COMMAND RESPONSIBILITY — A CONTEMPORARY EXPOSITION*

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ABSTRACT

Emerging from the vestiges of World War II, the doctrine of command or superior responsibility is a form of indirect criminal liability, which purports that a commander or superior may be held criminally responsible for crimes committed by subordinates. Contemporary times may shine a different spotlight on the doctrine of command responsibility, owing to the advancements in digital technology and our constant reliance on it. It is as such an enabler of justice, but it may act as a double-edged sword for high-ranking officials seeking to flout law and commit humanitarian violations. This thesis aims to provide a contemporary exposition of the doctrine of command responsibility, the elements to be satisfied to prove such a doctrine, and the intricacies and nuances involved in proving its scope and application in international criminal law.

"When [a commander] violates the sacred trust, he not only profanes his entire cult but threatens the very fabric of international society...This officer, of proven field merit, entrusted with high command involving authority adequate to responsibility, has failed this irrevocable standard; has failed his duty to his troops, to his country, to his

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enemy, to mankind; has failed utterly his soldier faith."
—General Douglas McArthur[1]

I. INTRODUCTION

Command responsibility, as a concept, is deeply entrenched in military parlance, but it now applies outside the demarcated borders of a military system. Of late, however, the term has been reserved to denote a situation in which not only a military commander, but also a non-military leader, is held criminally liable for the conduct of his subordinates as if he or she had personally executed the criminal deed.[2] The said doctrine stipulates that a superior, whether military or non-military, can be held criminally responsible for the commission of international crimes by subordinates. Command responsibility as a doctrine enjoys the status of customary international law and forms part of international criminal law by way of its inclusion in the Rome Statute (establishing the International Criminal Court) and statutes of international criminal tribunals.[3]

Modern international criminal justice, particularly the doctrine of command responsibility, owes its exposition to the war crimes trials of World War II. During the establishment of different international tribunals, it was felt by many that international criminal law did not possess the legal finesse necessary to reprobate the atrocities committed. While crimes were manifestly considered to be morally wrong by the international community as a whole, legal sanctions against such actions were not entirely developed. International criminal law thus had to develop and draw level with the expectations of the world, against the backdrop of the acts of savagery that took place at the time. International criminal law kept up with changing times by introducing new kinds of crimes like aggression and abolishing age-old defenses like "the defense of obedience to superior orders and *tu quoque*."[4] Individual criminal responsibility was also used to hold responsible many top-level officials.

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[1] Commander-in-Chief, United States Army Forces in the Pacific, confirming the Yamashita sentencing (Feb. 11, 1946).

[2] *See, generally,* Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L CRIM. JUST. 159 (2005).

[3] GUÉNAËL METTRAUX. THE LAW OF COMMAND RESPONSIBILITY 4 (2009); Prosecutor v. Jose Cardoso Ferreira, Judgment, Case No. 04c/2001, ¶ 507, (Special Panels for Serious Crimes 2003). In this case, it was affirmed that "command responsibility is not only a principle of customary international law, but also conventional international law."

[4] *See* Mettraux, *supra* note 3, at 4.

Prior to the development of the command responsibility doctrine, superiors could be convicted of a crime only if they had personally participated in its commission; in other words, there was no way of holding a superior responsible directly if the subordinates committed the crime.[5] Under the law of command responsibility, the superior or commander is held criminally responsible primarily for failing to prevent the commission of the criminal act by the subordinate. It could therefore be said that command responsibility implies a crime of omission.[6] Command responsibility has also been given the terms "imputed responsibility or criminal negligence" by the United Nations Secretary General.[7]

Because command responsibility is a form of criminal liability, basic tenets of criminal law have to be adhered to. This includes, but is not limited to, establishing guilt or the mental element of *mens rea*. "Criminal law is predicated on the idea of free human agency,"[8] which infers that the accused has the relevant capacity to act in furtherance of established norms, legal or moral, and possesses the basic understanding that contravention of such a norm would result in dire consequences. In line with this view, command responsibility consists of three constituent elements: "reflecting, respectively, power and agency ('effective command and control'), *mens rea* ('he knew or should have known'), and the omission that actually triggers criminal responsibility ('failure to take the reasonable and necessary steps')."[9] *Actus reus* as a quintessential material element is also not to be forgotten. Needless to say, command responsibility as a doctrine is rife with criticisms owing to its "fault" element. The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal of the Former Yugoslavia (ICTY) had a different standard ("had reason to know"), as opposed to the standard of the International Criminal Court (ICC), which concerns itself with what the commander "should have known."

Thus, this Article will try to explain the different fault thresholds mentioned in international law for the doctrine of command responsibility

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[5] *Id.* at 5.

[6] International Committee of the Red Cross [hereinafter "ICRC"], Command Responsibility and Failure to Act, Advisory Service on International Humanitarian Law, at 1 (Apr. 2014), *available at* www.icrc.org/en/download/file/1087/command-responsibility-icrc-eng.pdf (last visited May 8, 2020).

[7] WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 304 (2000); Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, at ¶ 56, UN Doc. S/25704 (1993).

[8] H.G. van der Wilt, *Command Responsibility*, OXFORD BIBLIOGRAPHIES ONLINE, Sept. 30, 2014, *at* www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0088.xml (last visited June 23, 2019).

[9] *See* Wilt, *supra* note 7.

and examine whether or not the concept lends itself to an easy prognosis. A discussion on whether command responsibility should be a separate offense or be treated as a mode of liability will also be provided.

With the advancement of technology—and a growing dependence on cyberspace—the doctrinal application of command responsibility has become more convex. This aspect is relatively untouched in command responsibility's scholarly universe, making its exposition all the more necessary. On an organizational level, command responsibility relies on a pyramidal depiction or a helix of power, rather than a loop, be it on the military or the civilian level. While demarcation of responsibilities and duties is clear in a military set-up, organizational hierarchy can differ among civilian structures. For instance, in a company, the devolution of powers is clearly indicated either statutorily or by way of repeated practice; however, in a seemingly paramilitary armed group consisting of very few participants, it is not easy to distinguish between subordinates and superiors or to establish a helm at the superior level. These technicalities are to be closely analyzed before applying the doctrine of command responsibility to any scenario. This Article will revisit this situation from a legal standpoint, while opining on whether the doctrine of command responsibility has changed over time and the possible reasons for these changes.

II. THE LEGAL BASIS OF THE DOCTRINE OF COMMAND RESPONSIBILITY

A. Evolution of Law

The doctrine of command responsibility has been in existence since time immemorial. For instance, around 500 B.C., in the oldest military treatise in the world, Sun Tzu wrote: "When troops flee, are insubordinate, distressed, collapse in disorder, or are routed, it is the fault of the general. None of these disorders can be attributed to natural causes."[10] Command responsibility is a quintessential doctrine used to punish superiors who do not fulfill their duty by failing to prevent crimes from being committed by subordinates. Hugo Grotius inadvertently alluded to the same when he wrote: "[W]e must accept the principle that he who knows of a crime and is able and bound to prevent it but fails to do so, himself commits a crime."[11]

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[10] SUN TZU, THE ART OF WAR 125 (S. Griffith trans., 1963).

[11] *See* HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 292 (Stephen Neff ed., 2012) (1615).

It is pertinent to note that neither the 1907 Hague Regulations nor the 1929 Geneva Conventions dealt specifically with the issue of command responsibility. However, the Fourth Hague Convention itself, along with the Regulations, stated as follows: "A belligerent party shall […] be responsible for all acts committed by persons forming part of its armed forces." Furthermore, Article 1(1) of the Regulations Respecting the Laws and Customs of War on Land stipulates that the said laws apply to armies commanded by a person responsible for his or her subordinates.[12] Given these, it may be stated that command responsibility existed prior to World War II; however, history is not replete with convictions based on the said doctrine, since there was a lack of sufficient authorization to intrude in a predominant area of state action.[13] A significant aftermath of World War II was the rise of prosecutions based on command or superior responsibility.[14] The debate surrounding war crimes during this time provided a platform to illustrate the doctrine of command responsibility. It is generally assumed that command responsibility became part of armed conflicts after the Nuremberg judgments.[15] These cases framed the contemporary exposition of the doctrine and plummeted it into popular focus.[16]

B. Command Responsibility in Practice

Because criminal law has traditionally focused on individual responsibility rather than communal guilt,[17] it is important to ascertain individual responsibility while proving command responsibility. It is also important to strike out the application of all the constituent elements of the "crime." Furthermore, one must understand that responsibility is not absolute; it is important to ascertain when responsibility ends and accountability begins.[18]

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[12] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land [hereinafter "Fourth Hague Convention and Regulations"], art. 1(1), Oct. 18, 1907, 187 C.T.S. 227.

[13] William Parks, *Command Responsibility for War Crimes*, 62 MILITARY L. REV. 1, 19 (1973).

[14] *In re* Yamashita, 327 U.S. 1 (1946); U.S. v. Wilhelm von List, *in* I, THE LAW OF WAR: A DOCUMENTARY HISTORY 158 (Leon Friedman ed. 1972); Can v. Meyer, 4 LRTWC 9 (1948).

[15] Amy McCarthy, *Erosion of the Rule of Law as a Basis for Command Responsibility under International Humanitarian Law,* 18 CHI. J. INT'L L. 553, 556 (2018).

[16] *Id.*

[17] IX CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE AND RISK, IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 4 (Mark Pieth & Radha Ivory eds., 2011).

[18] *See, generally,* Thomas Bivins, *Responsibility and Accountability, in* ETHICS IN PUBLIC RELATIONS: RESPONSIBLE ADVOCACY (Kathy Fitzpatrick & Carolyn Bronstein eds., 2012).

There is something inherently controversial about holding someone criminally responsible for the acts of another person; however, international law and modern domestic criminal systems purport that in case a superior directed, abetted, or aided in the immediate commission of the crime by the subordinate, the superior shall be held responsible.[19] As far as international criminal law is concerned, it becomes imperative to recognize the superior's responsibility in times of war or armed conflicts. Since superiors are the ones primarily involved in making plans and issuing orders that result in commissions of crime, they have "more opportunity for deliberation and reflection" as opposed to their subordinates.[20] Explained broadly, command responsibility pertains to the liability of a military commander for failure to discharge duties in an effective manner. Such failure does not necessarily mean insufficient control over the activities of the subordinates, since exposing troops to unnecessary risks or harm could result in the commander being punished.[21] In a limited sense, command responsibility relates to the commander's liability for the subordinates' criminal conduct, which could be "civil, criminal or disciplinary."[22]

Superiors who are at the helm of the hierarchical order usually do not find themselves on the battlefield where various humanitarian violations occur; however, the theory of command responsibility stipulates that even such highly ranked individuals must be held accountable for the violations that occurred due to their failure to prevent them.[23] It is relevant to note that superiors who order or incite violence are liable to be tried as accomplices.[24] However, even if direct orders are not given by superiors, humanitarian violations may also occur if they do not put a stop to certain behaviors exhibited by their soldiers.[25] The unique characteristics exhibited by military

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[19] Elies van Sliedregt, *Criminalisation of Crimes against Humanity, under National Law*, 16 J. INT'L CRIM. JUST. 729, 732 (2018); Harmen van der Wilt, *Srebrenica: on Joint Criminal Enterprise, Aiding and Abetting and Command Responsibility*, 62 NETH. INT'L L. REV. 229, 234 (2015); *See, generally*, Bader Mohammed Alsharidi, *The Consistency of Implementing Command Responsibility in International Criminal Law: An Analysis of the Nature of This Doctrine in the Ad Hoc and Special Tribunals' Case Law and at the International Criminal Court in Bemba*, 12 EYES ON THE ICC 73 (2016) (as a critique of the Bemba decision).

[20] Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 455 (2019).

[21] *Id.* at 466.

[22] *Id.* at 455.

[23] GARY SOLIS, THE LAW OF ARMED CONFLICT 392 (2010).

[24] Paola Gaeta, *The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law*, 10 EUR. J. INT'L L. 172, 174 (1999).

[25] *In re* Yamashita, 327 U.S. 1, 15 (1946): "It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent."

command lead one to rightly believe that military commanders may be held criminally liable for failure to prevent violations from occurring, thus resulting in the creation of command responsibility as a doctrine.[26]

International criminal law purports that an individual may be convicted of crimes either through direct or indirect (by omission) responsibility.[27] Command responsibility is a form of indirect responsibility which a superior incurs in case he or she fails to prevent the commission of crimes; thus, the superior's conduct is passive. Command responsibility is the only statutory form of indirect responsibility in international criminal law.[28]

Ad hoc tribunals like the ICTY paved the path for the application of the doctrine. One of the most important cases is *Prosecutor v. Mucić*, famously called the *Čelebići* case.[29] Among the accused, Delić and Landzo (a deputy commander and a guard, respectively) were held to be personally responsible for their direct participation and contribution in crimes committed against the detainees. However, Mucić, who was the commander of the Čelebići camp, was found guilty, under the doctrine of command responsibility, for crimes committed by his subordinates owing to his "commander" status. Chiefly, three elements are to be fulfilled for a superior to be held liable under Article 7(3) of the ICTY Statute: (i) proof of the existence of a superior-subordinate relationship; (ii) proof that the superior knew or had reason to know that the subordinate was about to or had committed a crime; and (iii) proof that the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.[30] In the *Orić* case, the ICTY Trial Chamber included a fourth element: *(iv) a subordinate commits a crime under international law.*[31]

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[26] *See* Parks, *supra* note 13, at 86.

[27] Allison Danner & Jenny Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 120 (2005). While direct responsibility may be a result of active conduct of the accused, indirect responsibility is from his/her passive conduct.

[28] Bing Jia, *The Doctrine of Command Responsibility Current Problems*, 3 Y.B. INT'L HUMANITARIAN L. 131, 143 & 161 (2000).

[29] Prosecutor v. Delalić [hereinafter "Čelebići Trials"], Judgment, Case No. IT-96-21-T (Int'l Crim. Trib. for the Former Yugoslavia 1998); Prosecutor v. Delalić [hereinafter "Čelebići Appeals"], Judgment, Case No. IT-96-21-A, (Int'l Crim. Trib. for the Former Yugoslavia 2001).

[30] *Čelebići Trials*, Case No. IT-96-21-T, ¶ 346.

[31] Prosecutor v. Orić, Judgment, Case No. IT-03-68, ¶ 294 (Int'l Crim. Trib. for the Former Yugoslavia 2006).

C. Treatment of the Doctrine of Command Responsibility in the Rome Statute

Article 28 of the Rome Statute adopts an analogous approach to the ICTY, with certain minute changes.[32] Of primary importance is the requirement under the Rome Statute that the commander's dereliction of duty resulted in the commission of the crimes by subordinates; in effect, they were "a result of his or her failure to exercise control properly over such forces."[33]

The import of command responsibility becomes particularly relevant when applying the said doctrine to civilian superiors, since civilians are also participants under International Humanitarian Law ("IHL"). Furthermore, as will be elaborated in the succeeding parts of this Article, the Rome Statute distinguishes between military commanders and civilian superiors in the *mens rea* element. For military commanders, the *mens rea* element may seem identical to the "had reason to know" standard under the ICTY Statute; however, the Rome Statute requires a "should have known" threshold. For civilian superiors, the *mens rea* requirement is more demanding or more liberal, depending on how one interprets it; they must have "consciously disregarded" information related to crimes committed by subordinates.[34] One may argue that the reason for creating a distinction between civilian superiors and military commanders is simple: a military commander operates in a different setting, wherein trained armed forces with strict military discipline carry out military operations; wielding violence, as an instrument to advance motives, is instinctive and justifiable.

Popular notion contends that one of the reasons behind altering the *mens rea* requirement in the Rome Statute may be explained by the "theories of equivalence or cumulative culpability."[35] To elaborate, the lack of intention or knowledge somewhat justifies in diluting the culpability of a superior, especially when pitted against negligence. Nonetheless, the law purports that any wrongdoing be punished, and the more severe the offense, the direr the punishment. It is essential, therefore, to note that a military commander enjoys a particularly delicate position; the commander is "entrusted with the inherently dangerous activity of supervising persons with training in violence

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[32] Darryl Robinson, *How Command Responsibility Got So Complicated: A Culpability Contradiction, its Obfuscation, and a Simple Solution*, 13 MELB. J. INTL. L. 1, 7 (2012); 1999 Rome Statute on the Establishment of an International Criminal Court [hereinafter "Rome Statute"], art. 28, July 17, 1998, 2187 U.N.T.S. 3.

[33] *See* Robinson, *supra* note 32, at 8.

[34] *Id.* at 8.

[35] Sanford Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine,* 73 CAL. L. REV. 323, 406, 409 (1985).

who have access to weapons and other equipment to carry out violence, and who have undergone indoctrination to reduce their inhibitions against violence."[36] Constant vigilance is expected to be exercised by the commander, and he or she expects the same from the subordinates. Hence, a commander cannot contend that he or she was simply criminally negligent in fashioning his or her own lack of knowledge.

It could be argued that a certain complicity by omission is present in such a scenario, as command responsibility supports the notion that, since the commander is operating the steering wheel, failure to be aware of commission of crimes by subordinates "is a sufficiently blameworthy state of mind to ground accessory liability."[37] Primarily, command responsibility is about negligence;[38] however, sometimes even deliberate acts are punished as negligence. On the surface, it seems like command responsibility would hold a negligent military commander responsible; it also purports to catch the commander giving illegal orders (which becomes easy if there is a paper trial indicating the same). Logically, it would not be fair to place the former and latter categories of commanders on an equal level of culpability and punishment. In the former, the commander is hardly the principal perpetrator of the crime, as intent is absent. But in the latter, it is not all that easy to convict the commander since there is no evidence proving that an illegal order was given.

Criminal law generally solves the above evidentiary conundrum by reversing the burden of proof to satisfy an element of crime, i.e. if the prosecutor can prove that the subordinate committed the crime, the commander can testify that no illegal orders were given so as to escape liability. However, the thin line of "negligence" is quite blurred in the command responsibility arena; mere lapses in judgment or simple errors do not lead to the conviction of a commander, and he or she is also not culpable for incorrect inferences. As has been noted: "no sailor and no soldier can carry with him a library of international law or have immediate access to a professor in that subject who can tell him whether or not a particular command is a

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[36] *See* Robinson, *supra* note 32, at 11.

[37] Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L. L. 925, 927 (2008); *See also* Andrew Ashworth, *The Elasticity of Mens Rea*, in CRIME, PROOF AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS (Colin Tapper ed., 1981).

[38] ICRC, COMMENTARY ON THE ADDITIONALLY PROTOCOLS 1012 (1987), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf. The ICRC purports that the element of intent is of utmost importance, like any criminal law system.

lawful one."[39] Thus, simple negligence may not fall within the purview of command responsibility.[40]

D. Mode of Liability, or a Separate Offense?

Command responsibility covers two forms. On one hand, it may appear to deal with the responsibility of a commander who has ordered a subordinate to commit an act against the law of armed conflict or is not opposed to the commission of such an act; on the other, it includes the subordinates' defense that they are not liable for the violation by virtue of the fact that they were acting under the orders of the commander, thereby resulting in a dilution of their own liability in the process.[41] However, since it is a form of indirect culpability, command responsibility is applicable even if the superior gives no order. An analysis of certain treaty provisions would show that conventions on international criminal law were drafted with the aim of excluding the defense of superior orders.[42] Article 33 of the Rome Statute also reflects the same.[43] Bassiouni wrote that:

> Some of these defenses, like obedience to superior orders, reprisals and *tu quoque*, arise under international criminal law, national military law, and national criminal law. Coercion and necessity arise essentially under national criminal law, but coercion also arises under international criminal law and national military law when it relates to obedience to superior orders.[44]

It was predominantly viewed that rendering criminal accountability to those accused of war crimes was more important than examining a doctrine-based approach of the defenses within international criminal law.

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[39] *The Peleus Trial, Trial of Kapitanleutnant Heinz Eck and Four Others for the Killing of Members of the Crew of the Greek Steamship Peleus, Sunk on the High Seas, in* I THE UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 12 (1947).

[40] Burrus Carnahan, *The Law of War in the United States Court of Military Appeals,* 20 REVUE DE DROIT PENAL MILITAIRE ET DE DROIT LA GUERRE 331, 344-45 (1981).

[41] L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 320 (1995).

[42] ELIES VAN SLIEDREGT, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW 61 (2003).

[43] ROME STATUTE, art. 33, which provides that "personal criminal responsibility is present even if a crime is committed by a person pursuant to an order of a superior, whether military or civilian, unless (a) the person was under a legal obligation to obey such an order; (b) the person was not aware that the order was unlawful; (c) the order was not manifestly unlawful."

[44] M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 449 (1999); GEERT-JAN KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 29 (2008).

Illustratively, the Charter of the International Military Tribunal ("IMT") sets out to countervail the plea of superior orders, which was used to shield the accused from prosecution.[45]

It is imperative at this juncture to answer the primordial legal question about command responsibility: is it a mode of liability for the crimes committed by subordinates, or a separate offense of the superior for failure to discharge his or her duties of control established under international law? Essentially, is a superior to be held criminally responsible for the crimes committed by his subordinates "as an accomplice,"[46] or for a separate offense of omission, consisting of the dereliction of his duty to control, prevent or punish?[47] As previously discussed, this conundrum may arise while justifying command responsibility's dereliction of duty argument. The following is clear: if the superior indeed personally, by way of a positive act, played a part in the commission of the crime by the subordinate—either by ordering its commission or instigating the subordinate—he or she automatically becomes a participant in the crime and shall be held criminally liable as an accomplice.[48] Put differently, what needs to be answered is whether the superior who "knew" or had "reason to know" that subordinates were committing crimes or had committed crimes, and failed to prevent such commission (either by punishing the subordinates or by ordering them to stop such commission), is likely to be charged merely for his or her omission, or for the subordinates' crime that the superior failed to prevent or punish.[49]

Why is it so important to determine the nature of command responsibility? Answering the above question will not only assist in a theoretical manner but is helpful even from a practical standpoint. It could have a direct impact on sentencing in international trials, in the sense that if a superior's responsibility in relation to failure to prevent or punish the subordinate is not overarching, his or her conviction would be restricted to the separate act or omission (dereliction of duty), rather than the principal and core international crime. Also, the above analysis would assist in the implementation of the Rome Statute on a domestic level.[50] It becomes all the

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[45] *See* A FRANK REEL, THE CASE OF GENERAL YAMASHITA (1949).

[46] *See* Knoops, *supra* note 44.

[47] Otto Triffterer, *Command Responsibility crimen sui generis or participation as otherwise provided in Article 28 of the Rome Statute?*, in MENSCHENGERECHTES STRAFRECHT: FESTSCHRIFT FÜR ALBIN ESE 901-24 (Jörg Arnold ed., 2005).

[48] Robert Cryer, *The Boundaries of Liability in International Criminal Law*, 6 J. CONFLICT & SECURITY L. 3, 23 (2001).

[49] Chantal Meloni, *Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?*, 5 J. INT'L. CRIM. JUST. 619, 637 (2007).

[50] *Id.* at 636; loosely applied in the INDIAN PEN. CODE, § 76 which deals with "an act done by a person bound, or by mistake of fact believing himself bound, by law" and

more challenging if command responsibility is understood as a mode of liability for which there shall be sentencing of the superior for intentional crimes committed by the subordinates, when: (i) the superior failed to know and failed to prevent or punish the commission of crime (and therefore, acted in a negligent manner); and (ii) liability is purely due to the failure to punish.[51] Certain domestic legislations provide that the failure to control or essentially punish is a *crimen sui generis*.[52]

Alternatively, it could be asserted that, per the doctrine of command responsibility, the commander is held liable as an accessory to the crimes committed by the subordinates, and accordingly, the commander must be charged, convicted, and sentenced as such. Therefore, to satisfy established principles, command responsibility as a mode of liability must require that a commander's dereliction contributed to the crimes of subordinates.[53] An advantage of specifically punishing derelictions as a separate offense is that the debate surrounding "culpability" would vanish, since the commander would be charged solely for his or her dereliction of duty and not as a party (accessory) to the crimes in which he or she did not participate. However, this scenario would result in a misnomer, since international criminal law (Rome Statute and Tribunal Statutes) appears to recognize command responsibility as a mode of liability, not as a separate crime; it is mentioned in "general principles," not in the list of crimes.[54]

Causal contribution is therefore of vital importance. The Rome Statute supports causal contribution, while international criminal law tribunals reject such an approach.[55] "Personal culpability" purports that the accused must have a personal connection to the crime and must also have a culpable

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provides that "nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it." By way of illustration, to explain the above provision, the INDIAN PEN. CODE also states as follows: "(a) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence." This provision has been applied in the superior-subordinate context by the Supreme Court of India in R.S. Nayak v. A.R. Antulay, 1986 SCR (2) 621, ¶ 71, in the following manner: "the superior's direction is no defence in respect of criminal acts, as every officer is bound to act according to law and is not entitled to protection of a superior's direction as a defence in the matter of commission of a crime."

[51] Meloni, *supra* note 49.; *See, generally,* RICHARD LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY (1982).

[52] *See* Triffterer, *supra* note 47, at 903.

[53] *See* Robinson, *supra* note 32, at 4.

[54] *See, generally,* Rome Statute, art. 28.

[55] *See* Robinson, *supra* note 32, at 12.

state of mind.[56] Since culpability is personal, a person cannot be punished for crimes in which he or she had no role to play, either from the *actus reus* or the *mens rea* angle. While criminality is not a one-legged boot, it involves the presence of multiple actors; an individual may still share liability for acts physically carried out by others, provided that he or she contributed to the commission of such acts in some manner, while also simultaneously fulfilling the *mens rea* requirement.[57] International criminal law scholars have observed that "the requirement that the accused be 'causally linked to the crime itself is a general and fundamental requirement of criminal law'[58] and that 'in all criminal justice systems, some form of causality is required.'"[59] Simply put, those who are directly responsible for the commission of crimes are liable as principal actors, and those who indirectly participate are held liable as accessories. An example of the former would be the physical perpetrator who fulfills the *actus reus* element of the crime; while the latter is a person whose influence or assistance led to the principal actor making the choice to commit the crime.[60]

The causal contribution threshold for accessories is lower, since they merely influence perpetrators.[61] "Accordingly, it is not required that an accessory 'causes' the crime in the sense of a *sine qua non* or 'but for' causal relation; all that is required is some 'contribution.'"[62] It may be noted that the requisite degree of contribution may perhaps be satisfied by arguing that the other person's acts enabled or had an impact on the crime, that it at least "could have" made a difference, or that it enhanced the risk of the crime occurring.[63] On a similar vein, it is contended that a commander's failure to punish a crime may not have necessarily contributed to the crime, but it may result in there being no punishment at all. Failure to fulfill the duty to punish directly results in assisting the perpetrators to avoid arrest, trial, or subsequent

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[56] Toni Pickard, *Culpable Mistakes and Rape: Relating Mens Rea to the Crime*, 30 U. TORONTO L. J. 75, 81 (1980) 1; *See, generally,* M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711 (2008).

[57] John Gardner, *Complicity and Causality*, 1 CRIM. L. & PHILOSOPHY 127, 132 (2007).

[58] Guénaël Mettraux, Command Responsibility in International Law - The Boundaries of Criminal Liability for Military Commanders and Civilian Leaders, at 5 (2008) (thesis submitted for the degree of Doctor of Philosophy, University of London).

[59] Ilias Bantekas, *On Stretching the Boundaries of Responsible Command,* 7 J. INT'L. CRIM. JUST. 1197, 1199 (2009).

[60] Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L. J. 91, 100 (1985).

[61] Michael Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 401 (2007).

[62] *See* Robinson, *supra* note 32, at 14.

[63] Francis Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 717 (1930).

conviction. "One could argue that if 'accessory after the fact' is justifiable under the culpability principle, then a concept of command responsibility without causation is also justifiable, because the commander also contributes to the frustration of justice."[64]

It is important to note that there is no unswerving formula that may be employed to ascertain the exact nature of command responsibility. While the above discussion may shed some light on the matter, it chooses not to devolve into a discourse on how to determine such. However, one glaring aspect is that there seems to be a conundrum in relation to causality, yet it could also be argued that under command responsibility, there is no requirement of causality at all—the crime is committed regardless of the action or the inaction of a commander. In effect, the commander makes no "contribution" to the crime; at best, it could be said that the contribution is passive—if the commander fails to punish the perpetrator for committing a crime at one instance, and another crime is committed in the future, the latter could have been avoided if there had been a punishment for the earlier crime. There is no simple reasoning to clear the immiscibility surrounding the "causality" issue in command responsibility.

III. JURISPRUDENTIAL DEVELOPMENT OF THE DOCTRINE OF COMMAND RESPONSIBILITY

A. Growth of Jurisprudence in Relation to the Law of Command Responsibility

It is interesting to note that the doctrine of command responsibility was developed primarily as a norm of international law and did not stem from domestic sources. This sets the doctrine apart from other principles of international criminal law.[65] The extent of criminality and criminal responsibility comes to the fore while applying the doctrine to crimes committed during wars and other conflicts. International law was severely lacking in criminalizing the conduct of any passive participant in a war crime. The doctrine of command responsibility filled the quintessential void by imposing a penalty for commanders who flouted their duties, one of which is failure to prevent the commission of the crime committed by their subordinates. The law of command responsibility heavily depended on access to the judicial process (availability of an avenue), and the lack of prior case law on the matter impeded its application. *Ad hoc* tribunals have governing

[64] *See* Robinson, *supra* note 32, at 48.
[65] *See* Mettraux, *supra* note 58, at 69.

documents that stipulate that command responsibility may be applicable to any crime within the tribunals' jurisdiction.[66] Thus, by way of inclusion in the statutory documents, it was ensured that command responsibility got the rightful treatment it deserves.

The rationale behind punishing those at the helm rather than foot soldiers is also a sound one. Justifiably, those at the helm have both the authority and the ability to give orders with devastating aftermaths. Other certain aspects also shed light on why prosecutors prefer charging high-ranking officials with international crimes, rather than persons who are direct perpetrators.[67] Financially, it is better to focus limited resources on important trials rather than attempting to punish all those responsible for the commission of international crimes. Politically, it is astute to prosecute those who wield power in conflict-ridden zones, so that such power may be better defused and peace restored. It is relevant to note that one of the major successes of the ICTY was the counteracting of the political and social influence of the war criminal Radovan Karadžić.[68] It is also, perhaps, in conjunction with the aim of "ending impunity" to charge and punish those who are in positions of power, since these efforts have long-lasting positive effects and may aid in transitional justice in conflict areas. Nonetheless, such prosecutorial discretion is not devoid of innate risks and has a few drawbacks.

When the prosecution decides to devote its time and energy to convicting high-level perpetrators, it could be argued that the direct perpetrators who are actually responsible for committing the harrowing crimes go scot-free. Some believe that it may amount to a *de facto* immunity to direct perpetrators, unless national authorities concomitantly and actively pursue and punish those directly responsible for such crimes.[69] Furthermore, it is also extremely difficult to find evidence fulfilling the criteria of Article 69(3) of the Rome Statute to indict and convict high-ranking officials, rather than direct perpetrators. Factually, such a pursuit also does not paint a true picture of the atrocities that plagued conflict areas, since it may result in a

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[66] United Nations Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia [hereinafter "ICTY Statute"], art. 7(3), U.N. Doc. S/Res/827 (May 25, 1999); United Nations Security Council, Statute of the International Criminal Tribunal for Rwanda, art. 6(3), U.N. Doc. S/Res/955 (Nov. 8, 1994).

[67] *See, generally*, Daniel Nsereko, *Prosecutorial Discretion before National Courts and International Tribunals*, 3 J. INT'L. CRIM. JUST. 124 (2005).

[68] Alex Whiting, *The Many Significances of the Karadžić Conviction*, JUST SECURITY, Mar. 28, 2016, *available at* www.justsecurity.org/30261/significances-karadzic-conviction (last visited June 23, 2019).

[69] Post-World War II, domestic criminal prosecutions were prevalent after the (partial) success of both the Nuremberg and Tokyo tribunals. Even *ad hoc* tribunals have been followed by national prosecutorial attempts.

"Tyndall effect" of sorts, i.e. focusing the blame of large-scale atrocities on a lone individual.

The other question that may remain unanswered is that of the importance of "position" or "influence," rather than the "act" per se. Emphasis would be on the status that the potential defendant held at the time of commission of the crime and not on the crime and the level of responsibility.[70] It may be contended that such a prosecutorial predilection may even go against the established tenets of criminal law; on the other hand, it may be an unavoidable one. The ranking of the defendant then takes the forefront, and that may lead to the prosecution working its way backwards, wherein the defendant will be connected to the crime, rather than the crime being connected to the defendant. Simply put:

> [C]riminal charges would in turn be brought not against those most responsible for particular crimes, but against those who present the greatest ratio between their alleged responsibility for the crimes and the position which they held in the hierarchy at the time, with a premium being placed upon the latter part of that equation.[71]

Whether one would view such an approach positively or negatively may not be helpful, since international criminal law has already made the choice. Punishing those who are at the helm of the hierarchical structure rather than low or mid-level officials comes embedded with the notion of added feasibility and ease of prosecution.[72] Command responsibility thus ensures that those who played an important role in the occurrence of international crimes, be it by way of failure to reprimand the actual perpetrators or prevent the crime at all, do not escape justice. Even though they are not directly or physically carrying out of the crime, the commanders possess an ineffaceable responsibility.

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[70] Timothy Wu & Yong King, *Criminal Liability for the Actions of Subordinates-The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT'L L. J. 272, 290 (1997).

[71] *See* Mettraux, *supra* note 58, at 22.

[72] On prosecutorial discretion in international criminal law, *see, generally,* Matthew Brubacher, *Prosecutorial Discretion within the International Criminal Court,* 2 J. INT'L. CRIM. JUST. 75 (2004); Hiromasa Takemura, *Prosecutorial Discretion in International Criminal Justice: Between Fragmentation and Unification* in THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW 633-56 (Larissa van den Herik & Casrten Stahn eds., 2012).

B. Analysis of Jurisprudential Development of the Doctrine: Dissection of the Ingredients of Command Responsibility

1. 'Acceptance' by the Superior and the 'Reason to Know' Standard

As previously discussed, a superior needs to exercise effective control over subordinates, i.e. the "material ability to prevent offences or punish the offender."[73] Establishing a behavioral standard for the commander is not sufficient to satisfy the tenets of command responsibility, meaning it is not enough that the superior officer knew about past offenses and failed to prevent them in order to prove that he or she was aware of the possibility of similar offenses being committed in the future.[74] However, it may be enough to institute an enquiry against the said commander. While trying to ascertain this requirement, the failure of the superior to punish the offender may be analyzed closely, since it directly relates to whether he or she had enough information to understand whether future crimes may be committed by subordinates.[75] Furthermore, a superior's obvious failure to punish any crime committed by a subordinate may be understood as acceptance of such conduct that may propel the commission of a similar crime in the future.[76] If the superior would not be able to carry out the necessary steps for preventing or punishing the crime, or, in other words, if too many impeding factors exist, then it would mean that the superior does not possess the material ability required to exercise effective control.[77]

The "reason to know" standard was analyzed by the ICTY when it held that "by failing to take measures to punish crimes of which he has knowledge, the superior has reason to know that there is a real and reasonable risk those unlawful acts might recur."[78] It was also noted that a superior's failure to punish a crime meets the "had reason to know" standard if he or she had also realized, with the information he or she possessed, that it could have alerted him or her to the possibility of crimes being committed by his or

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[73] *See* ICTY Statute, art. 7(3); Prosecutor v. Hadžihasanović and Kubura [hereinafter "Hadžihasanović Appeals"], Judgment, Case No. IT-01-47-A, ¶ 228 (Int'l. Crim. Trib. for the Former Yugoslavia 2008).

[74] *Hadžihasanović Appeals*, Case No. IT-01-47-A, ¶ 30.

[75] *Id.*

[76] *Id.*

[77] *Id.* ¶ 31; Prosecutor v. Popović [hereinafter "Popović Appeals"], Judgment, Case No. IT-05-88-A, ¶ 1857 (Int'l. Crim. Trib. for the Former Yugoslavia 2015).

[78] *Hadžihasanović Appeals*, Case No. IT-01-47-A, ¶ 31.

her subordinates.[79] Clearly, such an assessment has to be made on a case-to-case basis. Further, per the ICTY Statute, ascertaining the gravity of the crimes is quintessential. This is determined by the following criteria: (1) the gravity of the underlying crime committed by the convicted person's subordinate; and (2) the gravity of the convicted person's own conduct in failing to prevent or punish the underlying crimes.[80]

It is thus clear that to secure a conviction under Article 7(3) of the ICTY Statute, an essential consideration is the assessment of the gravity of the superior's conduct at sentencing or punishing the subordinates' crimes.

2. 'Necessary and Reasonable' Standard

The other relevant aspect to analyze is what constitutes the "necessary and reasonable" measures. Tribunals have assessed whether measures that normally would not constitute either necessary or reasonable could be construed to justify the non-fulfillment of the duty to punish by the commander.[81] It was affirmed by the ICTY that such an ascertainment (of what comprises "necessary and reasonable") is a matter of evidence, not of substantive law, which would differ from one case to another. The ICTY jurisprudence has also listed out certain minimum standards to fulfill the "duty to punish" threshold.[82] For instance, the steps taken to secure an adequate investigation, i.e. the superior's duty to punish the perpetrators, including the obligation to investigate, try and establish facts, and report to competent authorities or sanction the offenders, etc., are taken into consideration.

Article 87(1) of Additional Protocol-I ("AP-I") stipulates the duty of commanders to report to competent authorities, while Article 87(3) of AP-I also provides that when a commander is aware of his subordinates' violation(s) of IHL, his or her responsibility is to "initiate disciplinary or penal action against violators thereof."[83] Such reporting by the commander must be sufficient enough to necessitate initiation of an action by the competent authorities. Even if a commander reports to the competent authorities, and

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[79] *Id.* ¶ 267.

[80] *See* ICTY Statute, art. 7(3).

[81] Prosecutor v. Bagilishema [hereinafter "Bagilishema Appeals"], Judgment, Case No. ICTR-95-IA-A, ¶ 33 (Int'l Crim. Trib. for Rwanda 2002); *See Popović Appeals*, Case No. IT-05-88-A, ¶ 1857).

[82] Prosecutor v. Blaškić, Judgment, Case No. IT-95-14-A, ¶ 62 (Int'l. Crim. Trib. for the Former Yugoslavia, 2004).

[83] 1977 Protocol Additions to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts [hereinafter "Additional Protocol-I"] art. 87, June 8, 1977, 1125 U.N.T.S. 3.

the authorities do not punish the action, his or her duty will have been fulfilled; however, he or she cannot merely satisfy himself or herself with empty assurances which may not fructify into relevant action by the authorities.[84] Even in armed conflicts, where subordinates commit crimes while acting per the orders of the heads of the military or political structures, international law stipulates that commanders must take some action to punish the subordinates.[85] Interestingly, it was also held that effective control over subordinates may be exercised by one or more commanders, and even if one such commander has effective control, all may incur criminal responsibility.[86]

3. 'Knew or Had Reason to Know' Standard – General Information

Article 6(3) of the ICTR Statute purports that a potential defendant would fulfill the *mens rea* standard of command responsibility when he "knew or had reason to know" that the subordinate was about to commit a criminal act.[87] It was held by the ICTR[88] that the defendant's subordinates need not have killed Tutsi civilians; it is sufficient for the subordinates to have committed any criminal act mentioned in the ICTR Statute, like direct and public incitement to commit genocide.[89] Thus, any commander possessing even "general information" which may assist him or her in noticing that possible unlawful acts may be committed by his subordinates is sufficient; he or she does not need to possess specific information.[90] Direct personal knowledge or total awareness of criminal plan or discourse is unnecessary.[91]

In the *Nahimana* case, it was submitted that nationally, no crime had been committed by the defendant or that the Ministry of Information did not specify that the broadcast was criminal. This fact was considered wholly irrelevant since the minimum "reason to know" standard had been met by the defendant; he had reason to know that a significant risk did exist, since the journalists would incite the commission of crimes against Tutsis.[92] It is

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[84] *See Popović Appeals*, Case No. IT-05-88-A, ¶ 1938.

[85] *Id.*

[86] *Id.*

[87] Prosecutor v. Nahimana [hereinafter "Nahimana Appeals"], Judgment, Case No. ICTR-99-52-A, ¶ 795 (Int'l. Crim. Trib. for Rwanda 2007).

[88] *Id.* ¶ 1938.

[89] *Id.* ¶ 865.

[90] *Id.* ¶ 791; *See Čelebići Appeals*, Case No. IT-96-21-A, ¶ 238; *See Bagilishema Appeals*, Case No. ICTR-95-IA-A, ¶¶ 28, 42; Prosecutor v. Krnojelac [hereinafter "Krnojelac Appeals"], Judgment, Case No. IT-97-25-A, ¶¶ 154-55 (Int'l. Crim. Trib. for the Former Yugoslavia 2003).

[91] *See Nahimana Appeals*, Case No. ICTR-99-52-A, ¶ 791.

[92] *Id.* ¶ 840.

pertinent to note that in jurisprudence, there is no requirement that the *de jure* or *de facto* control exercised by the civilian superior has to be similar to that of a military commander to attract the application of the doctrine of command responsibility; it would suffice if the civilian superior has effective control over his or her subordinates and has the material ability to prevent or punish crimes committed by the subordinates.[93]

4. ICC and Command Responsibility[94]

In the *Bemba* appeals, the key issue boiled down to whether the defendant took "necessary and reasonable" measures to prevent or punish the commission of war crimes and crimes against humanity (including rape and pillage), or submit them to the competent authorities for further action, in the state of Central African Republic ("CAR").[95] Under Article 28(a)(ii) of the Rome Statute, it is stipulated that to escape the command responsibility standard, such measures ought to be taken.[96] The Trial Chamber held that he had failed to meet such standard; he did not do all that he could, within his "material ability," to either prevent or repress the commission of crimes.[97] It was also held that a lower degree of exercise of control, including substantial influence over the forces committing crimes, would not suffice to prove command responsibility.[98]

The Appeals Chamber, however, concluded that the Trial Chamber had erroneously held that the above standard was not met. The other main issue before the Appeals Chamber was whether the conviction of the defendant on the charge of command responsibility exceeded the confirmation of charges. In this respect, it was held by the Appeals Chamber that the defendant must always be kept abreast of the factual allegations to be used by the Prosecution to prove his alleged violations.[99]

It is pertinent to note that it must be shown to the Appeals Chamber's satisfaction that the factual conclusions made by the Trial Chamber are definite and irrefutable (including in terms of evidence). The standard is such that when a reasonable person can poke holes in the factual findings or raise

[93] *Id.* ¶ 605; *See Krnojelac Appeals*, Case No. IT-97-25-A, ¶ 155.

[94] *See* Prosecutor v. Bemba [hereinafter "Bemba Appeals"], Judgment, ICC-01/05-01/13 A-A2-A3-A4-A5, (Int'l. Crim. Ct. 2018).

[95] Prosecutor v. Bemba [hereinafter "Bemba Trials"], Judgment, ICC-01/05-01/08, ¶ 59 (Int'l. Crim. Ct. 2016).

[96] *See* ROME STATUTE, art. 28.

[97] *See Bemba Trials*, ¶ 729.

[98] *Id.* ¶ 183.

[99] *See Bemba Appeals*, ICC-01/05-01/13 A-A2-A3-A4-A5, ¶ 968.

serious issues in relation to the veracity of any finding, it would result in the Appeals Chamber believing that the Trial Chamber did not establish the adequate standard of proof and that a factual error has been made. While trying to ascertain whether there is reasonableness, the Trial Chamber must comprehend the "operational realities on the ground at the time faced by the commander." This is evident in Article 28 of the Rome Statute, which provides that it "is not a form of strict liability" and that commanders are permitted to make a cost/benefit analysis to arrive at the measures they are to take to fulfill their overall responsibility to prevent or punish the commission of crimes.[100] Any view taken by a court in retrospect, without understanding ground realities, is not valid. It was held that "simply juxtaposing the fact that certain crimes were committed by the subordinates of a commander with a list of measures which the commander could hypothetically have taken does not, in and of itself, show that the commander acted unreasonably at the time."[101] The Trial Chamber was required to pinpoint what the commander should have done in a concrete fashion, and abstract conclusions must be avoided. It was also stipulated that the Trial Chamber should have proven that the defendant did not take specific measures that any other similarly positioned reasonable and diligent commander would have; it is not the defendant's burden to discharge.

The defendant argued before the Appeals Chamber that in his case, there was "non-linear command," making his situation a unique one. Although the Trial Chamber considered the defendant's difficulties while taking investigatory action, it found them unpersuasive. In reasoning that the defendant did not carry out all the "necessary and reasonable" measures, the Trial Chamber held that he did not exercise his "extensive material ability to prevent and repress the crimes."[102] The Appeals Chamber however appreciated the fact that the defendant's troops were in a foreign land, wherein the defendant was a mere remote commander, thereby diluting his ability to take necessary measures.

It was also held that the Trial Chamber committed serious errors in considering the defendant's motives while ascertaining whether the measures he took were reasonable and necessary, since the Chamber's conclusions were too strict. While the motives of any commander are irrelevant in determining whether his or her actions were reasonable and necessary, it is important to understand whether such actions were taken in good faith. The commander

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[100] Prosecutor v. Bemba (Appeals), Judgment, ICC-01/05-01/08 A, ¶ 170 (Int'l. Crim. Ct. 2018).

[101] *Id.* ¶ 7.

[102] *Id.* ¶ 133.

must prove that there was a genuine attempt to prevent or repress the crimes or submit to competent authorities.[103] The Trial Chamber however found that the defendant's main intention behind the measures taken was the protection of the image of his troops, which, according to the Appeals Chamber, does not diminish them in the "reasonable and necessary" scale. The Appeals Chamber was highly unsatisfied with the Trial Chamber's conclusion that all the measures taken by the defendant were to "counter public allegations and rehabilitate the public image" of his troops, a negative motivation which was an "aggravating factor" in the failure to fulfill Article 28 of the Rome Statute.

It was therefore concluded by the Trial Chamber that the genuineness or lack thereof, of the measures taken, was undeniably tainted. However, the Appeals Chamber held that such a finding was a gross error since the Trial Chamber did not justify how the defendant's motivations could be linked to his failure to take "necessary and reasonable measures."[104] It was thus held that the Trial Chamber's assertion of linking the *actus reus* of the action taken by the defendant, with its perceived *mens rea,* is incorrect. In relation to the inquiry made by the defendant, the Appeals Chamber held that it was necessary to establish: (i) that the shortcomings of the inquiry were sufficiently serious; (ii) that the commander was aware of the shortcomings; (iii) that it was materially possible to correct the shortcomings; and (iv) that the shortcomings fell within his or her authority to remedy. Such an assessment was not made by the Trial Chamber and therefore, the Appeals Chamber did not accept its findings.[105]

However, a dissenting opinion argued that the majority seemed to have suggested that the existence of "doubt" resulting in a dissenting opinion at the Trial Chamber level, would lead to an automatic acquittal.[106] Such an appellate review standard sets a dangerous precedent, since it would necessarily imply that convictions are next to impossible to justify. It was also opined therein that the majority of the Appeals Chamber seemed to have applied a "modified standard of review," in violation of the statutory requirement that an intervention be permitted at the appellate level only if the Trial Chamber's error materially affected its decision.[106] Thus, the above appeals decision is slightly abstract in the sense that its conclusions seemingly stemmed from a partial appreciation of evidence and factual circumstances. Regardless, it is true that the Trial Chamber did commit certain errors in

[103] *Id.* ¶ 176.
[104] *Id.* ¶ 9.
[105] *Id.* ¶ 180.
[106] *Id.* ¶¶ 11-12 (Monageng & Hofmański, *JJ., dissenting*).
[106] *Id.* ¶ 110 (Monageng & Hofmański, *JJ., dissenting*).

deciding on the defendant's guilt, primarily owing to prosecutorial mistakes which have been seemingly remedied by the decision of the Appeals Chamber.

Meanwhile, a separate opinion argued that a high-level commander is not always required to prevent or repress commission of crimes; rather, it is the responsibility of mid-level commanders to manage their troops.[107] This opinion confoundingly insinuated that a high-level commander can thus escape the clutches of justice.

IV. COMMAND RESPONSIBILITY – FACETS OF ITS APPLICABILITY

A. When Does Command Responsibility Apply?

Command responsibility as a doctrine applies, in theory, to both international and non-international armed conflicts.[109] The ICTY recognized that, just because Additional Protocol II (AP-II) contained no provisions for a commander's obligation to prevent and reprimand crimes committed or to be committed by his or her subordinates, it does not necessarily mean that command responsibility cannot apply in non-international armed conflicts. It was also noted that any crime committed by a member of an organized armed force could be related to the commander's inability to prevent the crime per the doctrine of command responsibility.[108] Therefore, it is irrelevant whether a war crime was committed during an international or a non-international armed conflict.

It may be noted that "the basis of the commander's responsibility lies in his obligations as commander of troops making up an organized military force under his command, and not in the particular theatre in which the act was committed by a member of that military force."[109] The doctrine of command responsibility therefore applies in both times of war and peace.[110] However, the above statement should not be misconstrued while hypothesizing about the modes of applicability of the doctrine in both times

[107] *Id.* ¶ 33 (Wyngart & Morrison, *JJ., separate*).

[109] International Commission of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General [hereinafter "Darfur Report"], ¶ 560, Jan. 25, 2005.

[108] *See* Prosecutor v. Hadžihasanović (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility), Case No. IT-01-47-AR72, ¶ 11 (Int'l. Crim. Trib. for the Former Yugoslavia 2003).

[109] *Id.* ¶ 20.

[110] *See, generally*, *Darfur Report*, *supra* note 109.

of peace and war. It would be relatively simpler to prove *actus reus* and the culpability criterion in times of peace when it is easy to gather evidence, establish facts, and proceed with the case. Similarly, since it is easier to differentiate between civilian and military objectives during times of peace, a commander exercising effective control and fulfilling the requisites of the doctrine of command responsibility can be easily established. The existence or non-existence of a conflict would also determine which laws would apply (domestic or otherwise) and which obligations would arise out of it.[113] Thus, the applicability of the doctrine would depend on the individual circumstances surrounding the crime and whether or not the commander was actually bound by certain duties at a particular time and particular situation.

B. Military Commanders and Civilian Superiors

Command responsibility began by being applied to military commanders and continues to directly apply to them today.[111] As discussed, the doctrine was formulated initially by the military for its own application. The way hierarchy works in the military cannot be equated to any other structural organization. The immediacy attached to defense forces in relation to respecting humanitarian and human rights law is unparalleled. It is also easy to delineate the organizational chart in such a setup.

A defendant who has been charged with command responsibility by virtue of his position as a superior officer in the military aids vastly in proving all the relevant modes of liability.[112] Exercise of effective control is an important factor to fulfill the elements of command responsibility, and the fact that the defendant was appointed as a *de jure* commander of the defense forces could arguably mean that he or she had exercised effective control over his or her subordinates (or direct perpetrators).[113] The role of a military commander could, in itself, help in ascertaining effective control, for instance, of documentary evidence in the form of sanction orders, reports, etc.[114] The degree of discipline exercised by military subordinates towards superior

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[113] Hans-Peter Gasser, *Armed Conflict within the Territory of a State*, *in* IM DIENST AND DER GEMEINSCHAFT 225, 229 (Walter Haller et al. eds., 1989; George Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42, 61 (2000), criticising the ICTY's "legislative" tendencies in that regard.

[111] Beatrice Bonafé, *Finding a Proper Role for Command Responsibility*, 5 J. INT'L. CRIM. JUST. 599, 604, 611 (2007).

[112] *See* Mettraux, *supra* note 58, at 91.

[113] *See Hadžihasanović Appeals*, Case No. IT-01-47-A, ¶ 20.

[114] Prosecutor v. Kordić and Čerkez, Judgment, Case No. IT-95-14/2-T, ¶ 421 (Int'l. Crim. Trib. for the Former Yugoslavia 2001).

authorities could also determine whether the defendant had "effective control" over the perpetrators, and if he or she did, how he or she exercised it. In attempting to prove *mens rea*, there is a difference between the standards applied under the statutes of the *ad hoc* tribunals and the Rome Statute, as mentioned above.[115]

Customary law dictates that the state of mind to be proven should be the same for all superiors, i.e. the "he or she knew or had reason to know" standard; however, the defendant's function may be directly proportional to the *mens rea* standard to be proved.[116] The Rome Statute, however, differentiates between civilian and military commanders, especially in the *mens rea* standard.[117] The Rome Statute stipulates that for a military commander, the *mens rea* standard is lower, as opposed to a civilian superior.[118] On a comparative scale, it is easier to satisfy the conditions of command responsibility for a military commander than for a civilian superior, thereby tipping the scale in the latter's favor. Under customary international law, it must be proven that the superior had enough information to permit him or her to establish that crimes may have been committed by his or her subordinates.[119] However, the Rome Statute provides that to hold a military commander responsible criminally, no such information is necessary if it can be proven that "owing to the circumstances at the time, he [or] she 'should have known' that the forces were committing or about to commit such crimes."[120] There is thus, clearly, a lower *mens rea* threshold under the Rome Statute, which may greatly impact jurisprudence in this matter.

The final element of command responsibility is that the commander failed to adopt "necessary and reasonable measures"; however, this does not apply to civilian superiors. The reason is due to IHL and how it lists out

[115] *See, generally,* for a discussion on "mental state," George Fletcher & Jens Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case,* 3 J. INT'L. CRIM. JUST. 539 (2005).

[116] *See, generally,* ROME STATUTE, art. 28; Yudan Tan, *The Identification of Customary Rules in International Criminal Law,* 34(2) UTRECHT J. INT'L & EUR. L. 92, 92-110 (2018).

[117] *See, generally,* ROME STATUTE, art. 28; Prosecutor v. Kayishema and Ruzidana [hereinafter "Kayishema"], Judgment, Case No. ICTR-95-1-T, ¶ 227 (Int'l. Crim. Trib. for Rwanda 1999), where the lower standard was applied by the ICTR, although the reasoning behind such a decision was highly unclear, since the ICTR Statute has no such distinction between the *mens rea* standard for military and civilian superiors.

[118] *Id.*

[119] *See, generally,* Tan, *supra* note 119.

[120] *See* ROME STATUTE, art. 28 (a)(i).

specific obligations for military commanders as opposed to other superiors.[121] In case the military commander satisfied only some obligations, while blatantly ignoring the rest, it would also be more straightforward to assess the scope and extent of his or her derogation. Another important aspect of the doctrine is that a military commander would be criminally responsible irrespective of the position he or she held in the forces: "depending on the circumstances, a commander with superior responsibility may be a colonel commanding a brigade, a corporal commanding a platoon or even a rank-less individual commanding a small group of men."[122]

C. Military vs. Civilian Superiors – Is There a Dichotomy?

As can be seen from the discussion above, it is important to comprehend the basic ideology behind command responsibility. Its scope is not related to the nature or role of the position—that is, military or civilian—rather, it is purely the degree of authority that the commander is able to exercise over subordinates.[123] The test is the "effective control" exercised by the commander over subordinates and whether he or she could be termed as a "superior" in the chain of command.[124] Thus, clearly, the doctrine of command or superior responsibility can apply to paramilitary leaders, militia heads, and the like.

The laws of war stipulate that "responsible command" does not limit itself to military commanders;[125] however, international law does not cull out the kinds of superiors who may be bound by the doctrine of superior responsibility. Civilian leadership or commandership has a much wider spectrum: it could include heads of States, political officer-bearers, and chief executive officers or directors (managing or otherwise) of corporations—all of whom have different roles and responsibilities.[126]

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[121] Additional Protocol-I, art. 86; ICRC, *supra* note 38, ¶ 3536; I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 558-63.

[122] Prosecutor v. Kunarac, Judgment, Case No. IT-96-23 & 23/1, ¶ 398 (Int'l. Crim. Trib. for the Former Yugoslavia 2001).

[123] *See Bagilishema Appeals*, Case No. ICTR-95-IA-A, ¶¶ 50-51.

[124] Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, *Report presented by the United States to the Preliminary Peace Conference*, 14 AM. J. INT'L. L. 95, 121 (1920). In March 1919, the said Commission posited that both civil and military authorities would be bound by the law of superior/command responsibility.

[125] *See* Fourth Hague Convention and Regulations, art. 1.

[126] MAARSCHALKERWEERD NYBONDAS, THE COMMAND RESPONSIBILITY DOCTRINE IN INTERNATIONAL CRIMINAL LAW AND ITS APPLICABILITY TO CIVILIAN SUPERIORS 93 (2009).

Even the owner or manager of a private company or a political party-head could be called a civilian superior to attract the doctrine of superior responsibility.[127] Specifically, a recommendation was made by the International Commission of Jurists that companies in conflict zones may fall within the ambit of superior responsibility, especially the ones engaging or employing private military companies for security purposes.[128] In such an instance, the first company could be the superior which may be held criminally liable for the crimes committed by the "subordinate" military company.[129] Furthermore, the Office of the Prosecutor at the ICC also acknowledged that business enterprises do contribute to the commission of international crimes.[130] Steven Ratner propounded a four-part legal theory to levy responsibility on corporations for human rights violations, writing that "corporate duties are a function of four clusters of issues: the corporation's relationship with the government, its nexus to affected populations, the particular human right at issue, and the place of individuals violating human rights within the corporate structure."[131] Thus, if the above cluster meets the command responsibility thresholds, heads of corporations could be held responsible for the commission of international crimes.

The Tokyo Trials of the IMT found that a person like a minister, who manages a government, is obligated to ensure legal treatment of prisoners of war, and failure to ensure such would result in criminal responsibility.[132] Such a reasoning was popularly considered to be flawed, since not all duties and obligations of a State may be attributed to its officials under international law.[133] Further, just because a State is bound by an international obligation

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[127] HÉCTOR OLÁSOLO, THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES 106 (2009).

[128] International Commission of Jurists: Expert Legal Panel on Corporate Complicity in International Crimes [hereinafter "ICJ Report"], *Corporate Complicity and Legal Accountability*, 2 CRIM. L. & INT'L. CRIMES 37, 42-43 (2008).

[129] *Id.*

[130] Alex Batesmith, *Corporate criminal responsibility for war crimes and other violations of international humanitarian law: the impact of the business and human rights movement*, *in* CORPORATE HUMAN RIGHTS VIOLATIONS: GLOBAL PROSPECTS FOR LEGAL ACTION 285, 292 (Stefanie Khoury & David Whyte eds., 2017). The author mentions that Prosecutor Fatou Bensouda stated the following in a Conference on Corporate Responsibility in Conflict Zones: "Conflicts are driven either by financial enrichment or ideology; therefore, a thorough investigation of the finances behind a conflict helps to identify suspects and develop a more complete picture of responsibility."

[131] Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 496-97 (2001).

[132] *See, generally,* Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT'L. L. 1085 (2011).

[133] Int'l. Law Comm'n (53rd session), 2001 Draft Articles on State Responsibility for Internationally Wrongful Acts with commentaries [hereinafter "ILC Draft Articles"], U.N.

(owing to a treaty or convention), it cannot be said that individuals are also bound by the same.[134] Such an assertion would result in the emergence of a precarious legal fiction that may disparage the well-established law of attribution to states and individuals.[135]

The "responsible command" principle of IHL being stretched to apply to civilian leaders may result in them facing criminal consequences.[136] Nonetheless, such an application would be fraught with legal difficulties. Since the doctrine of command responsibility rests on the existence of a hierarchical structure with a vertical chain of command like in a military unit, where discipline and obedience are prerequisites, civilian leaders need to have responsibilities that resemble those of military leaders. Civilian structures are not the same since their organizational hierarchy is usually different from that of military forces. Furthermore, since international law lacks clarity on the consequences of breach of obligations by civilian leaders, jurisprudence relied on domestic laws to substantiate such duties.[137] However, the violation of a domestic law by a civilian superior will make him or her criminally responsible under international law only if it constitutes a violation under international law, in accordance with the principle of *nullum crimen sine lege*.[138]

Jurisprudence also shows that the same effective control is required to be exercised by both civilian and military leaders over their subordinates for them to be held liable under the doctrine of command responsibility, even though the nature and functions may be different.[139] On an evidentiary scale, different submissions have to be made for a civilian and military superior to establish effective control, which includes proving the *mens rea* standard. In the civilian context, in case an organizationally similar pyramidal structure exists, it is easier to understand devolvement or the levels of authority.[140]

Doc. A/56/10 (2001); *See, generally,* CORNELIS ARNOLD POMPE, AGGRESSIVE WAR: AN INTERNATIONAL CRIME (1953)

[134] *See* ILC Draft Articles, *supra* note 136, art. 58.

[135] *See, generally,* James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874 (2002).

[136] Geoffrey Corn, *Contemplating the true nature of the notion of "responsibility" in responsible command*, 96 INT'L REV. RED CROSS 901, 903 (2014).

[137] *See, generally*, ICRC, THE DOMESTIC IMPLEMENTATION OF HUMANITARIAN LAW: A MANUAL (2013).

[138] Int'l Law Comm'n (48th session), 1996 Draft Code of Crimes against the Peace and Security of Mankind with Commentaries [hereinafter "Draft Code of Crimes"], art. 5, 13, U.N. Doc. A/CN.4/L.532 (1996).

[139] *See Bagilishema Appeals*, Case No. ICTR-95-IA-A, ¶ 55.

[140] *See* ROME STATUTE, art. 28.

The "necessary and reasonable" standard will also vastly differ since a civilian leader's material ability will not be the same as that of the military commander's ability. Some leaders may also fulfill dual functions, and they may be charged based on the doctrine of superior responsibility, wherein any artificial demarcation between his or her civil and military functions would prove to be futile; only the "effective control" standard is required to be assessed.[141] Under such standard, it is essential to analyze whether such a leader fulfilled his or her duty to prevent and repress the commission of crimes by subordinates. The *mens rea* threshold would also vary conclusively based on whether the defendant could be regarded as a military commander or a non-military one, per the Rome Statute. The ICTR has further held that superior responsibility for civilians does not mandate that the defendant must have exercised a state-like or public authority over subordinates.[142] It would suffice that the civilian superior was on the higher end of a hierarchical pyramid of command over the perpetrators, and could thus exercise effective control over subordinates.[143] Therefore, the doctrine of command responsibility applies to all servicemen, anyone "who is entitled to give orders to soldiers that it is the latter's duty to obey."[144]

Arguably, a lower threshold for civilian superiors is not desirable, since that may lead them to disrespect established international law. Command responsibility's history is replete with jurisprudence concerning the human rights violations committed by civilian superiors during World War II.[145] Civilian superiors are also equally accountable for their contribution to, involvement in, or lack of exercise of diligence to or in relation to such atrocious crimes; why, then, should they be treated with a lower standard?[146] Civilian accountability should be measured by an objective standard, wherein if a civilian superior fails to control subordinates by failing to prevent or punish crimes, he or she should be held liable.

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[141] For instance, there may be cases where the Head of the State is also the head/supreme commander of defense forces.

[142] *See Nahimana Appeals*, Case No. ICTR-99-52-A, ¶ 785.

[143] *Id.*

[144] CHANTAL MELONI, COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 2 (2010).

[145] Mark Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War*, 86 CAL. L. REV. 939, 1040-41 (1998).

[146] *See, generally,* David Johnson, *The Defense of Superior Orders*, 9 AUSTL. Y.B. INT'L L. 291 (1985).

It is also believed that, since the Rome Statute criminalizes only the most atrocious acts, lowering the civilian command responsibility standard would "undercut the court's goal of strong, individual deterrence."[147] Individual accountability lies at the cornerstone of ICC's goal to end impunity. However, it is not easy to determine the culpability standard of a civilian superior (compared to that of a military commander) since it may be difficult to determine the hierarchical gradation in the civilian's organizational setup.

In the *Akayesu* case, the local militia committed crimes against Tutsis who had taken refuge in a town in Rwanda; however, the Prosecutor did not charge the town's mayor (a civilian superior) using the doctrine of command responsibility.[148] At this juncture, it is relevant to note that Article 28(1) of the Rome Statute applies to "a military commander or a person effectively acting as a military commander," and Article 28(2) applies to non-military superiors or civilian superiors. It is interesting to note that the principle of command responsibility has always been applied to both military commanders and civilian superiors,[149] but the Rome Statute has chosen to separate the standard depending on whether the superior is from the military or is a civilian. This may weaken the culpability standard and consequently the efficiency of the ICC, since such a demarcation may be viewed with apprehension by those championing the cause of "ending impunity." In this respect, the inclusion of the terms "consciously disregarded" and "crimes concerned activities" may prove to ultimately reduce civilian liability.[150]

In the *Čelebići* case, the ICTY concluded that civilian superiors are liable under the doctrine of command responsibility only when they act as military commanders, which can be ascertained only after conducting a factual inquiry.[151] If the civilian organization's structure resembles that of a military unit, then a civilian superior can be said to have powers like those of a military commander. It was also held that civilians should be scrutinized in the same manner as military commanders if they were performing functionally similar activities.[152] Bassiouni posited that it is necessary to appreciate the primarily evidentiary distinction between a military and a civilian commander. On the one hand, a commander-in-chief may have the title, but is ultimately unable

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[147] Greg Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 YALE J. INT'L L. 89, 143 (2000).

[148] Prosecutor v. Akayesu, Judgment, Case No. ICTR-96-4-T, (Int'l. Crim. Trib. for Rwanda 1998).

[149] *See* Vetter, *supra* note 150, at 110.

[150] *See* ROME STATUTE, art. 28(2).

[151] *See Čelebići Trials*, Case No. IT-96-21-T, ¶¶ 377-378.

[152] Prosecutor v. Mucić, Judgment, Case No. IT-96-21, ¶ 375 (Int'l. Crim. Trib. for Rwanda 2001).

to exercise the full powers attached to his or her office.[153] On the other hand, a civilian superior may not have the title, but is able to decide on matters of strategic importance.

It is important to appreciate the differentiation prescribed in the Rome Statute. A civilian commander's responsibility standard has a stipulation requiring that the crimes of the subordinates must "concern activities that were within the effective responsibility and control of the superior"—a requirement absent in the military standard. It was argued in the *Čelebići* case that the "crimes concerned" provision in Article 28(2)(b) of the Rome Statute contains a causation element within itself, an argument which was not accepted by the ICTY.[154] The defense counsel contended that the prosecution is required to prove that the violation was caused directly by the superior's alleged failure. However, the court held that there was no "requirement of proof of causation as a separate element of superior responsibility,"[155] thereby implying that a causal nexus may not have to be established to prove the superior's inaction. It must be noted that Article 28(2)(b) of the Rome Statute does not seem to infer this requirement, especially in light of the manner in which the provision is worded:[156]

> With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their

[153] *See, generally,* M. Cherif Bassiouni, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 350 (1996).

[154] *See Čelebići Trials*, Case No. IT-96-21-T, ¶ 398.

[155] *Id.*

[156] Article 28 of the Rome Statute does not seem to include "causation" as an essential ingredient, as rightly pointed out by the ICTY.

> commission or to submit the matter to the competent authorities for investigation and prosecution.[157]

"Concerned" would mean "relating to, pertaining to, affecting, involving, being substantially engaged in or taking part in."[158] "Affecting" could connote causation, in the criminal sense. Thus, if "concerned" is construed in the above manner, it can safely be concluded that the superior did have authority over the subordinates and that he or she could control their actions, making him or her criminally liable.[159]

Another plausible reason for a relaxed standard under Article 28(2)(b) is that civilian superiors cannot be responsible for their subordinates the way military superiors are, since they cannot control them throughout the week for all hours of each day. This reasoning would go against the grain of the "causation" argument, and therefore the Article 28(2)(b) standard could merely be reflective of the nature and functional difference of civilian authority. Such an interpretation may render the very existence of the civilian-military distinction redundant, and the ICC has not viewed the provision in such superfluous light. The provision perceptibly cannot exist as a cosmetic afterthought; therefore, such an interpretation must be discouraged.

The knowledge element contained in Article 28(2)(b) is the most important since it clearly maintains the distinction between civilian and military supervisors or commanders. Owing to the knowledge threshold, the civilian superior may be less diligent in controlling subordinates and therefore may be willfully blind to the crimes they committed. Further, it could be contended that willful blindness would come into play when a superior "simply ignores information within his actual possession compelling the conclusion that criminal offenses are being committed or about to be committed."[160] The "consciously disregarded" standard may also lead one to ask whether it effectively lessens the civilian superior's duty from criminal liability to "being informed." In case the civilian superior's duty is also the same as that of the military commander, he or she will then share the exact same relationship with subordinates.[161] If that is the case, then the difference

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[157] ROME STATUTE, art. 28(2).

[158] *Concern,* CAMBRIDGE ENGLISH DICTIONARY, *available at* dictionary.cambridge.org/dictionary/english/concern (last visited June 23, 2019).

[159] *See, generally,* Draft Code on Crimes, *supra* note 141.

[160] This could otherwise be termed as "constructive knowledge"; *See Čelebići Trials,* Case No. IT-96-21-T, ¶ 387.

[161] *See, generally,* THOMAS SCHMIDT, CRIMES OF BUSINESS IN INTERNATIONAL LAW: CONCEPTS OF INDIVIDUAL AND CORPORATE RESPONSIBILITY FOR THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 364-65 (2015).

between Article 28(1)(a) and Article 28(2)(a) is an artificial one and the knowledge standard would not be lower, except for the term "consciously disregarded," which inherently indicates a lower standard. As mentioned above, the distinction is specifically pertinent when the prosecution tries to assemble evidence.[162] The defendant commander may, however, argue that he or she did not acquire the required knowledge.

It must be remembered that the superior's duty is an important criterion to consider, since he or she may be more or less prone to prosecution simply by virtue of its interpretation. If such a duty is reduced, that would mean that the knowledge standard may also concomitantly be reduced, from "owing to the circumstances at the time, should have known," to "consciously disregarding information." However, it is more dangerous if the duty of a civilian superior is reduced, since it could have a damaging impact on the evidence scale. On the other hand, if the level of duty is the same for both a civilian and a military superior, but only the knowledge requirement standard is different, then it must be analyzed if the information given to the superior was sufficient to make him or her conclude that crimes may have occurred or were about to occur. Further, it must be assessed whether the actions (or inactions) of the superior imply that he or she chose to discount the information given.[163]

Having said this, the evidentiary standards for the prosecution of a civilian superior are still much higher under the Rome Statute than those of the *ad hoc* tribunals. Paramilitary organizations committing acts of aggression, threatening peace and engaging in terrorism, and participating in a wide range of conflicts are factual realities today. In such trying times, the bifurcation may prove to be more problematic than envisaged. Even so, the determination will heavily rely on facts and circumstances at the time, and defendants may try to escape liability under Article 28(2)(b) of the Rome Statute.

D. Command Responsibility in Current Times – Illustrative Analysis

An illustrative exposition will be attempted in this sub-section, wherein the corporate criminal liability of a corporation will be analyzed to understand whether the superior responsibility doctrine may be applicable to its top officials. It is a known fact that the United Kingdom (U.K.) has been supplying arms to Saudi Arabia since the 1960s, so much so that the U.K.

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[162] *See, generally*, Joshua Root, *New Frontiers in the Laws of War: Some Other Mens Rea? The Nature of Command Responsibility in the Rome Statute*, 23 J. TRANSNAT'L L. & POL'Y 119 (2013).

[163] *Id.*

government has classified Saudi Arabia as a "priority market."[164] In recent times, export licenses have been granted by the U.K. government to various countries, especially Saudi Arabia, for different arms and armaments, among them being "assault rifles, command and control vehicles, crowd control ammunition, hand grenades, machine guns, submachine guns and tear gas/irritant ammunition."[165] The U.K. Ministry of Defence and a British company—BAE Systems ("BAE")—are also known to have provided both military and civilian support personnel to Saudi Arabia "to maintain the operational capability of exported U.K. arms and equipment."[166] Since March 2015, Saudi Arabia has been actively engaged in an armed conflict in Yemen against an armed Yemeni group called the Houthis. The group conquered many areas in that territory,[167] leading to a conflict that resulted in the deaths and injuries of many civilians, largely due to the aerial explosives used. Damage to civilian objects like hospitals, residential areas, monuments of cultural importance, and the like has also been widespread.[168] Reportedly, the State of Yemen is ridden with famine.[169] Ratner's four-cluster legal theory is seemingly satisfied in this factual background.[170]

Having established the facts, it will now be analyzed whether the doctrine of superior responsibility, in accordance with Article 28(2)(b) of the Rome Statute, can be applicable against the Chief Executive Office, Chief Managing Director, or some other person wielding similar powers (for the sake of brevity, the term "CEO" shall be used) in BAE, for causing the commission of war crimes in Yemen. As mentioned above, BAE operates jointly with the army personnel on the ground in Yemen, by virtue of its employees providing training and operational support to use its weapons. *First*, U.K. is a state party to the Rome Statute,[171] therefore, there is no

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[164] Amnesty International U.K., The Lawfulness of the Authorisation by the United Kingdom of Weapons and Related Items for Export to Saudi Arabia in the context of Saudi Arabia's Military Intervention in Yemen (Dec. 2015), *at* https://www.amnesty.org.uk/files/webfm/Documents/issues/legal_opinion_on_saudi_arms_exports_16_december_2015_correction.pdf (last visited May 26, 2020)

[165] *Id.* at 6.

[166] *Id.* at 7.

[167] Congressional Research Service, Yemen: Civil War and Regional Intervention, at 2 (Mar. 21, 2019), *at* fas.org/sgp/crs/mideast/R43960.pdf (last visited June 23, 2019).

[168] *World Report 2019, Yemen: Events of 2018*, HUMAN RIGHTS WATCH, *at* www.hrw.org/world-report/2019/country-chapters/yemen (last visited May 8, 2020).

[169] Annabel Symington, *10 million Yemenis 'one step away from famine', UN food relief agency calls for 'unhindered access' to frontline regions*, UN NEWS, Mar. 26, 2019, available at news.un.org/en/story/2019/03/1035501 (last visited May 8, 2020).

[170] Ratner, *supra* note 134.

[171] The U.K. ratified the Rome Statute on Oct. 4, 2001. *See* ROME STATUTE, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18#EndDec (last visited May 8, 2020).

question that the statute applies to U.K. *Second*, arguably, the situation in Yemen is one where war crimes have been committed. War crimes fall within the jurisdiction of the ICC; therefore, the said crime can be prosecuted by the ICC. The knowledge standard under the Rome Statute purports that the superior "knew or consciously disregarded" the information which clearly indicated that the subordinates were committing crimes. If it could be contended that the training and operational support provided by subordinates, i.e. the employees of BAE, are indeed "crimes" (since such action directly resulted in the commission of war crimes in Yemen), then the doctrine of superior responsibility may be applied.

The knowledge standard is specifically difficult to prove. This requirement will be met if it can be established that: (i) pertinent information was given to the CEO of BAE that the training and operational support to be provided by the employees will result in the use of explosives that may result in the commission of war crimes; and (ii) the CEO chose to willfully ignore (consciously disregard) the information. In relation to the nexus element, employees (presumably) of BAE provide training to the Saudi army which in turn results in the commission of war crimes in Yemen. As averred above, if the said activity of providing training could be construed as a crime (for without the explosives and without the training, there would be no war crimes), then all that needs to be proven is that this activity was within the effective responsibility and control of the CEO. The proof may be supplied by a clearly set-out chain of command or organizational set-up in any company, wherein all the important decisions are signed off by the CEO and cannot be carried out without his or her approval.

Finally, it needs to be established that the CEO did not take "all necessary and reasonable measures" within his or her material ability to prevent or repress the commission of the war crimes. With regard to this aspect, it can be said that the CEO knew that he or she was approving an activity that would result in the commission of war crimes in Yemen, did not even pause to consider the repercussions of such an action (or inaction), and took no measure to stop the occurrence of the crimes. Instead, the company continued to sell the weapons, and the crimes were indirectly caused by the training provided by BAE's employees to the military personnel on field. Thus, proving effective control or influence, along with the requisite evidence, may be sufficient to hold the CEO liable under the superior responsibility doctrine of the Rome Statute. However, the path leading to successful prosecution will be cobbled by innate structural complications.

Economic and fiscal considerations may lead the equation, since such companies wield an insurmountable amount of power, thus enabling their

CEOs to escape liability. However, justice can never be an afterthought, and the law must not distort its own realities to suit the needs of a few, even the powerful. Having said so, proving the doctrine of command responsibility in the above illustration is difficult, since the direct act resulting in the commission of war crimes was the use of weapons, not the provision of training and operational support by the BAE employees. The defense could easily argue that the remoteness, as well as the indirect linkage of the act (training) and the consequence (war crimes) would suffice to disprove the existence of the ingredients of command responsibility.

Furthermore, it cannot be said that all business leaders may be automatically held accountable simply by virtue of existing labor practices and hierarchical structures imposed by company laws.[172] In this instance, it may be too much of a stretch to hold the CEO of BAE responsible, under the doctrine of command responsibility, for having committed war crimes. Empirically, the most important aspect to consider and reconsider is that of evidence, the threshold for which is generally quite high in any criminal trial. The civilian superior responsibility standard under the ICC is not embedded with unambiguous conditionalities, and only time will tell if the "remoteness" reasoning holds any water. Even though it could be argued that the civilian command responsibility provisions of the Rome Statute manage to weaken the ICC's power to bring civilian offenders to international criminal justice, it could also be contended that such a distinction is important and is all the more necessary when there is lack of clarity in any organizational structure. The syllogism is not by way of a formulaic and straitjacket inference; rather, it would depend on the immediacy of the factual circumstances of the time.

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[172] Alexander Zahar, *Command Responsibility of Civilian Superiors for Genocide*, 14 LEIDEN J. INT'L L. 591, 602 (2001): Strongly disagreeing with the ICTR on the *Musema* judgment, the author argues that merely by virtue of the accused exercising control over his employees (financial and legal, as stipulated in labor law), it cannot be said that he can be convicted under command responsibility. He believes that it would be fatuous to stretch the doctrine in such an excessive manner, since the accused was not any different from another factory manager.

V. COMMAND RESPONSIBILITY AND ITS POTENTIAL TREATMENT IN CONTEMPORARY TIMES

A. Digital Evidence in International Criminal Law

In the time of the "Great Acceleration,"[173] advancements in technology are not the exception; they are the norm. However, paradoxically, the more society relies on technology, the more vulnerable and prone to digital attacks it becomes. Similarly, it is only natural that such advancements have crept into international criminal law, especially in its procedural aspects. An example is in the field of evidence collection. For instance, Article 69(2) of the Rome Statute deals with giving testimonies via audio or video conferencing,[174] and Rule 67 of the Rules of Procedure and Evidence of the ICC concerns itself with the procedural requirements of such testimonies.[175] Regulation 26(4) of the Regulations of the ICC 2004 provides that "in court proceedings, evidence shall be presented in electronic form whenever possible, however, the original form shall be authoritative."[176] It was only in 2008 that the Office of the Prosecutor ("OTP") relied on digital evidence while arresting Bemba, who had been accused of committing war crimes and crimes against humanity in the CAR,[177] as well as Mbarushimana, who was accused of committing war crimes and crimes against humanity in the Democratic Republic of Congo.[178] During the investigations, a barrage of digital evidence was produced. The evidence then had to be scrutinized by the national authorities owing to the fact that the OTP did not readily have experts to check its authenticity.[179] After 2010, "digital evidence gained predominance in all aspects of law and its usage was proportionally

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[173] Will Steffen, *The trajectory of the Anthropocene: The Great Acceleration*, 2 THE ANTHROPOCENE REV. 81, 83 (2015).

[174] *See* ROME STATUTE, art. 69(2).

[175] Rules of Procedure and Evidence of the International Criminal Court 2002, r. 67, UN Doc. PCNICC/2000/1/Add.1 (2000).

[176] Regulations of the International Criminal Court, reg. 26(4), ICC-BD/01-01-04 (2004).

[177] Prosecutor v. Bemba, Further Corrected version of Prosecution's Consolidated Response to the Appellants' Documents in Support of Appeal, ICC-01/05-01/13, ¶ 5 (Int'l Crim. Ct. 2017); Aparajitha Narayanan, Evidentiary Challenges of New Technologies in International Criminal Trials (2020) (unpublished manuscript for the University of Leeds R2P Student Journal, on file with the author).

[178] Prosecutor v. Mbarushimana [hereinafter "Mbarushimana"], Decision on the Confirmation of Charges, ICC-01/04-01/10, ¶ 23 (Int'l Crim. Ct. 2011); *See* Narayanan, *supra* note 180.

[179] *See Mbarushimana*, ICC-01/04-01/10.

augmented owing to the increased use of many sources of digital evidence, like laptops, mobile phones, social media etc."[180]

B. Cyberattacks

Research has shown that in 2019, cyberattacks occur every 14 seconds in all parts of the world.[181] One example of a cyberwarfare is operation Orchard. The said operation was an air strike carried out by the Israelis on an alleged nuclear facility in Syria.[182] There was wide speculation that the Israeli forces may have employed a technology identical to that of USA—an airborne network attack system which allowed their planes to go into the territory of Syria while undetected by radar.[183] The said network is a computer program developed by BAE and used in the military to attack computer systems and networks, thereby disparaging enemy communications.[184] The network seems to act as programs that may hack into enemy networks and weaken their links. Specific military targeting is also possible, i.e. targets can be localized to missile systems, rendering their usage impossible by disabling their operating systems. It can be said that the use of the above network in an already existing armed conflict zone is use of armed force; however, such an argument could be countered since it involves the use of cyber, not traditional, means of force.

In order to ascertain whether cyberattacks could be "armed force" or not, certain criteria may be assessed (pitted against economic or political coercion—which does not possess the features of an armed force). These are: (i) *severity* (if the cyberattack resulted in a "higher threat of physical injury or property damage"); (ii) *immediacy* (more harm as a consequence of armed force than economic or political coercion); (iii) *relatedness* (direct relation between the attack and the resulting consequences); (iv) *invasiveness* (how invasive the armed force could be); (v) *measurability* (since armed force leads to consequences that could definitely be assessed, by virtue of their tangibility);

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[180] Human Rights Center-UC Berkeley School of Law, Digital Fingerprints: Using Electronic Evidence to Advance Prosecutions at the International Criminal Court, at 5 (2014) *available at* https://www.law.berkeley.edu/files/HRC/Digital_fingerprints_interior_cover2.pdf.

[181] Cybersecurity Ventures, *Cyberattacks take place every 14 seconds throughout the world in 2019*, INTERNATIONAL CYBERSECURITY CONGRESS, May, 22 2019, *at* icc.moscow/news/cyberattacks-take-place-every-14-seconds-throughout-the-world-in-2019/ (last visited May 8, 2020).

[182] John Leyden, *Israel suspected of 'hacking' Syrian air defenses*, ENTERPRISE SECURITY, Oct. 4, 2007, *at* www.theregister.co.uk/2007/10/04/radar_hack_raid/ (last visited May 8, 2020).

[183] *Id.* Titiriga Remus, *Cyber-Attacks and International Law of Armed Conflicts: A Jus ad Bellum Perspective*, 8 J. INT'L COM. L. & TECH. 179, 181 (2013).

[184] *Id.*

and (vi) *presumptive illegitimacy* ("the fact that violence is presumptively illegal under domestic and international law"). However, methods of carrying out economic and political coercion may be legal.[185] Conclusively, if it can be proven that a cyberattack satisfies the above criteria, it could fall under the "use of force" ambit.

C. Command Responsibility and Cyberspace Attacks

As discussed above, it is not an easy feat to secure a conviction based on the doctrine of command responsibility. The main issue with cybercrimes is identification of the perpetrator. The nature of cybercrimes is that their reach is so wide and oftentimes scattered that it is close to impossible to ascertain which areas and entities were affected, let alone identify the culprit. However, this Article will attempt to examine how (and if) command responsibility for cyberspace attacks can be applicable. Literature is severely lacking in the discussion of individual criminal responsibility and cyberspace crimes. In a way, the Tallinn Manual on the International Law applicable to Cyberwarfare (for IHL) is the only legal text where there is a discussion of cybercrimes and criminality on an international scale.[186] Command responsibility primarily criminalizes omission or inaction; therefore, the failure to prevent the cybercrimes from occurring is the "responsibility or duty" in discussion. Sliedregt writes that the "[a]ttribution of cyber activity is a problem; it challenges basic tenets of criminal law, such as agency and locus delicti."[187] However, distance from the scene of the crime is not indirectly proportional to the perpetrator's responsibility.[188]

Basically, a "cyberattack" includes sundry destructive activities occurring in the arena of cyberspace. IHL, the law applicable in times of armed conflicts, international or non-international, will be triggered in case hostilities exist—that is, if a cyberattack can be said to constitute hostilities.[189] The doctrine of command responsibility provides that military commanders have a general duty to stop the commission of certain crimes. In the digital

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[185] Michael Schmitt, *Computer network attack and the use of force in international law: thoughts on a normative framework*, 37 COLUM. J. TRANSNAT'L L. 885 (1999); *see* Remus, *supra* note 186, at 182.

[186] TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE [hereinafter "Tallinn Manual"] (Michael Schmitt ed., 2013).

[187] Elias van Sliedregt, *Command Responsibility and Cyberattacks*, 21 J. CONFLICT & SECURITY L. 505, 506 (2016).

[188] CARSTEN STAHN, A CRITICAL INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 129 (2018).

[189] *See* Tallinn Manual, *supra* note 189.

context, arguably, this duty could mean understanding cyber operations as well. This argument also finds its basis in the Tallinn Manual commentary, which specifies that military commanders, while not required to have in-depth knowledge of cyber operations, definitely need to have the capacity to "fulfill their legal duty to act reasonably to identify, prevent, or stop the commission of cyber war crimes."[190] In the *Bemba* judgment, the ICC implied that commanders have a duty to know and prevent crimes from occurring.[191]

As discussed, the behavior of parties to armed conflicts is not unrestricted. Restrictions are imposed by, among others, the United Nations Charter, human rights law, environmental law, peacekeeping, law of neutrality, and most importantly, *jus in bello* or the law of war, which is solely dedicated to applying constraints on the waging of war. In IHL, the right of a party to use any means or methods of warfare is circumscribed. Article 35 of AP-I stipulates that any means or methods of warfare that are indiscriminate or causing superfluous injury or unnecessary suffering are strictly prohibited.[192] The aim of IHL is to mitigate human suffering, not eliminate it altogether, which would explain why collateral damage is within the permissible boundaries imposed by IHL. In an effort to humanize war, IHL was promulgated and sundry proscriptions were devised, some of which find dispositive clarity in Article 35. IHL purports that it is irrelevant if one relies on Article 51 of the United Nations Charter or if the act is sanctioned by the United Nations—protection of civilians is at the core of IHL's essence and will always be superlative.[193] The principles governing such protection are primarily those of military necessity (stemming from the prohibition of superfluous injury and unnecessary suffering), proportionality, humanity (derived from the Martens clause), and distinction (between civilians and combatants and between civilian and military objectives).[194]

D. Illustrative Exposition

For example, consider that the origin of an "attack" has been identified by the information technology (IT) unit of the defense department of a State. The attack resulted in the loss of civilian life, and it took place in a

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[190] *Id.* at 94.

[191] *See Bemba Appeals*, ICC-01/05-01/13 A-A2-A3-A4-A5.

[192] *See* Additional Protocol-I, art. 35.

[193] ICRC, *Civilians protected under International Humanitarian Law*, ICRC WEBSITE, *available at* www.icrc.org/en/doc/war-and-law/protected-persons/civilians/overview-civilians-protected.htm (last visited May 8, 2020).

[194] *See* Additional-Protocol I; *See also* ICRC, *Fundamental Principles of IHL*, ICRC WEBSITE, *available at* casebook.icrc.org/glossary/fundamental-principles-ihl (last visited May 8, 2020).

situation of armed conflict between the said State and another (thus, international). The military commander, however, states that she had no knowledge that the said attack would take place. Since she is the commander for all units (including IT), it is but obvious that she had necessary training of cyber operations (as purported in the Tallinn Manual). Even so, the commander took no necessary or reasonable measures to prevent the attack, since he or she did not even know about it.

If the doctrine of command responsibility is to be applied, a superior-subordinate relationship must first be established. Then, it must be determined whether there was effective control over such subordinates by the commander, which may have led to the potential punishment of the subordinate-offender. Since there was an armed conflict, and the cybercrime occurred as part of the said conflict, it could be stated that the unit was under the "effective control" of the commander. And since this was a unit under her command, the criterion of superior-subordinate relationship is also met.

Furthermore, even though the commander stated that she had no prior knowledge of the attack and therefore could not have prevented its occurrence, her accountability does not magically vanish. She could have met the "reason to know" standard, which posits that she must have had information wherein she had notice of the plausibility of the occurrence of the cybercrime. However, if it is provided that the subordinates were not committing such crimes for the first time, only that the effect was more widespread this time, it could be said that she had "sufficiently alarming information putting a superior on notice of the risk that crimes might subsequently be carried out by his subordinates and justifying further inquiry[, which] is sufficient to hold a superior liable under Article 7(3) of the Statute."[195] Since she had training in cyber activities, the ICC standard of objective reasonableness ("should have known") is also met, especially when weighed along with experience and position.

Finally, the commander did not reprimand or punish the perpetrators or even report past behavior to competent authorities. This criterion's satisfaction also adds to her culpability. In light of the ICC's implication in *Bemba* that the commander has a duty to know and expect the occurrence of crimes, in the instant hypothesis, command responsibility's criteria are demonstrably fulfilled.

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[195] Prosecutor v. Strugar, Judgment, Case No. ICTY-IT-01-42-A, ¶ 304 (Int'l Crim. Trib. for the Former Yugoslavia 2008).

VI. CONCLUSION

In the past, impunity was granted to those in positions of power quite easily (be it in the defense or in the political arena), since there was no governing law or judicial body to punish those responsible for the commission of mass atrocities. At the end of World War I, upon the capture of the Kaiser, the victorious side realized that there was no law in place to punish him, and famously, then American President Wilson rebuked: "Don't send him to Bermuda, I want to go there myself."[196] Those were self-negating times, in the sense that, while everyone knew that mass atrocities were widely prevalent, they could not be repressed, let alone averted. International criminal justice then witnessed a sea of change when the veil of individual criminal responsibility was uncloaked and the application of the principle of command responsibility gained predominance. Now, various international criminal tribunals have confirmed that unpunished misconduct committed by soldiers and their consequent commission of war crimes are unquestionably linked.[197] To respect the spirit of international law, it is essential to maintain good discipline among soldiers and establish a clear chain of command. The lack of maintenance of order and a clear set of well-laid out rules from an early stage may culminate in the commission of international crimes.

The nature of mass atrocities is unfathomably violent and gruesome, and unpredictably so, which brings Hamlet's quote to mind: "there are more things in heaven and earth Horatio, than are dreamt of in your philosophy."[198] Consequently, due to their unforeseeable nature, redressal mechanisms were also not prevalent. It is for this reason that command responsibility also gained legal recognition after World War II, and the last lap was covered by judicial actors, rather than States. The doctrine of command responsibility was first applied in the *Yamashita* case, thereby consciously or unconsciously paving the path for its application in the future. Even States readily accepted the doctrine, resulting in its crystallization into customary international law. The exact form the doctrine would take was still unclear to many then, but now, custom dictates that:

> A superior could be held criminally responsible where the following requirements are met:
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> (i) at the time relevant to the charges, there existed a superior-subordinate relationship between the superior-accused and the

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[196] *See* Mettraux, *supra* note 3, at 267.

[197] *See* McCarthy, *supra* note 15, at 555.

[198] WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK (1599).

> perpetrators of the crimes which form the basis of the charges against that superior;
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> (ii) the superior knew or had reason to know that a subordinate was about to commit such acts or had done so; and
>
> (iii) the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[199]

A prosecutor using the command responsibility doctrine does not even have to prove that the superior persuaded the subordinates to commit the crime or that the superior was directly responsible for its commission; all that he or she is required to prove is the "truth of these two propositions[,]" since law purports that the exact facts need not be established.[200]

However, some critics feel that the doctrine of command responsibility is innately flawed since it aims to place on the same pedestal those who directly and intentionally perpetrate heinous crimes and those who fail in their duty to prevent such crimes, do not report them, or negligently commit them.[201] Additionally, scholars also contend that since crimes falling under the purview of international criminal law and necessitating prosecution are extremely heinous and barbaric, it would not be rational for "negligent" actors to be punished for them.[202] It was posited that "willful" or "intentional" crimes should form part of international criminal law, rather than ones where culpability is indirect.[203]

However, as elaborated above, the reasons for imposing such a high threshold of duty over commanders is due to the disciplinary nature of their roles, and how steadfastly rules are followed in a military set-up. Nonetheless,

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[199] *See* Mettraux, *supra* note 3, at 270; for a critique of Article 28, *see, generally*, Volker Nerlich, *Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?*, 5 J. INT'L CRIM. JUST. 665 (2007).

[200] Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 350 (2007).

[201] *Id.*

[202] William Schabas, *General Principles of Criminal Law in the International Criminal Court* 6 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 400, 417 (1998). "It is doubtful whether negligent behaviour can be reconciled with a crime requiring the highest level of intent. Logically, it is impossible to commit a crime of intent by negligence."

[203] As mentioned above, such a view was taken by many owing to the particularly heinous nature of international crimes, resulting in many earlier treaties/conventions purporting that only "intentional" crimes are punishable. Even Article 30 of the Rome Statute seemingly maintains such a position, since intent and knowledge are of paramount importance for international culpability. *See* Rome Statute, art. 30(1). *See, generally,* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 160 (2003).

it must be remembered that there are various armed groups in existence in this day and age, and all of them may have extremely varied degrees of organization. Accordingly, should the contours of the doctrine of command responsibility be enlarged or compressed? Furthermore, it may be argued that interpreting the doctrine in a strict manner for "any and all" types of organizations may prove to be irrational and rather harmful, disparaging not only the culpability structures, but also damaging the sanctity of the doctrine *per se*.

Furthermore, organizationally, even in a civilian hierarchical structure (a company for instance), demarcation of roles and responsibilities is amply clear. Even so, the threshold for civilian superiors (under Article 28(2) of the Rome Statute) is lower due to the supposed lack of extreme danger in a situation, fewer avenues for similar violent abuse of power, and other circumstances that are present outside the military context. Contemporary times also dictate that as technology becomes more and more borderless, it tends to take crimes in its stride, thereby enhancing their outreach as well. Cyberwarfare and command responsibility may also be levelled on the same pedestal; such a notion is neither absurd nor a mere futuristic fantasy any longer, as it is highly plausible. While the saying "change is the only constant" may hold true for most issues, only time will tell whether the doctrine of command responsibility will need modernization beyond established statutory or jurisprudential understanding. Regardless, it must always be kept in mind that a balanced and nuanced view needs to be taken while espousing the advantages of the ready acceptance of indirect responsibility in international criminal law, "preferably resulting in the converging of divergent minds."[204] It is hoped that this Article aids in clarifying some of the obscurity surrounding the law of command responsibility and be used as a platform to conduct a detailed research on the impact of modern developments to the doctrine of command responsibility.

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[204] *See* Narayanan, *supra* note 180, at 14.