribunal for the Far East was established on 19 January 1946 as the equivalent to the Nuremberg International Military Tribunal, with a view to the prosecution of the most prominent of the Japanese military and political leadership.²¹⁰ The indictment was complex and included 55 counts.²¹¹ This review will concentrate on two of these, which concern the subject of this study. Count 54 charged all of the accused, with two exceptions, with 'having ordered, authorized and permitted' breaches of the laws and customs of war in violation of the laws of war. Count 55 charged all the accused with having 'deliberately and recklessly disregarded their legal duty to take adequate steps to secure the

²⁰⁸ *ibid* 1198.

²⁰⁹ *ibid* 1202.

International Military Tribunal for the Far East Special proclamation by the Supreme Commander for the Allied Powers at Tokyo January 19, 1946; charter dated January 19, 1946; amended charter dated April 26, 1946. Tribunal established January 19, 1946 United States Treaties and Other International Acts Series (TIAS) 1589. The trial began on 29 April 1946.

²¹¹ ITMFE Judgment (n103) Part A Chap I 26

observance and prevent breaches [of the laws and customs of war] in violation of the laws of war'.²¹² The distinction between the two charges is not entirely clear, although Count 55 may concern imputed knowledge.

The Tribunal found that detainees and prisoners of war were in the power of the belligerent power that had captured them. Under customary international law, as codified in Hague Convention IV of 1907 and the Geneva Prisoner of War Convention of 1929 the belligerent government concerned was responsible for their care, including protection from ill treatment.²¹³ Echoing the Nuremberg Tribunal's position they noted that responsibility was 'not a meaningless obligation cast upon a political abstraction.'²¹⁴ The responsibility for such individuals' treatment was attributable to individuals and they determined responsibility was hierarchical descending from the Cabinet to those with direct responsibility for prisoners. An accused would fail in their duty and become responsible for ill treatment of prisoners if they did not establish the necessary arrangements for their care, or if, having established such arrangements they failed to ensure its continued and effective working.²¹⁵ Nonetheless in spite of the wide-ranging nature of this obligation, the Tribunal was clear that this was not a form of objective liability. Actual knowledge was not necessary, however, imputed knowledge sufficed.²¹⁶ Reliance could not be placed on assurances if the individual concerned should have been put on notice. If crimes were 'notorious, numerous and widespread' these were matters that would go towards imputation of knowledge.²¹⁷

As far as military commanders were concerned, the Tokyo Tribunal adopted a similar analytical approach to their counterparts in the *High Command* and the *Hostage* cases, assessing the personal responsibility of the officer concerned. In finding General Heitaro Kimura guilty under both Counts 54 and 55 the Tribunal noted his claim that when he assumed command of the Burma Area Army in August 1944, he had issued orders to his troops to conduct themselves properly and not to ill-treat prisoners. They, however, found that, in view of the nature and extent of the continuing ill treatment of such prisoners, often close to his headquarters, that he was negligent in his performance of his duty to prevent war crimes.

²¹² *ibid* Annex 6 Indictment 28, 40.

²¹³ *ibid* Chap II The Law 35, 37-40.

²¹⁴ *ibid* 38.

²¹⁵ *ibid* 39

²¹⁶ *ibid* 39.

²¹⁷ *ibid* 39.

The Tribunal held:

The duty of an army commander in such circumstances is not discharged by the mere issue of routine orders, if indeed such orders were issued. His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out. This he did not do.²¹⁸

As illustrated by the case of General Itagaki the Tribunal dealt with claims by the accused that the operational situation had precluded proper performance of commanders' responsibilities. Thousands of allied prisoners of war were held in camps for which he had administrative responsibility. He claimed that he had done his best with limited supplies in the face of Allied attacks on the Japanese supply chain and that following the Japanese capitulation supplies were made available by his units to the camps. The Tribunal convicted him under Count 54. If he had found himself unable to maintain the prisoners and internees under his charge in the future his duty was to distribute what supplies he had and meantime to inform his superiors that arrangements must be made, if necessary, with the Allies, for their support.²¹⁹

The approach adopted with regard to the members of the Cabinet had important differences. The basis of responsibility applied with respect to Japanese politicians has led to widespread controversy.²²⁰ Any politician, who remained in Government knowing of the ill treatment of prisoners, was regarded as having assumed personal criminal responsibility for any such ill treatment in the future. Although as with military accused, they recognised the requirement for the existence of a specific duty in order to establish responsibility on the basis of an omission to act, they then read this as a liability applicable to all members of the government as place holders for that body. This applied even though the accused concerned was not directly concerned with the care of prisoners.²²¹ Two cases, both involving former Japanese Foreign Secretaries, Hirota and Shigemitsu have been regarded as especially controversial.

Koki Hirota was convicted under Count 55 with respect to the atrocities at Nanking in December 1937 and the first two months of 1938 and controversially executed. The Tribunal found that as Foreign Minister he had been informed of these war crimes immediately after the Japanese forces captured Nanking. He accordingly took the matter up with the War

²¹⁸ Chap X Verdicts 569-571.

²¹⁹ *ibid* 566-567

²²⁰ Bonafe *The Relationship between State and Individual Responsibility* (n 14) 611; Mettraux (n25) 104; Boister and Cryer (n106) 234-236.

²²¹ IMTFE Judgment (n103) Chap II The Law (b) Responsibility for War Crimes Against Prisoners 39.

Ministry and accepted the assurances he received that the atrocities would be stopped. Further war crimes continued to be reported for an extended period of at least a month. The Tribunal held that the accused:

was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented [...] His inaction amounted to criminal negligence.²²²

Mamoru Shigemitsu was also found guilty by the Tribunal under Count 55 having been prosecuted over the protests of the senior prosecutor. The Tribunal noted that numerous protests had been forwarded by the Protecting Powers regarding treatment of prisoners. These having been received in the first instance by the Foreign Ministry were then forwarded to the relevant Ministries with requests for information. They concluded that he did not adequately investigate the allegations despite having been put on notice and that he should have pressed the matter to the point of resignation to clear himself of the responsibility.²²³

Command responsibility arises from the criminal responsibility of an accused for the actions of his subordinates. The doctrine originates in the principle of responsible command and has primary relevance to military commanders. The Tokyo Tribunal in its deliberations against the military commanders tried under the Indictment correctly assessed their individual culpability for their omission to act to prevent breaches of international humanitarian law. In contrast to their military counterparts certain of the senior Japanese politicians were convicted on the basis of collective responsibility through the application of cabinet responsibility to the doctrine. This clearly represented a misreading of the boundaries of command responsibility doctrine as founded in the principle of responsible command.

3.2.5. THE TRIAL OF ADMIRAL TOYODA

In the trial of Admiral Toyoda, the former Japanese Chief of Naval Staff, a Military Tribunal again rejected the concept of command responsibility as a form of objective liability, holding that liability could be established on the basis of either actual or imputed knowledge. The tribunal then analysed the elements of command responsibility doctrine. This included for the

²²² *ibid* Chap X Verdicts 564.

²²³ *ibid* Chap X Verdicts 578 'We do no injustice to SHIGEMITSU when we hold that the circumstances, as he knew them, made him suspicious that the treatment of the prisoners was not as it should have been. Indeed, a witness gave evidence for him to that effect. Thereupon he took no adequate steps to have the matter investigated, although he, as a member of the government bore overhead responsibility for the welfare of the prisoners. He should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged.'

first time explicit reference to punishment and prevention as two elements whose absence may give rise to command responsibility. As the Tribunal concluded:

[h]is duty as a commander included his duty to control his troops, to take necessary steps to prevent commission by them of atrocities, and to punish offenders. His guilt cannot be determined by whether he had operational command, administrative command or both. If he knew, or should have known, by use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and punish the offenders he was derelict in his duties. Only the degree of his guilt would remain.²²⁴

Admiral Toyoda was acquitted of the charges against him.²²⁵ This case may be considered to highlight the extent to which command responsibility doctrine had advanced since the trial and conviction of General Yamashita. The cases since that first notorious trial had frequently referred in their judgments to that first prosecution and conviction. They had, however, advanced the doctrine from that first finding that failure to meet the obligations established under the principle of responsible command to prevent and punish would result in criminal responsibility to a doctrine, which, although still uncertain with regard to important issues such as the nature of the knowledge requirement was recognisably that defined by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties in 1919.

The position following World War II therefore was that commanders, and a limited number of civilian superiors, had been tried and convicted on the basis of command responsibility doctrine in a series of cases commencing with the trial of General Yamashita. This was part of the general process of individualisation of criminal responsibility with the introduction of international criminal law replacing the traditional focus on state responsibility.²²⁶ This process concerned senior military and civilian figures in the service of the German or Japanese states, as exemplified by General Yamashita, Admiral Toyoda, Koki Hirota, Foreign Minister of Japan and Field Marshal List.

In contrast to later developments with respect to the doctrine addressed in the following chapters all those military commanders concerned held de jure command appointments. As discussed in the previous chapter this it is proposed reflected the transition from the previous position where these individuals had been placeholders for the state, as senior state organs, without incurring personal responsibility. The boundaries of the doctrine were still

²²⁴ *United States v Soemu Toyoda*, Official Transcript of the Record of the Trial, 5006.

²²⁵ *United States v Soemu Toyoda*, Record of Trial 5021; see Parks (n 46) 69-73; Theodor Meron 'Is international law Moving towards Criminalisation' (1998) 9 EJIL 30.

²²⁶ Cassese, *International Criminal Law* (n 4) 5.

uncertain.²²⁷ Nonetheless, command responsibility as developed by the post-World War II war crimes tribunals was rapidly recognised as a doctrine of customary international law.²²⁸ It was quickly recorded in the national military law manuals of leading States. The UK Manual of Military Law of 1958, for example, notes:

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces or other persons subject to their control. Such responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible, if he has actual knowledge or should have knowledge, through reports received by him, or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and if he fails to use the means at his disposal to ensure compliance with the law of war.²²⁹

It should be noted, however, that this represented a statement regarding international law, rather than indicating that the doctrine had been incorporated in that form, if at all, in their domestic criminal law.

3.3 CODIFYING CUSTOMARY INTERNATIONAL LAW

Notwithstanding the establishment of the customary international law doctrine in the post war trials, command responsibility was not addressed in an international treaty until Additional Protocol I to the 1949 Geneva Conventions.²³⁰ The lengthy delay had been attributed to a range of reasons, all plausible. These include the suggestion that the jurisprudence of the war crimes trials left uncertainty as to the boundaries of the doctrine and the reluctance of states to prosecute their own nationals on the basis of command responsibility in domestic courts.²³¹ It has also been proposed that, in the period immediately following World War II, there was a general reluctance to engage with international humanitarian law. It was regarded as contrary to the spirit of the age and was seen as challenging the new model of the United Nations and the renunciation of war.²³² Finally, the Cold War undoubtedly had a

²²⁷ UNWCC LRTWC Vol IV 85. The Commentary notes 'The law on this matter is still developing and it would be wrong to expect to find hard and fast rules in universal application. In the circumstances it is inevitable that considerable discretion is left in the hands of the Courts to decide how far it is reasonable to hold a commander responsible for each offence of his troops as he has not been explicitly proved to have ordered.'

²²⁸ Hersch Lauterpacht, (ed) *Oppenheim's International Law* Vol II (7th edn Longmans Green & Co 1952) 202, 572.

²²⁹ Manual of Military Law Part III (HMSO London, 1958) para 631.

²³⁰ Additional Protocol I (n 27).

²³¹ Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 EJIL 2, 5-6.

²³² Josef L Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision,' (1951) 45 AJIL 37, 43.

chilling effect on the development of international law in general.²³³ Nonetheless, and perhaps surprisingly, command responsibility was included amongst the subject matter of Additional Protocol I.

Article 86(2) of Additional Protocol 1 represents a codification of customary international law establishing the responsibility of the superior for his omission to act.²³⁴ It does not impose an obligation directly upon the commander, rather in the style typical of the Geneva Conventions requiring the States Parties to prevent and repress breaches of the Geneva Conventions or the Protocol. The provision did not clarify the issue as to whether the commander was to be regarded as responsible on the basis of negligent performance of a duty or on the basis of complicity.²³⁵ This continuing question will be addressed further in the following chapter in relation to the jurisprudence of the ad hoc international criminal tribunals.

There is a requirement for actual or imputed knowledge as the Article provides that the commander may incur responsibility 'if they knew or had information which should have enabled them to conclude' that their subordinates were committing or were about to commit violations of humanitarian law. The divergence between the English and French text with regard to the issue of the definition of imputed knowledge has given rise to continued academic discussion. The English text referred to 'information which should have enabled them to conclude in the circumstances at the time' while the French text insisted on by their delegation translated as 'information enabling them to conclude.' The Commentary proposes that the French version should be preferred as more accurately reflecting the treaty provision.²³⁶ It has been suggested that the English wording would enable the commander to be found responsible on the basis of a negligence standard while the French version requires actual knowledge, this is not unanimously accepted.²³⁷ Finally responsibility is incurred on the basis that the commander failed to take all feasible measures within their power to prevent or repress the breach.²³⁸

Article 87 addressing 'Duties of commanders' similarly establishes obligations on the States parties and the parties to the international conflict. The approach to the offences covered

²³³ Mettraux (n 25) 3.

²³⁴ Smidt (n 68) 202; *Celebici* case Judgment (n 73) para 340; *Prosecutor v Blaskic* (Judgment) ICTY-95-14-T (3 March 2000) para 324; Matthew Lippman, 'The Evolution and Scope of Command Responsibility' (2000) 13 LJIL 158.

²³⁵ Chantal Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior' (2007) 5 JICJ 624.

²³⁶ Commentary on the Additional Protocols of 1977 (n99) para 3545.

²³⁷ *Ibid* para 3541. Per contra see Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable to Armed Conflicts Geneva (1974-1977) Vol IX CDDH/II/SR. 61 para 59 where the French delegate states 'Any resulting difference between the two texts would at least not be a difference of substance.' See also the remarks of the Canadian delegate at para 57.

²³⁸ AP I (n26) art 86(2).

differs from the preceding article as it refers to the obligations to punish subordinates who have committed offences rather than the criminal responsibility arising from the failure to prevent underlying crimes. This contrasts with the position under article 86 which is restricted to addressing present and future offences. The first paragraph of the provision requires the States Parties and parties to a conflict to require military commanders to prevent and where necessary to suppress and report to the relevant authorities breaches of the Geneva Conventions and the Protocol. The internal structure of article 87 is obscure with the third paragraph appearing to restate the first, although it has been described as specifying better the duties of the commander in including the requisite mens rea under the doctrine.²³⁹ In both paragraphs the duty to prevent or repress extended beyond subordinates to 'other persons under their control.' As the Commentary notes this reflects the position of the commander of an occupation force with responsibility extended to both units outside their chain of command operating within their area of responsibility and the local population of the area of occupation.²⁴⁰

The Commentary and it appears the majority of academic opinion, considered that article 86, which establishes the basis of liability based on the failure to prevent or repress a breach of international humanitarian law must be read in conjunction with article 87, which then establishes the specific duties of the commander.²⁴¹ There are, however, others who take the view that it is wrong to adopt this approach; proposing rather that the first article codifies the concept of command responsibility as an international law doctrine, while article 87 is concerned with a separate obligation under domestic criminal law concerned with the obligation to punish.²⁴² This latter option does provide an explanation for the differing temporal periods applicable in the two articles. As noted, this analysis represents a minority view among commentators or in the ad hoc tribunals' jurisprudence.

The second paragraph of the article addresses the general requirement that commanders in accordance with the principle of responsible command ensure that the armed forces under their command are aware of their obligations under international humanitarian law, in particular the Geneva Conventions and the Protocols.

²³⁹ Meloni, *Command Responsibility in International Law* (n 47) 67. This may relate to the introduction of Article 87 in the course of the Conference.

²⁴⁰ Commentary on the Additional Protocols of 1977 (n 236) para 3555.

²⁴¹ *ibid* para 3541; Kirsten ML Keith, 'The Mens Rea of Superior Responsibility as Developed by ICTY jurisprudence' (2001), 14 LJIL 626; Meloni, *Command Responsibility in International Law* (n 47) 70.

²⁴² Yuval Shany and Keren R Michaeli, 'The Case Against Ariel Sharon: Revising The Doctrine of Command Responsibility' (2002) 34 NYU J Int'l L & Pol 797, 838-840; Barry Sander, 'Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence' (2010) 23 LJIL 127-129; Charles Garraway personal conversation with author 2007.

Another issue that remained unresolved was whether the provisions in Additional Protocol I were to be regarded as applicable to civilian superiors as well as military commanders. The context might certainly be said to indicate that the latter were the intended subjects and the language of the two Articles did not readily provide an answer. Again, the Commentary arrived at a view, although this was not clearly reflected in the official text of the Protocol.

Although the immediate effect of the codification of command responsibility doctrine was limited as there was no international appetite to prosecute commanders or indeed civilian superiors on the basis of superior responsibility its impact on the form of the doctrine adopted in the ad hoc international criminal tribunals was decisive. The elements established under article 86(2) namely the superior/subordinate relationship, knowledge or imputed knowledge and the requirement for the existence of a duty to take measure to prevent or repress breaches were the basis for the provisions in their Statutes and were to play an important part in the development of the tribunals jurisprudence in the next round of development of individual criminal responsibility under the ad hoc international criminal tribunals. While not formally part of the Additional Protocol the text of the Commentary has also proved to be of considerable influence in these tribunals case law.

3.4 CONCLUSION

Applying the elements of the principle of responsible command to the proposals put forward by the Commission on the Responsibility of the Authors of the War it is apparent that the proposed structure represented a sophisticated mode of liability which addressed liability for omission with respect to breaches of the law of war on the part of senior politicians and military commanders in Germany. Although the proposed application of the principle of responsible command to civilians extended beyond the boundaries of application of the principle of responsible command the area of application was the highest levels of the strategic direction of warfare.

Command responsibility doctrine as established by the post war war crimes trials developed rapidly from its origins in the controversial trial of General Yamashita. That verdict is noteworthy for its establishment the existence of an affirmative duty laid upon commanders to take appropriate measures within their power to prevent or punish breaches of international humanitarian law with failure giving rise to international criminal responsibility.

In contrast to the Yamashita case the remaining cases established the requirement for knowledge. While, however, there was consensus on the issue of actual knowledge the issue of imputed knowledge remained divisive.

In the Tokyo IMT the doctrine of cabinet responsibility appears to have been applied to certain politicians resulting in the application of collective rather than individual responsibility.

Following a lengthy hiatus the customary international law doctrine, as established in the post-war war crimes trials was subject to partial codification in Additional Protocol I of 1977 in articles 86 and 87. Article 86, in particular article 86(2), establishes the basis of superior responsibility based on their failure to prevent or repress a breach of international humanitarian law if they had actual knowledge or imputed knowledge in the form of 'information which should have enabled them to conclude in the circumstances at the time' that a subordinate was committing or was about to commit either a grave breach under the Geneva Conventions or the Protocol. The provision requires to be read in conjunction with article 87, which establishes the specific positive duties applicable to commanders. This raised an issue of interpretation at the outset with regard to whether and to what extent the duties of superiors generally differed from those of commanders.

The Commentary did emphasise that commanders' responsibility primarily was concerned with the 'members of the armed forces under their command.'²⁴³

The Commentary makes plain the primary obligation of any commander to exercise command and the requirement for the existence of a chain of command in order for the application of internal discipline.²⁴⁴ Under article 87 this system is required to ensure that the members of the force in question comply with international humanitarian law in armed conflict in accordance with the principle of responsible command. The centrality of this provision and its observance is emphasised with the role of the commander described as 'decisive.'²⁴⁵

Article 87(3) appeared to potentially extend the responsibility of commanders beyond their direct subordinates in the chain of command through the reference to 'other persons under his control.'

The Commentary indicated that this was particularly intended to refer to occupation commanders' responsibilities. The wording, however, potentially offered scope for

²⁴³ Commentary to Additional Protocol 1 1977 (n 83), relative to Article 87, para 3554.

²⁴⁴ *ibid*, para 3555.

²⁴⁵ *ibid* para 3550.

development of the doctrine by indicating that the relationship between superior and subordinate was to be read broadly as command is construed as applying more narrowly than the concept of control.²⁴⁶ This approach was indeed applied subsequently in the ad hoc international criminal tribunals in the development of the doctrine on the basis of the exercise of effective control.

The next chapter will take forward the review of the development of the customary international law form of the doctrine as developed in the ad hoc international criminal tribunals on the basis of the post-war war crimes tribunals jurisprudence and the application of Articles 86 and 87 of Additional Protocol I.

²⁴⁶ *ibid* para 3555.

THE DEVELOPMENT OF COMMAND RESPONSIBILITY DOCTRINE IN THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS

4.1 INTRODUCTION

The previous chapter examined how the post-war war crimes trials had established by their close a customary international law command responsibility doctrine based on and drawing from the principle of responsible command. The subsequent partial codification of the doctrine in the Additional Protocol provided the first formal definition of the doctrine and the principle of responsible command.

This chapter will continue the process of defining command responsibility doctrine by assessing the developments in the concept in the ad hoc international criminal tribunals' jurisprudence. Based on the limited precedents from the war crimes trials and the provisions in Additional Protocol I the work of the ad hoc international criminal tribunals has developed the customary international law form of the doctrine so that it has become a firmly established customary law doctrine.

Founded as it is in customary international law the process of doctrinal development has been described as driven by judicial interpretation and arguably on occasion judicial activism, a description of the process arguably inevitable in view of the structure of the tribunals' statutes and the limited case law available. Notwithstanding the development of the doctrine in the ad hoc tribunals jurisprudence as their mandate drew to a close there still remained significant areas of uncertainty with respect to the doctrine. The first issue related to the nature of the customary law form of the doctrine with the accepted structure of the doctrine as a mode of liability with the commander incurring responsibility for their subordinates underlying crime being subject to a vigorous challenge from those regarding it rather as a separate offence. The second relates to the attempts by the ad hoc tribunals to broaden the reach of the doctrine through changes to the nature of the underlying crime and the role of the subordinate in that crime that will incur criminal responsibility on the part of the commander.

4.2 COMMAND RESPONSIBILITY IN THE AD HOC TRIBUNALS

The International Criminal Tribunals for the former Yugoslavia and Rwanda, were established by the UN Security Council.²⁴⁷ A consequence of their status as UN subsidiary organs, and the absence of a treaty, was the grounding of their jurisdiction in customary international criminal law. Building on the basis of the legacy of the post-war war crimes trials the ad hoc international criminal tribunals, in particular the ICTY, significantly developed customary international criminal law regarding command responsibility.²⁴⁸ As had been the case with their predecessors, however, this reliance on limited precedents and the need to found their jurisprudence in customary international law led, on occasions, to confusion.

As has been said at the establishment of the ad hoc international criminal tribunals by the UN Security Council the extent of command responsibility doctrine and its basis were still an issue. Although the post-war war crimes tribunals had established a useful foundation both generally with respect to international criminal law and particularly with respect to command responsibility doctrine the ad hoc tribunals continued the development of the concept of command responsibility doctrine as a significant tool in the treatment of atrocities. With limited precedents it was inevitable that the judges would engage not only in interpretation but in expansion of the doctrine. As has been said on some occasions the arguably created new law rather than developing the doctrine. This chapter seeks to establish the current scope and the meaning of command responsibility in the ad hoc tribunals jurisprudence as their work drew to a conclusion. The task is not straightforward due to what has correctly been described as the complex nature of the doctrine.²⁴⁹

The relationship between the form of command responsibility doctrine as codified in Additional Protocol I and as reflected in articles 7(3) and 6(3) of the ad hoc tribunals Statutes

²⁴⁷ The ICTY was established under UNSCR 827 (1993), UN Doc S/RES/827 (1993), dated 25 May 1993, which adopted the Statute of the Tribunal annexed to the Interim Report of the Commission of Experts (S/25274). The ICTR was similarly established under UNSCR 955 (1994), UN Doc S/RES/955(1994) dated 8 November 1994, with the Statute of the Tribunal annexed. Both tribunals were therefore UN organs.

²⁴⁸ Cassese, *International Criminal Law* (n 4) 241-2; Mettraux (n 25) 8-14; Meloni, *Command Responsibility in International Criminal Law* (n 47); Bonafe, 'Finding a Proper Role for Command Responsibility' (n 171) 601-602; Sander (n242) 106; van Sliedregt, 'Command Responsibility at the ICTY' (n 137) 378.

²⁴⁹ van Sliedregt, 'Command Responsibility at the ICTY' (n 136) 377ff.

apparent.²⁵⁰ The criminal responsibility of the commander is defined in parallel to that of the subordinate responsible for the underlying crime.²⁵¹ Thus the structure of article 86(2), '[t]he fact that a breach [of the Geneva Conventions or Protocol I] was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility', is closely reflected in the wording of the ICTY Statute, '[t]he 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.'²⁵² A consequence of the adoption of this structure was that the nature of command responsibility remained an unresolved issue. Command responsibility as developed in the case law of the post war tribunals was generally regarded as a mode of liability with the commander incurring responsibility for the crimes of his subordinates. Under Additional Protocol I command responsibility could either be interpreted either as a mode of liability or a separate offence of dereliction of duty on the part of the superior. A similar open approach was adopted with respect to the structure of article 7(3) of the ad hoc tribunals statutes. The effect was to leave doubt over the nature of command responsibility throughout the period of the tribunals' operations.

The leading case on command responsibility under customary international law as developed by the ad hoc tribunals remains the *Celebici* case Judgment which represented the first comprehensive judgment in the ad hoc tribunals jurisprudence regarding the doctrine.²⁵³ The elements of command responsibility under article 7(3) of the ICTY Statute were analysed by the Trial Chamber as follows:

- (i) the existence of a superior-subordinate relationship.
- (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
- (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.²⁵⁴

This structure was consistently followed in subsequent tribunal judgments and academic literature. Notwithstanding the differences in the doctrine under the ICC Statute it continues to

²⁵⁰ Meloni, *Command Responsibility in International Law* (n 47) 66-67 and 79; *Prosecutor v Aleksovski* (Trial Judgment) ICTY-95-14/1-T (25 June 1999) para 70.

²⁵¹ Kai Ambos, 'Superior Responsibility', Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* Vol .3, (1st edn OUP 2002) 820; Meloni, *Command Responsibility in International Law* (n 46) 79, van Sliedregt, *Command Responsibility at the ICTY* (n 137) 397-8.

²⁵² Art 7(3) ICTY Statute. The same structure was adopted in Article 6(3) ICTR Statute.

²⁵³ *Celebici* case Judgment (n 73).

²⁵⁴ *ibid* (n 72) para 346; affirmed in *Celebici* case Appeal Judgment (n 124) paras 189-198, 225-226, 238-239, 256, 263 and 346.

be adopted by some commentators with regard to the nature of command responsibility in terms of the ICC Statute.²⁵⁵

This chapter falls into four sections addressing the elements of command responsibility doctrine as developed under the ad hoc tribunals' jurisprudence. The first section will address the commission of an underlying crime by a subordinate as a pre-requisite for the application of the doctrine. The second section will address the superior-subordinate relationship and effective control. The third section will examine the necessary mens rea and the fourth, the failure on the part of the commander to take the necessary and reasonable measures to prevent or punish their subordinates' crimes. The final section of the chapter addresses the issue of causation.

4.2.1 THE COMMISSION OF AN UNDERLYING CRIME

The approach adopted by the *Celebici* Trial Chamber and followed in the subsequent ad hoc tribunal's cases of regarding the commission of an underlying crime by a subordinate of the accused as a requirement for the application of the doctrine but nonetheless not an element of the doctrine as such was challenged in the *Oric* Case. The Trial Chamber in the latter case in the course of considering a Defence challenge to the Prosecution's broad based analysis of the requirement for the commission of an underlying crime, concluded that the commission of an underlying crime should rather be regarded as a fourth element of the doctrine.²⁵⁶ The finding was however rejected by the Appeals Chamber settling the question as far as the ad hoc tribunals jurisprudence is concerned although there is continuing academic support for its inclusion.²⁵⁷

A more fundamental issue, however, remained to be answered, namely, the interpretation of the term 'committed' in article 7(3) or article 6(3). Was this restricted on the basis of a literal interpretation to those crimes in which the subordinates were the principal perpetrators?

²⁵⁵Treatment of this issue was on occasions less systematic in the ICTR although after initial uncertainty it has followed its sister tribunal's analysis of command responsibility. see *Prosecutor v Akayesu*, (Judgment) ICTR -96-4-T (2 September 1998) paras 486-491; Meloni, *Command Responsibility in International Law* (n 47) 44 criticises the lack of structure in the requirements with respect to the mens rea and actus reus.

²⁵⁶Judgment) (n 135) para 294.

²⁵⁷ *Celebici* case Judgment,(n73) para 346 'the commission of one or more of the crimes under Articles 2 to 5 of the Statute is a necessary prerequisite for the application of Article 7(3)' rejecting defence position commission of crime was an element of the doctrine; *Prosecutor v Oric* (Appeals Judgment) ICTY-03-68-A (3 July 2008) para 18 'For a superior to incur criminal responsibility under Article 7(3) , in addition to establishing beyond reasonable doubt that his subordinate is criminally responsible, the following elements must be established beyond reasonable doubt ;i) the existence of a superior –subordinate relationship; ii) that the superior knew or had reason to know that his subordinate was about to commit a crime or had done so; and iii) that the superior failed to take the necessary and reasonable measures to prevent his subordinate's criminal conduct or punish his subordinate.' Footnotes omitted.

Alternatively, was it to be given a broad reading as including any of the other modes of liability under article 7(1) or article 6(1) and indeed possibly even more broadly? The question was not considered directly in the ad hoc tribunals early cases for, as the *Oric* Trial Chamber noted in June 2006, 'until recently, both the requirement of a principal crime [...] and its performance in any of the modes of liability provided for in Article 7(1) appeared so obvious as to hardly need to be explicitly stated.'²⁵⁸

Analysing the issue the *Oric* Trial Chamber confirmed the finding in the *Boskoski and Tarculovski* proceedings that a broad interpretation of the term 'committed' was to be preferred. They supported this conclusion by proposing that the term was open to different interpretations dependant on context, with the differing usage of the term in articles 7(1) and 7(3) speaking for such a reading. As a broad interpretation could not be excluded decisive weight had to be afforded to the purpose of the doctrine, requiring commanders to ensure their subordinates complied with international humanitarian law.²⁵⁹ The term accordingly applied to all modes of criminal responsibility under article 7(1), both those involving positive acts and those concerning culpable omissions.²⁶⁰

The ruling was affirmed in the *Blagojevic and Jokic* Appeal Judgement.²⁶¹ Referencing previous holdings that criminal responsibility under article 7(3) was based primarily on article 86(2) of Additional Protocol I the Appeals Chamber concluded that the meaning of 'commit' in article 7(3) tracked the broad interpretation of the term adopted in that instrument. This broad interpretation was supported by reference to the general object and purpose of Protocol I, the purpose of command responsibility under that Protocol to ensure compliance with international humanitarian law, the intention behind the establishment of the ad hoc criminal tribunal to put an end to violations of international humanitarian law and finally the declared purpose of command responsibility under the Statute to hold commanders to account for their failure to prevent or punish the crimes of their subordinates.²⁶² Here the Appeals Chamber analysis was clearly linking the principle of responsible command with the doctrine of command responsibility. The judgment notes the object and purpose of Protocol I is to 'reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application'. Mettraux in his foundational study of command responsibility doctrine observes that both the principle and the associated doctrine serve to

²⁵⁸ *Prosecutor v Oric* Judgment (n 136) para 295.

²⁵⁹ *ibid* paras 298- 300.

²⁶⁰ *ibid* paras 302 and 305.

²⁶¹ *Prosecutor v Blagojevic and Jokic*, (Appeal Judgment) ICTY-02-60-A (9 May 2007).

²⁶² *Prosecutor v Blagojevic and Jokic* Judgment (n 10) para 280-282. The analysis was affirmed by the Appeals Chamber in *Prosecutor v Nahimana and Others* (Appeal Judgement) ICTR-99-52-A (28 November 1997) para 485.

enforce international humanitarian law through and by commanders.²⁶³ The state is behind both the doctrine and the principle. The principle is then applied by the Appeals Chamber to extend the boundaries of the doctrine with the Chamber holding that it could not accept that the obligation to prevent or punish violations of international humanitarian law extended only to the principal perpetrator.

This issue has given rise to academic controversy with a number of respected commentators contending that the position adopted in the ad hoc tribunals' jurisprudence is mistaken.²⁶⁴ The purposive analysis of the requirement for the commission of the underlying crime adopted by the ad hoc tribunals in these cases has been claimed to lack support either in the post-war precedents or state practice. While it may not fit happily with international criminal law it does fit rather well with the purposes of international humanitarian law and the principle of responsible command. The interpretation adopted in the ad hoc tribunals' jurisprudence has also been criticised on more general grounds.²⁶⁵

The post-war precedents, and indeed the early cases concerning command responsibility in the ad hoc tribunals' jurisprudence, were concerned with the commission of criminal offences in which the accused's subordinates were the principal perpetrators. As Judge Hunt commented in the *Hadzihasanovic* Article 7(3) AC Decision, 'the customary international law which supports the existence of the principle... supports the application of that principle in the situations which reasonably fall within it.'²⁶⁶ The application of the obligation to prevent or punish violations of international criminal law to those cases in which subordinates through their role as accomplices played a substantial role in the crime appears to reasonably come within that analysis.²⁶⁷ Customary international law is not static and tribunals, particularly those in the position of the ad hoc tribunals necessarily have engaged in the development of the existing limited customary international law and the limited assistance provided by their respective statutes.

If it were to be interpreted narrowly to include only those individuals who had physically committed the underlying crime it would not effectively hold commanders to account and

²⁶³ Mettraux, (n 25) 54 and fn(74)

²⁶⁴ Kai Ambos, 'Command Responsibility and Organisationsherrschaft' (n 94) 127, 137

²⁶⁵ K Ambos, 'Joint Criminal Enterprise and Command Responsibility' (n 29) 78-9, van Sliedregt, 'Command Responsibility at the ICTY' (n 137) 387; Mettraux,(n 25) 35-136; contra Gideon Boas, James L Bischoff and Natalie L Reid (Eds) '*International Law Practitioner Library-Vol 1 Forms of Responsibility in International Criminal Law*' (1st edn, CUP, 2008) 237-248,

²⁶⁶ *Hadzihasanovic* Article 7(3) AC Decision (n112) Separate and Partially Dissenting Opinion of Judge David Hunt para 39

²⁶⁷ *Prosecutor v Blagojevic and Jokic* Appeal Judgement (n261) para 282.

accordingly would not effectively ensure compliance with international humanitarian law or the principle of responsible command.²⁶⁸

In view of the ad hoc tribunals position that the requirement that a subordinate has committed the underlying offence does not require that they have directly committed the offence, does the criminal responsibility of an identifiable subordinate require to be established? The ad hoc tribunals accepted jurisprudence requires at least identification of subordinates through their membership of an identified group over which the commander exercised effective control.²⁶⁹The *Oric* Appeals Chamber confirmed that although those responsible for the direct perpetration of the underlying offence did not require to be identified the existence of one or more culpable subordinates required to be established in order to establish responsibility under article 7(3).²⁷⁰

The issue of whether a commander may incur command responsibility for crimes that a subordinate commander in the chain of command had failed to prevent or punish, or as one commentator has summarised the situation, for ‘multiple superior responsibility’ has been debated²⁷¹ The Trial Chamber convicted Oric on the basis of command responsibility under article 7(3) of the ICTY Statute for his failure to prevent the murder and cruel treatment of detainees held in the Srebrenica detention facility.²⁷² They found that the Srebrenica military police were responsible for the detention of Serb detainees at that location during the relevant period during which they were ill-treated and some were killed.²⁷³ The Trial Chamber found no evidence that those directly responsible were part of the military police unit in question. The military police were, however, held to be responsible for the humane treatment of the detainees during the period of their detention. The Srebrenica military police commander accordingly had the responsibility to ensure the detainees were properly guarded and treated appropriately.²⁷⁴ The Trial Chamber found that a superior subordinate relationship descended from Oric to the Srebrenica military police unit responsible for the proper treatment of the detainees through an identified subordinate commander Krzdic²⁷⁵

²⁶⁸ *ibid* paras 281-282; *Prosecutor v Oric* Judgment (n 136) para 300.

²⁶⁹ *Prosecutor v Krnojelac*, (Decision on the Defence Preliminary Motion on the Form of the Indictment) ICTY -97-25-PT 24 February 1999 paras 19 and 46, *Prosecutor v Hadzihasanovic et al* (Judgment) ICTY-01-47-T (15 March 2006) para 90; *Prosecutor v Blaskic*, (Appeal Judgment) ICTY Case No IT-01-47-T (29 July 2004) para 217.

²⁷⁰ *Prosecutor v Oric* Appeal Judgment (n 257) para 35.

²⁷¹ See van Sleidriegt, (n 2) 383; also Meloni, *Command Responsibility in International Law* (n 47) 90.

²⁷² *Prosecutor v Oric* Judgment (n 136) para 578.

²⁷³ *ibid* para 488.

²⁷⁴ *ibid* para 490.

²⁷⁵ *ibid* para 533.

It has been proposed that the Trial Chamber implicitly established Oric's command responsibility on the basis of multiple command responsibility through his identified subordinate commander for his failure to prevent the ill treatment of the Serb detainees for whom the Srebrenica military police under his command had responsibility.²⁷⁶

While this may have been their analysis it was, however, defective as the Appeals Chamber correctly concluded.

In their analysis in the course of their judgment the Appeals Chamber found that the Trial Chamber had failed to make findings crucial to their conviction of Oric under article 7(3) of the ICTY Statute. They failed to resolve the issue of the alleged criminal responsibility of his only identified subordinate Krzdic. They had also failed to resolve whether Oric knew or had reason to know that his subordinate was about to or had committed crimes.²⁷⁷ Rather than examine these issues they concluded that the Trial Chamber had concentrated on whether Oric had reason to know of the commission of the actual crimes committed by the unknown perpetrators which were not directly committed by his subordinate.²⁷⁸ The Appeals Chamber accordingly reversed his convictions under article 7(3) of the ICTY Statute in relation to these charges.

The Appeals Chamber found in the course of its judgment that the Trial Chamber did not find Krzdic, criminally responsible on the basis of article 7(3). The Trial Chamber did not make any findings as to whether the principal perpetrators were under the effective control of either Krzdic or his predecessor. The Trial Chamber had not found there was a superior-subordinate relationship in existence between Krzdic and the direct perpetrators or the guards. It had not considered whether Oric could possibly incur responsibility under article 7(3) with respect to his subordinate's criminal responsibility on the same basis.²⁷⁹

The concept of multiple command responsibility has been questioned on the basis it represents an unacceptable extension of what is, in the case of omission liability, already a weak link between the commander and the underlying crime and was raised by Oric as a preliminary point in the Oric Appeal.²⁸⁰ Reviewing the issue the Appeals Chamber in that case recalled that effective control marked the existence of a superior subordinate relationship. They then concluded that the question of 'whether – due to proximity or remoteness of control – the superior indeed possesses effective control is a matter of evidence not of substantive

²⁷⁶ van Sliedregt, 'Command Responsibility at the ICTY' (n137) 383.

²⁷⁷ *Prosecutor v Oric* Appeal Judgment (n 257) 61.

²⁷⁸ *ibid* para 57.

²⁷⁹ *ibid* para 39.

²⁸⁰ *ibid* para 19.

law.²⁸¹ It has been proposed that command responsibility complies with the requirement for personal culpability when the omission on the part of the commander can be closely linked to the relevant subordinate's underlying crime.²⁸² As indicated by articles 86 and 87 of Additional Protocol I this, reflecting the principle of responsible command, is to ensure compliance with international humanitarian law. The initial prosecutions in the ICTY relating to command responsibility were of low-ranking individuals in a military context who had direct responsibility for subordinates responsible for the direct commission of the underlying crimes. It has been proposed that the ICTY jurisprudence indicates a preference for charges based upon joint criminal enterprise when addressing the responsibility of senior commanders in the chain of command.²⁸³ It is arguable, however, that in the case of more senior commanders in formally structured state armed forces command responsibility captures better the role played by them in the matter. Almost invariably a senior commander will not exercise his command authority directly with respect to troops serving in tactical units or formations but through intermediate commanders in subordinate formations who in turn exercise control through subordinate commanders in command of individual units and subunits. In such a case the commander who operates through the chain of command is reliant upon information being passed to him with respect to the underlying offences through the routine or specific reporting process. In the course of operations such as those conducted in Iraq and Afghanistan in recent years the doctrine would appear to be relevant with respect to their responsibilities under the doctrine of command responsibility based upon the precedents afforded by the Hostages and High Command trials discussed in the preceding chapter.

4.2.2 SUPERIOR SUBORDINATE RELATIONSHIP AND EFFECTIVE CONTROL

In order for an accused to incur responsibility under the ad hoc tribunals jurisprudence for his failure to prevent or punish crimes committed by another it is a fundamental requirement of command responsibility for a superior-subordinate relationship to be established between the accused and those who committed the underlying crimes.²⁸⁴ The ad hoc international criminal tribunals introduced two significant changes in customary international law affecting that

²⁸¹ *ibid* para 20.

²⁸² van Sliedregt, 'Command Responsibility at the ICTY' (n 137) 387.

²⁸³ See analysis in Mettraux (n25) 150-152; See additionally discussion regarding the operation of JCE and command responsibility and the chain of command in Danner & Martinez (n28) 75.

²⁸⁴ *Celebici* case Judgment (n 73) para 647; see also *Prosecutor v Kordic et al* (Judgment) ICTY-95-14/2-T (26 February 2001) para 408.

relationship. First was the reduction in the significance of de jure command authority and the extension of command responsibility to their de facto counterparts. The post -Second World War crimes trials largely concerned individuals who had held senior command appointments and who formally exercised disciplinary authority over their subordinates within the chain of command or in the case of those appointed as occupation commanders the territory and its inhabitants in the area of occupation. Even then despite a formal appointment, a de jure commander lacking the ability to control his subordinates would not be regarded as incurring superior responsibility.²⁸⁵

As the *Celibici* Trial Chamber noted, the situation in the former Yugoslavia was one, in which, 'previously existing formal structures [had] broken down and where, during an interim period, the new, possibly improvised, control and command structures, may be ambiguous and ill-defined'.²⁸⁶ A similar situation clearly existed in Rwanda during the period in which the Rwandan Genocide occurred. This was reflected in the approach adopted in the ad hoc tribunals' jurisprudence regarding de jure commanders. Although in the early days of the tribunals there were indications of the traditional emphasis on de jure appointments with the Appeals Chamber of the ICTY considering that possession of de jure power gave rise to a presumption of effective control this initial hesitancy soon changed.²⁸⁷ The ad hoc tribunals adopted the position that de jure authority did not equate to effective control.²⁸⁸ The consequence is that even where the case concerns a de jure commander the prosecution is required to prove that the accused exercised effective control over their subordinates in the hierarchy at the relevant time.²⁸⁹

The chaotic situation confronted by the tribunals drove the development of the concept of de facto command as a significant concept in command responsibility doctrine in customary international law. Such commanders possessed de facto command authority in the sense that they had acquired similar powers of control over their subordinates to their de jure counterparts without having been formally appointed by higher authority to their positions.

²⁸⁵ As in the case of Cappellini and others Italy Court of Cassation of Milan 12 July 1945, no 41 in 71 *Rivista Penale* 1946, II, 84-89, cited in Cassese, *International Criminal Law* (n 4) 248 as representing a situation where an officer deprived of his authority was held not to be responsible for the actions of his subordinates. Viewed in translation at San Remo Institute. Case relates to Italian forces following the armistice where a Carabinieri commanding officer was deprived of his command authority by the Germans.

²⁸⁶ *Celibici* case Judgment (n 74) para 354.

²⁸⁷ *Celibici* case Appeal Judgment (n 125) para 197, 'a court may presume that possession of such power *prima facie* results in effective control...'

²⁸⁸ *Prosecutor v Oric* Appeal Judgment (n 257) para 91, 'de jure authority is not synonymous with effective control. Whereas the possession of *de jure* powers may certainly suggest a material ability to punish criminal acts of subordinates, it may be neither necessary or sufficient to prove such ability.' See also para 92, 'the possession of *de jure* authority, without more, provides only some evidence of such effective control.'

²⁸⁹ *Prosecutor v Oric* Judgment (n 136) para 92.

Having discussed the difficulties created by the emergence of improvised hierarchies with regard to de jure commanders the *Celibici* Trial Chamber went on to determine that:

Persons effectively in command of such more informal structures, with power to protect and punish the crimes of persons who are in fact under their control, may in certain circumstances be held responsible for their failure to do so. [...] The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility.²⁹⁰

The *Celibici* Trial Chambers finding was affirmed by the Appeals Chamber which confirmed that:

[u]nder Article 7(3) of the ICTY Statute a commander [...] is thus the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed.²⁹¹

Analysing the situation faced by the Tribunal the Appeals Chamber noted that to enforce the law required the establishment of the responsibility of commanders who the evidence indicated controlled the direct perpetrators without having a formal commission.²⁹²

The Appeals Chamber noted that the Trial Chamber had reviewed the basis and the content of de facto authority. It then confirmed that in determining questions of responsibility it was necessary to review the effective exercise of power or control and not formal titles. Although the control exercised by a de jure or de facto commander might take different forms a 'de facto superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts'.²⁹³ The Appeals Chamber concluded its analysis by noting that provided that a commander had effective control over subordinates he would be held responsible if he failed to prevent or punish their commission of crimes.²⁹⁴

The absence of a de jure appointment has been suggested as creating a difficulty with respect to the basis of a de facto commander's duty to act. It has been proposed that the existence of an expectation of obedience and of subordination establishes the necessary connection with regard to such commanders.²⁹⁵ The *Halilovic* Trial Chamber held that 'international humanitarian law entrusts commanders with a role of guarantors [...] and for this reason they are placed in a position of control over their subordinates, and it is this position which

²⁹⁰ *Celibici* case Judgment (n 74) para 354; for their general consideration of existing practice see paras 346-349; see Cassese, *International Criminal Law* (n 4) 247 regarding general conditions of command responsibility.

²⁹¹ *Celibici* case Appeal Judgment (n 125) para 192.

²⁹² *ibid* para 193.

²⁹³ *Ibid* para 197.

²⁹⁴ *ibid* para 198.

²⁹⁵ See Mettraux (n 25) 143.

generates a responsibility for failure to act'.²⁹⁶ The basis in other words of the de facto commanders authority is his exercise of effective control within a hierarchical relationship, namely the chain of command. The consequence of this situation was an emphasis on the need to identify the individual who was effectively exercising control.²⁹⁷

The essential element is the commander's ability to impose his will on his subordinates. As the *Celebici* Trial Chamber noted, 'the factor critical to the exercise of command responsibility is the actual possession or non-possession, of powers of control over the actions of subordinates'.²⁹⁸ Later tribunals have indicated additional factors in their assessment of whether a commander possessed this standard of control. These differ from the indicia used in the establishment of actual knowledge through circumstantial evidence in that they are not indicators of responsibility for application in the case of circumstantial evidence, differing rather with respect to each case within the overall boundaries of the establishment of effective control. The same situation applies with respect to factors that were decisive in determining the commander in question lacked effective control.²⁹⁹

In the case of commanders of armed militias and rebel groups disciplinary arrangements may be rough and ready and effective control may be driven by the commander's ability to impose his will on his followers. In the Special Court for Sierra Leone the *Brima* Trial Chamber concluded in their judgment, '[t]he power of the superior to issue orders is crucial, although these orders may be criminal in nature. Similarly, the superior must be capable of taking disciplinary action [...]'.³⁰⁰

The ad hoc tribunals held that substantial influence is not enough to establish superior responsibility.³⁰¹ Any individual who lacks the ability to prevent or punish and has to persuade their audience to comply lacks the essential requirement of effective control.

Applying the concept of effective control, the ad hoc tribunals' jurisprudence confirmed that command responsibility could apply to commanders throughout the chain of command

²⁹⁶ *Prosecutor v Halilovic* Judgment (n 109) para 87.

²⁹⁷ *Celebici* case Judgment (n 74) para 197.

²⁹⁸ *ibid* para 736; see Mettraux (n 25) notes at 164 and respective footnotes factors developed in individual tribunal cases from the findings of the respective chambers such as 'effective disciplinary and investigatory powers of the accused.'

²⁹⁹ See Mettraux (n 25), 168-170 for a detailed review of these factors.

³⁰⁰ *Prosecutor v Brima et al* (Judgment) SCSL-04-16-T, 20 June 2007, para 787. The Trial Chamber developed a specific set of indicia for the forces in their jurisdiction (para 788) such as 'first entitlement to the profits of war, such as looted property and natural resources [...].'

³⁰¹ *Celebici Case* Judgment (n 74) para 266, 'Nothing relied on by the Prosecution indicates that there is sufficient evidence of State Practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law.' Accordingly, Delalic although of considerable standing in the community was not held to have command status. See also *Prosecutor v Kordic* Judgment (n 263) para 841 'In sum the Chamber finds that Kordic was neither a commander nor a superior [...] since he possessed neither the authority to prevent the crimes that were committed, nor to punish the perpetrators of those crimes.' Footnote omitted.

depending upon the circumstances of the case. The remoteness of the commander in question from the subordinate responsible for the commission of the underlying crime does not preclude responsibility provided that they exercise effective control, either directly or indirectly, as discussed above with respect to the *Oric* prosecution. The temporary nature of a superior subordinate relationship does not prevent the existence of a relationship of subordination provided that the commander exercises effective control in the sense of the ability to prevent or punish, for example when troops are temporarily attached for a particular operation to another unit at the time the crime was committed.³⁰² The position differs, however, in NATO operations and Coalition operations such as those against Iraq where units or formations are assigned for operational purposes to other formations. In such cases a commander may be given operational command of attached forces, however, disciplinary authority is retained by the providing state. In that case all such a commander could do would be to withdraw the force or a constituent unit or employ it on another task and report the allegations to the national authorities concerned.

4.2.3 MENS REA -THE REQUIREMENT OF KNOWLEDGE

In order to incur responsibility under the ad hoc tribunals statutes a superior must either have had actual knowledge or had reason to know that his subordinates were about to or had committed a crime.³⁰³ The ad hoc tribunals case law confirmed that actual knowledge could be established either directly or, in the absence of the former, through circumstantial evidence. The ad hoc tribunals rejected the existence of a general presumption of knowledge when subordinates' crimes were numerous and widespread which had been applied in post Second World War crimes trials.³⁰⁴ They did, however, make use of indicia in determining whether a commander had actual knowledge in the absence of direct evidence. Those listed by the UN Commission of Experts in their Final Report and applied in the *Celebici* case and subsequently in the ad hoc tribunals' jurisprudence may serve as an illustration. The Committee of Experts identified the following namely, '(a) The number of illegal acts; (b) the type of illegal acts; (c)

³⁰² *Prosecutor v Kunarac et al*, (Judgment) ICTY -96-23-T & IT-96-23/1-T (22 February 2001) para 399; 'The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination between the members of a unit and its commander. To be held liable for the acts of men who operated under him on an ad hoc or temporary basis, it must be shown that, at the time when the acts charged in the Indictment were committed, these persons were under the effective control of that particular individual.'; See also *Prosecutor v Halilovic*, (n109) para 61 'To hold a commander liable for the acts of troops who operated under his command on a temporary basis it must be shown that at the time when the acts charged in the indictment were committed, these troops were under the effective control of that commander.'

³⁰³ *Celebici* case Judgment (n 73) para 383.

³⁰⁴ *ibid* para 393; *Prosecutor v Blaskic* Judgment (n 269) para 307; *Prosecutor v Aleksovski* Judgment (n 250) para 80.

the scope of illegal acts; (d) the time during which the illegal acts occurred; (e) the number and type of troops involved; (f) the logistics involved, if any; (g) the geographical location of the acts; (h) the widespread occurrence of the acts; (i) the tactical tempo of operations; (k) the modus operandi of similar illegal acts; (l) the officers and staff involved; (m) and the location of the commander at the time. Additional indicia have also subsequently been utilised in the tribunals case law.³⁰⁵ The use of such indicia has the implicit risk that, despite the rejection in the tribunals' jurisprudence of a presumption of knowledge on the part of the superior, the actual knowledge standard applied in practice can in fact stray into that territory. This situation is illustrated in the *Blaskic* case in which the Trial Chamber commented that '[i]t is [...] difficult to see how these crimes which the accused himself thought had been organised and ordered at a high level of the military hierarchy could have escaped his knowledge'.³⁰⁶

Although the same standard of knowledge is applicable to both military commanders and civilian superiors it is clearly more straightforward to prove the existence of such knowledge in the case of military commanders than their civilian counterparts.³⁰⁷ Military units are organised in formations with reporting systems established for the benefit of the commanders including the notification of subordinates' crimes, the related investigations and sentences awarded.³⁰⁸

Command responsibility can apply not only where the commander was found to have actual knowledge of the crimes but also if he had reason to know of the underlying crimes. In contrast to the position regarding the standard of actual knowledge the meaning to be given to the term 'had reason to know' saw diverging interpretations by the *Celibici* and *Blaskic* Trial Chambers.³⁰⁹

Both Chambers were in agreement that the post-World War II jurisprudence had confirmed the existence of a duty on the part of commanders to remain informed concerning their subordinates' activities. They differed, however, regarding to the applicable standard to be applied. The *Celibici* Trial Chamber concluded that the customary law standard had been altered following the adoption of Additional Protocol I. Having regard to the ordinary meaning

³⁰⁵ See *Prosecutor v Prlic* (Judgment) ICTY Case IT-04-74-T, 29 May 2013, para 248 The Trial Chamber noted that '[a]uthority over a hierarchy constitutes an important indicium of knowledge, although it is not determinative...'; See also *Prosecutor v Blaskic* Judgment (n 234) para 307. See also discussion Keith (n 241) 620, See Boas and Others *International Criminal Law Practitioner Library – Forms of Responsibility in International Criminal Law*, Vol 1, Cambridge University Press, Cambridge, 2007, p205 for extensive list of indicia.

³⁰⁶ *Prosecutor v Blaskic* Judgment, (n 234) para 484; for an extended discussion of the categories and forms of knowledge and the utilisation of indicia see Mettraux (n25) 208-218.

³⁰⁷ *Prosecutor v Prlic* Judgment (n305) para 247; *Prosecutor v Oric* Judgment (n 136) para 320.

³⁰⁸ Recognition of this situation goes back to the early days of the doctrine see the discussion regarding the German Army reports and returns procedures in Parks (n 46) 59; see also Smidt (n 70) 183.

³⁰⁹ *Celibici* case Judgment (n74) paras 388-393; *Prosecutor v Blaskic*, Judgment (n 234), paras 324-331.

of the language of article 86(2) and the travaux préparatoires it concluded that a superior could only incur criminal responsibility if some specific information was available to him which put him on notice of the need for additional investigation.³¹⁰ Such offences must be similar in character to those charged, it is not enough that the superior should have been aware of a general low level risk that his subordinates might potentially commit crimes.³¹¹ The *Blaskic* Trial Chamber concluded that the customary international law position had not been changed by Additional Protocol I.³¹² It held that the words 'had information' in article 86(2) must be interpreted broadly. Reading articles 86(2) and article 87 together, in accordance with the Commentary and, given the responsibilities of commanders under international humanitarian law, it found that commanders' duties obliged them to keep themselves informed of the conduct of their subordinates at all times.³¹³

The *Celebici* Appeals Chamber, in contrast to the *Celebici* and *Blaskic* Trial Chambers, found no consistent standard in the post-World War II war crimes trials jurisprudence.³¹⁴ Following the reasoning of the *Celebici* Trial Chamber they considered the interpretation of article 86(2) of Additional Protocol I was straightforward and the literal interpretation of the language of the provision should be preferred.³¹⁵ The consistency in the language used in article 86(2) of AP1, the ILC Report, and the Commentary in their view demonstrated consensus as to the relevant mens rea.³¹⁶ If 'had reason to know' was regarded as an obligation to inquire further on the basis of general information they noted then there was no material difference between article 86(2) and the post-World War II jurisprudence.³¹⁷

Notwithstanding the position adopted in the ad hoc tribunals jurisprudence the relative commentary to article 87 of Additional Protocol I states, 'at this level was held responsible on the basis of his failure to have proper regard to the information everything depends on commanders, and without their conscientious supervision general legal requirements are unlikely to be effective.'³¹⁸ The Appeals Chamber affirmed that the courts which referred to the

³¹⁰ *Celebici* case Judgment (n 73) paras 388-393.

³¹¹ *Prosecutor v Blaskic* Appeal Judgment (n 269) para 41; *Prosecutor v Hadzihasanovic, et al* Judgment (n 269) paras 103-188; see Mettraux (n 25) 199 ff for a discussion of the nature of the knowledge available to the superior and the level of resultant risk.

³¹² *Prosecutor v Blaskic* Judgment (n 234) para 324.

³¹³ *ibid*, paras 328-329.

³¹⁴ *Celebici* case Appeal Judgment (n 124) para 229.

³¹⁵ *ibid* para 233, 'It means that, at the critical time, the commander had in his possession such information that should have put him on notice of the fact that an unlawful act was being, or was about to be committed...'

³¹⁶ *ibid* paras 234-5.

³¹⁷ *ibid* para 235.

³¹⁸ 'Such offences must be similar in character to those charged, it is not enough that the superior should have been aware of a general low-level risk that his subordinates might potentially commit crime,' Commentary on the Additional Protocols of 8 June 1977 (n99) para 3550.

existence of a duty to know also produced evidence that the accused were put on notice. The position is uncertain. The argument that if a commander has actual knowledge the duty to know would be obiter is correct in itself but not conclusive as to the existence of the obligation.³¹⁹ As noted above, the Appeals Chamber concluded that the customary law at the time of the post-war war crimes trials did not impose a general duty to know which if breached would render a commander responsible for his subordinates crimes.³²⁰ Commanders represent the first line of defence in ensuring that effective control is maintained over their subordinates and that their subordinates comply with international humanitarian law standards. Arriving at a position under which a commander available to him, but not when they lacked information as a result of negligently failing to exercise effective control must be regarded as questionable in view of the accepted relationship between the principle of responsible command and command responsibility doctrine. Command responsibility doctrine is founded on a utilitarian understanding of the most effective methods of promoting and ensuring compliance with international humanitarian law under the principle of responsible command. Ensuring this requires commanders to maintain the necessary level of knowledge to take action to prevent the commission of crimes by their subordinates.³²¹

4.2.4 FAILURE TO TAKE NECESSARY AND REASONABLE MEASURES

The duty to prevent and the duty to punish represent two distinct obligations each of which can give rise to command responsibility under the ad hoc tribunal's statutes. The establishment of the obligation to prevent and the obligation to punish as autonomous obligations, based on the structure of Additional Protocol 1, has been described as representing a significant expansion of the scope of the command responsibility doctrine. Failure in respect of either obligation potentially gives rise to responsibility on the part of the accused; in practice, however, the convictions concerning command responsibility appear to generally relate to the former rather than the latter. The obligation to prevent clearly represents the primary obligation of the commander under the doctrine and is linked to the central element of the principle of responsible command namely the obligation imposed upon commanders to ensure that international humanitarian law is respected by their subordinates. As the ad hoc

³¹⁹ *Celebici Case Appeal Judgment* (n 125) para 229.

³²⁰ *ibid* para 230.

³²¹ *Martinez* (n 171) 664; *Prosecutor v Halilovic Judgment* (n109) para 39 'Ensuring this protection requires, in the first place, preventative measures which commanders are in a position to take, by virtue of the effective control which they have over their subordinates, thereby ensuring the enforcement of international humanitarian law in armed conflict'.

tribunal's jurisprudence confirms a commander with effective control over subordinates is expected to take preventative action in order to ensure their compliance with the law.

The tribunals jurisprudence with regard to this element of the customary international law form of the doctrine expressly links command responsibility. The *Halilovic* Trial Chamber identified that the obligation to prevent in the ad hoc tribunal's jurisprudence included both a general and a specific duty to prevent the commission of crimes by a commander's subordinates with only the latter giving rise to command responsibility.³²² The ad hoc tribunals jurisprudence confirms international humanitarian law is concerned not only with the immediate prevention of breaches but also with preventative action in the wider sense to address their possibility of their occurring. It is on this basis that commanders are viewed as guarantors of international humanitarian law and are placed in a position of control over their subordinates and incur responsibility for their failure to do so analysing the content of the general obligation the duty to exercise control was identified from the post war precedents before the relevant provisions of Additional Protocol 1 were reviewed. The existence of a prior preventative duty on the part of a commander has been confirmed first in ensuring that his troops are aware of their obligations under international humanitarian law and secondly, in the obligation to maintain effective control over the troops under his command.

4.3 THE CAUSAL LINK- OR THE CHESHIRE CAT

Causality in the case of omission liability has been described as based on a hypothetical link between the commanders failure to act and the subordinates underlying crime.³²³ The position is rendered more complex in the case of the ad hoc tribunals jurisprudence by the undifferentiated structure of the doctrine under the ad hoc tribunals statutes and the evolving view in the ad hoc tribunals jurisprudence that command responsibility represented a dereliction of duty offence not necessarily accordingly requiring a causal link between the superiors omission and the underlying crime, rather than a mode of liability. Bearing these issues in mind is it possible to arrive at a coherent view of the tribunals' jurisprudence on this issue, a jurisprudence which has been described as uncertain and evolving?³²⁴

³²² *Prosecutor v Halilovic* Judgment (n109) para 80.

³²³ van Sliedregt, 'Command Responsibility at the ICTY' (n 13) 391.

³²⁴ *Prosecutor v Gotovina et al*, ICTY-06-90-T, Notice of Re-Classification and Re-Filing of Defendant Mladan Markac's Public Redacted Final Trial Brief dated 23 May 2011, para 140.

Article 86(2) of Additional Protocol I although not expressly narrating the causal link as is the case in the wording of article 28 of the ICC Statute nonetheless does so implicitly. This arises in connection with the establishment of command responsibility with respect to the provision that superiors did not take all feasible measures within their power ‘to prevent or repress the breach’, in that but for their failure to act the underlying crime could have been prevented. The same structure was adopted in article 7(3) / 6(3) of the ad hoc tribunals statutes, although it has been proposed that the change from ‘repress’ to ‘punish’ confirms that while the causal link requires to be established in the case of the failure to prevent in the case of the failure to punish the situation is different unless there is the possibility of further crimes being committed in consequence.³²⁵ Under that interpretation the position does not appear to differ significantly from the interpretation adopted of the causal link under article 28 adopted by the ICC *Bemba Gombo* Trial Chamber in their judgment.³²⁶

The established position in the ad hoc tribunals’ jurisprudence has been that customary international law does not require the establishment of a causal link between the conduct of a superior and the underlying crimes committed by his subordinates. To what extent can this be justified? The Celebici Trial Chamber in their analysis of the doctrine concluded that they found no support for the existence of a causal link as a separate element of superior responsibility, either in case law, treaty law, or, with one exception, in the literature.³²⁷ Their analysis then, however, qualified this position finding that a recognition of a causal nexus was inherent in the requirements for crimes to be committed by subordinates and the commanders failure to take the necessary and reasonable measures to prevent these, applying the condition formula, otherwise the ‘but for’ test.³²⁸ The Chamber then identified a likely causal connection between the failure to punish past crimes and the likelihood of the commission of future offences by subordinates, but excluded the possibility of the existence of such a link between an offence committed by a subordinate and the subsequent failure of a commander to punish the perpetrator of that same offence.³²⁹ This analysis can be criticised on the basis that a causal link can indeed be identified between the failure of the commander to perform his duty and the

³²⁵ Triffterer, ‘Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute’, 15 LJIL (2002) 179, 184 This does appear questionable in the light of the position adopted by the *Celebici Case* Appeals Chamber

³²⁶ *Prosecutor v Bemba Gombo Judgment* (n 146) paras 210-213

³²⁷ *Celebici case Judgment* (n 73) para 398. The Chamber cited the position adopted by M Bassiouni and P Manikas in ‘*The Law of the International Criminal Tribunal for the Former Yugoslavia*’ (Transnational Publishers 1996) 530 who suggested causation was an essential element of superior responsibility; Mettraux (n 25) 83-84 lists a number of post-World War II war crimes trials as precedents for the requirement for a causal link including the *Hostage* case.

³²⁸ *Celebici case Judgment* (n 73) para 399, ‘In fact, a recognition of a necessary causal nexus may be considered inherent in the requirement of crimes committed by subordinates and the superior’s failure to take the measures within his powers to prevent them. In this situation, the superior may be considered to be causally linked to the offences, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed.’

³²⁹ *ibid* para 400

impunity of his subordinates who perpetrated the underlying crime.³³⁰ The causal contribution in such a case is of course of a general nature rather than involving specific direct assistance.

The Appeals Chamber reviewing the Trial Chambers analysis in the course of the Blaskic Appeal noted that the Celebici Trial Chamber had cited no authority for their conclusion on the existence of an inherent causal nexus in the case of the failure to prevent and their specific rejection of a causal link in the case of the failure to punish, concluding that the existence of a causal link in the case of the failure to prevent was an evidential issue.³³¹ The existence of hypothetical causation cannot, however, properly be regarded in this light, the issue of causality requires to be addressed in order to establish responsibility.

As noted at the outset the contested nature of command responsibility in the ad hoc tribunals' jurisprudence has played its part in this debate. The *Halilovic* Trial Chamber's often cited comment that to require the establishment of a causal link for command responsibility to exist this would change the basis of command responsibility to the extent that it would 'virtually require involvement on the part of the commander in the crime the subordinate committed',³³² was driven by the developing view in the tribunals jurisprudence that responsibility was a result of the commanders culpability with a resultant absence of a requirement of a causal nexus with the subordinates crime.³³³ The issue arose again in the *Hadzihasanovic* Appeals Judgement.

The *Hadzihasanovic* Trial Chamber while in agreement with the *Halilovic* Chamber regarding the nature of command responsibility in the ad hoc tribunals' jurisprudence³³⁴ had disputed their position regarding the issue of the causal link. The Chamber held that responsibility for failure to prevent could be imposed only where there was 'a relevant and significant nexus between the crime and the responsibility of the superior accused of having failed in his duty to prevent', finding this to be an implicit part of the conditions required to establish command responsibility.³³⁵ The Appeals Chamber, however, considered that command responsibility did not require the existence of a causal link between a commanders failure to prevent crimes and their commission. It recalled its previous finding that it was 'not persuaded' that the existence of a causal link between a commander's failure to prevent subordinates' crimes and their occurrence required proof in every case and noted approvingly the *Halilovic* Trial Chamber's

³³⁰ Mettraux (n 25) 87-89. See also Meloni *Command Responsibility in International Law* (n 47), 175 fn 167.

³³¹ *Prosecutor v Blaskic* Appeal Judgment (n 269) para 77.

³³² *Prosecutor v Halilovic* Judgement (n109) para 78.

³³³ *ibid* para 54, *Prosecutor v Oric* Judgement (n 136) para 293; see Cassese, *International Criminal Law* (n 4) 242.

³³⁴ *Prosecutor v Hadzihasanovic et al* Judgment (n 269) para 191.

³³⁵ *ibid* para 192.

view on the impact of a requirement for a causal link on the nature of the doctrine. It then noted that in the present case the Trial Chamber had examined the causal link finding that the Chamber had correctly assessed whether Hadzihasanovic had taken necessary and reasonable measures to prevent his alleged subordinates crimes, a position that, it has been suggested shows that the issue had some relevance.³³⁶ Despite the support from within the ad hoc tribunals for the view of command responsibility doctrine as a separate dereliction of duty offence the view that it rather is to be regarded as a mode of liability ultimately prevailed. This renders the Appeals Chambers support for the *Halilovic* conclusion questionable as their concern was founded on the inconsistency between the existence of a causal link and command responsibility as a separate dereliction of duty offence.

Having regard to the nature of the doctrine the issue of causation can best be approached by considering the two obligations under the customary form of the doctrine, the prevention or punishment of a criminal act by a subordinate. As regards the former a causal link can be identified on the basis proposed by the *Hadzihasanovic* Trial Chamber, namely the 'omission created or heightened a real and material risk that those crimes would be committed, a risk he accepted willingly'.³³⁷ In the case where the commander failed to act despite his knowledge it has been proposed that this has much in common with the requirement in the case of aiding and abetting that the contribution must have had a substantial effect.³³⁸ It is enough, however, that the commander's failure to act is connected to the overall environment in which the subordinate has had the ability to commit the underlying crime.³³⁹ In the case of the failure to punish the position is more complex. Some commentators while accepting the existence of a causal link in the case of failure to prevent take the view that in the latter case the commander's omission cannot be viewed as having contributed to the underlying crime. Two options exist which potentially can establish causation at the hypothetical level, the first being again that the commander's failure plays a significant part in the failure to investigate and punish the subordinate who had committed the crime. Under the second the link in the case of failure to investigate is that this has a significant impact on the prevention of future crimes through the impression that this behaviour is tolerated, while with respect of the failure to punish or to report the matter for action a causal link is identified between the failure to exercise control and the commission of the underlying crime.³⁴⁰

³³⁶ *Prosecutor v Hadzihasanovic et al* (Appeal Judgment) ICTY-01-47-A (22 April 2008) para 41; see Mettraux, (n 25) 86 fn 212.

³³⁷ *Prosecutor v Hadzihasanovic et al* Judgment (n 269) para 193.

³³⁸ Mettraux (n 25) 88.

³³⁹ *Ibid* 43.

³⁴⁰ See Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility' (n325) 202; Greenwood, 'Command Responsibility and the Hadzihasanovic Decision', (2004) 2 JICJ 603.

4.4 CONCLUSION

Faced as they were with limited precedents, and the modern emphasis on individual culpability the ad hoc tribunals judges were faced with a challenging conundrum.

In this process the principle of responsible command has proved to be an invaluable source of interpretation in delineating the boundaries of the doctrine.

On occasions judges in interpreting the law have emphasised individual culpability as opposed to the utilitarian arguments in favour of culpability based on negligence. This is an aspect of command responsibility doctrine which accords with the elements of responsible command predicated on the requirement for the commander to maintain awareness of their subordinate's conduct. Similarly, the support for successor superior responsibility did not fit well with the requirement for the commander to exercise effective command and control over an accused at the time of the perpetration of the underlying crime. These issues were closely related to the debate over the nature of command responsibility

Effective control is central to the concept of command responsibility in the ad hoc tribunals jurisprudence and is established in order for the commander to be regarded as in a superior subordinate relationship and later with respect to the measures taken with respect to the commission of the underlying crime. It is necessary for there to be an existing duty in order for the obligation to act to arise in accordance with the principle of responsible command. The nature of the underlying crime can be interpreted broadly again as this accords with the principle of responsible command and the requirement to ensure that subordinates comply with IHL and to hold commanders to account.

The commission of the underlying crime is necessary in order for command responsibility to arise. The obligation laid on the commander as established under the ad hoc tribunals' jurisprudence is not absolute it is based rather on his failure to take the necessary and reasonable measures within his power. It can be said to represent a due diligence obligation of conduct.

The next chapter will seek to explore the operation of the doctrine of command responsibility in the International Criminal Court

CHAPTER 5

COMMAND RESPONSIBILITY UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

5.1 INTRODUCTION

The previous chapter analysed the nature and elements of the customary international law form of the doctrine, as developed in the ad hoc tribunals' jurisprudence.

In approaching the conventional form of the doctrine under the Rome Statute the first section will address the requirement for an underlying crime committed by a subordinate, the superior subordinate relationship and the requirement for effective control and knowledge. The following section will address the existence of a general and specific duty to exercise control on the part of the commander, the obligation to prevent repress and submit matters to higher authority and the issue of causation. The final section will examine the issues raised by the Appeals Chamber in the Appeal Judgment which overturned the conviction of Bemba Gombo on the basis of command responsibility, in so far as they affect the issues with which this study is concerned.³⁴¹

Before turning to the review of the provisions of article 28 there are two preliminary issues which bear on the process of interpretation of the customary form of the doctrine by the International Criminal Court and the impact of the article 28 form of the doctrine should any other court require to consider the scope of the customary form of the doctrine. These are covered here.

The first is in interpreting its Statute the International Criminal Court is required to apply article 21, the provision regarding applicable law. Briefly this provides for a hierarchy of sources.³⁴² The ICC Statute, the Elements of Crimes and the Rules of Procedure and Evidence rank first in the hierarchy of sources. Secondly come applicable treaties and the principles and rules of

³⁴¹ Prosecutor v Bemba Gombo Appeal Judgment (n55).

³⁴² Leena Grover 'A call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 EJIL 543 558; Cassese, *International Criminal Law* (n 4) 15.

international law, including the established principles of the international law of armed conflict. This includes customary international law. Thirdly, failing these, the Court may refer to general principles of law derived from domestic legal systems of the world including, where appropriate, the national laws of States that would normally exercise jurisdiction over the crime, in a comparative process. The last must not be inconsistent with the Statute, international law and international norms and standards.

Article 9 of the ICC Statute provides for Elements of Crimes to assist the Court in the interpretation and application of articles 6, 7, 8 and 8 bis. In their current form these were drafted by the Preparatory Committee and adopted by the Assembly of States Parties following adoption of the Statute. They have been described as being of crucial importance for the work of the ICC in the interpretation of these provisions, however, they are restricted in their coverage to these specific Articles.

Assuming that the Court needs to go beyond the terms of article 28, and as article 28 is not dealt with within the Elements of Crimes, they will require to refer to the customary international law in order to assist in the interpretation of that provision. This was the analysis adopted by both the Pre-Trial Chamber and the Trial Chamber in the *Bemba Gombo Case*. In that case both in the Pre-Trial Chamber II decision confirming the charges against Bemba Gombo and subsequently in the Trial Judgment the judges referred to the ad hoc tribunals jurisprudence on the customary international law form of the doctrine in their interpretation of article 28(a).³⁴³

The second issue which again requires to be discussed as a preliminary matter before moving on to the provisions of article 28 is with regard to article 10 of the Statute.

Clearly not every State is a Party to the Rome Statute and accordingly bound conventionally by its provisions, but they may be so bound where these represent customary law. As the *Furundzija* Trial Chamber stated the relationship between the Statute and customary international law varies.³⁴⁴ Such States may potentially find themselves faced with diverging versions of customary international law. As the International Court begins to develop its jurisprudence this is likely to be regarded as representing a source of customary international law. Clearly this may differ from the jurisprudence of the ad hoc tribunals. article 10 provides that '[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'

³⁴³ *Prosecutor v Bemba Gombo* Confirmation Decision (n 150) paras 404-43; *Prosecutor v Bemba Gombo* Judgment (n 146) paras 170-213.

³⁴⁴ *Prosecutor v Furundzija*, (Judgment) ICTY-01-95-17/1-T (10 December 1998) para 227, 'Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law.'

The interpretation of this article has given rise to discussion among commentators.³⁴⁵ The provision appears to be footed in an understanding of two regimes of customary law and is generally accepted as being intended to preserve existing international law from more restrictive interpretations in the Statute. The question is whether it goes further. As indicated, there are certainly divergences between the Rome Statute and the ad hoc tribunals jurisprudence regarding modes of criminal responsibility and future tribunals may find themselves required to consider the impact of the ICC Statute upon customary international law. The provision would seem to indicate an acceptance of the possibility of the development of customary international law as well as preserving existing interpretations in view of its structure an aspect which appears to have been overlooked by some commentators.

Having addressed these preliminary matters I will now address the issue of the approach to the underlying crime committed by the subordinate which serves as a precondition for the application of the doctrine.

5.2 ASPECTS OF THE CONVENTIONAL DOCTRINE

5.2.1 THE UNDERLYING OFFENCE

Reflecting the established position under customary international law in order for a superior to incur criminal responsibility under article 28 of the ICC Statute crimes within the jurisdiction of the court require to be committed by his subordinates. Discussion by commentators appears to be based on the reiteration of their previous positions with regard to this aspect under customary law and there does not appear to be any additional justification to depart from the position adopted by the *Celibici* Trial Chamber and subsequently affirmed by the Oric Appeals Chamber that 'the commission of one or more of the crimes under... the statute is a necessary prerequisite for the existence of superior responsibility but nonetheless does not form one of its constitutive elements.'³⁴⁶ This view is supported by the analysis by Pre-Trial Chamber II in the *Bemba Gombo* proceedings of the elements of the doctrine under article 28 with respect to a military commander, which

³⁴⁵ Grover (n 340) 570-571; Cassese, *International Criminal Law* (n 4) 14, 56; Werle (n 2) 45.

³⁴⁶ *Prosecutor v Oric* Appeal Judgment (n257)

similarly does not include the commission of the underlying crime as an element of the offence.³⁴⁷

This position was not, however, adopted by the Trial Chamber which did include in the Judgment, as one of the elements of command responsibility under article 28(a), the requirement that crimes within the jurisdiction of the court have been committed by forces.³⁴⁸ It is not immediately apparent why in this instance it chose to move away from the accepted position in the ad hoc tribunals jurisprudence which had been adopted in the Confirmation Decision. No doubt the point will arise in subsequent cases when, it may be clarified.

This is not, however, the sole issue that arises in this context. Does the requirement that crimes have been committed limit superior responsibility to crimes that have been completed in all their elements or does this extend to crimes that have been attempted by a commander's subordinates. Is the term commission of the underlying crime to be given a broad reading as in the ad hoc tribunals case law following the *Blagojevic* Judgment, or will the previous restrictive reading be applied?³⁴⁹

As to whether a superior could be found responsible on the basis of crimes that had been attempted by his subordinates there are divergent views amongst commentators. One view is that in the light of the lack of any reference to the attempted form of the underlying crime in article 28 the underlying crime must have been completed in all its elements, thus excluding under this reading attempted crimes.³⁵⁰

On another view the reference at article 28(a)(i) and 28(b)(i) regarding the superior's knowledge or constructive knowledge of crimes that his subordinates were committing or about to commit extends the relevant form of the subordinates conduct to include the attempted form of the underlying crime.³⁵¹ It is additionally suggested that the relevance of the attempted form is confirmed by the wording of article 25(3)(f) which specifically provides for criminal responsibility for the attempted form of the crime in addition to incitement to genocide under article 25(3)(c). Both these inchoate offences are punishable under the Statute independent of the commission of a crime in all its elements.

It has been proposed that the reference to the attempted form is restricted in its application to incitement to commit genocide under the preceding paragraph in view of the reference to 'attempts to commit such a crime', however, the text indicates that the attempted form

³⁴⁷ *Prosecutor v Bemba Gombo* Confirmation Decision (n 150) para 407.

³⁴⁸ *Prosecutor v Bemba Gombo* Trial Judgment (n 146) para 170.

³⁴⁹ *Prosecutor v Blagojevic*, Appeal Judgment (n 261) paras 279-282.

³⁵⁰ Mettraux, (n 25) 132.

³⁵¹ Roberta Arnold, 'Article 28: Responsibility of Commanders and Other Superiors,' Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article*, (Hart, 2007) 823.

should rather be regarded as applicable to other forms of responsibility under the article so that it would establish responsibility in the case of an individual who attempted to commit a crime within the jurisdiction of the court under sub-paragraph 25 3(a).³⁵²

The attempted form is narrowly defined in that the subordinate is required to have taken a substantial step towards its commission, but the crime did not occur because of circumstances independent of their intentions.

The extent to which this divergence from the position in the ad hoc tribunals' jurisprudence will impact on prosecutions before the Court is questionable. The Court is intended to have jurisdiction over the most serious international crimes and accordingly it would seem likely that it will be concerned with superior responsibility arising from crimes which have in fact been committed rather than those which have reached the stage of attempt.

There then remains the question of whether a broad reading of the role of the subordinate in the commission of the underlying crime should be adopted with regard to article 28, mirroring the position adopted in the ad hoc tribunals jurisprudence.³⁵³ Article 25 of the Rome Statute is a considerably more detailed provision than article 7(1) of the ICTY Statute or its equivalent under the ICTR Statute. Article 25(3) has been described as establishing a systematic structure of participation concerning four levels of responsibility. 'Commission' is distinguished from other forms of participation and the inchoate crimes of incitement to genocide and attempt. It has been proposed that the better interpretation of the term 'commit' is a narrow one, in accordance with the earlier ad hoc tribunals jurisprudence This accords with the view of those commentators critical of the position latterly adopted in the ad hoc tribunals as contrary to the principle of legality and establishing an overly broad ambit for command responsibility.³⁵⁴

If a narrow interpretation of the role of the subordinate in the commission of the underlying crime were to be adopted this would potentially render superior responsibility under article 28 of limited use in the prosecution of superiors for their subordinates' indirect participation in the underlying crimes.

It remains to be seen whether the International Criminal Court adopts the broadening of the role of the subordinate in the commission of the underlying offence on a utilitarian deterrence basis, should this issue arise. The issue of the overall aims of the Statute will be discussed further in the context of the application of a negligence standard to military commanders.

³⁵²Kelly D Askin 'Crimes within the Jurisdiction of the International Criminal Court' (1999) 10 *CrimLF* 33, 37 and fn 16.

³⁵³ See Volker Nerlich 'Superior Responsibility under Article 28 ICC Statute; For What Exactly is the Superior Held Responsible?' (2007) 5 *JICJ* 665.

³⁵⁴ Elies van Sliedregt 'Command Responsibility at the ICTY-Three Generations of Case-law and still Ambiguity', 377, 387; Mettraux (n 25) 135.

There is of course the additional point that in contrast to the position when the ad hoc tribunals adopted a broad reading of the requirement that there is now existing precedent for this interpretation under the customary form of the doctrine, which as noted, the Court has frequently followed in its limited jurisprudence to date. The Bemba Gombo case the only trial so far to be completed in the ICC on the basis of the command responsibility of the accused did not consider this issue directly although the Trial Chamber did note the broad reading of the term commit adopted in the ICTY jurisprudence.³⁵⁵

Leaving aside the continuing question over the view to be adopted of the role of the underlying offence in the doctrine what of its remaining elements under the ICC Statute? The *Celibici* case Trial Chamber's analysis continues to be used by many commentators in discussion regarding command responsibility under the ICC Statute. Others have proposed that a more complex analytical model is required in order to satisfactorily capture the elements of this version of the doctrine.³⁵⁶ The issues identified by these commentators vary but include the further breakdown of the actus reus and mens rea to reflect the bifurcated regimes established under the doctrine, particularly, but not solely relating to the differing standards of liability applicable to military commanders and their civilian counterparts. Additional propositions include the requirement for an underlying crime and the existence of a causal link between the superiors omission and the underlying crime.³⁵⁷ Pre-Trial Chamber II of the ICC in their decision regarding the charges against Jean-Pierre Bemba Gombo although they limited their analysis to those elements of the doctrine applicable with regard to a military commander such as the accused adopted a more complex analytical model rather than the three element structure adopted in the *Celibici* case.³⁵⁸ The same approach was subsequently followed by the Trial Chamber in their analysis of the doctrine.³⁵⁹

While the superior subordinate relationship exists as in customary international law there is a significant divergence in the position under the ICC Statute with regard to the question of knowledge and intent.

³⁵⁵ *Prosecutor v Bemba Gombo* Judgment (n 146) para 175 fn 389.

³⁵⁶ Van Sliedregt, Command Responsibility at the ICTY (n137) 392.

³⁵⁸ *Celibici* case Judgment (n 73).

³⁵⁹ *Prosecutor v Bemba Gombo* Judgment (n 146) para 170.

5.2.2. THE SUPERIOR- SUBORDINATE RELATIONSHIP

The most obvious feature of the doctrine under article 28 is that it distinguishes between military commanders and other forms of superiors. Article 28(a) addresses the 'military commander or person effectively acting as a military commander' while article 28(b) concerns non-military superiors characterised as being in 'superior and subordinate relationships not described in paragraph (a)'. The immediate impact is that the role of the accused, whether as a military commander or a civilian superior will require to be determined at an early stage of the proceedings.³⁶⁰ This contrasts with the position under the ICTY jurisprudence where a more relaxed view could be taken as to the point as a result of the use of the generic term 'superior' in the ad hoc tribunals statutes.³⁶¹

Article 28(a) applies to 'a military commander or person effectively acting as a military commander', the question then is who falls within that category. The differentiation between the two terms would suggest that 'military commander' refers to a de jure appointment to perform a military command role while 'effectively acting as a military commander' would suggest that it is intended to refer to a de facto commander.³⁶² It has also been proposed that the reference to a 'person effectively acting as a military commander' might be intended to refer to senior politicians with military functions. This has its origins in the comment by the Australian delegation in the course of the Rome Conference that in view of the Karadzic Case in considering civilian superior responsibility regard had to be paid to senior politicians involved in the command and control of military forces.³⁶³

The analysis adopted by the Pre-Trial and Trial Chambers in the *Bemba Gombo* proceedings regarding the issue differed, however, from this approach and is to be preferred. Having first held that the term 'military commander' referred to de jure commanders irrespective of rank or level in the chain of command the Pre-Trial Chamber went on to include civilian superiors who perform de jure military functions in this category. Accordingly, certain Heads of State who are

³⁶⁰ The issue required to be resolved as part of the preliminary proceedings in the case in the course of the Pre-Trial Chamber II Decision on the Charges against Jean-Pierre Bemba Gombo(n150) para 406

³⁶¹ As illustrated in the *Celibici* case Judgment (n 74) in which the judges discussed both command responsibility and civilian superior responsibility, presumably on the basis that the accused were civilians who were also acting as de facto military commanders and ruled determining the issue was irrelevant in the *Celibici* Case. Note discussion 130 onwards regarding article 7(3) and paras 735-6 regarding the issue of accused's status.

³⁶² See 'Working paper on article 25, Responsibility of commanders and superiors, Working Group on General Principles of Criminal Law', Committee of the Whole, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court A/CONF.183/C.1/WGPP/L.7, dated 22 June 1998 at fn 1, 'it was accepted that this language would include persons who control irregular forces such as warlords.'

³⁶³ Some support may be drawn for this view from the PTCs discussion regarding the position of heads of state acting as de jure commanders in chief at fn 522 to para 408, *Ibid* when they describe such a head of state performing this role as 'a sort of quasi de facto commander.' A rather odd reading of de jure on the part of the Chamber which does not appear to accord with the usual understanding of the term.

Commanders in Chief fall to be regarded as military commanders, even if this function only forms part of the functions of their office.³⁶⁴ As regards a 'person effectively acting as a military commander' the Pre-Trial Chamber confirmed that in accordance with the ad hoc tribunals case law this category referred to de facto commanders who exercised effective control of a group through a chain of command.³⁶⁵

The same position was adopted by the Trial Chamber in their analysis of these issues.³⁶⁶ Although de facto superior responsibility had been a creation of the ad hoc tribunals jurisprudence, based on a purposive interpretation of the ICTY Statute, it can be said that the inclusion of de facto superior responsibility with regard to military commanders has been resolved by the definitive reference to 'a person effectively acting as a military commander' under article 28(a).

The Pre-Trial Chamber having defined de facto commanders then went on to hold that the term was applicable not only to irregular non- government forces but also to those in command over regular government force such as gendarmerie. This view appears to be shared by some commentators who refer to such commanders as 'military- like commanders' indicating that the similarity lies in the structure of the formation which they command. The inclusion, however, of de jure commanders of regular government forces amongst de facto commanders is mistaken. Such commanders are officially appointed to command subordinates in a chain of command, they have not acquired their authority from their ability to exercise effective control. It is that issue which is the determining factor in this definition. This issue did not arise in the Trial Judgment and accordingly it cannot yet be confirmed as to whether it represents the position under the ICC jurisprudence. For the reasons set out here it is argued that this would represent a mistake.

What the criteria are to determine the role of the accused is not immediately clear particularly as a superior under article 28 may according to the circumstances fulfil responsibilities both as a military commander and as a civilian superior.³⁶⁷

³⁶⁴ Prosecutor v *Bemba Gombo* Confirmation Decision (n 150) para 408.

³⁶⁵ *ibid* para 409.

³⁶⁶ Prosecutor v *Bemba Gombo* Judgment (n 146) paras 176 and 177.

³⁶⁷ Mettraux (n 25) 28-29 proposes at fn 25 that a preliminary hearing may be required to hear submissions on the point. This would appear to be necessary in view of the divergence in the mens rea between military commanders and civilian superiors under Article 28 of the Rome Statute.

It seems likely that, as in the Bemba Gombo proceedings the Court will in future proceedings require to assess the superior's functions, the nature of the individuals who are his subordinates and their roles. To adapt an illustration from the post-World War II war crimes trials the US President is the Commander in Chief of that state's armed forces and accordingly a de jure military commander. His office also involves other executive functions in which he is acting in his capacity as a civilian superior with respect to government employees under his control. Determining when he falls into which category will depend upon which function, he is performing. This situation is not unusual, although differentiation is likely to prove more difficult in the context of failed and failing States where the distinction between the respective functions may be less clear cut and, significantly from the point of view of evidence more difficult to determine.³⁶⁸

5.2.3 EFFECTIVE CONTROL

Under the ad hoc tribunals' jurisprudence, the possession of effective control in the sense of the ability to prevent or punish was regarded as the threshold in the establishment of a superior subordinate relationship. Although in principle the same situation applies under article 28 the structure of the article gives rise to a number of issues concerning effective control and the superior subordinate relationship.

Article 28 provides for effective command and control or for effective authority and control depending upon the status of the superior concerned. The first issue that arises relates to whether the concept of 'effective command and control' is an alternative or has a different meaning from that of 'effective authority and control'.³⁶⁹ Under article 28(a) which relates to military commanders and persons effectively acting as a military commander both the concepts are applicable. In contrast in the case of civilian superiors only the concept of effective authority and control applies.

Assuming that the use of the two terms in the alternative is not simply redundant a number of proposals have been put forward as to their justification. Under one view they are equivalent concepts, but the latter expression is applicable to superiors who do not possess formal powers of command.³⁷⁰ Accordingly, military commanders may exercise their authority in one

³⁶⁸ High Command case (n 83) 542.

³⁶⁹ Kai Ambos, 'Superior Responsibility' (n 251) 839.

³⁷⁰ UN Doc A/CONF.183/C.1/WGPP/L.7 22 June 1998, see fn 2 regarding equivalence.

way while quasi-military commanders of gendarmerie units and other organisations organised under a similar hierarchical command structure would exercise their authority in a rather different fashion. This model is at its highest only partially true as gendarmerie units and their equivalents form part of the state armed forces.³⁷¹ For the reasons outlined earlier this differentiation into military and quasi-military commanders should be rejected, with the differentiation drawn between de jure and de facto commanders (persons effectively acting as commanders). If that course is adopted it is possible to argue that commanders of military units operating within a clear chain of command and an effective disciplinary system maintain effective control in a different fashion to their counterparts commanding paramilitaries, militias and insurgents where effective control is dependant more on personal attributes of the commander than a formal disciplinary system and is more primitive in its nature.³⁷² Under another view the latter phrase is intended to cover the case of an occupation commander with respect to the extension of his superior responsibility relationships beyond his direct subordinates, as opposed to the operational military commanders relationship with his subordinates.³⁷³

It has also been proposed that under article 28(a) both 'command' and 'authority' carry with them the concept of control with the term 'command' regarded as referring explicitly to power to control, while the term 'authority' is regarded as implying a right to command. Accordingly, a superior with command and authority exercises effective control over his subordinates and has the capacity to issue orders.³⁷⁴ Whilst this statement can be viewed, however, as expressing the exercise of effective control within a military chain of command it suggests that the terms 'command' and 'authority' should be read together which does not appear to reflect the structure of article 28 (a).

Based on the structure of the provision it appears that 'command and control' and 'authority and control' are to be regarded as broadly equivalent with the different terminology with respect to the de jure military commander relating to his formal powers of command. This view is supported by the record of the travaux preparatoires where some delegations thought that the addition of the term was 'unnecessary and confusing', indicating equivalence in meaning of the two terms.³⁷⁵ As noted above there is one other category of military commander, the

³⁷¹ Mettraux (n 25) 29; Meloni, *Command Responsibility in International Criminal Law* (n 47) 160-161.

³⁷² Mettraux (n 25) 29.

³⁷³ Ambos, 'Joint Criminal Enterprise' (n 29) 839; WJ Fenrick, 'Article 28: Responsibility of Commanders and Other Superiors' (518).

³⁷⁴ Ambos, 'Joint Criminal Enterprise' (n 29).

³⁷⁵ Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working paper on article 25, Responsibility of commanders and superiors, UN Doc A/CONF.183/C.1/WGGP/L.7, 22 June 1998.

occupation commander whose responsibility extends beyond his chain of command in relation to criminal offences committed within his area of executive authority to any individuals under his effective control. In this instance it is suggested the alternative term 'authority and control' should indeed be regarded as applicable in view of the differences between the exercise of effective control by such an executive as opposed to an operational military commander.

As regards those superiors who fall under article 28(b) the term 'authority and control' would again indicate that while such a superior must maintain effective control they would be likely to do so using different methods and processes from the archetypal military commander.

This interpretation is supported by the finding of Pre-Trial Chamber II that the terms were applicable alternative this in situations of military commanders and de facto military commanders. They went on to conclude that 'the additional words 'command' and 'authority' under the two expressions has (sic) no substantial effect on the required level or standard of 'control'. In view of the structure adopted the Chamber considered that there must be some difference in the meaning of the terms, as otherwise the addition of the term 'effective authority' would indeed seem redundant, citing the position of the occupation commander. Although this does not accord with the proposal that effective authority and control is to be viewed in this context as primarily applicable to de facto commanders it does support the suggestion that this could be taken as recognition of the different methods and process utilised by such commanders.³⁷⁶

There is a further proviso with regards to the extent of the effective control which is applicable solely to civilian superiors. Under article 28(b)(ii) the underlying crimes must concern 'activities that were within the effective responsibility and control of the superior.' A number of different interpretations as to this requirement have been proposed.³⁷⁷ The general consensus that it recognises that military commanders' responsibility for their subordinates is wider than their civilian counterparts, which is limited in its scope by the employment relationship is supported by the US justification for a separate provision covering civilian superiors in the Rome Conference.³⁷⁸

³⁷⁶ *Bemba Gombo* Confirmation Decision (n 150) para 412.

³⁷⁷ Greg R Vetter 'Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)' (2000) 25 Yale J Int'l L 89, 115, 119 and 120 who proposes four possible options, that it may add an additional element with regard to the ICC civilian standard, as a modification of the superior-subordinate relationship, an implicit causation requirement or recognition of the limitations on civilian superior authority; cited by Mettraux (n 25) 32, who supports the last option; see also Ambos 'Joint Criminal Enterprise and Command Responsibility' (n30) 840; Meloni, *Command Responsibility in International Criminal Law* (n 47) 162 proposes that this amounts to an additional requirement in addition to subordination with respect to civilian superiors.

³⁷⁸ See Committee of the Whole, Summary Record of the 1st Meeting held on 16 June 1998 UN Doc A/CONF.183/C1/SR1, 20 November 1998, para 67 ff.

Although under the settled jurisprudence of the ad hoc tribunals the superior subordinate relationship, together with effective control must exist at the time the underlying crimes were committed the issue of successor superior responsibility has caused bitter division among the ICTY judges since the controversial Appeals Chamber *Hadzihasanovic* Article 7(3) AC Decision, exacerbated by the division in the Appeals Chamber in the *Oric* Appeal Judgment.³⁷⁹ In their review of the requirements for effective control in the *Bemba Gombo* decision the Pre-Trial Chamber stressed the requirement for temporal coincidence between the effective control and the crime. In arriving at their finding the Chamber noted the position under the ad hoc tribunals jurisprudence but, acknowledging the existence of the school of thought supporting the concept of successor superior responsibility, nonetheless found that the terms of the article, in particular the reference to ‘failure to control his forces properly’ indicated that a superior required to have effective control before the underlying crime was committed.³⁸⁰ As was the case with the ICTY proceedings in which the issue was discussed the view of the Pre-Trial Chamber regarding the nature of superior responsibility clearly was relevant to their ruling. This issue will be discussed further in the course of this chapter.

5.2.4 KNOWLEDGE AND CONSTRUCTIVE KNOWLEDGE

The next issue is the examination of the mens rea standard which apply under article 28. This differs significantly from the position under the established jurisprudence of the ad hoc tribunals which applied an actual knowledge standard and a constructive knowledge had reason to know’ standard. The *Celebici Case* Appeal Chamber rejected the existence of a general duty to know upon superiors which, if breached, would incur superior responsibility. The Appeal Chamber interpreted the constructive knowledge standard as being substantially equivalent to that established under article 86 (2), ‘had information enabling them to conclude.’³⁸¹

Article 30 of the Rome Statute although it establishes a general mens rea standard of intent and knowledge for crimes under the Statute permits the application of other subjective standards if specifically provided for. Article 28 does so, applying differing mens rea standards to military commanders and civilian superiors and the introduction of a new constructive knowledge standard for civilian superiors.

³⁷⁹ *Hadzihasanovic* Article 7(3) AC Decision (n 112); *Prosecutor v Oric* Appeal Judgment (n 257).

³⁸⁰ *Bemba Gombo* Confirmation Decision (n 150) paras 418-9.

³⁸¹ *Celebici Case* Appeal Judgment (n 124) para 230.

The first standard, that of actual knowledge, applies to both military commanders and civilian superiors, the superior is responsible for the crimes committed by his subordinates if he knew that they were committing or about to commit such crimes and failed to take the necessary action. The Pre-Trial Chamber in the *Bemba Gombo* confirmation decision concluded in line with the ad hoc tribunal's jurisprudence that actual knowledge required to be established by direct or circumstantial evidence.³⁸² They took account of the indicia which the ad hoc tribunal's had utilised to reach a finding on a superiors actual knowledge through circumstantial evidence.³⁸³ The Chamber subsequently went on to find in the course of the Decision that there is a distinction between the knowledge required under article 30 (3) finding that this was only applicable to article 25 of the Statute. They distinguished between the position under article 30 where the accused had participated either as a principal or accessory in the crimes and that of superior responsibility under article 28 where this was not the case.³⁸⁴ This appears questionable, in this case the usual knowledge standard under article 30(3) should be applied.

The second standard, the 'should have known', standard is applicable only to military commanders, the commander is responsible for crimes committed by forces under his command where he owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes and failed to take the necessary action. The Pre-Trial Chamber concluded that this standard required the superior to have been negligent in failing to acquire knowledge of his subordinates crimes, citing the Amnesty International Amicus Curiae Observations, that the article had replaced the customary international law passive notice standard with the more active duty to take steps to learn of crimes committed by subordinates.³⁸⁵ The Chamber noted that the travaux préparatoires indicated that the drafters had intended to take a more stringent approach towards this category of superiors compared to other superiors under article 28 (b) on the basis of their nature and

³⁸² Mettraux (n25) 216-218.

³⁸³ *Bemba Gombo* Confirmation Decision (n 150) paras 430-431. The Chamber found that 'Actual knowledge may also be proven if 'a priori, [a military commander] is part of an organised structure with established reporting and monitoring systems,' citing *Prosecutor v Hadzihasanovic et al* Trial Judgment (n 269) para 94. The case cited refers rather to knowledge being more easily proved in such a case, a rather different conclusion; See Mettraux (n 25) 216.

³⁸⁴ *Bemba Gombo* Confirmation Decision (n 150) para 479; See Kai Ambos, 'Critical Issues in the Bemba Confirmation Decision (2009) 22 LJIL 715, 720- 721. He proposes that the differing subjective element in Article 28 and Article 25(3) is irrelevant in this context and the Chambers affirmation that a superior does not participate in the commission of the crime is dubious in the absence of a doctrinal analysis of the provision.

³⁸⁵ *Bemba Gombo* Confirmation Decision (n 150) para 432, fn565, citing Amnesty International Amicus Curiae Observations ICC-01/05-01/08-406, paras 3 and 6 and para 433, 'Thus, it is the Chambers view that the 'should have known' standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on (sic) the commission of the crime.'

responsibility.³⁸⁶ It might have been expected that when this the first contested case on the basis of command responsibility had proceeded from trial to appeal that the respective chambers would have produced a well- reasoned analysis even in the event of disagreement between the Trial and Appeal Chambers. The reality has been that the majority of the intellectual lifting was carried out by the Pre- Trial Chamber and by the two judges Steiner and Ozaki with their Separate Opinions in the course of the trial previously referred to.

Notwithstanding that the Pre-Trial Chamber considered that there was a difference between the position under the Rome Statute as opposed to that under the ad hoc tribunals' jurisprudence with regards to the applicable standard some commentators have suggested otherwise. Despite the difference in the wording it has been proposed that the 'had reason to know' standard, as interpreted by the *Celebici Case Appeals Chamber*, equates to the 'should have known' standard, qualified as it is by the phrase 'owing to the circumstances at the time.' One respected commentator has proposed that the similarity of the two standards is supported by the fact that the formula used in the ICTY statute was based on a US proposal that referred to knowledge gained 'through reports of the accused person or through other means' relying on the *Hostage Case* and the language of article 86 (2) of Additional Protocol I. Further support is afforded to this reading he considers by the 'should have known' standard's origins in an American proposal.³⁸⁷ Under one view this reading is proposed as preferable as it means that a commander can be regarded as incurring liability on the basis that information was available to him. As a result of this he was put on notice that crimes were being or were about to be committed by his subordinates. Such a negligence standard set higher than simple negligence has been proposed in the ICTY jurisprudence as reconcilable with the fundamental principle of culpability.

On another view the standard should be interpreted strictly as the deterrent value would be enhanced by liability on the basis of negligence in failing to acquire knowledge of his subordinate's crimes.³⁸⁸ Such a position has been proposed as incompatible with the principle of culpability under criminal law but accords with the structure of the principle of responsible command.

³⁸⁶ The US delegation member who drafted the text for what became Article 28 noted that the standard was contrary to the usual principles of culpability under criminal law but was justified by such a commander's position in command of an inherently lethal force. See 'Summary Records of the 1st Meeting of the Committee of the Whole, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', UN Doc A/CONF 183/C1/SR1 dated 20 November 1998.

³⁸⁷ Ambos, 'Joint Criminal Enterprise and Command Responsibility' (n 30) 848; Vetter (n 377) 123, similarly considers that the 'had reason to know' constructive knowledge standard applied in the ad hoc tribunals jurisprudence is closer to the constructive knowledge standard applied to military commanders under the ICC Statute than a strict 'should have known' standard, as a result of the inclusion of the phrase 'owing to the circumstances at the time'. He suggests that the difference is that 'circumstances' has a broader meaning than 'information' and will therefore permit the use of a wider range of information.

³⁸⁸ Martinez (n 171) 639 ff.

The application of this standard has caused considerable controversy amongst commentators. If the crime is regarded as a mode of liability it is difficult to reconcile the negligence of the superior and the underlying intentional crime committed by the subordinates unless differing standards of culpability under criminal law are applied in the case of command responsibility under the ICC Statute.³⁸⁹ At the same time there are a considerable body of writers consider that there are strong deterrent arguments supporting this approach.³⁹⁰ It has been proposed that the fundamental basis of the dispute rests in the contrast between a utilitarian deterrence based theory of criminal law which permits an individual to be used to promote and ensure conformity to society's standards against the deontological retributive theory of law under which liability is attributed on the basis of individual guilt. Negligence is a weak basis for liability under the retributive theory, it is linked conceptually to the utilitarian deterrence theory and may increase deterrence if it is used for criminal liability.³⁹¹ The fundamental nature of the doctrinal split explains the strength of the opinions on both sides of this conceptual dispute.

The third standard, that of constructive knowledge, 'consciously disregarded the information' standard is applicable only to civilian superiors. Such an actor is responsible for the crimes of his subordinates if he consciously disregarded information which clearly indicated that his subordinates were committing or about to commit such crimes and failed to take the necessary action. In view of the circumstances of the *Bemba Gombo Case* none of the Chambers who have dealt with it from the stage of the confirmation of charges through to the Appeal Judgment have required to consider this aspect.

5.3 FURTHER ASPECTS OF THE CONVENTIONAL DOCTRINE

5.3.1 THE GENERAL AND SPECIFIC DUTIES TO EXERCISE CONTROL

The structure of superior responsibility under article 28 is more complex than the form of the doctrine under customary international law. Although the general duty of a superior to maintain control over his subordinates was clearly recognised in the ad hoc tribunals'

³⁸⁹ Ambos, 'Joint Criminal Enterprise and Command Responsibility' (n 30) 853, arguing 'the literal application of the Rome Statute would entail *negligence* liability for *intentional* acts, a construction which is not only logically impossible but, more importantly, hardly compatible with the principle of guilt'; See also Damaska, 'The Shadow Side of Command Responsibility' (n48) 471-2; Mettraux (n 25) 210-213, is severely critical of the standard.

³⁹⁰ D Robinson, 'A Justification of Command Responsibility' (2017) 28 CrimLF 633; Martinez (n 171) 638ff; Matthew Lippman, 'The Evolution and Scope of Command Responsibility' (2000) 13 LJIL163-4; Eugenia Levine, 'Command Responsibility: the Mens Rea Requirement' (2005) Global Policy Forum 1ff.

³⁹¹ Arthur T O'Reilly, 'Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Retributive Justice' (2004) 40 Gonz L Rev 127ff; see also Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 LJIL 925 ff, regarding the competition between international humanitarian law and international human rights law concepts with criminal law liberalism in international criminal law.

jurisprudence, based on the principle of responsible command its extension beyond military commanders to civilian superiors was, as discussed based on limited authority. This position has been resolved by the structure of article 38 which substantially equates the underlying general duty of both military commanders and their civilian counterparts.

Article 28(a) referring to military commanders and those effectively acting in that capacity and article 28(b) referring to other superior and subordinate relationships both refer to crimes occurring 'as a result of his or her failure to exercise control properly over such forces.' The duty to act therefore extends to the general duty to exercise control over their respective subordinates. It has been brought back to an earlier stage than under the customary law form of the doctrine. The consequence is that in the event the superior fails to exercise general control he cannot then claim that he was not in a position to exercise control over his subordinates when they were committing or about to commit a crime.

Notwithstanding the existence of this general duty, nonetheless the more specific omission liability under article 28(a)(ii) and (b)(ii) does not establish superior responsibility unless he fails to take the necessary action to prevent, repress or to submit the matter to the competent authorities when he either knew or owing to the circumstances at the time should have known that a crime was being committed or was about to be committed.³⁹² Despite this differentiation confusion arose in the course of the *Bemba Gombo* Trial Judgment with the majority concluding that these general duties were relevant to command responsibility³⁹³. Judges Steiner and Ozaki correctly distinguished between the two forms in their Separate Opinions.³⁹⁴

5.3.2 PREVENT, REPRESS AND SUBMIT THE MATTER TO THE COMPETENT AUTHORITIES

Under the ad hoc tribunals jurisprudence effective control was regarded as the power to prevent and punish the underlying offences committed by subordinates. Article 28 refers rather to the power to 'prevent or repress the commission of the underlying offences, or to submit the matter to the competent authorities for investigation and prosecution' at art 28(a)(ii) and (b)(iii)] . The question then to be answered is whether this introduces a change in the current position.

³⁹² Triffterer, 'Causality, a separate element of the doctrine of superior responsibility' (n 323) 198.

³⁹³ *Prosecutor v Bemba Gombo* Judgment (n 146) paras 735-741.

³⁹⁴ *ibid* (n 146) ICC-01/05-01/08-3343-Anxl, Separate Opinion of Judge S Steiner 21 March 2016, paras 10-15; ICC-01/05-01/08-3343-AnxII, Separate Opinion of Judge K Ozaki, (n154) paras 15-18.

Having regard to the use of the term 'repress' under Article 87 of Additional Protocol I and its substitution by the term 'punish' in the ad hoc tribunals statutes provisions regarding superior responsibility Article 28 can be read as being in accordance with the existing position. The term 'prevent or repress' accordingly should be read as equating to 'prevent or punish' under the ad hoc tribunals' statutes. Submission of the matter to the competent authorities appears to be an express reference to the accepted position under the ad hoc tribunals jurisprudence with respect to superiors lacking adequate disciplinary powers to punish subordinate's crimes by referring the case to the relevant authorities. Such a reference would, as in the ad hoc tribunals' jurisprudence be based upon the belief that the process would be conducted in good faith.

This position is supported by the view taken by Pre-Trial Chamber II that the reference in Article 28 to measures to prevent, repress or submit the matter to the competent authorities does indeed equate with the position adopted under the ad hoc tribunals' jurisprudence.³⁹⁵

An added complication, however, results from the Chambers subsequent finding with regard to the duty to repress. They concluded that the duty to repress had two elements at different stages in the commission of the underlying crimes. The first was 'a duty to stop ongoing crimes from being committed' as with the duty to suppress crimes under Article 87 of Additional Protocol I, while the second element was that discussed above, 'an obligation to punish forces after the commission of crimes.'³⁹⁶ There appears a substantial similarity between the duty to prevent and the first component of the requirement to repress.

On an alternative view submission of the matter to the appropriate authorities for action is intended to provide for successor superior responsibility, with the duty being applicable to a subsequent commander who becomes aware of the commission of a crime by a subordinate prior to his assumption of command.³⁹⁷ Although this may be a possible interpretation of the provision, unless the subsequent ICC jurisprudence moves away from the Pre-Trial Chamber II rejection of the concept of successor superior responsibility it would seem to be precluded by that affirmation.

As in the ad hoc tribunals jurisprudence these are not alternatives which the superior is equally able to choose. If the superior fails to prevent the commission of crimes when he knew or owing to the circumstances should have known that they were being committed or were about

³⁹⁵ *Prosecutor v Bemba Gombo* Confirmation Decision (n 150) para 415.

³⁹⁶ *ibid* para 439.

³⁹⁷ van Sliedregt, 'Command Responsibility at the ICTY' (n 137) 391.

to be committed, he cannot avoid responsibility by taking action to punish or submitting the matter to the appropriate authorities. The Pre-Trial Chamber confirmed this position in the Bemba Gombo Decision, however, they also concluded that ‘a failure to fulfil one of these duties is a separate crime under the Statute.’ Accordingly, they concluded that a superior could be held criminally responsible for one or more breaches of duty under Article 28(a) in respect of the same underlying crime. To impose charges and punishments on this basis is contrary to basic principles as they apply to modes of liability.

Under the ad hoc tribunals’ jurisprudence the superior could only incur responsibility for his failure to take measures within his material ability. Under Article 28 the requirement is expressed as being to take ‘all necessary and reasonable measures within his power’. It has been proposed that this is intended to limit the responsibility of the superior, on a straightforward reading it simply expresses more clearly than under the customary international law the actions which a superior can be expected to take to fulfil his responsibilities.

5.3.3. THE REQUIREMENT FOR CAUSATION

There are grounds for optimism that the ICC jurisprudence will avoid the issues that have been identified as arising in the ad hoc tribunals with respect to the issue of causation.³⁹⁸ These arose as a result of the rather perverse decision of the *Celebici* Trial Chamber regarding the issue of causality and its rejection of the requirement for proof of causation as a separate element of command responsibility doctrine under customary international law. In contrast the structure of article 28 of the ICC Statute clearly establishes the existence of a causal link with the reference to the subordinate’s crimes resulting from the failure of the commander to take the necessary and appropriate action.

The *Bemba Gombo* Pre Trial Chamber in their Confirmation Decision confirmed under Article 28 that the underlying crimes committed by subordinates were a result of [the superior’s] failure to exercise control properly. They thus indicated that a causal link does require to be proved with regard to command responsibility in terms of the ICC Statute. A direct causal link was limited to the duty to prevent the commission of future crimes. Nonetheless they noted

³⁹⁸ D Robinson ‘How Command Responsibility got so complicated; a culpability contradiction, its obfuscation and a simple solution’ (2012) 13 *Melb J Int’l L* 1, 52.

that the failure of a superior to repress crimes or to punish crimes could have a causal impact on the occurrence of further crimes.³⁹⁹

The Chamber noted that as the relevant provision did not indicate the causal threshold required the 'but for' test represented a possible option for the determination of the appropriate causal threshold. Having, however, established the elements of this⁴⁰⁰ they noted the difficulty of determining the effect of an omission as opposed to the performance of a positive act. In the absence of the requirement to establish a direct causal link they accordingly concluded that the test to be applied was whether the omission on the part of the commander increased the risk of the commission of the underlying offence sufficiently to find he had incurred criminal responsibility under article 29(a) of the Statute.⁴⁰¹

The Trial Chamber in their judgment concurred with Pre Trial-Chamber I that a 'but for' causation standard did not require to be established between the commander's omission and the subordinate's crimes. They considered that the nexus requirement would be satisfied if it was established that the crime would not have been committed 'had the commander exercised control properly' or alternatively 'the commander exercising control properly would have prevented the crimes.'⁴⁰²

In her Separate Opinion⁴⁰³ Judge Steiner concurred with the analysis of the PTC in their Confirmation Decision. A causal link was, she considered, required between the commander's omission to act and the subordinates' crimes under the Rome Statute in contrast to the position under the ad hoc tribunals' statutes. Judge Steiner reviewed the position with regard to causality and omissions, noting that omissions neither showed causal energy, and the relationship required to be determined by the application of a normative concept of causation. The absence of a positive act established she proposed a hypothetical causal force. The PTC had concluded the threshold was that the omission increased the risk of the commission of the underlying crime. She did not consider that a slight risk would represent an appropriate

³⁹⁹ *Prosecutor v Bemba Gombo* case Confirmation Decision (n 150) para 424.

⁴⁰⁰ *ibid* para 425, 'a possible way to determine the level of causality would be to apply a 'but for' test, in the sense that, but for the superior's failure to fulfil his duty to take reasonable and necessary measures to prevent crimes those crimes would not have been committed by his force'.

⁴⁰¹ *ibid*, '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 responsible'.

⁴⁰² *Prosecutor v Bemba Gombo* case Judgment (n 146) paras 210-213.

⁴⁰³ *Prosecutor v Bemba Gombo* Judgment Separate Opinion of Judge Steiner (n 394).

standard. A high standard of probability represented an appropriate threshold for causation in the case of both actions and omissions to ensure commonality in assessment.⁴⁰⁴

Judge Ozaki, noted in his Separate Opinion⁴⁰⁵ that liability based on an omission required a number of complex hypothetical evaluations, particularly when considering systemic crimes. Having regard to the sui generis nature of command responsibility and the elements of the doctrine he concurred with the Trial Chambers analysis.⁴⁰⁶

5.3.4 ISSUES FROM THE APPEAL

The issues that arose in the course of the Appeal⁴⁰⁷ led to considerable controversy among both legal commentators and NGOs working in this area. They do not, however, when examined appear to have affected the existing position regarding the approach to the elements of the doctrine. The issues which I will briefly address are, first, the question of the role of motivation in the assessment of a commander's actions in taking measures to prevent or repress the commission of underlying crimes and, second, that of remoteness.

The Appeals Chamber was not impressed by the approach they considered adopted by their Trial Chamber colleagues with respect to Bemba Gombo's motivations for his actions which can be summed up in one quotation, '[t]he Trial Chamber's preoccupation with Mr Bemba's motivations appears to have coloured its entire assessment of the measures that he took.'⁴⁰⁸ Leaving aside the factual assessment the issue that must be considered is the legal assessment that the Chamber made. The Appeal Chamber noted Bemba Gombo's submission that motivation was always irrelevant in the assessment of the necessary and reasonable measures he undertook and considered that an accused must show he genuinely tried to prevent or repress the crimes or to submit the matter to the competent authorities.⁴⁰⁹

5.4 CONCLUSION

Command responsibility doctrine was developed by the ad hoc international criminal tribunals on the basis of limited precedents dating back to the immediate aftermath of the

⁴⁰⁴ *ibid* paras 16-24.

⁴⁰⁵ *Prosecutor v Bemba Gombo* Judgment Separate Opinion of Judge Ozaki (n 154).

⁴⁰⁶ *ibid* paras 18-23.

⁴⁰⁷ *Prosecutor v Bemba Gombo* Appeal Judgment (n 55).

⁴⁰⁸ *ibid* para 178.

⁴⁰⁹ *ibid* para 176.

Second World War and a rather brief partial codification in Additional Protocol 1. It is unsurprising therefore that there were significant areas of controversy with regard to the customary law model of the doctrine.

The ICC has benefited in its limited consideration of command responsibility to date from its ability to make use of the precedents afforded by the jurisprudence of the ad hoc international criminal tribunals. The influence of the ad hoc tribunals' jurisprudence is unsurprising and can be traced in article 28 as well as other provisions of the Rome Statute as well as in the direct citation of precedents.

Reflecting the difference in their respective jurisdictions the freedom afforded to the judiciary in the International Criminal Court to interpret and develop international criminal law is considerably more constrained. Significant areas of controversy in the ad hoc tribunals' jurisprudence are avoided due to the structure of article 28. The nature of command responsibility in the doctrine is fixed as a mode of liability. Successor superior responsibility has been noted in passing as a position adopted by some of the ad hoc tribunals' chambers, the existence of an express causal link avoids the issues that arose in that connection in the ad hoc tribunals' case law. From the perspective of the principle of responsible command it is arguable that the court's jurisprudence accords generally more closely with accepted customary international law than some of the interpretations latterly applied by the ad hoc tribunals, in particular the ICTY.

As noted, article 28 of the ICC Statute represents a considerably more sophisticated structure than the equivalent articles concerning command responsibility doctrine in the ad hoc tribunals' statutes.

The conventional form of the doctrine as has been noted differs from the customary international law form of the doctrine on several significant points. In the case of military commanders, a low constructive knowledge standard, 'should have known', is applied, contrastingly in the case of civilian superiors the standard applied is a recklessness test. The 'should have known' standard arguably equates better to the long-standing constructive knowledge initiated in the post war trials which equates more closely to the requirement under the principle of responsible command for a commander to maintain awareness of subordinates' activities.

In contrast to the explicit reference to civilian superiors for the first time in the statute the larger question of de facto command responsibility is dealt with by implication. This would potentially seem to arise from the coincidence of the Rome Conference with the early days of the ICTY mandate with the bulk of the preparatory work having preceded the reliance on

de facto positions in order to justify prosecution of accused on command responsibility charges.

As was apparent in the first trial in the ICC on the basis of command responsibility the structure of command responsibility is rendered more complex as a result of the reference in article 28 to both general and specific control. The duty to act extends to the general duty of control but the more specific omission liability under that article does not establish command responsibility unless the commander (or civilian superior) knew or should have known a relevant crime. Nonetheless, the approach adopted more clearly differentiates between the wider obligations imposed on a commander under the principle of responsible command and those directly relevant to responsibility under command responsibility doctrine.

CHAPTER 6

ESTABLISHING STATE RESPONSIBILITY

6.1 INTRODUCTION

This chapter follows on from the examination of the fundamental international humanitarian law principle of responsible command and its role in the establishment of command responsibility doctrine and its interpretation as a doctrine of international criminal law in the first part of this study.

This study will address, first, the establishment of aggravated state responsibility under attribution of conduct to the state through its organs or agents and, secondly, on the basis of due diligence when the state incurs responsibility for the effect of its failure to act to prevent acts when under a legal duty to do so the source and nature of the responsibility differs with respect to these obligations.

In the case of attribution, the conduct of the actor whose conduct engages the responsibility of the state is attributable to that state. If the primary obligations in question establish a due diligence standard, then the rights and interests in question will establish whether the states conduct is in breach of its international obligations. The *Bosnia Genocide* case which will be referred to here and in the following chapter illustrates this relationship; with the Court determining whether the conduct of the Republika Srpska forces could be attributed to Serbia.⁴¹⁰

6.2 ESTABLISHING THE CRITERIA FOR ATTRIBUTION

Article 40 establishes two criteria to distinguish between 'a serious breach by a State of an obligation arising under a peremptory norm of general international law' from other breaches incurring state responsibility.⁴¹¹ The first is with respect to the nature of the obligation in question which having regard to the ICJ jurisprudence concerns a peremptory norm under international law and the Commission refer to as obligations to the international community as a whole. The second concerns the issue of the intensity of the breach, which must have been serious. Both certainly concern serious breaches of obligations owed to the

⁴¹⁰ *Bosnia Genocide* case Judgment (n1) 43.

⁴¹¹ DASR art 40(1).

international community as such. The concept of peremptory norms is generally recognised in international practice, in jurisprudence and doctrine. These include the core crimes discussed in this thesis namely genocide, crimes against humanity and war crimes.⁴¹²

Unfortunately the abandonment of the concept of the crime of state in particular draft article 19 of the draft ARSIWA 1996 removed the significant distinction that had existed between ordinary delicts and crimes of state.⁴¹³ The consequence of the identification of a serious breach of a peremptory norm is the establishment of obligations on states to refrain from recognising the situation created as lawful or providing aid and assistance and furthermore they are required to cooperate to bring the breach to a conclusion.⁴¹⁴

6.3 ATTRIBUTION

The two requirements, attribution and breach, together form the essential elements of an internationally wrongful act and no further secondary obligations are fundamentally necessary to establish its existence. The requirement for fault, intent, due diligence, or any other additional standard falls to be determined under the applicable primary rules in a specific case.⁴¹⁵ As the Commentaries confirm whether an international obligation has been breached may depend on the knowledge of a state organ, or agent, in which case it is said to be subjective, or it may not do so, in which case the responsibility is objective.⁴¹⁶

The definition of conduct is not restricted to positive acts and may consist of either an action or omission or possibly may concern both positive and omissive acts simultaneously. The Commentaries and international jurisprudence indicate that there is no difference between the two with respect to their consequences.⁴¹⁷

Articles 4 to 11 address the institutional, functional and agency grounds under which individual conduct is attributable to the state.⁴¹⁸ Two of these are particularly relevant in the

⁴¹² As noted in the Introduction to this thesis aggression is certainly one of the core crimes, however, in view of its peculiar leadership component it is not addressed in the context of this study.

⁴¹³ Report of the ILC on the work of its 48th session 6 May-26 July 1996 (Official Records of the General Assembly, Fifty –first Session, Supplement No.10(A/51/10 AND Corr.1, 125-151).

⁴¹⁴ *ibid.*

⁴¹⁵ DASR Commentaries (n3) article 2, 34, para (3); James Crawford, *Revising the Draft Articles on State Responsibility* (1999) 10 EJIL 435, 438; Crawford and Olleson, 'The Nature and Forms of International responsibility' (n18) 464ff.

⁴¹⁶ DASR Commentaries (n 3) article 2, 34, para (3).

⁴¹⁷ DASR Commentaries (n 3) art 2 para (4) narrates, 'Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two', (emphasis added); *Corfu Channel Case (UK v Albania) (Merits)* [1949] ICJ Rep 4, 22 and 23; *United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, (Judgment) [1980] ICJ Rep 3, paras 63 and 67.

⁴¹⁸ Kristen. E. Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines' (2014) 15 Melb J Int'l L 330.

context of this study, namely article 4 which deals with the conduct of the organs of a state and article 8 which addresses conduct directed or controlled by the state. This is not to entirely exclude the grounds addressed under the remaining articles. One such ground is that of attribution under article 6 by the ICJ with respect to the attribution of the activities of the Scorpions to the RS in the *Bosnia Genocide* proceedings.⁴¹⁹

6.3.1 STATE ORGANS

Looking first at the attribution of state responsibility with respect to state organs article 4 establishes the primary rule under customary international law with respect to attribution of state responsibility that, '[t]he conduct of any State organ shall be considered an act of that State under international law [...]'.⁴²⁰

In view of the concept of the state as an international law subject in this context the definition of an organ includes any government organ regardless of function, role or status and whether part of central, federal or local government.⁴²¹ The issue of attribution to such de jure state organs is so well established that it has been described as being taken for granted, as for example with respect to the attribution of the conduct of a state's armed forces to it.⁴²²

A wide reading is also necessarily given to the conduct of such an organ which will be considered as attributable to the state, including ultra vires conduct or conduct contrary to directions provided that it can be related to its official function.⁴²³ As the ILC Commentaries state 'It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power.'⁴²⁴ The acquiescence of a commander in

⁴¹⁹ *Bosnia Genocide* case (n 1) para 389, '...the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.'

⁴²⁰ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights* (Advisory Opinion) 1999 ICJ Rep 62,87.

⁴²¹ James Crawford, (2002) ILC DASR Commentary article 4 para (6),98; *Bosnia Genocide* case (n 1) para 388.

⁴²² *Armed Activities on the Territory of the Republic of Congo (Democratic Republic of Congo v Uganda)* (Judgment) ICJ Rep 2005, 165, 242; Simon Olleson, 'The impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts' (British Institute of International and Comparative Law 2009) 33 citing actions of the USA in *Oil Platforms (Islamic Republic of Iran v United States of America)*, Merits, ICJ Reports 2003, 161 See ILC DASR Commentary (n 3) on article 4 at para (3), citing the statement by Umpire Leiber in the *Moses* case that, 'An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority.' fn 102 Moore, History and Digest, vol III, 3127, at 3129 (1871). See also *ibid*, para (6) citing *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, ICJ Reports (1999) 62, 87, para 62, 'According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State.'

⁴²³ DASR art 7; *Armed Activities on the Territory of the Republic of the Congo (Democratic Republic of Congo v Uganda)*, Judgment, ICJ Reports, 2005, 165, 242. See also Judicial Decisions involving Questions of International Law- General Claims Commission *Youmans v Mexico* (1927) 21 AJIL 555, 571; *Caire (France) v United Mexican States* (1929) 5RIAA 516, 530.

⁴²⁴ ILC DASR Commentaries (n 3) art 4 para 13.

the conduct of his subordinates may be reflected in the way in which the state as such may systematically not acting to prevent crimes which accord with the interests of the state.⁴²⁵

As noted, the definition of a state organ in article 4 (2) applies primarily to de jure state organs having that status under the domestic law of the state concerned. It is not, however, enough to refer to domestic law to confirm a body has that status. In view of the use of the term 'includes' in the paragraph 2 the final determination of the status of a state organ falls to be made under international law. A State cannot avoid responsibility for a body which in reality functions as one of its own organ's.⁴²⁶

This reflects the ICJ's conclusion in the *Nicaragua* case and affirmed in the *Bosnia Genocide* case that individuals or groups could be equated with state organs, even if they did not have that standing in domestic law, provided that the relationship was of 'dependence on the one side and control on the other'.⁴²⁷

The Court continued:

in such a case it is appropriate to look beyond the legal status alone, in order to grasp the reality of the relationship between the person taking action and the state to which he is so closely attached is to appear to be nothing more than its agent 'any other solution would allow states to escape their international responsibility [...]'.⁴²⁸

In adopting this position, the ICJ jurisprudence confirmed that in defining a de facto state organ it was necessary to look at the exercise of control rather than legal status, in an echo of the international criminal law jurisprudence on the critical role of control in command responsibility doctrine. The establishment of such a status would, however, inevitably be exceptional in view of the level of complete state control necessary in order to establish the existence of de facto organ status.⁴²⁹ Applying this analysis the Court concluded that those responsible for the genocide at Srebrenica had not been in a state of complete dependence on the external state supporting them.⁴³⁰

⁴²⁵ Nollkaemper 'Systemic Effects of International Responsibility for International Crimes' (n 28) 313, 319.

⁴²⁶DASR article 4(2) relative Commentary (n 3) para 11; For a discussion of the distinction between the two concepts see Andre JJ de Hoogh 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadic Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia', (2002) 72 BYIL 255, at 265-8.

⁴²⁷*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 (*Nicaragua* case); *Bosnia Genocide* case (n 1) para 392.

⁴²⁸ *ibid* para 392.

⁴²⁹*ibid*, para 393.

⁴³⁰*ibid*, para 394.

3.2 STATE AGENTS

DASR article 8 addresses the customary international law basis under which the conduct of a person or group is attributable to a state if, '[...] acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.' This reflects a situation which has become increasingly commonplace. It concerns a state's control over a specific operation in which the law has been broken by a person or entity acting on state instructions. The arrangement has the potential to obscure the connection with the state concerned through the 'othering' of those responsible for the direct commission of underlying crimes. The process of establishing the link between such proxies and the state on whose behalf they act through attribution is a complex one.⁴³¹

Such individuals or groups represent an exception to the general rule that the acts of private individuals or entities cannot be attributed to the state on the basis of the existence of an agency relationship with a state. The emphasis in this relationship is on effective control over a specific operation, rather than the issue of complete dependence.⁴³² General control even if there was a high degree of dependency could not in itself result in responsibility for the acts of an entity being attributable to a state.⁴³³

Clearly mindful of the confusion regarding the existence of two distinct tests for control in the earlier ICJ judgment in the *Bosnia Genocide* Judgment, the Court highlighted that the two tests addressed distinct issues.⁴³⁴ The judgment expressly confirmed that in the context of that second scenario rather than establishing a relationship of complete dependence on the part of the person or entity the issue which fell to be determined was, 'that they acted in accordance with that States instructions or under its effective control' in respect of each operation in which breaches of international law had occurred. Control, therefore, as noted was exercised under this analysis over the operation rather than the group.

The Court rejected attempts to have it adopt the 'overall control' standard applied by the ICTY Appeals Chamber in the *Tadic Case* with respect to the nature of the armed conflict in Bosnia and the attribution of the conduct of the Bosnian Serbs to the FRY with respect to state responsibility.⁴³⁵ Logic, it said, did not require the application of the same test in

⁴³¹ Ruth Jamieson and Kieran McEvoy, 'State Crime by Proxy and Judicial Othering' (2005) 45 BJC 504, 505.

⁴³² *Nicaragua* case Judgment (n422) para 115; Stefan Talmon, 'The responsibility of outside powers for acts of secessionist entities' (2009) 58 ICLQ 493, 498ff.

⁴³³ *Nicaragua Case Judgment* (n 422) 62-3; James Crawford, *State Responsibility: The General Part* (CUP 2013) 156.

⁴³⁴ *Bosnia Genocide* case Judgment (n 1) para 397.

⁴³⁵ *Prosecutor v Tadic* (Appeal Judgement) ICTY-94-1-A (15 July 1999) 53-61.

resolving two different issues. Secondly, the proposed test widened the connection between a state's organs and its international responsibility too far.⁴³⁶

The issue of the differing standards of control applied by the ICJ, the ICTY (now followed in turn by the ICC), has been deplored as one of the most prominent examples of the fragmentation of international law.⁴³⁷ Is this, however, a justified criticism.?

The effective control test established by the ICJ sets a high standard for attribution on this basis, indeed it is arguable that the combination of the strict control test with respect to de facto state organ attribution and the effective control standard with respect to agency established by the ICJ establishes such high standards for control as to render their application verging on the theoretical rather than the practical.⁴³⁸

The ICTY Appeals Chamber developed their overall control test in the course of the *Tadic* Appeal Judgement when determining the issue of the nature of the armed conflict in Bosnia.⁴³⁹ This was relevant to the determination of whether the grave breaches regime under the Geneva Conventions was applicable. In determining whether the acts of the armed forces of the RS could be attributed to the FRY thereby internationalising the existing internal armed conflict the Chamber applied the general rules for attribution for the purposes of state responsibility.

The ICTY Appeals Chamber concluded that the armed conflict was indeed international founded in its analysis that the conduct of the RS armed forces was attributable to the FRY as they were acting on behalf of that state.⁴⁴⁰ In the course of their deliberations the Chamber identifying only the subordinate effective control standard put forward by the ICJ in the *Nicaragua* case did not find it persuasive.⁴⁴¹ Adopting the teleological analysis typical of ICTY jurisprudence they concluded that the rigour of the test was inconsistent with the logic of the law of state responsibility based, as they held, on a realistic, factual conception of accountability.⁴⁴²

⁴³⁶ *Bosnia Genocide* case Judgment (n 1) paras 403-406.

⁴³⁷ *Loizidou v Turkey* (Merits) App no 40/1993/435/514 (ECHR, 18 December 1996) para 56; Martti Koskeniemi and Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 LJIL 553-579.

⁴³⁸ Talmon (n 432) 493ff, 503.

⁴³⁹ *Prosecutor v Tadic* Appeal Judgment (n 435).

⁴⁴⁰ *ibid* 504, Tristan Ferraro, 'The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict', (2015) 97 IRRC, 1227, 1234.

⁴⁴¹ *Prosecutor v Tadic* Appeal Judgment (n 435) para 115.

⁴⁴² *ibid* para 121.

The Chamber then distinguished between the attribution to a state of the acts of organised groups, where it sufficed that the group as a whole was under the overall control of the state, as distinct from private individuals or disorganised groupings where effective control was required.⁴⁴³ In establishing the criteria for overall control over such a group the Chamber concluded that this was established by the state 'equipping and financing the group' and 'coordinating or helping in the general planning of its military activity'. Provided these conditions were met conduct should be attributable to the state without the requirement for direction or control by the state of the specific operation and the requirement that the breach of international law occurred in the context of that operation under specified by the ICJ.⁴⁴⁴

This lower standard of control was justified on the basis that such a group was organised with, 'a structure, a chain of command and a set of rules as well as the outward symbols of authority.'⁴⁴⁵ Accordingly, it was sufficient for the group as an entity to be under the State's overall control.⁴⁴⁶

The Appeals Chambers analysis was, as was to be expected, adopted in subsequent ICTY jurisprudence and has now been adopted by the ICC in establishing the existence of an international armed conflict through the participation of an organised armed group acting on behalf of another state.⁴⁴⁷

In arriving at their respective conclusions in the *Tadic* Appeal and in the *Bosnia Genocide* case it is arguable that in both the ICTY Appeals Chamber erred in their respective analysis. In the case of the former they failed to distinguish between the ICJ's rather obscure analysis in the *Nicaragua* case of the analysis of the elements necessary for the existence of a de facto state organ and those applicable to effective control for a specific operation in terms of a state agent.

The relevant concern in this case is not the first area of contention concerning the utilisation by the ICTY of attribution under the international law of state responsibility to establish the nature of an armed conflict under international humanitarian law. It is certainly arguable that the Appeals Chamber approach adopted conflated secondary and primary obligations, international humanitarian law not representing a specialist regime within the law of state

⁴⁴³ *ibid* para 137.

⁴⁴⁴ *Prosecutor v Tadic* Appeal Judgement (n 435) paras 131 and 132.

⁴⁴⁵ *ibid*, para 137.

⁴⁴⁶ *ibid*, para 120. Judgment.

⁴⁴⁷ *Prosecutor v Prlic* Judgment (n 305) para 86; *Prosecutor v Thomas Lubanga Dyilo* (Judgment) ICC-01-04-01/06 (14 March 2012) 247, 593, para 541; *Prosecutor v Jean- Pierre Bemba Gombo* Judgment) (n146) para 130.

responsibility.⁴⁴⁸ It rather concerns whether there should be one uniform standard of control for attribution or rather whether a varying test of control should be applied having regard to the factual circumstances of the case under consideration. Two of the judges in the *Bosnia Genocide* case dissociated themselves from the majority's analysis. The then ICJ Vice President Al-Khasawneh argued that 'a strong case can be made for the proposition that the test of control is a variable one.' He contended that the Court in repudiating the control standard applied by the *Tadic* Appeals Chamber had not paid proper regard to the crucial issue that having regard to the changing nature of armed conflict differing activities could justify changes to the rules concerning attribution. In contrast to the situation that had existed in the *Nicaragua* case where the primary objective did not necessarily concern crimes against humanity or war crimes in the *Bosnia Genocide* case the shared objective was the commission of international crimes in such a situation to require specific control over specific crimes established to high a threshold.⁴⁴⁹ His fellow judge, Judge Ad Hoc Mahiou, similarly noted the 'perfect similarity of views' between the FRY and RS meant that overall control which established a decisive influence sufficed in the circumstances of the case.⁴⁵⁰ In such circumstances a stricter standard of control was unnecessary. On the other hand, are those who argue for a uniform standard based on the desirability of a common standard of control. Those taking this position may be indifferent as to which standard should be adopted, whether effective control or overall control,⁴⁵¹ or argue for one or other of the respective tests of control. On the one side are those commentators who contend that the ICJ in its *Nicaragua* and *Bosnia Genocide Case* Judgments affirmed the correct test, being effective control.⁴⁵² On the other another influential commentator has proposed the *Nicaragua* test of effective control is not validated by international law being restricted to the ICJ jurisprudence and the ILC contending that the overall control test would more effectively deal with developing trends in international practice. The overall control test, it is argued lowers the barrier in that it enables a tribunal to arrive at a determination based on which international law subject exercises global control.⁴⁵³ It has to be recognised, however, that the overall

⁴⁴⁸ Marco Milanovic, 'State Responsibility for Genocide' (2006) 17 EJIL 585.

⁴⁴⁹ *Bosnia Genocide Case* Judgment (n1) Dissent of Vice-President Al-Khasawneh paras 36-39.

⁴⁵⁰ *Bosnia Genocide Case* Judgment (n1) Dissent of Judge Ad Hoc Mahiou, paras 116-117.

⁴⁵¹ See *Georgia v Russia (II)* 38263/08 Amicus Curiae Brief submitted by Hampson and Lubell, para 16.

⁴⁵² Milanovic *State Responsibility for Genocide* (n 448) 587; Talmon (n 432) 517; Crawford (n 428) *State Responsibility: The General Part* 156 '[...] This determination (the ICJ's *Bosnia Genocide case* Judgment) effectively ends the debate as to the correct standard of control to be applied under Article 8. Moreover, it does so in a manner that reflects the ILC's thinking on the subject [...].'

⁴⁵³ Antonio Cassese, 'The *Nicaragua* and *Tadic* Tests Revisited in Light of the ICJ Judgment on Genocide in *Bosnia*' (2007) 18 EJIL 649, 665.

control test still requires state involvement not only with respect to logistic support but also involvement in the planning and preparation of the military operations.⁴⁵⁴

The upshot of this situation has been that there are therefore currently two distinct tests under international law namely the 'effective control test' as applied by the ICJ regarding attribution on the basis of de facto state agency under the law of state responsibility and then the 'overall control test' originally adopted in the ICTY jurisprudence and which has since been followed by the ICC with respect to the use of force regime regarding the existence of an international armed conflict but also as an attribution criterion.⁴⁵⁵

Differing standards in themselves are to be expected in the context of modern international law in which international tribunals have developed without any realistic prospect of the development of an institutional hierarchy. As noted above, the ICTY Appeals Chamber in applying the overall control standard had regard to the teleological approach characteristic of its jurisprudential analysis, as opposed to the ICJ's focus on the issues of sovereignty and voluntarism.⁴⁵⁶ The ICC's emerging jurisprudence reflects the same institutional focus in contrast to that of the ICJ.⁴⁵⁷ The differing perspectives of the institutions reflect their differing concerns with humanitarianism on the one side and traditional public international law on the other.

The dissenting judges in the *Bosnia Genocide* case Judgment were, however, concerned not with the differing standards adopted under international criminal law and public international law. They were addressing rather the issue of the application of two differing standards for control within the context of public international law. They concluded the established test in the *Nicaragua* case may be appropriate in certain circumstances where conduct is not necessarily unlawful; the position differs markedly in cases such as the *Bosnia Genocide* case where the unity of aims inevitably results in a lower standard of control being exercised.

⁴⁵⁴ *Prosecutor v Tadic* Appeal Judgment (n 435) para 145.

⁴⁵⁵ N Tsagourias and R Buchan, 'Automatic Cyber Defence and the Laws of War' (2018) GYIL 19.

⁴⁵⁶ Koskenniemi and Leino (n 437), 567.

⁴⁵⁷ See fn 51.

6.4 DUE DILIGENCE

In addition to attribution states may of course also incur responsibility for breach of their separate and distinct primary obligation to exercise due diligence thereby obliging a state to take all measures it could reasonably expected to take in prevention and repression.⁴⁵⁸ A international law must establish duty direct for the state is required to act with due diligence general duty of due diligence does not exist, international law must establish a duty to act before a state is required to act with due diligence. A state is accordingly responsible when it fails to prevent its territory or more widely its jurisdiction being used contrary to the international legal rights of other states.⁴⁵⁹

The ICRC customary international law study interprets the obligation as applicable not only to 3rd parties but also to states armed forces and de facto organs and agents acting under its direction or control.⁴⁶⁰ in the case of due diligence state responsibility is incurred rather as a result of the state's negligence than its direct actions. While the first form of responsibility, attribution, is objective in nature in this latter form of responsibility the obligation which the principle establishes is based on an obligation of means with the requirement for effective control established on the specific facts of the case rather than being dependent upon the result.⁴⁶¹ It is this which establishes the complementary nature of the relationship and the shared responsibility referred to earlier.

When due diligence is applicable a state's obligations are extended to require it to prevent or repress a breach of international law. It provides at its core a standard against which state fault can be established in regard to the consequences of the conduct and the extent to which the consequences could have been avoided.⁴⁶²

As noted in the ILA report on this issue international law focuses on means rather than results, providing states with a 'significant measure of autonomy and flexibility'⁴⁶³.

⁴⁵⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment ICJ Reports 2005 168, para 178; *Bosnia Genocide* case Judgment 43 para 430.

⁴⁵⁹ *Corfu Channel Case* (n 414); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 157

⁴⁶⁰ J-M Henckaerts and L Oswald-Beck, *Customary International Humanitarian Law Vol 1 Rules*, ICRC, cup, Rule 144,509. The 2016 ICRC Commentary throws doubt on this interpretation at paras 144 and 150. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168, 268.

⁴⁶¹ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, 115.

⁴⁶² T Stephens and D French, 'ILA Study Group on Due Diligence in International Law' Second Report International Law Association (Second Report) 2016.

⁴⁶³ *ibid.*

6.5 CONCLUSION

State responsibility has to date played a limited role with respect to international crimes in contrast to individual criminal responsibility which represents a considerably more sophisticated regime. Nonetheless, the core crimes with which this study is concerned concern the dual responsibility of individuals and states. Seeking to address such crime simply on the basis of individual responsibility does not provide a satisfactory legal response to such systemic criminality. In order for the role of the state to be satisfactorily addressed in the case of systemic crimes it is necessary for state responsibility to be established.⁴⁶⁴ In the case of systemic crimes proper recognition of their nature can only be achieved through their recognition as serious breaches of peremptory norms.

Modern armed conflicts represent confused and complex situations. State responsibility has required to address these. The *Bosnia Genocide* case represents to date the most significant case to date with respect to the establishment of state responsibility. The court relied on the factual assessment which had been carried out by the ICTY in the course of its investigation of Serbia's failure to prevent and punish the Srebrenica genocide. In its proceedings the Court relied on the tests for attribution which it had established in its *Nicaragua* judgment with respect to the establishment of de facto state organ and de facto state agency, namely strict control and effective control, rejecting the proposed lower 'overall control standard', adopted by the *Tadic* Appeals Chamber.

In both its *Nicaragua* and *Bosnia Genocide* judgments the ICJ propounded the requirement for high levels of control in their determination of the issue as to whether on the evidence the non-state armed groups could be regarded as either de facto state organs or agents. In both instances the ICJ relied almost entirely on the determination of the level of control exercised by the external state over the non-state entity.⁴⁶⁵

In the absence of specified tests for control in the DASR ICJ jurisprudence has identified the high standard of control required in order to establish attribution.

Faced with this difficulty in tracing the link necessary to establish attribution the breach of primary obligations provides a basis to establish responsibility not based on the primary

⁴⁶⁴ Nollkaemper, 'Introduction' (n 11) 1.

⁴⁶⁵ *Nicaragua* case (n 424) and *Bosnia Genocide* case (n 1).

wrongful act but arising from the separate failure to fulfil the primary obligation. This can arise both with respect to the obligation to prevent a wrongful act but also with respect to other forms of participation regarding the duty to respect and protect fundamental legal interests. As has been identified this can apply with respect to a wide range of areas of international law including international humanitarian law on a range of bases to include the obligation to respect and to ensure respect under Common Article 1 of the 1949 Geneva Conventions.⁴⁶⁶

The utilisation of due diligence avoids the issue of the high standard of control necessary to establish attribution to the state of non-state actors. The state incurs responsibility for its negligence rather than through attribution of conduct in permitting its territory or territory within its jurisdiction to be used for or as the source of acts harmful to other states.⁴⁶⁷

⁴⁶⁶ Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?' (2017) 60 GYIL 667, 669.

⁴⁶⁷ *Corfu Channel* Case (n 414) 22.

CHAPTER 7

UTILISING COMMAND RESPONSIBILITY IN THE ESTABLISHMENT OF STATE RESPONSIBILITY

7.1 INTRODUCTION

Drawing on the preceding examination of command responsibility doctrine and its relationship with the fundamental international humanitarian law principle of responsible command, this chapter seeks to align command responsibility as an international criminal law principle and state responsibility because they are both linked by their common purpose of the protection of the international community from systemic criminality. It will thus explain how command responsibility can be utilised to establish state responsibility in cases where conduct gives rise to systemic crime on the one hand and aggravated state responsibility on the other.

The chapter begins with the review of how jurisprudence has dealt with the issue of concurrence between individual criminal responsibility and state responsibility.

The concept of system criminality is then discussed as one of the elements of this study which seeks to address the utilisation of international criminal law to establish the role of the state in such criminality.

The three sections which follow will address in more detail the issue of concurrence by reviewing the specificities of concurrence between individual criminal responsibility for systemic crime and aggravated state responsibility and the roles of primary and secondary norms in the establishment of concurrent responsibility. This part ends with the examination of the overlap between criminal and aggravated state responsibility at the level of secondary obligations.

The chapter then goes on to discuss prevention and due diligence as common themes in both regimes in order to justify the utilisation of command responsibility to establish state responsibility.

7.2 DEVELOPMENT OF CONCURRENCE BETWEEN INDIVIDUAL AND STATE RESPONSIBILITY REGIMES

Concurrence between the individual criminal responsibility and state responsibility regimes has, as previously noted, both practical and theoretical implications⁴⁶⁸ On a practical level and as the *Bosnia Genocide* case judgment of 2007⁴⁶⁹ illustrated, the findings of criminal proceedings can be relied upon in order to establish state responsibility. In practice it could not have been very difficult for the ICJ or any other process dealing with state responsibility to replicate the fact-finding process carried out by criminal tribunals. As Nollkaemper opined, the concurrent proceedings may also assist in the resolution of the larger theoretical issues such as the unity of state responsibility, transparency or partial transparency of the state and the nature of state responsibility. These issues will, so far as relevant to this study be addressed subsequently in the course of this chapter.

Concurrence has also a theoretical grounding. Concurrence between the international criminal responsibility and state responsibility regimes in the context of this study is the product of the emergence of international criminal responsibility and the emergence of a hierarchy of norms; more specifically the recognition of peremptory norms and their erga omnes character.

Historically, individuals were regarded as objects of international law whose conduct was attributable to the state, the only international legal subject which could also be held responsible. The work of the Commission on the Responsibility of the Authors of the War⁴⁷⁰ as part of the Versailles Treaty process⁴⁷¹ following the First World War established the first theoretical structure which could be utilised to establish individual criminal responsibility and hence potentially introduce concurrent responsibility under international law The proposal proved, however, to be a conceptual step too far and in practice the traditional international law model of state responsibility was followed.

It was not until the end of the Second World War and the proceedings in the Nuremberg and Tokyo Tribunals that the picture significantly altered. The emphasis in these trials was on individual criminal responsibility to overcome the weaknesses of procedures directed almost

⁴⁶⁸ Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (n 15).

⁴⁶⁹ *Bosnia Genocide* case Judgment (n 1).

⁴⁷⁰ Adatci (n 80).

⁴⁷¹ Treaty of Peace between the Allied and Associated Powers and Germany adopted 28 June 1919 entered into force 10 June 1920 112 BFSP 1

exclusively at the level of state responsibility, as illustrated by the Versailles Treaty provisions

The proceedings of the Nuremberg Tribunal are commonly remembered for its statement that

'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'⁴⁷²

What is more often forgotten is that the Tribunal, then went on to reject the proposition that individual responsibility was exclusive, concluding rather, 'that international law imposes duties and liabilities upon individuals as well as upon States [...]'.⁴⁷³ This analysis represents the initial recognition by an international tribunal of the existence of dual responsibility under international law.

The establishment of individual criminal responsibility and the resulting distinction drawn between the state and an individual accused of an international crime allowed for the determination of the criminal responsibility of the accused, whether they had acted as a state organ or a private individual. In its absence individual criminal responsibility could not have existed with respect to state organs because it would have been absorbed by the state and thus the existing state- oriented structure of responsibility would have continued to apply.⁴⁷⁴

State responsibility has, however, remained both relevant and significant. Developments in the law of state responsibility and the introduction of jus cogens norms demonstrates an alignment with international criminal law.

Jus cogens norms include among others the prohibition of genocide, crimes against humanity and war crimes which also have a criminal law dimension. Their violation under international criminal law as well as their violation under the law of state responsibility gives rise to a duality of internationally wrongful acts and to concurrent responsibility -individual criminal responsibility and state responsibility.

The concurrence between the state responsibility regime and the international criminal law regime is now addressed in the respective 'without prejudice' provisions in the Rome Statute and the ILC DASR 2001.⁴⁷⁵

⁴⁷²Trial of the Major War Criminals before the International Military Tribunal vol1 (Nurnberg 1947) 223.

⁴⁷³ Ibid.

⁴⁷⁴ Bonafe, 'The Relationship between State and Individual Responsibility' (n 14) 64-66.

⁴⁷⁵ ICC Statute (n 2) art 25(4) and DASR (n3) art 58.

The relationship between the international criminal law regime and the state responsibility regime has been characterised as being in tension with each other in view of their competing approaches to responsibility.⁴⁷⁶ State responsibility, whether ordinary or aggravated emphatically does not include state crime but is primarily civil concerned with reparations and, potentially, systemic consequences in the case of aggravated state responsibility. In contrast individual criminal responsibility as a criminal regime is concerned with the identification and punishment of offenders.

The development of international criminal law under the influence of the ad hoc international tribunals and the ICC has resulted in a considerably more sophisticated legal structure for the establishment of individual responsibility in particular in the case of systemic crimes compared to state responsibility, even in the light of the adoption of the ILC DASR 2001. International criminal law in both in its customary form and now under the Rome Statute has regard to the systemic nature of international crimes as evinced by their definitions and modes of liability. Nonetheless, it ultimately is concerned with individual criminal responsibility and the current emphasis on criminal proceedings produces a necessarily fragmented view of the crimes. Failure, however, to recognise the state's part in the commission of international crime fails to adequately capture the true nature of system criminality and the role of the state.⁴⁷⁷

The *Bosnia Genocide* case 2007⁴⁷⁸ represents the most significant example to date of the concurrence between the two regimes: individual criminal and state responsibility.⁴⁷⁹ The ICJ affirmed the concept of duality of responsibility, referring to the findings of the Nuremberg Tribunal and citing article 25(4) of the ICC Statute and article 58 DASR and the relative Commentary on article 58(3).⁴⁸⁰

In the *Bosnia Genocide* Case the ICJ relied almost entirely on the findings and analyses of the criminal tribunal. It did so with respect to the law, the assessment of the evidence from a factual perspective and the weight to be afforded to the other tribunal's legal analyses. The only exception to this practical expression of concurrence was with respect to divergence

⁴⁷⁶ Cassese, *International Criminal Law* (n4) 9.

⁴⁷⁷ C Brolmann & J Nijman, 'Legal Personality as a Fundamental Concept of International Law Amsterdam Law School Legal Studies Research Paper No 2016-43' Amsterdam Center for International Law, University of Amsterdam (2017).

⁴⁷⁸ *Bosnia Genocide* case Judgment (n1).

⁴⁷⁹ Nollkaemper, 'Concurrence between individual responsibility and state responsibility in international law' (n 15) 615.

⁴⁸⁰ ILC DASR Commentaries (n 3) relative Commentary on article 58(3) '[...] The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.'

between the use of the control tests established by the Court in the *Nicaragua* case, as opposed to those established by the ICTY.⁴⁸¹

In short, the Court in arriving at its finding with respect to the question of Serbia's state responsibility can be said to have aligned the international criminal and state responsibility regimes.⁴⁸²

7.3 SYSTEM CRIMINALITY

As noted previously, a distinctive characteristic of such criminality is that it occurs in the context of systemic violence committed by the state as such. In contrast to domestic law where individuals commit crimes on their own volition, international criminal law has been concerned with the responsibility of individuals who act on behalf of the state in the commission of international crimes. This shows that the shadow of the state looms over systemic crimes requiring proper consideration in order that a coherent picture of criminality and wrongfulness emerges. Roling introduced the concept of 'system criminality' and Kelman subsequently proposed the existence of 'crimes of obedience'. The respective terms highlight different elements of such crime. Roling described system criminality as arising when, '[...] criminality depends on societal forces, rather than on personal inclinations, the effect of these forces ranging from direct orders, through official favour, to conspicuous indifference.'⁴⁸³

System criminality has been described as involving the development of a normative climate within a collective entity so that systemic crimes are not regarded as being contrary to a norm but rather conform to the normative climate within that entity. Kelman has proposed that crimes of obedience differ from their domestic counterparts in that they occur either on the basis of direct orders, or in an environment in which such crimes were, 'implicitly sponsored, expected, or at least tolerated by the authorities.'⁴⁸⁴ As was subsequently noted regarding the Balkan Wars and the break-up of Yugoslavia, 'a specific climate and mentality had to be created in order to prepare people to participate in, commit to, or tolerate the crimes that occurred.'⁴⁸⁵

⁴⁸¹ M Milanovic, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 EJIL 669, 694. Per contra Cassese 'The Nicaragua and VASI Tests Revisited' (n 450) 649.

⁴⁸² Milanovic, State Responsibility for Genocide (n448) 693

⁴⁸³ BVA Roling, 'Criminal Responsibility for Violations of the Laws of War' (1976) 12 Rev BDI 8, 12.

⁴⁸⁴ Kelman (n 17) 26, 27.

⁴⁸⁵ J Vlasda, 'Organised Innocence and Exclusion: 'Nation States' in the Aftermath of War and Collective Crime' (2007) 74 Social Research 1173, 1174.

International crimes are often committed as a consequence of direction by commanders or official acquiescence which accords with government policy, not necessarily declared.⁴⁸⁶ The latter element may potentially be the more significant in its consequential erosion of military discipline and moral standards on the part of combatants. This has been proposed to have been the case with elements of the US Forces in Vietnam, from the emphasis on the 'body count' and an implied policy under which prosecution and certainly conviction was unlikely for the injury or death of local civilians.⁴⁸⁷ It also appears to potentially be the case with respect to the reported conduct of Russian forces in Ukraine following the recent invasion. The involvement of the state may normalise such conduct within the state and its organs, such as the security or armed forces through the process of authorisation, routinisation and dehumanisation.⁴⁸⁸ International crimes cease to be regarded as deviant behaviour in the light of these influences.⁴⁸⁹

The role of the state and state organs, such as the state armed forces can be observed historically in post-World War II war crimes trials, the *Hostage*,⁴⁹⁰ *High Command*⁴⁹¹ cases and the *Tokyo*⁴⁹² Trials as well as in ad hoc international tribunal cases.⁴⁹³ It is certainly the case that ad hoc tribunals sought to focus on collective criminality. It nonetheless did so on the basis of individual criminal responsibility. Prosecuting individual members of the political leadership of a state, as in the case of Slobadan Milosevic before the ICTY while dissociating them from the political environment in which they operated can produce a dangerously unbalanced picture.⁴⁹⁴ Although Milosevic played a central role in the armed conflicts surrounding the disintegration of the former Yugoslavia, he certainly did not do so alone. The role of the state was also evident in ICJ proceedings, the *Armed Activities on the Territory of the Congo*⁴⁹⁵ and *Bosnia Genocide* cases.⁴⁹⁶

⁴⁸⁶ Nollkaemper, 'Systematic Effects of International Responsibility for International Crimes' (n 28) 319.

⁴⁸⁷ I Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 EJIL 561, 575.

⁴⁸⁸ Kelman (n 17) 27; UK MOD Joint Doctrine Publication 1-10 Captured Persons (CPERS) (3rd edn, change 1, DCDC MOD 2015) 4-5, fig.4.2.

⁴⁸⁹ MA Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 NWL Rev, 539, 567

⁴⁹⁰ *Hostage* case (n89).

⁴⁹¹ *High Command* case (n 82).

⁴⁹² *Tokyo* Trials (n61).

⁴⁹³ *Prosecutor v Krstic* case Judgment (n 10).

⁴⁹⁴ *Prosecutor v Milosevic* (Opening Statement for the Prosecution) ICTY-02-54-T (12 February 2002) 8, 'He is prosecuted on the basis of his individual criminal responsibility. No state or organisation is on trial here today.'

⁴⁹⁵ *Armed Activities* case Judgment (n 19).

⁴⁹⁶ *Bosnia Genocide* case Judgment (n 1).

'In terms of international criminal law, the so-called 'international element' or 'context of organized violence' which ascribes to crimes their character as international crimes is the context of large scale or organised violence committed or initiated in the main, by states. This context has been described as transforming ordinary crimes into international crimes.⁴⁹⁷ It arises through the structure of such crimes which have been described as generally 'double layered' in that they consist firstly of an underlying offence and then an international component. The underlying offence generally represents a crime under domestic law while the latter element, which effects their transformation into international crimes, is that they also are regarded as being in pursuance of state policy and in breaching the category of obligations owed to the international community as such

While, however, it is true to say that international crimes generally are widespread and systematic in their character it is not invariably the case, others, such as war crimes can be committed as isolated acts by individuals.⁴⁹⁸ Accordingly, the systemic nature of such crime requires to be established having regard to the category of the international crime concerned before such criminality can properly be labelled as systemic.

It is of course the case that objections can be put forward to the proposition that action should be taken at the level of the system. The existence of a hierarchical structure as in the armed forces with the separation between the direct perpetrator and the level of policy development either on the part of the state authorities or internally within the higher echelons of the chain of command further increases the difficulty in establishing responsibility at the policy level, whether state or military as opposed to the direct perpetrators.⁴⁹⁹

It is not, however, the position of this study that collective responsibility in the pre-Second World War sense should be adopted, along with the concept of collective guilt. As outlined in the Introduction to this study the intention is that state responsibility arising from the commission of an international crime should be pursued on the basis of aggravated state responsibility. This does not carry with it the concept of collective guilt but nonetheless enables the role of the state to be marked. Moreover, such responsibility has a rule of law quality as does criminal responsibility.

⁴⁹⁷ Werle (n 2) sidebar 81.

⁴⁹⁸ Bonafe *The Relationship Between State and Individual Responsibility* (n 14) 82.

⁴⁹⁹ Kelman (n 17) 28.

7.4 CONCURRENCE BETWEEN INTERNATIONAL CRIMINAL RESPONSIBILITY AND AGGRAVATED STATE RESPONSIBILITY IN JUDICIAL PROCEEDINGS

International crimes and systemic criminality have been captured in the law of state responsibility in the form of aggravated responsibility for serious breaches of international obligations.⁵⁰⁰ Such breaches refer to breaches of substantive norms of fundamental character for the international community among which are those that constitute international crimes.

That said, the utilisation of the inter-state judicial process in order to determine the establishment of aggravated state responsibility has been limited. The exceptions to the rule are the *Croatia Genocide* case 2015, the *Bosnia Genocide* case 2007 and the earlier *Armed Activities on the Territory of the Congo* case.⁵⁰¹ The International Commission of Inquiry on Darfur which presented its report to the UN Secretary General in 2005 was composed of jurists and was influential in subsequent UN involvement in the situation in that region. Finally, the report of the Judicial Commission of Inquiry, the Porter Commission, established by the Ugandan Government into allegations of that states involvement in the DRC was viewed as worthy of special attention by the ICJ in their proceedings in the *Armed Activities on the Territory of the Congo* case.⁵⁰²

The extent to which the concurrence between criminal and state responsibility were part of the reasoning before these proceedings differs. Command responsibility has not arisen as a form of criminal responsibility in any of these cases. It potentially could have, if there had been concurrent criminal proceedings regarding the events addressed in the ICJ *Armed Activities on the Territory of the Congo* case.⁵⁰³ In that case the ICJ considered the evidence regarding the activities of the Ugandan armed forces commander in the DRC in the relevant period. It concluded that Uganda as the occupying power in Ituri District was obliged to exercise due diligence, taking the measures within its power to

secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory [...] and not to tolerate such violence by any third party.⁵⁰⁴

⁵⁰⁰ DASR (n 3) arts 40 and 41.

⁵⁰¹ *Bosnia Genocide* case Judgment (n 1); *Armed Activities* case Judgment (n 19).

⁵⁰² *ibid* 121.

⁵⁰³ *ibid*.

⁵⁰⁴ *ibid*, para 178.

The Court then went on to hold that state's responsibility as occupying power was engaged, first, 'for any acts of its military that violated its international obligations', and, secondly,

for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own initiative.⁵⁰⁵

This represents a classic example of the occupation commander acting as a place holder for the state and, additionally, potentially of command responsibility through his failure to fulfil his obligations under the doctrine. Had he been prosecuted on the basis of command responsibility the evidence, findings and analysis of the criminal proceedings would have had direct relevance to the issue of state responsibility, the subject of the ICJ proceedings.

Notwithstanding the absence of prior criminal proceedings there are clear similarities to the subsequent *Bosnia Genocide* proceedings with respect to the availability of a large amount of evidence and the requirement for the Court to establish a basis for its appropriate handling and utilisation. It is arguable that the Court was only able to proceed with the case on the basis of its availability. In any event the Court observed that the Parties had provided it with a 'vast amount' of documents, including UN and governmental reports. Concerning the approach to be adopted in assessing this it noted

evidence obtained by persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information some of it of a technical nature, merits special attention. The Court will thus give appropriate consideration to the Report of the Porter Commission which gathered evidence in this manner.⁵⁰⁶

In adopting this course, the Court was following the position it had first adopted in the *Corfu Channel* case proceedings regarding the expert evidence provided by the expert witnesses.⁵⁰⁷

Regarding the *Bosnia Genocide* case Judgment. the links in the law and the evidential process between this case before the ICJ and the criminal proceedings before the ICTY were clearly apparent and serve as an illustration of the approach proposed in this study, although again the case does not involve command responsibility.⁵⁰⁸

⁵⁰⁵ *ibid*, para 179.

⁵⁰⁶ *ibid* para 121.

⁵⁰⁷ *Corfu Channel* case (n 414) 21.

⁵⁰⁸ See R J Goldstone and RJ Hamilton, 'Bosnia v Serbia: Lessons from the Encounter of the international Court of Justice with the International Criminal Tribunal for the Former Yugoslavia' (2008) 21 LJIL 95, 96; also A Gattini 'Evidential Issues in the ICJs *Genocide* Judgment' (n 22) 890.

Applying its preferred attribution tests the Court did not consider the massacres at Srebrenica were committed by Serbian organs nor were either the actions of the VRS forces or the Scorpions militia attributable to Serbia.⁵⁰⁹ The Court concluded that Serbia had failed to comply with its obligation under article 1 of the Genocide Convention to prevent and punish genocide. Having had the means to prevent the genocide it had nonetheless omitted to do so.⁵¹⁰

As in the *Armed Activities on the Territory of the Congo* case the Court commented on the quantity of evidence it had received. It then noted with respect to the evidence it had received from the criminal proceedings before the ICTY that:

it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight.⁵¹¹

The Court properly confirmed that it must make its own determination of the facts in the case notwithstanding many of the allegations having previously been the subject of international criminal proceedings before the ICTY.⁵¹² In so ruling the Court disposed of an issue of legal debate prior to the proceedings, namely whether the ICJ could proceed in the absence of criminal proceedings.⁵¹³ In practice, however, although as the Court noted it must review the facts the sheer volume of evidence gathered in the course of the criminal proceedings indicates that the ICJ is in reality dependent on the existence of previous criminal proceedings. The Court is not structured to deal with the examination and cross examination of witnesses and the assessment of forensic evidence. It necessarily must adopt a parasitic approach to the criminal tribunal whose proceedings it is quarrying.

Following the same approach in its *Genocide Case 2015 Judgment*, the Court noted the different legal regimes and aims of state and individual criminal responsibility and reiterated that it would nonetheless take account, where appropriate of the decisions of international criminal courts or tribunals, as it had in its 2007 judgment.⁵¹⁴

The relationship between the ICJ, the ad hoc international tribunals and latterly, the ICC is not the subject of any formal juridical hierarchy. Nonetheless, the ICJ's relationship with the

⁵⁰⁹ *Bosnia Genocide case Judgment* (n 1) paras 413-415.

⁵¹⁰ *ibid* para 438.

⁵¹¹ *ibid* para 223.

⁵¹² *Ibid* para 212.

⁵¹³ Bonafe, *The Relationship Between State and Individual Responsibility* (n 14) 2.

⁵¹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) Judgment* ICJ Rep 3,61 para 129.

ICTY in the two *Genocide* Cases gives weight to the view that it will defer to specialist criminal tribunals in their area of expertise while at the same time expecting such tribunals to reciprocate.⁵¹⁵

Questions can arise, however, in view of the differing functions of the ICJ addressing international state responsibility and those of an international criminal tribunal. The potential consequences of this difference in emphasis were apparent in the 2007 *Bosnia Genocide* case Judgment. It has been proposed that there was an assumption on the part of the Court that the absence of a specific criminal charge excluded the possibility of proceedings with respect to state responsibility with respect to that matter⁵¹⁶. The evidence suggests that the court's analysis was erroneous and that the position simply represented a prosecutorial decision on the charging in that case.

This error represents an element that must be guarded against in future cases addressing state responsibility both generally, and with respect to cases specifically concerning command responsibility. As with the above situation the absence of evidence, findings, and analysis by a criminal tribunal is again likely to give rise to difficult issues regarding the form of the state responsibility case.

7.5 THE ROLE OF SECONDARY NORMS IN THE ESTABLISHMENT OF CONCURRENT RESPONSIBILITY

In this section I will discuss certain secondary norms which can be aligned with elements of individual criminal responsibility and thus support concurrent responsibility a will be discussed in section 7.

The ILC DASR focus on the secondary obligations under international law in terms of which a state incurs responsibility for its wrongful acts or omissions and the resultant legal consequences.⁵¹⁷ These arise following the breach of a primary obligation which establishes an international obligation for a state.⁵¹⁸ Accordingly, they are objective in character with no requirement for the existence of either fault or damage, unless this is required in terms of the relative primary obligation to which they are linked. They are applicable to the entirety of a state's international obligations whether customary or conventional and whether bilateral or

⁵¹⁵ Goldstone and Hamilton (n 505) 112

⁵¹⁶ *Bosnia Geocide* case Judgment (n 1).

⁵¹⁷ DASR (n 3) Commentaries General Commentary 31, para (1).

⁵¹⁸ DASR (n3) arts 1 and 2.

multilateral.⁵¹⁹ Notwithstanding their aim to produce a generally applicable set of residual rules they are tied to the specific primary obligations in which they originate.

The respective regimes regarding the secondary obligations with respect to state and individual criminal responsibility differ significantly from each other in a number of areas, most significantly with respect to the tribunals responsible for their enforcement, the bases of attribution of responsibility and the consequences of such attribution.

As previously noted, what has been described as the most significant difference between the two forms of responsibility is the general nature of the state responsibility regime. In contrast to domestic legal systems which generally distinguish between differing types of obligations, state responsibility forms a single form of civil responsibility and does not provide for penal consequences for breaches of international law even if they relate to the commission of international crimes.⁵²⁰ Yet, in this case it provides for a different form of responsibility. The overarching purpose is to maintain the interests of the international community.

This takes the form of aggravated state responsibility applicable to serious breaches of peremptory norms as addressed under articles 40 and 41 DASR. Article 40 establishes the criteria which mark the divergence of serious breaches of obligations under peremptory norms from ordinary breaches of a state's obligations. First, the breach must concern a serious breach of a peremptory norm and such peremptory norms include international crimes as well.⁵²¹

Secondly, the breach must be serious in its nature concerning a gross or systematic failure by the responsible state to fulfil the obligation upon it.⁵²² The Commentary notes 'gross' as referring to 'the intensity of the violation, or its effects', with 'systematic failure' descriptive of the 'organised and deliberate' manner in which such a breach is effected.⁵²³ 'Serious' is, however, defined at article 40(2) as involving 'a gross or systematic failure by the responsible State to fulfil the obligation.' The commentary to the article proposes at paragraph 8 that factors which may establish the seriousness of the violation would include 'the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims.' The 2007 ICJ *Bosnia Genocide* case Judgment shows the Court engaging in just this process in assessing whether genocide had occurred,

⁵¹⁹ DASR (n3) Commentaries, General Commentary 32 para (5).

⁵²⁰ DASR (n 3) Commentary Chap III paras (5)-(7).

⁵²¹ DASR (n 3) art 40 (1).

⁵²² DASR (n3) art 40 (2).

⁵²³ DASR (n 3) art 40 Commentaries General Commentary paras (7) and (8).

although specifically concerned with the requirements for the commission of genocide under the Convention.⁵²⁴

Article 40 does not establish a procedure in order to establish whether there has been a serious breach of a peremptory norm.⁵²⁵ The Commentary text proposes that the likelihood is that such cases will be determined through international political channels rather than through the interstate courts. This reflects the reality of the position which has generally seen such cases being addressed through the UN Security Council or regional organisations.

Article 41 establishes a particular set of consequences in the event of a serious breach of a peremptory norm by requiring states to cooperate to bring the matter to an end.⁵²⁶ This is achieved through the establishment of a positive obligation on states not to recognise the consequences as lawful and a negative obligation not to furnish aid or assistance to the responsible state to maintain the situation.⁵²⁷ Although measures to achieve these ends are not prescribed, again a solution can be found in the *Bosnia Genocide* case Judgment by reference to the obligations to prevent and punish genocide. The Court noted that 'the obligation in question is one of conduct and not of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them.'⁵²⁸ Again, the Court reviewed the evidence before them obtained from the ICTY prosecutions.

As regards the obligation to punish the Court again referred to the ICTY proceedings and concluded that Serbia had failed to cooperate with the ICTY⁵²⁹

7.6 ATTRIBUTION, PREVENTION, REPRESSION AND DUE DILIGENCE

In this section, I will discuss attribution, prevention, and repression as well as due diligence as elements of state responsibility which can be aligned with individual criminal responsibility.

⁵²⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports, [2007], 43, paras 242-244 'Examination of Factual Evidence: Introduction.'

⁵²⁵ *ibid*, para (9).

⁵²⁶ art 41 DASR.

⁵²⁷ *ibid*

⁵²⁸ *Genocide case* (n 489), para 430.

⁵²⁹ *ibid*, para 449.

As discussed with respect to article 2 DASR a central question with respect to international responsibility is whether certain conduct is attributable to a state. What requires to be addressed here is the identification of 'which persons should be considered as acting on behalf of the State [...].'⁵³⁰ Article 4-11 of the Draft Articles define when conduct is to be considered conduct of the state. This study is concerned primarily with the general position concerning the institutional link under which the conduct of a state organ is attributable to the state and is regarded as an act of that state.⁵³¹ As paragraph 6 to the commentary on article 4 confirms in determining this status the issue is primarily addressed on the basis of the state's domestic law and practice. However, in terms of article 4(2) this includes both de jure and also de facto state organs. These represent the individuals and institutions such as armed forces commanders and the armed forces through which states as juridical entities operate. As discussed in chapter 6 so long as they are acting in that capacity, even if their conduct is ultra vires, such organs conduct is attributable to the state. In the case, however, of armed forces engaged in armed conflict the state is uniquely responsible for all acts by members of its armed forces.⁵³²

The second possible link of potential relevance is that which is often referred to as a factual link. Here, the primary interest is when a private individual or entity, such as a non-state armed group acts under the direction or control of a state then their conduct is attributable to the state. In this instance for the purposes of this study a non-state armed group is instructed or controlled by a commander in the state armed forces acting as 'auxiliaries'.⁵³³

In addition, however, to responsibility based on attribution, states may also incur responsibility for breach of their separate and distinct failure to exercise due diligence in the prevention and repression of international crimes.⁵³⁴ In contrast to the need to attribute the requirements with respect to the failure to exercise due diligence is less demanding. It requires actual or constructive knowledge on the part of the state that harm was emanating from its territory or territory under its effective control and the failure to take reasonable action to terminate the harm.

A general duty of due diligence does not exist, international law must establish a primary obligation to act before a state is required to act with due diligence. The obligations with

⁵³⁰ DASR (n 3) Commentary part 2, para (5); V Lanevoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28 EJIL 563, 565.

⁵³¹ DASR (n 3) art 4; LaGrand (Germany v United States of America) (Provisional Measures, Order of 3 March 1999), ICJ Rep 1999, 9, para 28.

⁵³² Hague Convention IV and Annexed Regulations (n 25) art 3; Additional Protocol 1 (n 26) art 91; Kalshoven (n 62) 833-5.

⁵³³ DASR (n 3) art 8.

⁵³⁴ *Armed Activities* case Judgment (n 19) para 178; *Bosnia Genocide* case Judgment (n 1) para 430.

which this study is particularly concerned are the duties to prevent and punish the commission of the international crimes, under customary and treaty law, as illustrated in the *Bosnia Genocide case*.⁵³⁵

The obligation to take action under international law has been said to be either an obligation of result or an obligation of conduct. An obligation of result has been described as establishing an obligation on the state to achieve the specific result required under international law. The standard is absolute and failure to fulfil this obligation will constitute an internationally wrongful act despite the absence of fault on the part of the state.⁵³⁶ An obligation of conduct is limited by the operation of the due diligence rule. Responsibility is in this case dependent upon the state failing to exercise appropriate due diligence.⁵³⁷

The primary application of the due diligence obligation in the context of this study is with respect to the prevention of the commission of international crimes by individuals either within a state's territory, or in certain circumstances extraterritorially.⁵³⁸ The issue of whether due diligence is also applicable with respect to persons whose conduct is attributable to the state has been debated on the basis that as state organs attribution will arise in relation to their activities.

It has been proposed that under Hague Convention IV 1907 and Additional Protocol I 1977 states incur liability if they fail to exercise due diligence in the prevention of war crimes committed by members of the state armed forces.⁵³⁹ It has also been suggested that Common Articles 1 and 3 of the 1949 Geneva Conventions impose a duty of due diligence.⁵⁴⁰ In *Armed Activities on the Territory of the Congo* the ICJ distinguished, however, between Uganda's responsibility for actions by its forces that violated that states international obligations that were attributable to it and its lack of vigilance in the prevention of violations of IHRL and IHL by other actors in the territory under belligerent occupation

⁵³⁵ *ibid.*

⁵³⁶ R. Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German YB Int'l L* 9, 47- 48.

⁵³⁷ DASR (n 3) Commentaries 62, para 914) but see Pisillo-Mazzeschi, (n 536) 47- 48.

⁵³⁸ *Corfu Channel case* (n 414) 22; See Lanevoy (n 527) 565.

⁵³⁹ Additional Protocol I 1977 (n 27) article 91; Hague Convention IV and Annexed Regulations (n 25) art 3; D French and T Stephens, 'ILA Study Group on Due Diligence in International Law, First Report,' ILA (2014) '(First Report)' 11-12; See also Commentary on the Additional Protocols of 8 June 1977(n 99) para 3661. Responsibility arises if the Party to the conflict has not acted with due diligence to prevent or repress acts committed by members of the state armed forces or by private individuals. In the Commentary the view is adopted that 'ensure respect' was viewed in terms of a duty requiring preparatory measures should be taken under supervision.

⁵⁴⁰ Geneva Conventions of 1949 and their Commentaries Commentary of 2016 Article 3: Conflicts not of an International Character, para 889 proposes that normal principles of attribution apply in the case of failure of the state to meet its obligations under the provision; per contra French and Stephens First Report (n 539) which proposes that due diligence obligations exist with respect to the obligation under the Convention; see also C Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble' (2010) 21 *EJIL* 125.

which were due diligence obligations.⁵⁴¹ In the *Bosnia Genocide* case the Court confirmed that if conduct is attributable to a state the issue as to whether it had satisfied the obligation to prevent with respect to the same acts became irrelevant. Contrarily if conduct was not attributable to the state, then it could incur responsibility for a violation of the obligation to prevent the commission of an international crime.⁵⁴²

When due diligence is applicable, a state's obligations are extended to require it to prevent or repress a breach of international law. The due diligence concept provides at its core a standard of care against which state fault can be established that has regard to the outcome of the wrongful conduct and the extent to which the consequences could have been avoided had the state in question taken appropriate preventative action.⁵⁴³ This standard accordingly produces a flexible outcome through establishing a broader response to performance which better reflects the varying abilities of states to respond to challenges of this nature.

In the context of this study the particular concern is with the obligation to prevent and the obligation to punish. Pisillo-Mazzeschi in his influential study on due diligence first proposed that the generally accepted interpretation of the obligation of prevention as subject to due diligence was an oversimplification.⁵⁴⁴ Under his analysis the obligation to prevent, has two distinct elements. The first, requiring a state to possess the legal and administrative apparatus sufficient to ensure the norm regarding prevention is respected is an obligation of result, not subject to the due diligence rule. The second element, the obligation on a state to prevent breaches, however, is an obligation of conduct which requires the state to use its apparatus with appropriate diligence so as to prevent harmful acts⁵⁴⁵ The Commentary to the ILC DARS applies a best effort standard to the obligation of prevention, 'requiring States to take all reasonable or necessary measures to prevent a given event from occurring but without warranting that the event will not occur.'⁵⁴⁶

The Second ILA Report on Due Diligence establishes that the objective standard of due diligence is applicable to a range of issues where a standard requires to be established for all states to include international humanitarian law, the associated issue of terrorism and

⁵⁴¹ *Armed Activities* case Judgment (n 19).

⁵⁴² *Bosnia Genocide* case Judgment (n1) para 382; E De Brabandere, 'Host States Due Diligence Obligations in International Investment Law,' (2015) 42 *Syracuse JIntlL&Com* 320, 333.

⁵⁴³ Stephens and French, Second Report (n462) 1,2.

⁵⁴⁴ Pisillo-Mazzeschi, (n 536).

⁵⁴⁵ *ibid* 26-27, 34-36.

⁵⁴⁶ DARS (n 3) 62.

international environmental law.⁵⁴⁷The Commentaries on the Prevention of Transboundary Harm, frequently referred to in this context, refer to the standard of care expected of a good Government.⁵⁴⁸ Less developed states are held to the same standard as their counterparts although allowance is made for their more limited resources with respect to the degree of care expected of such states.

The obligation to repress is also to be regarded as consisting of distinct obligations.⁵⁴⁹ First, there is the obligation to possess the necessary state apparatus normally able to ensure enforcement and secondly the obligation to employ that apparatus.⁵⁵⁰ With respect to the issue of the activities which the obligation to punish is concerned the process of investigation and the obligation to try and sentence those responsible are differentiated. The investigatory stage is subjected to the due diligence rule as the outcome cannot be guaranteed⁵⁵¹ while the trial process and sentencing is not as both of these activities can be guaranteed by an effectively governed state.⁵⁵²

In assessing whether a state has met a due diligence obligation the question arises as to what standard is expected is expected of it. The concept of reasonableness plays a central role in determining the content of the due diligence standard. It represents in principle a generally applicable international standard, regardless of the seriousness or otherwise of the issue under consideration, being the standard applied by the ICJ in the *Genocide case*.⁵⁵³ The *Neer case* is generally regarded as establishing the minimum standard to meet the obligation of due diligence the two elements applicable being, first, measurement against the international standard and secondly, that a breach of the acceptable standard should be such that 'that every reasonable and impartial man would readily recognize its

⁵⁴⁷ Stephens and French, Second Report (n 462), 18.

⁵⁴⁸ See ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries 2001, in particular relative commentary to article 3 para (17), 'The main elements of the obligation of due diligence involved in the duty of prevention could be thus stated: the degree of care in question is that expected of a good Government. It should possess a legal system and sufficient resources to maintain an adequate administrative apparatus to control and monitor the activities. It is, however, understood that the degree of care expected of a state with a well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed. Even in the latter case, vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State, which is a natural attribute of any Government, are expected.' (Citations omitted.)

⁵⁴⁹ Pisillo-Mazzeschi (n 536) 28

⁵⁵⁰ *ibid* 28-29.

⁵⁵¹ *Janes et al* (US v Mexico) 4 RIAA 87 (Mex-US Gen Cl Comm'n 1925)

⁵⁵² Pisillo-Mazzeschi (n 536) 30

⁵⁵³ *Bosnia Genocide case Judgment* (n1) paras 428-430.

insufficiency.⁵⁵⁴ Moving from the general to the specific with regard to what the standard represents in concrete terms is, however, a more difficult matter⁵⁵⁵

States have considerable freedom in their decisions concerning the measures that they must take to meet the international standard unless the terms of the applicable primary obligation or a specific duty required to be met preclude this.⁵⁵⁶

As an obligation of conduct the actions of a state are not measured against the achievement of a specific result. The application of the standard of 'reasonableness' is, however, nonetheless inevitably case specific with the assessment of whether the standard has been met being made retrospectively having regard to the specific elements of the case.

The measures that a state must take to prevent or punish a serious breach of a peremptory norm were reviewed in the previous section with respect to article 41 DASR

Knowledge, whether actual or constructive, forms an essential element in due diligence. A state cannot be expected to take action to prevent a threat if it does not have knowledge of its existence. The fact that a threat arises within a state's territory or extraterritorially within their area of which it exercises effective control does not in itself establish knowledge.⁵⁵⁷ A state may not, however, necessarily be entitled to take no action to ascertain the existence of a potential risk or the activities of a non-state entity or individuals. A state may be under the obligation to exercise due diligence with respect to either risks or activities in order to discover what is going on. Clearly actual knowledge of an activity requiring preventative action gives rise to due diligence.⁵⁵⁸

The obligation is not, however, simply one of actual knowledge, constructive knowledge is also an issue. Exclusive territorial control by a state necessarily affects the ability of a state which has suffered harm as the result of a breach of international law originating within the former states territory. In this situation the latter state is frequently unable to provide direct proof of the facts establishing responsibility. Accordingly, in such a case in proving actual or constructive knowledge on the part of the state from whose territory the activities in question

⁵⁵⁴ *LFH Neer and Pauline Neer (USA v United Mexican States)* Decision of 15 October 1926, IV, UNRIIA 60 at 61-62.

⁵⁵⁵ *Stephens and French* Second Report (n 462) 3.

⁵⁵⁶ *Bosnia Genocide* case Judgment (n 1) para 430.

⁵⁵⁷ *Corfu Channel* case Judgment (n 414) 22.

⁵⁵⁸ *ibid* 19, 20.

originate a state may be permitted to utilise inferences and circumstantial evidence in proving its case.⁵⁵⁹

7.7 DIFFERENCES AND SIMILARITIES IN CRIMINAL AND AGGRAVATED STATE RESPONSIBILITY

In addressing the relationship between the two regimes there are significant differences and similarities with respect to the establishment of individual criminal and aggravated state responsibility.

A similarity between the two regimes concerns the element of seriousness. Article 40 ASRIWA provides that aggravated state responsibility arises when there is a serious breach of a peremptory norm arising from gross or systematic failure on the part of the state to fulfil such an international obligation.

In the case of the international crimes the reference in the Preamble to the ICC Statute to ‘the most serious crimes of concern to the international community as a whole’, reiterated in article 5 of the Statute, echoes the seriousness threshold under aggravated state responsibility.

Some international crimes in defining the requirements for individual criminal responsibility include a seriousness requirement. Others may be committed by individuals in isolation. The consequence is that the relationship between individual and state responsibility with respect to the issue of seriousness has to be determined with respect to the specific offence. In contrast to isolated war crimes, when war crimes are carried out systemically by state organs there is clearly the potential of overlap between individual criminal and aggravated state responsibility.

Regarding genocide and notwithstanding its structure which in theory can give rise to the case of a lone genocidaire, in practice it is difficult to imagine genocide as having other than a systemic nature.⁵⁶⁰ Although the Commentary to the ICC Statute affirms the lack of a requirement for state involvement, however, the Elements of Crimes do establish a wider

⁵⁵⁹ *ibid*, 18.

⁵⁶⁰ *Prosecutor v Jelusic* (Appeal Judgment) ICTY-95-10-A (5 July 2001).

context referring to a manifest pattern of such conduct or conduct of a scale that could itself result in the destruction necessary for the commission of the crime of genocide.⁵⁶¹

The definition of crimes against humanity under the ICC Statute clearly requires a threshold of seriousness to be established. Such crimes are defined, first, by the requirement for a widespread or systematic attack against a civilian population. The definition continues by requiring the conduct concerned to be in accordance with or in furtherance of state or organisational policy.

Isolated war crimes committed by individual service personnel will fail to meet the seriousness requirement. However, the reference in the chapeau of article 8 to the court having jurisdiction with respect to war crimes 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes', indicates that cases involving such systematic breaches will meet the seriousness threshold and establish concurrent responsibility. The recent approach to this issue adopted by the Court rendered this reference of little practical effect.

When there is an overlap between individual and state responsibility with respect to international crimes it has been proposed that the material element of these crimes is normally determined initially with respect to the broader criminal context and then with respect to the participation of the accused within that context. This structural approach has been identified in the jurisprudence of the ad hoc international criminal tribunals with the increasing reliance by international tribunals and courts on forms of collective liability such as command responsibility, the direct subject of this study.⁵⁶²

One potential difference identified between the two categories of proceedings is the issue of the standard of proof an element with respect to which the ICJ has failed to establish a general standards preferring to maintain their ad hoc approach of specifying the position with respect to the immediate case.⁵⁶³ The Court has frequently been concerned with a limited range of issues which have not required assessment of evidence and the making of complex findings of fact.⁵⁶⁴ In conducting cases the ICJ is not required to hear the evidence of

⁵⁶¹ Bonafe *The Relationship Between State and Individual Responsibility* (n 14) 87 proposes however that the seriousness element is established on the basis of the requirement to possess special intent and that this can be implied on the basis that the genocide has been carried out based on a prior plan or policy.

⁵⁶² *ibid* 114.

⁵⁶³ *Armed Activities* case Judgment (n 19), 168 at para 59; Simone Halink, 'All Things Considered: How the International Court of Justice Delegated its Fact-Assessment to the United Nations in the Armed Activities Case', (2007) 40 NYUJ Int'l L & Pol, 14, 24

⁵⁶⁴ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua and Honduras)* (Judgment) [2007] ICJ Rep 659.

witnesses but can proceed on the basis of documentary evidence, moreover, as it is not a criminal tribunal it is not obliged to apply criminal evidentiary standards.

In the case of geographical boundary disputes a civil case standard based on the balance of probabilities is normally appropriate. The situation differs, however, with respect to the determination of the current generation of 'fact- heavy cases' concerning particularly serious claims when the high standard of proof applied by the Court appears more closely to resemble the standard applied in criminal proceedings. As an illustration in the *Genocide Case Judgment of 2007* the Court concluded that it required 'fully conclusive evidence' with respect to both the allegations and proof of attribution.⁵⁶⁵ The ICJ remains a judicial tribunal charged with the establishment of state responsibility rather than the determination of criminal charges. Despite the varying terminology which the Court has used in cases and within cases it is arguable, however, that when this standard is applied by the Court this amounts to an equivalent of beyond reasonable doubt, the criminal standard.

An important difference in the establishment of individual and state responsibility is between the requirement for the establishment of mens rea or criminal intent as an essential element in the establishment of criminal responsibility; and fault which is not a general requirement in the establishment of state responsibility. Certain international crimes, such as genocide, require specific intent to be established, this poses particular difficulties with regard to collective crimes. With respect to these, the ad hoc international tribunals and the ICC have shown themselves as relying on the general criminal context or even matters not directly concerning the criminal offence concerned. The process involves a two- stage enquiry with respect to specific intent in these cases with the general criminal context first being taken into account. The personal responsibility of the accused in the light of this general context is then examined to ascertain whether the accused possesses the necessary specific intent. This involves a change in the methodology followed in such cases with initial assessment of the wider surrounding context. The latter issue is an important aspect in determining individual criminal responsibility with respect to crimes of a collective nature.

Article 2 DASR does not list fault as an element in the establishment of an internationally wrongful act of a state with the associated Commentary noting that the establishment of fault is a matter for the interpretation and application of the relevant primary obligations. Commentators differ over whether in principle fault is required as an element in the establishment of aggravated state responsibility. The position adopted in this study is,

⁵⁶⁵ *Bosnia Genocide case Judgment* (n 1) para 209 'The Court requires that it be fully convinced that allegations made in the proceedings, [...] have been clearly established. The same standard applies to the proof of attribution of such acts.'

however, that intent is an inherent element of aggravated state responsibility, regardless of whether fault may be identified as arising under the relevant primary norms. The Commentary text continues by noting that some of the peremptory norms concerned ‘by their very nature require an intentional violation on a large scale.’⁵⁶⁶

This does not however resolve the matter entirely as primary norms may require fault to be established, for example genocide, which requires the existence of specific intent on the part of the perpetrator.⁵⁶⁷ It has been proposed that aggravated state responsibility with respect to genocide does indeed impose a requirement that state organs possess the necessary intent to destroy the specified group.⁵⁶⁸ The question has been posed as to how fault is to be established when a specific intent crime has been committed by a state. It is clearly difficult to argue that the *mens rea* of the state in the circumstances should be established from that of the individual state organ concerned. In such cases one is normally looking at serious breaches involving a range of wrongful acts carried out by state organs throughout the structure of the state. This makes it difficult to equate the two as the *mens rea* is established among various state organs. The other arguably preferable possibility is to argue for the existence of an objectivised form of collective fault based on the state as a legal entity rather than the individual state organs so that one would look at the overall terms of state policy.⁵⁶⁹

The consequence is that the relationship between state and individual responsibility with respect to the psychological element presents difficulties with respect to isolated crimes with the position becoming even more complex when one considers systemic crimes requiring a specific intent in view of the divergences between the concept of *mens rea* and fault under the two international law regimes. It can be argued that in the case of specific intent crimes the approach adopted bring the establishment of individual criminal responsibility closer to that with respect to aggravated state responsibility, *mens rea* and state fault are established in similar fashion although they do not equate with each other.

⁵⁶⁶ ILC Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001 Article 40 Commentary (para 8). Nollkaemper ‘Concurrence between Individual Responsibility and State Responsibility in International Law’ (n 15) 634.

⁵⁶⁷ *ibid.*

⁵⁶⁸ Bonafe, *The Relationship Between State and Individual Responsibility* (n 14) 122.

⁵⁶⁹ See *Bosnia Genocide* case Judgment para 376, where the Court concluded that the ‘Applicant has not established the existence [of the necessary specific intent] on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events [...] reveal a consistent pattern of conduct which could only point to the existence of such intent.’

7.8 UTILISING COMMAND RESPONSIBILITY DOCTRINE TO ESTABLISH STATE RESPONSIBILITY

As was said, the aim of this research has been to seek to achieve an approach to responsibility for systemic crime through the linked allocation of individual criminal responsibility under international criminal law and of state responsibility. In the preceding sections I have presented the two forms of responsibility and identified similarities and differences between them. Where the two meet is that aggravated state responsibility aligns with individual criminal responsibility in that they both arise in relation to similar acts which are wrongful as far as state responsibility is concerned and crimes as far as international criminal responsibility is concerned. Moreover, they are both aligned in that they arise in relation to systemic crimes involving the state apparatus.

The question then arises as to how command responsibility doctrine as a mode of international criminal responsibility can be linked to state responsibility in relation to systemic crimes.

As previously discussed, international criminal law and state responsibility form two distinct regimes under international law. Accordingly, criminal responsibility under international criminal law can only be addressed on the basis of individual agency. Reliance on individual responsibility results in a partial picture of responsibility with respect to systemic crime. Both command responsibility and the indirect forms of perpetration which are currently popular in the ICC jurisprudence seek to address the situation found in large organisations in which superiors are separated from the direct perpetrator. Despite the difference between the role assigned to the commander in command responsibility doctrine and that of the accused charged under the concept of *Organisationsherrschaft* there are significant similarities in the hierarchical structure within which both operate.

The final research question addresses how the alignment of command and state responsibility can contribute to a comprehensive concept of responsibility. This issue has been addressed in respect to various aspects of this thesis and indeed the preceding research question. International criminal law seeks to address the criminal responsibility of natural persons and although it has a variety of mechanisms in order to deal with group criminality through the addressing of the rules of the various participants there is no basis in terms of that regime to address the responsibility of judicial actors. Accordingly, under the international criminal law regime only the personal responsibility of individuals can be addressed. This potentially results in a political leader, Milosevic, or some future political leader undergoing a prosecution divorced from the context of the state within which they operated which necessarily can only produce a narrow picture of responsibility. There has to

be consideration of the role of the state under the state responsibility regime as such crimes are collectively perpetrated and involve complex relationships within the state.

A state has an obligation not to commit international crimes but also to prevent the commission of international crimes. Responsible command as a fundamental principle behind command responsibility requires that commanders act responsibly, ensure troops under their command are subject to a system of internal discipline, are properly organised and most significantly observe international law. The principle originates in the responsibility of states for their forces conduct in international armed conflict and has served as the foundation and then established the boundaries for the development of the individual criminal responsibility doctrine of command responsibility. Criminal responsibility on their part under the doctrine is then established on the basis of their failure to take the necessary and reasonable measures to prevent or punish the commission of the underlying offence. The consequences with respect to the determination of state responsibility of these differing positions are the following.

Derelection of the duty by the commander can lead to state responsibility through attribution. As discussed, the commander is the personification of the state in the field whose role is to ensure that international law is respected by her subordinates. The commander as a *de jure* commander of a state's armed forces exemplifies the concept of a state organ in terms of article 4 ARSIWA.⁵⁷⁰ The commander's failure in this regard can then be attributed to her state holding it responsible for similar wrongful acts. In the Armed Activities on the Territory of the Congo Case the Court held that the acts and omissions of the Ugandan armed forces engaged that state's international responsibility.⁵⁷¹ Associated with the issue of attribution is the issue of the application of the due diligence. A state has a due diligence obligation to prevent the commission of international crimes and the commander has an equal duty. Therefore, failure of the commander leads to failure of the state in this regard and consequently its responsibility. It is noteworthy that the Court addressed both the application of attribution and due diligence with respect to the conduct of its troops in the Armed Activities case. The Court first found that Uganda violated its 'duty of vigilance' by its failure to take reasonable and necessary measures to ensure its forces did not take part in looting, plundering and exploitation of the DRC's natural resources. It then noted the Ugandan commander in that state failed to take any action to enforce discipline at senior levels within the chain of command. The Court then addressed the issue of the occupied territory at Ituri, having found that the Ugandan forces conduct in both occupied and unoccupied territory

⁵⁷⁰ DASR (n 3) relative commentary to article 40 para 1.

⁵⁷¹ *Armed Activities* case Judgment (n 19) 252, para 245.

incurred state responsibility. It noted that Uganda's obligations to prevent looting in that area as occupier extended more widely to the civilian population.⁵⁷²

By aligning state and individual criminal responsibility, a more integrated approach to responsibility is attained in relation to systemic crimes. Otherwise, focusing on one aspect of responsibility, the role of the state and its responsibility will be downplayed.

⁵⁷² *ibid* 253, para 250.

CHAPTER 8

CONCLUSION

8.1 INTRODUCTION

This chapter concludes this study by summarising the key findings regarding the research aim and the research questions. It additionally establishes their respective contributions both with regard to practice and theory. It also reviews the limitations of the study and make recommendations regarding further research.

8.2 BACKGROUND

State responsibility, in particular aggravated state responsibility, and individual criminal liability under international criminal law have both experienced considerable academic attention in recent decades. On the one hand there has been the conclusion of the work by the ILC in the development of the Articles on the Responsibility of States for Internationally Wrongful Acts at the level of secondary norms based on general principles. It laid down rules which apply to all violations of international law but at the same time it introduced aggravated state responsibility for violations of jus cogens (peremptory norms) and erga omnes obligations which are owed to the international community as a whole. These include the prohibition of genocide, crimes against humanity and war crimes, among others. On the other has been the development of international criminal law establishing individual criminal responsibility for the commission of international crimes, again such as genocide, crimes against humanity and war crimes, among others. The international criminal law regime exhibits the usual characteristics of criminal regimes in its sophisticated structure of establishing direct or indirect responsibility.

The academic literature with respect to these two regimes has largely treated them as distinct from each other with a general acceptance of the existence of an overlap between them in relation to the underlying violations that give rise to responsibility. There has however been some research which has considered differing aspects of this overlap regarding the responsibility of states and individuals for the same breach of the international

obligations owed to the international community as a whole. As part of this process, there has also been research into the details of this relationship through the examination and systematic analysis of both forms of responsibility.

8.3 STRUCTURE OF STUDY

This study takes forward existing research by looking at the concurrence between individual responsibility and state responsibility in international law as identified by Nollkaemper when he noted that the findings with respect to individual criminal responsibility in international criminal law may be utilised in subsequent cases concerning state responsibility. This is not only because of the overlap between these forms of responsibility regarding the underlying violations but more critically because such violations take place and are the result of system criminality where the state is actively concerned or acquiesces in the commission of international crimes. It is the present author's view as developed in the thesis that the combination of the determination of individual criminal responsibility and state responsibility can more fully provide a true assessment of system criminality and that by aligning both forms of responsibility, their common purpose will be achieved which is to protect the human values of the international community as a whole. In order to do this, the thesis focuses on command responsibility which is a particular form of liability imposed on commanders as the placeholders of their state to ensure that international crimes are not committed. Because of the role of commander, the purpose of command responsibility as a form of liability and its source in the doctrine of responsible command, the links between individual criminal responsibility and state responsibility become apparent. This relationship provides a theoretical and practical basis for the establishment of state responsibility for international crimes committed by soldiers in the course of armed conflict on the basis of command responsibility. The thesis will thus explain the elements of the two forms of responsibility before identifying areas where they align in order to explain how command responsibility can be utilised to establish state responsibility.

The thesis divides itself into three parts. The first part comprises the introduction, chapter 1, which explains the context and introduces the main areas of inquiry and explains the thesis methodology and originality. It outlines the general structure of the relationship between state responsibility and individual criminal responsibility, the overlap between these at the level of primary and secondary norms and the framework which will be utilised to examine the links between the two regimes. It then establishes the aims and research questions of

the study, provides the literature review concerning the relevant existing work which this study seeks to take forward and addresses methodology and originality.

The second part of this study, consisting of chapters 2 to 6, sets out the examination of the component elements of the proposed analytical structure. Each of the chapters forming this part of the study set out a detailed examination of the immediate issue under review which will then be discussed in the following part.

Chapter 2 is concerned with the fundamental international humanitarian law principle of responsible command and its role as the foundation of command responsibility as an international criminal law doctrine and in the establishment of that doctrine's boundaries. It reviews the elements of the principle of responsible command requiring that commanders act responsibly, ensure that the troops under their command are properly organised, subject to a system of internal discipline and comply with international humanitarian law standards. Both of the aspects of the principle continue to be of significance with the latter element of particular significance in its role in the establishment of the boundaries of the doctrine. Article 1 of the Hague Regulations annexed to Hague Convention IV 1907 established in international law the principle of responsible command and its role in maintaining legality without at that stage establishing the criminal responsibility of a commander for criminal acts committed by their subordinates.

The chapter also addresses Additional Protocol 1 to the 1949 Geneva Conventions as the first example of the codification of the principle of responsible command in an international treaty. As also discussed in chapter 3, the codification of the concept of command responsibility in Additional Protocol I represents an example of the process of conflation between criminal and state responsibility. Article 87 of Additional Protocol 1 addresses the international humanitarian law responsibility of commanders during an armed conflict and article 86 Additional Protocol 1 addresses the narrower criminal law responsibility of commanders as a consequence of the breach of legal duties binding upon them. These two articles reveal the structural relationship between the two forms of responsibility. Article 87 gives rise to state responsibility because it imposes obligations on states which are implemented by their commanders and article 86 is concerned criminal law responsibility for violations of their duties. Subsequent criminal law provisions have rendered the criminal law doctrine elements of command responsibility as identical to the duties imposed under international humanitarian law.

Chapter 3 explains the overlap between the international humanitarian law principle of responsible command and the criminal law command responsibility doctrine and addresses

the normative foundations of the doctrine of command responsibility by looking into theory and the relevant jurisprudence.

Chapter 4 then moves on to analyse the customary international law form of command responsibility developed in the ad hoc international criminal tribunals' jurisprudence on the basis of the relative statutes. It explains the elements of the doctrine as emerged in the jurisprudence of the ad hoc tribunals in particular the superior-subordinate relationship and the standard of effective control; the required mens rea of knowledge or had reason to know; the underlying crimes; and the lack of prevention or punishment. Another issue that is also considered is nature of command responsibility and whether it is responsibility for the crime committed by the subordinates or for dereliction of duty.

Continuing with the theme of the development of the doctrine chapter 5 moves on to consider the conventional form of the doctrine under the Rome Statute of the international Criminal Court with the development of a general and specific duty to exercise control on the part of the commander, the obligation to prevent, repress and submit matters to higher authority and the issue of causation.

Chapter 6 represents a change in focus by addressing the nature and aims of state responsibility which is the other form of responsibility considered in this thesis which is also necessary in order to establish concurrent responsibility. It also discusses the elements of state responsibility and in particular that of attribution.

Chapter 7 moves on to consider the relationship between individual criminal responsibility and state responsibility with regard to systemic crime. It also addresses the issue of whether there is a requirement of fault under state responsibility. Neither the commentary to Article 40 nor the article itself mention a requirement to establish fault. Nonetheless there are certain primary norms prohibiting specific international crimes that require the existence of specific intent. Bonafe proposes that there may be the requirement to identify fault. She raises whether specific intent requires to be identified among state organs or whether it can be inferred from the examination of the evidence.⁵⁷³ This last would appear to be the appropriate course. Although there is debate regarding the existence of the requirement for fault in the establishment of state responsibility in the case of certain crimes such as genocide and more generally with respect to the wider category of systemic crimes be by definition under which command responsibility conducted with the intent to commit them on the part of the state as evidenced by systemic practice. On this basis, the chapter then aligns command responsibility and state responsibility and explains how command

⁵⁷³Bonafe, *The Relationship Between State and Individual Responsibility* (n 14) 123.

responsibility can be utilised to establish state responsibility in the case of concurrent responsibility.

8.4 CONTRIBUTION OF THE THESIS

The thesis addressed the main research question it set to answer which was how the international criminal law doctrine of command responsibility can be utilised in the establishment of state responsibility for system criminality. It identified the connecting threads between the two forms of responsibility and aligned them in the case of system criminality. The scheme proposed by the thesis represents an integrated approach to responsibility for systemic crimes in contrast to its currently fragmented nature; an approach that will achieve deterrence and punishment which are the aims served by state and criminal responsibility. It will also facilitate but also structure the process of establishing responsibility through a coherent process for the handling of evidence. It will above all serve the interests of justice in the international community at the state as well as individual level. This is particularly important in relation to systemic crimes because by stressing and promoting individual criminal responsibility, aggravated state responsibility for equivalent violations may fall into desuetude, but as was said states are behind such crimes.

8.5 RECOMMENDATIONS FOR FUTURE APPLICATIONS AND RESEARCH

The conceptual model proposed by this study of unitary individual criminal responsibility and aggravated state responsibility is based on one specific form of individual criminal responsibility directed at the responsibility of the commander for their failure to prevent and punish the commission of underlying crimes by their subordinates. Further work is accordingly required with respect in order to identify the connecting links between other forms of individual criminal responsibility and state responsibility. It can be done for example with respect to associated forms of criminal responsibility such as joint criminal enterprise and indirect perpetration. The structure in particular of the latter form of responsibility bears considerable resemblance to that of command responsibility doctrine utilised this study, although based in positive action rather than omission.

Although the thesis cannot deal with all these issues for obvious reasons, it is important to stress that the thesis provided the conceptual grounding and the methodology according to

which such research can be carried out. In addition to scholarship, courts such as the ICJ or criminal courts such as the ICC can benefit from the model proposed in the thesis when adjudicating relevant cases by looking at both forms of responsibility in order to establish the facts, mens rea and in order to understand the context within which violations of international law take place. In my opinion, such concurrence cannot be avoided not only because individuals and states are the ones that commit violations of international law but their alignment in systemic crimes is more than evident.

BIBLIOGRAPHY**Table of Cases****International Court of Justice**

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43

Dissenting Opinion of Vice President Al-Khasawneh [2007] ICJ Rep 241

Dissenting Opinion of Judge ad hoc Mahiou [2007] ICJ Rep 24

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Judgment) [2015] ICJ Rep 3

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment) [2005] ICJ Rep 168

Corfu Channel Case (United Kingdom v Albania) (Merits) [1949] ICJ Rep 4

Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States) (Judgment) [1986] ICJ Rep 14

Oil Platforms (Islamic Republic of Iran v United States of America) (Merits) [2003] ICJ Rep 161

Separate Opinion of Judge Simma [2003] ICJ Rep 324

United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) (Judgment) [1980] ICJ Rep 3

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v Aleksovski (Judgment) ICTY-95-14/1-T (25 June 1999)

Prosecutor v Blagojević and Jokic (Judgment) ICTY IT-02-60-T (17 January 2005)

Prosecutor v Blagojevic and Jokic (Appeal Judgment ICTY-02-60-A (9 May 2007)

Prosecutor v Blaskic (Judgment) ICTY-95-14-T (3 March 2000)

Prosecutor v Blaskic, (Appeal Judgment) ICTY-01-47-T (29 July 2004)

Prosecutor v Brdjanin (Judgment) ICTY-99-36-T (1 September 2004)

Prosecutor v Brdjanin (Appeal Judgment) ICTY-99-36-A (3 April 2007)

Prosecutor v Delalić et al (Judgment) ICTY-96-21-T (16 November 1998)

Prosecutor v Delalić et al (Appeal Judgment) ICTY-96-21-A (20 February 2001)

Prosecutor v Furundzija (Judgment) ICTY-95-17/1-T (10 December 1998)

Prosecutor v Govotovina et al, ICTY-06-90-T, Notice of Re-Classification and Re-Filing of Defendant Mladan Markac's Public Redacted Final Trial Brief dated 23 May 2011

Prosecutor v Hadzihasanovic et al (Decision on Joint Challenge to Jurisdiction) ICTY-01-47-PT (12 November 2002)

Prosecutor v Hadzihasanovic et al (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) ICTY-01-47-AR72 (16 July 2003)

Prosecutor v Hadzihasanovic et al (Judgment) ICTY-01-47-T (15 March 2006).

Prosecutor v Hadzihasanovic et al (Appeal Judgment) ICTY-01-47-A (22 April 2008)

Prosecutor v Halilović (Trial Judgment) ICTY-01-48-T (16 November 2005)

Prosecutor v Halilovic (Appeal Judgment) ICTY-01-48-A (16 November 2005)

Prosecutor v Jelusic (Appeal Judgment) ICTY-95-10-A (5 July 2001)

Prosecutor v Kordic and Cerkez (Judgment) ICTY-95-14/2-T (26 February 2001)

Prosecutor v Kordic and Cerkez (Appeal Judgment) ICTY-95-14/2-A (17 December 2004)

Prosecutor v Kristic (Judgment) ICTY-98-33-T (2 August 2001)

Prosecutor v Kristic (Appeal Judgment) ICTY-98-33-A (19 April 2004)

Prosecutor v Krnojelac, (Decision on the Defence Preliminary Motion on the Form of the Indictment) ICTY -97-25-PT (24 February 1999)

Prosecutor v Oric (Judgment) ICTY-03-68-T (30 June 2006)

Prosecutor v Oric (Appeal Judgment) ICTY-03-68-A (3 July 2008)

Prosecutor v Prlic (Judgment) ICTY-04-74-T (29 May 2013)

Prosecutor v Stakić (Trial Judgment) IT-97-24-T, ICTY, (31 July 2003)

Prosecutor v Stakić (Appeal Judgment) IT-97-24-A, ICTY, (22 March 2006)

Prosecutor v Tadić (Appeal Judgment) ICTY-94-1-A (15 July 1999)

Prosecutor v Vasiljević (Trial Judgment) ICTY-98-32-T (29 November 2002)

Prosecutor v Vasiljević (Appeal Judgment) ICTY-98-32-A (25 February 2004)

Prosecutor v Milošević (Indictment) IT-02-54-T, ICTY (22 November 2002)

International Criminal Court

Prosecutor v Thomas Lubanga Dyilo (Judgment) ICC-01/02-01/06-2842 (14 March 2012)

Prosecutor v Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424, (15 June 2009)

Prosecutor v Jean-Pierre Bemba Gombo (Judgment) ICC-01/05-01/08-3343 (21 March 2016)

Prosecutor v Jean -Pierre Bemba Gombo (Appeal Judgment) ICC-01/05-01/08-A (8 June 2018)

Post World War II War Crimes Trials

United States of America v Friedrich Flick et al ('The Flick case') Trials of War Criminals before the Nuerenberg Military Tribunals under Control Council Law No 10 Vol VI (United States Government Printing Office Washington 1952) Opinion and Judgment 1187

United States of America v Wilhelm von Leeb et al ('High Command case') United States Military Tribunal Trials of War Criminals before the Nuerenberg Military Tribunals under Control Council Law No 10 Vo1 XI (United States Government Printing Office 1950) Judgment 462

United States of America v Wilhelm List et al ('Hostage case') Trials of War Criminals before the Nuerenberg Military Tribunals under Control Council Law no 10 Vol XI (United States Government Printing Office 1950) Judgment 1230

United States of America v Herman Roehling ('The Roehling case') Trials of War Criminals before the Nuerenberg Military Tribunals under Control Council Law No 10 Vol XIV Appendix B (United States Government Printing Office 1952) Judgment 1075, Judgment on Appeal 1097

International Military Tribunal for the Far East Judgment of 4 November 1948 transcript <https://werle.rewi.hu-berlin.de/tokio.pdf> accessed 12 June 2020

Judicial Decisions involving Questions of International Law-International Military Tribunal (Nuremberg) Judgment and Sentences (1947) 41 AJIL 172

Re Toyoda (United States v Soemu Toyoda), Judgment 6 September 1949, Official Transcript of the Record of Trial

Trial of Tomoyuki Yamashita (Re Yamashita) United States Military Commission Manila and the Supreme Court of the United States Yamashita Judgment 7 December 1945 Vol IV Law Reports of Trials of War Criminals selected and prepared by the United Nations War Crimes Commission 1949 (His Majesty's Stationary Office 1948) 1

Table of Instruments

International Treaties and Conventions

1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land 18 October 1907 UKTS 9 (1910) Cd 5030 (Hague Convention IV and Hague Regulations)

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Humanity (signed 7 May 1945, entered into force December 20 1945) Official Gazette Control Council For Germany 50-55 (1946)

The 2001 Articles on Responsibility of States for Internationally Wrongful Acts 53 UN GAOR Supp. (No.10) at 43; UN Doc. A/56/83/2001

The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal (signed 8 August 1945, entered into force 8 August 1945) 82 UNTS 280

The Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 278

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 609

The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002 and last amended 2015) 2187 UNTS 3

The Statute of the International Criminal Tribunal for Rwanda, adopted by UNSC Res. 955 (1994) and last amended by UNSC Res. 1717 (2006)

The Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991, adopted by UNSC Res. 827 (1993) and last amended by UNSC Res. 1877 (2009)

Secondary Sources

Akande D, 'International Law, Immunities and the International Criminal Court' (2004) 98 AJIL 407

Adatci M, 'Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties' (1920) 14 American Journal of International Law 95

Ambos K, 'Superior Responsibility', in Cassese *et al* (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (OUP 2002)

Ambos K, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 JICJ 159

Ambos K and Triffterer O (eds), *The Rome Statute of the International Criminal Court: A Commentary: Observers Notes, Article by Article* (2nd edn Hart 2008)

Ambos K, 'Critical Issues in the Bemba Confirmation Decision' (2009) 22 LJIL 71

Ambos K, 'Command Responsibility and *Organisationsherrschaft*: ways of attributing international crimes to the most responsible' in Nollkaemper A and van der Wilt H (eds), *System Criminality in International Law* (CUP, 2009)

Alfaro R J, 'Report on the Question of International Criminal Jurisdiction' (1950) vol 2 YILC 1

Arnold R, Triffterer O, 'Article 28: Responsibility of Commanders and Other Superiors' in Ambos K and Triffterer O (eds), *The Rome Statute of the International Criminal Court: A Commentary: Observers Notes, Article by Article* (2nd edn Hart 2008)

Askin K D, 'Crimes within the Jurisdiction of the International Criminal Court' (1999) 10 Crim Law F 33

Bantekas I, 'The Contemporary Law of Superior Responsibility' (1999) 93 AJIL 573

Bantekas I, Principles of direct and superior responsibility in international humanitarian law (MUP 2002).

Bantekas I, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law' (2006) 6 Int'l Crim Law Rev 121

Barnidge R P, 'The Due Diligence Principle under International Law' (2006) 8 Int Community Law Rev 81

Becker T, *Terrorism and the State* (Hart Publishing, 2006)

Berkes A, 'The Standard of 'Due Diligence' as a Result of Interchange between the Law of Armed Conflict and General International Law' JC&SL 433

Boas G, Bischoff J L and Reid N L, *International Criminal Law Practitioner Library: Vol 1 Forms of Responsibility in International Criminal Law* (CUP 2007)

Bodansky D and Cook J R, 'Symposium: The ILC's State Responsibility Articles, Introduction and Overview' (2002) 96 AJIL 773

Bonafe B I, 'Finding a Proper Role for Command Responsibility' (2007) 5 JICJ 599

Bonafe B I *The Relationship Between State and Individual Responsibility for International Crimes* (Martinus Nijhoff Publishers 2009)

Boon K E, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines' (2014) 15 MelbULRev 330

De Brabandere E, 'Host States' Due Diligence Obligations in International Investment Law' (2015) 42 SyracuseJIntlL&Com 4

Brent M, 'Responding to Attacks by Non-State Actors: The Attribution Requirements of Self-Defence' (2009) 16 AustILJ 133

Brolmann C M and Nijman J E, 'Legal Personality as a Fundamental Concept of International Law' in d'Aspremont J and Singh S (eds), *Concepts for International Law-Contributions to Disciplinary Thought* (E Elgar 2017)

Cannizzaro E, 'Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ' (2007) 1 EJIL 42

Caron DD, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 AJIL 857

Cassese A, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International humanitarian Law' (1998) 9 EJIL 2

Cassese A, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 EJIL 649

Cassese A, *International Criminal Law* (2nd edn OUP 2008)

Christenson G A, 'Attributing Acts of Omission to the State' (1991) 12 Mich J Int'l L 312

Crawford J *Second Report on State Responsibility* ILC 53rd sess. UN Doc A/CN.4/498 and Add 1-4

Crawford J and Olleson S, 'The Nature and Forms of International Responsibility' in Evans M D (ed) *International Law* (2nd edn OUP 2006)

Cryer R, *Prosecuting International Crimes-Selectivity in the international Criminal Law Regime* (CUP 2005)

Cryer R, 'The *Ad Hoc* Tribunals and the law of Command Responsibility: A Quiet Earthquake' in Darcy S and Powderley J (eds), *Judicial Creativity at the International Tribunals* (OUP 2010)

Danner A M and Martinez J S, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law' (2005) 93 CalLRev 75

Damaska M, 'The Shadow Side of Command Responsibility' (2001) 49 AmJCompL 455

Davis G B, 'Amelioration of the Laws of War on Land' (1908) 2 AJIL 63

Drost P N, *The Crime of State, Book 1 Humanicide* (Sythoff 1959) 304

Drumbl M A, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 NWLRev 539

Eckhardt W G, 'Command Criminal Responsibility: A Plea for a Workable Standard' (1982) 97 MilLRev 1

Fenrick W J, 'Article 28: Responsibility of Commanders and Other Superiors, in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers notes, article by article* (Nomos Verlagsgesellschaft 1999)

- Ferraro T, 'The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict' (2015) 97 *International Review of the Red Cross* 1227
- Focarelli C, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble', (2010) 21 *EJIL* 125
- Franck T M, 'Individual Criminal liability and Collective Civil Responsibility: Do they reinforce or contradict one another?' (2007) 6 *WashUGlobalStudLRev* 567
- French D and Stephens T, 'ILA Study Group on Due Diligence in International Law, First Report' (ILA 2014)
- Gattini A, 'Breach of International Obligations', in Nollkaemper A and Plakokefalos I (eds), *Principles of Shared Responsibility in International Law-An Appraisal of the State of the Art*, (CUP 2014)
- Gattini A, 'Evidentiary Issues in the ICJ's *Genocide* Judgment' (2007) 5 *JICJ* 889
- Goldstone R J and Hamilton R J, 'Bosnia v Serbia: Lessons from the Encounter of the international Court of Justice with the International Criminal Tribunal for the Former Yugoslavia' (2008) 21 *LJIL* 95
- Green LC, 'Command Responsibility in International Humanitarian Law' (1995) 5 *Transnat'l L&ContempProbs* 319
- Greenwood C, 'Command Responsibility and the *Hadzihasanovic* Decision', (2004) 2 *JICJ* 598
- Grover L, 'A Call To Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 *EJIL* 543
- Halink S, 'All Things Considered: How the International Court of Justice Delegated its Fact-Assessment to the United Nations in the Armed Activities Case' (2007) 40 *NYUJInt'lL&Pol* 13
- Hart H L A, *Punishment and Responsibility* (1st edn Clarendon Press 1968)
- Hart H L A, *The Concept of Law* (1st edn Clarendon Press 1975)
- de Hoogh AJJ, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World' (2016) 29 *LJIL* 19
- de Hoogh AJJ, 'Articles 4 and 8 of the 2001 Articles on State Responsibility, the *Tadic* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2002) 72 *BYBIL* 255
- Jamieson R and McEvoy K, 'State Crime by Proxy and Juridical Othering' (2005) 45 *BJC* 504
- Jia B B, 'The Doctrine of Command Responsibility Revisited' (2004) 3 *Chinese JIL* 1

Kalshoven F, 'State Responsibility for Warlike Acts of the Armed Forces ', 1991 40 Int'l & CompLQ 827

Keith K M L, 'The Mens Rea of Superior Responsibility as Developed by ICTY Jurisprudence' (2001) 14 LJIL 617

Kelman H C, 'The Policy Context of International Crimes' in Nollkaemper A and van der Wilt H (eds) *System Criminality in International Criminal Law* (CUP 2009)

Koskenniemi M and Leino P, 'Fragmentation of International Law? Postmodern Anxieties', (2002) 15 LJIL 553

Kunz J L, 'The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision' (1951) 45 AJIL 37

Land Warfare Development Centre, *Land Operations* (AC 71940, Army Doctrine Publication 2017)

Lanovoy V, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28 EJIL 563

Lauterpacht H, (ed) *Oppenheim's International Law Vol II* (7th edn Longmans Green & Co 1952)

Lehto M, *Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism beyond Violent Acts* (Brill Nijhoff 2009)

Lippman M, 'The Evolution and Scope of Command Responsibility' (2000) 13 LJIL 139

Lippmann M, 'Humanitarian Law: The Uncertain Contours of Command Responsibility' (2000) 8 Tulsa Journal of Comparative and International Law 1

Martinez J S, 'Understanding Mens Rea in Command Responsibility' (2007) 5 JICJ 638

Meloni C, *Command Responsibility in International Criminal Law* (TMC Asser Press 2010)

Meloni C, 'Command Responsibility - Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior' (2007) 5 JICJ 619

Meron T, 'Is international law Moving towards Criminalisation' (1998) 9 EJIL 18

Messineo F, 'Attribution of Conduct', in Nollkaemper A and Plakokefalos I (eds) *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP, 2014)

Mettraux G, *The Law of Command Responsibility* (OUP 2009)

Milanovic M, 'State Responsibility for Genocide' (2006) 17 EJIL 553

Milanovic M, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 EJIL 669

Nerlich V, 'Superior Responsibility under Article 28 ICC Statute; For What Exactly is the Superior Held Responsible?' (2007) 5 JICJ 665

Nollkaemper A, 'Concurrence between Individual Responsibility and State Responsibility in International Law' 52 *Int'l&CompLQ* (2003) 615

Nollkaemper A, 'State Responsibility for International Crimes: A Review of Principles of Reparation' (Amsterdam Centre for International Law Working Papers 2009)

Nollkaemper A, 'Introduction' in Nollkaemper A and van der Wilt (eds), *System Criminality in International Law* (CUP 2009)

Nollkaemper A and van der Wilt H (eds), *System Criminality in International Law* (CUP 2009)

Nollkaemper A, 'Systematic Effects of International Responsibility for International Crimes' (2010) 8 *Santa Clara JInt'l L* 313

Nollkaemper A and Plakokefalos I, (eds) *The Practice of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2016)

Nollkaemper A et al (eds) *The Practice of Shared Responsibility in International Law*, vol 3 (CUP 2017)

Nolte G, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of Bilateral Conception of Inter-state Relations' (2002) 13 *EJIL* 1083

Nybondas M L, *Command Responsibility and its Applicability to Civilian Superiors* (TMC Asser Press, 2010)

Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable to Armed Conflicts Geneva (1974-1977) Vol IX CDDH/I/SR.

Olleson S, 'The impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts' (BIICL 2009)

O'Reilly A T, 'Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Retributive Justice' (2004) 40 *Gonzaga LRev* 127

Osiel M, 'The Banality of Good: Aligning Incentives against Mass Atrocity' (2005) 105 *Colum LRev* 1751

Parks W H, 'Command Responsibility for War Crimes' (1973) 62 *MilLawRev* 1

Pictet J S (ed) *Geneva Convention relative to the Treatment of Prisoners of War: Commentary* (ICRC 1960)

Pilloud C, Sandoz Y, Swinarski C and Zimmermann B (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987)

Pisillo-Mazzeschi R, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German YB Int'l L* 9

Prevost AM, 'Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita' (1992) 14 HumRtsQ 303

Reid N L 'Bridging the Conceptual Chasm: Superior Responsibility as the missing Link between State and Individual Responsibility under International Law' (2005) 18 LJIL 795

Rhea H M, 'The Commission on the Responsibility of the Authors of the War and Enforcement of Penalties and its Contribution to International Criminal Justice after World War II' (2014) 25 CrimLF 147

Robinson D, 'The Identity Crisis of International Criminal Law' (2008) 21 LJIL 925

Robinson D, 'How Command Responsibility got so complicated; a culpability contradiction, its obfuscation and a simple solution' (2012) 13 MelbJInt'lL 1

Robinson D, 'A Justification of Command Responsibility' (2017) 28 CrimLF 633

Robinson DE, 'Exploring justice in extreme cases: Criminal law theory and international criminal law,' (PhD thesis, University of Leiden 2020).

Roling B V A, 'Criminal Responsibility for Violations of the Laws of War' (1976) 12 Rev BDI 8

Ronen Y, 'Superior Responsibility of Civilians for International Crimes committed in International Settings' (2010) 43 VandJTransnatL 313

Sander B, 'Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence' (2010) 23 LJIL 23

Schabas W A, 'Enforcing international humanitarian law: Catching the accomplices' (2001) 83 IRRC 439

Scobbie I, 'Assumptions and presuppositions: state responsibility for system crimes' in Nollkaemper A and van der Wilt H (eds) *System Criminality in International Law* (CUP 2009)

Scott J B, *The Proceedings of the Hague Peace Conferences: Translations of the Official Texts* vol 2 (OUP 1921)

Seibert-Fohr A, 'From Complicity to Due Diligence: When Do States Incur Responsibility for their Involvement in Serious International Wrongdoing' (2017) 60 GYIL 667

van Sliedregt E, 'Command Responsibility at the ICTY-Three Generations of Case-law and Still Ambiguity' in Swart B, Zahar A and Slutter G (eds), *The Legacy of the International Criminal Tribunal for the former Yugoslavia* (OUP 2011)

van Sliedregt E, 'System Criminality at the ICTY' in Nollkaemper A and van der Wilt H, (eds), *System Criminality in International Law* (CUP 2009)

Smidt ML, 'Yamashita, Medina and beyond: Command Responsibility in Contemporary Military Operations' (2000) 164 MilLRev 155

Spinedi M, 'State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datur?' (2002) 13 EJIL 895

Stephens T and French D, 'ILA Study Group on Due Diligence in International Law, Second Report', July 2016' (ILA 2016)

Swart B, Zahar A and Sluiter G (eds), *The Legacy of the International Criminal Tribunal for the former Yugoslavia* (OUP 2011)

Tallgren I, 'The Sensibility and Sense of International Criminal Law' (2002) 13 EJIL 561

Talmon S 'The responsibility of outside powers for the acts of secessionist entities', (2009) 58, ICLQ 493

Tams C J, 'All's Well That Ends Well? Comments on the ILC's Articles on State Responsibility', (2002) 62 *Zeitschrift fur ausländisches öffentliches Recht und Völkerrecht*, 759, 765, accessed through SSRN accessed 20 October 2020

Tams C J, 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?' (2002) 13, EJIL 1161

Teitelbaum R, 'Recent Fact- Finding Developments at the International Court of Justice' (2007) 6 LPICT 119

Triffterer O (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article*, (Nomos Verlagsgesellschaft 1999)

Triffterer O, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute' (2002) 15 LJIL 179

Tsagourias N, 'Cyber-attacks, self-defence and the problem of attribution' (2012) 17 JC & SL 229

Tsagourias N and Buchan R, 'Automatic Cyber Defence and the Laws of War' (2017) GYIL 60

UK MOD Joint Doctrine Publication 1-10 Captured Persons (CPERS) (3rd edn, change 1 DCDC MOD 2015

Vetter G R, 'Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)' (2000) YaleJIntlL 89

Villalpando S, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21 EJIL 387

J Vlasda, 'Organised Innocence and Exclusion: Nation States in the Aftermath of War and Collective Crime' (2007) 74 Social Research 1173

War Office, *Manual of Military Law* (6th edn HMSO 1914)

War Office, *Manual of Military Law Part III* (HMSO 1958)

Werle G, *Principles of International Criminal Law* (2nd edn TMC Asser Press 2009)

White ND, 'Responses of political organs to crimes by states' in Nollkaemper A and van der Wilt H(eds), *System Criminality in International Law* (CUP 2009)

Zyberi G, 'Responsibility of States and Individuals for Mass Atrocity Crimes', in Nollkaemper A and Plakokefalos I (eds) *The Practice of Shared Responsibility in International Law* (CUP 2017)
