

***COMMAND RESPONSIBILITY* IN INTERNATIONAL
LAW – THE BOUNDARIES OF CRIMINAL LIABILITY
FOR MILITARY COMMANDERS AND CIVILIAN
LEADERS**

A Thesis Submitted for the Degree
of
Doctor of Philosophy

by

Guénaél Mettraux

Licence en Droit, Université de Lausanne
LLM, University College London

**University of London
The London School of Economics and Political Science
Law Department**

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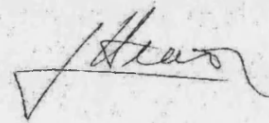
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Guénaél Mettraux

Dated this 8th day of January 2008

The Hague

ABSTRACT

Born in the aftermath of the Second World War, the doctrine of command or superior responsibility provides that a military commander or a civilian leader may be held criminally responsible in relation to crimes committed by subordinates even where he has taken no direct or personal part in the commission of these crimes.

The basis of this type of liability lies in a grave and culpable failure on the part of a superior to fulfill his duty to prevent or punish crimes of subordinates. Command responsibility is not a form of objective liability, nor is it a form of accomplice liability although it borrows elements from various types and forms of liability. It is a form of liability that is personal in nature and which is triggered by a personal and culpable dereliction of duty. Liability is entailed, however, not for a specific crime of 'dereliction of duty', but instead in relation to the underlying offence that has been committed by subordinates of the superior. In that sense, the responsibility of a superior is entailed and is closely linked to the crimes of his subordinates for which he may be convicted.

Contrary to most other forms of criminal liability, the doctrine of command responsibility first developed as a norm of international law, rather than under domestic law. It is central to the ability of international law to ensure compliance with standards of humanitarian law and it remains a most important legal instrument in the fight against impunity.

The present thesis provides a comprehensive and insightful dissection of that doctrine, its scope of application, its elements as well as the evidential difficulties involved in establishing those elements in the context of criminal prosecutions.

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I INTRODUCTION

1 THE RESURGENCE OF INTERNATIONAL CRIMINAL JUSTICE AND THE RE-BIRTH OF COMMAND RESPONSIBILITY

Though there had been a number of important war crimes trials prior to the Second World War, the prosecution of crimes committed during that conflict marked the birth of modern international criminal justice. By means of two monumental international trials in Nuremberg and Tokyo, as well as many other domestic trials, thousands of individuals, and through them the political, judicial, medical and industrial institutions of the Third Reich and its allies, were made to account for their actions.

The un-precedented nature of that enterprise raised many problems for those charged with the responsibility for managing these proceedings. One such challenge stemmed from the realization that international law lagged far behind the level of legal sophistication necessary and desirable for tackling the sort of criminality which had characterized this conflict. At that stage, international criminal law was still underdeveloped and a deep chasm existed between what was regarded as morally repugnant and the range of conducts which international law in fact prohibited. There was a prevailing sense of the necessity for international law to catch up with basic moral sentiment and for a judicial mechanism to sanction egregious violations of human freedom and dignity which until then had stood beyond the realm of international criminal law:¹

When some of the participants in war, whether in high or low place, violate those principles of decency, honour, fair play, and humanity which we have come to know as 'civilized', they must be punished. The machinery is new, but the principles are ageless. Some of the atrocities committed around the world during the past war were so revolting that if the perpetrators thereof were permitted to escape punishment for lack of proper machinery, the word 'civilization' would be a mockery and deserve the contempt it would receive.

¹ See e.g., statement of the 'Law Member' of the *Toyoda* War Crimes Tribunal (*United States v Soemil Toyoda* ('*Toyoda* case'), War Crimes Tribunal Courthouse, Tokyo, Honshu, Japan, September 1949, 19 *United States v Soemu Toyoda*, Official Transcript of Record of Trial), p 5004.

Such evolutionary moments in the life of the law, as Justice Jackson acknowledged, 'rarely come and quickly pass'.² International criminal law had to evolve to meet the new challenges. New categories of crimes were duly established (e.g., crimes against humanity and aggression) and old defences disappeared (e.g., the defence of obedience to superior orders and the defence of *tu quoque*).³ Most critical to that process was the recognition at Nuremberg that individuals could be held criminally responsible for their actions under international law and that an official position would not immunize those who committed an international crime:

Individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance to the authority of the state if the state in authorising action moves outside its competence under international law.⁴

No less momentous an advance was the concrete application of the principle of individual criminal responsibility to thousands of individuals, including many high-ranking civilian and military leaders who were brought to justice in the months and years following the end of the war. The shortcomings of existing international law in capturing what in effect was a system of state-sanctioned criminality required that

² Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945 ('Jackson, *International Conference*'), p 37.

³ The major leap forward of international law as occurred during that period was best described by Justice Jackson in his Nuremberg preparatory Report to the President of the United States:

International law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs. But every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances.

Report to the President by Mr. Justice Jackson, 6 June 1945 (re-printed in Jackson, *International Conference*, pp 42, 51-52).

⁴ International Military Tribunal ('IMT') Judgement, p 223, cited with approval in *Furundzija* Trial Judgement, par 155.

innovative concepts and new mechanisms be found to criminalise certain forms of participation in that system.

Until that point, it had been common wisdom that criminal liability under international law could only be incurred where an individual had been personally involved in the commission of a crime. In the case of a military commander or civilian leader, this meant that to be liable he had to have taken a personal part in the commission of a crime by his subordinates as, for instance, by ordering that crime or by aiding and abetting it.

One of the most significant advances of the post-war era was the development of a doctrine that attributes criminal responsibility to military and civilian leaders, not only where they have taken a personal or direct part in the commission of a crime, but also where they have failed to prevent or punish crimes of subordinates. Prior to that development, international law offered precious little mechanism for criminalizing the passive acquiescence of a leader in the commission of crimes by subordinates. What would later be coined as the doctrine of ‘command responsibility’ filled that gap by providing for a penally-enforced minimum standard of conduct for leaders and commanders with respect to the conduct of their subordinates. The recognition that military commanders and civilian leaders could be held accountable under international law for failing in their duties of supervision signified a qualitative leap in the way breaches of international criminal law were to be dealt with.

The distinction which international criminal law draws between command responsibility, on the one hand, and other, more traditional, forms of criminal liability for personal or direct involvement in the commission of a crime has remained since then. The Statutes of all United Nations War Crimes Tribunals, for instance, provide for two separate general types or categories of liability, one based on that doctrine and one based on other forms of liability which criminalise the direct or personal involvement in the commission of a crime.⁵ Command responsibility is, therefore, not

⁵ Consider, for instance, Articles 7(1) and 7(3) of the ICTY Statute, Articles 6(1) and 6(3) of the ICTR Statute or Articles 6(1) and Article 6(3) of the Statute of the Special Court for Sierra Leone. See also Sections 14 and 16 of Regulation 2000/15 applicable to East Timor’s Special Panels for Serious Crimes which provides for a similar definition of ‘command responsibility’.

to be confused with liability for ordering a crime or for a form of complicity. It is, as will be seen below, a *sui generis* form of liability based on a personal dereliction of duty on the part of a superior who was bound by a duty to act to prevent or punish the crimes of subordinates and who culpably failed to fulfil this duty.

The view that a superior could be held criminally responsible in relation to crimes committed by subordinates was applied in several cases arising out of the Second World War, but by the time these prosecutions were coming to an end, 'the principles governing this type of [command] liability [...] [were] not yet settled'.⁶ For the next fifty years, the doctrine of superior responsibility was barely applied and it remained a very weak and unlikely threat for political and military leaders.⁷ Geopolitical factors certainly played their part in that half-century of stagnation. But so did plain political considerations. The decision to have recourse to the doctrine of command responsibility indeed constitutes a risky prosecutorial strategy. It suggests a readiness on the part of the prosecuting authorities to hold accountable those in the chain of command who might bear responsibility for crimes committed lower down that chain, and not just the perpetrators themselves. The decision *not* to have recourse to that doctrine is, therefore, an important indication of a state's (un-)readiness to try all those who may bear some responsibility for the commission of international crimes and not just executioners. Applying the doctrine of superior responsibility in the context of war crimes proceedings could have the effect of disclosing some uncomfortable and repressed truths about the exact extent of criminal responsibilities.⁸

The general reluctance to apply the doctrine of superior responsibility at the national level also reveals a somewhat disturbing feature of international criminal law.

⁶ *Law Reports of Trials of War Criminals*, Selected and Prepared by the United Nations War Crimes Commission, Vol IV (1948), p 87. See also *Halilovic* Trial Judgement, pars 42-48.

⁷ See e.g. the *Eichmann*, Israel, District Court of Jerusalem, judgment of 12 December 1961, English translation in 36 ILR, 5; see also *Eichmann*, Israel, Supreme Court, judgment of 29 May 1962, English translation in 36 ILR 277-342. As far as the responsibility of commanders is concerned, the most significant development during those years was the adoption of Articles 86 and 87 of Additional Protocol I.

⁸ See G. Simpson, 'Didactic and Dissident Histories in War Crimes Trials', 60(3) *Albany Law Review* 801 (1997), in particular p 829.

International criminal law has grown and has been developed almost exclusively onto *others*. It has systematically been applied by judges of one nation against the citizens of another. This element of extraneity between the judge and the judged appears to have acted as a powerful dis-inhibitor for legal creativity and has unleashed a keen prosecutorial and judicial readiness to expand the reach of international law. That enthusiasm has not been matched at the national level where international criminal law has been handled with great reluctance when it comes to assess the conduct of nationals, in particular a nation's leaders. The 'over-reach' of many aspects of international criminal law as were built into international case law might explain its limited appeal at the domestic level and also the fact that it has remained dormant for so many years.

Half a century would pass before international criminal law eventually awoke from its torpor. The most important contributing factor in the resurgence of international criminal law was the establishment of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and for Rwanda in the early 1990s. These tribunals provided venues for the prosecution of international crimes and prompted a number of domestic jurisdictions to prosecute such crimes at the national level. The existence of the two United Nations Tribunals also spurred major developments in international criminal law, not least in the law of command responsibility. Their jurisprudence became the vector for a process of clarification and crystallisation of international criminal law which culminated in the adoption of the Statute of the International Criminal Court.

These two factors – the availability of judicial venues and the clarification of legal standards through judicial decisions – are closely related as regards the law of command responsibility. According to the Statutes of the *ad hoc* Tribunals, any crime that falls within the Tribunals' jurisdiction (i.e., genocide, crimes against humanity or war crimes) may be charged pursuant to the doctrine of command responsibility.⁹ This possibility, and the use that was made of it by the two Tribunals, had the effect of revitalizing the law of command responsibility. The resurgence of international criminal justice was, therefore, at the same time the main factor for the re-birth of the doctrine of command responsibility.

⁹ See Article 7(3) ICTY Statute and Article 6(3) ICTR Statute.

The jurisdictional mandate of international criminal tribunals has not been limited in principle to high-ranking individuals although there was little doubt that these tribunals should first and foremost deal with this category of people.¹⁰ As the system of international criminal justice grew in confidence, international prosecutors also increasingly focused their attention and resources on political and military leaders, rather than executioners and foot-soldiers.¹¹

¹⁰ At the ICTY, for instance, the Statute of the Tribunal provides that the Tribunal shall have jurisdiction over 'persons responsible for serious violations of international humanitarian law' (Article 1 ICTY Statute). This expression, the Tribunal made clear, is not limited to high-level accused, but may also include particularly serious criminal activities carried out by lower-level perpetrators. Over the years, however, the ICTY Prosecutor has focused ever more intensely upon high-ranking officials and army officers. On 26 March 2004, the Security Council made it clear that the ICTY should focus primarily on 'the most senior leaders suspected of being most responsible for crimes' (see SC/RES/1534 (2004)), thereby narrowing down the *a priori* jurisdiction *ratione personae* of the Tribunal. The Tribunal has specified that the expression 'most senior leaders' is not limited to the architects of an overall policy forming the basis of the alleged crimes (see, e.g., *Prosecutor v Jankovic*, Decision on Rule 11bis Referral, 15 November 2005, par 20; *Prosecutor v Dragomir Milosevic*, Decision on Referral of Case Pursuant to Rule 11bis, 8 July 2005, par 22). According to the ICTY, the accused must, instead, have exercised such a significant degree of authority that it is appropriate to refer to him as being among the 'most senior' rather than 'intermediate' (*Prosecutor v Lukic and Lukic*, Decision on Referral of Case Pursuant to Rule 11bis with Confidential Annex A and Annex B, 5 April 2007, par 28; *Prosecutor v Delic*, Decision on Motion for Referral of Case Pursuant to Rule 11bis, 9 July 2007, par 24). From its inception, the Tribunal for Rwanda has focused almost exclusively upon the highest ranking alleged perpetrators. The jurisdiction of the Sierra Leone Special Court is limited to 'those persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law' (see Article 1, Statute of the Special Court for Sierra Leone). The Secretary-General of the United Nations explained that the expression 'persons most responsible' refer to the political and military leadership and others in command authority down the chain of command (see Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 Oct 2000, S/2000/915, pars 29-31).

¹¹ See, e.g., Deferral Hearing (ICTY – *Macedonian* cases), Transcript, 25 September 2002. See also C. Del Ponte, 'Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of the ICTY' 4(3) *JICJ* 539 (2006). For a criticism of Judge Goldstone's 'pyramidal strategy' at the ICTY, see A. Cassese, 'The ICTY: A Living and Vital Reality', 2(2) *JICJ* 585 (2004); see also P. Wald, [Book review] 'Justice in Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia. By Pierre Hazan', 99(3) *AJIL* 720 (2005). The prosecution of less prominent individuals has often been left to domestic jurisdictions. It is interesting in

The growing prosecutorial interest for high-ranking officials at the international level is based in large part on the perception that those placed higher in the hierarchy bear greater responsibility for large-scale criminal offences than those located further down the chain of command.¹² Such leaders are also often perceived to be in a better position to prevent such crimes from being committed or from re-occurring. According to that view, the punishment of high-ranking officials, therefore, stands a better chance of contributing to the prevention of criminal offences than would be the case with lower-ranking individuals.

Prosecutorial preference for high-ranking military officers and state officials may be defended on various grounds. For international courts and tribunals, in particular, such a strategy is justifiable both financially and practically as it allows them to concentrate their limited resources on a few *exemplary* trials that are most likely to have a wider resonance locally or even worldwide. Focusing on high-ranking officials is also often described as a particularly potent mechanism for bringing peace and stability back to the places where crimes have been committed, even if for no other reason than the indictment of such individuals might neutralize their political influence in that region. One of the oft-cited ‘achievements’ of the Yugoslav Tribunal is to have eliminated the political influence of Radovan Karadzic in Bosnia and Herzegovina following his indictment by the Tribunal. Furthermore, the prosecution of military and political

that regard to note that the ICTY has adopted a mechanism whereby it might send certain categories of cases back to the courts of the former Yugoslavia. Rule 11*bis* of its Rules of Procedure and Evidence provides for the possibility of ‘referring’ cases pending before the Tribunal to ‘another court’, if certain requirements are met. It is evident that the rank or position of the accused in the hierarchy is one of the factors most relevant to the Tribunal’s decision to refer a case back to domestic jurisdictions in the former Yugoslavia (see, e.g., *Prosecutor v Delic*, Decision on Motion for Referral of Case Pursuant to Rule 11*bis*, 9 July 2007, pars 23-26; *Prosecutor v Lukic and Lukic*, Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B, 5 April 2007, par 28). See also, J. De Hemptinne, ‘La Décentralisation de la Justice Pénale Internationale, un Enjeu pour l’Avenir’, *Journal des Tribunaux*, 15 Nov. 2003, 112th year, No 6114 (Belgium).

¹² See e.g. *Prosecutor v Delic*, Decision on Motion for Referral of Case Pursuant to Rule 11*bis*, 9 July 2007, par 23, footnote omitted (‘While a high level of responsibility may arise from the alleged level of participation in the commission of crimes alleged in the indictment, a person holding a high rank may ultimately bear a higher responsibility by virtue of that high position.’).

leaders is generally regarded as a more effective means, in the long term, to combat the general culture of impunity that has long characterized international society than would the trial and prosecution of foot-soldiers.

However, such a prosecutorial course is not without a price. First, focusing exclusively or primarily on high-level perpetrators may have the practical effect of granting a *de facto* immunity to all those lower down the chain who physically perpetrated the crimes in question, unless the effort of international prosecutors to prosecute the highest ranking perpetrators is accompanied by a parallel effort at the national level to prosecute mid- and lower-level perpetrators.¹³ Secondly, the non-prosecution of mid- and lower-level perpetrators may deprive prosecuting authorities of evidence relevant to the prosecution of individuals higher up in the chain of command.¹⁴ Thirdly, should criminal prosecutions be limited to the higher echelons, the historical records written by these courts and tribunals might remain incomplete and ultimately offer a distorted perspective of the events surrounding such atrocities.

Lastly and perhaps most importantly, the risk exists that where too much emphasis is given to rank, the *position* of an individual, rather than the degree of his *responsibility*

¹³ After the Second World War, the Nuremberg and Tokyo trials were followed by many localised criminal prosecutions. Likewise, the effort of the *ad hoc* Tribunals to bring to justice those responsible for violations of humanitarian law in the former Yugoslavia and Rwanda has been accompanied by many – though not always satisfactory – prosecutorial efforts at the domestic level. The situation in Rwanda is telling in that regard. Whilst political and military leaders are being tried before the ICTR to the tune of international human rights standards, foot-soldiers are being tried in local courts with a much lower due process standard. Also, whereas high-level defendants who appear before the ICTR incur, at the most, a life sentence, their subordinates and lower-ranking perpetrators could be sentenced to death before a local court.

¹⁴ From a prosecutorial point of view, so-called ‘linkage evidence’ between low- or mid-level perpetrators and those higher up in the chain may be both critical to prosecutorial success or even necessary to a successful prosecution. In a number of cases before the ICTY, for instance, the Prosecution was able to use evidence led against a lower-level perpetrator in a subsequent case against an individual who ranked higher in the relevant hierarchy (either through adjudicated facts or by calling a person convicted before the Tribunal to give evidence against a former superior). It should be pointed out, however, that such evidence is rarely of great significance to the trial of a higher-ranking individual (see P. Wald, [Book review] ‘Justice in Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia. By Pierre Hazan’, 99(3) *AJIL* 720 (2005)).

for the crime in question becomes the principal factor in the decision to indict him or her. The position which an individual held in the state apparatus or in any other relevant hierarchical structure is a factor that might be relevant to the decision to prosecute him. It would be wrong and unfair, however, to decide upon the indictment of a given individual *because of* the position which he held at the relevant time or if disproportionate weight is given to that factor.¹⁵ Should the position of the accused become the focus of his ‘indictability’, prosecuting authorities would in effect be looking for evidence linking the accused to *a* or, worse, to *any* crime rather than to work their way up from a criminal offence to those most responsible for it. Criminal 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.

Regardless of the merits and risks of such preference, the focus of international criminal justice upon high-ranking individuals has prompted a search for legal mechanisms capable of capturing the conduct of those who, though not physically involved in the commission of the crimes, played an important part in the realization of these crimes or who bore responsibility for their remaining un-punished. The doctrine of superior responsibility endows prosecuting authorities with a tool that renders such prosecutions both more feasible and more likely.

Since at least the end of the Second World War, this doctrine has provided a legal vehicle to support the effort of the international community to end impunity for mass atrocities. Under that doctrine, leaders and commanders may be held criminally responsible, not for their direct involvement in the commission of crimes, but for their failure to prevent or to punish the crimes of their subordinates. Under that doctrine, it is no valid defence for a commander or a high-ranking state official to claim that he

¹⁵ On prosecutorial discretion in selecting those individuals who will be subjected to international criminal prosecutions, see, generally, D.D. Nanda Nsereko, ‘Prosecutorial Discretion before National Courts and International Tribunals’, 3 *JICJ* 124 (2005); H.B. Jallow, ‘Prosecutorial Discretion and International Criminal Justice’, 3 *JICJ* 145 (2005); and L. Côté, ‘Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law’, 3 *JICJ* 162 (2005).

did not take any direct part in the commission of a crime or that he did not intend the consequences of his subordinates' actions.

Stricto sensu, 'command responsibility' is concerned not with the criminal responsibility of a leader or commander who is personally and directly involved in the commission of criminal offences and who can be shown to have planned, ordered, committed or aided and abetted the crimes of others.¹⁶ Rather, it is concerned with criminal liability for a culpable omission to prevent or punish crimes of individuals who are in a position of subordination *vis-à-vis* the accused. Under international law, the doctrine of command responsibility thus developed, not as a separate criminal offence, but as a form of liability for omission in relation to crimes committed by subordinates. This study is concerned solely with this aspect of the criminal responsibility of superiors, and not with other modes of liability pursuant to which a military commander or political leader could be held criminally responsible.

The doctrine of command responsibility is inspired by different sorts of goals and purposes which have created certain tensions within that doctrine. Command responsibility is conceived as a necessary aspect of the good functioning of any chain of command, as a guarantee that standards of humanitarian law are capable of being respected within that chain, as a form of criminal liability and as a way to prevent the commission of crimes by individuals who are operating within such a structure. The multiplication of goals and purposes that have been assigned to that doctrine explain that it might at times find it difficult to satisfy all of these demands within the scope of a single and comprehensive doctrine of criminal liability. The difficulties which this may raise are not limited to deciding which of those goals or purposes should have priority. These tensions raise fundamental questions about the type of criminal conduct which the doctrine is meant to sanction and how broad a scope the doctrine should be given.

The points of friction are apparent where the 'dereliction of duty' aspects of the doctrine of command responsibility come into contact with the 'participatory' or

¹⁶ Such conduct would be charged under other heads of responsibility such as 'planning', 'ordering', 'committing', 'aiding and abetting' or participation in a 'joint criminal enterprise'.

complicity-like aspects of the doctrine. At the centre of the debate over the scope and the nature of the doctrine of command responsibility lie questions about causality, the scope and nature of the necessary state of mind as well as about the nature of the fault that must be attributed to the errant commander. Under international law, a commander who is found responsible for failing to comply with his duties to prevent and punish crimes of subordinates will be found responsible, not solely for that dereliction, but directly in relation to and for the criminal consequences of that failure. Where the crime that he failed to punish or prevent is a murder, for instance, he too will be found responsible for the crime of murder. International law, as presently exists, does not know of a crime of ‘dereliction of duty’ which would criminalise the mere fact of a breach of a superior’s duties without regard to the nature and consequences of that breach.

As a result, the relationship that will exist in some cases between the conduct of the superior and the crimes in relation to which he could be convicted may be a remote one. In the *Hadzihasanovic* case, for instance, the Appeals Chamber of the ICTY, made it clear that a superior could be held criminally responsible for failing to punish crimes of subordinates even if that superior had not been in a position to prevent the commission of those crimes.¹⁷ In such a case, if found responsible, the superior will be convicted under international law, not for a separate offence of dereliction of duty, but in relation to and for the underlying offence that has been committed by his subordinate. The remoteness of the necessary linkage between the conduct of the superior and the crime of the subordinate in such a scenario is accentuated in the jurisprudence of the *ad hoc* Tribunals by the fact that these Tribunals have taken the view that superior responsibility could be entailed without any causal nexus between the dereliction of duty of the superior and the crime which he is said to have failed to prevent or to punish. According to that jurisprudence, a superior could therefore be held criminally responsible for failing to punish certain crimes although he had no part in the commission of that offence and regardless of the fact that he did not otherwise contribute to its commission or to the fact that the perpetrators remained un-punished. As will be discussed further below, such an approach is open to serious scrutiny as it

¹⁷ See, generally, *Hadzihasanovic* Article 7(3) AC Decision, pars 37 *et seq.*

steers the doctrine of superior responsibility away from some of the core and general requirements of criminal liability – in particular, that of causality – whilst at the same time attaching to the violations of that doctrine the full consequences of the criminal law. It also raises general issues about the sort of linkage that international law requires between the conduct of the superior and the crime of his subordinates. Is proof of a causal relationship between his failure and the underlying offence an element of that doctrine under international law or have the *ad hoc* Tribunals rightly rejected such a requirement? At the *mens rea* level, how much of the underlying offence must he have known about to be found responsible for that crime? Is a general awareness of the commission or likely commission of a crime by subordinates sufficient to engage his superior responsibility or must he know more about the characteristics of that crime? And as far as concern the nature of the failure, what sort of breach would be capable of attracting his individual criminal responsibility pursuant to that doctrine? These questions and the answers thereto lie at the core of the debate over the doctrine of command responsibility. State practice and precedents have not always been consistent in answering these questions, but a much clearer picture has now emerged which has given the law of command responsibility much needed specificity and certainty. The debate over the doctrine of command responsibility has now been narrowed down to a set of mostly technical and much more limited aspects of that doctrine.

It would be wrong, however, to conceive of the tensions that characterize the doctrine of command responsibility as merely academic. These tensions, whether they have been resolved or are the process of so being, are capable of impacting fundamentally upon the role and duties of civilian leaders and military commanders as regards the conduct of their subordinates, particularly in situations of armed conflict or political unrest where the risk of crimes is increased. Although the doctrine of command responsibility does not create a general and positive duty of protection on the part of superiors, it does in fact set up a minimum standard of conduct for those in a position of authority which, if breached, could have criminal consequences. As such, international law is capable of traversing the constitutional and institutional arrangements that have been adopted at the state level and to impose upon leaders and rulers of those states a basic set of rules and principles that are binding upon them pursuant to international law. The doctrine of command responsibility is thus at once an internationally-sanctioned minimum standard of conduct that leaders of men are

expected to maintain in relation to their subordinates as well as a penal instrument to sanction any departure from that standard.

2 PURPOSES, METHOD, STRUCTURE AND TERMINOLOGY

The purpose of this thesis is to examine the limits of the doctrine of command or superior responsibility under international law and to consider whether those limits are compatible with other principles of international law.

With a view to presenting a single and cohesive overview of the doctrine of superior responsibility, the thesis reviews an extensive array of incidents of state practice as well as the jurisprudence of national and international tribunals. The jurisprudence of the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda provides many of the leads to understanding the law of command responsibility as these two institutions have undertaken to bring order to existing precedents and draw out general rules and principles from those. The *ad hoc* Tribunals have been powerful engines of development of the law of command responsibility and its main producers over the past ten years. Another reason why the jurisprudence of the *ad hoc* Tribunals is given pride of place in the present study has to do with the fact that the law of command responsibility as identified by them is not a body of law that applies to one jurisdiction only, nor does it embody a negotiated and preferred statutory definition of superior responsibility as is the case, for instance, before the ICC. Instead, the law of superior responsibility as identified and as applied before the Yugoslav and Rwanda Tribunals is said to represent the current state of customary international law.¹⁸ Although there may be some doubt as to whether many of the Tribunals' pronouncements are in fact sufficiently grounded in state practice and *opinio juris*, there is no doubt that much of their case law regarding superior responsibility is supported by some level of practice and precedents.¹⁹

¹⁸ See, e.g., *Fofana* Trial Judgment, par 233; *Brima* Trial Judgment, par 782, and cases cited below in this work.

¹⁹ For a critical appraisal of the Tribunals' identification of customary international law, see, generally, G. Mettraux, *International Crimes and the ad hoc Tribunals* (Oxford: Oxford University Press, 2005) ('Mettraux, *International Crimes*') pp 13 *et seq.*

This work is also an exercise in collecting the various judgements, decisions and instruments that have contributed to the development of the law of command responsibility, in organizing those into a coherent structure, in analysing the relevant holdings and documents, and in extracting the principles which underlie those. The general nature and scope of command responsibility, as well as the three main elements that make up that doctrine, are then discussed separately in all of their aspects and nuances relying upon the body of cases and material that is relevant to each one of them.

The thesis is organized into two main parts. The first discusses the legal nature of command responsibility as a form of criminal liability as well as the scope of application of that doctrine (chapter 3). Under international law, command or superior liability constitutes a form of criminal liability for omission whereby an individual holding a position of sufficient authority may be found criminally responsible where, all other conditions being met, he has failed to comply with his obligation to prevent and punish crimes of subordinates.

The first part of the work considers the issue of the scope of application of the doctrine of superior responsibility, addressing the following general questions: In what context or under what circumstances could the doctrine of command responsibility apply (chapter 4)? To what categories of individuals could it apply (chapter 5)? As will be discussed below, command responsibility may, in principle, apply in all circumstances (peacetime and armed conflicts, whatever the nature thereof), to any individual in a position of sufficient authority (whether his responsibilities were of a military or civilian nature or of a different sort) and whether he drew his authority over subordinates from the law (*de jure* superiors) or from another source of authority (*de facto* superiors).

The second and main part of this work (chapters 6-10) dissects and discusses in detail each of the three elements that make up the law of command responsibility, namely:

- (i) The relationship of superior-subordinate that must link the accused and those who committed the underlying offences;
- (ii) The knowledge which the superior must have of his subordinates' criminal conduct; and

- (iii) A grave and personal failure on the part of the accused to take necessary and reasonable measures to prevent or to punish those crimes.

Each of these elements contains several sub-requirements which circumscribe the scope of application of this form of liability and which specify the circumstances under which a superior may be held criminally responsible in relation to crimes committed by subordinates.

A terminological clarification must also be made at this stage. Because of the growing significance of the doctrine of command responsibility to civilian leaders, the expression 'superior responsibility' has slowly come to be preferred to the more military-like expression 'command responsibility'.²⁰ However, the difference in phraseology does not connote any difference of *substance* or *nature* between the two expressions²¹ and both phrases are used interchangeably.²²

²⁰ *Hadzihasanovic*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 Nov 2002 ('*Hadzihasanovic* TC Decision on Jurisdiction'), par 127, referring to *Celebici* Appeal Judgement, par 195; see also *Celebici* Trial Judgement, par 356. Article 28 of the ICC Statute talks of the 'Responsibility of Commanders and Other Superiors'. See also Draft Code of Crimes Against the Peace and Security of Mankind, commentary to Article 6 (Responsibility of the Superior), at 37. See also T. Wu en Y.S. Kang, 'Criminal liability for the actions of subordinates - The doctrine of command responsibility and its analogues in United States Law', 38(1) *Harvard International Law Journal* (1997), at p 291, and Y. Sandoz, *et al.* (eds), *Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I), (Geneva: ICRC, Martin Nijhoff Publishers, 1987) ('ICRC, *Commentary on the Additional Protocols*'), p 1013. See also G. Werle, *Principles of International Criminal Law*, (The Hague: TMC Asser Press, 2005), par 369, pp 128-129.

²¹ Thus, for instance, the Statutes of both the ICTY and the ICTR refer to the 'superior', rather than to the 'commander' in the text of Articles 7(3)/6(3), thereby also underlining the fact that this provision applies to both civilians and military leaders. The ICTY Report of the Secretary-General of the United Nations likewise generically refers to the obligation of 'A person in a position of superior authority' (Report of the Secretary-General pursuant to Para 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (3 May 1993) ('Secretary-General Report (ICTY)', par 55). Article 6(3) of the Statute of the Special Court for Sierra Leone is drafted in similar terms.

²² See e.g. *Oric* Trial Judgement, par 308.

II NATURE AND SCOPE OF APPLICATION OF COMMAND RESPONSIBILITY

3 COMMAND RESPONSIBILITY AS A *SUI GENERIS* FORM OF LIABILITY FOR OMISSION

3.1 Liability for omission

General remarks

Some early case law suggested that rather than a form of liability, the criminal responsibility of a commander arising from the crimes of his subordinates constituted a discrete category of violations of the laws and customs of war.²³ However, the doctrine later developed, not as a separate category of war crimes, but as a form of criminal liability that applies not just to war crimes but to other categories of international crimes, such as crimes against humanity and genocide.

Command responsibility has sometimes been described as a form of accomplice liability.²⁴ As will be seen below, however, though it contains some attributes of ‘accomplice liability’, command responsibility does not readily fit within such a category. Instead, the most recent and most persuasive jurisprudential pronouncements have characterized this doctrine as a form of liability for culpable omission.²⁵ According to that view, a superior may be held criminally responsible, not for his part in the commission of crimes by his subordinates, but because of a personal and

²³ The liability of Japanese leaders was dealt with in such a way by the *Tokyo Tribunal*. See also the trial of General Seeger before a British Military Court, at Wuppertal, where the Judge-Advocate suggested that Seeger’s military position ‘required him to do things which he failed to do and which amounted to a war crime in the sense that they were in breach of the Laws and Usages of War’ (*Law Reports of Trials of War Criminals*, Selected and Prepared by the United Nations War Crimes Commission, Vol IV (1948), pp 88-89). The *Law Reports* are referred to as “LRTWC”.

²⁴ See e.g., Military Criminal Code of The Netherlands, Articles 148-149. See also references given in *Halilovic Trial Judgement*, par 43.

²⁵ See, e.g., *Fofana Trial Judgment*, par 234.

culpable failure on his part to adopt necessary and reasonable measures to prevent or punish those crimes.

It should be emphasized, however, that command responsibility is in many ways a hybrid form of liability which is made of composite elements that are traditionally found in different categories of forms of liability. Those are sewn together into what has sometimes been described as a *sui generis* form of liability for omission.²⁶ Therefore, trying to fit command responsibility into any one of the more traditional modes of liability is bound to be unsuccessful or, at least, to be of limited assistance in understanding the nature and specificity of that doctrine. Command responsibility is also un-characteristically international in origin. It was first born and, for the most part, continued to grow in an international context rather than in internal legal orders. This contrasts, not insignificantly, with other forms of criminal liability which, until recently, international criminal law was content to leave to national law.

There are many ways in which a military or civilian leader may take a criminal part in the commission of crimes by his subordinates. He can order crimes, instigate them or otherwise aid and abet them. International law has added one category of criminal liability which applies solely to those who bear sufficient authority over other people. Those who can exercise such authority – in the form of an ability to exercise ‘effective control’, as defined below – have a duty under international law to take necessary and reasonable measures to prevent or to punish crimes of subordinates where they have learnt of their commission or likely commission. If they fail to do so, they could be held criminally responsible for those crimes. Thus understood, international humanitarian law may be said to entrust commanders with ‘a role of guarantors of laws dealing with humanitarian protection and war crimes’.²⁷ The origin of that role and the responsibility that attaches to it may be traced back to the principle of ‘responsible command’ which will be discussed later in more detail.

²⁶ *Halilovic* Trial Judgement, par 78, and references given therein; *Hadzihasanovic* Trial Judgement, par 75; *Oric* Trial Judgement, par 293.

²⁷ *Halilovic* Trial Judgement, par 87.

The position of authority which a superior holds over other individuals in the form of an ability to exercise ‘effective control’ is, therefore, at once the triggering factor for his obligation to act to prevent and to punish crimes of subordinates as well as the basis upon which he will be held responsible if he fails to do so.²⁸ In the absence of such authority, no duty to act as would be relevant to the doctrine of superior responsibility exists and no liability may be incurred pursuant to that doctrine.

As noted above, under international law, command responsibility arises out of a failure on the part of the superior to comply with his duty to act.²⁹ Liability is incurred for a personal failure on his part to perform an act required of him by international law, namely, to take necessary and reasonable measures to prevent or punish crimes of subordinates.³⁰ The omission is culpable because international law imposes such a duty upon him in the first place and attaches criminal consequences to his failure to comply with that duty.³¹

It follows from the above that under international law a superior is not charged with the crimes of his subordinates, or for being a party to those crimes, but with a failure to carry out his duty as a superior to exercise the required control over his subordinates.³² It is not, therefore, a form of strict liability whereby a superior would be held responsible for no other reason than the fact that he was in a position of authority *vis-à-vis* those who committed the crimes.³³ That having been said, and as will be

²⁸ *Halilovic* Trial Judgement, par 81.

²⁹ See, e.g., *Krnjelac* Appeal Judgement, par 171; *Bagilishema* Appeal Judgement, par 35; *Hadzihasanovic* TC Decision on Jurisdiction, par 55; *Halilovic* Trial Judgement, pars 38, 41 and 54; *Oric* Trial Judgement, par 293.

³⁰ See e.g., *Krnjelac* Appeal Judgement, par 171; *Halilovic* Trial Judgement, par 54.

³¹ *Halilovic* Trial Judgement, pars 38 and 54; *Oric* Trial Judgement, footnote 838, page 106.

³² *Krnjelac* Appeal Judgement, par 171. See also *Krnjelac* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, par 32.

³³ See *Celebici* Appeal Judgement, par 239; *Celebici* Trial Judgement, par 383; *Halilovic* Trial Judgement, par 65. The ICTY Appeals Chamber also pointed out that it might be misleading, and not totally accurate, to describe superior responsibility in terms of ‘vicarious liability’ as this expression might wrongly suggest that this form of liability is a form of *strict* imputed liability (see *Celebici* Appeal Judgement, par 239). See, also, *Prosecutor v Momcilo Mandic*, Verdict, No: X-KR-05-58, 18

discussed below, the conduct of the accused is closely related to the actions of his subordinates and liability, or rather the scope thereof, is in large part determined by the conduct of the culpable subordinate(s).

It should be emphasized that superior responsibility is not a form of '*responsabilité de résultat*', whereby a superior could be held criminally responsible merely because his actions failed to prevent or punish a crime. Instead, it may be characterized as a '*responsabilité de moyens*' in the sense that it compels superiors to adopt certain measures to prevent and punish crimes and provides for liability if they fail to do so.³⁴ Accordingly, the mere fact that a superior was un-successful in preventing crimes or in identifying the culprits does not permit an inference to be drawn that he failed in his duty.³⁵ It would have to be established, furthermore, that his conduct was grossly inadequate and that his failure contributed to the commission of the crime or contributed to the perpetrators remaining un-punished.

Three elements are essential for criminal liability to attach to a superior's omission to act: knowledge of the crimes committed by subordinates, the power to prevent the wrongs done by others and a duty to do so. 'The three elements combined', Judge Rölöng pointed out, 'may lead to criminal responsibility'.³⁶ Concerning more specifically the duty to act that attaches to superiors, Judge Rölöng noted the following:

One could argue that this duty [to prevent crimes] exists, as soon as knowledge and power are apparent. International law may develop to this point. At this moment, however, one has to look for the specific obligation, placed on government officials or military commanders, which makes them criminally responsible for 'omissions'.

July 2007 (State Court of Bosnia and Herzegovina), 153 ('Command responsibility is not a form of strict liability.'), citing *Celebici* Appeal Judgment, par 239.

³⁴ See e.g. *Brima* Trial Judgment, par 1740: 'The law does not require proof that the Accused Brima could have prevented the commission of the crimes. The law requires that the Accused Brima took all steps reasonably open to him in an attempt to do so.'

³⁵ See, e.g., *Ford v Garcia*, Judgment, 3 Nov 2000, 289 F.3d 1283, 52 Fed R Serv 3d.

³⁶ Re-printed in B. Rölöng and C. Rüter (eds.), *The Tokyo Judgement* (Amsterdam: University Press Amsterdam, 1977), Vol II, Opinion of Mr. Justice Rölöng, Member for The Netherlands, p 1042, 1063-1064.

The identification of those duties which, if breached, may entail the individual criminal responsibility is one of the most intricate questions relevant to the doctrine of superior responsibility. At this stage, it suffices to point out that both international law and domestic law are relevant to this issue. International law places upon those in a position of sufficient authority – i.e., those in ‘effective control’ of others, as defined below – a general duty to take appropriate steps to prevent and punish crimes of subordinates. International law further specifies the nature and reach of that obligation by requiring that the superior should adopt ‘necessary and reasonable’ measures to fulfil that duty. Under international law, only those duties and obligations which a superior is required to adopt once he has acquired knowledge of the possibility of a crime having been committed or being about to be committed by subordinates may have the effect of engaging the responsibility of a superior.³⁷ Beyond this, international law provides little guidance as to what a superior is concretely required to do to prevent and punish crimes of subordinates and domestic law plays a significant role in specifying and fleshing out these duties. This division of labour between international law and domestic law regarding the duties and obligations of superiors relevant to that doctrine will be discussed below.³⁸

3.1.1 A pre-existing legal duty to act

It has been noted above that a failure to act when under a legal duty to do so constitutes ‘the essence of this form of [superior] responsibility’.³⁹ This proposition could be read in two ways. First, it could be interpreted as referring to the general duty of superiors to adopt appropriate measures to prevent and punish crimes of subordinates. According to that view, a breach of that general duty would be sufficient, all other conditions being met, to engage the superior’s criminal responsibility. A second way to interpret that holding is the following: a superior may only be held

³⁷ See, e.g., *Bagilishema* Appeal Judgement, pars 33-34; *Celebici* Appeal Judgement, par 226. See, also, *Halilovic* Trial Judgement, pars 79-90, in particular par 88; *Hadzihasanovic* Trial Judgement, pars 145 *et seq.*, 1234, 1434; and *Oric* Trial Judgement, par 330; *Strugar* Trial Judgement, par 420; *Celebici* Appeal Judgement, par 226, concerning the distinction between a commander’s ‘general’ and ‘specific’ obligations as regard the prevention of crimes and his superior responsibility.

³⁸ See below.

³⁹ *Halilovic* Trial Judgement, par 38.

responsible where he has failed to adopt a measure that he was expressly required by law to adopt. In other words, whilst under the first interpretation a commander could be held responsible even where he did not have explicit legal competence to adopt the measures which he is said to have failed to adopt, the second interpretation would limit his liability to those situations where he is shown to have failed to take steps for which he had formal legal competence.

This issue came up before the Yugoslav Tribunal in the *Celebici* case. The judgement of that Chamber on that point is contradictory and un-satisfactory. At first, the Trial Chamber held, without ambiguity, that ‘criminal responsibility for omissions is incurred only where there exists a legal obligation to act’.⁴⁰ Later on in the judgement, however, and without explaining this sudden change of view, the *Celebici* Trial Chamber held:

[W]ith respect to the concept of superior, we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility. The Trial Chamber accordingly does not adopt the position taken by the ILC on this point, and finds that the lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior.⁴¹

That latter finding of the Trial Chamber was not supported by any authority, nor by any state practice. No reason was given for the Chamber’s change of approach in the middle of its judgement, nor did it seek to explain its disapproval and, ultimately, its rejection of the authority which contradicted its finding. The subsequent jurisprudence of the *ad hoc* Tribunals has failed to clarify matters, mostly reiterating the Trial Chamber’s position without questioning its accuracy or the existence of any support for it under international law.⁴²

⁴⁰ *Celebici* Trial Judgement, par 334. See also, *Hadzihasanovic* TC Decision on Jurisdiction, par 125, which makes an express reference to that holding.

⁴¹ *Celebici* Trial Judgement, par 395.

⁴² Due to the confusing change of position of the *Celebici* Trial Chamber, later trial chambers have come to adopt one or the other position (e.g. *Aleksovski* Trial Judgement, par 72; see also, for a different approach, *Blaskic* Trial Judgement, par 296; *Strugar* Trial Judgement, par 372; *Kordic* Trial Judgement, pars 442-443; *Halilovic* Trial Judgement, par 73; *Stakic* Trial Judgement, par 461. Particularly

In fact, and contrary to this jurisprudence, existing state practice and precedents tend to support the view that a superior may only be held criminally responsible pursuant to the doctrine of superior responsibility where he was under a specific, and pre-existing, legal duty and had formal legal competence to adopt a particular measure which, the prosecution claims, he culpably failed to adopt. In other words, should this approach be adopted, a superior could not be held criminally responsible for failing to adopt a measure which he had no legal competence to adopt or which was not otherwise in the realm of his competence.

The first known illustration of this requirement goes back to the First World War. After the War, the American representatives at the Commission on the Responsibility of the Authors of the War noted the following:

To establish responsibility in such cases [i.e., for commanders] it is elementary that the individual sought to be punished should have knowledge of the commission of the acts of a criminal nature and that he should have possessed *the power as well as the authority* to prevent, to put an end to, or repress them. *Neither knowledge of commission nor ability to prevent is alone sufficient. The duty or obligation to act is essential. They must exist in conjunction, and a standard of liability which does not include them all is to be rejected.*⁴³

illustrative of the confusion in this matter is the *Strugar* case. Although the Trial Chamber in this case asserts in its legal considerations that ‘the question whether a superior had explicit legal capacity to take such measures will be immaterial if he had the material ability to act’ (*Strugar* Trial Judgement, par 372), it goes on to note in several of its factual findings that the accused had had the ‘*legal authority and the material means*’ to adopt the measures which he was found to have failed to adopt (see, e.g., *Strugar* Trial Judgement, pars 433, 444 and 446). And for each and every failure assigned to him, the Chamber was careful to note that he had had the authority, and not only the ability, to do it in the first place. See, e.g., *Strugar* Trial Judgement, par 406 (concerning the authority to issue orders and instructions relating to discipline of units), par 407 (concerning the authority to seek an increase in the number of military police), par 408 (concerning the authority to apply disciplinary measures) or pars 411-413 (concerning the authority to appoint and remove officers).

⁴³ Commission on Responsibility of the Authors of the War and on the Enforcement of Penalties, Report presented by the United States to the Preliminary Peace Conference, 29 March 1919, Pamphlet No 32, Division of International Law, Carnegie Endowment for International Peace, re-printed in 14(1) *AJIL* 95 (1920) at 143 (emphasis added).

For a commander to be found criminally responsible in relation to the actions of subordinates, it was thus considered necessary by the American delegate to establish that the superior had had (i) a legal duty *and* (ii) the material ability to carry out the action which he is accused of having failed to take.

The same view was later adopted by the International Law Commission. Article 12 of the 1991 ILC *Draft Code of Crimes Against the Peace and Security of Mankind* provided for superior responsibility in the following terms:

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures with their power to prevent or repress the crime.

In its Commentary, the ILC made it clear that a superior would only incur responsibility under that doctrine if he ‘had *the legal competence* to take measures to prevent or repress the crime and the material possibility to take such measures.’⁴⁴ The 1996 ILC Draft adopted a similar requirement.⁴⁵ The same position was followed in other international instruments.⁴⁶ Judicial precedents also suggest that a superior may

⁴⁴ ILC Yearbook, 1988, Vol II (part II) pp 70-71 (emphasis added).

⁴⁵ See, for an identical requirement, ILC Commentary to Article 6 (Responsibility of the superior) the 1996 ILC *Draft Code of Crimes Against the Peace and Security of Mankind*: ‘An individual incurs criminal responsibility for the failure to act only when there is a legal obligation to act and the failure to perform this obligation results in a crime.’ And ‘for the superior to incur responsibility, he must have had the legal competence to take measures to prevent or repress the crime and the material possibility to take such measures.’

⁴⁶ See, e.g., Article 9(3) of the 1998 *Draft Convention on Forced Disappearance* which provides that ‘[f]orced disappearance committed by a subordinate shall not relieve his superiors of criminal responsibility if the latter failed to exercise the *powers vested in them* to prevent or halt the commission of the crime, if they were in possession of information that enabled them to know that the crime was being or was about to be committed’ (emphasis added). See also Article 86 of Additional Protocol I entitled ‘failure to act’ which, in its paragraph 1, imposes responsibility for grave breaches which result from a ‘failure to act when under a duty to do so’. The ICRC Commentary on that provision makes it clear that ‘responsibility for a breach consisting of a failure to act can only be established if the person failed to act when he had a duty to do so’ (para 3537, p 1010). See also Count 55 of the *Tokyo*

only be held responsible for a failure to adopt a measure which he was legally bound to adopt and for which he had legal competence. In *Ford v Garcia*, for instance, a US Federal Court pointed out that ‘effective control’ means that ‘the commander has the legal authority and the practical ability to exert control over his troops’.⁴⁷

The above review of existing precedents suggests that the conclusion of the *Celebici* Trial Chamber – later adopted by other chambers of the ICTY and ICTR – had no or little support in existing state practice and had no precedents under international law. Insofar as precedents exist, they all seem to point to an express requirement that a superior may only be held criminally responsible where he has failed to adopt a particular course or take certain steps which he was required, by law, to adopt and for which he was legally competent.⁴⁸

It should be noted, however, that in more recent cases, the ICTY Appeals Chamber appears to have opted for the view that, for superior responsibility to be incurred, a duty to act, in addition to the ability to do so, had to be required.⁴⁹

The absence of legal competence to adopt a particular measure should, therefore, provide a valid defence to superior responsibility charges.⁵⁰ In other words, if this view

Indictment where the accused are being charged with a failure to act where they ‘recklessly disregarded their legal duty by virtue of their offices to take adequate steps to ensure the observance and prevent breaches of the laws and customs of war’ (re-printed in R. Pritchard and S. Magbauna Zaide (eds.), *The Tokyo War Crimes Trial* (New York/London, 1981), p 48, 424, emphasis added).

⁴⁷ *Ford v Garcia*, Judgement, 3 Nov 2000, 289 F.3d 1283, 52 Fed R Serv 3d. See also the finding of the U.S. Military Tribunal in the *Ministries* case, where it noted that members of the German Foreign Office could not be held criminally responsible for the initiation or execution of certain criminal policies – in this case, persecution of the Catholics – which they had neither initiated nor carried out and which lay outside of their ‘official competency’ (*United States v von Weizsaecker*, 14 LRTWC 308, 526).

⁴⁸ As far as the literature on the subject is concerned, see also, I. Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester: Manchester University Press, 2003) (‘Bantekas, *Principles of Responsibility*’), p 74.

⁴⁹ See, in particular, *Halilovic* Appeal Judgment, pars 184 and 214.

⁵⁰ See also L.C. Green in C. Bassiouni, ‘Commentaries on the International Law Commission’s 1991 Draft Code of Crimes Against the Peace and Security of Mankind’, 11 *Nouvelles études pénales* (1993) 196.

is accepted, a superior could not be held criminally responsible for failing to adopt a particular measure which he had no formal legal competence to adopt. This, in turn, means that the nature and the extent of what a superior is required to do in a particular instance to prevent or punish crimes and which, if he fails to do, might render him criminally responsible, is *not* determined solely by what he could have or should have done, but primarily by what competence lay within his legal authority and responsibility.⁵¹ A telling illustration of that fact may be found in the acquittal of two chiefs-of-staff, Foertsch and von Geitner, in the *Hostage* case. Both defendants were acquitted based primarily on the fact that, although they had held important and high-level positions in the military hierarchy, the Prosecution had failed to prove that they had had any commanding responsibilities at the relevant time. The findings made by the military tribunal in the *High Command* case in relation to the accused von Leeb are equally valid. In that case, the tribunal emphasized the fact that, as commander-in-chief of an army group, ‘the duties imposed upon [von Leeb] were exclusively operational and his headquarters and staff were strictly operational in their functions’.⁵² The tribunal went on to note that ‘his authority in th[e] field of [executive power] was more in the nature of a right to intervene than a direct responsibility’.⁵³ The tribunal found that, in those circumstances, ‘it [was] not considered [...] that criminal liability attache[d] to him merely on the theory of subordination and over-all command’.⁵⁴

It is important to note, in that respect, that in addition to those duties and obligations which international law or domestic law may specifically place upon the superior, international law also provides for a general obligation to refrain from any conduct that would be regarded as criminal ‘according to the general principles of law recognised

⁵¹ As part of its pleading obligations, the prosecution is required to identify the source and scope of the legal duty said to have been binding upon the accused and which he is said to have breached at the time. As noted by the *Mpambara* Trial Chamber (ICTR), ‘[t]his is an essential element for charging an accused with a failure to prevent or punish. An accused must at least know the scope of his obligations to be in a position to dispute his alleged default.’ (*Mpambara* Trial Judgement, par 32).

⁵² *High Command* case, p 554 (cited with approval in *Halilovic* Appeal Judgment, par 212).

⁵³ *High Command* case, p 554.

⁵⁴ *High Command* case, p 555.

by the community of nations'.⁵⁵ Where the conduct of a superior meets that standard, he could be held criminally responsible regardless of the fact that he had not failed to adopt any of the measures which he was otherwise legally competent to adopt.

It should be pointed out at this stage that only those duties – to prevent and punish crimes – which arise from a position of authority (i.e., a position of 'effective control') vis-à-vis others are susceptible to engage the superior responsibility of the one who breaches those duties.⁵⁶ If that duty arises from another source, its breach will not be such as to trigger the application of the doctrine of superior responsibility. A person may have the ability, and responsibility, to take certain measures to prevent or punish crimes without the breach of this duty being capable of engaging his superior responsibility. For instance, a police officer or a military prosecutor might bear certain responsibility in that regard, but the breach of his duties would not otherwise be sufficient to engage his superior responsibility although, *strict sensu*, he could be said to have had the material ability – and the duty – to prevent or punish crimes. Therefore, to establish that the violation of a duty to act is capable of engaging the superior responsibility of the infringer, the prosecution would have to exclude all reasonable possibilities that the duty of an accused to prevent or punish crimes could have resulted from any other source than a relationship of authority with the perpetrators.

⁵⁵ See Article 15(2) ICCPR and Article 7(2) ECHR. For a telling illustration and application of that principle, see, e.g., *Baumgarten v Germany*, (960/00) U.N. Doc. CCPR/C/78/D/960/2000 (2003), before the Human Rights Committee, in particular par 9.4. See also *Polyukhovich v Commonwealth of Australia* (1991), 172 CLR 501, Judgement of the High Court of Australia.

⁵⁶ In the *Halilovic* case, the ICTY Appeals Chamber has made it clear that only those duties or obligations related to the effective prevention and punishment of crimes, as result from a relationship of authority are relevant to the doctrine of superior responsibility (*Halilovic* Appeal Judgment, par 214). In that case, the Appeals Chamber therefore set out to determine who had 'the duty and the ability' to initiate an investigation into the killings that were relevant to the charges (see *Halilovic* Appeal Judgment, par 184). Having reviewed that matter, the Chamber noted that the mandate of the 'Inspection Team' which Mr Halilovic had been heading at the time relevant to the charges 'did not include duties or obligations related to the effective prevention or punishment of crimes (which would form the required basis for Halilovic's effective control over the perpetrators)' (*Halilovic* Appeal Judgment, par 214, footnote omitted).

3.1.2 Material ability to prevent or punish crimes

Liability pursuant to the doctrine of superior responsibility is dependent not only on the superior having had a legal duty which he culpably failed to perform, but also on the demonstration that he had the material ability to adopt or to implement the measures which is said he should have adopted in the circumstances.

In practice, the prosecution would have to establish that the accused had the power to adopt a particular course of action in the circumstances ruling at the time and that such a course would have been both feasible and reasonable in those circumstances.⁵⁷

This general requirement of material ability or capacity of the superior to adopt the measures which he is said to have failed to adopt is encapsulated, as far as the doctrine of superior responsibility is concerned, in the exigency that the superior must be shown to have failed to adopt 'necessary and reasonable measures'. The definition of this phrase will be discussed in great detail below.

3.2 Responsible command

The general duty of all superiors to adopt certain measures to prevent and punish the crimes of their subordinates has its roots in a fundamental principle of humanitarian law: 'responsible command'.⁵⁸ That principle, whose expression may be found in various humanitarian instruments,⁵⁹ demands of superiors that they shall ensure that forces under their command are properly organized, that they are disciplined and that

⁵⁷ See, generally, *Krnjelac* Trial Judgement, par 95; *Celebici* Trial Judgement, par 395; *Celebici* Appeal Judgement, par 226; *Halilovic* Trial Judgement, pars 73-74. See also ICRC, *Commentary on the Additional Protocols*, p 1010, par 3548.

⁵⁸ See, e.g., *Halilovic* Trial Judgement, par 40, and references cited therein; *Hadzihasanovic* Article 7(3) AC Decision, par 22.

⁵⁹ See, e.g., Article 1 of the Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention (II) with Respect to the Laws and Customs of War on Land of 1899; Article 1 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907; Articles 18 and 33 of (Geneva) Convention relative to the Treatment of Prisoners of War, 1929; Article 43(1) of the 1977 Additional Protocol I to the Geneva Conventions.

they are capable of complying with humanitarian standards.⁶⁰ The role and importance of commanders in guaranteeing the good functioning of the chain of command and general compliance with humanitarian law within that chain may not be over-stated.⁶¹

The significance of the principle of ‘responsible command’ is not limited to tracing the origin of the doctrine of command responsibility. More significantly for the present purpose, the principle of ‘responsible command’ is an important interpretive tool when it comes to determining the scope of the doctrine of command responsibility. When it comes to interpreting the scope of the doctrine of superior responsibility, in particular the scope of a superior’s duty to act, the principle of responsible command has often provided a ready standard to draw that line. Furthermore, as will be seen below, the relevance of that principle is not limited to military commanders but applies, generally, to all those who are in a position of superior authority.

In practice, both the doctrine of command responsibility and the principle of responsible command are regarded as enforcement mechanisms for standards of humanitarian law through and by those who have been charged with the responsibility of commanding or leading others.⁶² In some ways, command responsibility may be said to constitute a penal derivative of the more general concept of responsible command.⁶³ As once noted, ‘the duties comprised in responsible command are

⁶⁰ See, e.g., *Hadzihasanovic* TC Decision on Jurisdiction, par 66.

⁶¹ See, for instance, ICRC Commentary to Article 87 of Additional Protocol I which provides that ‘the role of commanders is decisive [...] the necessary measures for the proper application of the [Geneva] Conventions and the [Additional] Protocol must be taken at the level of the troops, so that a fatal gap between the undertakings entered into by Parties to the conflict and the conduct of individuals is avoided. At this level everything depends on commanders, and without their conscientious supervision, general legal requirements are unlikely to be effective.’ (ICRC, *Commentary on the Additional Protocols*), p 1018, par 3550; cited with approval in *Halilovic* Trial Judgement, footnote 91, page 16).

⁶² See in particular *Hadzihasanovic* Article 7(3) AC Decision, par 14-16; *Hadzihasanovic* TC Decision on Jurisdiction, pars 66, 93, 174, and 197; *Halilovic* Trial Judgement, pars 39, 40 and 87. See also *Yamashita v. Styer* 327 U.S. 1, 14-15 (1946).

⁶³ See *Yamashita*, U.S. Military Commission, 4 United Nations War Crimes Commission Law reports, 1, 35: ‘Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history.’

generally enforced through command responsibility. The latter flows from the former.’⁶⁴

However, whilst overlapping in part, the two notions remain distinct because whilst the concept of ‘responsible command’ looks at the duties of commanders in general, the doctrine of command responsibility focuses on the criminal liability flowing from the breach of certain ‘specific’ legal duties that are binding upon a superior.⁶⁵ In other words, whilst responsible command seeks to guarantee the application of humanitarian standards through a well-functioning military structure, command responsibility seeks to punish the commanders who have failed to guarantee that goal by effectively allowed their subordinates to commit crimes.

Despite the differences of perspective that exist between the two notions, the general duty of commanders to maintain order within the ranks and to ensure compliance with humanitarian standards in the chain of command (‘responsible command’) has had much influence in shaping and expanding the realm of the doctrine of command responsibility. It is an interpretive tool of great relevance to establishing the boundaries of ‘command responsibility’ and it has provided a fairly recognisable standard against which to decide whether a particular breach of duty is serious enough to carry penal consequences under international law.

⁶⁴ *Hadzihasanovic* Article 7(3) AC Decision, pars 16 and 23. See also *Hadzihasanovic* Article 7(3) AC Decision, Separate and Partially Dissenting Opinion of Judge David Hunt, par 3, footnote omitted: ‘Responsible command leads to command responsibility, which is the most effective method by which international criminal law can enforce responsible command.’ At the diplomatic conference that led up to the adoption of Additional Protocol I, the delegate of the United States commented in the following terms about the role and function of commanders concerning the implementation of the Protocol: ‘By and large, implementation of Protocol I and of the Geneva Conventions depended on commanders. Without their conscientious supervision, general legal requirements were unlikely to be effective.’ The U.S. delegate further pointed out that what became Article 86 of Additional Protocol I was ‘designed to provide commanders with clear notice of their responsibilities both in prevention and repression of breaches during the actual conduct of military operations and in the prevention and repression of breaches through the establishment of the appropriate training measures required at all times’ (see CDDH/I/SR.50, pars 68-70). See also W.H. Parks, ‘Command Responsibility for War Crimes’ 62 *Military Law Review* 1 (1973), at p 2.

⁶⁵ See *Hadzihasanovic* Article 7(3) AC Decision, par 22.

But whilst every conduct that entails the individual criminal responsibility of the commander will, to some degree, fall short of the standard of responsible command, not every breach of that standard will have criminal consequences for the commander.⁶⁶ That is because, as the Appeals Chamber of the ICTY has noted, the concept of ‘responsible command’ ‘looks to the duties comprised in the idea of command, whereas that of command responsibility looks at liability flowing from breach of those duties.’⁶⁷ Only where the obligation said to have been breached is one that was binding upon the superior specifically for the purpose of preventing or punishing crimes of subordinates, and insofar as it has been endowed by international law with criminal consequences in case of breach, will the breach of one such duty be relevant to superior responsibility.

3.3 Division of labour between international law and domestic law

International law provides little guidance as to the concrete measures which a commander is required to adopt when he learns of crimes which have been committed or are about to be committed by subordinates. In place of a detailed list of steps or measures required of superiors, international law has placed upon them a general, and mostly un-specific, obligation to take ‘necessary and reasonable’ measures to prevent and punish the crimes of subordinates. The detail of what this requirement encompasses concretely and in practice has been left mostly to domestic – military, disciplinary or penal – law, although liability is incurred, ultimately, pursuant to the general standard of international law and the scope of criminal liability is measured against that same standard.⁶⁸

In effect, superior responsibility is built upon a twofold system of duties, partly based on international law, and partly based on domestic law:

⁶⁶ As will be seen below, only the most serious departures from that standard, and only when those departures breach specific duties of the commanders, have those been endowed with criminal consequences. On the distinction between ‘general’ and ‘specific’ duties of superiors, see, *inter alia*, *Halilovic* Trial Judgement, pars 79 *et seq*; *Hadzihasanovic* Trial Judgement, pars 145 *et seq.*, 1234, 1434; and *Oric* Trial Judgement, par 330.

⁶⁷ *Hadzihasanovic* Article 7(3) AC Decision, par 22.

⁶⁸ See, e.g., *Ntagerura et al* Appeal Judgement, pars 342-343.

- (i) International law provides for a general obligation to take ‘necessary and reasonable’ measures to prevent and punish crimes of subordinates: ‘[t]he law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war.’⁶⁹ Under international law, a commander may be found responsible under the doctrine of superior responsibility, and his omission will be regarded as culpable, where his conduct falls short of that standard.⁷⁰
- (ii) National or domestic law provides for specific duties and obligations of civilian and military superiors at various levels of the hierarchy to which they belong and lays down the responsibilities of state officials in the various sections of the state structure.⁷¹ The ICTY Appeals Chamber has made it clear that the applicable domestic laws and internal regulations of a particular state are directly relevant to determining the ‘framework of a commander’s material ability to punish his subordinates’.⁷² In particular, those rules and regulations would be relevant to establishing the nature and scope of duties of any particular state official and whether those rules may be said to have created a relationship of superior-subordinate as is relevant to the doctrine of superior responsibility.⁷³ Domestic law also provides guidance as to the

⁶⁹ See, e.g., *United States v Karl Brandt and others* (‘Medical case’), Vol II, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, 186, 212. See also *United States v Pohl and others*, Vol V, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, iv, 1011.

⁷⁰ See, e.g., *Halilovic* Trial Judgement, par 54.

⁷¹ See, e.g., *Ntagerura et al* Appeal Judgement, pars 342-343.

⁷² See *Halilovic* Appeal Judgment, par 183.

⁷³ See, e.g., *Halilovic* Appeal Judgment, pars 210-213. The fact, for instance, that the head of a particular body, whether military or otherwise, held certain powers and had certain obligations within that body under the applicable domestic legislation does not mean that he would bear responsibility for any type of incident as has taken place within the scope of responsibility of that particular body. As was made clear by the Special Court for Sierra Leone, it would have to be shown that the accused had control and responsibility over those aspects of the work of that body as are relevant to the charges. In

position of a particular individual in the – military or civilian – structure to which he is said to have belonged *de jure* and the list of duties and obligations that might attach to such a position.

International law thus only provides the foundational basis for the duties and obligations of superiors to prevent and punish crimes of their subordinates. Where an individual meets the requirement of international law vis-à-vis other individuals whom he controls, he is then required by international law to act to prevent and punish their crimes.⁷⁴ That standard also constitutes the legal basis upon which a finding of criminal responsibility may be made *qua* international law.

There is no one internationally-sanctioned way to conduct an investigation into allegations of crimes or to prevent crimes of subordinates. The responsibility to organize a state's response to the commission of a crime or the risk thereof has, for the most part, been left to the domestic legislations. The reason behind such a division of labour between international law and domestic law is due primarily to the view shared by many states that an international ordering of its command(ing) and leadership structure would represent an undue interference with state sovereignty. When Additional Protocol I to the Geneva Conventions was being adopted, for instance, it was decided to leave it to each individual state to ensure compliance with its obligation in the way which it intended, including insofar as related to the duties of commanders and superiors.⁷⁵

the case of the accused Brima, the Court thus noted that the accused was nominally in charge of several government ministries and assumed that he would have been able to give orders in relation to work carried out under his ministries. The *Brima* Trial Chamber noted, however, that there was no evidence 'regarding the type of issues that came within his portfolios or to whom he would have been entitled to issue orders, even apart from the question of whether such orders were issued and obeyed' (*Brima* Trial Judgment, par 1658).

⁷⁴ See, e.g., *Prosecutor v Momcilo Mandic*, Verdict, No: X-KR-05-58, 18 July 2007 (State Court of Bosnia and Herzegovina), at 152.

⁷⁵ Articles 86-87 of Additional Protocol I. See also Article 1 of Geneva Convention or the general wording of the Geneva Conventions and Protocols which talk of obligations of the High Contracting Parties to respect and ensure respect of those instruments. Also, the concept of a 'duty to act' provided in Article 86 of Additional Protocol I, for instance, raises what the ICRC calls 'the complex problem of

States have exercised their discretion in that regard in many different ways, distributing the responsibility of ensuring compliance with humanitarian law at various levels of the state hierarchy, and creating different structures and bodies competent with this matter. Thus, under international law generally and as regards the Geneva Conventions and Additional Protocols in particular, the responsibility for enforcing humanitarian law standards is primarily that of states and only subsidiarily that of their agents or those placed in a position of authority *vis-à-vis* others.⁷⁶ And, within that subsidiary context, commanders and superiors have been given responsibilities which may vary a great deal from one domestic legal order to the other, with international law providing only a general standard of conduct which any commander is bound to comply with. Thus, under international law, superior responsibility only becomes an issue where a military commander or a civilian leader is shown to have failed in his duties by breaching that part of the state's international obligation – to prevent and punish crimes of subordinates – which international law had placed upon him and which is generally detailed in the internal legislation applicable to him under domestic law.

The distribution of responsibilities operated at the national level between the organs competent to prevent and punish crimes is relevant to international law to the extent that an accused person could not be said to have breached his duty because he failed to adopt a particular measure which his national law required a different authority, not he, to adopt. It would, therefore, have to be established in every case where command

the attribution of powers and duties' (ICRC, *Commentary on the Additional Protocols*, par 3537). This problem is not, as the ICRC goes on to point out, a matter of international law, but is governed by national law of the contracting parties (*ibid.*). The ICRC Commentary points out that it is the national laws of state parties which attribute and distribute powers and duties to their agents, including their officers and commanders (ICRC, *Commentary on the Additional Protocols*, p 1010, par 3537).

⁷⁶ As noted previously, for instance, the addressees of Article 87 of Additional Protocol I are not the commanders, but the High Contracting Parties and the Parties to the conflict. See M. Bothe, K. Partsch and W. Solf, *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1982), par 2.5, p 528 (concerning Article 87 of Additional Protocol I). The responsibility to comply with the obligations contained in that provision rests with the state parties to the treaty, which are bound in turn 'to require' commanders to take certain actions.

responsibility charges have been brought what sort of power and responsibility the accused had under national law in regard to the prevention and punishment of crimes by subordinates, and the extent thereof. Thus, in his Opinion attached to the *Tokyo Judgment*, Judge Röling of the Netherlands pointed out that criminal responsibility for the mistreatment of prisoners of war could not be attributed to every member of the Japanese government. '[T]he responsibility for not preventing violations of the rules of war should be limited', Judge Röling said, 'to these officials especially indicated in the pertinent domestic law'.⁷⁷ If, for instance, domestic law places upon a different organ the responsibility of leading an investigations into allegations of crimes or where it has circumscribed the responsibility of the accused in such a way that he has no duty in that regard, the accused could not, in principle, be held criminally responsible for failing to do so himself. Where, for instance, the powers and responsibility of a military officer were strictly operational or tactical in character, he may not be charged in principle with a failure to take measures that fall outside of the realm of his operational and tactical competence.⁷⁸

The relevance of domestic law in establishing superior responsibility is, therefore, essentially threefold:

⁷⁷ B. Röling and C. Rüter (eds.), *The Tokyo Judgement* (Amsterdam: University Press Amsterdam, 1977), pp 1042, 1064.

⁷⁸ See *United States v Soemil Toyoda*, War Crimes Tribunal Courthouse, Tokyo, Honshu, Japan, September 1949, 19 *United States v Soemu Toyoda* 5005-5006 (Official Transcript of Record of Trial) ('*Toyoda case*'), p 5013: 'It is the considered conclusion of the Tribunal that the Commander-in-Chief, Combined Fleet, did in actuality exercise only operational and tactical control over the subordinate fleets. That the authority of a Commander-in-Chief should be restricted is for military men difficult to envision, but it is nonetheless true and has been commented upon elsewhere in this judgement. Functionally, the Commander-in-Chief, Combined Fleet, was confined by the nature of the intricate naval organization to planning grand strategy in its broadest scope, and by the very breadth of this concern, had small association with, and bore no responsibility for, the methods employed by the fleet commanders in performance of their missions.' Further in its judgement, the tribunal also dismissed a charge, based on the fact that it attributed to the accused duties and responsibilities that were not his under Japanese law: 'there is small purpose in pursuing this matter further at this point since the Tribunal is convinced that the defendant held no competence or obligation of duty within the meaning of Specification 4 while Chief of the Naval General Staff.'

- (i) Domestic law determines how the general obligation of the state to ensure compliance with humanitarian law, and in particular how its obligation to prevent and punish crimes, is being shared or divided between its various organs. That responsibility has not been placed solely upon military commanders (or civilian leaders), but has often been shared between them and other specialized organs (e.g., military or civilian prosecutors, military police, military security).⁷⁹
- (ii) Domestic law provides the basis to establish what responsibility and duties a superior had within that system to prevent and punish crimes of subordinates.⁸⁰ International law does not prohibit a state from limiting the nature and scope of his commander's responsibility, although it may not, in so doing, render inoperative the general requirement that a commander should adopt necessary and reasonable measures to prevent and punish crimes.⁸¹ In each particular case where superior responsibility charges have been brought, the court will have to determine what measure or measures were within the legal competence or jurisdiction of the accused when it came to preventing and punishing crimes of subordinates, and how this general duty has been organized within the state hierarchy, so as to determine what failure of duty could be attributed to the accused and so as not to attribute to

⁷⁹ In the *Halilovic* Judgment, for instance, the ICTY Appeals Chamber made it clear that domestic or internal rules (in this case, the rules applicable to the Bosnian government army) were relevant to establishing what authority was responsible to conduct an investigation on military personnel suspected of killing civilians (see, generally, *Halilovic* Appeal Judgment, pars 183-184).

⁸⁰ *Ntagerura et al* Appeal Judgement, pars 342-343.

⁸¹ For instance, in the *High Command* case, the Tribunal noted the following in relation to military commanders in occupied territories: 'It is the opinion of this Tribunal that a state can, as to certain matters, under international law limit the exercise of sovereign powers by a military commander in an occupied area, but we are of the opinion that under international law and accepted usages of civilized nations that he has certain responsibilities which he cannot set aside or ignore by reason of activities of his own state within his area.' (re-printed in L. Friedman, *The Law of War, A Documentary History*, (London: Random House, 1972) ('Friedman, Law of War'), Vol II, p 1451).

him responsibilities that were not his own under domestic law.⁸² Thus, the determination of what the accused may be said to have failed to do can only be based on what domestic law – and by a rippling effect, international law – required him to do in this matter. It also means that the accused may not be blamed – nor may he be found criminally responsible – for a failure to adopt measures or take steps which he was not required by domestic law to adopt because, for instance, these measures were the responsibility of another individual, organ or entity. The duties resulting from that distribution of tasks and responsibility will, however, be interpreted in light of the international instrument from which they derive or, generally, in light of the demands and requirements of international law.⁸³

- (iii) Domestic law provides the standard against which the conduct of the accused forming the basis of the charges may be measured. Recourse to domestic law will permit the court to determine the extent to which the conduct of the accused, as established on the evidence, constitutes a deviation from the standard that was required of him in this matter.⁸⁴

In the case of a commanding officer and other state officials, domestic law is, therefore, determinative of the scope of and manner in which individuals in a position of authority are required to exercise their duties – including their duty to prevent and

⁸² See, e.g., *Ntagerura et al* Appeal Judgement, pars 342-343. See also Articles 5(2)(c) and 7(2)(c) of Canada's Crimes Against Humanity and War Crimes Act which provides, in relation to non-military 'superiors', that the offence in relation to which a superior may be held criminally responsible must relate to 'activities for which the superior has effective authority and control'.

⁸³ See M. Bothe, K. Partsch and W. Solf, *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1982) par 2.5, p 528.

⁸⁴ Once it has been established what the duties and obligations of that superior were under domestic law and what he did or did not do at the time, the two may be compared. The extent to which the superior's actual conduct reveals a deviation from the required standard may be said to form the basis of the court's assessment of the gravity of the violation of his duties and of the possibly criminal character of his conduct.

punish crimes.⁸⁵ In other words, whilst international law sets out the threshold below which the superior risks engaging his criminal responsibility, it is domestic law which is primarily relevant to determining the question of the superior's compliance or non-compliance with his obligations and extent of deviation therefrom.⁸⁶ But, as will be discussed further below, international law also provides for a minimum standard of conduct – in the form of a general requirement of 'necessary and reasonable' measures to prevent and punish crimes – below which domestic law may not go. A superior person could not, therefore, seek to validate its conduct by pointing to domestic law where that law has placed upon him duties and obligations which fall short of the minimum requirement of international law.

Where the superior has complied with the obligations which domestic law placed upon him to prevent and punish crimes, there is a rebuttable presumption that his conduct was appropriate in the circumstances. To rebut that presumption, the prosecuting authorities would have to establish that domestic law fell short of the requirements of international law and that the conduct of the superior was such that he could not reasonably have assumed that his conduct accorded with international law.⁸⁷ An exception to that general presumption would apply where the law itself constitutes a breach of international law or where that law has been adopted to legalize acts which are otherwise regarded as criminal under international law.

Conversely, a violation by a superior of duties binding upon him under domestic law – as far as pertinent to his obligation to prevent and punish crimes – would be evidentially relevant to establishing that the conduct of the accused fell short of the

⁸⁵ ICRC, *Commentary on the Additional Protocols*, p 1010, par 3537. See also, e.g., *Bagilishema* Appeal Judgement, par 57 concerning the relevance of Rwandan law to the scope of duties of a *bourgmestre*, as the accused was at the time of the crimes. See also *Kayishema* Appeal Judgement, par 299; *Kayishema* Trial Judgement, par 481; *Hadzihasanovic* Article 7(3) AC Decision, par 146.

⁸⁶ Likewise, in multi-national forces, national contingents remain, in principle, subject to their respective national regulations and laws.

⁸⁷ Such an inference will not easily be made by the court as domestic law provides the most direct, and most precise, source of legal obligation for any one commander and international law only a general and mostly vague framework.

required standard.⁸⁸ A simple dereliction of domestic duty does not, however, create a presumption that the conduct of the superior falls short of the international standard of conduct required of him since that standard only sanctions a most serious category of breaches of duty.⁸⁹ Where a breach of domestic law has been demonstrated, the prosecution would, additionally, have to establish that his dereliction constitutes a gross violation of the duties that were binding upon him *qua* international law and that this violation was akin to acquiescence with the crimes of his subordinates.

3.4 Personal dereliction of duty

3.4.1 Attributability

As with other forms of criminal liability under international criminal law, the logic that underlies the doctrine of superior responsibility is that criminal responsibility is personal and based on fault:

The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he was not personally engaged or in some other way participated [...].⁹⁰

Pursuant to the doctrine of superior responsibility, the criminal responsibility of a superior may therefore only be engaged by reason of his failure to comply with his obligations, and by reason of *his own* failure only.⁹¹

⁸⁸ The same principles would apply to assessing the responsibility of non-military leaders.

⁸⁹ See below, 10.3.

⁹⁰ *Tadic* Appeal Judgement, par 186. One Trial Chamber of the ICTR has suggested, however, that command responsibility ‘creates an exception to this principle’ (*Mpambara* Trial Judgement, par 26). This contention is supported by neither precedent nor authority.

⁹¹ *Celebici* Appeal Judgement, par 239; *Krnjelac* Appeal Judgement, par 171; *Hadzihasanovic* Article 7(3) AC Decision, Separate and Partially Dissenting Opinion of Judge David Hunt, par 9. For an interesting example of this principle, though more directly relevant to liability for ‘ordering’, see the findings of the U.S. Tribunal against the accused von Leeb in relation to the passing on of the Commissar Order. The *High Command* Tribunal refused to declare von Leeb responsible for the implementation of this order within his chain of command based on the fact that he did not disseminate that order, that he protested against it, opposed it and refused to obey it. Interestingly, the Tribunal

The impugned conduct must be directly traceable to the superior and must be attributable to him. It must, therefore, be established that the superior had a legal duty to take certain steps to prevent and punish crimes of subordinates and that through personal dereliction on his part, he failed to comply with his obligations. In the words of the *High Command* Tribunal at Nuremberg:

That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.⁹²

As noted above, criminal liability pursuant to that doctrine supposes a grave, intentional and personal dereliction of duty on the part of the superior through which he demonstrates acquiescence with, and thereby contributes to, the crimes of his subordinates. The mere fact of military subordination between the superior charged and the direct perpetrators alone would not be sufficient for criminal responsibility to attach to the former. In other words, the responsibility of the superior is not vicariously related to the crimes of his subordinates:

Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means coextensive. Modern war such as the last war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only

finally noted that '[i]f his subordinate commanders disseminated it and permitted its enforcement, that is their responsibility and not his' (*Von Leeb and others*, *High Command* case, US Military Tribunal sitting at Nuremberg, Judgment of 28 October 1948, in TWC, XI, pp 543-544; also reprinted in L. Friedman, *Laws of War*, vol II, 1458).

⁹² *High Command* case, pp 543-544.

where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.⁹³

Command responsibility is responsibility for the commander's own acts or, rather, for his own omission, in failing to take appropriate remedial actions to prevent or to punish a subordinate when he knew or had reason to know that he was about to commit acts amounting to a war crime or had done so.⁹⁴ His dereliction of duty does not render him, *stricto sensu*, a party to the crimes of his subordinates.⁹⁵

The crimes of his subordinates are not, therefore, 'attributed' to the superior; they merely form the underlying criminal basis in relation to which his own omission might be regarded as criminal. As will be seen below, the commission of a crime by subordinates is a condition of application of the doctrine of superior responsibility though not an element of it. It is also a factor that may be relevant to sentencing.

⁹³ See, e.g., *High Command* case, pp 543-544.

⁹⁴ *Hadzihasanovic* Article 7(3) AC Decision, Separate and Partially Dissenting Opinion of Judge David Hunt, par 9; *Celebici* Trial Judgement, par 400; *Kordic* Trial Judgement, par 447; *Bagilishema* Appeal Judgement, par 35; *Krnjelac* Appeal Judgement, par 171; *Aleksovski* Trial Judgement, par 72; *Hadzihasanovic* TC Decision on Jurisdiction, par 131; *Halilovic* Trial Judgement, par 54. See also *Trial of General Tomoyuki Yamashita*, United States Military Commission, Manila, (8th October-7th December, 1945), and the Supreme Court of the United States (Judgements delivered on 4th February, 1946) as re-printed in *Law Reports of Trials of War Criminals*, Vol. IV, (Buffalo: William S. Hein & Co. Inc, 1997), in particular pp 43-44: '[...] it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified.'

⁹⁵ *Hadzihasanovic* Article 7(3) AC Decision, Partially Dissenting Opinion of Judge Shahabuddeen, pars 32 and 33.

3.4.2 Duties of commanders and duties of subordinates

As noted above, a commander is not to be held criminally responsible for the failure of his subordinates to properly investigate or to take adequate measures to prevent crimes, but only for his own failure to do either of those things.

International law permits commanders to delegate tasks and duties to others in relation to their general obligation to prevent and punish crimes of subordinates. Commanders are, therefore, not required personally to involve themselves in the process of preventing the commission of each and every criminal offence by subordinates neither are they expected to investigate allegations of crimes themselves.⁹⁶ Oftentimes, the superior would not be in position to do so. International law duly recognizes the demands and difficulties of a commanding function and allows for commanders to give a degree of leeway to their subordinates in these matters and, in return, to assume that details entrusted to them are duly and legally executed. Where he delegates such responsibility to some of his subordinates, the commander is in turn entitled to assume that the assignment entrusted to that organ will be properly executed, unless he knows that it will not or cannot carry the assignment. In the *High Command* case, a military tribunal noted that '[w]hile [the accused Von Leeb] had the right to issue orders to his subordinates concerning such matters, he also had the right to assume that the officers in command of those units would properly perform the function which had been entrusted to them by higher authorities'⁹⁷ Just as they are entitled to delegate in principle, commanders are not expected to keep informed of all steps and measures taken in that preventative or investigatory process.

⁹⁶ See, e.g., Commentary to Article 87, Additional Protocol I, par 3563, where it is noted that, although the commander has certain duties under the laws of war, 'this does not mean that he must do everything himself'.

⁹⁷ *High Command* case, p 558. The tribunal also noted that '[m]any administrative duties had been left to [von Leeb's] subordinate armies and his army group rear area. He and his staff alike would have the right to assume that the commanders entrusted with such administrative functions would see to their proper execution. Under such conditions it must be accepted that certain details of activities within the sphere of his subordinates would not be brought to his attention' (*ibid.*, p 555).

In such a situation, unless the commander has received information suggesting that the investigative (or preventive) structure that is not working properly, he would be entitled to assume that the mechanism put in place is capable of preventing or punishing those crimes.⁹⁸ Only where he becomes aware of grave malfunctioning in the chain of command would he be required to intervene.

As already noted, international law allows a superior to delegate to others the responsibility to execute and implement those obligations.⁹⁹ Thus, for instance, '[t]he obligation [of the commander] to prevent or punish may, under some circumstances, be satisfied by reporting the matter to the competent authorities.'¹⁰⁰ The responsibility to carry out investigatory steps would then fall to others.

Not only would a requirement that the commander should take personal control of the process or that he should personally involve himself in the process be impracticable (a commander has other duties than to ensure compliance with humanitarian law) and counter-productive (the commander generally does not have the required skills and expertise to investigate allegations of crimes), but it could also defeat the very purpose of that investigation (insofar as, for instance, the commander himself might have been

⁹⁸ See, e.g., U.S., Federal Court of Florida, *Ford v Garcia*, Judgement, 3 Nov 2000, 289 F.3d 1283, 52 Fed R Serv 3d.

⁹⁹ See, e.g., *Aleksovski* Trial Judgement, par 78; *Blaskic* Trial Judgement, par 302. See also Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, (Geneva: ICRC, Martin Nijhoff Publishers, 1987) ('ICRC, *Commentary on the Additional Protocols*'), par 3562. Thus, for instance, allegations of killing of Argentinean POWs by British forces during the Falklands war of 1982 were referred to the Crown Prosecution Service, which in turn instructed the Metropolitan Police Commissioner to investigate this matter; the Director of Public Prosecutions decided, however, not to mount any prosecution. See, e.g., *The Times*, 20 August 1992 and 9 November 1993. The commander of the troops in question was not involved in the investigation, nor was he required to be by international law.

¹⁰⁰ *Stakic* Trial Judgement, par 461; see also *Blaskic* Trial Judgement, par 335; *Oric* Trial Judgement, par 336; *Halilovic* Trial Judgement, par 100. In the same sense, see *Ford v Garcia*, Judgement, 3 Nov 2000, 289 F.3d 1283, 52 Fed R Serv 3d. See also W. Fenrick, 'Article 28', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), at 93).

directly implicated in the crimes and might be tempted to derail or to manipulate the investigation). Most importantly for the present matter, international law does not contain any requirement that the commander should involve himself personally in the investigation or in the effort to prevent or punish crimes of subordinates. Instead, and as already noted, international law allows for a great deal of flexibility in the manner in which the commander can organise – and delegate – the implementation of some aspects of his duty to prevent and punish crimes.

Where the competent authority to which the matter – of prevention or punishment – has been referred fails to carry out its task, it is that authority, not the commander, which could bear responsibility for that failure. Where, however, the commander becomes aware that this organ is incapable or unable to carry out its mandate or has otherwise demonstrated its unwillingness to do so and that this organ is subordinated to that commander, he would be required to take further measures to ensure that the matter is being properly dealt with and that the effectiveness of the process is not being negated by the delegation of responsibility to others. To the extent that he has delegated some of his obligations to others, a superior is indeed required to ensure that the purpose of preventing or punishing crimes is not undermined or impaired by his decision to do so.¹⁰¹

From an evidential point of view, the fact that a subordinate to whom the task of prevention or investigation of crimes has been delegated has carried out its mandate incompetently or inadequately is no evidence of a failure on the part of his superior unless his inadequacy was known to the superior and that the latter culpably failed to address it. Conversely, the fact that a subordinate to whom such task had been assigned has complied with his own duties does not necessarily permit an inference that his superior has complied with *his* own obligations. Where, for instance, a commander delegates to a subordinate the task of investigating allegations of crimes, that the subordinate does so diligently and sends his report back to his commander suggesting that disciplinary or penal measures should be taken against certain individuals and that the superior culpably fails to follow up on this matter, the

¹⁰¹ See, e.g., *Oric* Trial Judgement, par 573.

responsibility of the superior might be engaged, while his subordinate would in principle be exempt of liability.

3.4.3 Duties of commanders and duties of states

The obligations of a superior which might attract his criminal responsibility must not only be distinguished from those obligations which are born by his subordinates. They must also be distinguished from those that pertain to the state of which the superior is an agent. War crimes tribunals have often wrongly assumed that obligations binding upon a state to ensure compliance with standards of humanitarian law could somehow be transferred onto commanders and superiors who should see to their enforcement.

The assumption that it is up to commanders to implement and to ensure compliance with all of the state's obligations under humanitarian law has no support in international law.¹⁰² Such a requirement would also be impracticable since commanders and superiors often have neither the time nor the resources and expertise to carry out such a task. Nor, often, will they have the authority to do so. Equally wrong would be a suggestion that any type of breach of a state's obligations would necessarily imply individual criminal responsibility of the individual who actually committed that breach. Although it may be true as regard the breach of certain types of state obligations (e.g., to prevent or punish acts of genocide), more often than not, it will not be the case. The ICRC Customary Law Study provides, for instance, for obligations of *the states*, and *not of commanders*, to provide instruction in international humanitarian law to members of the armed forces (Rule 142) or to ensure teaching in

¹⁰² See, e.g., OR IX, p 42, CDDH/I/SR.71, par 17, which records discussions and debates during the adoption of Additional Protocol I when a number of states expressed their views that Articles 86 and 87 should not apply in such a way as to result in an unjustified transfer of responsibilities from the level of the government (or other state organs) to commanders in the theatre of operations (see also ICRC, *Commentary on the Additional Protocols*, par 3562). This explains, *inter alia*, that the choice of competent entities to carry particular duties under the laws of war were left primarily to the states to decide and that, for instance, paragraph 1 of Article 87 Additional Protocol I provides that only 'where necessary' must commanders 'suppress and [...] report [breaches] to competent authorities' and also why paragraph 3 of the same provision provides that commanders will initiate disciplinary or penal actions against violators only 'where appropriate' (see ICRC, *Commentary on the Additional Protocols*, par 3562).

international humanitarian law to the civilian population (Rule 143). Likewise, the ICRC Study makes it clear that, under customary international law, the obligation to investigate allegations of war crimes is one which rests primarily upon the state itself.¹⁰³ That general obligation of the state is mirrored in the person of the superior to the extent only that international law – as specified under domestic law – places that duty upon him. When resorting to the doctrine of superior responsibility, courts must, therefore, be careful not to assign individual criminal responsibility to superiors where the duties and obligations that were breached were in fact binding on states only.

International law imposes duties and liabilities upon individuals as well as upon states.¹⁰⁴ The responsibility which might be attributed to a state is by no means exclusive of the criminal or penal liability of those who might have contributed by their acts or conduct to that responsibility. Article 25(4) of the Statute of the International Criminal Court provides, for instance, that “[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law”.¹⁰⁵ The reverse is also true. The International Court of Justice has rightly observed that the ‘duality of responsibility continues to be a constant feature of international law’.¹⁰⁶ The criminal responsibility of state agents and the civil responsibility of the state to which their acts may be attributed do not just run parallel to each other. The criminal responsibility of the agent and the civil responsibility of the state are not alternative responses to an international wrong. Instead, they supplement each other and sanction different types of wrongs. A state would not, therefore, be exempted from responsibility for internationally wrongful conduct by the prosecution

¹⁰³ See J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, 3 vols. (Cambridge: Cambridge University Press, 2005), Vol I : Rules, Rule 158 and Rule 161.

¹⁰⁴ Judgment of the International Military Tribunal at Nuremberg, Trial of the Major War Criminals, 1947, *Official Documents*, Vol. 1, p. 223.

¹⁰⁵ See also ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly resolution 56/83, 12 December 2001), Article 58, which provides that “These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.”

¹⁰⁶ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, (‘ICJ Genocide case’), par 173.

and punishment of state officials who carried it out.¹⁰⁷ And although both types of responsibilities, criminal for an individual and civil-like for the state, might arise from the same underlying conduct, such as a violation of the Genocide Convention, the basis of liability will remain quite different even where the criminal conduct of the agent serves as a foundation for the responsibility of the state.¹⁰⁸ As far as criminal liability is concerned, whether arising under the doctrine of superior responsibility or pursuant to another form of liability, the roots of criminal responsibility lie in the commission of an act or in a conduct which has been criminalized by international law and which can be attributed to a particular individual who satisfy the relevant requirements of *actus reus* and *mens rea*, whilst state responsibility is triggered by a breach of obligations and responsibilities as were binding upon that state under international law and as might result from the conduct of an organ of that state, an agent or another person whose conduct may be attributed to the state.¹⁰⁹

The ‘duality of responsibilities’¹¹⁰ outlined by the International Court of Justice in the Bosnia-Serbia Genocide case means, *inter alia*, that findings of criminal responsibility made by a criminal court can serve as an evidential basis to establish the civil responsibility of a state where the convicted person was an agent of that state or where

¹⁰⁷ ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58, par 3, cited with approval in the ICJ *Genocide* case, par 173.

¹⁰⁸ See ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58, par 3 (“Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.”). During the drafting of the Articles on Responsibility of States, it was decided that states could not be held criminally responsible for committing a criminal offence, but that its responsibility would be civil in nature, not penal (see, generally, J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002)).

¹⁰⁹ See, e.g., ICJ *Genocide* case, pars 169-170.

¹¹⁰ See, in particular, ICJ *Genocide* case, pars 163 and 173.

his conduct could otherwise be attributed to the state.¹¹¹ International law does not permit, however, an inference to be drawn to the effect that obligations of states to ensure compliance with humanitarian standards are necessarily mirrored in the obligations that commanders have to prevent and punish crimes of subordinates. Only a limited set of such duties and obligations are binding upon superiors and even fewer among those might in turn be relevant to the superiors' criminal responsibility. In each case, the court would, therefore, have to satisfy itself that the duty or obligation that has been breached was in fact legally binding upon the commander at the relevant time.

3.4.4 Gravity of breach of duty

A superior is not to be held criminally responsible pursuant to the doctrine of superior responsibility merely because he has breached his duties. First, the duty in question must have been one specifically provided for under international law for the purpose of preventing or punishing crimes of subordinates.¹¹² Secondly, only those failures of duty which arise *after* the superior has acquired sufficient knowledge (or, in one view, ought to have acquired such knowledge), as defined below, could have the effect of engaging his superior responsibility.¹¹³ The violation of duties resting upon the superior prior to that time could not, in and of themselves, have that effect. Such violations could be relevant, however, to assess the overall conduct of the accused, in particular, whether, on the totality of the evidence, he may be said to have possessed

¹¹¹ Thus, in the *Genocide* case, the International Court of Justice made great use of the findings of the Yugoslav Tribunal. It should be noted that findings which ICTY Trial Chamber made at trial and that were not overturned on appeal were treated as highly persuasive by the International Court of Justice. The ICJ termed the working methods of the ICTY as 'rigorous'. The ICTY findings with regard to individual criminal responsibility contributed significantly to the ICJ's assessment of state responsibility.

¹¹² See, e.g., *Halilovic* Trial Judgment, pars 79 *et seq*; *Hadzihasanovic* Trial Judgment, pars 145 *et seq*; *Oric* Trial Judgment, par 330. The Appeals Chamber rejected the terminological distinction or dichotomy drawn by certain Trial Chambers between 'general' and 'specific' measures (*Halilovic* Appeal Judgment, par 64).

¹¹³ See, e.g., *Hadzihasanovic* Trial Judgement, pars 145 *et seq.* 1234, 1434; *Halilovic* Trial Judgement, pars 79 *et seq*; *Oric* Trial Judgement, par 330; *Strugar* Trial Judgement, par 420.

the required state of mind and whether, overall, he may be said to have taken 'reasonable and necessary measures' in the circumstances to prevent or punish crimes.¹¹⁴

Thirdly, to have the effect of attracting the superior's criminal responsibility, the breach of duty in question must be of sufficient gravity. The nature and intensity of the breach of duty, as well as the consequences thereof, are relevant to determining whether the actions of the superior are such that they might engage his superior responsibility. Only a most serious category of breach of those duties might have the effect of triggering the application of the doctrine of superior responsibility. Military command or civilian leadership is no moral assignment and fighting a war as often accompanies charges of superior responsibility leaves little time to those charged with command to ponder the finer points of international law. The primary, and most important, duty of a commander, and of a civilian leader, is to command and to lead.¹¹⁵ As part of this primary function, and subordinated to it, lies a duty of the superior to ensure compliance with the standards of humanitarian law among his subordinates.¹¹⁶ This order of priority in terms of duties of the superior must be fully integrated into the court's considerations when assessing the propriety, adequacy and legality of a superior's conduct.

Taking into account that reality, international law has criminalized not every breach of a commander's duties, but only the most serious deviations of those duties. Command responsibility does not seek to sanction each and every violation of a commander's duties, however minor. Nor does it criminalise the violation of secondary duties and obligations, but only covers that sort of organized criminality that spreads from the commander down the chain of command:

¹¹⁴ *Celebici Appeal Judgement*, par 226; *Halilovic Trial Judgement*, par 88; *Strugar Trial Judgement*, par 420. For instance, a breach of the commander's 'general duty' to remind troops of their duty to take all precaution in the context of military operations would not of itself be enough to entail his individual criminal responsibility.

¹¹⁵ ICRC, *Commentary on the Additional Protocols*, par 3549: 'The first duty of a military commander, whatever his rank, is to exercise command.'

¹¹⁶ As noted above, the extent of that responsibility is mostly decided by domestic law and the way in which the responsibility of the state has been distributed among its various organs.

‘Command responsibility’ is primarily an exigency of the world community, which intends to see to it that ‘system criminality’ – that is, the obnoxious involvement of policy makers in widespread and systematic disregard of human rights – be punished too, so that the root causes of international criminality can be eliminated in the country concerned.¹¹⁷

Ultimately, to engage the superior’s responsibility pursuant to that doctrine, the breach of duty in question must be shown to have been a ‘gross breach’ of those duties and one which must have had grave consequences.¹¹⁸ In effect, the breach must be such as to be tantamount to acquiescence or toleration of the crimes on his part.¹¹⁹ What this requirement means in practice will be discussed further below as regards the third element of command responsibility (a failure to adopt ‘necessary and reasonable measures’ to prevent or punish crimes). It should be pointed out at this stage, however, that mere negligence on the part of the superior would not be sufficient to attract his superior responsibility under international law.¹²⁰

3.5 Connection with the underlying offence

Although the basis for superior responsibility lies in a personal failure on the part of the superior to comply with his own duties, he is not being convicted under international law for a separate crime of ‘dereliction of duty’. Instead, the superior is convicted for the crimes committed by his subordinates which he has failed to prevent

¹¹⁷ See ICTY First Annual Report, par 51.

¹¹⁸ *Bagilishema* Appeal Judgement, par 36.

¹¹⁹ See ICRC, *Commentary on the Additional Protocols*, p 1010, par 3547. In its 1994 Final Report, the UN Commission of Experts Established Pursuant to Security Council 780 [1992] noted that in similar fashion that liability as a commander would only be incurred in case of ‘such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences’ of his acts or conduct. See UN Commission of Experts Established Pursuant to Security Council 780 [1992], Final Report, UN doc S/1994/674, 27 May 1994, par 58. See also *Halilovic* Trial Judgement, par 95.

¹²⁰ See, e.g., *Halilovic* Trial Judgement, par 71; *Bagilishema* Appeal Judgement, pars 35-36. See, however, the Report of the United Nations Secretary-General regarding the establishment of the ICTY (Report of the Secretary-General pursuant to Para. 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (3 May 1993), at par 56), which refers somewhat loosely to command responsibility as a form of ‘imputed responsibility’ or ‘criminal negligence’.

or punish (for instance, rape, murder or torture). This is so because the conduct of the accused, though based on a breach of duty, is closely connected in several important ways to the crimes of his subordinates. The relationship between the conduct of the superior and the underlying offence that forms the basis of the charges against him is described below.

3.5.1 Relation of superior-subordinate and effective control

The first element that connects the superior to the underlying crime is the relationship of authority which binds him with those who have committed that offence. As noted above, a relationship of ‘effective control’ between the parties is the mechanism that triggers the application of the doctrine of superior responsibility to the dominant party in that relationship. But a relationship of ‘effective control’ is not merely one between the superior and the perpetrators. It is also a relationship that connects the superior directly to the crimes themselves. As will be discussed further below, ‘effective control’ means the material ability of the superior to prevent offences or to punish the principal offenders.¹²¹ Thus, a finding of ‘effective control’ depends on proof having been made that the superior was materially able, in the circumstances of the case, to prevent or to punish the crimes with which he is subsequently charged.

In sum, the requirement of ‘effective control’ creates a direct link between the superior and the crimes with which he is charged insofar as superior responsibility depends on proof having been made of the superior’s material ability to prevent or punish those crimes in the first place.

3.5.2 *Mens rea*

3.5.2.1 No liability without knowledge

The conduct of the superior is also connected to the crimes of his subordinates at the *mens rea* level. As noted above, under customary law, superior responsibility is not a form of objective or strict liability, and liability may not, therefore, be entailed by a superior in the absence of proof that the superior knew or had reason to know of crimes committed or about to be committed by his subordinates.

¹²¹ *Bagilishema* Appeal Judgement, par 50; *Celebici* Appeal Judgement, pars 196-198.

Under customary law, a failure or a neglect to acquire such knowledge does not constitute a sufficient basis for liability, and therefore a superior may not be held responsible for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.¹²² In other words, international law does not impose upon commanders a ‘duty to know’ and a superior could not be held criminally responsible for failing to acquire such information.¹²³ Nor can knowledge of a fact ever be presumed.¹²⁴ All circumstances, as might be relevant to his ability to acquire knowledge, will, therefore, have to be taken into consideration. When considering whether General Toyoda knew of his subordinates’ actions, the court noted the following:

It is difficult for reasonable men to conceive that a man of the defendant’s background, intelligence and knowledge of his own people would not know of the commission, or the possible commission of some of these reprehensible acts. However, the acts, so the evidence indicates, were committed in isolated areas, remote in distance and communication and, for obvious reasons, under conditions of secrecy with little discussion by the participants beyond those immediately concerned. The accused could only have gained actual knowledge of the particular events by chance or by engaging upon a task outside the normal duties of his office. The

¹²² *Celebici* Appeal Judgement, par 226; *Blaskic* Appeal Judgement, pars 62-63; *Halilovic* Trial Judgement, par 69; *Strugar* Trial Judgement, par 369.

¹²³ See, e.g., *Hadzihasanovic* TC Decision on Jurisdiction, par 128; *Celebici* Appeal Judgement, pars 226 and 241; *Blaskic* Appeal Judgement, par 62. As noted by one trial chamber of the ICTY, ‘a superior could not be held criminally responsible for not making sure that he was informed of the acts of his subordinates’ (*Prosecutor v Hadzihasanovic et al*, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, 11 March 2005 (*‘Hadzihasanovic* Rule 98bis Decision’), par 165). In 1948, the United Nations War Crimes Commission had noted that there was no support for the suggestion that a commander could be required to discover the standard of conduct of his troops. However, despite the Commission’s belief that ‘it may be that this view will gain ground’, the position was instead abandoned by international law (Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol IV (1948), pp 91-93).

¹²⁴ See, e.g., *Oric* Trial Judgement, par 319; *Celebici* Trial Judgement, par 386; *Naletilic* Trial Judgement, par 71; *Strugar* Trial Judgement, par 368; *Halilovic* Trial Judgement, pars 66 and 69; *Limaj* Trial Judgement, par 524.

evidence in no way supports the fact of his knowledge and the Tribunal therefore cannot consider it as shown or proved.¹²⁵

Superior liability cannot, therefore, arise from a failure to act in spite of knowledge:

Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.¹²⁶

The superior's duty to act, and the consequent liability that may follow, is triggered by the acquisition of sufficient information as would permit him to conclude that his subordinates had committed or were about to commit a crime.¹²⁷

In that respect, customary international law may be said to have evolved quite significantly since the time when the relevant *mens rea* could be inferred from the mere existence of information pertaining to those crimes.¹²⁸ But whilst customary law

¹²⁵ *Toyoda case*, pp 5013-5014. In a number of cases, it has been pointed out by defence counsel that crimes are often unlikely to be reported to superiors for fear of retribution, and that those who committed them thus tend to hide them from their superiors. Although not necessarily true in all cases, this consideration is certainly a relevant factor which the court would have to take into account with all other circumstantial evidence.

¹²⁶ *Celebici Appeal Judgement*, par 226; see also *Halilovic Trial Judgement*, par 69; *Fofana Trial Judgment*, par 245.

¹²⁷ *Bagilishema Appeal Judgement*, par 33; *Kordic Trial Judgement*, par 445; *Kvocka Trial Judgement*, par 317; *Limaj Trial Judgement*, par 527; *Hadzihasanovic Rule 98bis Decision*, par 166; *Hadzihasanovic Trial Judgement*, pars 1042, 1231, 1457; *Oric Trial Judgement*, par 574.

¹²⁸ See, e.g., *Tokyo Judgement*, re-printed in B. Röling and C. Rüter (eds.), *The Tokyo Judgement* (Amsterdam: University Press Amsterdam, 1977), Vol 1, p 30: 'it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.' See, *ibid.*, pp 446-448, concerning the findings of the Tribunal in relation to the accused Kiichiro Hiranuma, and pp 453-454, concerning Iwane Matsui. There has been a similar trend in domestic criminal law away from negligence based standards and towards requiring that the defendant must himself have known a relevant fact or intended a relevant consequence – see e.g. s. 8 of the Criminal Justice Act 1967 in the

stepped away from an objective sort of liability for superiors, the ICC Statute goes back to such a standard insofar as concerns military(-like) commanders by providing that such a commander could be held criminally responsible, not only where he knew or had reason to know that crimes had been or were about to be committed by subordinates, but also where he ‘should have known’ that to be the case. As will be seen below, this standard is open to some serious criticism. At this stage, it is sufficient to note that such a standard does away with the connection that exists under customary law between the state of mind of the superior and the crimes of his subordinates, replacing it with a legal fiction of knowledge on the part of the superior.

It is an unresolved issue whether international law imposes upon commanders an obligation to monitor the activities of his troops. Some recent judgments suggest that this might in fact be the case.¹²⁹ It is doubtful, however, whether the breach of such a general monitoring obligation, if indeed it exists, would be sufficient to attract the superior responsibility of a commander who would fail to comply with it. It seems more likely, and more appropriate, to regard any such failure as a matter of evidential relevance to the issue of whether he, in fact, failed to take necessary and reasonable measures to prevent or punish the crimes of his subordinates.¹³⁰

3.5.2.2 Knowledge and extent thereof

Under customary international law, superior responsibility may only be entailed where the superior ‘knew’ or ‘had reason to know’ that subordinates had committed crimes or were about to commit such crimes. Whilst the expression ‘knew’ means that the superior must have had actual knowledge of those crimes and of his subordinates’ involvement, ‘had reason to know’ means that the superior had in his possession information which would at least put him on notice of the risk of such offences, such information alerting him to the need for additional investigation to determine whether

United Kingdom, which abolished the presumption that a man intended the natural and probable consequences of his own acts.

¹²⁹ See, e.g., *Hadzihasanovic* Trial Judgment, pars 156 *et seq.*

¹³⁰ See *Oric* Trial Judgment, par 330; *Halilovic* Trial Judgment, pars 79 *et seq.*

such crimes were about to be committed by his subordinates.¹³¹ In both cases, the superior must have had sufficient information in his possession to conclude that crimes had been or were about to be committed by subordinates.¹³²

The object of that knowledge must consist of those crimes with which the superior is later charged as an accused person. It would, therefore, not be sufficient to establish that the superior had information that a crime, or any crime, had been or was about to be committed by subordinates. Superior responsibility requires proof that at the relevant time he was aware of those elements that are constitutive of the offence with which he is charged.¹³³ This will include proof that he knew of any special intent relevant to the offence in question.

As noted above, and as will be discussed further below, the standard of *mens rea* applicable to military(-like) commanders before the ICC Statute differs drastically from the standard recognized under customary international law. In effect, Article 28(a)(i) of the ICC Statute imposes liability for negligence or, depending on the interpretation that will be given to the expression ‘should have known’, could even provide for a form of vicarious liability based on a failure of the superior to keep himself properly informed of his subordinates’ actions. The ‘should have known’ test replaces the requirement of the superior’s awareness of his subordinates’ actions with a legal fiction of knowledge based on a failure to keep properly informed.

3.5.2.3 Volitional element

The failure of the superior is related to the underlying offence in yet another way: the superior must be shown, through his acts or otherwise, to have acquiesced with the crime of his subordinates of which he knew or had reason to know. It is not enough that he be shown to have known of those crimes to render him liable under that

¹³¹ *Celebici* Appeal Judgement, pars 223-226; *Krnojelac* Trial Judgement, par 94; *Bagilishema* Appeal Judgement, pars 26-38.

¹³² See, e.g., *Galic* Appeal Judgment, par 184, emphasis added and footnote omitted (‘the “had reason to know” standard will only be satisfied if information was available to the superior which would have put him on notice of offenses committed by his subordinates.’); *Celebici* Appeal Judgment, par 241.

¹³³ See *Krnojelac* Appeal Judgement, par 155.

doctrine. Having acquired sufficient knowledge of his subordinates' criminal activities, the superior must be shown to have deliberately failed to act as he was required to or was reckless as to the likely consequences of his failure to act. In effect, to obtain a conviction on that basis, the prosecution will have to establish that the superior's failure was such that it amounted to a form of 'personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence'.¹³⁴

Therefore, under customary international law, 'criminal negligence is not a basis of liability in the context of command responsibility'.¹³⁵ A superior may only be held criminally responsible pursuant to that doctrine where he knew or had reason that crimes had been committed or were about to be committed and deliberately failed to perform his duties or culpably or wilfully disregarding them.¹³⁶

3.5.3 The underlying offence

3.5.3.1 No liability without an underlying offence

Under international law, superior responsibility presupposes that a crime has actually been committed by subordinates and that this crime has been completed.¹³⁷ A superior could not, therefore, be found criminally responsible in relation to crimes that have merely been planned or attempted by his subordinates.¹³⁸ In other words, superior responsibility does not apply to inchoate offences under international law.¹³⁹ This also means that a mere dereliction of duty on the part of the superior, even a grave one, that is not accompanied by the commission of a completed criminal offence by

¹³⁴ *High Command* case, pp 543-544.

¹³⁵ *Halilovic* Trial Judgement, par 71, citing with approval the finding of the Appeals Chamber in *Celebici* (*Celebici* Appeal Judgement, par 239).

¹³⁶ See *Bagilishema* Appeal Judgement, par 35.

¹³⁷ See, e.g., *Strugar* Trial Judgement, par 373; and also, *Oric* Trial Judgement, par 577.

¹³⁸ *Hadzihasanovic* Article 7(3) AC Decision, pars 204, 209-210.

¹³⁹ See, however, the un-supported finding of the *Oric* Trial Chamber to the contrary (*Oric* Trial Judgment, par 328).

subordinates would not be sufficient to trigger the application of the doctrine of superior responsibility under international law.

The position of international law on that point is also relevant to the issue of *mens rea*. The duty of the superior to act to prevent crimes would not be triggered until that time when he learns that a crime is 'about to be committed'. A superior could not, therefore, be held responsible as a superior for a failure to prevent where he has failed to act having received information that crimes 'were about to be planned or instigated' by subordinates, short of that information providing him with notice of the impending commission of that crime.¹⁴⁰

3.5.3.2 Derivative nature of command responsibility

As noted above, under international law, a conviction based on superior responsibility does not lead to a conviction for 'dereliction of duty' or for any particular category of misprision.¹⁴¹ Instead, liability pursuant to that doctrine is incurred in relation to the actual criminal offence which subordinates have committed and which the superior has failed to prevent or failed to punish.

¹⁴⁰ See *Hadzihasanovic* Trial Judgement, pars 204, 209-210 and *Oric* Trial Chamber, par 328, seemingly misunderstanding the nature of the point made by the *Hadzihasanovic* Trial Chamber.

¹⁴¹ It is interesting to note, in that regard that, in contrast to the position under international law, as described above, some domestic legal systems have drawn a distinction between those failures which may engage the superior's criminal responsibility in regard to the underlying offence committed by his subordinates (say, murder or torture) and those failures in relation to which he would be convicted, not in relation to any criminal offence committed by subordinates, but for a violation of his own duties, i.e., for a category of 'dereliction of duties'. U.S. military regulations applicable before military commissions, for instance, provide for a twofold system. Where the commander or superior has generally failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the offense or offenses, he may be charged for the related substantive offence that was committed by his subordinates. Where, however, the commander has merely failed to submit the matter to competent authorities for investigation or prosecution, his responsibility will be one of 'misprision', and not one for the underlying criminal offence; this offence is not, the instruction makes clear, a lesser-included offence of the related substantive offence (see U.S. Department of Defence, Military Commission Instruction No 2 Crimes and Elements for Trials by Military Commission, 30 April 2003, p. 18-19).

In a way, command responsibility is, therefore, derivative of the crimes committed by the perpetrators.¹⁴² The superior does not – or, in any case, need not – participate in the *actus reus* of the underlying offence.¹⁴³ Nor does he need to share the *mens rea* of the perpetrator to be found responsible pursuant to that doctrine. It is enough that he be shown to have failed to prevent or punish such crimes and that his failure contributed to the commission of the offence (‘failure to prevent’) or to the impunity of the perpetrators (‘failure to punish’). The nature of the causal relationship that links his conduct to the crime will be discussed below.

At this point, it must be noted that superior responsibility is not a case of the superior being held ‘responsible for the crimes of’ subordinates,¹⁴⁴ but responsibility ‘in respect of’ crimes committed by subordinates.¹⁴⁵ Thus, the superior does not become a party to the crimes of his subordinates, nor does he share their responsibility. Rather, it is ‘because of’ those crimes that he should bear responsibility as he culpably failed to act to prevent or punish them when he had the material ability – and the legal duty – to do so.¹⁴⁶

3.5.3.3 No need that subordinate be identified or punished

Superior responsibility does not require, in principle, that the actual perpetrator of the underlying offence be identified.¹⁴⁷ A failure to do so on the part of the prosecution, as

¹⁴² *Oric* Trial Judgement, par 292.

¹⁴³ See *Hadzihasanovic* Article 7(3) AC Decision, Partially Dissenting Opinion of Judge Shahabuddeen, par 32, cited in *Halilovic* Trial Judgement, par 53; *Oric* Trial Judgement, par 239.

¹⁴⁴ *Celebici* Trial Judgement, par 331.

¹⁴⁵ See *Celebici* Appeal Judgement, par 225; *Halilovic* Trial Judgement, pars 43-54; See *Hadzihasanovic* Article 7(3) AC Decision, Partially Dissenting Opinion of Judge Shahabuddeen, par 32; and *Oric* Trial Judgement, par 293.

¹⁴⁶ *Halilovic* Trial Judgement, par 54.

¹⁴⁷ See *Blagojevic* Appeal Judgment, par 287.

will be discussed below, may, however, have evidential consequences upon the prosecution's ability to meet its case.¹⁴⁸

It should also be pointed out that it is not necessary for a superior to be held responsible that the perpetrator himself be charged or convicted for the crime that forms the basis of superior responsibility charges. It is sufficient to establish that the perpetrator was a subordinate of the accused at the time, that he was under his effective control, that the accused had adequate notice of his crime and that the superior culpably failed to prevent or to punish it.

3.5.4 Requirement of causation

3.5.4.1 The issue

The requirement that the conduct of an individual charged with a criminal offence must be causally linked to the crime itself is a general and fundamental requirement of criminal law.¹⁴⁹ However, international case law is contradictory on the point of deciding whether that requirement also applies to the doctrine of superior responsibility and, if it does, what it means in practice. Whilst some decisions suggest that this basic requirement applies to the doctrine of superior responsibility, more recent jurisprudence has taken the opposite tack.

It is the position of this author that international law demands proof of a causal relationship between the failure of the accused and the commission of crimes by subordinates (in regard to his duty to prevent crimes) and between his failure and the resulting impunity of the perpetrators (in regard to his duty to punish crimes).

3.5.4.2 Existing case law and precedents

In the *Celebici* case, a trial chamber of the ICTY held that 'a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior's failure to take the measures within his powers to

¹⁴⁸ See, below, sub-section 8.2.2.

¹⁴⁹ A. Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 1999, 3rd ed.), 124.

prevent them'.¹⁵⁰ In the same judgement, the Chamber later stated, however, that it had found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility and, therefore, concluded that 'causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates'.¹⁵¹ The Trial Chamber went on to add, without offering any support for its proposition, that customary international law did not require proof of a causal relationship between the conduct of the accused and the crimes of his subordinates.¹⁵²

A stream of subsequent judgements from the *ad hoc* Tribunals have adopted the view that 'causality' does not constitute an element to be established to prove superior responsibility, many of them limiting their considerations to a reference to the *Celebici* holding or those judgements that had echoed its finding.¹⁵³ This position appears to fall short of the requirements of customary international law.

¹⁵⁰ *Celebici* Trial Judgement, par 399.

¹⁵¹ *Celebici* Trial Judgement, par 398. See also, *ibid.*, pars 399-400 and *Kordic* Trial Judgement, par 447.

¹⁵² The Appeals Chamber in *Blaskic* noted that the *Celebici* Trial Chamber's finding on that point 'does not cite any authority for that statement on the existence of the nexus [between the acts of the accused and the crimes of his subordinates]' (*Blaskic* Appeal Judgement, par 76).

¹⁵³ See *Blaskic* Appeal Judgement, par 77 and *Hadzihasanovic* Article 7(3) AC Decision, Partially Dissenting Opinion of Judge Shahabuddeen, par 16; *Kordic* Appeal Judgement, pars 830-832. It is not entirely certain whether the Appeals Chamber in this case rejected this ground of appeal on its merit – i.e., whether such a requirement exists or not under international law – or on the narrower basis that it had not been satisfied that the Appellant had met its burden of persuasion on appeal. See also *Halilovic* Trial Judgement, par 78; *Oric* Trial Judgement, par 338; *Brdjanin* Trial Judgement, par 280. The *Ford v Garcia* case (Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283) offers an interesting, though inconclusive, domestic illustration of the existing confusion in this issue. In his instruction to the jury, the district court had instructed the jury to that effect, *inter alia*, that plaintiff could only recover those damages arising from those omissions that can be attributed to the defendant. 'In other words,' the court said, 'there must be a sufficient causal connection between an omission of the defendant and any damage sustained by a plaintiff' (*ibid.*, 1287). In addition to the three elements that form the basis of superior responsibility, the district court said, the jury had to be satisfied that the injuries that form the basis of the charges:

Contrary to the Trial Chamber's ultimate finding in *Celebici*, insofar as precedents and state practice exist in this matter, they point to the conclusion that a causal relationship between the failure of the commander to fulfil his duties and the crimes of his subordinates is required under international law. In the *Hostage* case, for instance, the Military Tribunal said that liability as a commander required –

[P]roof of a *causative*, over act or omission from which a guilty intent can be inferred.¹⁵⁴

The Tribunal went on to say in relation to the charges against the accused Foertsch, a staff officer, that –

[T]he evidence fails to show the commission of an unlawful act *which was the result of* any action, affirmative or passive, on the part of this defendant. His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law. He must be one who orders, abets or takes a consenting part in the crime.¹⁵⁵

In the same case, this time in relation to the accused Von Geitner, another staff officer, the court acquitted the accused as, the court said, the prosecution had failed to show that he took any consenting part in the commission of the crimes 'coupled with the

[W]ere a direct or a reasonably foreseeable consequence of one or both defendants' failure to fulfil their obligations under the doctrine of command responsibility (*ibid.*, 1287).

On appeal, the plaintiff sought to argue that the 'proximate cause' instruction of the district court had been in error, submitting that proximate cause is irrelevant under the doctrine of command responsibility (*ibid.*, 1293). The court of appeal – for the Eleventh Circuit – dismissed this ground of appeal on the basis that the plaintiff's failure at trial to object to the jury's instructions on that point was to be regarded as a waiver of the right to raise on appeal. In a concurring opinion, and relying *inter alia* on the *Celebici* Trial Judgement mentioned above, Judge Birkett expressed a view about the matter, recording the fact that he considered that 'proximate cause' was irrelevant to assigning liability pursuant to the doctrine of command responsibility: 'The doctrine [of command responsibility] does not require a direct causal link between a plaintiff victim's injuries and the acts or omissions of a commander' (*ibid.*, 1298). See also *Hilao v Estate of Marcos*, 103 F.3d 767, 774, 776-779 (9th Cir. 1996).

¹⁵⁴ *Hostage* case p 1261, emphasis added.

¹⁵⁵ *Hostage* case, quoted in LRWTC XV p 76-77 (emphasis added).

nature and responsibility of his position and the want of authority on his part to prevent the execution of the unlawful acts charged'.¹⁵⁶

Judge Bernard, of France, likewise underlined the importance of that requirement to the doctrine of superior responsibility in his Opinion in the *Tokyo Judgment*. Judge Bernard first made the point that 'no-one can be held responsible for other than the necessary consequences of his own acts or omissions'. He went on to add that –

Responsibility for omission supposes, of course, an ultimate commission following the omission, and emanating either from the individual to whom the omission is imputed, or from one or several others. The responsibility for the results of this commission is only imputable to the author of the omission if the commission is the certain result of the latter. The relation of cause and effect may be easily ascertainable when the author of the omission and that of the commission are the same individual; it is no longer the case when they are different. The only possible manner of establishing this causal connection would consist in proving that the author of the omission could by an action of some kind prevent the commission and its direct harmful consequences.¹⁵⁷

The requirement of causality continued to be applied in later war crimes trials. In the *Schonfeld et al* case, for instance, the Judge Advocate indicated that superior liability could only be envisaged where the crimes are 'the natural result of the negligence of the accused; in other words, that a direction from [the accused Harders], given at the correct time, would have prevented any unjustifiable killing taking place'.¹⁵⁸ The same view was taken by the Judge Advocate in the *Baba Masao* case:

In order to succeed [in proving command responsibility] the prosecution must prove [...] that war crimes were committed *as a result of* the accused's failure to discharge his duties as a commander, either by deliberately failing in his duties or by culpably or wilfully disregarding them, not caring whether this resulted in the commission of a war crime or not.¹⁵⁹

¹⁵⁶ LRTWC, XV, p 77.

¹⁵⁷ Reprinted in B. Röling and C. Rüter (eds.), *The Tokyo Judgement* (Amsterdam: University Press Amsterdam, 1977), Dissenting Judgement of the Member from France, p 482, 492.

¹⁵⁸ LRTWC, XI, 70-71.

¹⁵⁹ Summing-up of the Judge-Advocate General (emphasis added) (*Baba Masao* case, Military Court at Rabaul, Judgement, 2 June 1947, re-printed in part in *Annual Digest* 1947, 205 *et seq.*, at 207).

In the *Medina* case, a case arising from the Vietnam War, the court was instructed that where murder charges have been brought pursuant to the doctrine of superior responsibility, those crimes must be shown to have –

*[r]esulted from the omission of the accused in failing to exercise over subordinates subject to his command after having gained knowledge that his subordinates were killing non-combatants.*¹⁶⁰

The same requirement was subsequently enshrined in Article 86(1) of Additional Protocol I which provides that –

The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol *which result from a failure to act when under duty to do so.*¹⁶¹

A similar approach was later adopted by the International Law Commission in Article 6 (Responsibility of the superior) of its 1996 ILC *Draft Code of Crimes Against the Peace and Security of Mankind*, which provides that a military commander may be held criminally responsible for the unlawful conduct of his subordinates ‘if he contributes directly or indirectly to their commission of a crime’.¹⁶²

It is also instructive to note that Article 28 of the ICC Statute provides for the responsibility of a superior in relation to crimes of subordinates where, all other conditions being met, crimes have been committed ‘as a result of’ his or her failure.¹⁶³ The same standard has been adopted in several ICC implementing legislations in countries such as Canada and Great Britain, which provide expressly that to be held

¹⁶⁰ See generally K. Howard, ‘Command Responsibility for War Crimes’, 21 *Journal of Public Law* 7 (1972), pp 10-12 (emphasis added).

¹⁶¹ Emphasis added. It must be noted, however, that this provision is binding *per se* upon states only (i.e., ‘The High Contracting Parties and the Parties to the conflict’), not upon commanders.

¹⁶² The 1991 ILC Draft Code is silent on that point and, therefore, provides no support for either proposition.

¹⁶³ Article 28(a) and (b). See also K. Ambos, ‘Joint Criminal Enterprise and Command Responsibility’, 5 *JICJ* 159 (2007).

responsible, the crimes must have been committed ‘as a result’ of the commander’s failure.¹⁶⁴

Finally, the literature on the subject provides further support for the position that such requirement of a causal link exists under international law.¹⁶⁵ Basic principles of personal liability, which demand that criminal responsibility only be assigned where the accused has himself taken part or has otherwise contributed to the commission of the crime, militate in the same sense.¹⁶⁶

3.5.4.3 Policy reasons

There are sound policy reasons that support the requirement of causality in relation to the doctrine of command responsibility. Proof of a causal relationship between the failure of the accused and the commission of the crimes (‘failure to prevent’) or the resulting impunity of the perpetrators (‘failure to punish’) would guard those charged with superior responsibility against the latent risk of a finding that they failed to adopt ‘necessary and reasonable’ measures while they could in fact do no more than what they did in the circumstances. The requirement of proof of a causal relationship between the superior’s failure and the crimes in relation to which a superior is

¹⁶⁴ No known implementation legislation excludes that requirement of causality, although several of them do not explicitly provide for it, therefore providing support for neither position. Also, some implementing legislation is of little relevance to the present matter as they conceive of command responsibility in a totally different light than under customary international law (for instance, as a crime in itself or as a separate offence, or as a form of complicity, rather than as a *sui generis* form of criminal participation). German law also supports the requirement of a causal link between the alleged failure of the commander and the alleged grave consequences which form the basis of the charges. See Article 41 WStG and § 130 WiG. See also Article 357(1) alt. 3 *StGb*. See also Scholz and Lingens, *Wehrstrafgesetz* (3rd ed 1988), Par 41, mn 2, 17, 13.

¹⁶⁵ See, in particular, O. Triffterer, ‘Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?’, 15 *Leiden Journal of International Law* (2002) 179-205; O. Triffterer, ‘Command Responsibility’, in C. Prittwitz et al, *Festschrift für Klaus Lüdersen – Zum 70. Geburtstag, am 2 Mai 2002*, pp 437-462; V. Nehrlich, “Superior Responsibility under Article 28 ICCSt.: For What Exactly is the Superior Held Responsible?”, 5 *JICJ*, 665 (2007). This author has supported a similar approach in a recent publication (Mettraux, *International Crimes*, pp 309-310).

¹⁶⁶ See *Tadic* Appeal Judgement, par 186.

convicted would provide unassailable evidence that his action would have been necessary and reasonable in the circumstances.

Furthermore, if no causal relation between the actions of a superior and the crimes of subordinates were required, this could in fact create a disincentive for commanders to comply with their duties: knowing that they could be held responsible regardless of any relationship between their actions and the crimes of their subordinates, they might prefer to stay clear of any involvement with those crimes if a failed attempt to prevent or punish crimes may later serve to establish their guilt.¹⁶⁷

Finally, without such a causal link between the failure of the accused and the crimes that form the basis of the charge, one may question whether such failure could ever be regarded as grave enough to meet the requirement of ‘seriousness’ which underlies the doctrine of superior responsibility and which is also found in the statute or charter of international criminal courts and tribunals under different labels.¹⁶⁸ A superior who is not shown in any way to have contributed to the crimes of his subordinates could hardly be accused of ‘affecting the peace of the world’, as Justice Jackson put it.

3.5.4.4 A requirement of causality for command responsibility

In view of the above, and in view of the absence of any reasoned practice to the contrary, it may be concluded that, under customary international law, there is a causality requirement of variable degree for all modes of participation in an international crime under international law, including in relation to command responsibility.¹⁶⁹ One trial chamber of the ICTY, whilst acknowledging the position of

¹⁶⁷ See ‘Note. Command Responsibility for War Crimes’, 82 *Yale Law Journal* (1973) 1274, 1291. For instance, in a situation where a superior learns of crimes committed by subordinates, a commander might be tempted to cover them up even if he had no part in them rather than to punish the perpetrators because his responsibility for failing to prevent the crimes would not be dependent on his having played any part therein.

¹⁶⁸ See, e.g., Article 1 of the ICTY Statute; Article 1 of the ICTR Statute; Article 1(1) of the SCSL Statute; Article 1 of the ICC Statute.

¹⁶⁹ As acknowledged by the *Celebici* Trial Chamber itself, causation has a ‘central place’ in criminal law (*Celebici* Trial Judgement, par 398).

the ICTY Appeals Chamber, came as close to reintroducing the requirement of causality as the binding jurisprudence of the Appeals Chamber would allow.¹⁷⁰

3.5.4.4.1 Causality and failure to prevent

Where superior responsibility charges have been brought for an alleged failure to prevent crimes of subordinates, the prosecution would have to establish that the failure of the commander to act was a significant – though not necessarily the sole – contributing factor in the commission of the crime by subordinates. Put in another way, a relationship of causality must be established in such cases between the commander's failure to act and the crime or crimes committed by his subordinates which form the basis of the charges.

This failure of the superior does not have to be the only cause of the crime. Nor does it have to be its most significant contributing factor. It is sufficient to show that, had the superior adopted necessary and reasonable measures upon learning that a crime was about to be committed by subordinates, he would have been able to prevent that crime from occurring. The contribution that his failure made to the crime lies, not within the actual process of commission of that offence, but earlier in the criminal process. His failure to act effectively created the possibility for his subordinates to commit this crime. In the words of Judge Bernard, cited above, proof must be made that the

¹⁷⁰ In *Hadzihasanovic*, the Trial Chamber appears to have gone as far as it could to state its view that a causal (or quasi-causal) requirement was necessary to liability as commander whilst keeping its finding within the bounds of the Appeals Chamber's binding jurisprudence in the *Blaskic* appeal. Whilst taking stock of that jurisprudence and its apparent rejection of a causality requirement, the Trial Chamber held, nevertheless, that liability as a superior required proof of 'a pertinent and significant link' ('un lien pertinent et significatif', in the French original) between the underlying offence and the omission attributed to the superior (*Hadzihasanovic* Trial Judgement, par 192). The Trial Chamber further noted that a superior is responsible under that doctrine, all other conditions being met, because his omission has created or increased a real and reasonably foreseeable risk that crimes would be committed, that he has accepted that risk and that a crime was indeed committed (*ibid.*, par 193). In that sense, the Chamber concluded, the superior may be said to have substantially contributed to the commission of these crimes (*ibid.*).

superior ‘could by an action of some kind prevent the commission and its direct harmful consequences’.¹⁷¹

In that sense, the contribution which a superior must make to the underlying offence has much in common with the requirement that the contribution of an aider and abetter must be shown to have had ‘a substantial effect’ on the commission of the crime by the principal offender.¹⁷² And there are cases where the line between the two categories of liability may be hard to draw as, for instance, when a superior is found responsible for aiding and abetting a crime because he was present at the scene of a crime and did nothing to prevent or stop the commission of that crime.¹⁷³ However, although the borders of those forms of liability may be co-terminus in such a case, their respective conditions remain distinct. First, whereas liability for aiding and abetting is incurred for an act of practical assistance, encouragement or moral support to the principal offender,¹⁷⁴ the basis of liability *re* command responsibility lies in a failure to act when under a legal duty to do so. But differences are not limited to the conduct from which liability flows. Secondly, in such a scenario, the perpetrators must be shown to have known of their superior’s presence and have taken this as an encouragement. In the case of superior responsibility, by contrast, there is no requirement that subordinates

¹⁷¹ See Reprinted in B. Röling and C. Rüter (eds.), *The Tokyo Judgement* (Amsterdam: University Press Amsterdam, 1977), Dissenting Judgement of the Member from France, p 482, 492.

¹⁷² See, e.g., *Kayishema* Appeal Judgement, par 186; *Celebici* Appeal Judgement, par 352; *Tadic* Appeal Judgement, par 229; *Blaskic* Appeal Judgement, par 46; *Furundzija* Trial Judgement, pars 235 and 249; *Vasiljevic* Trial Judgement, par 70; *Kunarac* Trial Judgement, par 391.

¹⁷³ See, e.g., *Aleksovski* Trial Judgement, pars 64-65; *Vasiljevic* Trial Judgement, par 70; *Furundzija* Trial Judgement, par 232; *Tadic* Trial Judgement, par 689; *Kunarac* Trial Judgement, par 393; *Krnjelac* Trial Judgement, par 88; *Kajelijeli* Trial Judgement, par 769; *Bagilishema* Trial Judgement, pars 34 and 386; *Kayishema* Trial Judgement, par 201; *Kamuhanda* Trial Judgement, par 600.

¹⁷⁴ See, e.g., *Aleksovski* Appeal Judgement, par 62; *Kayishema* Appeal Judgement, par 186; *Celebici* Appeal Judgement, par 352; *Tadic* Appeal Judgement, par 229; *Blaskic* Appeal Judgement, pars 46-48; *Kunarac* Trial Judgement, par 392. An act of ‘aiding and abetting’ could in principle take the form of an act or an omission (see *Oric* Trial Judgement, par 283; *Krnjelac* Trial Judgement, par 88; *Kunarac* Trial Judgement, par 391; *Vasiljevic* Trial Judgement, par 70; *Brdjanin* Trial Judgement, par 271; *Blagojevic* Trial Judgement, par 726; *Kayishema* Trial Judgement, pars 206-207; *Kajelijeli* Trial Judgement, par 766; *Kamuhanda* Trial Judgement, par 597).

knew of their superior's approval or acquiescence with their crimes. Finally, whilst in the above example proof would have to be made that the aider and abettor knew that his presence would encourage or give moral support to the principal,¹⁷⁵ no such requirement applies under the doctrine of superior responsibility. It is sufficient to establish that the superior, with knowledge of his subordinates' crimes, decided not to act upon his duties and thus demonstrated a degree of disregard for his obligations that was akin to acquiescence with or approval of those crimes. Under the doctrine of superior responsibility, his approval or acquiescence with those crimes does not have to be known to the perpetrators.

As will be seen below, there are situations in which the conduct of the accused might fulfil the requirements of two or more forms of liability, including superior responsibility, and where the issue of cumulative convictions in regard to two or more bases of liability will arise.¹⁷⁶

3.5.4.4.2 Causality and failure to punish

The requirement of causality also applies to charges that a superior is responsible for a 'failure to punish' crimes of subordinates. In such a case, the relationship of causality that must be established is not one between the failure of the superior and the crimes of his subordinates. Indeed, in such a scenario, the failure of the superior will necessarily occur after the actual commission of crimes by his subordinates and subsequent also to the superior having learnt of those crimes.

The causal relationship that must be established in such a case is one between the conduct of the superior, on the one hand, and the impunity of the perpetrators, on the other. According to this author, international law requires proof of the fact that the failure of the superior to act upon knowledge of the commission of crimes by his subordinates was a significant contributing factor in the failure of the competent authorities to investigate the crimes, to identify and to punish the perpetrators. In other words, it must be established that the impunity of the perpetrators resulted, at least in

¹⁷⁵ See, e.g., *Kayishema* Trial Judgement, par 201; *Kamuhanda* Trial Judgement, par 600.

¹⁷⁶ See below, 3.6.

part, from the inaction of the superior who knew, had reason to know or, in the case of the ICC, should have known of those crimes.

As will be discussed next, the causal link which must exist between the conduct of the superior and the crimes of his subordinates will not only be relevant to deciding the guilt or innocence of the accused. It will also be of relevance to determine an adequate sentence where a conviction has been entered pursuant to the doctrine of superior liability.

3.5.5 Extent of liability and sentencing

As noted above, the nature of ‘command responsibility’ as a form of criminal liability is pertinent, not only to establishing the conditions under which a person in a position of authority may be convicted under that doctrine, but also to determining the *extent* of his responsibility where he has in fact been found guilty.¹⁷⁷

Three main factors are relevant to determining the extent to which the superior may be held responsible for the crimes committed and also what sentence would be appropriate in the circumstances: the seriousness of his dereliction of duty, the gravity of the consequences of his dereliction and the extent to which his failure may be said to have contributed to the commission of the offence (‘failure to prevent’) or to his subordinates remaining un-punished for their crime (‘failure to punish’).

As a form of liability for omission based on the breach of a legal duty, the accused’s own, personal, dereliction and the extent to which his conduct deviated from the legal standard required of him in the circumstances are the factors most relevant to ascertaining the extent of his liability.¹⁷⁸ The extent of the superior’s dereliction will be measured by comparing the duties which were binding upon him to prevent and punish crimes, and which he had the material ability to adopt, and the conduct which

¹⁷⁷ See *Hadzihasanovic* Article 7(3) AC Decision, Partially Dissenting Opinion of Judge Shahabuddeen, par 33.

¹⁷⁸ See, e.g., *Bagilishema* Appeal Judgement, par 36.

he actually adopted in the circumstances. How this is done, in practice, will be discussed below in relation to the third element of command responsibility.¹⁷⁹

However, and as noted above, the responsibility of a superior is not detached from the underlying offences that form the basis of the charges against him. And the gravity of his conduct as would be relevant to his sentence will be measured, in part, against the consequences of his dereliction, namely, the crime which he failed to prevent or to punish:

As a practical matter, the seriousness of a superior's conduct in failing to prevent or punish crimes must be measured to some degree by the nature of the crimes to which this failure relates. A failure to prevent or punish murder or torture committed by a subordinate must be regarded as being of greater gravity than a failure to prevent or punish an act of plunder, for example.¹⁸⁰

This, in turn, means that, when determining the gravity of the conduct of an accused and when deciding upon an appropriate sentence, the court would have to determine both the gravity of the underlying offence as well as the extent to which the commander's failure contributed to the commission of that crime or to its remaining un-punished.¹⁸¹

The personal dereliction attributable to the commander is thus the vector of liability based on which a commander may be found to be criminally responsible in relation to crimes committed by his subordinates, whilst the gravity of his subordinates' crimes is relevant to determining the extent of that responsibility and the sentence which is appropriate in the circumstances.¹⁸² As noted by one ICTY Trial Chamber:

¹⁷⁹ See below, generally, 10.2-10.4.

¹⁸⁰ *Celebici* Appeal Judgement, par 732.

¹⁸¹ The *ad hoc* Tribunals for the former Yugoslavia and for Rwanda have both pointed out that the most important factor in sentencing is the gravity of the criminal conduct attributable to the accused (see, generally, Mettraux, *International Crimes*, pp 346-350 and references cited therein).

¹⁸² Some authors have referred to command responsibility as a form of 'derivative liability' (see T. Wu en Y.S Kang, 'Criminal Liability for the Actions of Subordinates - The Doctrine of Command Responsibility and its Analogues in United States Law', 38(1) *Harvard International Law Journal* (1997) pp 272, 279 and 282).

The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed.¹⁸³

The doctrine of command responsibility covers many different types of conducts which may vary quite significantly in terms of their respective seriousness.¹⁸⁴ As with other forms of liability under international law, an appropriate sentence will be based primarily on the gravity of his conduct rather than on the legal label that attaches to the form of liability based on which conviction has been entered.¹⁸⁵ As noted above, the primary considerations for sentencing will be the extent to which the conduct of the accused may be said to deviate from his obligations as a superior, the gravity of the consequences of his failure to act and the extent to which his failure in fact contributed to the commission of the crime ('failure to prevent') or to the perpetrators remaining un-punished ('failure to punish').

It is often said that a position of authority of the sort held by a superior might be, and often will be, regarded as a factor relevant to sentencing. Though once or several times removed from the crime when compared to his subordinates who actually committed the crimes, the responsibility of the superior and his degree of moral culpability might

¹⁸³ *Halilovic* Trial Judgement, par 54.

¹⁸⁴ A failure to prevent crimes will, in general, be more serious than a failure to punish. In the first case, the crimes were committed, at least in part, because or as a result of the commander's failure to act, whilst in case of a failure to punish, his contribution to the underlying offence is much more remote.

¹⁸⁵ The *ad hoc* Tribunals have pointed out that the fact that an aider and abettor may not have shared the intent of the principal offender may lessen his criminal culpability compared to that of a principal or compared to that of an accused acting pursuant to a joint criminal enterprise who does share the intent of the principal offender (see, e.g., *Krstic* Appeal Judgement, par 268; *Vasiljevic* Appeal Judgement, pars 181-182; *Kajelijeli* Trial Judgement, par 963; *Vasiljevic* Trial Judgement, pars 71 and 272). As a consequence of this, and all conditions being equal, an aider and abettor who did not share that intent may receive a lighter sentence than that of a principal or a member of a joint criminal enterprise who shares its criminal intent. Ultimately, however, it is the gravity of the accused's conduct that will determine an appropriate sentence, not the legal labelling of that conduct (*ibid.*). See, also, Rule 145 of the ICC Rules of Procedure and Evidence.

in some cases be greater than theirs.¹⁸⁶ It should be pointed out, however, that a rank or a high-position in the hierarchy may not serve at once as a basis for conviction under the ‘superior responsibility’ doctrine and, also, as an aggravating factor when it comes to sentencing.¹⁸⁷ Where the accused has been convicted pursuant to the doctrine of command responsibility, the fact that he was in a position of authority *vis-à-vis* those who committed the crimes may not be regarded as an aggravating factor for sentencing, in addition to being a condition of his liability.¹⁸⁸ Doing so would result in his position being counted twice as relevant to his sentence. His conduct could be aggravated in several other ways, however, as for instance where the evidence suggests that he took an active part in the commission of the crimes by his subordinates.¹⁸⁹ Likewise, an on-going and lengthy failure on the part of a superior to comply with his duties would in principle be more serious than an isolated incident of dereliction of duty.¹⁹⁰

Where an individual in a position of authority has been convicted, not pursuant to the doctrine of superior responsibility, but for another type of culpable involvement, his position in the hierarchy or, rather, the abuse of that position for the purpose of

¹⁸⁶ See e.g., in relation to the issue of referral of cases to national jurisdiction, the holding of the ICTY Trial Chamber in *Prosecutor v Delic*, Decision on Motion for Referral of Case Pursuant to Rule 11bis, 9 July 2007, par 24.

¹⁸⁷ See, e.g., *Hadzihasanovic* Trial Judgement, footnote 4877, page 712; *Celebici* Appeal Judgement, par 745 and footnote 1261.

¹⁸⁸ Sentencing patterns at the *ad hoc* Tribunals support the view that, personal conduct and the gravity thereof, not rank, is the determinative factor in sentencing. Compare, for instance, the sentences given to General Enver Hadzihasanovic (five years of imprisonment) or General Tihomir Blaskic (nine years of imprisonment), with the sentence handed to Milorad Krnojelac, a lowly prison commander (fifteen years of imprisonment). Comparison in sentencing before the *ad hoc* Tribunals is rendered more difficult by the fact that, in most cases, conviction is entered both pursuant to Articles 7(3)/6(3) and Articles 7(1)/6(1) of the Statutes, that is both for ‘command responsibility’ and for another mode of ‘direct’ involvement in the commission of the crime. There is no presumption that a conviction on that basis will necessarily lead to a heavy sentence, and many sentences for command responsibility have in fact been relatively modest in comparison to the gravity of the underlying offence in relation to which it was applied.

¹⁸⁹ *Celebici* Appeal Judgement, par 736. See also *Aleksovski* Appeal Judgement, par 183.

¹⁹⁰ See *Celebici* Appeal Judgement, par 739.

participating in a criminal offence, could be regarded as an aggravating factor.¹⁹¹ It must be insisted that the holding of a position of authority would not *per se* render a criminal conduct more serious.¹⁹² A position of authority would only have that effect where the person holding such a position abused it or used it with a view to furthering his criminal actions or that of others.¹⁹³ In all cases, the establishment of responsibility and the extent thereof is based on an assessment of the accused's personal conduct rather than on his rank.

3.6 Overlap of types of liabilities

Often, violations of international humanitarian law on the part of individuals in a position of authority will fulfil the elements of several modes of liabilities. For instance, a military commander who agrees with civilian authorities to forcibly displace civilians of another ethnic group using his troops for that purpose could be charged both as a member of a joint criminal enterprise to commit this crime and pursuant to the doctrine of superior responsibility insofar as crimes were committed – in part – by his own subordinates. Also, where a commander fails to comply with his obligations over a long period of time and that crimes continue to be committed during

¹⁹¹ See, e.g., *Krnjelac* Trial Judgment, par 512; *Krstic* Trial Judgment, par 709; *Sikirica* Sentencing Judgment, par 172; *Celebici* Appeal Judgment, par 736; *Aleksovski* Appeal Judgment, par 183; *Babic* Sentencing Judgment, pars 54-62.

¹⁹² See, e.g., *Hadzihasanovic* Trial Judgement, par 2076; *Krstic* Trial Judgement, par 709: 'A high rank in the military or political field does not, in itself lead to a harsher sentence.' The Prosecutor of the ICTY has suggested that the importance of commanders and superiors in preventing crimes from being committed, in particular in the context of armed conflict, justifies that exemplary sentences be imposed upon them. In the *Oric* appeal, for instance, the Prosecutor of the ICTY took the view that the doctrine of superior responsibility is "the key to preventing violations of international humanitarian law", particularly in situations of armed conflicts (*Prosecutor v Oric*, The Prosecution's Appeal Brief, 16 Oct 2006, par 233).

¹⁹³ See, e.g., *Krnjelac* Trial Judgement, par 512; *Krstic* Trial Judgement, par 709; *Sikirica* Sentencing Judgement, par 172; *Aleksovski* Appeal Judgement, par 183; *Plavsic* Sentencing Judgement, par 57; *Simic* Trial Judgement, par 67; *Stakic* Trial Judgement, par 912; *Nikolic* Sentencing Judgement, par 135; *Obrenovic* Sentencing Judgement, par 99; *Banovic* Sentencing Judgement, par 55; *Jokic* Sentencing Judgement, par 61; *Mrdja* Sentencing Judgement, pars 51-54; *Babic* Sentencing Judgement, pars 54-62 (in particular, par 59).

that period, it may be that his continued failure to act would cease to be relevant *solely* to his responsibility as a commander, but where it could possibly come to be regarded as a form of ‘aiding and abetting’, ‘incitement’ or even ‘instigation’ to commit crimes if the subordinates are shown to have known of their commander’s awareness of their crimes and that his failure to act contributed to their continued commission.¹⁹⁴

Where the conduct of an accused does, *prima facie*, meet the requirements of several categories of forms of liability, the prosecution has some discretion to decide how to charge the individual and whether to charge him with some or all forms of liability which apply to his conduct.¹⁹⁵ The prosecution has often used that discretion by charging an accused person both as a superior and based on another form of liability such as joint criminal enterprise or aiding and abetting.¹⁹⁶

As far as the court is concerned, where it has been satisfied through the evidence that the conduct of the accused satisfies the requirements of both superior responsibility and those of another form of liability (as principle or accessory) in relation to the same underlying conduct, it would have to decide whether it is legally permissible to convict him on the basis of both forms of liability or only in relation to one of them. The jurisprudence of the *ad hoc* Tribunals suggests that it would be illogical, and unfair, to convict a superior under the doctrine of superior responsibility as well as under another head of liability in relation to the same conduct.¹⁹⁷ It would in fact seem wrong to

¹⁹⁴ See, e.g., *Kordic* Trial Judgement, par 371. In the *Blaskic* appeal, for instance, the ICTY Appeals Chamber pointed out that perpetration of a crime could take the form of an omission where a legal duty is imposed upon an individual – *inter alia* as commander – to care for the persons under the control of his subordinates. In such a case, the Appeals Chamber pointed out, ‘[w]ilful failure to discharge such a duty may incur criminal responsibility pursuant to Article 7(1) of the [ICTY] Statute in the absence of a positive act (*Blaskic* Appeal Judgement, par 663, footnote omitted). See also *Bagilishema* Trial Judgement, par 29, footnote 19 (cited in *Blaskic* Appeal Judgement, footnote 1384): ‘An individual incurs criminal responsibility for an omission by failing to perform an act in violation of his or her duty to perform such an act.’

¹⁹⁵ That discretion is not unlimited however (see, e.g., *Naletilic* Appeal Judgment, pars 102 *et seq*).

¹⁹⁶ See, e.g., the *Krajisnik* case or *Krnojelac* case before the ICTY.

¹⁹⁷ See, e.g., *Blaskic* Appeal Judgement, par 91. See also *Furundzija* Trial Judgement, par 230; *Todorovic* Sentencing Judgement; *Krnojelac* Trial Judgement, par 173; *Naletilic* Trial Judgement, par 81. It is debatable whether a chamber should always and invariably convict an accused under Article

punish an accused for taking part in the commission of a crime whilst at the same time holding him liable for failing to prevent or punish that crime.¹⁹⁸ The United Nations Tribunals have, therefore, demonstrated a clear preference for conviction on one, rather than two, bases of liability and preference has generally been given to conviction pursuant to the more direct mode of participation (rather than pursuant to the doctrine of superior responsibility) where the evidence would have permitted a conviction on both counts.¹⁹⁹ In a situation where the conduct of that accused would satisfy the requirements of both superior responsibility as well as another form of liability and that a conviction should be entered on that basis of that latter form of

7(1) in those circumstances, or whether it should have the discretion to opt for an Article 7(3) conviction if more appropriate in that specific case (see *Krnojelac* Trial Judgement, par 173; *Kupreskic* Appeal Judgement, par 451; *Kamuhanda* Trial Judgement, par 623). Considering that Article 7(3) has not been made subject to Article 7(1) by the Statute and that there is no *a priori* hierarchy between those two provisions and that there may indeed be situations where the conduct of the accused would be best characterized as command responsibility (as where his ‘aiding and abetting’ a crime would be strictly limited to his failure to abide by his obligations as a commander), it is suggested that trial chambers should have the discretion to opt for one rather than the other, depending on the circumstances of the case. See, however, *Stakic* Trial Judgement, par 465, which asserts (but does not support the assertion) that Article 7(3) of the ICTY Statute is ‘an omnibus clause’ which only becomes applicable ‘where the primary basis of responsibility [i.e., Article 7(1)] cannot be applied’. More recently, the Appeals Chamber of the ICTR has gone as far as suggesting that convictions ‘should not be entered under both Articles 6(1) [direct modes of participation] and 6(3) [command responsibility] of the Statute for the same crime based on the same conduct’ (*Gacumbitsi* Appeal Judgement, par 142; see also *Kajelijeli* Appeal Judgement, par 81). Doing so, the ICTY Appeals Chamber said, would invalidate the Trial Chamber’s decision (*Kordic* Appeal Judgement, pars 34-35; *Blaskic* Appeal Judgement, pars 91-92; see also *Kajelijeli* Appeal Judgement, par 81).

¹⁹⁸ The Appeals Chamber of the ICTY has also noted that Article 7(1) of the ICTY Statute, which is concerned with categories of liability for ‘direct’ involvement in the commission of a crime, and Article 7(3), which deals with superior responsibility, connote distinct categories of criminal responsibility (*Blaskic* Appeal Judgment, par 91).

¹⁹⁹ See, references in previous footnote. See, however, *Krnojelac* Trial Judgement, par 173. During the *Halilovic* appeals hearing, Judge Shahabuddeen pertinently queried counsel for the Prosecution whether the ICTY jurisprudence on that point meant that ‘convictions [under both Article 7(1) and 7(3) of the ICTY Statute] cannot be made under both paragraphs or that convictions should not be made under both paragraphs?’ (*Prosecutor v Halilovic*, Transcript of Appeals Hearing, 10 July 2007, pp 61-62).

responsibility, the accused's superior position could be regarded as an aggravating factor in sentencing.²⁰⁰

As noted above, where an accused has been convicted on a basis other than superior responsibility, his position of authority and the use that was made of it to participate in criminal activities could, in some instances, be regarded as an aggravating factor relevant to sentencing.²⁰¹

4 SCOPE OF APPLICATION OF THE DOCTRINE OF COMMAND RESPONSIBILITY

As noted above, the doctrine of superior responsibility may apply, in principle, in both internal and international armed conflicts.²⁰² The differences that exist in the way in which both categories of conflicts are regulated by international law have not had the effect of limiting the application of that doctrine to only one such context. The Appeals Chamber of the ICTY made it clear that the fact that Additional Protocol II, unlike Additional Protocol I, did not provide for specific provisions concerning commanders' obligations to prevent and punish crimes of their subordinates could not be read in such a way as to exclude the application of that doctrine in the context of internal armed conflicts. According to the Appeals Chamber, wherever customary international law recognizes that a war crime may be committed by a member of an organised military force, it also recognizes that a commander may be rendered criminally

²⁰⁰ See, e.g., *Blaskic* Appeal Judgment, par 91. See, also, *Aleksovski* Appeal Judgment, par 183; *Celebici* Appeal Judgement, par 745.

²⁰¹ See, e.g., *Blaskic* Appeals Chamber, par 91. According to the *ad hoc* Tribunals, aggravating factors have to be proved to the same evidential standard as, for instance, elements of crimes, i.e., 'beyond reasonable doubt' (see, e.g., *Celebici* Appeal Judgment, par 763; *Kunarac* Trial Judgment, par 847; *Vasiljevic* Trial Judgment, par 272 and references cited therein).

²⁰² *Hadzihasanovic* Article 7(3) AC Decision, pars 11 *et seq.* See also, generally, *Oric* Trial Judgement, par 291; *Brdjanin* Trial Judgement, par 275; *Hadzihasanovic* Article 7(3) AC Decision, pars 150-179, and references given therein; and Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution of 18 September 2004, 25 January 2005 ('*Darfur* Report'), par 560.

responsible in relation to such a crime pursuant to the doctrine of superior responsibility.²⁰³

Thus, the fact that it was in the course of an internal armed conflict that a war crime was about to be committed or was committed is not relevant to the responsibility of the commander; that only goes to the characteristics of the particular crime and not to the responsibility of the commander. The basis of the commander's responsibility lies in his obligations as commander of troops making up an organised military force under his command, and not in the particular theatre in which the act was committed by a member of that military force.²⁰⁴

The jurisprudence of the *ad hoc* Tribunals suggests that the doctrine of superior responsibility applies not only to situations of armed conflicts, but also to peacetime situations or any situation falling short of an armed conflict.²⁰⁵ State practice on that point is weak however and it remains to be seen whether that position will be adopted in other jurisdictional contexts.²⁰⁶

The fact that the doctrine of superior responsibility might apply both in times of war as well as in peacetime need not mean that it will necessarily apply in the same way in both contexts nor that evidence relevant to establishing its elements in one context will be considered in the same light or that it will be given the same weight in another context. For instance, an inference of knowledge that subordinates have committed crimes or that they are about to do so might be more easily drawn in peacetime where

²⁰³ *Hadzihasanovic* Article 7(3) AC Decision, par 18.

²⁰⁴ *Ibid*, par 20.

²⁰⁵ *Hadzihasanovic* TC Decision on Jurisdiction, par 93(v): 'the doctrine [of command responsibility] has been recognised as applying to offences committed either within or in the absence of an armed conflict'. See also *Hadzihasanovic* Article 7(3) AC Decision, Separate and Partially Dissenting Opinion of Judge David Hunt, par 8, which notes that the principle of command responsibility has been said to be applicable 'to whatever situation reasonably falls within the application of the principle'. Noticeably, neither the Statutes of the UN war crimes Tribunals, nor the Statute of the ICC, limit the application of the doctrine of superior responsibility to situations of armed conflicts. Concerning the applicability of that doctrine to peacetime situations, see also *Maximo Hilao v Estate of Ferdinand Marcos*, United States Court of Appeals for the Ninth Circuit, 103 F.3d 767, 17 Dec 1996.

²⁰⁶ See *Jane Doe et al v Liu Qi et al* (349 F.Supp.2d 1258 (N.D. Cal. 2004)) at 1330; *Hilao III*, 103 F.3d at 777 (quoting *In re Yamashita*, 327 U.S. at 15, 66 S.Ct. 340).'

the absence of the mayhem that generally accompanies warfare makes the circulation and the acquisition of information a more likely occurrence than would be the case where the troops and their commanders are involved in the thick of war. Likewise, an inference of effective control might be more readily drawn where no combat activities are taking place since such activities might render communication between a commander and his subordinates more difficult, and in turn, obedience less certain and discipline a much greater challenge.

Furthermore, the nature of the events surrounding the commission of the crimes might trigger the application of different legal regimes at the domestic level which might in turn provide for different kinds of duties and obligations for commanders. Thus, an obligation which might be binding upon a commander in one context may not necessarily bind him, or not to the same extent, in another.²⁰⁷ In all cases, the court would, therefore, have to determine whether a particular duty or obligation which the superior is said to have failed to adopt was in fact binding upon him in the context relevant to the charges.

5 MILITARY COMMANDERS, CIVILIAN LEADERS, AND OTHER SUPERIORS, WHETHER *DE JURE* OR *DE FACTO*

5.1 Military commanders

The doctrine of command responsibility first applied to military commanders and still applies in its purest form to this particular category of ‘superiors’. The hierarchical structure of the military, the way in which discipline is organised and enforced in that context, and the particular urgency that exists in every army to ensure compliance with

²⁰⁷ Such caution is particularly appropriate where it is suggested that obligations that are binding upon a commander in the context of an international armed conflict are equally binding upon commanders in the context of internal armed conflicts. See *Hadzihasanovic* Article 7(3) AC Decision, par 12. See also H.P. Gasser, ‘Armed Conflict within the Territory of a State’, in W. Haller et als (eds.) *Im Dienst and der Gemeinschaft* (1989), 225, 229.

See also G. Aldrich, ‘Symposium: The Hague Peace Conferences: The Laws of War on Land’, *American Journal of International Law* (2000) 42, 61, criticising the ICTY’s ‘legislative’ tendencies in that regard.

humanitarian standards explain why the doctrine of command responsibility constitutes an important part of any functioning military hierarchy.

The *military* nature of the position held by an accused charged with superior responsibility might be directly relevant to all three elements of that form of liability. First, as discussed further below, the fact that the accused was appointed – *de jure* – as a military commander of the individuals who committed the underlying offence might be an important – though not a sufficient – indication that he was able to exercise effective control over them.²⁰⁸ The powers and authority that normally attach to such role, if effective, would indeed permit the court to draw certain inferences from it. Likewise, the existence or inexistence of binding military orders from the accused to the perpetrators and of reports being sent back from the latter to the former along the chain of command might be evidentially relevant to establishing the accused's authority over the perpetrators. Considering also the particular nature of the military, and the extreme degree of submissiveness to superior authority practiced in such an environment, any deviation from this model would be relevant, in principle, to determining whether the accused in fact had effective control over the perpetrators or whether his authority fell short of that standard.

As far as the required mental state is concerned, a distinction exists as regards military(-like) commanders between the regime applicable under customary international law – as identified by the *ad hoc* Tribunals – and the ICC Statute. Under customary law, the state of mind that must be proved is the same for all categories of superiors ('knew or had reason to know'), though the nature of the accused's function may be *evidentially* relevant to the manner in which that state of mind might be proved. By contrast, and as discussed further below, the Statute of the ICC provides for two distinct standards of *mens rea*: one for military and military-like commanders and one for other superiors.²⁰⁹ Under the ICC Statute, the standard of *mens rea* applicable to military(-like) commanders is not only lower – and, thus, easier to establish for the prosecutor – than the one applicable to other superiors, but it is also lower than the state of mind required under customary international law for all

²⁰⁸ See below, 8.1.2.

²⁰⁹ See, respectively, Article 28(a) and Article 28(b) of the ICC Statute.

categories of superiors. As noted above, to be liable under customary international law, the superior must be shown to have had in his possession sufficient information as would permit him to conclude that crimes had or might have been committed by his subordinates. The ICC Statute, for its part, provides that a military commander could be held criminally responsible without any such information where ‘owing to the circumstances at the time, [he] should have known that the forces were committing or about to commit such crimes’.²¹⁰ As will be discussed further below, this lower *mens rea* has the effect of greatly expanding the scope of superior responsibility of military commanders.

Concerning the third and last element of command responsibility (the requirement that the superior must be shown to have failed to adopt ‘necessary and reasonable measures’), one genuine specificity of military commanders, as distinguished from other categories of superiors, lies in the fact that international humanitarian law provides expressly for a number of duties and obligations which are binding on military commanders.²¹¹ Those rules and provisions will be directly relevant to assessing the scope of a military commander’s duty to prevent and punish crimes of subordinates in a particular instance and the extent to which his conduct may be said to have departed from such standard.

Finally, as with any other category of superiors, a military commander could be held criminally responsible pursuant to that doctrine whether he had a high or a lowly position in the chain of command that linked him and the perpetrators. ‘Depending on the circumstances, a commander with superior responsibility [...] may be a colonel commanding a brigade, a corporal commanding a platoon or even a rankless individual commanding a small group of men.’²¹²

²¹⁰ Article 28(a) ICC Statute.

²¹¹ See, in particular, Article 86 Additional Protocol I and ICRC, *Commentary on the Additional Protocols*, par 3536; see also Rule 153, ICRC, *Customary Study*, Volume 1, pp 558-563.

²¹² See *Kunarac Trial Judgement*, par 398; see also, *Halilovic Trial Judgement*, par 61.

5.2 Non-military leaders

5.2.1 General scope of application of the doctrine of superior responsibility

What determines the boundaries of applicability of the doctrine of superior responsibility is not the *nature* of the role or function (e.g., military, civilian or other) played by an individual, but the *degree of authority* which he is capable of exercising over others.²¹³ In other words, anyone who exercises ‘effective control’, as defined below, and who finds himself in a chain of command with the perpetrators of crimes could be regarded as a superior for the purpose of the doctrine of command responsibility and could in principle be held criminally responsible in relation to crimes committed by subordinates.²¹⁴ The doctrine of superior responsibility could therefore apply, for instance, to paramilitary leaders, to leaders of rebel groups or militias or to the leaders of terrorist groups.

5.2.2 Superior responsibility of civilian leaders

As noted above, the doctrine of command responsibility applies, though not necessarily in the same manner or to the same extent, to any category of superiors as understood in the law of command responsibility, who exercise a sufficient degree of authority over others (i.e., ‘effective control’), including civilian and paramilitary leaders.²¹⁵

²¹³ See, e.g., *Bagilishema* Appeal Judgement, pars 50-51, 55; *Kajelijeli* Appeal Judgement, par 87.

²¹⁴ According to the jurisprudence of the *ad hoc* Tribunals, it is this position of authority over others that forms the basis of an obligation on the part of the superior to prevent and punish the crimes of his subalterns. See, e.g., *Bagilishema* Appeal Judgement, par 50; *Celebici* Appeal Judgment, par 198.

²¹⁵ See, e.g., *Gacumbitsi* Appeal Judgement, par 85 and references given therein; *Bagilishema* Appeal Judgement, par 51; *Celebici* Appeal Judgement, pars 196-197; *Celebici* Trial Judgement, pars 356-357, 363. See also *Darfur* Report, par 558. Already in March 1919, the Commission on Responsibility of the Authors of the War and on the Enforcement of Penalties considered that the principle of superior responsibility could apply to ‘all authorities civil or military’ (Commission on Responsibility of the Authors of the War and on the Enforcement of Penalties, Report presented by the United States to the Preliminary Peace Conference, 29 March 1919, Pamphlet No 32, Division of International Law, Carnegie Endowment for International Peace, re-printed in 14(1) *AJIL* 95 (1920), at 121).

Although the laws of war make it clear that the application of the requirement of ‘responsible command’ is not limited to the commanders of military outfits,²¹⁶ international law does not provide expressly for the applicability of that principle to civilian, terrorist or paramilitary leaders. The absence of a general standard of conduct sanctioned by international law for such leaders is all the more unfortunate given that compared to the relatively homogenous nature of the military hierarchy in most armies, civilian leadership encompasses a much greater variety of roles and responsibilities: presidents of states, ministers, mayors of cities or municipalities, political leaders, police officers, directors of businesses or companies – all of which are hardly comparable when it comes to their duties and obligations.²¹⁷ Nor is the original legal basis for the application of the doctrine of superior responsibility to civilian and paramilitary leaders all that clear.

At Tokyo, when the issue of civilian superior responsibility first arose, the Tribunal had recourse to a simple, albeit legally doubtful, syllogism to solve the problem posed by the absence of a clear legal basis to put forward. The Tribunal held that as governments have certain legal duties under international law (in particular in regard to the treatment of prisoners of war), and governments are in the hands of their ministers and other high-ranking state officials, therefore ministers and high-ranking state officials have the responsibility to ensure the good treatment of prisoners of war. If they failed, they could be held criminally responsible for their conduct. The shortcomings of this view are not hard to fathom. First, under international law, not all duties and obligations of the state are attributable to its officials, and most are not. Secondly, none of the instruments relied upon by the Tribunal provided for the personal, let alone, penal, responsibility of state officials. Responsibility, if any, for a failure to comply with those standards, was with the signatory states. Thirdly, these conventions and instruments to which the Tribunal referred did not provide for a legal duty of individuals (ministers or others), but for legal duties of the State itself. To the extent that the doctrine of command responsibility is liability for a culpable omission to comply with a legal obligation, the Tokyo Tribunal thus circumvented the problem

²¹⁶ See, e.g., Article 1 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907.

²¹⁷ The same is true, though perhaps to a lesser extent, of paramilitary leaders.

of identifying any such obligation insofar as was relevant to civilian leaders by creating a fiction of legal equivalence between the state and its representatives and attributing to the accused duties and obligations that were not their own but those of the state.

Later courts and tribunals have faced the conundrum of locating a source of the legal duty resting on civilian and paramilitary leaders to prevent and punish crimes in three ways. Some have purely and simply ignored this issue and not dealt with it. Such course is generally accompanied by a broad and circular statement to the effect that the law of superior responsibility applies to both military and civilian leaders and that civilian leaders have been held criminally responsible under that doctrine in earlier cases.

Other tribunals have pointed to the duties and obligations of civilian leaders – for instance, mayors or municipal leaders – under domestic law whilst pointing out that their conduct fell short of such standards. Having so determined, the court would go on to conclude that the superior had failed in his duties and could, all other conditions being met, therefore be held criminally responsible. A flaw in that approach is that, although domestic law is relevant to specifying the duties and obligations of superiors as generally stated under international law, it does not provide for an *international* duty, the breach of which would constitute an international crime. On its own, and without else, the violation of domestic laws and regulations might lead to responsibility (even criminal responsibility) under domestic law. It does not provide, however, the foundations for a duty recognized under international law, nor for criminal liability being entailed under that regime.

A third judicial course has been to apply the principle of ‘responsible command’ by analogy to civilian and paramilitary leaders or, rather, to consider that this principle had grown to apply not only to military, but also to civilian and other, leaders. The violation of the fundamental requirements underlying that principle would in turn be said to entail penal consequences. This approach is probably the most satisfactory from a theoretical point of view, though it does not answer all the questions relevant to this matter. Indeed, it might be reasonably argued that international law has come to recognize that to the extent that they are often most capable of ensuring compliance with humanitarian law, and that they are often themselves formally in charge of the

military hierarchy, civilian or paramilitary leaders should bear generally similar responsibilities to those born by military officers and that they should respond in like manner where they breach those duties. Whilst the principle seems sound enough, the practicalities are more complicated. The doctrine of command responsibility is very much fitted to a hierarchical structure of a military sort where obedience is a way of life and where the – vertical – chain of command provides both for the means of control and enforcement (downwards) and for the regular circulation of information and reports up and down the chain of command.²¹⁸ Civilian and paramilitary structures are generally not organized in such fashion or not to the same extent, which renders the application of the doctrine to civilian leaders somewhat unwieldy. As will be seen below, those differences might impact on the ways in which the elements of command responsibility may be proved in the case of civilian or paramilitary leaders, as opposed to military commanders.

But whilst international law may be said to provide for the general principle of liability for civilian – and paramilitary – leaders, it provides little if any detail as to what the obligations as might arise from this principle mean in practice. Whilst the general duties of military commanders are laid down in a number of international instruments, the same may not be said of the duties and obligations of civilian leaders. That explains that courts and tribunals have generally turned to national law to particularise and substantiate the general duty of civilian leaders to prevent or punish crimes of subordinates. It should be reiterated here, however, that whilst not all violations of a superior's obligations under international law might have the effect of engaging a superior's individual criminal responsibility, this is even truer of his non-compliance with domestic standards.²¹⁹ Ultimately, the violation of domestic law will only engage the superior's criminal responsibility under international law if it constitutes, at the

²¹⁸ See, e.g., *Celebici* Appeal Judgement, par 303.

²¹⁹ As will be made clear below, reliance upon domestic law to determine the nature and scope of a superior's duties and obligations serves essentially two purposes: first, to identify those duties and obligations which were within the scope of responsibility or jurisdiction of the accused by law; secondly, to measure the extent to which his actual conduct as established through evidence at trial may be said to deviate from the conduct that was required of him under that legal regime. See, e.g., *Ntagerura et al* Appeal Judgement, pars 342-343.

same time, a violation of international law as was binding on the superior at the time and only if that violation has been endowed with penal consequences by international law.

The difficulties and ambiguities in identifying the duties and obligations of civilian leaders which might have criminal consequences under international law might explain that the doctrine of superior responsibility has only rarely been applied to civilians. Where, for instance, there is evidence of personal involvement in the commission of the crimes on the part of the accused or where crimes have been committed together by a group of individuals some of whom were not in a superior-subordinate relationship, other forms of liability – such as ‘joint criminal enterprise’ – have generally been preferred to superior responsibility charges.²²⁰

Civilians and military leaders are under a general obligation to adopt necessary and reasonable measures to prevent and punish crimes of their subordinates.²²¹ However, the nature of the authority exercised by the superior might be relevant to establishing whether those elements have in fact been met in the particular circumstances of the case.²²² The Appeals Chamber of the Rwanda Tribunal has thus pointed out that although the same *degree* of control over the perpetrators (i.e., ‘effective control’²²³) must be exercised by both civilian and military leaders for them to be found liable under that doctrine, the *manner* in which that control may be exercised might vary

²²⁰ Consider, for instance, the basis on which Mr Krajisnik, an influential Bosnian-Serb politician, was convicted (*Krajisnik* Trial Judgement) or the charges brought against Mr Seselj, a Serb politician (*Prosecutor v. Vojislav Seselj*, Modified Amended Indictment, 15 July 2005). In many recent examples, both types of charges have been brought cumulatively. For an interesting discussion of the differences and similarities between joint criminal enterprise and superior responsibility, see K. Ambos, “Joint Criminal Enterprise and Command Responsibility”, 5(1) *JICJ* 159 (2007).

²²¹ See *Brdjanin* Trial Judgement, par 283; *Celebici* Appeal Judgement, pars 196-197; *Ntakirutimana* Trial Judgement, par 819; *Kayishema* Trial Judgement, pars 213-215; *Musema* Trial Judgement, par 148.

²²² *Celebici* Appeal Judgement, par 240; *Brdjanin* Trial Judgement, par 283. As noted above, this is the position under customary international law, as identified by the *ad hoc* Tribunals. The ICC Statute, by contrast, draws a distinction between the *mens rea* applicable to military commanders on the one hand and non-military superiors on the other (see below, 9.1.1-9.1.2).

²²³ Concerning the meaning of this expression, see below, 8.2.

from a civilian context to a military one.²²⁴ This, in turn, will have evidential consequences both in relation to the nature and the amount of evidence which must be put forward by the prosecution to establish such control in relation to a civilian accused.²²⁵ The absence of a vertically-integrated chain of command and the absence of a culture of obedience and submission to strict discipline in the civilian context might foreclose certain inferences which would otherwise be open in a military setting.

Proof that a civilian leader possessed the requisite *mens rea* might also pose specific problems to prosecuting authorities. Whilst the transmission of regular information to a superior via a functioning military chain of command might allow for some inferences to be drawn as to the extent of a superior's knowledge, no such inference might be possible in a civilian context unless a similarly hierarchical and pyramidal system of reporting was in place at the time within that structure. Before the ICC, these evidential differences were replaced by a dual standard of *mens rea*: one for military(-like) commanders and one for non-military superiors, including civilian leaders.²²⁶ The ICC regime will be discussed below.

Finally, as regards the third element of superior responsibility (a failure to adopt 'necessary and reasonable measures'), the measures which a civilian leader may be required – and which he might be materially able – to adopt when he learns of crimes committed by subordinates will generally differ a great deal from those which a military commander would be required to adopt.²²⁷ What might be 'necessary' or

²²⁴ *Bagilishema* Appeal Judgement, pars 52 and 55; *Kajelijeli* Appeal Judgement, par 87; *Aleksovski* Appeal Judgement, par 76; *Celebici* Trial Judgement, pars 377-378; *Aleksovski* Trial Judgement, par 78.

²²⁵ See, *inter alia*, B. Bonafe, "Finding a Proper Role for Command Responsibility", 5 *JICJ* 599 (2007), noting the specific difficulties involved in proving the existence of a 'civilian' relationship of superior-subordinate.

²²⁶ Article 28(a)-(b) ICC Statute.

²²⁷ Thus, whilst a civilian leader might be required by his domestic law to call upon the assistance of the civilian police or the public prosecutor's office, as the case might be, a military commander's duties and obligations will generally be limited to having recourse to resources and mechanisms available to him within his military chain of command. Again, domestic law, rather than international law, will detail the nature and scope of a superior's obligations in that regard (see, above, 3.3).

‘reasonable’ for a military commander in a particular context might not, therefore, and often will not, be so for a civilian superior, and vice-versa.

The dividing line between those who could be regarded as being military commanders and those who should be regarded as civilian leaders can, in some cases, be a hard one to draw. It may also be plainly artificial to seek to do so when a particular official has duties of a dual sort, civilian and military.²²⁸ Should one such individual be charged on the basis of the doctrine of superior responsibility as known to customary law, the issue for the court to decide would not be to determine which aspects of his mandate prevails over the other – civilian or military – but whether this individual had effective control over the perpetrators and what his duty to prevent and punish crimes involved considering that his responsibility extended to both the military and the civilian structures. Under the Statute of the ICC, however, and because the standard of *mens rea* relevant to both categories of superiors differ significantly, the Court would be required to make a preliminary finding as to whether the accused should be regarded as a ‘military commander or a person effectively acting as a military commander’ or as a non-military commander.²²⁹ Depending on that preliminary finding, the standard of *mens rea* to be proved would differ quite significantly.

Finally, it should be pointed out that the applicability of the doctrine of superior responsibility to civilian leaders is not limited to civilians who hold public offices or to those who are acting on behalf of a state. In a recent appeals judgment, the Appeals Chamber of the United Nations Tribunal for Rwanda thus held that superior responsibility for a civilian leader did not require that the accused exercised any sort of ‘*puissance publique*’ or a state-like type of authority over others.²³⁰ It is enough, the Appeals Chamber held, that he was in a hierarchical chain of authority with the perpetrators and that he was, at the time of the crime, in a position to exercise effective control over them. For instance, the owner or the manager of a privately-owned

²²⁸ That would be the case, for instance, in a country where the president is regarded, by law, as commander-in-chief of the army.

²²⁹ See below, 9.1.1-9.1.2.

²³⁰ *Nahimana Appeal Judgment*, par 785.

company or the leader of a political party could fall within the terms of that doctrine.²³¹

5.2.3 Superior responsibility of paramilitary commanders and similar leaders

Responsible command and paramilitary leaders

The requirement that a superior should be shown to have had a particular legal duty to act in the manner alleged by the prosecution creates specific problems where the duties and obligations of certain types of leaders has not been expressly provided for under either international or domestic law. Such is the case, for instance, with paramilitary leaders or the leaders of terrorist groups. In such cases, neither international law, nor national law, explicitly provides for a set of duties and obligations that would be specifically binding upon such leaders.

How does the requirement of a pre-existing legal duty to act translate in the case of superiors such as paramilitary leaders whose responsibility and duty are not expressly laid down in any detail in either international or domestic law? Faced with this question, recourse is sometimes made to a legal fiction: once an individual has the material ability to prevent and punish the crimes of others, he may be said to be in effective control of those people and may, therefore, also be said to have a duty to adopt those measures which he is able to take. If he fails to do so, he may be held criminally responsible for this failure. This legal fiction is unsatisfactory in several respects. First, *de facto*, this reasoning dispenses with the separate and additional requirement recognized by international law of a pre-existing 'legal duty' to act, merging it instead with the question of the superior's *ability* to take certain measures. Secondly, if a superior were said to have a duty to adopt all those measures which he is able or capable to adopt, the source of his duty to act in a certain way – and the source of the consequent liability that would ensue if he does not so act – would cease to be the law. Instead, the basis of his responsibility would consist of his presumed ability to

²³¹ The doctrine has been applied by the ICTR, for instance, to the director of a tea factory (*Musema* case before the ICTR) and to the senior management of a radio station (*Nahimana et al* case before the ICTR).

affect a certain result. In other words, his conduct could not be assessed against an abstract, general, required standard of conduct – the rule of law – but against what he is said to have been capable of achieving. This would generate great legal uncertainty and also create a risk of unfairness to the accused. Thirdly, the above legal fiction does not resolve the question of the pre-existence of that duty: if a superior is convicted for failing to take a certain measure, how could it be established, independently of his failure to adopt it, that he indeed had the material ability to adopt that very measure? How could the court determine that he was able to take certain measures when the only available evidence is, precisely, that he did not take such measures? The legal fiction thus quickly becomes self-justifying. Lastly, if such a course was taken, anyone who could positively contribute to the prevention or punishment of a crime, however removed from it, could be said to have had a legal duty to do so and could in turn be found criminally responsible for failing to do what he or she had the power to do to prevent or punish those crimes.²³² Such a result, clearly, was never intended by the doctrine of superior responsibility.

It would, therefore, appear that the requirement of a pre-existing legal duty to act and the breach thereof must be kept separate from the issue of the superior's *ability* to adopt particular measures to prevent and punish crimes of subordinates in a particular situation. It must be accepted that the principle of 'responsible command' which originally applied to military commanders has now grown to apply to all superiors who are able to exercise effective control over others. Such a view keeps the issues of a relationship of subordination ('effective control'), of a legal duty to act ('responsible command') and of the scope thereof ('necessary and reasonable measures') clearly distinct and separate.

When it comes to determining individual measures which a paramilitary leader would be required to adopt and in relation to which he could be held responsible where he has failed to do so, regard must again be given to the basic requirements contained in the

²³² In the above mentioned example, the train official near Auschwitz who is fully aware of the fate reserved for those transported by train through his station, but who does nothing to prevent those trains from reaching their destination, although he could have derailed them, could be said to have had the ability to prevent crimes and thus have had an obligation to prevent them. If he fails, the theory goes, he would be criminally responsible.

concept of ‘responsible command’. Importantly that standard does not contain a list of measures which a commander is required to adopt pursuant to that principle.²³³ It might not, therefore, be argued that a paramilitary commander could be held responsible simply because he failed to take certain specific measures – say, write a report to the military authorities or set out a commission of investigation – merely because he *could* possibly have done so. Instead, all the principle of responsible command requires is that the commander makes a good-faith and adequate attempt to prevent and punish crimes of which he knows or has reasons to know about. In all cases, however, steps taken by a commander must be commensurate with the values which the principle of responsible command seeks to protect and must, therefore, be calibrated to the risk which exists of a crime being committed or the need to see that a crime be punished. If the conduct of the accused may be said to fall within these boundaries, he could not in principle be held criminally responsible – even where other measures could possibly have been adopted by him.

The rather scanty and basic, some might say lenient, set of duties which are applicable to paramilitary leaders might dissatisfy those who would wish the law to be more encompassing and stricter with individuals whose very existence generally lies beyond the law and whose actions have often caused great suffering to innocent civilians. But the duties and responsibility of commanders, whether they are paramilitaries or legitimate military commanders, may only be dictated by what the law requires of them, not by what morality might reprove or what one may wish the law to be. In the case of paramilitary and similar leaders, the law only provides for the most rudimentary set of obligations and the criminal responsibility of those leaders is to be assessed accordingly.

Further, it should be reiterated once more that command responsibility was never intended to criminalize each and every departure from an ideal model of conduct. Rather, command responsibility is intended to criminalize only the most serious and

²³³ See, e.g., Articles 1 and 43 of Hague Regulations and Article 19 of 9th Hague Convention concerning bombardment by naval forces in time of war, as well as Article 26 of 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. See also *Hadzihasanovic* TC Decision on Jurisdiction, par 69.

systemic departures from that standard.²³⁴ The law of command responsibility as applies to paramilitary leaders, as discussed above, would appear to fall squarely within that realm.

Specific evidential challenges

Difficulties pertaining to establishing the superior responsibility of paramilitary leaders are primarily evidential in nature, rather than legal. In a paramilitary unit or within a similarly amorphous structure, proof of a hierarchical or organized chain of command, and proof of its members' positions therein, are often difficult to figure out.²³⁵

The organization, functioning and composition of any such outfit might vary a great deal from one to the other and relationships of authority within such a structure might fluctuate and change a great deal over time.²³⁶ This, in turn, might complicate the task of prosecuting authorities when seeking to establish the capacity of an individual to exercise effective control over others within that structure. Proof of such a relationship is not rendered impossible by the informal nature of the command structure, but it certainly renders it evidentially more challenging.²³⁷

More difficult still, from a prosecutorial point of view, would be to establish that a paramilitary or a similar entity and its members were acting under the effective control of other individuals who are located *outside* of that structure. Where such a relationship can be proved, superior responsibility could apply to those outside the paramilitary structure if they can be shown to have had effective control over its

²³⁴ See ICTY First Annual Report.

²³⁵ See, e.g., the findings of the Commission of Inquiry into Darfur concerning the 'Janjaweed', at *Darfur* Report, pars 106-110. See also ICTY indictment against Mr Raznjatovic, aka 'Arkan', the famous leader of a paramilitary outfit known as the 'Tigers' (*Prosecutor v Zeljko Raznjatovic*, Initial Indictment, 30 September 1997, in particular pars 3.1-3.4). Mr Raznjatovic was murdered before he was apprehended and, therefore, was never tried before the ICTY.

²³⁶ See, e.g., *Darfur* Report, pars 106-110, concerning three different categories of 'Janjaweed' groups.

²³⁷ See, e.g., *ibid.*, pars 561 and 564, concerning the possible application of the doctrine of superior responsibility to rebel leaders. The indefinite nature of such an outfit might also complicate the prosecution's task to prove that such a leader knew of crimes committed by members of his group and that he failed to take steps that were required of him to prevent and punish such crimes.

members and that there existed between them a chain of command, albeit an informal one.²³⁸

As already pointed out above, the ICC Statute draws a distinction, as far as *mens rea* is concerned, between military commanders or persons effectively acting as military commanders and non-military commanders. It is unclear in which of these categories paramilitary leaders would fall and whether they would systematically be placed in one category rather than the other or whether this would depend on the nature of the authority which the accused actually exercised in a particular case.

5.3 *De jure* superiors and *de facto* superiors

Modern warfare, and the context in which international crimes are committed, is continually evolving; today, warfare is increasingly involving irregular combatants and informal formations. The doctrine of command responsibility has evolved in parallel to these developments and provides the normative resources to ensure continued compliance with international criminal law from all actors, including guerrilla movements, paramilitaries, terrorists and others, both in the theatre of war and in peace.

As far as the law of superior responsibility is concerned, its most significant evolutionary development has been the recognition in recent years that not only those legally elected or legally appointed to command (i.e., '*de jure* superiors') could be regarded as responsible leaders for the purpose of that doctrine. Under international law, any individual who is able to exercise 'effective control' over others and with

²³⁸ In its Report on the situation in Darfur, the Commission of Inquiry set up by the Security Council pursuant to Resolution 1564 (18 September 2004) concluded, for instance, that –

When militias attack jointly with the armed forces, it can be held that they act under the effective control of the Government, consistently with the notion of control set out in 1999 in *Tadic (Appeal)* at §§ 98-145. Thus they are acting as *de facto* State officials of the Government of Sudan. It follows that, if it may be proved that all the requisite elements of effective control were fulfilled in each individual case, responsibility for their crimes is incurred not only by the individual perpetrators but also by the relevant officials of the army for ordering or planning, those crimes, or for failing to prevent or repress them, under the notion of superior responsibility.

Darfur Report, par 123; see also, *ibid.*, pars 98-99, 111-120, 124-125. Concerning the factors that might be relevant to establishing such a relationship of effective control, see, in particular, *ibid.*, pars 111-116.

whom he shares a chain of command could be found responsible in principle pursuant to that doctrine, regardless of any official mandate or legal appointment to that effect.²³⁹ Such leaders are commonly referred to as '*de facto* superiors'.

A *de facto* relationship of command or authority is one that is first and foremost defined negatively: it is a relationship of subordination that is *not* based on a legal appointment or that is not formally recognized as a position of authority by the law (other, that is, than by the law of command responsibility). *De facto* superiors are those who have ascertained enough authority over others to exercise effective control over them, without their relationship having been formally recognized under the relevant domestic laws.²⁴⁰

This category of relationship of authority expresses in legal terms the practical realization that in many modern armed conflicts compliance with humanitarian standards depends to a great extent on those who, although not formally and legally appointed to command, have the effective ability to exercise powers similar to those of a *de jure* commander and who may thus play a similar role in enforcing those standards. The Appeals Chamber of the ICTY has recognized this fact without ambivalence:²⁴¹

The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce

²³⁹ See, e.g., *Gacumbitsi* Appeal Judgement, par 85 and references cited therein; *Bagilishema* Appeal Judgement, par 50; *Celebici* Appeal Judgement, par 192; *Halilovic* Appeal Judgment, par 59.

²⁴⁰ This would be the case, typically, of a relationship between the head of a paramilitary unit and his men, or between the leader of a terrorist outfit and members of his group.

²⁴¹ *Celebici* Appeal Judgement, par 193. See also, *ibid.*, pars 192-195, 266. See also, e.g., *Bagilishema* Appeal Judgement, par 50; *Kordic* Trial Judgement, pars 405-406.

humanitarian law against *de facto* superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander.

5.4 Several superiors criminally responsible in relation to the same crimes

Two or more superiors could be held responsible pursuant to the doctrine of superior responsibility in relation to the same underlying crime, all other conditions being met, if it is established that the principal offenders were under the command of those superiors at the relevant time.²⁴² Therefore, two commanders could, in principle, be held responsible for the acts of subordinates which were subject to a dual chain of command if the subordinates were subjected to both chains at the time of the crimes.²⁴³ In all cases, however, dereliction, fault and responsibility insofar as relevant to the doctrine of command responsibility are and remain personal. They may not be imputed to others, nor can they be inferred from the fault of another person.

From an evidential point of view, the failure of a superior to prevent or punish crimes of subordinates may not be inferred from the fact that his own superiors have failed in their duties. However, the unwillingness or inability of the upper echelon to do anything about the crimes could under certain circumstances offer a valid defence to a lower-ranking commander, or at least allow him to seek from the court a finding to the

²⁴² See, e.g., *Krnjelac* Trial Judgement, par 93; *Blaskic* Trial Judgement, pars 303-304; *Aleksovski* Trial Judgement, par 106; *oric* Trial Judgement, par 313; *Limaj* Trial Judgement, par 522. It should be pointed out that the responsibility and 'indictability' of a particular officer or superior does not depend in principle on his own superior being prosecuted. See *United States v Pohl and others*, Vol V, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, Supplemental Judgement of the Tribunal, 1168, 1171. One has to reserve the case where the prosecution of a particular accused person would constitute an abuse of the process (see *Celebici* Appeal Judgement, pars 596 *et seq*, concerning the decision of the ICTY Prosecutor to indict and prosecute the accused Esad Landzo and the issue of 'selective prosecution').

²⁴³ In those armies that were born out of the Yugoslav People's Army (JNA), for instance, military security forces were subject to a dual system of reporting: to the military structure in which they were organically set up, and along the professional line of command to their superior within the military security structure.

effect that he did all that was ‘necessary and reasonable’ in the circumstances and that he may not, therefore, be held criminally responsible. In particular, a superior could not be held criminally responsible pursuant to that doctrine because he failed to report crimes to his own superiors when he was aware that those superiors were themselves involved in the commission of such crimes.²⁴⁴ A commander or high-ranking officer’s ability to prevent or punish crimes is indeed generally dependent on the system and hierarchy in which he operates. Where he is being denied such support or where there is no chance that he will obtain such support from his own superiors, a superior could not, in principle, be held responsible for what is, in effect, a failure of the chain of command, not one of his own.²⁴⁵

III ELEMENTS OF ‘COMMAND RESPONSIBILITY’ AND UNDERLYING OFFENCES

6 GENERAL REMARKS

As seen, under customary international law, a superior may be held criminally responsible pursuant to the doctrine of superior responsibility where the following three elements have been established:²⁴⁶

- (i) the existence of a superior-subordinate relationship between the superior and the alleged principal offenders;

²⁴⁴ *Ntagerura* Appeal Judgement, par 345.

²⁴⁵ One has to reserve the situation where, in full awareness of the position of his own superior as regard the commission of crimes by subordinates, the accused may be shown to have accepted the strong likelihood of crimes being committed by troops under his command and has acquiesced to their commission.

²⁴⁶ See, *inter alia*, *Celebici* Appeal Judgement, pars 189-198, 225-226, 238-239, 256, 263, 346; *Aleksovski* Appeal Judgement, pars 72 and 76. See also, *inter alia*, *Bagilishema* Appeal Judgement, pars 24 *et seq.*, *Kunarac* Trial Judgement, pars 394-399, *Krnojelac* Trial Judgement, par 92 with references to other cases quoted therein; *Kordic* Trial Judgement, par 401; *Blaskic* Trial Judgement, par 294; *Bagilishema* Trial Judgement, par 38; *Kajelijeli* Trial Judgement, par 772 and decisions cited therein. See also below, for detailed discussion of each element of the definition. Under the Rome Statute of the ICC, a distinction is being made between military and non-military commanders and the *mens rea* applicable to military commanders before the ICC varies significantly from the standard applicable to such commanders under customary international law.

- (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 the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The three elements are best considered in that order since a duty to act on the part of the accused would only arise if there is a sufficient relationship of authority between him and the perpetrators and only then does his knowledge of their actions become relevant to his superior responsibility. Furthermore, the necessary *mens rea* must be established prior to considering the question of his compliance with his duty to take necessary and reasonable measures to prevent and punish crimes since no such duty would exist under the law of command responsibility prior to his having acquired the necessary knowledge. It is indeed the acquisition of information pertaining to the commission of crimes by subordinates that triggers the superior's duty to act.

The burden of proving these elements lies, at all times, with the prosecution and never shifts onto the defendant.²⁴⁷ The *ad hoc* Tribunals have pointed out that all three elements must be proved 'beyond reasonable doubt'.²⁴⁸

²⁴⁷ See e.g., *Stakic* Appeal Judgement, pars 9, 157, 337; *Kordic* Appeal Judgement, par 360; *Blaskic* Appeal Judgement, par 451; *Kvocka* Appeal Judgement, pars 632-634; *Vasiljevic* Appeal Judgement, par 120; *Ntagerura* Appeal Judgement, pars 166-175; *Celebici* Trial Judgement, par 601; *Kunarac* Trial Judgement, par 560. See also *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1292-1293; *Blaskic* Trial Judgement. Some of the legislations applicable to the prosecution of war crimes after the Second World War had provided, however, that the defendant could in some cases bear the secondary onus of adducing evidence where the prosecution had put before the court *prima facie* evidence of responsibility (see, e.g., 4 LRTWC 97, 108, 111 and 5 LRTWC, pp 128-129).

²⁴⁸ *Bagilishema* Appeal Judgement, pars 52 and 55; *Ntagerura* Appeal Judgement, pars 166-175; *Blaskic* Trial Judgement, par 308; *Aleksovski* Trial Judgement, par 80; *Krnjelac* Trial Judgement, par 94. See also Colonel Howard's charge to the jury in the Medina case (see J. Goldstein *et al* (eds.), *The My Lai Massacre and its Cover-Up: Beyond the Reach of Law?* (New York: Free Press, 1976), 468.

7 UNDERLYING OFFENCES

7.1 Commission of a criminal offence and manner of commission

In addition to the three requirements mentioned above, superior responsibility depends on proof having been made that the superior's subordinates have committed a chargeable offence. The range of criminal offences in relation to which a superior may engage his superior responsibility depends, not on international law, but on the law applicable in the jurisdiction before which such charges are being brought. Thus, for instance, the *ad hoc* Tribunals for the former Yugoslavia and Rwanda require as a condition of liability pursuant to that doctrine that '[a] crime over which the Tribunal has jurisdiction was committed'.²⁴⁹ Other jurisdictions – national or international – might provide for a greater or lesser scope of application of the doctrine of superior responsibility depending on the categories of crimes to which that doctrine applies in the particular legal system under consideration.²⁵⁰

In all cases, however, the underlying offence must have been properly committed, in the sense of all of its constitutive elements having been met. In this sense, and as noted above, superior responsibility could not be incurred under international law for an offence that has merely been attempted or for any other inchoate offence.²⁵¹

The commission of a criminal offence by individuals subordinated to the accused is not, *stricto sensu* an element of the doctrine of command responsibility, but a condition of its applicability. Furthermore, as far as existing international criminal courts and tribunals are concerned, the commission of such an offence by subordinates is a condition of their having jurisdiction over the alleged failure of the superior to prevent or punish those.

One trial chamber of the ICTY has suggested that a superior could be held criminally responsible under international law in relation to crimes committed by subordinates

²⁴⁹ See, e.g., *Gacumbitsi* Appeal Judgement, par 143. See also *Oric* Trial Judgement, par 294.

²⁵⁰ National jurisdictions might also limit the application of the doctrine of 'superior responsibility' in another manner by limiting it, for instance, to situations of armed conflict.

²⁵¹ See above, 3.5.3.1.

whether those crimes were committed through an ‘act’ or by an ‘omission’.²⁵² This proposition must be strictly qualified insofar as it relates to alleged omissions on the part of subordinates. Where a subordinate commits a crime by a positive act (e.g., he intentionally kills an innocent civilian in full knowledge of the status of that victim) and that his superior culpably fails to prevent or punish that crime, the superior may, all other conditions being met, be held criminally responsible. Likewise, where that subordinate commits a crime through a culpable omission (e.g., where a subordinate whose responsibility it is to care for the well-being of POWs fails to provide them with food resulting in their death),²⁵³ the commander could, all other conditions being met, be found criminally responsible if he culpably fails to prevent or punish that criminal omission.²⁵⁴ But a superior could not be held responsible for his subordinate’s omission to act where that omission does not itself constitute a criminal offence.

It is unclear from existing case law whether a superior could be held criminally responsible in relation to crimes committed by a subordinate acting in a private capacity. Considering the fact that the responsibility of a superior is limited to the conduct of his subordinates and is circumscribed by the nature and scope of his mandate towards these individuals, it would seem illogical – and unrealistic – that liability should extend beyond the chain of command that sets the framework of their relationship. If, for instance, a police officer takes part in a bank robbery, such acts would fall beyond the scope of the doctrine of superior responsibility and the superior

²⁵² See, generally, *Oric* Trial Judgement, pars 302-304.

²⁵³ In French terminology, this would constitute a form of ‘commission par omission’.

²⁵⁴ Not every failure to act on the part of a subordinate – in particular, not every failure to prevent or punish a crime – will constitute a crime in relation to which the superior could in turn be held responsible. International humanitarian law does not set a general, and all-encompassing, obligation for soldiers, paramilitaries, or state officials to prevent or punish the criminal acts of others. For instance, a soldier who witnesses acts of looting by civilians in a village which he is patrolling and does nothing to prevent it is not thereby committing a criminal offence under international law, unless he is himself taking part in the commission of the offence. Humanitarian law does not require of him that he should prevent such crimes; nor does it provide in principle for criminal liability if he does not. See also K. Ambos, “Joint Criminal Enterprise and Command Responsibility”, 5 *JICJ* 159 (2007), calling for a strict interpretation of the crimes for which a commander may be held criminally responsible must have been ‘committed’ by subordinates.

of that police officer could not be held responsible pursuant to the doctrine of superior responsibility. The duty of a superior to enforce compliance with standards of humanitarian law is indeed limited to ensuring respect for such standards in the context of the role and mandate which the superior and his subordinate have been assigned within the chain of command to which they belong. Therefore, in all cases, there must be a sufficient functional relationship between the conduct that forms the basis of the underlying offence and the position which the subordinate holds in the hierarchy. Where the conduct of the subordinate is un-connected, or insufficiently connected, to his role and position in the hierarchy, his superior could not, in principle, be held liable as a superior in relation to that conduct.

7.2 *Perpendicular* command responsibility

The requirement of a relationship of superior-subordinate between the accused and the perpetrators, and the exigency of a chain of command linking them, raises the question of the possibility for a superior to be held criminally responsible in relation to crimes which have been committed, not by subordinates of the accused, but by third parties.²⁵⁵

In a number of cases before the ICTY, the Office of the Prosecutor had argued that a superior could be held criminally responsible pursuant to the doctrine of superior responsibility for a failure to prevent or to punish subordinates who had aided and abetted others to commit a crime, though they had not themselves committed that offence. In these cases, the *actus reus* of the underlying crime was said to have been committed by persons who were not subordinates of the accused at the relevant time. This position is supported by two arguments. The first and main contention is that the expression ‘committed’, which is used in most relevant instruments when referring to the underlying conduct of subordinates, must be interpreted in a broad manner which would include, not only the actual commission of the *actus reus* of the offence by subordinates, but also any other form of culpable participation by subordinates in the commission of that offence.²⁵⁶ Secondly, it is suggested that the object and purpose of

²⁵⁵ The Defence of Naser Oric referred to this theory as ‘double imputation’ whilst the Defence of Ljube Boskoski referred to this sort of alleged liability as ‘perpendicular command responsibility’.

²⁵⁶ See, e.g., *Prosecutor v Boskoski and Tarculovski*, Prosecution’s Response to the Boskoski Defence Appeal on Jurisdiction dated 22 September 2006, 2 October 2006, pars 12 *et seq.*; *Prosecutor v*

the doctrine of superior responsibility requires that a superior should be held criminally responsible for all modes of subordinates' participation in the commission of a crime.²⁵⁷ These arguments have been adopted by ICTY in the *Oric*, *Boskoski* and *Blagojevic* cases and by the ICTR in the *Nahimana et al* case.²⁵⁸

The counter-argument is that the expression 'committing' must be, and has always been, interpreted strictly and is limited to situations where subordinates are the actual perpetrators of the underlying offence.²⁵⁹ The proponents of that view point to the fact that all relevant instances of state practice and all precedents up to the *Boskoski* and *Oric* jurisprudence had interpreted the expression in such a restrictive way and that none had extended it to situations where crimes had merely been aided and abetted by subordinates.²⁶⁰

Boskoski and Tarculovski, Prosecution's Response to 'Assigned Pro Bono Counsel Motion Challenging Jurisdiction', 4 July 2006, pars 25-26. See also *Prosecutor v Oric*, Prosecution's Submission of Public Redacted Version of the 'Prosecution's Final Trial Brief', 31 March 2006, pars 228 *et seq.*

²⁵⁷ See, e.g., *Prosecutor v Boskoski and Tarculovski*, Prosecution's Response to the Boskoski Defence Appeal on Jurisdiction dated 22 September 2006, 2 October 2006, pars 15 *et seq.*

²⁵⁸ See *Prosecutor v Boskoski and Tarculovski*, Decision on Prosecution's Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment and Submission of Amended Pre-Trial Brief, 26 May 2006; *Prosecutor v Boskoski and Tarculovski*, Decision on Assigned Pro Bono Counsel Motion Challenging Jurisdiction, 8 September 2006; *Oric* Trial Judgement, pars 300-302; *Blagojevic* Appeal Judgment, pars 279 *et seq.* ('280. As a threshold matter, the Appeals Chamber confirms that superior responsibility under Article 7(3) of the Statute encompasses all forms of criminal conduct by subordinates, not only the "committing" of crimes in the restricted sense of the term, but all other modes of participation under Article 7(1) [of the ICTY Statute].'); *Nahimana* Appeal Judgment, par 485.

²⁵⁹ See, generally, *Prosecutor v Boskoski and Tarculovski*, Assigned Pro Bono Counsel Motion Challenging Jurisdiction, 21 June 2006; *Prosecutor v Boskoski and Tarculovski*, Boskoski Defence Appeal on Jurisdiction, 22 September 2006; *Prosecutor v Boskoski and Tarculovski*, Boskoski Defence Reply to 'Prosecution's Response to the Boskoski Appeal on Jurisdiction dated 22 September 2006', 6 October 2006; see also *Prosecutor v Oric*, Defence Closing Brief, 17 March 2006, pars 498 *et seq.*

²⁶⁰ *Ibid.*

The position of the ICTY finds little or no support in state practice or existing precedents. All known precedents,²⁶¹ all relevant legal instruments and every known incident of state practice,²⁶² solely concern or only refer to the responsibility of superiors for crimes that were actually committed by their own subordinates as principal perpetrators.²⁶³ The Appeals Chamber of the ICTR likewise noted that superior responsibility requires proof that the superior had ‘material ability to prevent

²⁶¹ See, for instance, the *Yamashita* case, the *Pohl* case, the *von List* case and the *von Leeb* case. See also *Gacumbitsi* Appeal Judgment, pars 143-144.

²⁶² See, for instance, Article 86 of Additional Protocol I, the various ILC draft codes on international offences, Article 6(3) of the Statute of the Special Court for Sierra Leone and the accompanying Report of the Secretary-General of the United Nations and Article 28 of the ICC Statute; See also *Darfur* Report, par 563: ‘responsibility for the crimes committed by the men under their effective control’ and par 564: ‘they failed to punish those under their control who committed serious crimes’. The same position has been adopted in the *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, as endorsed by the Secretary-General of the United Nations, 18 Feb 1999, par 81 referring to ‘atrocities [...] being or about to be committed by their subordinates’ when discussing the responsibility of military commanders and civilian leaders. Insofar as they have recorded a position in this matter, member States of the United Nations were unanimous in their view that command responsibility could only be entailed where crimes are alleged to have been ‘committed’ by subordinates of the accused. See Letter Dated 16 February 1993 from the Permanent Representative of Italy to the United Nations addressed to the Secretary-General, S/25300, 17 Feb 1993, par 3 (reprinted in V. Morris & M. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Volumes 1-2, (Ardsey: Transnational Publishers Inc., 1995) (‘Morris and Scharf, *Insider’s Guide*’), vol II, pp 375, 377); Letter dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, S/25575, 12 April 1993, art 11(b) (reprinted in Morris and Scharf, *Insider’s Guide*, vol II, pp 451, 454). See also the Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), par 52 (reprinted in Morris and Scharf, *Insider’s Guide* vol II, pp 312, 320).

²⁶³ See, e.g., *Darfur* Report, par 563: ‘responsibility for the crimes committed by the men under their effective control’ and par 564: ‘they failed to punish those under their control who committed serious crimes’. The same position has been adopted in the *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, as endorsed by the Secretary-General of the United Nations, 18 Feb 1999, par 81 referring to ‘atrocities [...] being or about to be committed by their subordinates’ when discussing the responsibility of military commanders and civilian leaders.

offences or punish *the principal offenders*'.²⁶⁴ No known precedent seems to mention – nor provide for – the possibility of perpendicular command responsibility of the sort entertained by the ICTY.

Furthermore, the position of the ICTY appears to contradict in some important respect the nature, structure and definition of superior responsibility under international law.²⁶⁵ In particular, superior responsibility requires proof that the accused failed to adopt 'necessary and reasonable' measures as were capable of preventing or punishing the crime which forms the basis of the charges. Under the perpendicular command responsibility theory, a superior could also be held responsible for failing to adopt those measures which would have prevented or punished his subordinates' involvement in the commission of a crime, rather than the commission of a crime by them.²⁶⁶

Should the more liberal approach adopted by the ICTY prevail however, the court would have to verify in all cases that subordinates of the accused have taken a culpable part in the commission of a chargeable offence and that all other conditions of command responsibility have been met in relation to them.²⁶⁷

²⁶⁴ See, e.g., *Bagilishema* Appeal Judgement, par 50 and jurisprudence cited therein. In *Bagilishema*, the Appeals Chamber noted that it 'is not suggested that "effective control" will necessarily be exercised by a civilian superior and by a military commander in the same way, or that it may necessarily be established in the same way in relation to both a civilian superior and a military commander' (*ibid.*, par 52; see also par 55). See also *Hadzihasanovic* Rule 98bis Decision, par 164; *Celebici* Appeal Judgement, pars 196-197; *Blaskic* Appeal Judgement, par 67; *Krnjelac* Trial Judgement, par 93; *Bagilishema* Appeal Judgement, pars 49-55; *Celebici* Appeal Judgement, pars 196-198.

²⁶⁵ See, generally, Defence submissions in the *Boskoski* case, *Prosecutor v Boskoski and Tarculovski*, *Boskoski* Defence Appeal on Jurisdiction, 22 September 2006, pars 49 *et seq.*

²⁶⁶ Under international law, 'aiding and abetting' is not causally linked to the commission of the principal crime; under international law, it must merely be demonstrated that the accused made a substantial contribution to the commission of the crime.

²⁶⁷ See *Blagojevic* Appeal Judgment, par 284.

8 A SUPERIOR-SUBORDINATE RELATIONSHIP BETWEEN THE ACCUSED AND THOSE WHO COMMITTED THE UNDERLYING OFFENCES

8.1 Relationship of subordination

8.1.1 An inter-personal relationship

To be held criminally responsible as a superior for a failure to prevent or punish crimes of subordinates, the accused must be shown to have been in a superior-subordinate relationship with those who committed the crimes which form the basis of the charges. Such a relationship may have existed either *de jure*, i.e., it was a relationship sanctioned by law, or *de facto*, in the sense of a relationship of subordination forged in factual and personal factors connecting the accused and the perpetrators.²⁶⁸

The exigency of a superior-subordinate relationship between the accused and the perpetrators does ‘not [...] import a requirement of *direct* or *formal* subordination’ so that a superior could be held criminally responsible in relation to crimes committed by subordinates who are several steps further down the chain of command.²⁶⁹ But a relationship of superior authority for the purpose of that doctrine is one between two individuals: a superior or commander on the one hand and another individual who is said to have committed crimes. A relationship of superior-subordinate, insofar as relevant to the doctrine of superior responsibility is, therefore, inter-personal in nature. Such a relationship is not established merely by showing that the accused led or was in charge of a particular entity (e.g., a ministry or a military unit) or that he was responsible for a particular undertaking (e.g., a military operation or a government policy); it would have to be established that through his role or position, a personal relationship of subordination *vis-à-vis* the perpetrators of the crimes was established

²⁶⁸ See, e.g., *Gacumbitsi* Appeal Judgement, par 85 and references cited therein; *Bagilishema* Appeal Judgement, par 50; *Celebici* Appeal Judgement, par 192; *Prosecutor v Momcilo Mandic*, Verdict, No: X-KR-05-58, 18 July 2007 (State Court of Bosnia and Herzegovina), at 152.

²⁶⁹ *Limaj* Trial Judgement, par 522, referring to *Celebici* Appeal Judgement, par 303. See also *Nahimana* Appeal Judgment, par 785, rejecting the suggestion that the requirement of ‘effective control’ required proof of a direct and personal relationship between the accused and the perpetrators.

and was recognized by both parties to that relationship. This awareness of a relationship of authority means, *inter alia*, that a person cannot be a ‘superior’ despite himself, i.e., without having been shown to have been aware of his position of authority vis-à-vis other individuals. Before an individual may be charged under the doctrine of superior responsibility, he must therefore be shown have been aware of his – hierarchically predominant – position vis-à-vis subordinates and aware of his duty to prevent or punish crimes of those subordinated to him. He must, therefore, have voluntarily accepted or taken up his position. Having taken up such a position, the accused could then be ‘presumed to have knowingly acquiesced to the duties under international law that are a corollary of such positions’, including a duty to ensure that subordinates do not commit crimes or that they are punished if they do.²⁷⁰

8.1.2 *De jure*

8.1.2.1 Definition

A *de jure* superior-subordinate relationship for the purpose of the doctrine superior responsibility means that the superior has been appointed, elected or otherwise assigned to a position of authority *for the purpose of commanding or leading* other persons who are thereby to be legally considered his subordinates. Any appointment which falls short of a commanding assignment or leadership role *vis-à-vis* those who are alleged to have committed the crimes is no evidence of a *de jure* relationship relevant to establishing command responsibility.²⁷¹ It could, however, be evidentially relevant to establishing a *de facto* relationship of authority between them, insofar as such an appointment might be indicative of some degree of authority on the part of the accused over the perpetrators.²⁷²

²⁷⁰ T. Wu and Y.S. King, “Criminal Liability for the Actions of Subordinates – The Doctrine of Command Responsibility and its Analogues in United States Law”, 38 *Harvard International Law Journal* 272, 290 (1997).

²⁷¹ Thus, for instance, an officer who would be appointed to review the morale or logistics facilities of an army corps or brigade would not, and could not, for that reason only, be said to be in a superior-subordinate relationship *vis-à-vis* members of that corps or brigade.

²⁷² See below, in particular 8.1.3 and 8.2.

The forms and procedure by which appointment to a commanding position or a *de jure* position of authority is made vary a great deal between different national armies and national civilian structures.²⁷³ In particular, *de jure* powers could be granted in writing or orally.²⁷⁴ In the context of a criminal trial where the accused is being charged with failing in his duties as commander, proof of *de jure* command does not require the prosecution to produce the order by which the accused was appointed or elected to this position. *De jure* command may indeed be established circumstantially.²⁷⁵ But an inference that the accused has been appointed to a particular function will not be drawn lightly and the inability of prosecuting authorities to produce such an order might weigh heavily against a finding of *de jure* command. This is particularly true in more formalized settings such as a military hierarchy.

8.1.2.2 A *de jure* position insufficient

The mere holding of a position of authority or a title in the hierarchy does not suffice to conclude that a person is a *de jure* superior where his position is not accompanied by the actual powers and authority normally attached to it.²⁷⁶ A brigade commander who holds that title but none of the powers that go with that role may not, therefore, be said to be the *de jure* commander of members of that brigade for the purpose of assigning criminal responsibility to him.²⁷⁷ The Appeals Chamber of the Yugoslav Tribunal has made it clear that in determining questions of responsibility, 'it is

²⁷³ That determination may only be made pursuant to and in accordance with local domestic law. International law does not provide for procedure or requirements as to the manner or procedure whereby an individual may be appointed to a *de jure* position of command. According to the ICTR Appeals Chamber, the source or basis of an accused's *de jure* authority could lay in the law or even in a contract (*Nahimana* Appeal Judgment, par 787).

²⁷⁴ *Nahimana* Appeal Judgment, par 787.

²⁷⁵ See, e.g., *Kordic* Trial Judgement, par 424; *Prosecutor v Nikolic*, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, par 24. The *ad hoc* Tribunals have held that such an inference must be the only reasonable one to be drawn from the evidence.

²⁷⁶ See *Celebici* Appeal Judgement, par 197.

²⁷⁷ *Celebici* Appeal Judgement, par 306.

necessary to look to effective exercise of power and not to formal titles'.²⁷⁸ This means that the fact that an individual bears a particular title or formally holds a position of authority is not, in itself, conclusive fact that he is in a position of authority *vis-à-vis* others for the purpose of the doctrine of superior responsibility. To allow for any inference concerning the relationship of subordination that is said to have existed between the accused and the perpetrators, a formal position of command must therefore be accompanied by those powers and authority normally attached to such a role. A starting point will be the official position held by the accused. Actual authority however will not be determined by looking at formal positions only. In *Cappellini et al*, for instance, an Italian court held that a superior who in fact had been deprived of actual authority over his troops, but was formally vested with his position or title, could not be held responsible for crimes perpetrated by his 'subordinates'.²⁷⁹ Whether *de jure* or *de facto*, military or civilian, the existence of a position of authority will have to be based upon an assessment of the reality of the authority of the accused.²⁸⁰

Thus, proof of a *de jure* appointment is not sufficient to trigger the application of the doctrine of superior responsibility.²⁸¹ It would have to be established, furthermore, that, at the time when the crimes were committed, that superior was in fact in a position to exercise 'effective control' over those individuals who committed the crimes and that he failed to do so.²⁸² The requirement of 'effective control' highlights the fact that an individual who has formally been appointed to command or to lead others but who, in practice, is unable to exercise his authority, may not be held

²⁷⁸ *Celebici* Appeal Judgement, par 197 and par 306 concerning the accused Hazim Delic ('this title or position [as deputy commander of the *Celebici* camp] is not dispositive of the issue and [...] it is necessary to look to whether there was evidence of *actual* authority or control exercised by Delic'). See also *Blagojevic* Appeal Judgment, par 302.

²⁷⁹ See *Cappellini et al*, Court of Cassation of Milan (Italy), Decision of 12 July 1945, no 41, in 71 *Rivista Penale*, 1946, II, pp 84-89.

²⁸⁰ See *Kordic* Trial Judgement, par 418.

²⁸¹ See also *Nahimana* Appeal Judgment, par 787, *in fine*, where the Appeals Chamber of the ICTR made it clear that the existence of *de jure* powers on the part of the accused is not determinative of the issue of effective control.

²⁸² See, e.g., *Bagilishema* Appeal Judgement, par 61; *Celebici* Appeal Judgement, pars 197-198.

responsible for crimes committed by those formally – but not effectively – under his authority. The meaning of this requirement will be discussed further below.²⁸³

8.1.3 *De facto*

8.1.3.1 Definition

As noted above, an individual could be regarded as being in a position of superior-subordinate for the purpose of this doctrine, not only where he was granted legal authority to lead or to command, but also where such a relationship has arisen from other factual and personal factors connecting the accused and the perpetrators.²⁸⁴

Where the source of the superior's authority arises from a source other than his domestic law, international law talks of a '*de facto*' relationship of command.

A *de facto* relationship of command can be defined as a relationship in which one party – the superior – has acquired over one or more people enough authority to prevent them from committing crimes or to punish them when they have done so. The origin or basis for such *de facto* authority may be diverse, but it must be such that there is an expectation of obedience to orders on the part of the superior and a parallel expectation of subjection to his authority on the part of those who are under his authority.

As will be discussed further below, the degree of authority necessary to trigger the application of the doctrine of superior responsibility lies in the dominant party's ability to exercise 'effective control' over the other party in that relationship. Short of that standard, there may be no finding of guilt based on the doctrine of superior responsibility.

8.1.3.2 *Raison d'être*

The concept of *de facto* command or *de facto* authority is very much a creation of the *ad hoc* Tribunals for the former Yugoslavia and Rwanda. This category of command

²⁸³ See below, 8.2.

²⁸⁴ See, e.g., *Gacumbitsi* Appeal Judgement, par 85 and references cited therein; *Bagilishema* Appeal Judgement, par 50; *Celebici* Appeal Judgement, par 192.

or superior responsibility results from a desire to capture under the concept of ‘command responsibility’, not only those persons who are formally and legally in command of troops, but also those who effectively lead and command and who have the ability to exercise similar powers and play a similar role in enforcing humanitarian standards. Paramilitary leaders are the prime example of superiors which this doctrine seeks to bring within the reach of the law.

As the nature of modern conflicts has changed over time, so has the way in which fighting parties organise themselves and how their command structures are made to respond to those changes. The concept of *de facto* command is in large part a response to changes in the ways fighting forces are being organized and commanded in modern-day conflicts. It is also in many ways a necessary development to ensure the continued significance and viability of humanitarian standards within less organized, and sometimes plainly amorphous, fighting structures.

8.1.3.3 Degree of authority and manner of control

The degree of authority or control which a *de facto* commander must wield over alleged subordinates before he could be held liable as a superior must be equivalent to that required in the case of *de jure* command.²⁸⁵ In effect, proof will have to be made that he was able to exercise ‘effective control’ over those subordinates.

²⁸⁵ See, in particular, *Celebici* Appeal Judgement, par 197; *Kordic* Trial Judgement, par 416; *Bagilishema* Appeal Judgement, par 51-55; *Kajelijeli* Appeal Judgement, par 87. It has been said that a *de facto* position of authority may be sufficient for a finding of criminal responsibility, provided the exercise of *de facto* authority is accompanied by the ‘trappings of the exercise of *de jure* authority’. See *Celebici* Trial Judgment, pars 151, 377-378. In the *Kajelijeli* appeal, however, the ICTR Appeals Chamber rejected that position, suggesting, without supporting it or explaining this reversal of jurisprudence, that there is no need to establish that (i) in order to establish ‘effective control’ by a *de facto* civilian superior, that superior must have exercised the trappings of *de jure* authority or that he exercised authority comparable to that applied in a military context; nor is there any requirement, the Appeals Chamber said, again citing no authority nor any reason for this apparent reversal of jurisprudence (ii) that a *de facto* civilian superior exercised the trappings of *de jure* authority generally (*Kajelijeli* Appeal Judgement, par 87). The Appeals Chamber added, however, that evidence that a *de facto* civilian superior exercised control in a military fashion or similar in form to that exercised by *de*

The way or manner in which that authority is exercised may take different forms although a *de facto* superior must in all cases be shown to have wielded substantially similar powers of control over subordinates as would have a *de jure* superior.²⁸⁶ The indications relevant to establishing this fact would include, for instance, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action.²⁸⁷ The manner in which the accused exercised his authority would also be relevant.²⁸⁸

Clearly, the uncertainty as to the level of authority necessary to trigger the application of that doctrine is capable of generating a great deal of legal uncertainties and, potentially, great unfairness to an accused. At what point, for instance, could a brave villager who took upon himself to organise the defence of his village against rebel attacks be said to have become the superior of those villagers and thus become responsible for their compliance with humanitarian law? Part of the answer lies in the requirement that, to be regarded as a *de facto* superior, and thus to have a duty to prevent and punish the crimes of others, that person must have been cognizant of his position of authority *vis-à-vis* other persons whose conduct he could be held responsible for. He must also have been aware of the duties which his relationship with another person, or group of persons, implied for him (in particular, a duty to prevent and punish crimes) and must have accepted this role and responsibility, albeit implicitly. 'The relationship between the commander and his subordinates need not have been formalized; a tacit or implicit understanding between them as to their positioning *vis-à-vis* one another is sufficient.'²⁸⁹

Short of establishing those elements, the doctrine of *de facto* superior responsibility would become an instrument of oppression, not one of justice. Furthermore, as will be seen below, the degree of control necessary to support a finding of effective control is

jure authorities may 'strengthen a finding that he or she exercised the requisite degree of effective control' (*ibid.*).

²⁸⁶ *Celebici* Appeal Judgement, par 197; *Bagilishema* Appeal Judgment, par 52.

²⁸⁷ *Bagilishema* Appeal Judgement, par 53; *Celebici* Trial Judgement, par 87.

²⁸⁸ See, e.g., *Kajelijeli* Appeal Judgement, par 87.

²⁸⁹ See *Kunarac* Trial Judgement, par 397; *Halilovic* Appeal Judgment, par 61.

a high one, which excludes from the realm of superior responsibility many a relationship of authority and power. Finally, to be capable of having penal consequences for the dominant party, the relationship of authority that links him to those who committed the crimes must have been formalized to a sufficient degree into a chain of command or authority.²⁹⁰

Finally, it should be pointed out that, just as a *de jure* position or a formal rank in a military hierarchy would not be enough to conclude that a *de jure* superior had effective control over those formally under his command, it may not be inferred from the sole fact of the existence of a *de facto* relationship of subordination that the party that was placed, *de facto*, in a hierarchical relationship vis-à-vis the perpetrators necessarily had effective control – in the form of a material ability to prevent or punish crimes – over those perpetrators. In the *Halilovic* case, for instance, the Appeals Chamber has noted that the Prosecution had failed to show how Mr Halilovic's alleged position as the *de facto* commander of a military operation in which the perpetrators were said to have partaken would have been sufficient to establish a chain of command or a hierarchical relationship between him and the perpetrators amounting to a superior-subordinate relationship in which he could have exercised effective control over the perpetrators.²⁹¹ The Appeals Chamber also noted that a position of 'over-all command', if not accompanied by a duty and the ability to prevent or punish crimes would not be sufficient to find that the person who possessed that authority was in fact in effective control of the perpetrators and that he had a duty to act in relation to their crimes.²⁹²

8.1.4 Chain of command

8.1.4.1 Chain of command between superior and perpetrators

The first requirement of superior responsibility, namely, the existence of a superior-subordinate relationship between the accused and the perpetrators, demands that a

²⁹⁰ See next sub-section.

²⁹¹ *Halilovic* Appeal Judgment, pars 211 and 214.

²⁹² *Halilovic* Appeal Judgment, par 214.

hierarchical relationship, direct or indirect,²⁹³ should exist between the accused and his alleged subordinates.²⁹⁴ As noted by the *Halilovic* Trial Chamber, ‘there is no requirement [under international law] that the superior-subordinate relationship be direct or immediate in nature for a commander to be found liable for the acts of his subordinate. What is required is the establishment of the superior’s effective control over the subordinate, whether that subordinate is immediately answerable to that superior or more remotely under his command.’²⁹⁵ Although this requirement does not mean that a “direct or formal subordination” must be established between the accused and the perpetrators, it means that the accused “by virtue of his position, [must be] senior in some sort of formal or informal hierarchy to the perpetrator”.²⁹⁶ A general ability, material or otherwise, to prevent or punish crimes may indeed also exist outside a superior-subordinate relationship which is the only category of relationship relevant to the doctrine of superior responsibility.²⁹⁷

The commission of crimes by individuals who form part or are members of the accused’s chain of command is not sufficient, however, to assign superior

²⁹³ See *Celebici* Appeal Judgement, pars 251-252; *Kajelijeli* Trial Judgement, par 771; *Semanza* Trial Judgement, par 400; *Kordic* Trial Judgement, pars 408 and 416. In particular, a commander could be held responsible, not only for the acts of those who are his immediate subordinates, but also for those who are subordinates of subordinates, as long as he may be shown to have had effective control over them, albeit through others.

²⁹⁴ See, e.g., *Gacumbitsi* Trial Judgement, par 773, where the Trial Chamber endorsed the requirement of a ‘hierarchical chain of authority’ between the accused and the perpetrators; see also *Gacumbitsi* Appeal Judgement, par 84; *Celebici* Appeal Judgement, par 254; *Celebici* Trial Judgement, par 354. See also *Halilovic* Trial Judgement, par 60 pointing to the necessity ‘to establish the existence of a hierarchical relationship between the superior and the subordinate’; *Halilovic* Appeal Judgment, pars 59, 211 and 214.

²⁹⁵ *Halilovic* Trial Judgement, par 63, footnotes omitted. See also *Oric* Trial Judgement, pars 310 and 311: ‘Whether this sort of [effective] control is directly exerted upon a subordinate or mediated by other sub-superiors or subordinates is immaterial, as long as the responsible superior would have means to prevent the relevant crimes from being committed or to take efficient measures for having them sanctioned.’ See also *Prosecutor v Momcilo Mandic*, Verdict, No: X-KR-05-58, 18 July 2007 (State Court of Bosnia and Herzegovina), at 153.

²⁹⁶ *Halilovic* Appeal Judgment, par 59.

²⁹⁷ *Halilovic* Appeal Judgment, par 59.

responsibility. As was noted at Nuremberg, the accused must be shown ‘both to have had knowledge and to have been connected with such criminal acts, either by way of participation or criminal acquiescence’.²⁹⁸

Though not sufficient to attribute responsibility,²⁹⁹ proof will therefore have to be made that there was a chain of command or authority, even if only an informal one, between the accused and those who perpetrated the crimes:

[O]nly those superiors, either *de jure* or *de facto*, military or civilian, who are clearly part of a chain of command, either directly or indirectly, with the actual power to control or punish the acts of subordinates may incur criminal responsibility.³⁰⁰

The existence of such a chain of command will be easier to establish in a military context than might be the case in a civilian or hybrid structure. Military positions will usually be strictly defined and the existence of a clear chain of command, based on a strict hierarchy, easier to demonstrate.³⁰¹

The presence of a chain of command between the accused and the perpetrators will permit the court, *inter alia*, to ‘distinguish[h] [for instance] civilian superiors from mere rabble-rousers or other persons of influence’.³⁰² It will also allow the court to exclude from the realm of superior responsibility those relationships of power or authority which were never structured hierarchically and remained too loose or informal to allow a party to exercise ‘effective control’ over others. Finally, such a chain of

²⁹⁸ Finding concerning the accused von Leeb, *High Command* case, p 555.

²⁹⁹ ‘Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction.’ (*High Command* case, p 543).

³⁰⁰ See *Kordic* Trial Judgement, par 416 (emphasis added). See also *Kajelijeli* Appeal Judgement, pars 84-85; *Kajelijeli* Trial Judgement, par 773; *Celebici* Trial Judgement, par 647. See, in particular, concerning the accused Hazim Delic’s acquittal in relation to command responsibility charges based on the fact that the prosecution failed to show that he was within the chain of command of the *Celebici* camp in which the crimes had been committed (*Celebici* Trial Judgement, par 810); *Halilovic* Trial Judgement, par 60. Finally, see, Bantekas, *Principles of Responsibility*, p 80.

³⁰¹ See e.g. *Kordic* Trial Judgement, par 419.

³⁰² *Celebici* Trial Judgement, par 87, cited in *Bagilishema* Appeal Judgement, par 53.

command provides a path to establishing that the accused exercise his authority through and along that chain:

[A]uthority or control need not be exercised directly over the perpetrators of the crimes, but may be wielded through the chain of command.³⁰³

The existence of a chain of command between the superior and his subordinates will also serve to limit the scope of acts for which a superior may be held criminally responsible. An accused person may not be held responsible, pursuant to the doctrine of command responsibility, for the acts of anyone other than those who were subordinated to him within his chain of command. In *Toyoda*, for instance, the Tribunal made it clear that the accused could only be made responsible for crimes ‘commi[tte]d by his subordinates, immediate or otherwise’.³⁰⁴ The necessity to prove that the perpetrator was subordinated to the superior does not import a requirement of *direct* or *formal* subordination but means, as the ICTY Appeals Chamber pointed out, that the accused is by virtue of his position senior in some sort of formal or informal hierarchy to the perpetrator.³⁰⁵

8.1.4.2 Vertical relation of subordination and chief of staff

In addition to having been in the same chain of command as the perpetrators, the accused must be shown to have been placed *vertically vis-à-vis* the perpetrator within that chain. As noted by the ICRC:

³⁰³ *Darfur* Report, pars 558 (and par 561).

³⁰⁴ *Toyoda* case, p 5006. At the time of the adoption of Security Council resolution 827, Mrs. Madeleine Albright, on behalf of the United States, expressed the view that superior responsibility could be entailed pursuant to the Statute of the ICTY only in case of a ‘failure of a superior – whether political or military – to take reasonable steps to prevent or punish such crimes by persons under his or her authority’ (re-printed in Morris and Scharf, *Insider’s Guide*, p 188).

³⁰⁵ *Celebici* Appeal Judgment, par 303. See *ibid* concerning the situation of two individuals of equal rank or status where one would have the practical ability to prevent the conduct of the other. See also *Halilovic* Appeal Judgment, pars 59, 211 and 214.

[The qualification of superior] is not a purely theoretical concept covering any superior in a line of command, but we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control. The direct link which must exist between the superior and the subordinate clearly follows from the duty to act laid [of the former].³⁰⁶

Therefore, it would not be sufficient to establish that the accused and the perpetrators belonged to a single military or civilian structure albeit perpendicularly so. For example, a chief of staff could not be said to be in a relationship of superior-subordinate with members of his military structure (other than the members of his staff) insofar as he holds no responsibility, and no authority over soldiers and officers within the chain of command, since he is related to that chain of command only through and because of his own subordination to the commander.³⁰⁷ In this example, the chain of command does not place the chief of staff formally within a vertical line of authority with the perpetrators so that he may not, in principle, be held criminally responsible as a superior in relation to crimes committed by other members of the army.³⁰⁸ That line of authority only exists between the commander and the

³⁰⁶ See ICRC, *Commentary on the Additional Protocols*, par 3544, p 1013, footnote omitted. See also *Celebici Appeal Judgement*, par 303.

³⁰⁷ In the *High Command* case, for instance, the Tribunal said in relation of the accused Woehler (p 684) that '[c]riminal acts or neglect of a commander in chief are not in themselves to be so charged against a chief of staff. He has no command authority over subordinated units nor is he a bearer of executive power. The chief of staff must be personally connected by evidence with such criminal offenses of his commander in chief before he can be held criminally responsible.' The same position was adopted in *von Mainstein*, *In re von Lewinski*, British Military Court at Hamburg (Germany, 19 Dec 1949, re-printed in part in *Annual Digest and Reports of Public International Law Cases*, Year 1949 (1955), pp 509 *et seq.*

³⁰⁸ The role of a chief of staff is not to exercise command functions, but to assist the commander and to provide him with practical and expert assistance which he might need. Their role in the military structure is akin to that of a 'chef de cabinet' in a civilian structure. Their authority is limited to the staff which has been assigned to them specifically (i.e., the members of the staff). As noted by a U.S. Military Tribunal in Nuremberg, the ordinary function of the chief of staff is to prepare reports, orders and directives for his commander and the exact extent of his power will depend to a large extent on the attribution thereof by his commander. See, e.g., *High Command* case: 'To prepare orders is the function of staff officers. Staff officers are an indispensable link in the chain of their final execution. [...] Staff officers, except in limited fields, are not endowed with command authority. [...] His sphere and

perpetrators, and whomever else may find himself *between* them in that chain of command.³⁰⁹

But whilst the existence of a chain of command and the presence of the accused and of the perpetrators within that chain are necessary conditions of liability under the

personal activities vary according to the nature and interests of his commanding officer and increase in scope dependent upon the position and responsibilities of such commander.' And 'One of his main duties was to relieve his commander of certain responsibility so that such commander could confine himself to those matters considered by him of major importance. It was of course the duty of a chief of staff to keep such commander informed of the activities which took place within the field of his command insofar at least as they were considered of sufficient importance by such commander. Another well-accepted function of chiefs of staff and of all other staff officers is, within the field of their activities, to prepare orders and directives which they consider necessary and appropriate in that field and which are submitted to their superiors for approval.' See also LRTWC, XV, p 78. The individual criminal responsibility of a chief of staff is, therefore, limited to his direct involvement in the commission of a criminal offence, as when he issues a criminal order. In the *Celebici* case, the Appeals Chamber cited with approval the holding of the U.S. Military Tribunal in the *High Command* case where the Tribunal stated that:

In the absence of participation in criminal orders or their execution within a command, a Chief of Staff does not become criminally responsible for criminal acts occurring therein. He has no command authority over subordinate units. All he can do in such cases is call those matters to the attention of his commanding general. Command authority and responsibility for its exercise rest definitively upon his commander.

United States v Wilhelm von Leeb et al, TWC, Vol. XI, pp 513-514 (cited in *Celebici* Appeal Judgement, par 260). The same approach was adopted in *von Mainstein*, In *re von Lewinski*, British Military Court at Hamburg (Germany, 19 Dec 1949, re-printed in part in *Annual Digest and Reports of Public International Law Cases*, Year 1949, pp 509 *et seq.*) and *Celebici* Appeal Judgement, pars 259-260. A chief of staff would, therefore, be found guilty only if he were involved in the execution of criminal policies by writing them into orders that were subsequently signed and issued by the commanding officer (*Celebici* Appeal Judgement, par 260). In such a case, he could be *directly* liable for aiding and abetting or another form of participation in the offences that resulted from the orders drafted by him (*Celebici* Appeal Judgement, par 260). Thus, only a positive act could render a chief of staff responsible, as opposed to mere omission on his part (LRTWC, Vol XV, p 78). In the absence of direct or personal participation in criminal orders or their execution within a command, a chief of staff may not be held criminally responsible for criminal acts occurring therein. See LRTWC, Vol XV, p 78. See, in particular, the *Hostage* and *High Command* cases in that regard.

³⁰⁹ This explains that a failure to properly exercise command authority is 'not the responsibility of a chief of staff.' *High Command* case (re-printed in LRTWC XV, p 77).

doctrine of superior liability it should be emphasized that the mere presence within that chain in itself is not sufficient to engage the criminal responsibility of the former for the acts of the latter:

Criminality does not attach to every individual in this chain of command from that fact alone.³¹⁰

8.1.4.3 Relevance of position in the chain of command

Whether it is concerned with a military, a paramilitary or a civilian leader, the doctrine of superior responsibility may apply, *a priori*, at any and every level of the hierarchy to which the accused belonged, regardless of the structure, sophistication and the number of levels of command which that hierarchy comprised.³¹¹

The place of the accused in the hierarchy might be evidentially relevant to identifying the nature and scope of his duties and, in turn, whether he has complied with those after he learnt of the commission or imminent commission of crimes by subordinates:

In its original judgment the Tribunal indicated (Tr. P. 8079) that it 'realized the necessity of guarding against assuming criminality, or even culpable responsibility, *solely* from the official titles which the several defendants held'. This should not be interpreted to mean, however, that the fact that a defendant occupies an important organizational position is of no consequence and has no probative value. People are placed in high positions for the purpose of exercising authority and performing duties pertaining to that position. If a man is designated as a purchasing agent, it can be fairly assumed that his duties and powers pertain to the making of purchases. If a defendant is designated as head of an *Amtsgruppe*, it is logical to assume that this was done with a purpose and that he was expected and authorised to perform the functions of an *Amtsgruppe* chief, and not merely to occupy an office with no duties or responsibilities or authority.³¹²

³¹⁰ *High Command* case, p 543.

³¹¹ See, e.g., *Kunarac* Trial Judgement, par 398; *Halilovic* Trial Judgement, par 61.

³¹² *United States v Pohl and others*, Vol V, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, Supplemental Judgement of the Tribunal, 1168, 1171.

Also, the position of the superior in that chain *vis-à-vis* the perpetrators will determine whether he would have been able to directly intervene with the perpetrators or whether he was dependent on others to do so. This, in turn, may be relevant to establishing whether he, or anyone else located between him and the perpetrators, is responsible for a failure to prevent or punish their crimes.

The number of echelons in the hierarchy that separate a superior charged with superior responsibility from the perpetrators might also be evidentially relevant to the extent that the material ability of the former to control the latter (his 'effective control') might have been impaired or otherwise shaped by the chain of command that linked them together and the various levels of command through which that relationship passed.³¹³ Unless it can be shown that the accused could exercise effective control directly over the perpetrators, it would have to be established that he was able to exercise his effective control over the perpetrators through other persons.³¹⁴ If that chain of control is broken at any point in the hierarchical structure that links the superior to the perpetrators, the former could not, in principle, be held criminally responsible in relation to crimes committed by the latter.

The position of the superior and the perpetrators in the chain of command may also be relevant to establishing the superior's requisite *mens rea*. An inference that the superior knew or had reason to know that his subordinates had committed or were about to commit crimes may be harder to establish when the superior stood *at a distance* from the perpetrators both physically but also hierarchically in the chain of

³¹³ From an evidential point of view, establishing the responsibility of a high-ranking accused might require more 'linkage' evidence than might generally be necessary for a low-level perpetrator who is more directly related to the perpetrators.

³¹⁴ Where members of a platoon have committed crimes and the commander of the corps to which this platoon belongs has been charged with command responsibility in relation to their actions, it would have to be established that he had effective control over, say, the commander or members of the relevant brigade, who in turn had effective control over the leader or relevant members of that platoon, who in turn had effective control over the perpetrators. It could be the case, in some instances, that a superior might be able exercise directly his effective control over individuals located several levels further down the chain of command without going through the chain of command. This, however, is a matter of evidence.

command. Such distance between the two poles multiplies the possibilities of information pertaining to their conduct having been retained, filtered out or lost rather than passed on up that chain. The closer the superior was, physically and hierarchically, from those who committed the crimes, the easier it will be, generally, for the prosecution to petition the court to draw an inference of knowledge on the part of that superior.

Finally, it should be noted that the fact that an accused person sat on top of the hierarchy or chain of command which is implicated in the events does not mean that his duties and responsibilities should be regarded as consisting of the sum of all duties and responsibilities of those officers or state officials who stood in the chain of command between him and the perpetrators. Such an individual has duties of his own and only a failure to comply with *his own obligations* is capable of engaging his individual criminal responsibility pursuant to the doctrine of superior responsibility.

8.1.4.4 Occupation commanders

International law provides for one narrow exception to the requirement that the relationship of subordination between the accused and the perpetrators be inscribed in a vertical chain of command: occupation commanders or military governors.³¹⁵

Where an occupation commander or military governor has been endowed with executive powers over a territory occupied by his forces, he has a general duty to ensure the well-being of the civilian population within that territory. It would be no defence to him to suggest that those who mistreated civilians within that territory were not, formally, within his line of command;³¹⁶ in such a situation, the commander is charged with the responsibility to see that individuals present within his zone of responsibility do not commit criminal offences against members of the civilian population (or prisoners of war) and, if they have, that they are being punished.³¹⁷ In

³¹⁵ See also Bantekas, *Principles of Responsibility*, p 80.

³¹⁶ See, e.g., *Hostage case (U.S. v List et al, LRTWC, vol XI, 1256)*.

³¹⁷ In the *Hostage case*, a U.S. Military Tribunal held:

The matter of subordination of units as a basis for fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command. But as to the commanding general of occupied territory who is charged

other words, an occupation commander – unlike other categories of commanders or superiors – cannot validly claim that his obligation to prevent and punish crimes was limited to those who were in his line of command.³¹⁸

This duty [of occupation commanders to prevent and punish crimes] extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territories having executive authority as well as military command will not be heard to say that a unit taking unlawful orders from someone other than himself was responsible for the crime and that he is thereby absolved from responsibility. [...] The duty and

with maintaining peace and order, punishing crime and protecting lives and property, subordination are relatively unimportant. His responsibility is general and not limited to a control of units directly under his command. Subordinate commanders in occupied territory are similarly responsible to the extent that executive authority has been delegated to them.

11 Trial of War Criminals before the Nuremberg Tribunal under Control Council Law No 10, Nuremberg, Oct. 1946 – Nov. 1949, at 1260. Whether that holding was – and is – fully supported in international law is somewhat uncertain. See also, in the same case, the findings of the Tribunal concerning defendant List, *Hostage* case, 1271: ‘A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area in his command. His responsibility is coextensive with his area of command.’

³¹⁸ See *High Command* case, p 547: ‘One of the functions of an occupational commander endowed with executive power was to maintain order and protect the civilian population against illegal acts. In the absence of any official directives limiting his executive powers as to these illegal acts within his area, he had the right and duty to take action for their suppression.’ In the proceedings against von Roques, the Tribunal, in analyzing the duties of a military occupational commander expressed ‘the opinion that command authority and executive power obligate the one who wields them to exercise them for the protection of prisoners of war and the civilians in his area; and that orders issued which indicate a repudiation of such duty and inaction with knowledge that others within his area are violating this duty which he owes, constitute criminality’ (*High Command* case, 11 Trial of War criminals before the Nuremberg tribunal under Control Council Law No 10, Nuremberg, Oct. 1946 – Nov. 1949, at 632); the Tribunal later found that von Roques ‘bears responsibility for the acts of his subordinates units acting under such orders, and for the acts of other agencies acting within his area, which were criminal and which they were able to carry out only with his acquiescence and approval’, *ibid.*, 647. Based on this theory, the Tribunal found von Roques guilty of implementing the Commissar Order in his rear area, even though he denied issuing the order, because he knew commissars were being shot by units subordinate to his command and by agencies in his area and did nothing about it. Bantekas has noted that the responsibility of executive commanders of occupied territories is ‘co-extensive with their area of command’ (Bantekas, *Principles of Responsibility*, p 80).

responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defense.³¹⁹

But an occupation commander may not be held criminally responsible merely because crimes have been committed within his zone of responsibility. The Tribunal in the *High Command* case pointed out that the responsibility of commanders of occupied territories 'is not unlimited'.³²⁰ In fact, several limitations are set upon the scope of their liability for crimes committed within their zone of responsibility. First, the responsibility of an occupying commander 'is fixed according to the customs of war, international agreements, fundamental principles of humanity, and the authority of the commander which has been delegated to him by his own government.'³²¹ The responsibility of one such commander is, therefore, outlined and circumscribed both by the laws of war – in particular insofar as it regulates situations of occupation – and by those domestic laws or regulations as do specify the nature and scope of his obligations. That last point is of significance since the scope of his duties and obligations as they exist under international law may be circumscribed by the occupying state to the extent however that, in so doing, that state is not setting for its commanders a standard that falls below the minimum threshold of responsibility set under international law.³²²

³¹⁹ *Hostage* case, p 1256.

³²⁰ *High Command* case, 543.

³²¹ *Ibid.*

³²² See, e.g., *High Command* case: '[...] a military commander, whether it be of an occupied territory or otherwise, is subject both to the orders of his military superiors and the state itself as to his jurisdiction and functions. He is their agent and instrument for certain purposes in a position from which they can remove him at will. [...] [A] state can, as to certain matters, under international law limit the exercise of sovereign powers by a military commander in an occupied area, but we are of the opinion that under international law and accepted usages of civilized nations that he has certain responsibilities which he cannot set aside or ignore by reason of activities of his own state within his area.' (Friedman, *Law of War*, Vol II, p 1451). See also what the *High Command* Tribunal said in relation to von Roques, LRTWC, Vol XI, 632: 'We are of the opinion that command authority and executive power obligate the one who wields them to exercise them for the protection of prisoners of war and the civilians in his area.'

Secondly, insofar as individual criminal responsibility is concerned, the superior responsibility of an occupation commander could only be engaged, as with any other categories of commanders, where the three general conditions of superior responsibility have been met.³²³ In particular, the criminal responsibility of an occupation commander is and remains personal and his act or neglect to act must be both voluntary and criminal.³²⁴ It will also have to be established that he possessed the required *mens rea* as defined below and that he was in effective control of the perpetrators.³²⁵ But there remain two important evidential differences between an occupation commander and other categories of superiors, which are based on the specific regulations applicable to cases of occupation and which are relevant to the application of the doctrine of superior responsibility:

- (i) First, where the accused was an occupation commander, as defined in the laws of war, conviction does not depend on proof of a vertical relationship of subordination between him and the perpetrators. Instead, he may be held criminally responsible pursuant to the doctrine of superior responsibility in relation to any crime directed at members of the civilian population – or prisoners of war – who found themselves within his zone of responsibility whether or not those were committed by individuals who were within his chain of command, all other conditions being met.
- (ii) Secondly, unlike what is the case with other categories of superiors, the legal duty of an occupation commander to prevent and punish criminal offences is not limited to those individuals who are in a position of hierarchical subordination with him, but also includes anyone present within his – occupied – zone of responsibility, to the extent, however, that they may be shown to have been under his ‘effective control’ at the relevant time.

³²³ See also, ‘Note. Command Responsibility for War Crimes’, 82 *Yale Law Journal* (1973), 1274, 1276.

³²⁴ See *High Command* case, p 543.

³²⁵ *High Command* case: ‘the occupying commander must have knowledge of these offenses and acquiesce or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal.’ (at 545).

The general duty of a military governor to protect the civilian population might extend beyond what would be required of him based solely on the doctrine of superior responsibility.³²⁶ A military governor could, therefore, be held criminally responsible, though not on the basis of the doctrine of superior responsibility, in relation to breaches of his duty to protect which might per se have been insufficient to trigger his superior responsibility or which might even be irrelevant to that doctrine.

8.2 'Effective control'

8.2.1 Definition

As noted above, to be liable as a superior, the accused must be shown to have exercised 'effective control' over those who are alleged to have committed the underlying crimes. In the language of the *ad hoc* Tribunals, this requirement means that he must have had –

[T]he material ability to prevent offences or punish the principal offenders.³²⁷

'Effective control' represents a minimum threshold of control over others below which one could not be held criminally responsible pursuant to the doctrine of superior responsibility.³²⁸ 'Effective control' is a necessary condition for criminal liability to be

³²⁶ See, e.g., M. Sassoli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", 16 *European Journal of International Law*, 661 (2005); Y. Dinstein, "The Israel Supreme Court and the Law of Belligerent Occupation: Article 43 of the Hague Regulations", 25 *Israel Yearbook on Human Rights*, 1 (1995); H.P. Gasser, "Protection of the Civilian Population", in D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford: Oxford University Press, 1995), at 209-255.

³²⁷ See, e.g., *Bagilishema* Appeal Judgement, par 50 and jurisprudence cited. In *Bagilishema*, the Appeals Chamber noted that it 'is not suggested that "effective control" will necessarily be exercised by a civilian superior and by a military commander in the same way, or that it may necessarily be established in the same way in relation to both a civilian superior and a military commander' (*ibid.*, par 52; see also par 55). See also *Hadzihasanovic* Rule 98bis Decision, par 164; *Celebici* Appeal Judgement, pars 196-197; *Blaskic* Appeal Judgement, par 67; *Krnojelac* Trial Judgement, par 93; *Bagilishema* Appeal Judgement, pars 49-55; *Celebici* Appeal Judgement, pars 196-198.

³²⁸ See, e.g., *Halilovic* Trial Judgement, par 59.

entailed as a superior.³²⁹ Accordingly, '[w]here there is no effective control, there is no superior responsibility.'³³⁰ It is indeed the power or authority of the superior to control the actions of his subordinates which forms the basis of the superior-subordinate relationship.³³¹

A relationship of 'effective control' between the accused and the perpetrators must be established whether the accused has been charged as *de jure* or *de facto* commander/superior of the perpetrators.³³² And it applies generally to any relationship of subordination relevant to the doctrine of superior responsibility, regardless of the military, paramilitary or civilian character of that relationship.

Concretely, 'effective control' is the power to effect, not any result in relation to any matter, but the power and ability to take effective steps to prevent and punish crimes which others have committed or are about to commit.³³³ The Appeals Chamber of the ICTY has noted that –

[T]hose indicators [of effective control] are limited to showing that the accused had the power to prevent, punish or initiate measures

³²⁹ See *Bagilishema* Appeal Judgement, par 56.

³³⁰ *Celebici* Appeal Judgement, footnote 374, p 79. It is theoretically possible to imagine a situation where a superior has effective control of the troops insofar as he has the material ability *to prevent* crimes, but does not have the material ability *to punish* those (or vice and versa). In such a case, liability would be limited *a priori* to the scope of his effective control and only those measures in relation to which he had the 'material ability' (as defined below) will be relevant to assessing his failure to adopt 'necessary and reasonable' measures.

³³¹ *Fofana* Trial Judgment, par 236, referring to *Kordic* Appeal Judgment, par 840, *Celebici* Trial Judgment, par 377 and *Strugar* Trial Judgment, par 359. A trial chamber of the Yugoslav Tribunal has noted that '[t]he doctrine of command responsibility is ultimately predicated upon the position of commander over and the power to control the acts of the perpetrators.' (*Mrskic* Trial Judgment, par 559).

³³² See, e.g., *Bagilishema* Appeal Judgement, pars 50 and 56; *Celebici* Appeal Judgement, par 196.

³³³ See, e.g., *Celebici* Trial Judgement, par 354. One trial chamber defined 'effective control' as 'the ability to maintain or enforce compliance of others with certain rules and orders' (*Oric* Trial Judgement, par 311).

leading to proceedings against the alleged perpetrators where appropriate.³³⁴

‘Effective control’ thus means the ‘capacity and power to force a certain act’ upon the persons alleged to have committed the offence.³³⁵ It consists of the power that one has to demand, expect and actually impose obedience with one’s orders for the purpose of preventing and punishing criminal offences.³³⁶ It is a relationship of authority which goes almost un-questioned between its two poles: one side orders; the other obeys. Any relationship of authority which falls short of that standard, as when one person has to convince, to cajole or to supplicate the other to act in a certain way, would fall short of ‘effective control’ as understood under the doctrine of command responsibility.³³⁷ In such a relationship, short of a criminal order – which a subordinate is bound to decline to obey under the laws of war – there is an enforceable expectation of obedience on the part of the giver of that order, and a mirror expectation of compliance on the part of those receiving that order. In substance, ‘effective control’ is the enforceable power to prevent and punish crimes of subordinates.

Evidence which might reveal a certain degree of authority or power on the part of the accused to effect other ends or to achieve other goals than to prevent or punish crimes would not, therefore, be relevant, in principle, to establishing a relationship of ‘effective control’.³³⁸ The fact, for instance, that the accused might have been able to direct combat activities involving the perpetrators, or the fact that he was able to decide upon structural or organizational matters within a given – military or civilian – structure of which the perpetrators were members are generally not conclusive – and in any case not sufficient – to establishing that he had effective control over those individuals. Evidence of authority outside the context of crime prevention and

³³⁴ *Blaskic* Appeal Judgement, par 69; see also *Hadzihasanovic* Rule 98bis Decision, par 164.

³³⁵ See *Sadaichi* case, reported in XV LRWTC 175 (1949). See also IV LRWTC 411, 480 (1950).

³³⁶ ‘Effective control’ is not, however, the same as absolute power. See, e.g., *Jane Doe et al v Liu Qi et al* (349 F.Supp.2d 1258 (N.D. Cal. 2004)) at 1332, acknowledging the jurisprudence of the ICTY and ICTR and noting that ‘effective control’ ‘extends to situations where the commander has less than absolute power’.

³³⁷ See below, 8.2.

³³⁸ *Ibid.*

punishment could be relevant, however, to the extent that it could be indicative of powers which could have been used for the purpose of guaranteeing compliance with international humanitarian law. Such evidence could thus form part of a circumstantial case of effective control. Ultimately, however, the prosecution must prove not that the accused had some authority over certain individuals, but that such authority enabled him to prevent and punish their crimes.³³⁹

The authority which the superior had over the perpetrators must be ‘effective’, that is ‘real’,³⁴⁰ as opposed to being merely theoretical or potential.³⁴¹ In that sense, the existence of such power may not be presumed nor can it be subject to any sort of assumption; instead, it must be established beyond reasonable doubt as a concrete exercise of superior authority. From an evidential point of view, there must be evidence that the accused was effectively capable of exercising that authority and of enforcing it in the concrete circumstances of the case.

Proof of effective control is, therefore, a necessary condition of liability under the doctrine of superior responsibility.³⁴² An accused charged with superior responsibility could not be found to have failed to adopt necessary and reasonable measures with a view to prevent or punish crimes of such individuals who were not under his effective control, even where he knew – or had reasons to know – that they had committed or were about to commit crimes.³⁴³

Finally, as will be discussed further below, it has been held that effective control must be shown to have existed *at that time when the crimes are alleged to have been*

³³⁹ Proof of effective control does not require that the accused held any position or had any rank or official title (see, e.g., *Oric* Trial Judgement, par 312).

³⁴⁰ *Kordic* Trial Judgement, par 422.

³⁴¹ See, e.g., *Celebici* Appeal Judgement, par 197: ‘it is necessary to look to effective exercise of power or control’.

³⁴² See, e.g., *Celebici* Appeal Judgement, footnote 374, p 79; see also *Bagilishema* Appeal Judgement, par 50. The *Hadzihasanovic* Trial Chamber appears to have considered that liability could be entailed by the commander if and where his subordinates had the ability – and, presumably, the mandate – to prevent the crimes of others (*Hadzihasanovic* Trial Judgement, pars 1746, 1782).

³⁴³ See, e.g., *Hadzihasanovic* Trial Judgement, par 1101.

committed.³⁴⁴ Under that jurisprudence, evidence that the accused was in effective control of the perpetrators either before or after the crimes were committed is therefore not sufficient. It must indeed be established that such a relationship existed at the time when the crimes were committed so that the superior was, effectively, in a position to either prevent or punish them at that time.³⁴⁵

8.2.2 Parties to that relationship

‘Effective control’ must be shown to have existed over those who committed the underlying offences, whether directly or indirectly.³⁴⁶ Effective control as might have existed over third parties is irrelevant to establishing superior responsibility, unless it can be shown that those third parties were in turn able to exercise effective control over the perpetrators.³⁴⁷ An accused person could not be said to be in ‘effective control’ if his ability to exercise control is dependent on the willingness or readiness of others to assist him.

With a view to establishing such a relationship of authority of one man over another, prosecuting authorities have to identify those individuals over whom, they say, the accused exercised effective control. However, the prosecution would not necessarily

³⁴⁴ See, e.g., *Kunarac* Trial Judgement, pars 399, 626-628. See also *Aleksovski* Appeal Judgement, par 76: ‘This necessarily implies that a superior must have such powers prior to his failure to exercise them.’; *Naletilic* Trial Judgement, par 160.

³⁴⁵ See below, 8.3.

³⁴⁶ See, e.g., *Stakic* Trial Judgement, par 459; *Celebici* Appeal Judgement, pars 249 and 992; *Celebici* Trial Judgement, par 377-378; *Brdjanin* Trial Judgement, par 276.

³⁴⁷ See, e.g., *Kordic* Trial Judgement, par 416; *Gacumbitsi* Trial Judgement, par 773; see also *Gacumbitsi* Appeal Judgement, par 84. In a situation where the prosecution case is that the accused had effective control over the perpetrators through a third party, the failure(s) of that third party to comply with his own duties or his failure to enforce his effective control over the perpetrators cannot be attributed to the accused. As already noted, command responsibility is liability for one’s own failure; not for the acts or omission of other persons. To find the accused responsible in such a case, the court would have to be satisfied that (i) the accused had effective control over a third party, that (ii) that third party had effective control over the perpetrators, and that (iii) that the accused intentional failed to prevent or punish crimes by the perpetrators in the knowledge that they had occurred or were likely to occur.

be required to identify them by name, if it can be established, as a minimum, that the perpetrators were part of a unit, organ or structure over which the accused had authority and through which the accused was able to exercise effective control over its members.³⁴⁸ As noted above, however, command of a unit or a group does not allow for an inference that its leader exercised effective control over its members, let alone over those members who committed the crimes.³⁴⁹ Indeed, a relationship of ‘effective control’ is and remains at all times an interpersonal relationship between the superior and one or more subordinates who committed crimes, whether that relationship had its root in the parties’ membership in a group or whether it existed outside of any formalized structure. It would not, therefore, be sufficient to establish that the accused was in charge of a particular unit or that he otherwise exercised commanding functions therein short of establishing that this role or function gave him ‘effective control’ over these members of the group or entity who have committed the crimes.

Thus, in the *Fofana* case, a Trial Chamber of the SCSL highlighted the fact that the accused Fofana had control over certain groups of Kamajor fighters in a particular area where crimes had been committed was not enough to conclude that he had control over all Kamajor fighters and commanders in that region.³⁵⁰ Likewise, in the *Brima* Judgment, the Trial Chamber refused to adopt the Prosecution’s suggestion that different fighting parties that had at times cooperated in military operations could be

³⁴⁸ See, e.g., Transcript from the *Oric* trial, p 8996 (statement of the Presiding Judge of the Trial Chamber): ‘it must be established at least that the individual who committed the crimes was within a group or unit under the control of the superior’. See also *Oric* Trial Judgment, par 311; *Blagojevic* Appeal Judgment, par 287; *Brima* Trial Judgment, par 790. In a case of mass murder, for instance, where many individuals have been involved in the killings, it might be impractical, or even impossible, for the prosecution to identify each and every one (or even any) of the actual perpetrators.

³⁴⁹ It could well be the case, in some instances, however, that although *overall control* of a particular structure has been established, it would not be the case that an accused had actual *effective control* over those members who have committed the crimes. That would be the case, for instance, where certain members of a particular unit are beyond control or where interference with the command structure of that entity has made it impossible for the superior to exercise any authority – or insufficient authority – over those individuals who committed the crimes so that he could not prevent or punish them.

³⁵⁰ See, e.g., *Fofana* Trial Judgment, par 819.

regarded as one single group for the purpose of the doctrine of superior responsibility and that the accused could be said to have had control over that group:³⁵¹

[T]he Prosecution's general characterization of both RUF [Revolutionary United Front] and AFRC [Armed Forces Revolutionary Council] members as "the Accused's Brima's subordinates" is untenable for the following reasons. Although the two groups were allied in one Government and worked closely together during the AFRC Government period, the available evidence suggests that individuals continued to identify themselves as either RUF or SLA and that at an organizational level separate commanders for each group co-existed in the Districts. The Trial Chamber is therefore not satisfied that the Accused Brima exercised effective control over members of the RUF merely by virtue of his *de jure* position within the AFRC Government administration in Freetown.

Distinguishing between groups of people or various chains of command may also be important and necessary where the activities of such groups or chain of command overlap in part but not in whole.³⁵² It may, therefore, be concluded that proof of superior responsibility requires conclusive evidence of the actual exercise of command and control over 'an identifiable group of subordinates'.³⁵³

A failure to identify the actual perpetrators would not be without potential negative consequences for the prosecution as it could foreclose certain inferences which might otherwise have been open.³⁵⁴ For instance, although an inference of 'effective control' would not be excluded by the prosecution's failure to name or to identify the individuals who carried out the underlying crimes, such inference could only be drawn

³⁵¹ *Brima* Trial Judgment, par 1655, footnote omitted; see also, *ibid*, pars 1872-1875.

³⁵² A trial chamber of the SCSL thus underlined the importance of distinguishing, for the purpose of the doctrine of superior responsibility, between the role and responsibilities of the Supreme Council (of which the accused had been a member) and the military since their responsibilities overlapped in part without being vertically integrated. See *Brima* Trial Judgment, par 1656.

³⁵³ *Brima* Trial Judgment, par 1659.

³⁵⁴ The failure of the Prosecution to establish the identity of the perpetrators was of critical importance to the *Kvocka* Trial Chamber's finding that Mr Kvocka could not be said to have been in effective control of the perpetrators despite the breadth of his authority in the camp (see *Kvocka* Trial Judgement, par 412). It is also of importance to identify the perpetrators because of the requirement that the accused must be shown to have known of their *mens rea*.

with the greatest of caution in such circumstances and only where there is clear and unshakeable evidence that the accused was able to control a group of individuals and that, through it, he was able to exercise effective control over the unidentified perpetrators.³⁵⁵ Likewise, where the actual perpetrators of the offence have not been identified, an inference that the accused knew or had reason to know of their criminal intent to commit a particular offence could only be drawn where there is clear and unshakeable evidence that those who committed the crimes possessed the required state of mind and that the accused was aware of it.

Where control over other individuals (i.e., the perpetrators) is exercised in common by a group of individuals, or as part of a collegiate body, of which the accused was a member, it would have to be established that the accused himself, in his personal capacity and/or in his role as a member of that group, was personally able to exercise effective control over the perpetrators.³⁵⁶ As already noted, ‘effective control’ is an inter-personal relationship between two individuals: the commander (as accused) and one (or more) subordinate(s) (who committed the crimes). In such cases, it would therefore have to be established that the role, function and position of the accused – whether as part of that collegiate body or otherwise – gave him the necessary power and authority over the perpetrators. His ability to exercise effective control over other members of a group or organ to which he belongs, or to use its authority or resources to achieve that end could be relevant to establishing his authority and responsibility over the perpetrators.³⁵⁷

³⁵⁵ Such an inference would become ever more remote where the relationship between the accused and the perpetrators goes through several levels in the chain of command.

³⁵⁶ See, e.g., *Brdjanin* Trial Judgement, par 277. The Appeals Chamber of the Rwanda Tribunal noted that membership to a collegiate body would not, in itself, demonstrate the existence of effective control on the part of any one of its members, although such membership could be evidentially relevant to establishing such a relationship (*Nahimana* Appeal Judgment, par 788). See also *Brima* Trial Judgment, pars 786 and 1657.

³⁵⁷ Where a superior cumulates mandates and functions, each of those may in principle be taken into consideration when determining whether he, in fact, had the material ability to prevent and punish the crimes that form the basis of the charges. See, e.g., *Oric* Trial Judgement, par 313; *Brdjanin* Trial Judgement, par 277; *Stakic* Trial Judgement, par 494; *Bagilishema* Appeal Judgement, par 51; *Musema*

8.2.3 Establishing effective control

8.2.3.1 A mixed matter of law and fact

The Appeals Chamber of the ICTY has noted that the indicators of effective control ‘are more a matter of evidence than of substantive law, and said that those indicators are limited to showing that the accused had the power to prevent, punish or initiate measures leading to proceedings against the alleged perpetrators where appropriate’.³⁵⁸

The matter of ‘effective control’ is indeed a mixed question of fact and law. International law shapes what, on the evidence, would be relevant to establishing ‘effective control’.³⁵⁹ It does not set out, however, a clear and definitive list of factors which would have to be met to allow for a finding of effective control. In other words, proof that the accused exercised effective control over the perpetrators could possibly be established through many alternative evidential courses and variations. In all cases, it must be noted that ‘[t]he evidentiary burden required to establish “effective control” is high.’³⁶⁰

8.2.3.2 Indicia of effective control

Establishing ‘effective control’ is no easy task for the prosecution. But no evidential shortcuts are open in this matter. As once noted, ‘great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote’.³⁶¹

The prosecution need not establish that the accused had been appointed to a position of command to be found liable under the doctrine of superior responsibility.³⁶² However,

Trial Judgement, par 135. In such a case, it would have to be established by prosecuting authorities that each of these mandates or roles is relevant to the charges. In particular, the prosecution would have to establish that a particular mandate or role gave him some degree of authority over the perpetrators.

³⁵⁸ *Blaskic* Appeal Judgement, par 69.

³⁵⁹ See, e.g., *Oric* Trial Judgement, par 329.

³⁶⁰ *Brima* Trial Judgment, par 1660.

³⁶¹ *Celebici* Trial Judgement, pars 377-378.

³⁶² See *Oric* Trial Judgement, par 312

his relationship with the perpetrators must be shown on the totality of the evidence to be of such *intensity* as to be similar in that regard to a functioning and effective relationship of *de jure* command. Any evidence which tends to suggest a departure from such a standard will therefore be relevant in principle as evidence that no such relationship existed.

The following factors have been found to bear some evidential relevance and weight when seeking to establish whether an accused person had effective control over those who committed the crimes that form the basis of the charges:³⁶³

- The giving or issuance of orders by the accused where these orders are being obeyed by those who are said to have committed the crimes;³⁶⁴
- Effective disciplinary and investigatory powers of the accused;³⁶⁵
- Reporting to the accused by members of the group or unit involved in the commission of the crimes;
- Power to report crimes;³⁶⁶

³⁶³ See, e.g., at the ICTY, *Aleksovski* Trial Judgement, pars 93-108, 133-137; *Blaskic* Trial Judgement, pars 463-464, 521-528, 724; *Blaskic* Appeal Judgement, pars 377-378, 394, 399, 485, 511, 609; *Celebici* Trial Judgement, pars 670-703, 737-767, 800-809; *Kordic* Appeal Judgement, pars 843-847; *Krnojelac* Trial Judgement, pars 96-106, 126; *Naletilic* Trial Judgement, pars 120-158; *Kordic* Trial Judgement, pars 418-424; *Halilovic* Trial Judgement, par 58; *Hadzihasanovic* Trial Judgement, e.g., pars 581 *et seq.*, 770 *et seq.*, 844 *et seq.* See also, at the ICTR, *Akayesu* Trial Judgement, pars 61-77, 182, 184, 191; *Kayishema* Trial Judgement, pars 501-504; *Kajelijeli* Trial Judgement, pars 900-904; *Kayishema* Appeal Judgement, par 299; *Bagilishema* Trial Judgement, pars 154-184; *Bagilishema* Appeal Judgement, par 53. For the SCSL, see generally *Brima* Trial Judgment, par 785.

³⁶⁴ See e.g. *Hadzihasanovic* Trial Judgement, pars 847, 851, 1034, 1202, 1286, 1744, 1848, 1878, 1945; *Oric* Trial Judgement, par 312, 700; *Brdjanin* Trial Judgement, par 281; *Halilovic* Trial Judgement, par 58; *Mrksic* Trial Judgment, par 567.

³⁶⁵ As with other evidence relevant to this matter, such powers must be shown to have been actual and effective, as opposed to merely formal and un-enforceable.

³⁶⁶ The Appeals Chamber of the ICTY has noted that ‘reporting criminal acts of subordinates to appropriate authorities is eviden[ce] of the material ability to punish them in the circumstances of a certain case, albeit to a very limited degree’ (*Blaskic* Appeal Judgment, par 499; *Halilovic* Appeal

- Ability to order and execute the arrest of the perpetrators;³⁶⁷
- Distribution of weapons, ammunition or provision of military hardware;³⁶⁸
- Official position, role and powers of the accused insofar as those gave him some authority over the perpetrators;³⁶⁹
- *De jure* authority of the accused over the perpetrators, if effective;³⁷⁰
- Power of the accused to make appointments among those said to have partaken in the crimes;³⁷¹
- Recruitment or training of employees or members of the group or entity in question by the state or its organs;³⁷²

Judgment, par 182). The ICTY has made it clear, however, that this would not necessarily be the case in all circumstances, and that it would have to be established that such reporting arose from a pre-existing duty or obligation to do so vis-à-vis individuals who were in a relationship of subordination with the accused (see, in particular, *Halilovic* Appeal Judgment, pars 194 and 210-214).

³⁶⁷ The ability of the accused to report crimes and violations of humanitarian law to higher authorities might also be relevant. Such evidence would only be relevant, however, to the extent that it can be shown that the superior authorities to which the accused was required to and could have reported were in turn in a position to exercise effective control over the perpetrators.

³⁶⁸ See, e.g., *Darfur* Report, pars 111 and 113.

³⁶⁹ *Halilovic* Trial Judgement, par 58. See also *Nahimana* Trial Judgment, par 970; *Nahimana* Appeal Judgment, pars 606 and 794, concerning the evidential relevance of any membership on the part of the accused to executive organs of the body or structure whose members were involved in the commission of crimes.

³⁷⁰ As pointed out above, and as will be discussed further below, though potentially relevant to establishing a relationship of effective control, evidence of a *de jure* relationship between the accused and the perpetrators would not in itself be sufficient to infer the existence of such a relationship or even to create a presumption to that effect. Compliance (or non-compliance) with the formal procedure of appointment (of the accused) to his – alleged – position of *de jure* authority would also be relevant in that regard (*Halilovic* Trial Judgement, par 58).

³⁷¹ Such evidence would be of relatively limited evidential weight in establishing effective control as it might only be very indirectly indicative of a power to prevent or punish crimes.

³⁷² See, again, *Darfur* Report, pars 115 and 121.

- Power to release prisoners (in cases where the charges are based on the unlawful detention and mistreatment of prisoners);³⁷³
- Power to stop crimes, including by those who committed them in the case at hand;
- Evidence that the accused represented the authorities during meetings which reveals or indicates some degree of authority on the part of the accused over the relevant troops or individuals who committed the crimes;³⁷⁴
- Control of the finances and salaries;³⁷⁵

³⁷³ It should be noted, however, that such evidence might not necessarily be indicative of any power over the perpetrators, but over other people or over a certain organ or entity. To be relevant to the issue of effective control, that evidence would have to show that the accused could thereby prevent crimes – or continued crimes – by some of his subordinates who are alleged to have taken part in the commission of the underlying offence. This evidence would likely and generally be most relevant in relation to the third element of command responsibility, rather than the first one.

³⁷⁴ See, e.g., *Oric* Trial Judgement, par 703. Again, whilst such indication might be indicative of some power or authority, in the abstract, on the part of the accused, it might not in fact contain any evidence of effective control, unless that role or function is shown to have endowed him with some actual authority or power over the perpetrators. See *Celebici* Trial Judgement, pars 652-653 and 682-683 (concerning the accused Delalic); *Nahimana* Appeal Judgment, pars 606 and 794, referring to the findings of the Trial Chamber on that point. It should be emphasized once more, however, that membership in a particular organ and the attendance of meetings on behalf of that organ does not per se suffice to establish effective control (see, e.g., *Brima* Trial Judgment, par 1657).

³⁷⁵ *Nahimana* Appeal Judgment, par 606, referring to the Trial Chamber's findings on that point; *Darfur* Report, par 113. Such factors, as might be evidentially relevant to this issue, should be approached with some caution. In the *Musema* case, for instance, the Trial Chamber found that because the accused – the director of a tea factory – exercised legal and financial control over the employees of that factory, particularly through his power to appoint and remove these employees, he could be said by virtue of these powers to have 'effective control' over the perpetrators because he could remove any of them, or threaten to remove any of them, from his or her position at the tea factory (*Musema* Trial Judgment, par 880). The Chamber also found that, by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of tea factory vehicles, uniforms or other Tea Factory property in the commission of such crimes and that he could, therefore, be said to have

- Command of the accused over military operations in which the perpetrators were involved, insofar as it is indicative of some degree of control of the accused over the perpetrators;³⁷⁶
- Leadership and authority of the accused, generally, over the alleged subordinates;³⁷⁷
- Power of the accused to shield perpetrators from investigation or punishment;³⁷⁸
- Power to give binding instructions to the perpetrators or to persons who could exercise effective control over the perpetrators;³⁷⁹

exercised *de jure* power and *de facto* control over tea factory employees (*ibid*). This reasoning appears to disconnect the nature of the powers necessary to trigger the application of the doctrine of command responsibility from the result which those powers should enable a superior to achieve. The record of this trial contains no indication that the power of the accused to remove from his position would in fact have been capable of preventing any of the crimes charged, nor that it would have constitute a reasonable response to the commission of the crimes charged. The view of the *Musema* Chamber also appears to lower the standard of – effective – control necessary to a point where it means no more than a contractual relationship. It also appears to ignore the requirement that parties to such a relationship must have hierarchically related to one another, not just horizontally. It could hardly be said that an employment relationship in a tea factory would be such as to create such a linkage.

³⁷⁶ See, e.g., *Hadzihasanovic* Trial Judgement, pars 851. As with other categories of evidence, this would only be relevant to establishing effective control on the part of the accused if it is indicative – directly or circumstantially – of some degree of authority over the perpetrators that empowered the accused to prevent or punish their crimes.

³⁷⁷ *Oric* Trial Judgement, par 702.

³⁷⁸ Evidence that the accused had the power to grant immunities to the perpetrators from justice or sanctions would be relevant if it is otherwise established that he had the ability to punish them had he decided to. The latter may not necessarily – and certainly not on its own – be inferred from the former.

³⁷⁹ As with the giving of orders – see above – the giving of such instructions by the accused would have to be obeyed and complied with by the subordinates to be relevant to establishing his effective control. Disobedience with or disregard for such instructions would actually constitute powerful evidence of the absence of such a relationship. The ICTY Appeals Chamber also made it clear that the giving of instructions to others may not *per se* be regarded as evidence of effective control unless it may be shown that these could only be issued by a commander or someone in a similar position of authority (*Halilovic*

- The ‘actual’ task or role that the accused performed at the relevant time, to the extent that such role or task is indicative of some degree of authority on the part of the accused over the perpetrators.³⁸⁰

The list of evidential indicators mentioned above is by no means exhaustive. Nor is the evidential weight of each of those factors identical when it comes to establishing whether the accused had effective control over the perpetrators.³⁸¹ Any admissible evidence that is indicative of a relationship of subordination between the accused and the perpetrators would be relevant to that determination. But the existence of any evidence of the sort mentioned above is not necessarily conclusive of the matter insofar as it might fall short of the required degree of control required,³⁸² or might otherwise be contradicted by evidence of absence of effective control over the perpetrators.

The range of factors relevant to this matter may also depend on the circumstances of the case in question, in particular the nature of the group or entity concerned by the charges. In conflicts in which the parties are less organized than traditional armies generally are, proof of ‘effective control’ on the part of the leaders of such outfits might present serious evidential challenges for the prosecuting authorities. The Special Court for Sierra Leone has thus pointed out that ‘in a conflict characterized by the participation of irregular armies or rebel groups, the traditional indicia of effective control provided in the jurisprudence may not be appropriate or useful’.³⁸³ The *Brima* Trial Chamber noted, furthermore, that the less developed the structure of the warring

Appeal Judgment, pars 190 and 205). The Appeals Chamber, therefore, made it clear that the court would have to carefully assess the order in question ‘in light of the rest of the evidence in order to ascertain the degree of control over the perpetrators’ which this order might reveal (*Halilovic* Appeal Judgment, par 204). In that context, the Appeals Chamber agreed with the submissions of the Defence to the effect that the ‘issuing of orders is not a matter that mathematically proves whether a person has effective control’ (*Halilovic* Appeal Judgment, footnote 574, page 85).

³⁸⁰ See, e.g., *Halilovic* Trial Judgement, par 58.

³⁸¹ The weight of each of these and other relevant factors will also depend a great deal on the circumstances relevant to each case.

³⁸² See below, in particular 8.2.

³⁸³ *Brima* Trial Judgment, par 787.

parties or those otherwise involved in the commission of international crimes, ‘the more important it becomes to focus on the nature of the superior’s authority rather than his or her formal designation’.³⁸⁴ The Chamber therefore came up with a list of specific indicia which might tend to indicate that the leaders of irregular armies were in fact able to exercise effective control over the members of such organization:³⁸⁵

- the superior had first entitlement to the profits of war, such as looted property and natural resources;
- the superior exercised control over the fate of vulnerable persons such as women and children;
- the superior had independent access to and/or control of the means to wage war, including arms and ammunition and communication equipments;
- the superior rewarded himself or herself with positions of power and influence;
- the superior had the capacity to intimidate subordinates into compliance and was willing to do so;
- the superior was protected by personal security guards, loyal to him or her, akin to a modern praetorian guard;
- the superior fuels or represents the ideology of the movement of which the subordinates adhere;
- the superior interacts with external bodies or individuals on behalf of the group.

The court’s evidential considerations as regards the question of effective control are not limited to those factual elements which support a finding of effective control. The court will also have to consider any such factor which, if proved, would militate against a finding that the accused had ‘effective control’ over the perpetrators at the time when the crimes were committed. Those factors include the following:

³⁸⁴ *Brima* Trial Judgment, par 787.

³⁸⁵ *Brima* Trial Judgment, par 788. The Trial Chamber made it clear, furthermore, that ‘traditional indicia of effective control’ such as the ability to issue orders would remain relevant to this matter, although these indicia may have to be defined more loosely in the context of less structured organizations (*Brima* Trial Judgment, par 788).

- Disregard or non-compliance by the perpetrators with orders or instructions of the accused;
- General unruliness of the troops;³⁸⁶
- Orders to the perpetrators coming from sources other than the accused which might have interfered with his authority;³⁸⁷
- Absence of legal authority of the accused over the perpetrators;
- Lack of a mechanism or structure in place to enforce compliance with standards of humanitarian law;³⁸⁸
- Under-developed or malfunctioning nature of the relevant military, civilian or paramilitary chain of command;³⁸⁹
- Existence of a parallel chain of command as, for instance, between the military and military security organs or between military and civilian organs;³⁹⁰
- Interference with the normal functioning of the chain of command;

³⁸⁶ The Trial Chamber in *Brima* held, however, that the unpredictability or irresponsibility of the troops does not necessarily exclude that such troops might have been under someone's effective control (see, in particular, *Brima* Trial Judgment, pars 1886-1887).

³⁸⁷ To the extent that the perpetrators are subject to two or more lines of command, the court would have to determine whether the perpetrators acted in a particular way, or were generally obedient, because of the accused's authority or because of the authority of a third party.

³⁸⁸ An accused will not be able to use this as an excuse for his inaction if it was both (i) his responsibility to put such a structure and place, and where (ii) he had the ability to do so.

³⁸⁹ See, e.g., *Oric* Trial Judgement, par 707.

³⁹⁰ In such a case, interference with the normal chain of command may be such that the accused, who is formally in a line of command with the perpetrators, is, in fact, unable to exercise control over them because they ultimately answer not to the accused or to the chain of command of which he is part, but to someone else. This line of defence was raised – un-successfully – by General Krstic before the ICTY.

- Independent power to decide and to act on the part of the alleged subordinates;³⁹¹
- Absence of reporting to the accused on the part of the alleged subordinates;
- Power-struggles or tensions within the relevant chain of command which interfered with the normal functioning of the chain of command;
- Communication breakdown which makes it impracticable or impossible for the accused to exercise his authority over the perpetrators or the full scale thereof;
- Limitation in resources at the disposal of the accused to ensure compliance with his orders and authority;³⁹²
- Evidence that the alleged superiors did not regard themselves as being in charge of the alleged subordinates;³⁹³
- Evidence that the alleged subordinates reserved their right to participate or not to participate in combat;³⁹⁴
- Evidence of displeasure and disapproval of the action of the alleged subordinates;³⁹⁵
- Absence of evidence of reporting by the alleged subordinates to the alleged superior;³⁹⁶

³⁹¹ See, e.g., *Oric* Trial Judgement, par 706.

³⁹² In all cases where command responsibility charges have been brought, the court would have to make its determination based on the reality of the situation at the time, and not based on abstract or objective criteria. Thus, standards of conduct as might apply in a well-organised military structure might not apply per se in the context of a self-organised, or disorganised and loose paramilitary structure.

³⁹³ *Hadzihasanovic* Trial Judgement, pars 795, 844 *et seq.*

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.* Such evidence would be of limited evidential weight in relation to this matter.

³⁹⁶ *Ibid.*

- Absence of record of involvement of the alleged subordinates in operation carried out by the alleged superior, or within the structure commanded by the latter.³⁹⁷

Once again, the existence of evidence indicative of any of the above matters is not necessarily conclusive to a finding of the absence of effective control. As will be discussed below, the evidence relevant to this matter will have to be considered as a whole and in the context of the circumstances as existed at the relevant time.

The court will also have to be satisfied that the extent to which the evidence suggests that the perpetrators have acted in line with the views of the accused – as expressed in orders or otherwise – has no other reasonable explanation than the fact that they were acting in pursuance of his authority, wishes or orders and that they felt bound to do so. Any evidence that other factors led the perpetrators to act in a way consistent with the wishes or instructions of the accused will thus have to be given considerable weight when deciding the question of his ‘effective control’.

A failure to initiate an investigation is not, as such, necessarily an indication of a lack of power to investigate.³⁹⁸ The reasons for that failure would have to be explored to determine whether it was in fact culpable or innocent. Conversely, the ability to initiate a criminal investigation against the perpetrator *may* be an indicator of ‘effective control’.³⁹⁹ Before drawing such a conclusion, however, it would have to be established that this ability, and the duty to initiate such an investigation, resulted from a pre-existing relationship of authority between both parties. In the *Halilovic* case, for instance, the Appeals Chamber made it clear that Mr Halilovic’s ability to investigate, and, more specifically, to draw up reports based on information which he had received about the commission of a crime ‘did not necessarily amount to the threshold required to establish even a “very limited degree” of effective control over the perpetrators’.⁴⁰⁰

³⁹⁷ *Ibid.*

³⁹⁸ *Halilovic* Appeal Judgment, par 177.

³⁹⁹ *Ibid.*, par 182.

⁴⁰⁰ *Ibid.*, par 194, citing with approval *Blaskic* Appeal Judgment, par 499; *Halilovic* Appeal Judgment, par 210.

8.2.3.3 *De jure* position of authority

Proof of a *de jure* appointment to command or to lead those who committed the crimes is relevant to the question of ‘effective control’, although such an appointment is by no means sufficient to establish that fact.⁴⁰¹

In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced.⁴⁰²

The formulation of the ICTY Appeals Chamber, whilst correct in substance, is somewhat unfortunate in that it might suggest a reversal of the burden of proof once evidence of *de jure* powers has been produced.⁴⁰³ Instead, the Appeals Chamber’s holding must be read as setting out a principle and specifying that principle in evidential terms: the principle is that proof of a *de jure* position is not in itself sufficient to establish that the superior was in effective control of the troops which are

⁴⁰¹ See, e.g., *Celebici* Appeal Judgement, pars 192-193; *Bagilishema* Appeal Judgement, par 50.

⁴⁰² *Celebici* Appeal Judgement, par 197.

⁴⁰³ Such reversal of burden would be contrary to the principle of presumption of innocence and the fundamental right of the accused to remain silent and is not accepted under international law. In fact, that erroneous interpretation of the Appeals Chamber’s holding has been adopted in at least two cases before the *ad hoc* Tribunals. See *Hadzihasanovic* Trial Judgement, par 86: ‘La Chambre rappelle que le titre officiel du commandant s’accompagne de la présomption de l’exercice d’un contrôle effectif’, and pars 845-846, 851, 1033, 1201, 1285, 1406, 1524, 1734, where the Trial Chamber appears to have misinterpreted the Appeals Chamber’s holding and, in so doing, arguably violated the fundamental rights of the accused. Those findings, insofar as they suggest that a *de jure* position of authority creates a legal presumption of effective control find no support under international law, violates the principle of presumption of innocence and the right of the accused to remain silent and are plainly wrong in law; see also *Muvunyi* Trial Judgement, par 475. Interestingly, an American court of appeal rejected the interpretation of the *Celebici* Appeal Judgement adopted by the *Hadzihasanovic* Trial Chamber; see *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1291-1292: ‘Thus, although we do not decide the issue, we note that nowhere in any international tribunal decision have we found any indication that the ultimate burden of *persuasion* shifts on this issue [of effective control] when the prosecutor [...] shows that the defendant possessed *de jure* power over the guilty troops. To the contrary, Delalic provides a strong suggestion that it is the plaintiff who must establish, in all command responsibility cases, that the defendant had effective control over his troops.’

formally under his command and that a conviction could be entered on the basis of that doctrine only where proof has been adduced of the actual authority of the accused.⁴⁰⁴ That is so because a *de jure* commander may not have the material ability to prevent or punish crimes of individuals who are legally – but not effectively – under his command.⁴⁰⁵ In evidential terms, that principle means that proof of a *de jure* position is evidentially relevant to the issue of effective control, but not necessarily sufficient.⁴⁰⁶ Thus, for instance, in a well-functioning military structure, a position of command will normally give an individual who holds such position a degree of power and authority over those placed under his command in the hierarchy. That degree *may* rise up to the level necessary to allow for a conclusion that the accused had effective control over the perpetrators. But proof of a *de jure* position may not replace the exigency of proof of effective control, nor can evidence of the former merely be recycled for the purpose of establishing effective control.⁴⁰⁷ The two requirements, a

⁴⁰⁴ See, for example, *Celebici* Appeal Judgement, par 306. See also *Bagilishema* Appeal Judgement, par 50; *Kunarac* Trial Judgement, par 396; *Celebici* Trial Judgement, pars 354 and 370; *Aleksovski* Appeal Judgement, par 76; and *Celebici* Appeal Judgement, par 193.

⁴⁰⁵ That would be the case, for instance, where an individual bears a title or holds a certain position but has none of the authority that normally accompanies that title. In such a situation, he could not be held criminally responsible for failing to prevent or punish the crimes of individuals formally, but not effectively, subordinated to him. See, e.g., *Brdjanin* Trial Judgement, par 276.

⁴⁰⁶ That interpretation has been confirmed by the ICTY Appeals Chamber in the *Blagojevic* case (*Blagojevic* Appeal Judgment, par 302). In the *Celebici* Appeal Judgment, the ICTY Appeals Chamber discussed the possibility that *de jure* authority alone may not lead to the imposition of command responsibility. The relevant discussion indicated “possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control.” In the view of the Appeals Chamber, the Trial Chamber’s conclusion in paragraph 419 of the Trial Judgement that Blagojevic remained in command and control of all units of the Bratunac Brigade reflects its assessment of his *de jure* authority over all members of the brigade, including Nikolic, following a lengthy discussion of various legal provisions, orders, and expert testimony. The Trial Chamber’s subsequent finding [...] that Blagojevic lacked effective control over Momir Nikolic reflected its assessment of the actual facts on the ground in light of the earlier legal discussion.’)

⁴⁰⁷ See, e.g., *Bagilishema* Appeal Judgement, par 50; *Blagojevic* Appeal Judgment, par 302; *Oric* Trial Judgement, pars 698-699; *Krstic* Trial Judgement, footnote 1418, p 229: ‘there is no evidence to rebut the presumption that as Commander of the Drina Corps, General Krstic’s *de jure* powers amounted to his effective control over subordinate troops (*Celebici* Appeal Judgment, par 197). To the contrary, the

de jure position of authority and the exercise of effective control, are distinct and cumulative so that one is not merely the spitting image of the other.⁴⁰⁸ A commander could be found to have been the *de jure* superior of the perpetrators, whilst having no effective control over them, and vice-versa.⁴⁰⁹

To be relevant to an inference of ‘effective control’ on the part of the accused, evidence of a *de jure* position *vis-à-vis* the perpetrators, will thus have to reveal, in addition to the fact that the accused and the perpetrators were legally in a relationship of superior to subordinates, that the accused was effectively able to enforce his legal authority through the exercise of his legal powers over the perpetrators. As noted by the ICTY Appeals Chamber, in determining questions of (superior) responsibility, ‘it is necessary to look to effective exercise of power or control and not to formal titles’.⁴¹⁰ Thus, whilst evidence of a *de jure* appointment in a functioning – civilian or military – hierarchy might substantiate and support evidence of effective control otherwise available, it does not in and of itself provide conclusive evidence of effective control on the part of the superior. Nor does it have the effect of shifting the burden of proof upon the defence to put forth evidence to the contrary, as one ICTY trial chamber appears to have considered.⁴¹¹

evidence on the record confirms that as Corps Commander General Krstic was firmly in charge of his troops. Conversely, it has not been established that General Krstic exercised formal powers over the 10th Sabotage Detachment and the MUP [or civilian police]. In the absence of other conclusive evidence that he in reality did exercise effective control over these troops, General Krstic cannot be said to incur command responsibility for their participation in the crimes.’

⁴⁰⁸ See, e.g., *Gacumbitsi* Appeal Judgement, par 144. The Prosecutor of the ICTY herself has recognised that ‘[a] superior vested with *de jure* authority who does not actually have effective control over his subordinates will not incur criminal responsibility pursuant to the doctrine of superior responsibility’ (*Prosecutor v Boskoski and Tarculovski*, Prosecution Amended Pre-Trial Brief, 4 April 2006, par 101).

⁴⁰⁹ See, e.g., *Blagojevic* Appeal Judgment, pars 300-304.

⁴¹⁰ *Celebici* Appeal Judgement, par 197. See also *Gacumbitsi* Appeal Judgement, par 144, where the ICTR Appeals Chamber rejected the Prosecution’s argument that the accused’s authority as *bourgmestre* to impose law and order in the commune where the crimes were committed would have given him effective control over anyone present in that area at the relevant time.

⁴¹¹ As already noted, such a reversal of the burden of proof would constitute a grave violation of the accused’s presumption of innocence and would be inconsistent with his right to remain silent.

The prosecution is, therefore, required to establish, on the evidence, that the acts and conduct of the accused, and those of his *de jure* subordinates, are consistent with his position as *de jure* commander and that he was able to exercise the authority given to him by law over his subordinates. In that context, and considering the totality of the evidence, a position of *de jure* authority would provide both corroboration and evidential support for a finding that the accused was in fact in effective control of the troops that were formally placed under his responsibility.⁴¹²

8.2.3.4 Issuance of orders and effective control

In many war crimes trials, the prosecution has sought to rely upon the issuance of orders by the accused to establish that he was in effective control of the perpetrators. In fact, of all categories of evidence put forth by the prosecution to establish 'effective control', the issuance of orders by the accused might be the type of evidence most commonly relied upon for that purpose and it often forms the core of the prosecution effective control case. Oftentimes, however, the orders put forward by prosecuting authorities for the purpose of establishing that requirement do not support an allegation of 'effective control'.⁴¹³

Although potentially relevant to establishing effective control, the issuance of orders by the accused is not necessarily conclusive of his having had any authority over the perpetrators. First, the formal existence of an order signed by the accused will not be relevant to establishing effective control unless the substance of that order actually reveals the existence of any such authority over the perpetrators.⁴¹⁴ The Trial Chamber in *Kordic* for instance, stated as follows:⁴¹⁵

The capacity to sign orders will be indicative of some authority.⁴¹⁶
The authority to issue orders, however, may be assumed *de facto*.
Therefore in order to make a proper determination of the status and

⁴¹² See *Oric* Trial Judgment, pars 698-699.

⁴¹³ Thus, for instance, in the *Delalic*, *Halilovic* or *Boskoski* cases.

⁴¹⁴ See, e.g., *Blaskic* Appeal Judgement, pars 68-69; *Celebici* Trial Judgement, par 672, *Kunarac* Trial Judgement, par 397 and *Kordic* Trial Judgement, par 421; *Naletilic* Trial Judgement, par 67.

⁴¹⁵ *Kordic* Trial Judgement, par 421 (footnotes are in the original).

⁴¹⁶ See *Celebici* Trial Judgement, par 672.

actual powers of control of a superior, it will be necessary to look to the substance of the documents signed and whether there is evidence of them being acted upon. For instance in the *Ministries* case, the court found that the mere appearance of an official's name on a distribution list attached to an official document could simply provide evidence that it was intended that he be provided with the relevant information, and not that 'those whose names appear on such distribution lists have responsibility for, or power and right of decision with respect to the subject matter of such document.'⁴¹⁷ Similarly, direct signing of release orders would demonstrate authority to release. An accused's signature on such a document, however, may not necessarily be indicative of actual authority to release as it may be purely formal or merely aimed at implementing a decision made by others.

To be relevant to establishing 'effective control', an order must be an order *from the accused* to or binding on those whom he is said to have had effective control over, i.e., the alleged perpetrators. In other words, the signing of an order by the accused will only be relevant to this matter when it provides evidence of a relationship of authority between himself and the perpetrators, whether directly or indirectly. The power of the accused to issue orders generally or to issue orders to third persons and the fact that such orders were obeyed by anyone other than the alleged perpetrators is thus of limited or of no relevance to the issue of 'effective control'.⁴¹⁸

To be evidentially relevant to the issue of effective control, an order would also have to demonstrate the power and authority of the accused *himself*, as opposed to anyone else's authority or power over the alleged perpetrators.⁴¹⁹ An order issued by someone else which is merely passed down the chain of command by the accused, or an order from him which is merely implementing his superior's orders and thus draws its force

⁴¹⁷ *Ministries* case (*USA v. Von Weizsaecker*), 14 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No.10 (1952), p. 693.

⁴¹⁸ One has to reserve the case of binding orders to third persons who, in turn, may be shown to have had effective control over the perpetrators.

⁴¹⁹ The fact that authority could only be exercised, or fully implemented, through the intervention of a third party would also be relevant to determining whether the accused had, in fact, effective control over the perpetrators (see, for good example of that principle, *Halilovic* Appeal Judgment, pars 206-207). Where, for instance, the implementation of orders depends on the intervention or the involvement of a third party, the court would be entitled to not regard such orders as evidence of effective control on the part of its giver (*Halilovic* Appeal Judgment, pars 206-207).

from the order of which it is an emanation, would not in principle be proof of effective control on the part of the accused; in such a case, the power and authority that underlies the order would not be that of the accused, but that of his own superiors.⁴²⁰ In the *Celebici* case, for instance, the Trial Chamber determined that a number of orders signed by Mr Delalic – who had been charged as a commander pursuant to Article 7(3) of the ICTY Statute – did not demonstrate a hierarchy of control between him and his alleged subordinates, but instead established a state of intermediate implementation of his superior's orders. In other words, these orders were said by the court to be evidence that Mr Delalic was exercising and implementing the power and authority of his own superiors, not his own.⁴²¹

To be relevant to establishing the effective control of the accused over the perpetrators at the relevant time, his signature as it appears on a particular order, would have to confer upon that order its force and validity.⁴²² If the matter being ordered in the document draws its force and authority from a source other than the decision and signature of the accused, that order may not be regarded as indicative of effective control on his part.⁴²³ That explains, for instance, that the orders of a chief of staff, who merely implements the orders of his own commander and who does not have command authority in the chain of command, are no evidence of effective control: 'an order over [a chief of staff's] signature does not have authority for subordinates in the chain of command'.⁴²⁴ For the same reason, effective control may not be inferred from the signing of orders on behalf or with the authority of someone else.⁴²⁵

⁴²⁰ See, adopting this view, I. Bantekas, "The Contemporary Law of Superior Responsibility", 93 *AJIL* (1999) 572, 583: 'orders which move down the chain of command cannot provide evidence of de facto control'. The order could be relevant to establishing the accused's liability for 'ordering' a crime, where that order was patently criminal in character.

⁴²¹ *Celebici* Trial Judgment, pars 671-673 and 695-697.

⁴²² See e.g. *Celebici* Trial Judgement, pars 671-673. See also *Halilovic* Appeal Judgment, pars 206-207.

⁴²³ *Celebici* Trial Judgement, pars 672-673, in particular, par 672.

⁴²⁴ *High Command* case, Vol XI, LRTWC, 462, 513-514. See also *Celebici* Trial Judgement, par 367, which cites the relevant passage from the *High Command* case.

⁴²⁵ See, e.g., *Celebici* Trial Judgement, par 685.

The capacity in which the accused signed the order will also be highly relevant to determining the significance of that order *qua* effective control.⁴²⁶ An order signed as ‘commander’ would clearly carry more weight, *in abstracto*, than one signed in any other capacity which would not necessarily imply the exercise of commanding authority.⁴²⁷ Thus, again, an order signed as chief of staff would not carry any evidential weight as far as effective control is concerned since such a position does not carry any legal authority to command.⁴²⁸

The court will, therefore, have to delve into the particulars of each order to determine the extent to which it indicates any authority on the part of the accused *vis-à-vis* the perpetrators which could support a finding of effective control. In the *Celebici* case, for instance, the Trial Chamber noted that release orders signed by Mr Delalic signed ‘for the Head of the Investigations Body’, and not as ‘Co-ordinator’ (Mr Delalic’s *de jure* function), did not indicate authority on his part to release prisoners.⁴²⁹ That position did not involve any sort of commanding authority, nor any other sort of authority over the alleged perpetrators. It did not, therefore, constitute evidence of ‘effective control’ on the part of the accused.

Furthermore, to be evidentially relevant to the issue of ‘effective control’, the order must be a *binding* order. A recommendation or non-binding instruction is not relevant to this matter since it does not demonstrate any exercise of commanding power or authority on the part of the issuer of the order *vis-à-vis* anyone else.

⁴²⁶ See, generally, *Celebici* Trial Judgement, pars 663 *et seq.*

⁴²⁷ Likewise, an order signed ‘on behalf of’, ‘in place’ or ‘acting for’ the accused’s superior would carry very limited weight re effective control. The weight to be given to an order *qua* effective control must in fact be assessed in light of the capacity in which it was signed. If the position or role in which the order was signed carries no commanding authority, the order may not be read as providing any evidence of effective control.

⁴²⁸ *High Command* case (pp 513-514) and *Celebici* Trial Judgment (par 367), noted in unison: ‘a chief of staff does not have command authority in the chain of command, an order over his own signature does not have authority for subordinates in the chain of command.’

⁴²⁹ *Celebici* Trial Judgement, par 684. See, by contrast, concerning the accused Zdravko Mucic, *ibid.*, par 764.

From a substantive point of view, an order must be indicative of his power to prevent or punish crimes by those to whom the order is directed.⁴³⁰ A routine order regarding unrelated matters could not be relevant to establishing his effective control over the perpetrators.⁴³¹ It must be demonstrated that, through his orders, the accused was or should have been able to punish and prevent the commission of crimes by his subordinates.

Finally, an order signed by the accused will support the prosecution's 'effective control' case only where that order is shown to have been complied with. The *existence* of an order is in itself evidence of nothing other than the fact that it has been issued. To be relevant to the issue of effective control, the order must be shown to have been obeyed or complied with by those to whom it was directed, i.e., the perpetrators:

[P]roof is required that the accused was not only able to issue orders but that the orders were actually followed.⁴³²

The mere act of obedience on the part of the subordinate, although necessary to any inference of *effective control*, is not in itself evidence of a superior-subordinate relationship however.⁴³³ It merely demonstrates the receiver's readiness or willingness to act in line with the views of the accused. It would have to be established, for instance, that the recipient of that order acted *because of* or *pursuant to* the order and

⁴³⁰ See, in particular, *Blaskic* Appeal Judgement, par 69.

⁴³¹ See e.g. *Halilovic* Appeal Judgment, par 205

⁴³² *Blaskic* Appeal Judgement, par 69. See also *Hadzihasanovic* Trial Judgement, pars 847, 851, 1034, 1202, 1286, 1744, 1848, 1878, 1945; *Oric* Trial Judgement, par 312, 700; *Brdjanin* Trial Judgement, par 281.

⁴³³ The Trial Chamber in *Kordic* noted that although Dario Kordic possessed sufficient authority over the Bosnian-Croat forces to order them to commit certain acts – and could therefore be liable for *ordering* those acts under Article 7(1) (*Kordic* Trial Judgement, par 834), he lacked 'effective control' over them and was therefore not liable under Article 7(3) (*ibid.*, pars 839-841). The issuance of a single or limited number of orders by the accused to the alleged perpetrators would not yet be conclusive of a superior-subordinate relationship even if those orders were all complied with.

*in compliance with it.*⁴³⁴ It could well be the case, for instance, that the individual in question acted in a manner consistent with the order because he agreed with it or because he considered that it was in his interest to do so, without him having felt in any way bound to comply with it. Where there is no such evidence or where any other reasonable conclusion has been excluded, however, an inference is open to conclude that the conduct of the perpetrators, which is in line with the order of the accused, was the result of that order.

The timing of the order is also of great importance. According to the ICTY Appeals Chamber, ‘effective control’ must indeed be established at the time when the crimes are alleged to have been committed.⁴³⁵ According to this author, it must be established at the time when the accused is said to have failed in his duty to act.⁴³⁶ In both cases, however, the time at which a particular order was given would be important to determining its relevance to this matter. Thus, although an order given sometime prior to or sometime after the acts could be relevant to establishing a habit of compliance on the part of the subordinates *vis-à-vis* the accused, if enough such orders have been produced to allow such an inference, it remains the case that effective control must be established at the time *when crimes were being committed*.⁴³⁷ ‘To hold a commander liable for the acts of troops who operated under his command on a temporary basis it must be shown that at the time when the acts charged in the indictment were

⁴³⁴ If, for instance, the order is complied with for any other reason than the authority of the person who has given that order, the fact that the order was executed would not necessarily constitute evidence of effective control. A messenger, for instance, who would carry a written order from one commander to another subordinated commander, would not himself be in effective control of the second commander simply because he is passing on the order of the first commander and the second commander complies with this order. Nor was the order obeyed because of that messenger’s authority.

⁴³⁵ See below, 8.3.

⁴³⁶ *Ibid.*

⁴³⁷ See *Kunarac* Trial Judgement, par 399; *Celebici* Appeal Judgement, pars 197-198, 256; *Limaj* Trial Judgement, par 522; *Strugar* Trial Judgement, par 362.

committed, these troops were under the effective control of that commander.’⁴³⁸ No amount of prior orders could replace that requirement.⁴³⁹

Ultimately, it is the cumulative effect of evidence of subjugation to orders and respect for the authority of the accused generally that might convince a tribunal of the existence of a superior-subordinate relationship amounting to ‘effective control’ on the part of the accused over the perpetrators.⁴⁴⁰

8.2.3.5 Assessing and weighing the evidence

Each fact or element said by the prosecution to be relevant to establishing the accused’s effective control over the perpetrators will first have to be considered individually by the court so as to determine whether the evidence pertaining to that fact actually contains any evidential traces of authority by the accused over the perpetrators. Once all such indications have been identified and sorted by the court, they will be considered together with the evidence suggesting an absence of effective control on the part of the accused. Based on the totality of the evidence, and taking into account all relevant circumstances as existed at the time, the court will then

⁴³⁸ *Halilovic* Trial Judgement, par 61, footnote omitted; see also *Brima* Trial Judgment, par 786, providing that superior responsibility may be incurred in relation to troops that have been temporarily re-subordinated to the accused.

⁴³⁹ The demonstration of systemic and consistent pattern of compliance with the orders of the accused on the part of the alleged perpetrators could, however, be relevant to drawing an inference to that effect. That statement has particular relevancy in situations where the military or civilian structures are weak or disorganised, and where compliance with military or state authority is less than forthcoming or selective. The same is true where troops which have been temporarily re-subordinated to another chain of command or where the crimes were committed only shortly after a new commander had assumed a position of *de jure* command over the perpetrators. See *Halilovic* Trial Judgement, par 61; *Kunarac* Trial Judgement, par 399; *Celebici* Appeal Judgement, pars 197-198, 256; *Limaj* Trial Judgement, par 522; *Strugar* Trial Judgement, par 362; *Brima* Trial Judgment, par 786. Concerning the suggestion that an order issued *after* the crimes could ‘confirm’ the existence of a relationship of effective control at the relevant time, see *Halilovic* Appeal Judgment, par 193.

⁴⁴⁰ See, e.g., *Prosecutor v Nikolic*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, par 24.

determine whether, on the whole, the evidence allows for a conclusion – beyond reasonable doubt – that the accused was in effective control of the perpetrators.⁴⁴¹

Where the degree of organization and sophistication of the troops or command structure is weak or dysfunctional, this factor will have to be fully considered when determining whether this may have interfered with the accused's ability to exercise his authority.⁴⁴² When considering this matter, the court would also have to give due consideration, *inter alia*, to the education, training, and experience of the accused, as well as that of the troops, and the time which had elapsed from the moment when the accused first assumed formal command over those troops until the time when the crimes were committed.⁴⁴³ Any circumstance, as might have interfered with the superior's ability to exercise his authority, such as the involvement of the troops into combat operations at the time, would also have to be given due consideration by the court.

Those facts, and similar ones, are all relevant to assessing the actual ability of the accused to exercise effective control over the perpetrators. That context-specific approach is particularly important where crimes have been committed in the heat of battle or in a situation where the powers of the accused might have been constrained by other factors and circumstances, such as the breakdown of communication with his troops or contradictory instructions coming from the accused's own superiors or from a parallel chain of command. Although that context might not completely negate the material ability of the commander to control his troops, it may have eroded it a great deal and might even have rendered it totally ineffective to the point where the commander could not be held responsible for any crimes committed by troops that were formally under his command.

⁴⁴¹ The court will only be able to conclude that the accused had effective control over the perpetrators where that conclusion is the only reasonable conclusion to be reached on the evidence.

⁴⁴² *Oric* Trial Judgement, par 707.

⁴⁴³ The shorter the time period that elapsed since he assumed command, the more unlikely it is that the accused would have been capable of asserting enough authority over the perpetrators to enforce his authority and to prevent and punish their crimes.

8.2.3.6 Scope of evidential relevance

A piece of the evidence presented to the court might be, and often is, relevant to two or more of the elements of superior responsibility, in particular to the first (a relationship of superior-subordinate) and third (a failure to take necessary and reasonable measures to prevent/punish crimes) conditions of liability.⁴⁴⁴ That is so because the ‘effective control’ of a superior will be determined based on his ‘material ability to prevent offences or punish the principal offenders’.⁴⁴⁵ This material ability will, in turn, set the framework within which the court will determine whether the accused has adopted the ‘necessary and reasonable’ measures that were required of him in the circumstances.⁴⁴⁶ Thus, evidence that the accused could punish or arrest the perpetrators or evidence that they systematically obeyed his orders would be relevant, in principle, to both establishing his authority over those individuals (first element of command responsibility) as well as whether he may be said to have adopted those measures that were required of him in the circumstances (third element of command responsibility).

8.2.4 Threshold of ‘effective control’ and other forms of authority

8.2.4.1 General remarks

As noted above, there is no superior responsibility without effective control.⁴⁴⁷ Any standard of control or authority which falls short of that standard would be insufficient to attract criminal liability under that doctrine. There is no intermediate level of control which could be relevant to superior responsibility;⁴⁴⁸ if the accused has been shown to

⁴⁴⁴ See *Limaj* Trial Judgement, par 526. See also D. Mundis, ‘Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute’, printed in G. Boas and W. Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY*, (The Hague: Brill, 2003), 239-275.

⁴⁴⁵ See, e.g., *Celebici* Appeal Judgement, pars 196-198; *Bagilishema* Appeal Judgement, pars 49-55; *Kayishema* Appeal Judgement, par 294; *Fofana* Trial Judgment, par 246.

⁴⁴⁶ See below, 10.2.

⁴⁴⁷ See, e.g., *Halilovic* Appeal Judgment, par 59.

⁴⁴⁸ *Bagilishema* Appeal Judgement, par 56.

have had effective control over the perpetrators at the time, he may, all other conditions being met, be held criminally responsible pursuant to that doctrine.

8.2.4.2 Effective control not the same as influence

‘Effective control’ must be distinguished from lower or lesser forms of influence or authority which certain individuals, charismatic ones, respected ones or those otherwise persuasive enough, may be able to exercise over other individuals without their relationship being one of superior to subordinates as understood under the doctrine of command responsibility.⁴⁴⁹

Effective control is not the same as an ability to convince, to prompt or to influence.⁴⁵⁰ That is so because in these situations those who are confronted with the instructions or demands of such an individual conserve their ability to decline to act in accordance with those, without facing any significant consequences or sanctions. Where effective control has been established, by contrast, that ability to disagree has been excluded. In the *Delalic* case,⁴⁵¹ the *Kunarac* case,⁴⁵² the *Kvocka* case,⁴⁵³ the *Kordic* case,⁴⁵⁴ and the *Halilovic* case,⁴⁵⁵ for instance, chambers of the *ad hoc* Tribunals have identified situations where an individual exercised some degree of authority or power over other

⁴⁴⁹ *Celebici* Appeal Judgement, pars 263 and 266; *Brdjanin* Trial Judgement, par 276, 281; *Halilovic* Trial Judgement, par 752.

⁴⁵⁰ See, e.g., *Brdjanin* Trial Judgement, par 276, 281. See *Oric* Trial Judgement, pars 566-567, which draws a very fine line between the two situations. Nor should the possession of skills or abilities necessary to the exercise of command, such as leadership, be equalled with ‘command’; see M. Smidt, ‘Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations’, 164 *Military Law Review* (2000) 155, 164, footnote omitted: ‘Command and leadership are not necessarily the same. The former is a legal status, an authoritative position recognized under the law. The latter is the skills and techniques necessary to influence soldiers to submit to the orders issues by those holding the lawful status of command.’

⁴⁵¹ *Celebici* Trial Judgement, par 658.

⁴⁵² *Kunarac* Trial Judgement, pars 863 and 628.

⁴⁵³ See, in particular, *Kvocka* Appeal Judgement, pars 144 and 382; *Kvocka* Trial Judgement, pars 368-372.

⁴⁵⁴ *Kordic* Trial Judgement, pars 412-416, 838-841.

⁴⁵⁵ *Halilovic* Trial Judgment, pars 743-752.

individuals which allowed him to exercise sometimes considerable power and influence over them, but which fell short of effective control and was therefore outside the scope of command responsibility.

There is indeed an important distinction, insofar as command responsibility is concerned, between ‘effective control’ on the one hand and lower forms of influence or authority on the other. For instance, where an individual is able, through courage, charisma or other reason, to exercise substantial influence over other individuals. In that case, the criminal responsibility of the accused would not be engaged if those whom he could influence or persuade commit any criminal offence and where he failed to do so:

The Appeals Chamber [of the ICTY] does not interpret the reference to ‘sufficient authority’ as entailing an acceptance of powers of persuasion or influence alone as being a sufficient basis on which to found command responsibility.⁴⁵⁶

The ICTY has made it clear that even ‘substantial influence’ on the part of the accused over the perpetrators would not be sufficient to engage his individual criminal responsibility as a superior:

[S]ubstantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions. Nothing relied on by the Prosecution indicates that there is sufficient evidence of State practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed.⁴⁵⁷

Thus, even a ‘highly influential individual’, whose role or personality would give him great authority *vis-à-vis* other people, would not necessarily, be regarded as being in

⁴⁵⁶ *Celebici* Appeal Judgement, par 263.

⁴⁵⁷ *Celebici* Appeal Judgement, par 266. See also *Naletilic* Trial Judgement, par 68. See also *Prosecutor v Momcilo Mandic*, Verdict, No: X-KR-05-58, 18 July 2007 (State Court of Bosnia and Herzegovina), at 152, pointing out that even ‘substantial influence’ would not be enough to trigger the application of that doctrine

effective control of those over whom he is able to exercise that influence.⁴⁵⁸ That is so because those who are confronted with his instructions conserve their ability to decline to act in accordance with them without any genuine risk of being sanctioned for their failure. Looking at it from the perspective of the alleged subordinate, to be relevant to a finding of effective control, the conduct of the accused must be accompanied by a sense on the part of his subordinate that he is obliged or duty-bound to comply with the accused's directions, and not simply because he considers those to be right or desirable.⁴⁵⁹

Thus, '[n]ot every position of authority and influence necessarily leads to superior responsibility under Article 7(3) of the Statute.'⁴⁶⁰ And the fact that the accused occupied a position of authority and influence *vis-à-vis* the perpetrators at the relevant time is, therefore, not necessarily – and often is not – inconsistent with a further finding that he was not exercising effective control over those people. In arriving at

⁴⁵⁸ See, e.g., *Celebici* Appeal Judgment, par 267-268; *Celebici* Trial Judgment, par 658; *Kordic* Trial Judgment, par 413; *Fofana* Trial Judgment, par 238; *Brima* Trial Judgment, par 784. Concerning the nature and intensity of the relationship that must exist between the accused and his alleged subordinates for that relationship to qualify as 'effective control', see also the Trial Chamber's findings in the *Fofana* case concerning the mystical powers of co-accused Kondewa : 'We find that there is no evidence upon which to conclude beyond reasonable doubt that Kondewa had a superior-subordinate relationship with any of the Kamajors involved in the commission of criminal acts in Koribondo. Although he possessed command over all the Kamajors from every part of the country, this was, however, limited to the Kamajors' belief in mystical powers which Kondewa allegedly possessed. This evidence is inconclusive, however, to establish beyond reasonable doubt that Kondewa had an effective control over the Kamajors, in the sense that he had the material ability to prevent or punish them for their criminal acts. The Chamber noted that Kondewa's *de jure* status as High Priest of the CDF gave him the authority over all the initiators in the country as well as put him in charge of the initiations. This authority did not give him the power to decide who should be deployed to go to the war front. He also never went to the war front himself. The evidence adduced, therefore, has not established beyond reasonable doubt that Kondewa had any superior-subordinate relationship with the Kamajors who operated in Koribondo during the attack.' (*Fofana* Trial Judgment, par 806).

⁴⁵⁹ See, e.g., *Kunarac* Trial Judgement, pars 863 and 628. See also *Celebici* Appeal Judgement, par 266 and *Kordic* Trial Judgement, pars 412-413.

⁴⁶⁰ *Kvocka* Appeal Judgement, pars 144 and 382. See also the findings of the Trial Chamber in the *Kvocka* case at pars 368-372, which clearly distinguished between the 'position of authority and influence' of Mr Kvocka within the camp and his effective control over the alleged perpetrators.

such a conclusion, the Trial Chamber in the *Kvocka* case noted, *inter alia*, the disorganized nature of the troops involved and their apparent lack of accountability as well as the fact that the Prosecution had not fully established which crimes were committed by which of Mr Kvocka's alleged subordinates.⁴⁶¹ These circumstances, the Appeals Chamber held, 'excluded any findings that Kvocka incurred responsibility [as a superior pursuant to Article 7(3) of the ICTY Statute]'.⁴⁶² It is revealing that the Chamber in that case made its finding that Mr Kvocka did not have effective control despite the fact that he had clear and broad authority and influence within the camp in which the crimes were committed, that a former inmate who had known him from before the war said in evidence that he understood him to have been the commander of that camp, that guards made it clear that they could not allow certain things to happen within that camp without Mr Kvocka's prior approval, that Mr Kvocka himself addressed prisoners in the course of their detention and that he told them that he was in charge, that he replaced the commander of the camp in his absence, that he passed on his orders and that he was seen and heard giving orders to camp guards.⁴⁶³

A similar approach, with identical findings, was adopted in the *Celebici* case and the *Kordic* case, where the accused, despite having been found to have exercised extensive powers and influence at the time, were found not to have been in a superior-subordinate relationship as understood under the law of command responsibility. The Trial Chamber in the *Celebici* case found that Mr Delalic had had much authority at the relevant time and was greatly respected in his community. There was evidence of 'general recognition and appreciation';⁴⁶⁴ he had been granted 'special authorisation' to negotiate and conclude agreements on behalf of the local Presidency;⁴⁶⁵ he was indeed a 'well-placed influential individual';⁴⁶⁶ he was also appointed as 'co-ordinator of the Konjic Municipality Defence Forces', which empowered him directly to co-ordinate the work of the defence forces of the Konjic Municipality and the War

⁴⁶¹ *Kvocka* Appeal Judgement, par 144.

⁴⁶² *Ibid.*

⁴⁶³ See *Kvocka* Trial Judgement, pars 368, 370-372 and 410-412, and evidence referred to therein.

⁴⁶⁴ See *Celebici* Trial Judgement, par 651.

⁴⁶⁵ *Ibid.*, par 653 (and 656, concerning his 'power of attorney').

⁴⁶⁶ *Ibid.*, par 658.

Presidency;⁴⁶⁷ Mr Delalic signed various orders;⁴⁶⁸ he participated in military operations and ceremonies;⁴⁶⁹ and he was the commander of a military formation known as a Tactical Group.⁴⁷⁰ Despite all of the above, the Trial Chamber found that the Prosecution had failed to prove that Mr Delalic had command authority and, therefore, superior responsibility.⁴⁷¹ The finding was upheld on appeal.⁴⁷² The *Kordic* Trial Chamber noted that Mr Kordic was a politician ‘with tremendous influence and power’, that he held ‘an important position in the leadership’ of Herzeg-Bosna, that he played ‘an important role in military matters’ ‘even at times issuing orders, and exercising authority over HVO forces’ and had in fact exercised ‘substantial influence’.⁴⁷³ Despite having exercised such extensive authority, the Trial Chamber found that he could not be said to have been in effective control and could not therefore be held responsible under Article 7(3).⁴⁷⁴ Other courts came to similar conclusions.⁴⁷⁵

Therefore, the court must fully assess the reality of the power which the accused was actually and genuinely able to exercise over the perpetrators at the relevant time. From an evidential point of view, the court will have to satisfy itself that all acts upon which the prosecution seeks to rely to establish effective control are ‘unequivocal exercise of

⁴⁶⁷ *Ibid.*, par 659.

⁴⁶⁸ See, e.g., *ibid.*, pars 662, 670 *et seq.*

⁴⁶⁹ *Ibid.*, pars 665-668.

⁴⁷⁰ *Ibid.*, pars 687 *et seq.*

⁴⁷¹ *Ibid.*, par 721.

⁴⁷² *Celebici* Appeal Judgment, pars 267-268.

⁴⁷³ *Kordic* Trial Judgement, pars 838-840.

⁴⁷⁴ *Ibid.*

⁴⁷⁵ See, e.g., *Halilovic* Trial Judgement, par 752, where the Trial Chamber notes that although he enjoyed some authority over the troops, this authority did not rise to the level of effective control and he could not, therefore, be regarded as having been in a position of superior-subordinate *vis-à-vis* the perpetrators. See also, generally, the *Toyoda* case on that point (War Crimes Tribunal Courthouse, Tokyo, Honshu, Japan, September 1949, 19 *United States v Soemu Toyoda* (Official Transcript of Record of Trial)).

superior authority'.⁴⁷⁶ If, however, those acts are reasonably consistent with the exercise of authority which falls short of that standard, or if any other interpretation not consistent with the prosecution's theory of command is reasonably open to the court, that interpretation will be preferred. And if, having considered all of the evidence on that point, there remains any doubt as to the extent of authority or power which the accused was able to exercise over the perpetrators, he must, in application of the principle in *dubio pro reo*, be acquitted.⁴⁷⁷

8.2.4.3 Effective control not the same as an appearance or a belief thereof

The belief, even if held in good faith, that someone was a superior or that he had effective control over certain individuals does not make him a superior under the law of superior responsibility, unless that belief is supported by concrete evidence that he in fact held such position or possessed such control.⁴⁷⁸ The same is true of the appearance of authority which the conduct of the accused or his personality might have created as to his role, function and authority. If not backed with concrete evidence of actual power, that appearance will not suffice to permit a finding that the accused was a superior to the perpetrators or that he had effective control over them.⁴⁷⁹

The 'impression' or 'belief' held by certain people that another person is one's superior or someone else's superior can be evidentially relevant only where that belief or impression is supported and substantiated by other evidence which establish that such a relationship *actually* existed. The mere *belief* that this was the case may under no circumstance create that relationship or replace evidence of actual power with

⁴⁷⁶ *Celebici* Trial Judgement, par 669.

⁴⁷⁷ See, e.g., *Hadzihasanovic* Article 7(3) AC Decision, par 51. See also *Prosecutor v. Tadic*, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, par 73; *Celebici* Trial Judgement, par 413; *Akayesu* Trial Judgement, par 319; *Kayishema* Trial Judgement, par 103.

⁴⁷⁸ See, e.g., *Halilovic* Trial Judgement, pars 342 *et seq* and 743-752.

⁴⁷⁹ *Kvočka* Trial Judgement, pars 368-372 and 410-412.

evidence of the belief of its existence.⁴⁸⁰ In the *Kordic* case, for instance, the Trial Chamber stated as follows:⁴⁸¹

A superior status, when not clearly spelled out in an appointment order, may be deduced through an analysis of the actual tasks performed by the accused in question. This was the approach taken by the Trial Chamber in *Nikolic*.⁴⁸² Evidence that an accused is perceived as having a high public profile, manifested through public appearances and statements, and thus as exercising some authority, may be relevant to the overall assessment of his actual authority although not sufficient in itself to establish it, without evidence of the accused's overall behaviour towards subordinates and his duties. Similarly, the participation of an accused in high-profile international negotiations would not be necessary in itself to demonstrate superior authority. While in the case of military commanders, the evidence of external observers such as international monitoring or humanitarian personnel may be relied upon, in the case of civilian leaders evidence of perceived authority may not be sufficient, as it may be indicative of mere powers of influence in the absence of a subordinate structure.

Before entering a finding on that point, the court will therefore have to delve into 'the reality of the authority of the accused' and show that the powers of the accused are 'real' for criminal responsibility to be attached to him.⁴⁸³ It must be reiterated that a proved awareness on the part of both the superior and the subordinate as to their position *vis-à-vis* the other is in itself a condition of liability pursuant to the doctrine of superior responsibility.

⁴⁸⁰ See generally *Kordic* Trial Judgement, par 423, referring to the *Prosecutor v. Karadzic and Mladic*, Rule 61 Decision, 16 July 1996, par 71, and the requirement of 'the effective exercise of those powers' which the accused had per official position.

⁴⁸¹ *Kordic* Trial Judgement, par 424 (footnote in the original).

⁴⁸² *Prosecutor v. Dragan Nikolic*, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber I, 20 October 1995, par 24. The Trial Chamber appears to have endorsed the witnesses' evidence in this regard: 'The witnesses based their conclusions upon an analysis of the distribution of tasks within the camp. The guards were subjugated to Dragan Nikolic's orders; nothing, apparently, could be carried out without his consent.'

⁴⁸³ *Kordic* Trial Judgement, pars 418 and 422.

8.2.5 Relationships of authority in a civilian structure

The doctrine of superior responsibility extends to civilian leaders ‘only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders’.⁴⁸⁴ The *degree of control* exercised by a civilian must, therefore, be comparable to that required of a military commander, although *the manner* in which that control is exercised, and ultimately the *nature* of that control may differ:

[T]he establishment of civilian superior responsibility requires proof beyond reasonable doubt that the accused exercised effective control over his subordinates, in the sense that he exercised a degree of control over them which is similar to the degree of control of military commanders. It is not suggested that ‘effective control’ will necessarily be exercised by a civilian superior and by a military commander in the same way, or that it may necessarily be established in the same way in relation to both a civilian superior and a military commander.⁴⁸⁵

The Appeals Chamber of the Rwanda Tribunal also pointed out that ‘[i]t is sufficient that, for one reason or another, the accused [a civilian] exercises the required “degree” of control over his subordinates, namely, that of effective control.’⁴⁸⁶ Thus, whilst the

⁴⁸⁴ *Celebici* Appeal Judgement, par 378; cited and reiterated in *Bagilishema* Appeal Judgement, par 51. See also *Musema* Trial Judgment, par 135; *Akayesu* Trial Judgment, par 491.

⁴⁸⁵ See *Bagilishema* Appeal Judgement, par 52; see also, *ibid.*, pars 54-55. See also *Fofana* Trial Judgment, pars 233 and 241, referring to the ‘inherent differences in the nature of the military and civilian superior-subordinate relationships’; *Brima* Trial Judgment, pars 782 and 1653.

⁴⁸⁶ *Bagilishema* Appeal Judgement, par 55. See also *Aleksovski* Appeal Judgement, par 76; *Celebici* Trial Judgement, pars 377-378; *Aleksovski* Trial Judgement, par 78. See, however, the suggestion of the *Brdjanin* Trial Chamber that ‘the concept of effective control for civilian superiors is different in that a civilian superior’s sanctioning power must be interpreted broadly’ (*Brdjanin* Trial Judgement, par 281). According to the *Brdjanin* Chamber, ‘[i]t cannot be expected that civilian superiors will have disciplinary power over their subordinates equivalent to that of military superiors in an analogous command position. For a finding that civilian superiors have effective control over their subordinates, it suffices that civilian superiors, through their position in the hierarchy have the duty to report whenever crimes are committed, and that, in light of their position, the likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures is extant’. These findings plainly contradict the findings of the ICTR Appeals Chamber in *Bagilishema* and, generally, existing case law concerning the requirement of ‘effective control’ which this holding impermissibly dilutes. Furthermore, these findings find no support in state practice, *opinio juris* or precedents. The Trial Chamber’s reliance upon

conclusion must be similar – i.e., ‘effective control’ has been established – the evidential road to establishing that fact, and the evidence relevant to proving it, might differ in the case of a civilian leader.

It may prove more difficult for the prosecuting authorities to establish that a ‘civilian’ had effective control over other people than might be the case within a functioning military structure.⁴⁸⁷ In the case of a military officer, certain inferences as to his ability to control his troops might be made from the nature of the structure within which he was exercising his authority and from the nature of his – *de jure* – authority over those who were formally under his command.⁴⁸⁸ A military structure is indeed highly hierarchical in character and relationships of superiors to subordinates are usually characterized by a high degree of submissiveness to orders which is rarely if ever found in civilian structures. The sociological make up of a civilian structure is generally very different. Relationships of authority are not founded on orders and submission thereto, but to a much greater extent upon pre-determined duties and responsibilities. Thus, whilst a court could, in some cases, be permitted to draw inferences concerning a military commander’s authority over his subordinates from the existence and proper functioning of a military chain of command between them, such inference will be drawn with the greater caution in the context of a civilian relationship of authority or will require such corroboration to meet the relevant threshold of effective control.

Ultimately, whether the authority of the superior is military, civilian or otherwise, the level of control which he must have been able to exercise over those who committed the crimes, for him to be held criminally liable, must be the same - namely, that of ‘effective control’.

the un-supported findings of the *Aleksovski* Trial Chamber’s findings offers little support for the finding itself (see *Aleksovski* Trial Judgement, par 78).

⁴⁸⁷ In some cases, the prosecuting authorities have, therefore, sought to prove that a civilian chain of command as was relevant to the charges effectively functioned in a military like fashion. This was the case, for instance, in the *Boskoski* case where the principal accused was the Minister of Interior at the relevant time.

⁴⁸⁸ See, e.g., *Celebici* Appeal Judgement, par 197. See, however, below, conditions under which such an inference may be drawn.

8.3 Requirement of temporal coincidence

The next question arising in relation to the issue of effective control is the timing thereof. At what time must the accused be shown to have been in effective control of those who actually committed the crimes that form the basis of the charges against him? Is it enough that he is shown to have had effective control at any time prior or after the commission of those crimes, or must he be specifically shown to have been in effective control of those men at the time when they committed the crimes?

According to the ICTY Appeals Chamber, under customary international law, effective control must have existed *at the time when the crimes are alleged to have been committed*.⁴⁸⁹ Under that jurisprudence, it would not be sufficient to establish that at some earlier times, or sometime after the commission of the underlying offence, the accused was able – on one or several occasions – to exercise effective control over the perpetrators, although evidence to that effect could be relevant in relation to the relevant period of time.⁴⁹⁰ In effect, the ICTY Appeals Chamber in the *Hadzihasanovic* case, by majority, held that there must exist a perfect temporal coincidence between the time when the crimes which form the basis of the charges were committed by the alleged perpetrators and the time when the superior-subordinate relationship existed between the accused and the perpetrators. Thus, the majority of the ICTY Appeals Chamber concluded that '[a]lthough the duty to prevent and the duty to punish are separable, each is coterminous with the commander's tenure.'⁴⁹¹ Crimes which were committed prior to a commander's assumption of

⁴⁸⁹ *Hadzihasanovic* Article 7(3) AC Decision, par 37(ff). This position has since then been reiterated in various decisions and judgements of the ICTY and ICTR. See also *Kunarac* Trial Judgement, pars 399, 626-628; *Aleksovski* Appeal Judgement, par 76: 'This necessarily implies that a superior must have such powers prior to his failure to exercise them.'; *Naletilic* Trial Judgement, par 160; *Hadzihasanovic* Trial Judgement, par 1485.

⁴⁹⁰ Before drawing any such inference, as may be open on the evidence, the court will take into account all circumstances relevant at the time which might have caused this relationship to falter or to come under strain at the time or as a result of the crimes having been committed.

⁴⁹¹ *Hadzihasanovic* Article 7(3) AC Decision, par 55.

command or after he has left his position could not be charged against him under that heading.⁴⁹²

The position of the majority of the Appeals Chamber on that point leaves, as one dissenting Judge observed, ‘a gaping hole in the protection which international humanitarian law seeks to provide for the victims of the crimes committed contrary to

⁴⁹² *Ibid.*, pars 37(ff) and par 45: ‘no [state] practice [as would be relevant to customary international law] can be found, nor is there any evidence of *opinio juris* that would sustain the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander’s assumption of command over that subordinate.’, and par 51: ‘Having examined the above authorities, the Appeals Chamber holds that an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the said accused assumed command over that subordinate’. The same reasoning was applied by the Trial Chamber in *Kvočka* (*Kvočka* Trial Judgement, par 349 and references cited therein), and adopted by the Appeals Chamber on appeal (see, in particular, *Kvočka* Appeal Judgement, pars 251-252). See also *Hadzihasanovic* Trial Judgement, par 1485. Under that jurisprudence, the fact that soldiers might have been subordinated to a commander only for a limited period of time does not exclude that he may be held responsible for their actions if, *at the time when the acts charged in the indictment were committed*, these persons were under his effective control. See, e.g., *Kunarac* Trial Judgement, pars 399 and 626-628. As soon as these troops are being subordinated back to their normal chain of command, the duty of the *temporary* commander to act is extinguished or, rather, his continued failure to act (if any) may not be taken into account to determine whether he failed in his duties and is thus responsible as a commander. See also *Celebici* Appeal Judgement, par 198. The time during which the commander was in charge of those troops will evidently be relevant to the determination of the measures which could be said to have been ‘necessary and reasonable’ for him to take. The length of time during which those soldiers have been under his command – prior to committing crimes – will also be evidentially relevant to determine the extent to which the commander would have been able to assert his effective control over those troops during that period. See also the following before the Special Court for Sierra Leone: *Fofana* Trial Judgment, par 240; *Brima* Trial Judgment, par 1673 (about crimes committed prior to the accused’s assumption of command over the perpetrators) and par 1725 (concerning sporadic as opposed to constant exercise of effective control).

that law’⁴⁹³ and the majority’s view appears to be highly questionable from a legal and practical point of view.⁴⁹⁴

As suggested by the Appeals Chamber, there must indeed be some degree of temporal coincidence, but it is one between the time at which the commander had effective control over the perpetrator and the time at which the commander is said to have failed to exercise his powers (to prevent or punish), not the time at which the crimes were committed as the majority of the Appeals Chamber suggested.⁴⁹⁵ Thus, for as long as a superior is shown to have had effective control over subordinates, he can be held responsible for their crimes if he fails to exercise such abilities of control.⁴⁹⁶ The ultimate source of a commander’s criminal responsibility is indeed his failure to comply with his duties as a commander. In that respect, he would fail no less should his subordinates commit crimes whether they were under his authority at the time of the crimes or whether they became so later in time.

It is unclear at this point, whether other courts and tribunals will come to adopt the view of the *Hadzihasanovic* majority, or whether, as happened with the *Yamashita* precedent, the arguments of the minority will come to prevail.⁴⁹⁷

⁴⁹³ *Hadzihasanovic* Article 7(3) AC Decision, Separate and Partially Dissenting Opinion of Judge David Hunt, par 22.

⁴⁹⁴ See generally the compelling arguments of Judge Shahabuddeen and Judge Hunt – *Hadzihasanovic* Article 7(3) AC Decision, Partially Dissenting Opinion of Judge Shahabuddeen, and Separate and Partially Dissenting Opinion of Judge David Hunt. See also *Oric* Trial Judgement, par 335.

⁴⁹⁵ See *Kunarac* Trial Judgement, par 399. The Trial Chamber in that case pointed out that it must be shown that ‘at the time when the acts charged in the Indictment were committed, these [subordinates] were under the effective control of that particular individual’. See also *Hadzihasanovic* Article 7(3) AC Decision, Partially Dissenting Opinion of Judge Shahabuddeen, par 28.

⁴⁹⁶ *Celebici* Appeal Judgement, par 198.

⁴⁹⁷ Inroads against the position of the majority of the Appeals Chamber have already started in the jurisprudence (see, e.g., *Oric* Trial Judgement, par 335). It should be noted that the position of the majority has been supported in the literature by highly respected authors (see e.g., C. Greenwood, “Command Responsibility And The Hadzihasanovic Decision”, 2(2) *JICJ* 598 (2004) and; T. Meron, ‘Revival of Customary Humanitarian Law’, 99 *AJIL*, 817 (2005).

9 A CULPABLE STATE OF MIND

9.1 General remarks

9.1.1 Requirement of knowledge: From Yamashita to the ICC

It is generally agreed that the first genuine articulation of the principle of command responsibility is found in the *Yamashita* case. The charge against General Yamashita was that between 9 October 1944 and 2 September 1945, in the Philippines Islands, ‘while he was the commander of armed forces of Japan at war with the United States of America and its allies’, he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he [...] thereby violated the laws of war’.

The US military commission charged with trying General Yamashita found that a military commander could, in some cases, be held criminally responsible when there is no effective attempt on his part to discover and control the criminal acts of his subordinates.⁴⁹⁸ The commission did not clearly lay down the conditions under which such consequences could ensue for the commander. It appeared to consider, however, that conviction did not require that the accused be shown to have known of the crimes committed by his troops, nor that he should need to have been able to control his troops at the time when the crimes were being committed. It was enough, the Judgment suggests, that General Yamashita failed to maintain control over those troops.⁴⁹⁹

The law of ‘command responsible’, as the commission viewed it, was thus much removed from the fundamental requirements of personal fault and culpable mindset

⁴⁹⁸ See Judgement of the United States Military Commission, Manila, 8 Oct 1945 – 7 Dec 1945, as re-printed in the *Law Reports of Trials of War Criminals*, Selected and Prepared by the United Nations War Crimes Commission, Vol IV, London: HMSO, 1948, 1, at 35-36; see also, extracts of the Judgement, as re-printed in Friedman, *Law of War*, pp 1596-1598.

⁴⁹⁹ *Ibid.*

which criminal law generally requires for criminal conviction. In all but name, the standard of liability set out by the US military commission was a form of objective liability whereby a commander could be held criminally responsible for crimes committed by his troops where he fails to discover and control the criminal acts of his subordinates and despite the absence of knowledge on his part of such a crime or, rather, regardless of any such awareness.

The US Supreme Court, to which a petition for *habeas corpus* had been directed by Yamashita's counsel, did not do much better than the military commission.⁵⁰⁰ In addition to declining to review the evidence that formed the basis of the conviction of General Yamashita, the Supreme Court gave legitimacy to the (quasi-)objective form of liability that had been adopted by the military commission. In reaching its conclusions, the Supreme Court adopted what an author rightly called 'a highly questionable interpretation of existing rules of international humanitarian law, as well as a wrong application of the principles to the case at bar, in addition to total disregard for the required mental element for the crime'.⁵⁰¹

Although much of the latter development of the law of command responsibility descends in one way or another from the *Yamashita* precedent, these developments are characterized as much by their resemblance with this precedent as from the distance which they have voluntarily taken from it. Particularly evident in that trend is the emphasis placed by later tribunals upon the importance and necessity of the superior's knowledge of his subordinates' criminal conduct. Without such knowledge, a superior could not be held criminally responsible under customary international law. The Statute of the ICC marks a clear retreat from that trend and a step back towards the *Yamashita* precedent. Under Article 28(a)(i) of the ICC Statute, a 'military commander or a person effectively acting as a military commander' could entail superior responsibility where he 'should have known' of his subordinates' crimes, though his

⁵⁰⁰ *Yamashita*, U.S. Supreme Court, Judgement of 4 February 1946, 18 AILC, 1-23 [327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946)], and re-printed, in part, in *Law Reports of Trials of War Criminals*, Selected and Prepared by the United Nations War Crimes Commission, Vol IV, London: HMSO, 1948, 1, at 37 *et seq.*

⁵⁰¹ A. Cassese, *International Criminal Law*, (Oxford: Oxford University Press, 2003), at 203.

knowledge of those crimes has not in fact been established. As will be seen below, this approach has serious implications for defendants charged with superior responsibility.

9.1.2 Customary international law and the ICC

The definition of what constitutes adequate and sufficient notice of the crimes for the purpose of assigning criminal responsibility to a superior varies quite significantly if one considers the position under customary international law (as identified by the *ad hoc* Tribunals) or that which applies under the Statute of the International Criminal Court.

9.1.2.1 Customary international law

To be criminally liable under customary international law, the superior must be shown to have known or to have had reason to know that his subordinate was about to commit or had committed the crime that forms the basis of the charges. The requirement comes in the alternative. It must, therefore, be proved either that –

- (i) the superior had actual knowledge (he ‘knew’), established through either direct or circumstantial evidence, that his subordinates had committed or were about to commit a crime; *or* that
- (ii) he had in his possession information which would at least put him on notice of the risk of such offence, such information alerting him to the need for additional investigation to determine whether such crime had been committed or was about to be committed by his subordinates (he ‘had reason to know’).⁵⁰²

That standard of knowledge applies to all categories of superiors. It may be the case, however, that certain inferences as might be open in the case of a military commander might not be open in the case of a civilian superior.⁵⁰³ In every case, however, the

⁵⁰² *Celebici* Appeal Judgement, pars 223-226; *Krnjelac* Trial Judgement, par 94; *Bagilishema* Appeal Judgement, pars 26-38.

⁵⁰³ One trial chamber of the ICTY has suggested that ‘the threshold to prove knowledge of a superior exercising more informal types of authority is higher than for those operating within a highly disciplined and formalized chain of command with established reporting and monitoring system’ (*Oric* Trial

court would have to be satisfied that either of these standards has been proved in relation to the accused.

9.1.2.2 ICC Statute

The situation before the International Criminal Court, as far as *mens rea* is concerned, diverges significantly from the position under customary international law as laid out above. Article 28 of the ICC Statute provides for a dual regime of superior responsibility which varies depending on the nature of the authority exercised by the accused at the relevant time.⁵⁰⁴

Where the accused is charged with having been a non-military superior pursuant to Article 28(b) of the Statute, the Prosecution will have to establish that the accused ‘knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes’. Such a standard does not diverge, in any significant manner, from the standard of *mens rea* applicable to all superiors under customary international law.⁵⁰⁵ The Prosecution would have to prove that the accused either effectively knew of the crimes or had sufficient information in his possession to conclude that such crimes had been committed or were about to be committed. The Statute sets out that the conclusion which the superior should have drawn from the information which he possessed should have been ‘clear’ to him and

Judgement, par 320). This statement, if it suggests different standards of knowledge, finds no support under international law. It should instead be read as a suggestion that *proof* of knowledge may be more difficult to establish in the case of ‘a superior exercising more informal types of authority’ and that inferences, as might be open in the case of a well-structured and organized organ might not be open in the case of a more informal or less organized structure. See, e.g., *Celebici* Appeal Judgement, pars 196 *et seq*; *Krnjelac* Trial Judgement, par 94; *Oric* Trial Judgement, par 320; *Brdjanin* Trial Judgement, par 282.

⁵⁰⁴ The full text of the Statute of the ICC is available on the ICC official website (www.icc-cpi.int).

⁵⁰⁵ See, generally, W. Fenrick, ‘Article 28’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft, 1999) 515; K. Ambos, ‘Superior Responsibility’, in A. Cassese *et al*, *The Rome Statute of the International Criminal Court – A Commentary*, Vol I, 823, 870 (Oxford: Oxford University Press, 2002); G. Vetter, ‘Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)’, 25(1) *Yale Journal of International Law*, 89-143 (2000).

that this information pertained specifically to the commission – or imminent – commission of the crimes of subordinates with which he is charged.

Where, however, the accused is charged with having been a ‘military commander’ or a ‘person effectively acting as a military commander’ he could be held criminally responsible, all other conditions being met, when he ‘knew or, owing to the circumstances at the time, should have known’ that his troops had or were about to commit crimes.⁵⁰⁶

The ICC Statute, therefore, establishes a lower *mens rea* standard for military superiors than is the case for non-military superiors, thus rendering the statutory distinction between these two categories of potentially great importance to the court’s determination as to guilt or innocence of the accused. In effect, the ICC Statute has set the threshold for the duty of the superior to act one step further back in the deductive chain of knowledge when it concerns military commanders, and requires them greater foresight than is the case with non-military superiors.⁵⁰⁷

The Statute of the ICC does not provide any criteria which would permit to distinguish between ‘military’ commanders or those effectively acting as such and those ‘other superiors’ to whom a different standard applies. This may lead to protracted litigation to determine that fact at trial, to legal uncertainties and to serious differences of treatment between accused persons whose role might in fact have been very similar in

⁵⁰⁶ Article 28(a)(i) of the ICC Statute.

⁵⁰⁷ Article 28(b)(i) of the ICC Statute. Two ICTR trial chambers have adopted the position of the ICC Statute whereby different degrees of *mens rea* would apply to military, as opposed to civilian, superiors (see *Kayishema* Trial Judgement, pars 227-228; *Muvunyi* Trial Judgement, par 473). They offered no authority or support for their position under international law at the time relevant to the charges. The validity of those findings is very doubtful. A similar approach has been adopted by Canada in its Crimes Against Humanity and War Crimes Act (2000, c. 24): under that law, the required *mens rea* for a military commander will be established, inter alia, when the accused can be showed to have been ‘criminally negligent in failing to know’, whilst it has been more narrowly defined in relation to non-military superiors where the prosecution would have to prove that such an accused ‘consciously disregard[ed] information that clearly indicate[d] that such an offence is about to be committed or is being committed [...]’.

nature.⁵⁰⁸ Furthermore, the Statute does not say in what category superiors with mixed responsibilities, military and civilian for instance, would fall. In effect, the Statute of the ICC has transformed what were matters of evidential inferences – i.e., evidential inferences that might have been open in the case of a military commander, but not in other cases – into different conditions of liability for military commanders on the one hand and ‘other superiors’ on the other.⁵⁰⁹

9.1.2.3 Domestic regimes

At the national level, different jurisdictions have and will continue to develop different shades of command responsibility thereby setting different standards of liability for military commanders and other superiors. It might also be the case that some domestic jurisdictions might never recognize superior responsibility as a discrete form of criminal liability.⁵¹⁰ The absence from domestic law of such a legal concept would not be sufficient, it would seem, to conclude pursuant to Article 17 of the ICC Statute that the state in question would thereby be ‘unable or unwilling’ to prosecute.⁵¹¹

⁵⁰⁸ See *Oric* Trial Chamber noting that ‘the borderline between military and civil authority can be fluid’ (*Oric* Trial Judgement, par 309). With a view to narrow down the problem, Canada has adopted the following definitions: according to the Crimes Against Humanity and War Crimes Act (2000, c. 24) (Articles 5 and 7), a ‘military commander’ ‘includes a person effectively acting as a military commander and a person who commands police with a degree of authority and control comparable to a military commander’; by contrast, a ‘superior’ ‘means a person in authority, other than a military commander’.

⁵⁰⁹ See G. Vetter, ‘Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)’ 25(1) *The Yale Journal of International Law* (2000) 89, 103, arguing that the standard of knowledge applicable to civilian superiors ‘reduces the efficacy of the permanent international criminal court’ and is ‘perhaps less strict than the prior law of command responsibility as applied to civilians’.

⁵¹⁰ The expression ‘command responsibility’ does not even exist in some legal systems, for instance, in the Latvian – legal – language. The author is grateful to Judge Anita Ušacka, Judge of the ICC, for this indication. See also *Prosecutor v Kovacevic*, Decision on Referral of Case Pursuant to Rule 11bis, 17 Nov 2006, pars 43-46.

⁵¹¹ A useful, though not completely comparable, precedent in that regard is to be found in some of the decisions taken by the ICTY pursuant to Rule 11bis. Pursuant to that provision, the ICTY is able to ‘refer’ cases back to local domestic authorities for prosecution. In several of the decisions where it has allowed such transfer back to a national jurisdiction, the ICTY has pointed out that the absence, under

Unless future state practice clearly signifies a shift towards the ICC-sanctioned definition of superior responsibility, the ICC itself might have to decide whether to use the full potential of its statutory provision, with the risk of applying a standard not otherwise accepted in many domestic legislations nor under customary international law, or whether to align its jurisprudence with that of other jurisdictions. The capacity of the ICC to set judicial precedents for other jurisdictions is as yet untested.

9.2 Knowledge

9.2.1 *Raison d'être* of the requirement of knowledge

The requirement, under customary law, that a superior must know or have reason to know that his subordinates are committing crimes or are about to do so exists so that a superior may not be held responsible for crimes of which he had no knowledge.⁵¹² As noted above, this standard differs significantly from that adopted in the ICC Statute.

9.2.2 Timing of knowledge

Only this information which was effectively in the possession of the accused prior to the time when he is said to have failed in his duty (to prevent or punish) is relevant to establishing his state of mind. No *post facto* inference as to the nature and scope of his knowledge at the relevant time may be drawn from the fact that crimes were indeed committed by subordinates:

domestic law, of a concept of 'superior' or 'command' responsibility did not prevent the referral of such cases (*Prosecutor v Ademi and Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, 14 September 2005, pars 38-46).

⁵¹² The soundness of such a requirement can be easily grasped from the literature on the *Yamashita* trial, in which the U.S. Supreme Court found the accused responsible for criminal actions of which he seems to have had no knowledge of (see, e.g., M. Stryszak, 'Command responsibility: How Much Should a Commander Be Expected to Know?', 11 *U.S.A.F. Academic Journal of Legal Studies*, 27 (2000); M. Smidt, 'Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations', 164 *Military Law Review* 155 (2000).

Leaders and commanders necessarily have to make decisions on the basis of their assessment of the information reasonably available to them at the time, rather than what is determined in hindsight.⁵¹³

The information that is said to be relevant to establishing his *mens rea* must, therefore, be shown to have been available to the accused prior to or at the time of his alleged failure to act adequately.⁵¹⁴ Any event or incident which took place after the commander is alleged to have failed in his duty is, therefore, irrelevant in principle to establishing his awareness of the existence of such a risk.⁵¹⁵

9.2.3 Knowledge of what?

9.2.3.1 Object of knowledge

Under customary international law, the information that must have been available to the superior at the time when he is said to have failed in his duties need not contain specific details of the unlawful acts which have been or are about to be committed.⁵¹⁶ And the 'had reasons to know' standard does not require that actual knowledge, either explicit or circumstantial, be established.⁵¹⁷ It is sufficient that the court be satisfied that the accused had 'some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates'.⁵¹⁸

As discussed further below, the two main questions to be resolved in that regard are:

⁵¹³ United States: Department of Defence Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War, 10 April 1992, re-printed in 31 *ILM* 612 (1992).

⁵¹⁴ See, e.g., *Aleksovski* Appeal Judgement, par 76.

⁵¹⁵ The same is true where he learned of those events after he is alleged to have failed in his duties and at a time when he was not in effective control of the relevant individuals anymore. In those circumstances, the information which he might have acquired of crimes committed by former subordinates would not be relevant to charges raised against him as commanders of the perpetrators.

⁵¹⁶ See *Krnjelac* Appeal Judgement, par 155.

⁵¹⁷ See, e.g., *Bagilishema* Appeal Judgement, par 28.

⁵¹⁸ *Ibid.*, par 28.

- (i) how precise or how specific must the information acquired by the accused have been for him to be said to have received sufficient notice of those crimes? and
- (ii) how likely must those crimes have been, for the accused to be said to have had sufficient notice so as to trigger his duty to act?

The present section deals with the first of these questions, whilst the next section will discuss question (ii).

Although the ‘had reason to know’ standard offers the prosecution a useful alternative path to establishing the superior’s *mens rea*, it is an evidential course that the prosecution has rarely pursued on its own. The line between a situation where the accused may be said to have had reasons to know of the crimes of his subordinates and one where he cannot be said to have had the required *mens rea* is a fine one, and one that is sometimes difficult to draw, thus often placing the prosecution (and the defence) in a position of uncertainty as to whether that line may have been reached in a particular case. As a result, the prosecution has generally argued – and sought to prove – its case in the alternative: the accused knew of the crimes and, should the tribunal not be satisfied that he did, it must conclude that he had reason to know of those crimes. The second course offers a fall-back position for the prosecution where evidence of knowledge falls short of actual knowledge. Because the second standard (‘had reason to know’) creates greater evidential uncertainties which are difficult to rebut for the defence, contemporary courts (but not necessarily older ones) have *generally* drawn inferences of notice with great caution.⁵¹⁹

Not any sort of general information would suffice to establish that the accused ‘had reason to know’ of the crimes or of their likely occurrence. According to the ICTY Appeals Chamber, ‘the principle of individual guilt requires that an accused can only be convicted for crimes if his *mens rea* comprises the *actus reus* of the crime’.⁵²⁰ What the superior must, therefore, be shown to have known or have had reason to know is that ‘acts such as those charged’ had been committed or were about to be committed

⁵¹⁹ See, e.g., *Bagilishema* Trial Judgement, par 988.

⁵²⁰ See *Naletilic* Appeal Judgement, par 114.

by his subordinates.⁵²¹ The commander must be shown to have known or have had reasons to know of all material elements which characterise the offence which his subordinates have committed and with which he is being charged.⁵²² This applies to both the elements of the underlying offence with which he is charged, as well as the chapeau elements relevant to establishing the charges against him.⁵²³ For instance, where a superior is charged with ‘murder’, he must be shown to have known or have had reasons to know that murders – and not any other criminal offence – had been committed or were about to be committed by subordinates, lest he could not be held criminally responsible in relation to such a crime. If this murder is charged as a crime against humanity, the accused must be shown to have known of the fundamental characteristics of this category; the same would be true where he is charged with war crimes or genocide.⁵²⁴

Knowledge of a general matrix of events and conduct does not suffice to constitute knowledge or notice relevant to superior responsibility under customary law.⁵²⁵ Nor does a general awareness of criminal propensities among some subordinates.⁵²⁶ As

⁵²¹ See *Strugar* Trial Judgement, pars 416-417; *Krnjelac* Appeal Judgement, pars 155, 178-179; *Hadzihasanovic* Trial Judgement, par 106.

⁵²² See, generally, *Krnjelac* Appeal Judgement, pars 155, 178-179; and *Naletilic* Appeal Judgement, par 114.

⁵²³ See *Naletilic* Appeal Judgement, pars 114-121, concerning the requirement that an accused charged with a violation of the laws or customs of war should be aware of the existence of an armed conflict at the time and of the nature – internal or international – of that conflict.

⁵²⁴ See, e.g., *Naletilic* Appeal Judgement, where the accused had been charged with a number of violations of the laws or customs of war, i.e., war crimes, pursuant to Common Article 3 of the Geneva Conventions, par 118:

The principle of individual guilt, as explained above, requires that fundamental characteristics of a war crime be mirrored in the perpetrator’s mind. [...] It is illogical to say that there is such a nexus unless it is proved that the accused has been aware of the factual circumstances concerning the nature of the hostilities. [...] [T]he Prosecution has to show “that the accused knew that *his* crimes” had a nexus to an international armed conflict, or at least that he had knowledge of the factual circumstances later bringing the Judges to the conclusion that the armed conflict was an international one.

See, *ibid*, par 121.

⁵²⁵ See *Bagilishema* Appeal Judgement, par 42.

⁵²⁶ *Hadzihasanovic* Trial Judgement, pars 115-117, and references given therein.

noted above, an accused charged with command responsibility must be shown to have known of the characteristic material elements of the offence with which he has been charged.⁵²⁷ Therefore it would not be sufficient to show that a commander knew or had reason to know of the commission or likely commission of *any* crime for him to be held liable under the doctrine of superior responsibility, even if other crimes are offences of lesser gravity.⁵²⁸ Nor is it enough to show that the accused was aware of the commission or likely commission of a crime generally similar in sort to the one with which he is charged. To be held criminally responsible under customary law, the commander must have known that the acts of his subordinates fell within the definition of that crime with which he is charged, rather than to qualify as anything less serious or substantively different in nature.⁵²⁹ In the *Krnojelac* appeal, for instance, the Appeals Chamber of the ICTY pointed out that it was not sufficient for the accused to have known that his subordinates had committed acts of beatings (which could qualify, for instance, as a crime against humanity of ‘cruel treatment’) to convict him of the crime of ‘torture’ if, in addition to the beatings, the accused was not shown to have known of the *prohibited purpose* behind the beatings which forms part of the definition of torture.⁵³⁰ The Appeals Chamber made it clear that a chamber would not be permitted to infer knowledge of crime A – an offence with material elements X – from evidence of the accused’s knowledge of the commission – or likely commission –

⁵²⁷ See, e.g., *Krnojelac* Appeal Judgement, pars 155, 178-179; see also *Naletilic* Appeal Judgement, par 114.

⁵²⁸ A good illustration of that proposition is to be found in the *Fofana et al* case before the Special Court for Sierra Leone. Having made a finding that the accused Fofana knew about the commission of crimes by subordinates in the Bo district and that crimes such as the infliction of mental harm or suffering had been committed in that area, the Trial Chamber in this case noted that such acts had not been included in a criminal order issued by Fofana’s superior, Norman. In the absence of any other evidence of knowledge on his part, the Chamber concluded that Fofana could not be said to have had adequate notice of such crimes (*Fofana* Trial Judgment, par 825).

⁵²⁹ See, generally, *Krnojelac* Appeal Judgement, pars 146 *et seq*; *Hadzihasanovic* Trial Judgement, par 1352.

⁵³⁰ *Krnojelac* Appeal Judgement, par 155. See also *Hadzihasanovic* Trial Judgement, pars 1435, 1481, 1750; *Oric* Trial Judgement, par 323. The awareness on the part of a superior of the commission of one category of crimes does not permit an inference to be drawn that the accused must have known of other crimes committed by the same individuals (see, e.g., *Hadzihasanovic* Trial Judgement, pars 1760-1761).

of crime B – an offence with material elements Y – by his subordinates, where the material elements of that latter offence do not subsume all the elements of the first offence.⁵³¹ In line with this jurisprudence, the commander may only be convicted of a particular offence if he is shown to have known or have had reasons to know of the characteristic element that make up the offence with which he is charged.⁵³²

As mentioned above, the accused must also be aware of the fact that his own conduct was illegal and criminal and, with that knowledge, he must have persisted. In addition, the accused must be shown to have had information that some of his subordinates had been involved in the commission of those crimes.⁵³³ As already noted, a commander or superior has no duty to act in relation to individuals who are not his subordinates.

9.2.3.2 Failure to prevent

9.2.3.2.1 Substantial likelihood of a crime

Where an accused has been charged with a failure to prevent crimes committed by subordinates, it is not sufficient to establish that he was aware of the risk that crimes might or could be committed by subordinates. In the context of an armed conflict in particular, such a risk is always present and is insufficient to justify the imposition of criminal liability. Therefore –

⁵³¹ *Krnjelac* Appeal Judgement, par 155. Concerning the differences in elements between the crimes of ‘cruel treatment’ and ‘torture’, see Mettraux, *International Crimes*, pp 110-118.

⁵³² See *Naletilic* Appeal Judgement, pars 114, 118 and 121, concerning the accused’s necessary knowledge of the fundamental characteristics of the general category of crimes with which he has been charged.

⁵³³ As already noted, a superior or commander has a duty to act – to prevent and punish crimes – in relation to subordinates only; if the information at his disposal suggests that crimes have been committed (or are about to be committed) by other people, without information suggesting the involvement of subordinates, the superior would have had no duty to act. Such information would, therefore, be insufficient as regard superior responsibility. To be liable, a superior need not, however, be shown to have not the exact identity of his or her subordinates who perpetrated the crimes relevant to the charges (see *Blagojevic* Appeal Judgment, par 287).

[T]he knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law.⁵³⁴

More than the general possibility or the likelihood of a crime must be established to provide sufficient notice relevant to that form of liability. A general foresight or a remote possibility about what might happen in the future does not meet that requirement.⁵³⁵ International law does not expect prophetic powers from superiors and the question of the commander's duty to act will be decided solely based on the evidence which was in fact in his possession at the time when he is said to have failed to act:

Leaders and commanders necessarily have to make decisions on the basis of their assessment of the information reasonably available to them at the time, rather than what is determined in hindsight.⁵³⁶

The information in the possession of the accused does not have to make it entirely certain that his subordinates have committed or are about to commit criminal offences such as those charged.⁵³⁷ The prosecution must establish, however, an awareness on the part of the accused of a higher likelihood of risk, namely, an –

[A]wareness of the substantial likelihood that a crime will be committed.⁵³⁸

⁵³⁴ See *Blaskic* Appeal Judgement, par 41.

⁵³⁵ Regarding the extent of information needed and the necessary degree of foreseeability of the crime, see above.

⁵³⁶ United States: Department of Defence Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War, 10 April 1992, re-printed in 31 *ILM* 612 (1992).

⁵³⁷ *Strugar* Trial Judgement, pars 369 and 416.

⁵³⁸ See *Blaskic* Appeal Judgement, pars 41-42. Although this finding was made in relation to 'order' charges, pursuant to Article 7(1), this principle should clearly apply to all forms of liability in the same manner, when the accused is charged with having failed to fully consider the consequence of his actions. And the Appeals Chamber made it clear that its holding applied in principle to every allegations of serious violation of humanitarian law (*ibid.*, par 41). See also *Kvočka* Appeal Judgement, pars 155 and 179, which talk of 'sufficiently alarming information'. See also *Strugar* Trial Judgement, par 370, which talks of 'the likelihood of illegal acts', par 417: 'a real and obvious prospect, a clear possibility', par 418: 'clear and strong risk' and a 'risk that [...] was so real, and the implications were so serious', par 420: 'substantial likelihood', par 421: 'very clear prospect' and par 422: 'clear likelihood'.

Thus, even a risk that is not slight, nor remote, would not be sufficient to establishing the required state of mind of the accused if it does not rise to the level of a *substantial likelihood*.⁵³⁹ This risk must be clear, strong, real and serious to meet that requirement.⁵⁴⁰ As noted by the Yugoslav Tribunal, ‘it is not sufficient that the information known to the commander at the time of the offence would have indicated the possibility that such offences *might* occur, but it is required that the information indicated that such crimes *would* occur’.⁵⁴¹ What must be established is the accused’s actual conscience and awareness of such a risk, not an abstract or objective sort of awareness based on information generally available at the time.

9.2.3.2.2 About to be committed

A crime must be about to be carried out imminently so that an immediate response would appear to be necessary and appropriate. The indication must be that crimes ‘are about to be committed’, which has been interpreted as requiring that steps have already been taken by subordinates to commit those crimes or that they are in the process of committing them. Therefore, ‘the duty to prevent should be understood as resting on a superior at any stage before the commission of a subordinate crime if he acquires knowledge that such crime is *being prepared or planned*, or when he has reasonable grounds to suspect subordinate crimes’.⁵⁴² A remote or uncertain possibility that such a

⁵³⁹ See finding of the *Strugar* Trial Chamber, at par 417. See also *Hadzihasanovic* Trial Judgement, par 1481.

⁵⁴⁰ See, in particular, *Strugar* Trial Judgement, pars 417-418; *Blaskic* Appeal Judgement, pars 41-42. See also *Halilovic* Trial Judgement, par 68 which requires ‘notice of the “present and real risk” of offences within the jurisdiction of the Tribunal’.

⁵⁴¹ *Halilovic* Trial Judgement, footnote 164, page 29, citing with approval *Strugar* Trial Judgement, pars 417-419, 420.

⁵⁴² *Kordic* Trial Judgement, par 445; adopted with approval by, *inter alia*, the Trial Chamber in the *Hadzihasanovic* case (see *Hadzihasanovic* Rule 98bis Decision, par 166). See also instructions to the jury by Colonel Howard in the *Calley – My Lai* – case where he instructed the jury that, for liability to attach, ‘it is essential that he know that his subordinates are in the process of committing atrocities or about to commit atrocities’ (re-printed in J. Goldstein *et al* (eds.), *The My Lai Massacre and its Cover-Up: Beyond the Reach of Law?* (New York: Free Press, 1976) p 467; *Halilovic* Trial Judgement, par 90.

crime might be committed at some later stage would not therefore meet the requirements of notice relevant to superior responsibility.

9.2.3.2.3 Reputation of perpetrators

To the extent that the criminal or violent reputation of those who have committed the underlying crimes is said to be relevant to the superior's *mens rea*, the prosecution would have to establish that those who had that reputation are in fact the same group of individuals as those who committed the crimes.⁵⁴³ Furthermore, evidence that the perpetrators had such a reputation would not in itself demonstrate that the accused possessed the required state of mind. It would have to be established that his awareness of that reputation, in the circumstances, would have made it clear to him that this reputation raised the substantial likelihood of those individuals committing the crimes with which he now stands accused.⁵⁴⁴ It would not be enough to establish that knowledge of that reputation should have alerted him to the possibility of such crimes being committed.⁵⁴⁵ Finally, it would not be enough to establish that the superior knew

⁵⁴³ *Hadzihasanovic* Trial Judgement, pars 1543, 1748-1750. See also, Final Report of the Commission of Inquiry into the Events at the Refugee Camp in Beirut ('*Sabra and Shattila* Report'), 7 Feb 1983, reprinted and translated in 22 *ILM* (1983) 473, 505-507 concerning the Chief of Staff, Lieutenant General Rafael Eitan.

⁵⁴⁴ See above. See also *Halilovic* Trial Judgement, par 68; *Brdjanin* Trial Judgement, par 278; *Celebici* Appeal Judgement, pars 223 and 241; *Strugar* Trial Judgement, pars 417-420; *Krnjelac* Appeal Judgement, par 155; *Blaskic* Trial Judgement, par 331. Under international law, there is no requirement, however, that the superior be specifically warned or alerted about the risk of the commission of a crime. See, e.g., *Sabra and Shattila* report: '[t]he absence of a warning from experts cannot serve as an explanation for ignoring the danger of a massacre. The Chief of Staff should have known and foreseen – by virtue of common knowledge, as well as the special information at his disposal – that there was a possibility of harm to the population in the camps at the hands of the Phalangists. Even if the experts did not fulfil their obligation, this does not absolve the Chief of Staff of responsibility.'

⁵⁴⁵ See 'Note. Command Responsibility for War Crimes', 82 *Yale Law Journal* (1973) 1274, 1280: 'it is not sufficient that the commander knew merely that the unit in question had a high "crime rate" or was generally unruly.'

that ‘something bad’ would happen, short of that ‘something bad’ being the crime with which he is now charged.⁵⁴⁶

9.2.3.3 Failure to punish

Where the superior is charged with a failure to punish crimes, it must be shown that he had sufficient information in his possession to put him on notice of the fact that his subordinates had committed crimes such as those with which he is being charged. As pointed out above, information that would put him on notice of the strong likelihood that such crimes have been committed could, in principle and if such information is verifiable, suffice.

9.2.3.4 Verifiability of the information

When a superior receives information suggesting improper conduct on the part of subordinates, he is entitled, and is in fact expected, to verify that information or to have that information verified, before taking any further steps. The superior’s awareness of a general rumour that crimes have been committed would not suffice, in principle, to conclude that he had thereby acquired sufficient notice as would be relevant to his criminal responsibility. US Supreme Court Judge Rutledge made it clear in his *Yamashita* opinion that ‘conviction shall not rest in any essential part upon unchecked rumor [...], but shall stand on proven fact’.⁵⁴⁷ That is true also of the information which the superior had in his possession at the time when he is said to have failed to act. Reports of crimes and atrocities, real or false, are indeed the stuff of

⁵⁴⁶ See statement of the *Halilovic* Trial Chamber: ‘The Trial Chamber has been provided with evidence concerning the nature of the 9th and 10th Brigades, referred to in the indictment as having “notorious reputations for being criminal and uncontrolled”. The evidence shows that members of both brigades not only demonstrated a lack of discipline, but also took civilians to dig trenches at the front line and committed thefts or other forms of misappropriation. However, the Trial Chamber finds that the misconduct was not comparable to the crimes committed in Grabovica. The Trial Chamber notes in this respect the testimony of the 1st Corps Commander Vahid Karavelic who, while knowing of breaches of discipline and previous behaviour of members of these brigades, said that it never occurred to him that they might commit atrocities against civilians in Grabovica.’ Press Release, Judgement in the Case The Prosecutor v Sefer Halilovic, 16 Nov 2005, p 3, 3rd par, available on ICTY website (www.un.org/icty).

⁵⁴⁷ See also *Hadzihasanovic* Trial Judgement, pars 1222-1223.

every armed conflict and the relevant *mens rea* could not be inferred from un-verified reports unless the commander is reckless in disregarding those.⁵⁴⁸ Therefore, that information must itself be verifiable.⁵⁴⁹

Where the commander receives information regarding allegations of crimes which, for some valid reasons, he is unable to verify or to substantiate, he may not be said to have had reason to know that a crime – as was suggested to him – has been or was about to be committed even if it later turns out that crimes were indeed committed.⁵⁵⁰

‘Knowledge’, as condition of liability, would otherwise be rendered meaningless and would constitute a mere fiction.

9.2.4 Categories and forms of knowledge

9.2.4.1 ‘Knew’

Actual knowledge, which may be defined as the awareness that the crimes charged against the accused were committed or were about to be committed,⁵⁵¹ may be established, either by way of direct evidence or circumstantially through evidence from which it may be inferred that the commander had indeed acquired such knowledge by the time he is said to have failed to act.⁵⁵²

⁵⁴⁸ Such recklessness could, under certain circumstances, be regarded as amounting to acquiescence of the crimes where the reports were sufficiently credible and substantiated to require of him to have those verified.

⁵⁴⁹ Already in the Massachusetts Articles of War of 1775, the Provisional Congress of Massachusetts Bay had noted that a commander could be held responsible in relation to crimes committed by subordinates where he refuses or omits to act ‘upon due proof’ that they have committed crimes. See W. Parks, “Command Responsibility for War Crimes”, 62 *Military Law Review*, 1, 5 (1973).

⁵⁵⁰ Where a party to a conflict airs allegations of crimes and abuses during an enemy attack which the other side is unable neither to verify nor to substantiate, the allegations could not themselves be said to provide valid notice under the command responsibility doctrine. In such a situation, and short of an opportunity to verify the allegation, the authorities would not be able to pursue and prosecute any one individual that might indeed have committed a crime in that context.

⁵⁵¹ *Kordic Trial Judgement*, par 427.

⁵⁵² See, e.g., *Blaskic Trial Judgement*, par 308; *Aleksovski Trial Judgement*, par 80; *Krnjelac Trial Judgement*, par 94.

Proof of actual knowledge means an awareness on the part of the accused, not just of the commission of a crime by subordinates, but of the commission of the crime charged against him by one or more of his subordinates.

9.2.4.2 ‘Had reason to know’

The second, imputed, form of knowledge recognized under customary law requires that the superior be shown to have possessed some general information putting him on notice of the commission of crimes of his subordinates or that such information as was available to him put him on notice of the strong likelihood that they were about to be committed (i.e., he ‘had reason to know’).⁵⁵³ As noted in one case, ‘[t]he standard of proof of imputed knowledge is strict.’⁵⁵⁴

The information need not be such that, by itself, it would be sufficient to compel the conclusion of the existence of such crimes, but that information must be sufficiently clear and alarming to indicate the strong likelihood of the offences charged having been or about to be committed to trigger the commander’s duty to act.⁵⁵⁵ Therefore, it is not sufficient that the commander knows, in general terms, that crimes have or may be about to be committed by his subordinates.⁵⁵⁶ Likewise, knowledge of a general context or environment in which crimes are being committed, as was the case in Rwanda during the genocide, would not provide sufficient notice for the purpose of command responsibility.⁵⁵⁷

As noted above, superior responsibility may not arise, under customary international law, in the absence of knowledge of the crimes or of the strong likelihood that such crimes are about to be committed. The mental standard of ‘had reason to know’ is

⁵⁵³ See, e.g., *Celebici* Appeal Judgement, par 238; *Kordic* Trial Judgement, par 437. See also *Bagilishema* Appeal Judgement, par 28.

⁵⁵⁴ *Brima* Trial Judgment, par 1734.

⁵⁵⁵ *Kordic* Trial Judgement, par 437; *Celebici* Appeal Judgement, pars 238 and 241; *Strugar* Trial Judgement, pars 369-370, 415-419; *Halilovic* Trial Judgement, par 68; *Celebici* Trial Judgement, par 393; *Fofana* Trial Judgment, par 244; *Brima* Trial Judgment, par 794.

⁵⁵⁶ On the extent of knowledge required, see below in particular 9.2.3.

⁵⁵⁷ See, e.g., *Bagilishema* Appeal Judgement, par 42.

determined only by reference to information which was in fact available to the commander at the relevant time.⁵⁵⁸ And the *ad hoc* Tribunals have expressly rejected the view that a commander could be held criminally responsible for the actions of his subordinates based solely on a failure to obtain information of a general nature within his reasonable access due to a serious dereliction of duty.⁵⁵⁹ In other words, the *ad hoc* Tribunals have said that customary law does not recognize a 'should have known' standard of *mens rea*.⁵⁶⁰ One trial chamber of the Special Court for Sierra Leone, in the *Brima* case, noted that 'negligent ignorance is insufficient to attribute imputed knowledge'.⁵⁶¹ Where, however, he has received information pertaining to the alleged commission of crimes by his troops, a commander may not remain willingly blind to those reports.⁵⁶²

⁵⁵⁸ *Blaskic* Appeal Judgement, par 62; *Celebici* Appeal Judgement, par 241; *Bagilishema* Appeal Judgement, par 42; *Krnjelac* Appeal Judgement, par 151; *Strugar* Trial Judgement, par 369.

⁵⁵⁹ See, e.g., *Kordic* Trial Judgement, par 432; *Celebici* Appeal Judgement, pars 238-240.

⁵⁶⁰ This standard was expressly excluded by the Appeals Chamber of the ICTY in the *Celebici* case.

⁵⁶¹ *Brima* Trial Judgment, par 796. Somewhat counter-intuitively, however, the same Trial Chamber added that superior responsibility will attach when the superior remains wilfully blind to the criminal acts of his subordinates (*Brima* Trial Judgment, par 796; see also *Celebici* Trial Judgment, par 387 and *Halilovic* Trial Judgment, par 69, which the *Brima* Chamber cites as authority for that proposition). The first statement to that effect (*Celebici* Trial Judgment, par 387), later cited as authority by both the *Halilovic* and *Brima* Trial Chambers did not provide for any authority or precedent as would support such a position. In fact, a superior who has received no information as would put him on – sufficient – notice of the crimes may not be held criminally responsible for his failure to acquire such knowledge. Where, however, he has obtained sufficient notice, although not necessarily a full record of the events, his deliberate failure to obtain 'further information' may be relevant to drawing any inference as regard an allegation that he had 'reason to know' of the crimes (see, e.g., *Mrksic* Trial Judgment, par 564).

⁵⁶² See, e.g., the holding of the Superior Military Government Court of the French Occupation Zone in Germany in the Roehling case: 'The defense of lack of knowledge – No superior may prefer this defense indefinitely; for it is his duty to know what occurs in his organization, and lack of knowledge, therefore, can only be the result of criminal negligence.' (Superior Military Government Court of the French Occupation Zone in Germany, Judgment of 25 January 1949 in the case versus Hermann Roehling and others, Decision on Writ of Appeal against the Judgment of 30 June 1948, re-printed in Trials of War Criminals before the Nuremberg Military Tribunals under Control Council law No.10, Vol XIV, 1097, at 1106).

9.2.4.3 'Should have known'

In contrast to the situation that prevails under customary law, Article 28(a)(i) of the ICC Statute provides that a 'military commander or a person effectively acting as a military commander' could be held criminally where, all other conditions being met, he 'should have known' of the crimes of his subordinates. This standard of *mens rea* effectively replaces the requirement of knowledge with a legal fiction of knowledge whereby a commander is attributed knowledge of a fact which he did not possess. In so doing, the ICC Statute greatly dilutes the principle of personal culpability that underlies the doctrine of superior liability under customary law. Whilst the 'had reason to know' standard requires proof that the accused possessed some information that should allowed him to draw certain conclusions as regard the commission of a crime or the risk thereof, the ICC standard goes one step below that standard and attributes knowledge based on a set of circumstances which, it is assumed, should have put the accused on notice of the commission of a crime or of the risk thereof.

Such a course has the practical effect, and might have been motivated by a desire, of facilitating prosecution – and conviction – of military commanders. The adoption of the 'should have known' test for military commanders has the effect of 'objectivising' a great deal 'command responsibility' as a form of liability. Once evidence of crimes committed by subordinates of a military commander has been adduced which the commander should have known about – but which he in fact did not know of or was not proved to have been known to him – he will almost necessarily be found criminally responsible: having had no information about those crimes at the time, he will almost unavoidably be said to have failed to take adequate steps to prevent and punish them. The third element of command responsibility is emptied of its content and the basis for liability has shifted from a failure to prevent or punish crimes to a failure to keep oneself informed, something that finds little or no support in existing case law and which in fact plainly contradicts customary law.

Equally worrying is the fact that, pursuant to that standard, the military commander might be automatically attributed knowledge of any special intent which his subordinates were found to have had at the time of the crimes, without him in fact knowing about it. In those circumstances, for instance, a military commander could be found guilty of genocide without even knowing of his subordinates' genocidal intent.

Turning a commander into a murderer, a rapist or a *génocidaire* because he failed to keep properly informed seems excessive, inappropriate and plainly unfair.

This new standard of *mens rea* also has the practical effect of shifting the burden of proof upon the defendant once evidence has been adduced of facts or matters which he 'should have known' about. A fundamental *defence* that would have been open to the accused before the *ad hoc* Tribunals and under customary law to the effect that the accused did not know of the crimes has arguably been foreclosed before the ICC. The Statute of the ICC has moved the line of defence to the point of arguing that this absence of knowledge made it impossible for the commander to comply with his duties, so that the third element may not be found to have been met. In effect, the defence can now only respond to such charges with a sort of defence of necessity: 'I, military commander, failed to act because my absence of knowledge made it impossible for me to do so.' In many ways, the Statute of the ICC sanctions a form of superior responsibility for military commanders not seen since the *Yamashita* precedent, a quasi-objective form of liability that raises serious concern about basic principle of personal culpability.

It would be a much safer course, and one more consistent with existing international law and general principles of personal liability, for the International Criminal Court to interpret that standard restrictively so as to mean that a military commander 'should have known' of crimes where information available to him at the time allowed for an inference that he should reasonably have drawn – namely, that crimes were being or were about to be committed by his men. In other words, the 'should have known' standard would be interpreted as a duty to make reasonable inferences based on information available to the commander, rather than as a duty to keep himself informed at all times and a duty to find out about any allegations of criminal activities by members of his command.⁵⁶³ Such standard, though still not fully satisfactory, would go some way to repairing the injuries which the text of the Statute appears to have inflicted upon basic principles of personal guilt.

⁵⁶³ See 'Note. Command Responsibility for War Crimes', 82 *Yale Law Journal* (1973) 1274, 1279-1280.

In sum, it might be said that the standard of knowledge required before the ICC does not represent the state of customary international law and finds little or no support in relevant judicial precedents. The standard of *mens rea* for military commanders adopted before the ICC greatly expands the scope of command responsibility for military commanders, bringing it dangerously close to a form of objective liability.

9.3 Establishing the required *mens rea*

9.3.1 Indicia of knowledge

In his direction to the jury in the *Medina* case, Colonel Howard noted that ‘the commander-subordinate relationship alone will not allow an inference of knowledge’.⁵⁶⁴ Establishing the superior’s knowledge will require the court to take into account all circumstances relevant to this matter, including the situation of the superior concerned at the time, the nature and training level of his troops and all other factors as might have contributed to – or prevented – his acquiring the required notice.⁵⁶⁵ Evidence said to be relevant to establishing the required state of mind must be assessed *in concreto*, i.e., in light of, and taking into account, the situation of the accused at the relevant time, including the means at his disposal to communicate with his troops, to seek and obtain reports from the field and more generally the structure then in place to ensure the proper transmittal of information to and from him: ‘Every case must be assessed in the light of the situation of the superior concerned at the time in question’.⁵⁶⁶ For instance, the rank and position of the accused at the time relevant to the charges might be a factor of relevance to this determination insofar as it could have impacted upon the ability of the superior to receive information pertaining to the crimes or upon the availability of certain categories of information or reports to him.⁵⁶⁷

⁵⁶⁴ J. Goldstein *et al* (eds.), *The My Lai Massacre and its Cover-Up: Beyond the Reach of Law?* (New York: Free Press, 1976) 467. See, also, *Oric* Trial Judgement, par 319.

⁵⁶⁵ See, e.g., *Celebici* Appeal Judgement, par 239; *Krnjelac* Appeal Judgement, par 156.

⁵⁶⁶ ICRC, *Commentary on the Additional Protocols*, par 3545.

⁵⁶⁷ See, on that point, the holding of the *Brima* Trial Chamber at paragraph 793.

A number of indicia exist which the court may take into account to determine whether a commander possessed the required state of mind at the relevant time, including the following:

- The position of the superior in the hierarchy;⁵⁶⁸
- The number and frequency of criminal acts committed by subordinates;
- The type of criminal acts committed by subordinates;
- The scope of relevant criminal activities;
- The length of time during which the illegal acts occurred;
- The number and type of troops involved in the operation in which crimes were committed;
- The logistics involved;
- The nature of the command which the superior held at the relevant time;
- The existence of reports from subordinate units concerning the situation on the ground;⁵⁶⁹
- The availability and adequate functioning of a reporting mechanism;⁵⁷⁰

⁵⁶⁸ Though a high position might give a superior potential access to a greater number and variety of sources of information, his remoteness from the field where crimes are said to have been committed might hamper his ability to know. The Tribunal in the *High Command* case acknowledged that fact: 'In many respects a high commander in the German Army was removed from information as to facts which may have been known to troops subordinate to him. In the first place, these troops were in many instances far removed from his headquarters. In addition the common soldiers and junior officers do not have extensive contacts with the high commanders and staff officers.' (*High Command* case, reprinted in Friedman, *Law of War*, vol II, 1453).

⁵⁶⁹ See, e.g., *High Command* case, reprinted in Friedman, *Law of War*, vol II, 1454.

⁵⁷⁰ See, e.g., *Toyoda* case, p 5019: 'this Tribunal cannot but conclude that this defendant did not in fact know of such things. It has not been shown that machinery existed for reports or that persons reported such to him.' See also Trial of Field Marshal Erhard Milch before an American military tribunal at

- The existence of relevant superior orders;
- The geographical scope in which the illegal acts were committed;
- The widespread and systematic commission of crimes by subordinates;
- The combat situation (if any) that was taking place at the relevant time;
- The tactical tempo of the operation, if any, and the extent of the activities;⁵⁷¹
- The *modus operandi* of similar illegal acts;
- The officers and staff involved in the operation (if any) and in the commission of crimes;
- The presence or absence of the commander from the scene at the time when the acts were said to have been committed;⁵⁷²
- The nature and scope of the accused's responsibility and his position in the hierarchy;⁵⁷³
- The character traits of the subordinates who committed the crimes;

Nuremberg, where the court found that Milch could not be held responsible for illegal experiments carried out by subordinates as the tribunal was not satisfied that he had known of their illegal nature at the time. As was noted by the United Nations War Crimes Commission, in relation to that case, no duty to find out whether these had such a nature is mentioned in the Judgement (Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol IV, p 91).

⁵⁷¹ See again *High Command* case, reprinted in Friedman, *Law of War*, vol II, 1454: 'Other factors to be considered as to the knowledge of criminal acts of the SIPO and SD by defendants is the time, the localities, the combat situation, the extent of the activities, and the nature of the command.'

⁵⁷² '[T]he more physically distant the superior was from the commission of the crimes, the more additional indicia are necessary to prove that he knew of the crimes' (*Naletilic* Trial Judgement, par 72). See also *Stakic* Trial Judgement, par 460. Presence itself at the scene of the crime is insufficient to infer knowledge of that crime (see *Hadzihasanovic* Trial Judgement, pars 1850, 1984).

⁵⁷³ *Oric* Trial Judgement, par 319.

- The fact that the events took place during a temporary absence of the superior from his command post;
- The training and instruction or lack thereof of the subordinates;
- The availability of reports addressed to the superior concerning those crimes;
- The geographical proximity between the crime committed and the place where the commander was located at the time;
- The position of authority held by the superior and his level of responsibility;⁵⁷⁴
- The fact that crimes will often be hidden from the command.⁵⁷⁵

Those factors are not, however, evidence of actual knowledge on the part of the commander, but merely factors which, taken as a whole or in combination, might be relevant to the court's finding regarding the accused's state of mind.⁵⁷⁶ The court will also factor in its determination all other relevant circumstances which might have

⁵⁷⁴ See generally, Final Report of the Commission of Experts, Established pursuant to Security Council Resolution 780 (1992) (S/1994/674), par 58; *Celebici* Appeal Judgement, par 238; *Celebici* Trial Judgement, par 386; *Kordic* Trial Judgement, pars 427-428 and 437; *Blaskic* Trial Judgement, pars 307-308; *Aleksovski* Trial Judgement par 80. See also ICRC, *Commentary on the Additional Protocols* (Article 86), par 3545.

⁵⁷⁵ Such measures may not in all cases disprove the fact of knowledge on the part of the commander, but this fact is highly relevant to establishing knowledge as it cannot be presumed (see, e.g., *Hadzihasanovic* Trial Judgement, pars 1229-1230). The Tribunal in the *High Command* case pointed out that units or individuals that have committed crimes are unlikely to report those crimes, but will, instead, generally seek to hide this fact. The Tribunal noted, for instance, that effort had been made to keep the criminal activities of Einsatzgruppen units from the German army (reprinted in Friedman, *Law of War*, vol II, 1454). It also pointed out what follows: 'Official reports of subordinate units normally furnish a vast amount of information. Reports of individual instances of illegal acts may however not be submitted to higher headquarters if for no other reason than that the suppression of such acts is the province of the subordinate and their occurrence might be subject for criticism.' (*Ibid.*)

⁵⁷⁶ See also *Oric* Trial Judgement, par 319.

prevented that superior from drawing the correct conclusion as to the degree of risk which existed at the time.⁵⁷⁷

9.3.2 No imputation of knowledge

It must be emphasized that under international law constructive knowledge does not encompass the imputation of knowledge on the basis of purely objective facts, which would imply that the commander must have known of crimes being committed by his subordinates or the likelihood thereof. To be relevant to establishing his state of mind, the evidence must, therefore, be shown to have been available to him. Knowledge cannot simply be inferred from the position held by the accused.⁵⁷⁸

Imputation of knowledge short of proving possession of the relevant information would be a pure fiction since knowledge would be presumed even though it did not exist or, at least, could not be proved to have existed. Nor can the acquisition of knowledge of certain facts on the part of the accused be inferred from the fact that other people, including individuals who collaborated with the accused, might have possessed that information. The prosecution would have to establish, albeit circumstantially, that such knowledge was indeed transmitted from one to the other or was otherwise known to the accused, short perhaps of establishing that this fact was common knowledge.⁵⁷⁹

⁵⁷⁷ See, generally, *Kvočka* Appeal Judgement, par 156; *Celebici* Appeal Judgement, par 239.

⁵⁷⁸ See e.g. finding of the IMT in relation to the accused Bormann, and cited in *The Charter and Judgement of the Nuremberg Tribunal – History and Analysis, Memorandum submitted by the Secretary-General*, 1949, page 57, footnote 96: ‘The evidence does not show that Bormann knew of Hitler’s plans to prepare, initiate or wage aggressive wars. He attended none of the important conferences when Hitler revealed piece by piece those plans for aggression. Nor can knowledge be conclusively inferred from the positions he held.’ (IMT Judgment, p 164). See also *Brima* Trial Judgment, par 792.

⁵⁷⁹ See, e.g., *Jespen* case (Jespen et al), Proceedings of a War Crimes Trial, Lunesburg, 13 August 1946, Summing-up of Judge-Advocate: ‘Nor can the isolated acts of individual guards, even if he were in charge of the convoy, be laid at his door so as to make him responsible unless he had knowledge of what those guards were doing and had the power to stop it but deliberately refrained from stopping it.’

It would also be wrong to conclude that a superior possessed the requisite state of mind because he knew of problems with the troops (which eventually committed the crimes which form the basis of the charges), short of any indication that these troops had or were about to commit crimes similar in nature to those charged against him.⁵⁸⁰ Under customary international law, notice of the commission of crime, or notice of the substantial likelihood thereof, is required. A remote, un-substantiated, possibility or the risk that a crime might be committed does not satisfy the *mens rea* requirement of command responsibility.⁵⁸¹ The superior's knowledge of problems with the troops would, where he has received information suggesting the commission of crimes by those troops give further credence to those reports and would be relevant to establishing whether, as a whole, he possessed sufficient information to trigger his duty to act.

9.3.3 Information in possession of the superior

Whatever information is said to have been relevant to establishing the state of mind of the accused, the superior must be shown to have acquired it and known of it at the time relevant to the charges. The information may not simply be shown to have been 'out there' and available in some form short of establishing that the commander actually

⁵⁸⁰ Article 86(2) of Additional Protocol I, for instance, clearly provides that 'The fact that a breach of the Conventions or of this Protocol was committed by a subordinate, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.' The ICRC *Commentary* to that provision makes it clear that the French version of Article 86 should be given priority over the English text and that the standard of knowledge required of commanders should read 'information which allow them to conclude' ('des informations leur permettant de conclure', in the French text). Awareness on the part of a commander of disciplinary problems with the troops would not therefore be sufficient to amount to notice insofar as relevant to his individual criminal responsibility. Where established beyond reasonable doubt, these two facts merely represents pieces of information which the superior cannot claim to be ignorant of and are in turn factors which 'may enable him to conclude either that breaches have been committed or that they are going to be committed'. ICRC, *Commentary on the Additional Protocols*, par 3545 (emphasis added). See also *Hadzihasanovic* Trial Judgment, pars 107, 114-118, 163-164, 167-169.

⁵⁸¹ See below, 9.2.3-9.4.

acquired it. Any other standard falls short of recognised customary international law.⁵⁸²

An inference to the effect that a superior was in possession of certain information could be drawn, however, where the information was personally addressed to him at his command post or office, even if he culpably failed to examine it or failed to grasp its significance. The International Law Commission has concluded that knowledge can be said to have been established ‘even if he has not examined the information sufficiently or, having examined it, has not drawn the obvious conclusions’.⁵⁸³ That inference must be the only reasonable one to be drawn from the evidence, and may be rebutted as, for instance, where the commander may establish that he was not at his command post at the time when the information was sent to that location or that he was otherwise denied access to that information.

As already noted, the ‘should have known’ test adopted by the ICC in relation to ‘military’ superiors dangerously dilutes this requirement, in fact presuming or assuming knowledge of facts which, under customary international law, must be established beyond reasonable doubt by the prosecuting authorities.

⁵⁸² In the *Pohl* trial, for instance, the Tribunal stated that it had not been established that the accused Tschentscher had had ‘actual knowledge’ of the offences committed by some of his troops. The Tribunal noted in particular that ‘participation [in the commission of crimes by his subordinates] was not of sufficient magnitude or duration to constitute notice to the defendant, and thus give an opportunity to control their actions’. The accused was acquitted in relation to these charges (see LRWCC vol VII, pp 63-64; and *United States v Pohl and others*, Vol V, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, p 1011).

⁵⁸³ See Report of the International Law Commission on the work of the fortieth session (9 May-29 July 1988), A/43/10, p 71, Article 10, Commentary (4). See also *Hadzihasanovic* Trial Judgement, par 1986; *Oric* Trial Judgement, par 322 citing *Celebici* Appeal Judgement, par 239; *Galic* Trial Judgement, par 175. See also *Hostage* case, LRTWC, vol VIII, p 71, cited also in the *High Command* case, LRTWC, vol XII, p 112 concerning the transmission of reports made for a commander and his awareness thereof.

9.4 Intent not to act despite knowledge

9.4.1 Knowledge insufficient

Knowledge on the part of a superior that his subordinates have committed or are about to commit crimes is not a sufficient state of *mens rea* to attract his superior responsibility. In addition, the superior must be shown to have had knowledge of the criminal conduct of his subordinates, he must be shown to have intended not to act as he was required to, with or despite that knowledge, or to have been reckless as to the likely consequences of his failure to act.⁵⁸⁴

9.4.2 Intentional failure to act

To be held liable, a military or civilian superior must have consciously failed to discharge his duties as a superior 'either by deliberately failing to perform them or by culpably or wilfully disregarding them'.⁵⁸⁵ In the language of World War II cases, there must be 'proof of a causative, overt act or omission from which a guilty intent can be inferred'.⁵⁸⁶ The failure of the commander to act must therefore be shown to

⁵⁸⁴ See generally Cassese, *International Criminal Law*, pp 210-211. See also, e.g., the judgment against Yoshio Tachibana *et al*, concerning the requirement of an 'intentional' omission to discharge a legal duty on the part of the commander for him to be held criminally responsible as commanders (Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol IV, pp 86-87). See also trial of Shiyoku Kou where a military commission found him responsible for crimes committed by his subordinates because he 'unlawfully and willfully' disregarded, neglected and failed to discharge his duties as a Japanese Army officer by, in effect, 'permitting and sanctioning' their commission (reported in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol IV, p 86).

⁵⁸⁵ *Bagilishema* Appeal Judgement, par 35.

⁵⁸⁶ See, e.g., the authoritative statement in the *Hostage* case to the effect that '[i]n determining the guilt or innocence of these defendants, we shall require proof of a causative, overt act or omission *from which a guilty intent can be inferred* before a verdict of guilty will be pronounced.' See also ICRC, *Commentary on the Additional Protocols*, concerning Article 86(2) of Additional Protocol I (at par 3541), which takes note of the 'difficulty of *establishing intent*' of the commander (emphasis added). See also *Tabellini* (Rome Military Tribunal, decision of 6 August 1945, pp 394-398).

have been *intentional* in the sense of being both voluntary and deliberate.⁵⁸⁷ In the *Jespen* case, for instance, the Judge-Advocate noted that:⁵⁸⁸

Nor can the isolated acts of individual guards, even if he were in charge of the convoy, be laid at his door so as to make him responsible unless he had knowledge of what those guards were doing and had the power to stop it *but deliberately refrained from stopping it*.

Likewise, the indictment before the IMTFE against the major war criminals (count 55) used the expression ‘*deliberately and recklessly*’ to describe the responsibility of high-ranking officials *vis-à-vis* the acts of subordinates, whilst in *Yamashita*, the US Supreme Court pointed out that the responsibility of the accused amounted to an unlawful breach of his duties as commander which, in effect, amounted to ‘*permitting* [subordinates] to commit’ those crimes.⁵⁸⁹

The deliberate failure of the commander to act must be akin, on the evidence, to acquiescence or approval on his part of the crimes of his subordinates.⁵⁹⁰ In the *High Command* case, the Tribunal noted that, in addition to knowledge of the crimes of his

⁵⁸⁷ In the *High Command* case, the Tribunal noted that, in all cases, his criminal responsibility is ‘personal’ and that the act or neglect to act which form the basis of the charges must have been ‘voluntary and criminal’ (*High Command* case, reprinted in Friedman, *Law of War*, vol II, p 1450). The Tribunal further pointed out that ‘[t]he term “voluntary” does not exclude pressures or compulsions even to the extent of superior orders. That the choice was a difficult one does not alter either its voluntary nature or its criminality.’ (*Ibid.*). See, however, *Koster* case, for a seemingly stricter requirement (*Koster v The United States*, Secretary of the Army Letter to Secretary of Defence, 23 March 1971, 687 F 2d, at 414).

⁵⁸⁸ *Jespen* case (*Jespen et al*), Proceedings of a War Crimes Trial, Lunesburg, 13 August 1946, Summing-up of Judge-Advocate (emphasis added).

⁵⁸⁹ *Yamashita* Supreme Court Judgment.

⁵⁹⁰ See, e.g., *Strugar* Trial Judgement, par 439. See also *Musema* Trial Judgement, par 131. See also *Flick* trial in which the court said, in relation to the accused Weiss that he had had ‘knowledge and approval’ of the acts of a subordinate and could therefore be held responsible for his acts (*United States vs Flick et al*, Opinion and Judgement, Military Tribunal at Nuremberg, Feb 1948, re-printed in LRWTC, Vol IX, p 54). See also S. Glaser, ‘Culpabilité en Droit International Pénal’, in *Rec. Cours La Haye*, 1960, Vol I, 467, 475.

subordinates, the defendant must be shown to have acquiesced to their commission.⁵⁹¹

The Tribunal in the *Hostage* case likewise required that it be shown on the evidence that the accused ‘approved of the action’ of his subordinates.⁵⁹² The clearest expression of that requirement was perhaps the one laid down by an American Military Tribunal in the *Hostage* case in relation to the accused Foertsch who was acquitted of the charges:⁵⁹³

No overt act from which a criminal intent could be inferred, has been established. That he had knowledge of the doing of acts which we have herein held to be unlawful under international law cannot be doubted. It is not enough to say that he must have been a guilty participant. It must be shown by some responsible act that he was. Many of these acts were committed by organizations over which the armed forces, with the exception of the commanding general, had no control at all. Many others were carried out through regular channels over his voiced objection or passive resistance. The evidence fails to show the commission of an unlawful act which was the result of any action, affirmative or passive, on the part of this defendant. *His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law. He must be one who orders, abets, or takes a consenting part in the crime.* We cannot say that the defendant met the foregoing requirements as to participation. We are required to say therefore that the evidence does not show beyond a reasonable doubt that the defendant Foertsch is guilty on any of the counts charged.

⁵⁹¹ The Tribunal also noted that ‘criminal responsibility [of a superior] is personal. The act or neglect to act must be voluntary and criminal’ (*High Command* case, in LRTWC, XI, p 543). In relation to the accused von Leeb, the same Tribunal made it clear that, to be individually liable, the accused ‘must be shown both to have had knowledge and to have been connected with such criminal acts, either by way of participation or criminal acquiescence’ (*Ibid*, p 555). See also the finding of the *High Command* Tribunal in relation to the accused von Kuechler.

⁵⁹² *Hostage* case, p 1260. Shiyoku Kou was sentenced to death by a military commission in the Philippines on 18 April 1946 because he ‘unlawfully and willfully’ disregarded, neglected and failed to discharge his duties as a Japanese Army officer by, in effect, ‘permitting and sanctioning’ the commission of offences by his troops. An American court sitting at Yokohama, likewise, found Yuicki Sakamoto guilty, *inter alia*, for failing in his duties as commanding officer in that he ‘permitted members of his command to commit cruel and brutal atrocities’ (see Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol IV, p 86).

⁵⁹³ *Hostage* case, p 1286.

In the *Toyoda* case, the Tribunal adopted a similar approach, making it clear that a commander could be held responsible for the crimes of his subordinates where, all other conditions being met, he could be said to have ‘order[ed], permit[ted] or condone[d]’ their criminal actions.⁵⁹⁴ The *Toyoda* court required that, to be found responsible, a commander must, in effect, be shown to have ‘permitted the atrocities’.⁵⁹⁵ That position is also consistent with the conclusions of the Commission of Experts on the former Yugoslavia.⁵⁹⁶

The Appeals Chamber of the ICTY appears to have acknowledged the necessity under customary international law of establishing such ‘a volitional element’ for the imposition of criminal responsibility, not only for command responsibility, but for all serious violations of international humanitarian law.⁵⁹⁷ A volitional element is indeed a basic requirement of criminal law and one that should apply to every form of individual criminal liability.⁵⁹⁸

⁵⁹⁴ *United States v Soemil Toyoda*, War Crimes Tribunal Courthouse, Tokyo, Honshu, Japan, September 1949, 19 *United States v Soemu Toyoda* (Official Transcript of Record of Trial). See, also, *ibid.*, p 5015: ‘It has not been shown that the defendant at any time ordered, condoned, or approved of such attacks, either as incidents or as policy; and, indeed, there is substantial evidence that the official Naval attitude was opposed to such tactics. [...] Summed up, there is no evidence which, in the opinion of this Tribunal, incriminates this defendant’.

⁵⁹⁵ 19 *United States v Soemu Toyoda* 5005-5006 (Official Transcript of Record of Trial). For a more recent domestic example of application of that principle, see also, *Xuncax*, 886 F. Supp., at 171-173, 174-175: ‘Gramajo was aware of and supported widespread acts of brutality committed by personnel under his command resulting in thousands of civilian deaths. [...] Gramajo refused to act to prevent such atrocities. [...] Gramajo may be held liable for the acts of members of the military forces under his command’ cited in *Maximo Hilao v Estate of Ferdinand Marcos*, United States Court of Appeals for the Ninth Circuit, 103 F.3d 767, 17 Dec 1996.

⁵⁹⁶ See UN Commission of Experts Established Pursuant to Security Council 780 [1992], Final Report, UN doc S/1994/674, 27 May 1994, par 58.

⁵⁹⁷ *Blaskic* Appeal Judgement, par 41. As already noted, although that statement was made in relation to ‘ordering’ charges, the Appeals Chamber made it clear that such a requirement would apply to all forms of criminal liability under international law.

⁵⁹⁸ See, e.g., *Blaskic* Appeal Judgement, par 41, concerning ‘ordering’ pursuant to Article 7(1) of the ICTY Statute. See also, generally, M. Henzelin, ‘Les “Raisons de Savoir” du Supérieur Hiérarchique qu’un Crime va Etre Commis ou a été Commis par un Subordonné – Examen de la Jurisprudence des

A proved failure on the part of a commander which is not shown to have been intentional, in the sense of being voluntary, deliberate, and informed, in the sense of his being aware of the consequences or likely consequences of his failure, does not therefore attract individual criminal responsibility under international law.⁵⁹⁹

9.5 Degree of fault

9.5.1 No liability without fault

It is not sufficient to show that the commander has knowingly failed to fulfil his obligations *vis-à-vis* his subordinates for him to engage his superior responsibility. In addition, the prosecution would have to establish that the superior either deliberately failed to perform his duties or culpably or wilfully disregarded them.⁶⁰⁰ To be liable, the commander must, therefore, have been aware of the criminal character of his action and, with that awareness, he must have consciously decided not to fulfil his obligations.

9.5.2 Gross negligence

Simple negligence on the part of a superior would not be sufficient to attract penal consequences pursuant to the doctrine of superior responsibility.⁶⁰¹ As provided by the

Tribunaux Pénaux Internationaux pour l'ex-Yougoslavie et le Rwanda', in P. Tavernier (ed), *Actualité de la Jurisprudence Pénale Internationale*, 2004, pp 81 *et seq.*

⁵⁹⁹ Such a failure could at most be relevant to the disciplinary responsibility of that commander.

⁶⁰⁰ *Bagilishema Appeal Judgement*, par 35.

⁶⁰¹ See, e.g., ICRC, Advisory Service, *Punishing Violations of International Humanitarian Law at the National Level*, p 53. In the trial of Kurt Meyer, the judge stated that anything relating to the question whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or *wilfully failed in his duty as a military commander to prevent, or to take such actions as the circumstances required to endeavour to prevent*, the killing of prisoners, were matters affecting the question of the accused's responsibility (see *Trial of S.S. Brigadeführer Kurt Meyer*, Canadian Military Court sitting at Aurich in Germany, verdict of 28 December 1945, *Law Reports of Trials of War Criminals*, Vol. IV, pp. 97 *et seq.*, 1947). The judge-advocate in the trial of Rauer and others, however, stated that the words, contained in the charge against Rauer 'concerned in the killing' were a direct allegation that he either instigated murder or condoned it. *The charge did not envisage negligence* (see LRTWC, vol IV, p 89). See also *In re Schultz*, U.S. Court of Military Appeals (1 C.M.A. at 523); see

ICRC, to be criminal, the negligence of the commander, ‘must be so serious that it is tantamount to malicious intent, apart from any link between the conduct in question and the damage that took place’.⁶⁰² In the words of an American Military Tribunal in Nuremberg, to be punishable, the criminal negligence of the commander –

[M]ust be personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.⁶⁰³

In line with that precedent, in his instructions to the court members in the *Medina* case, the military judge said in relation to the conditions under which a commander could be held responsible for the crimes of his subordinates that ‘culpable negligence’ on his part had to be demonstrated beyond reasonable doubt; ‘culpable negligence’ was defined in the following terms:

Culpable negligence is a degree of carelessness greater than simple negligence. [...] simple negligence is the absence of due care, that is, an omission by a person who is under a duty to exercise due care, which exhibits a lack of that degree of care for the safety of others which a reasonable, prudent commander could have exercised under the same or similar circumstances. Culpable negligence, on the other hand, is a higher degree of negligent omission, one that is accompanied by a gross, reckless, deliberate, or wanton disregard for the foreseeable consequences to others of that omission ... It is higher in magnitude than simple inadvertence, but falls short of intentional wrong. The essence of wanton or reckless conduct is

also B. Carnahan, “The Law of War in the United States Court of Military Appeals”, 20 (1981) *Revue de Droit Penal Militaire et de Droit de la Guerre*, 331, 343-344), where the Court noted that negligence was not universally accepted as a sufficient basis for criminal liability and that an individual may not be held responsible for a ‘war crime’ simply on the basis of ordinary negligence and concluded that negligent homicide was not universally accepted as a crime and could not therefore constitute a war crime. See also *Bagilishema* Appeal Judgement, pars 34-35; *Blaskic* Appeal Judgement, par 63.

⁶⁰² ICRC, *Commentary on the Additional Protocols*, p 1012, par 3541. The ICRC highlights the importance of that element as, like any other criminal law system, it is based on a question of intent (*ibid.*). See also *Akayesu* Trial Judgement, par 217, discussing superior responsibility pursuant to Article 6(3) of the ICTR Statute: ‘it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount or even malicious intent.’

⁶⁰³ See *High Command* case, in LRTWC, vol XI, at 543-544.

intentional conduct by way of omission where there is a duty to act, which conduct involved a high degree of likelihood that substantial harm will result to others.⁶⁰⁴

Therefore, a commander 'cannot be held criminally responsible for a mere error in judgement as to disputable legal questions'.⁶⁰⁵ Nor will he be held responsible for a mere failure to draw the correct inference from information at his disposal.⁶⁰⁶ As once famously noted - '[N]o sailor and no soldier can carry with him a library of international law'.⁶⁰⁷ Thus, for instance, an officer or high-ranking official who receives contradictory reports about allegations of crimes would be permitted to rely on the 'optimistic and calming report' which he receives from his chain of command in regard to this incident. A failure to verify those reports would not in principle engage his responsibility even if those reports later turn out to have been inaccurate or misleading. In its Final Report on the *Shatilla and Sabra* massacre, an Israeli Commission of Inquiry noted, *inter alia*, that it ought not to be critical of the Israeli Prime Minister because he did not on his own initiative take any interest in the detail of the operation and did not through his own questioning discover that the Phalangists were taking part in that operation. The Commission added that:

⁶⁰⁴ Captain Medina was charged with 'involuntary manslaughter' in relation to the crimes committed in the village of My Lai. The Appeals Chamber of the ICTY echoed that definition of the concept of 'recklessness' when it stated that 'the *mens rea* of recklessness incorporates the awareness of a risk that the result or consequence will occur or will probably occur, and the risk must be unjustifiable or unreasonable. The mere possibility of a risk that a crime or crimes will occur as a result of the actor's conduct generally does not suffice to ground criminal responsibility' (*Blaskic* Appeals Chamber, par 38). See also the definition of 'recklessness' in the *Model Penal Code* cited by the Appeals Chamber in the *Blaskic* case: 'a conscious disregard of a substantial and unjustifiable risk that the material element exists or will result from [the actor's] conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation' (*ibid.*, par 34).

⁶⁰⁵ *High Command* case, LRTWC, Vol XII, pp 73-74.

⁶⁰⁶ See 'Note. Command Responsibility for War Crimes', 82 *Yale Law Journal* (1973) 1274, 1297.

⁶⁰⁷ Comments attributed to the Judge-Advocate General in the *Peleus* case, British Military Court sitting at Hamburg, Judgement of 20 Oct 1945, reproduced in abridged format in LRTWC, Vol I, p 1-33, 144, 184, 257-258; see also complete version in J. Cameron (ed) *Trial of Heinz Heck et al, (The Peleus Trial)*, (London: Wiliam Hodge and co, 1948).

The tasks of the Prime Minister are many and diverse, and he was entitled to rely on the optimistic and calming report of the Defence Minister that the entire operation was proceeding without any hitches and in the most satisfactory manner.⁶⁰⁸

The responsibilities of commanders are many and often difficult ones. Their primary responsibility is not to enforce humanitarian law, but to lead men in the most testing of times.⁶⁰⁹ A lapse in judgement or a faulty assessment of the situation would not, in those conditions, be sufficient to attach to him the stigma of a criminal conviction. As noted by one American Military Tribunal in Nuremberg, ‘to err is human, but if error must occur it is right that the error must not be prejudicial to the defendants. That, we think, is the spirit of the law of civilized nations’.⁶¹⁰

9.6 Special intent crimes

The ICTY and ICTR have both said that, under customary international law, a commander may be held responsible for a special intent crime without him personally sharing that intent with the actual perpetrators. It is sufficient, the *ad hoc* Tribunals have said in concert, that he *knows* that his subordinates committed their crimes with that state of mind. According to the jurisprudence of the *ad hoc* Tribunals, a commander could, therefore, be held criminally responsible for genocide or torture if he knows of the state of mind of his subordinates (including their special intent), whilst not himself sharing their intent. The jurisprudence of the two *ad hoc* Tribunals also suggests that, in principle, any offence is susceptible of being committed by omission pursuant to the doctrine of command responsibility, and liability could therefore be entailed in relation to any special intent crime simply by establishing knowledge on the part of the superior of the *mens rea* that characterize that offence.

It is doubtful whether customary law (or the Statutes of the *ad hoc* Tribunals) allow for such an interpretation where the special intent in question forms part of the *chapeau* of

⁶⁰⁸ *Sabra and Shattila* report.

⁶⁰⁹ ICRC, *Commentary on the Additional Protocols*, par 3549 (‘The first duty of a commander, whatever his rank, is to exercise command.’)

⁶¹⁰ *United States vs Flick et al*, Opinion and Judgement, Military Tribunal at Nuremberg, Feb 1948, re-printed in LRTWC, Vol 6, p 1187.

the indicted offence, as is the case with genocide. That is because the *chapeau* elements of, say, genocide or crimes against humanity, are not solely elements of the offence. They are also, as far as international criminal tribunals are concerned, a condition of the exercise of their jurisdiction. Thus, where these elements cannot be established beyond reasonable doubt in the person of the accused, the court should not only acquit the accused, but it should further declare itself incompetent to hear the charges in the absence of jurisdiction over those charges. By suggesting that a commander could be held responsible where he merely knows of an element which forms part of the *chapeau* (as, for instance, the specific genocidal intent for the crime of genocide), the *ad hoc* Tribunals appear to have gone beyond or rather below their own jurisdiction.⁶¹¹ Also, and considering that the *ad hoc* Tribunals have rejected the requirement of causality between the failure of the superior and the crimes committed by his subordinates,⁶¹² the only connection between the conduct of the superior and the international crime with which he is charged would be limited to his having had knowledge of his subordinates' intentions. This, it would seem, is hardly enough to bring the superior's actions into the category of conduct that disturbs the peace and tranquillity of mankind.

It is the position of this author that superior responsibility may only be entailed in relation to those crimes whose special intent forms part of the *chapeau* if and when the superior himself possesses that intent, but not where he merely knows about his subordinates' special intent. Where, by contrast, the special intent is merely an element of the underlying offence – and not of the *chapeau* – it is sufficient in principle for the superior to be shown to have known of the intent of his

⁶¹¹ An argument to the contrary would only be open where the court has identified the actual subordinates who committed the crimes and where it has been established beyond reasonable doubt that they possessed the required state of mind. In such a case, an argument would be open that the court's jurisdiction over the acts of the accused would be based not solely on his actions, but on those of persons with whom he was associated and whose crimes have established beyond reasonable doubt.

⁶¹² See below, 10.4.

subordinates.⁶¹³ In such a case, liability does not depend on his own intent having been established. It is enough to prove that his subordinates possessed that intent and that the superior knew about it.

It should be added, however, that the concerns which the position of the *ad hoc* Tribunals have raised have been somewhat assuaged by the strict interpretation of the scope and detail of the notice of which the superior must be shown to have possessed under the jurisprudence of these Tribunals.⁶¹⁴ As pointed out above, it is not sufficient to show that the accused was aware of crimes committed by his subordinates. The Prosecution must prove that the accused knew or that he had reasons to know of the very underlying offences with which he is charged.⁶¹⁵ In particular, where a specific state of mind or a particular sort of conduct forms part of the definitional elements of that offence, the accused would thus have to be shown to have been aware of it before he may be held criminally responsible for failing to prevent or punish such a crime:

[I]n each case where you are of the opinion that a person was concerned in the commission of a criminal offence, you must also be satisfied that when he did take that part in it he knew the intended purpose of it.⁶¹⁶

⁶¹³ Thus, for instance, a superior could be held responsible where he knows, but does not share, the discriminatory *mens rea* required for the crime against humanity of ‘persecutions’ or where he knows, but does not share, one of the prohibited purposes behind the crime of torture.

⁶¹⁴ See above, 9.2.3.

⁶¹⁵ See, e.g., *Krnjelac* Appeal Judgement, par 155; *Krnjelac* Trial Judgement, par 493. This position is not disputed by the Office of the Prosecutor of the ICTY (see, e.g., *Prosecutor v Limaj et al*, Public Redacted Prosecution Final Trial Brief, 20 July 2005, par 343). In the case of the underlying offence of torture, for instance, that means that the prosecution has to establish that the accused knew, *inter alia*, of the specific purpose pursued by his subordinates when inflicting serious pain upon the victims.

⁶¹⁶ Summing-up of the Judge-Advocate in the *Ponzano* case, (*Ponzano* case (*Feuerstein et al*), Proceedings of a Military Court held at Curiohaus, Hamburg, Summing-up of the Judge-Advocate, 24 August 1948). See also *Krnjelac* Appeal Judgement, par 155.

10 BREACH OF A DUTY AND CONSEQUENTIAL FAILURE TO PREVENT OR TO PUNISH CRIMES OF SUBORDINATES

10.1 A dual source of liability – Failure to prevent or failure to punish crimes

10.1.1 Two distinct duties – To prevent and to punish crimes

The twin obligations that rest on commanders, to prevent and to punish crimes of their subordinates, were born as one: early expressions of the doctrine of superior responsibility suggested that criminal responsibility pursuant to that doctrine could only result from a failure of a commander to both prevent *and* punish the crimes of his subordinates.⁶¹⁷ The failure to comply with both duties was evidence of the gravity of the superior's dereliction and constituted a condition 'superior liability'.

Slowly, however, this once unitary basis of responsibility was split into two distinct obligations and two alternative bases for liability, so that the violation of either of these duties to prevent and to punish crimes could engage the criminal liability of a superior.⁶¹⁸ The position in international law remained uncertain until the combined jurisprudence of the *ad hoc* Tribunals clarified the matter by sanctioning the duality of these obligations. Under customary international law today, as articulated by the *ad hoc* Tribunals, a superior may, therefore, incur superior responsibility if he fails to prevent the crimes of subordinates *or* if he fails to punish such crimes committed by subordinates *or*, of course, where he fails to do both of these things.⁶¹⁹

⁶¹⁷ See, e.g., *Oric* Trial Judgment, pars 325-226 and references cited therein; *Halilovic* Trial Judgement, par 91 and references cited therein.

⁶¹⁸ See, generally, *Celebici* Appeal Judgment, pars 192, 193 and 198; *Celebici* Trial Judgment, par 395.

⁶¹⁹ See, e.g., *Blaskic* Appeal Judgement, par 83; *Halilovic* Trial Judgement, par 72. It must be noted, however, that both the Statutes of the ICTY and ICTR talk of a duty to prevent *and* to punish (see, Article 7(3) ICTY Statute and Article 6(3) of the ICTR Statute). Under international law, superior responsibility could, therefore, be incurred if either or both of those duties are breached.

As such, under contemporary customary international law, those two duties – to prevent and to punish crimes of subordinates – are therefore distinct and cumulative.⁶²⁰

As noted by a trial chamber of the ICTY:

[T]he duty to prevent or punish does not provide the Accused with alternative and equally satisfying options but with two distinct sets of obligations.⁶²¹

Compliance with one of these obligations would not, therefore, satisfy the superior's duty, nor would it provide a valid defence to charges that he failed to comply with the other half of his dual obligation:

[I]f the superior had reason to know in time to prevent, he commits an offence by failing to take steps to prevent, and he cannot make good that failure by subsequently punishing his subordinates who committed the offences.⁶²²

The sub-division of duties, cemented by jurisprudence of the *ad hoc* Tribunals, has had the effect of significantly expanding the scope of criminal liability of commanders under international law. It has rendered the prosecution of superiors more likely and proof of liability a lot simpler.⁶²³

⁶²⁰ See *Aleksovski* Appeal Judgement, pars 72, 76; *Celebici* Appeal Judgement, at pars 192, 193, 198; *Blaskic* Trial Judgement, par 336; *Blaskic* Appeal Judgement, par 83; *Bagilishema* Trial Judgement, par 49.

⁶²¹ *Oric* Rule 98bis Decision, Transcript page 8998. Thus, where a commander was aware of crimes being committed at the time of their commission *and* fails to punish them thereafter, he may be found responsible both for failing to prevent and failing to punish those crimes (see, e.g., *Oric* Trial Judgement, par 332). According to one ICTY trial chamber, the duty to prevent and punish crimes could also be said to be 'consecutive': 'It is the primary duty [of the commander] to intervene as soon as he becomes aware of crimes about to be committed, while taking measures to punish may only suffice, as substitute, if the superior became aware of these crimes only after their commission' (*Oric* Trial Judgement, par 326).

⁶²² *Hadzihasanovic* Article 7(3) AC Decision, Separate and Partially Dissenting Opinion of Judge David Hunt, par 23. See also *Blaskic* Trial Judgement, par 336; *Kordic* Trial Judgement, pars 444-446; *Halilovic* Trial Judgement, par 72; *Kordic* Trial Judgement, par 444.

⁶²³ In almost all cases prosecuted before the *ad hoc* Tribunals, however, those charged with superior responsibility were charged with both a failure to prevent and a failure to punish the same set of crimes. Some exceptions to this pattern exist (e.g. General Halilovic was charged for failure to punish only in

10.1.2 Duty to prevent

The duty of a superior to prevent crimes of subordinates is essential to the protection of standards of humanitarian law. Without the required oversight on the part of military commanders and other superiors, those standards would have little chance of being respected. Once a superior learns that subordinates are about to commit a criminal offence, this duty therefore requires him to adopt necessary and reasonable measures to prevent this risk from materializing.

The failure to prevent is distinguishable from the failure to punish in that these two duties concern distinct categories of crimes. Whilst the failure to punish concerns crimes that have already been committed at the time when the commander fails in his duties, a failure to prevent crimes concerns ‘future crimes’ that have not yet been committed at the time when the commander learns of the impending commission of a crime fails to act to prevent it.⁶²⁴ Thus, whilst the failure relevant to the commander’s duty to punish occurs after the crimes have been committed, the failure relevant to his duty to prevent would have occurred between the time when he learnt that crimes were about to be committed and the time at which those crimes were actually committed.

The duty to prevent must, therefore, be understood as resting upon a superior at any stage before the commission of a crime by one of his subordinates starting from the moment when he acquires knowledge that such a crime is ‘being prepared or planned’, or when he has reasonable grounds to suspect that such crimes is about to be committed.⁶²⁵ As noted above, that information must be such as to suggest that crimes are *about to* be committed by subordinates, i.e., that subordinates are making preparations for, are planning or clearly demonstrating their intention to commit the

relation to one incident, although the prosecution sought, unsuccessfully, to amend its indictment to add ‘failure to prevent’ charges in relation to that incident; Mr Boskoski, an accused before the ICTY, was charged with a ‘failure to punish’ only).

⁶²⁴ *Blaskic* Appeal Judgement, par 83; *Halilovic* Trial Judgement, par 72.

⁶²⁵ See, generally, *Kordic* Trial Judgement, par 445; *Kvocka* Trial Judgement, par 317; *Hadzihasanovic* Rule 98bis Decision, par 166. See also *Hadzihasanovic* Trial Judgement, pars 1042, 1231, 1457; *Oric* Trial Judgement, par 574; *Bagilishema* Appeal Judgement, par 33; *Hadzihasanovic* Trial Judgement, pars 1042, 1231, 1457.

crime charged.⁶²⁶ A failure to act prior to the time when the superior acquired such information could not form the basis of his responsibility.⁶²⁷ But from the moment when he acquires such knowledge, the superior has a duty to act.⁶²⁸

As for the duration of the obligation which lies upon the superior to prevent crimes of subordinates, it will last for as long as the superior remains sufficiently aware of the existence of a risk that a crime is about to be committed by subordinates, or until that time when his relationship of authority with those subordinates has been terminated.

10.1.3 Duty to punish

The duty to punish requires a superior to adopt necessary and reasonable measures to ensure that crimes that have been committed by subordinates are investigated and, where the culprits are identified, that they are punished.

The commander's duty to punish only arises after the commission of a crime and only once the accused has acquired sufficient information ('knew or had reasons to know' or 'knew or should have known') that a crime has been committed by a subordinate.⁶²⁹

Once the accused has learnt of crimes committed by his subordinates, or once he has learnt of the strong likelihood thereof, and for as long as he is in a relationship of superior-subordinate with those subordinates, he is under a legal duty to investigate those allegations and to take appropriate measures to see that the culprits are

⁶²⁶ See, e.g., *Blaskic* Appeal Judgement, par 83; *Strugar* Trial Judgement, par 373; *Kordic* Trial Judgement, pars 445-446. One Trial Chamber of the SCSL appears to have interpreted that position as requiring a superior to act where he has learnt that subordinates had received unlawful orders that are likely to lead to the commission of crimes.

⁶²⁷ This explains, for instance, that a failure on the part of the superior to inform his subordinates of their duties and responsibilities, in particular as regard their duties under humanitarian law, prior to the time when he acquired the necessary *mens rea* would not suffice to engage his superior responsibility, although such a failure could be regarded as a factor relevant to assessing the nature and gravity of any dereliction of duty on his part (see, e.g., *Mrksic* Trial Judgment, par 567).

⁶²⁸ See, e.g., *Limaj* Trial Judgement, par 527.

⁶²⁹ See, e.g., *Limaj* Trial Judgement, par 527; *Blaskic* Appeal Judgement, par 83; *Kordic* Trial Judgement, pars 445-446.

punished.⁶³⁰ The termination of their relationship of superior-subordinate puts an end to his duty to act, insofar as it would be pertinent to his criminal responsibility. His duty to act – and the possibility of criminal responsibility – would also end when the superior has been relieved of his responsibility to investigate by his own superiors or where this responsibility has been transferred to another competent authority that is not subordinated to him.

10.1.4 Relationship between the two duties

The duties to prevent and punish crimes of subordinates are not un-related. For instance, a proven failure to punish crimes may be relevant to establishing a failure to prevent subsequent criminal occurrences by the same group of subordinates:⁶³¹

[P]unishment is an inherent part of prevention of future crimes. It is insufficient for a commander to issue preventative orders or ensure systems are in place for the proper treatment of civilians or prisoners of war if subsequent breaches which may occur are not punished. This failure to punish on the part of a commander can only be seen by the troops to whom the preventative orders are issued as an implicit acceptance that such orders are not binding.⁶³²

The converse could also be true. When, for instance, a superior has been shown to have intentionally disregarded his duty to prevent subordinates from committing crimes, an inference might be open that he did not intend to see that the perpetrators of those crimes be punished.

⁶³⁰ The length of time that elapsed between the moment when the accused learnt of the commission of crimes by subordinates and the time when their relationship of subordination was terminated might be relevant to determining the type of measures which would have been ‘necessary and reasonable’ in the circumstances. The shorter that timeframe, the less room there will usually be for the superior to investigate fully and comprehensively. In other words, the extent to which his conduct might be regarded as adequate in the circumstances will depend in part on the time which he had at his disposal to carry out a proper investigation or to otherwise take measures to see to the punishment of the perpetrators.

⁶³¹ See *Hadzihasanovic* Trial Judgement, pars 1778-1780; see also, *ibid.*, pars 1982 and 1991; see also *Oric* Trial Judgement, par 326.

⁶³² *Halilovic* Trial Judgement, par 96.

Finally, as noted above, a commander could, in principle, be held criminally responsible for failing in his duty to prevent and for failing to punish the same crime if indeed he has breached both of his duties in relation to that crime.

10.2 Dereliction of duty

It has been pointed out above that superior responsibility requires proof of a gross and personal dereliction on the part of the commander, whereby he culpably and deliberately failed to carry out his duties to prevent or punish crimes committed by his subordinates. How this is determined in each case will be examined below.

10.2.1 General remarks – Failure to adopt ‘necessary and reasonable’ measures

Superior responsibility depends on proof of a failure on the part of the superior to take ‘necessary and reasonable measures to prevent or punish the crimes of his subordinates’.⁶³³ What is ‘necessary and reasonable’ in a specific case will depend a great deal on the circumstances of that case, and in particular on the extent of the commander’s *actual* and *proven* material ability to act to prevent or punish those crimes.⁶³⁴

According to the *Strugar* Trial Chamber, factors relevant to the Chamber’s assessment include, but are not limited to, whether specific orders prohibiting or stopping the criminal activities were issued; what measures to secure the implementation of these orders were taken; what other measures were taken to secure that the unlawful acts were interrupted and whether these measures were reasonably sufficient in the specific circumstances; and, after the commission of the crime, what steps were taken to secure an adequate investigation and to bring the perpetrators to justice.⁶³⁵

In all cases when superior responsibility charges are brought, measures relevant to assessing the criminal responsibility of the accused are limited to those which are

⁶³³ See, e.g., *Celebici* Appeal Judgement, par 226; *Krnjelac* Trial Judgement, par 95.

⁶³⁴ See, e.g., *Blaskic* Trial Judgement, par 302; *Aleksovski* Trial Judgement, 78; *Celebici* Trial Judgement, pars 302, 394-395; *Strugar* Trial Judgement, par 378.

⁶³⁵ *Strugar* Trial Judgement, par 378.

‘feasible in all the circumstances and are ‘within his power’’.⁶³⁶ As the ICRC Commentary to Additional Protocol I correctly emphasizes, international law ‘reasonably restricts the obligation upon superiors to “feasible” measures, since it is not always possible to prevent a breach or punish the perpetrators. In addition, it is a matter of common sense that the measures concerned are described as those “within their power” and only those.’⁶³⁷

Also, a particular measure or course of action could only be regarded as ‘necessary and reasonable’ where it has been shown to be capable of preventing and punishing the crimes in question in the circumstances which prevailed at the time. At Tokyo, Judge Bernard of France pointed out that no criminal responsibility could be established pursuant to the – as yet un-named – doctrine of superior responsibility unless proof was made that the defendant could in fact have prevented the crimes with which he was charged. ‘Can’, Judge Bernard pointed in that respect, ‘is not right; “might” only would be true.’⁶³⁸ The French judge added that –

No general rule can be made upon this point and proof that omission is the cause of harm done must be furnished in each case by the prosecution.⁶³⁹

Criminal liability for a failure to act in violation of the laws or customs of war, the French judge concluded, could therefore only be established where the superior’s actual ability to prevent the crimes charged against him has been established on the evidence:

Is guilty of passive complicity of violation of laws of war or of passive complicity of crimes against humanity only one who, able to prevent that violation from being committed, did not do so. No legal presumption could be invoked to establish that the defendant could have prevented such violation of such wholesale or particular violations of the laws of war, and the failing from their professional duty on from their moral obligations could not be considered as an

⁶³⁶ *Krnjelac* Trial Judgement, par 95. See also *Celebici* Appeal Judgement, par 226.

⁶³⁷ ICRC, *Commentary on the Additional Protocols*, p 1010, par 3548.

⁶³⁸ Re-printed in B. Röling and C. Rüter (eds.), *The Tokyo Judgement*, Vol II (Amsterdam: University Press Amsterdam, 1977), Dissenting Judgement of the Member from France, pp 482, 492-493.

⁶³⁹ *Ibid.*

element of the crime of complicity by negligence, imprudence, or omission unless the crimes committed were the direct result of this negligence, imprudence or omission.⁶⁴⁰

To be relevant to establishing the superior responsibility of an accused, the measure which the superior is said to have overlooked or breached must, therefore, be shown to have been both feasible in the circumstances of the case and have been capable of preventing or punishing the underlying crimes.

10.2.2 'Necessary'

In practice, the phrase 'necessary' means that upon learning of the commission or likely commission of crimes by subordinates, a superior is expected to adopt those measures which, in light of the information at his disposal at the time and in view of all relevant factual circumstances.⁶⁴¹

- (i) Are directly derived from the commander's legal duty to ensure compliance with the laws of war on the part of his subordinates;⁶⁴²

⁶⁴⁰ *Ibid.*

⁶⁴¹ The ICTY Appeals Chamber has summarized in one sentence the concept of 'necessary' measures in those terms: 'Measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish)' (*Halilovic* Appeal Judgment, par 63).

⁶⁴² Article 12 of the 1991 ILC *Draft Code of Crimes Against the Peace and Security of Mankind* provides, for instance, that: 'The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures with their power to prevent or repress the crime.' The ILC *Commentary* to that draft provision makes it clear that for a superior to incur responsibility pursuant to the above provision, 'he must have had the legal competence to take measures to prevent or repress the crime and the material possibility to take such measures.' ILC Yearbook, 1988, Vol II (part II) pp 70-71. As noted by one authority on the subject, 'these requirements [of legal competence and material possibility], at least, seem to provide an excuse to the superior, who has not issued an order and is not present to ascertain whether a subordinate is "going to commit" a crime.' (L.C. Green in C. Bassiouni, *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, 1993, p 196). See, for an identical requirement, ILC *Commentary* to Article 6 (Responsibility of the superior) the 1996 ILC *Draft Code of Crimes Against the Peace and Security of Mankind*: 'An individual incurs

- (ii) Are within the sphere of competence of the accused;⁶⁴³
- (iii) In regard specifically to an alleged failure to prevent crimes:
 - o Are capable of preventing the commission of the crime which the commander knows of or has reason to know of and that is about to be committed;
 - o Are proportionate to the threat that humanitarian law will be breached by subordinates;
- (iv) In regard specifically to an alleged failure to punish crimes:
 - o Are such as to be capable of contributing to the – eventual – punishment of a breach of humanitarian law as might have been committed by subordinates; or, at the least,
 - o Are such as to preserve the possibility of punishment of those responsible.

Particularly pertinent to assessing the extent to which a given conduct may be said to have been ‘necessary’ in the circumstances is the scope of the accused’s obligations according to the law to which he was subject at the time, i.e., his domestic law as was

criminal responsibility for the failure to act only when there is a legal obligation to act and the failure to perform this obligation results in a crime.’ And ‘for the superior to incur responsibility, he must have had the legal competence to take measures to prevent or repress the crime and the material possibility to take such measures.’

⁶⁴³ See, e.g., Commission on Responsibility of the Authors of the War and on the Enforcement of Penalties, Report presented by the United States to the Preliminary Peace Conference, 29 March 1919, Pamphlet No 32, Division of International Law, Carnegie Endowment for International Peace, reprinted in 14(1) *AJIL* 95 (1920), 143. See also 1950 ILC Draft Code of Offences against the Peace and Security of Mankind, A/CN.4/25, 26 April 1950, par 100: ‘Any person in an official position, whether civil or military, who fails to take the appropriate measures in his power and within his jurisdiction, in order to prevent or repress punishable acts under the draft code [of offences against the peace and security of mankind] shall be responsible therefor under international law and liable to punishment.’ See, however, *Oric* Trial Judgement, par 331, where the Trial Chamber says that a commander may be required to adopt certain measures even if he lacks the formal capacity or legal competence to perform those.

applicable to him then. Where, for instance, a superior is required by domestic law to report allegations of crimes or where he is expected to request the professional assistance of a particular body, that measure will be regarded, in principle and unless the circumstances did not permit or where that step would have been too onerous or bound to fail, as being ‘necessary’ in the circumstances.

It may not be assumed from the fact that a superior had *some* responsibilities and the ensuing powers that he had all-encompassing responsibility. In fact, a superior could only be held criminally responsible for failing to adopt a measure that fell within the scope of his responsibilities and mandate. In the case of the accused Von Leeb, for instance, the Tribunal pointed out that the executive power with which he had been endowed limited his ability to issue orders – and thus his ability to exercise control and authority – in the field of ‘operational’ matters. By contrast, administrative matters were not under his responsibility, a fact relevant to both his state of mind and the measures which could be said to fall within the realm of his competence for the purpose of establishing whether he failed in his duties. The court, therefore, concluded that he could not be held responsible in relation to matters which fell outside the scope of his responsibilities.⁶⁴⁴

Also relevant to this matter is the position of the accused in the hierarchy to which he belonged as his duties and obligations will generally be commensurate with the level of his responsibilities.⁶⁴⁵ A high-ranking officer, for instance, would not be expected, nor is he required under international law, to personally take care of the actual enforcement or implementation of measures directed at preventing or punishing crimes within the ranks.⁶⁴⁶ He may instead delegate a great deal of his responsibilities or, better said, the implementation thereof, to others.⁶⁴⁷ Such delegation or distribution of competencies and responsibilities will have often have been inscribed into domestic

⁶⁴⁴ *High Command* case, 11 Trial of War Criminals before the Nuremberg Tribunal under Control Council Law No 10, Nuremberg, Oct. 1946 Nov. 1949, in particular, at 554-555 (1951). See, also, the reasoning of the ICTY Appeals Chamber in *Halilovic* Appeal Judgment, in particular, pars 210-214.

⁶⁴⁵ See, generally, Article 87(2) of Additional Protocol I.

⁶⁴⁶ See above, 3.4.1.

⁶⁴⁷ *Ibid.*

laws and regulations. The nature of the responsibilities of a high-ranking officer or state official is primarily 'systemic' in nature. It is for him to oversee the good functioning of the structure of which he is a member so that, when crimes have been committed or are about to be committed, those whose responsibility it is to intervene are able to do so.⁶⁴⁸ By contrast, a low-ranking soldier may not be blamed or charged with the functional deficiencies of a system which he had no part in building or setting up. The duties of such an individual, and the liability that runs parallel to it, will be limited to those measures which he could effectively and reasonably implement at his level in the hierarchy.

10.2.3 'Reasonable'

The function of the principle of 'reasonableness' in the context of the doctrine of superior responsibility is essentially twofold. First, it serves to ensure a necessary degree of flexibility on the part of the commander in the choice of means which he can adopt to prevent or punish crimes of subordinates, whilst guaranteeing at the same time that the exercise of his discretion does not negate his fundamental obligation to prevent and punish crimes. In that context, 'reasonableness' requires a commander to take into consideration all factors relevant to his duties and responsibilities as commander, to give each of them their due weight, and, having done so, to adopt a position that does not negate his obligations under international law, nor renders them meaningless.⁶⁴⁹ Secondly, the requirement of 'reasonableness' functions as a minimum

⁶⁴⁸ See, e.g., R. Pritchard and S. Magbauna Zaide (eds.), *The Tokyo War Crimes Trial*, (New York/London, 1981) pp 48, 433: 'It is the duty of [government officials] to secure proper treatment of prisoners and prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. They fail in this duty if [...] (1) They fail to establish such a system, (2) If having established such a system, they fail to secure its continued and efficient working.'

⁶⁴⁹ Where, for instance, a commander learns of the commission of crimes while he and his troops are engaged in combat activities, he would be permitted in principle, to delay dealing with the investigation of those crimes until that time when he is able to do so without endangering on-going combat operations. Under Bosnian law, for instance, a military commander could request that aspects of an investigation into allegations of crimes be deferred with a view to permit a military operation to proceed, or for security reasons. See Transcript of proceedings, *Halilovic* case, 10 April 2005, pp 80-81. Likewise, it would not be 'reasonable' to require that a commander should deal with allegations of

standard of conduct required of superiors in preventing and punishing crimes of their subordinates. If a superior adopts measures that were reasonable in the circumstances, though others might have been available to him, he might not be held criminally responsible pursuant to that doctrine. In other words, to engage his superior responsibility, the course of action chosen by the commander must be shown to have been unreasonable in the circumstances.

Under international law, the phrase ‘reasonable’ refers to those measures which, in light of the information at the disposal of the commander at the time and in view of all relevant factual circumstances, were –

- (i) Legal;⁶⁵⁰
- (ii) Feasible;⁶⁵¹

crimes immediately if doing so might lead to the commission of additional crimes or might otherwise trigger disproportionate negative consequences. It could be the case, however, that where a superior intentionally delays investigating a particular matter, without proper justification for such delay, this could constitute an indicia of a failure to act with the requisite diligence. In 1439 already, Charles VII’s Ordinance provided as follows: ‘The King orders that each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been.’ Cited in L. C. Green, “Command Responsibility in International Humanitarian Law”, 5 *Transnational Law & Contemporary Problems*, 319, 321 (1995) and T. Meron, *Henry’s Wars and Shakespeare’s Laws* (Oxford: Oxford University Press, 1993), 149.

⁶⁵⁰ A commander is not permitted, nor is he expected, under the laws of war to commit a breach of his obligations for the purpose of enforcing compliance with the laws of war. See *Toyoda* case, p 5019, where a U.S. war crimes tribunal noted that full account must be taken of ‘his legal means of discharging [his] responsibility’.

⁶⁵¹ See, e.g., *Krnjelac* Trial Judgement, par 95; *Celebici* Appeal Judgement, par 226; *Kordic* Trial Judgement, par 441; *Hadzihasanovic* Trial Judgement, pars 1884-1886. The Appeals Chamber has described the requirement of ‘reasonable’ measures in the following terms: “‘reasonable’ measures are

(iii) Proportionate;⁶⁵² and

(iv) Timely.⁶⁵³

Assessing the extent to which those measures adopted by a superior may be said to have been ‘reasonable’ in the circumstances requires that the court take into

those reasonably falling within the material powers of the superior’ (*Halilovic* Appeal Judgment, par 63). Upon ratification or signature of Additional Protocol I, a number of countries (including Italy, Canada, Germany, the Netherlands, Spain and the U.K.) expressed their understanding that the term ‘feasible’ in Article 86 of the Protocol (‘all feasible measures’) was to be understood as meaning ‘practicable or practically possible’. See generally ICRC, *Customary International Humanitarian Law*, Vol II: Practice, part 2, par 571 and Vol I: Rules, Chapter 5 Section A. See, e.g., understanding by Canada which said that ‘feasible’ when used in the Protocol ‘refers to what is practicable or practically possible, taking into account all circumstances existing at the relevant time, including those circumstances relevant success of military operations’ (Canada, Statement at the CDDH, Official Records, Vol VI, CDDH/SR.42, 27 May 1977, p 224); see also, e.g., a similar statement by Germany (*ibid.*, p 226) and The Netherlands (*ibid.*, p 214, par 61) and the U.S. (*ibid.*, p 241). In somewhat similar fashion, the U.S. Air Force Pamphlet provides that a commander may be held responsible, all other conditions being met, where he fails to take ‘reasonably necessary steps to ensure compliance with the law and punish violators thereof’ (*U.S. Air Force Pamphlet* (1976), par 15-2(d)). See also Article 10 of the 1988 ILC Draft Code and Article 12 of the 1991 Draft Code, which both adopt the ‘feasibility’ criteria for the measures that a commander would be required to adopt. See also *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), UNSC, UN Doc S/25274 (1993), par 52.

⁶⁵² The measure(s) should first and foremost be an appropriate response to the information in possession of the commander at the time when he is duty-bound to act and the risk or situation which he is to confront. In the *Hadzihasanovic* case, for instance, the Trial Chamber found that disciplinary sanctions were an inadequate response to the commission of murders (*Hadzihasanovic* Trial Judgement, par 1777). Support for such a general proposition is doubtful. The adequacy of the measure adopted by the commander will be assessed, *inter alia*, in light of the urgency of the situation and the gravity of the likely consequences if he does not act, does not act in a particular manner or not with the necessary promptness (see, e.g., *Oric* Trial Judgement, par 329: ‘the more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentive and quicker the superior is expected to react’).

⁶⁵³ See, generally, *Kordic* Trial Judgement, pars 445-446; *Kvocka* Trial Judgement, par 317; *Hadzihasanovic* Trial Judgement, pars 1449, 1473 *et seq*; *Oric* Trial Judgement, pars 328-329. ‘Timely’ need not mean immediate, insofar as the circumstances do not make it possible – or reasonable – for the commander to act immediately.

consideration all relevant factors as were pertinent to the decision of the superior to adopt – or not to adopt – a particular course of action. In particular, the court will have to evaluate the means that were at the disposal of the superior at the time to fulfil his dual obligations to prevent and punish crimes.

The discretion which the concept of reasonableness embodies – in the form of a discretion to adopt certain measures but not others – is the discretion *of the commander*, not that of the court. In other words, it is not for the court to decide whether it would have adopted the same measures in the circumstances.⁶⁵⁴ Nor is it for the court to determine whether the measures which the superior has adopted were reasonable in the circumstances, but whether, in the circumstances, they could have appeared so to the commander.⁶⁵⁵

The decision of the superior to follow a particular course to prevent or punish certain crimes is thus a weighing exercise on his part which he must make between different considerations, all relevant to his duties and obligations. The decision which he takes, having considered all relevant factors, may not lead to a complete abandonment of his

⁶⁵⁴ Discussing judicial review of security measures adopted by the State in response to terrorist threats, Judge Aharon Barak, former President of the Supreme Court of Israel, noted the following: ‘The Court does not ask itself if it would have adopted the same security measures if it were responsible for security. Instead, the court asks if a reasonable person responsible for security would be prudent to adopt the security measures that were adopted. Thus, the court does not express agreement or disagreement with the means adopted, but rather fulfils its role of reviewing the constitutionality and legality of the executive acts.’ (A. Barak, *The Judge in a Democracy*, Princeton: Princeton University Press, 2006).

⁶⁵⁵ See, for an interesting parallel, the decision of the Supreme Court of Israel regarding the Court’s review, pursuant to the Geneva Conventions, of Israel’s decision to assign the residence of Arabs from the West Bank to the Gaza Strip (H.C. 7015/02, *Ajuri v. IDF commander in the W. Bank*, 56(6) P.D. 352, English translation available at www.court.gov.il), in particular at 375, J Barak, President: ‘In exercising judicial review [...] we do not make ourselves into security experts. We do not replace the military commander’s security considerations with our own. We take no position on the way security issues are handled. Our job is to maintain boundaries, and to guarantee the existence of conditions that restrict the military commander’s discretion [...] because of the important security aspects in which the commander’s decision is grounded. We do not, however, replace the commander’s discretion with our own. We insist upon the legality of the military commander’s exercise of discretion and that it falls into the range of reasonableness, determined by the relevant legal norms applicable to the issue.’

obligations. He must therefore ensure that, whatever decision he takes in the circumstances, the possibility of preventing or punishing crimes is not lost or rendered impossible as a result of his decision.⁶⁵⁶

10.2.4 Assessing the propriety of the superior's conduct

10.2.4.1 Pleadings

When charging an individual with superior responsibility, prosecuting authorities must give him adequate and timely notice of the nature and cause of the charges against him. As far as the alleged failure of the accused is concerned, prosecuting authorities are required to describe in some detail 'the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them'.⁶⁵⁷ The accused must be given clear and timely notice of those measures which the prosecution claims he was required and failed to adopt as well as the legal basis upon which it relies to support that allegation.⁶⁵⁸ His responsibility and the extent thereof as the case may be will in turn be assessed and evaluated against these pleadings.

10.2.4.2 Discretion of the commander

When assessing the superior's compliance with his duties, only those measures which were both 'necessary' and 'reasonable' in the circumstances will be relevant. Once the court has identified those measures, it will have to compare them with the actions actually taken by the accused in the case at hand. On that basis, the court will

⁶⁵⁶ See *Oric* Trial Judgement, par 573.

⁶⁵⁷ See, e.g., *Blaskic* Appeal Judgement, par 218 and authority cited therein. See also *Prosecutor v Brdjanin and Talic*, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, par 19; *Prosecutor v Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, par 18.

⁶⁵⁸ Concerning the requirement for the prosecuting authorities to identify the legal basis of the duty that was allegedly breached, see *Muvunyi* Trial Judgement, pars 473-475.

determine whether the deviation, if any, from the standard required of that superior is such as to invoke his criminal responsibility.⁶⁵⁹

International law does not provide for a check-list of measures which a commander is expected or required to adopt in a given situation to prevent or punish crimes. That is so, not only because such a list would be impracticable and would lack the necessary flexibility, but also because the mechanism or structure based on which crimes will be punished and prevented is organized very differently from one country to the other. International law's general imprecision on that point may also be explained by the fact that commanders who are in the field are generally better placed to decide what measures are likely, in a given situation, to achieve the goal for which they are being adopted than would a court of law years after the events.

10.2.4.3 Evaluation in context

Determining whether a superior in a particular case has complied with his obligations to prevent and punish crimes is not an objective test drawn in the abstract. Instead, the tribunal will have to conduct a very concrete assessment of the situation of the commander and the means at its disposal at the time relevant to the charges, taking into account all relevant circumstances. As noted by the *Toyoda* Tribunal when discussing this matter, '[t]his is not a trial of a man for events that took place under calm and academic conditions – conditions were essentially, intensely and grimly practical'.⁶⁶⁰ 'In determining the guilt or innocence of an accused, charged with dereliction of his duty as a commander,' the same Tribunal pointed out, 'consideration must be given to many factors. The theory is simple, its application is not'.⁶⁶¹

What measure or measures a superior should adopt in a particular context will be dictated primarily by the material powers which the superior had at the time and in the circumstances that prevailed to adopt a particular course of action.⁶⁶² This means that before a superior may be found to have failed to adopt a particular measure, it must be

⁶⁵⁹ See, generally, *Hadzihasanovic* Trial Judgement, par 1477.

⁶⁶⁰ See, e.g., *Toyoda*, p 5001.

⁶⁶¹ *Ibid.*, p 5006.

⁶⁶² See, e.g., *Strugar* Trial Judgement, par 378.

established that he was in fact materially able to adopt it and that this measure was at least capable of contributing to the prevention or punishment of a particular crime. In *Hadzihasanovic*, for instance, the Trial Chamber pointed out that it could not be concluded that a superior had failed to take a ‘necessary and reasonable’ measure when he failed to personally conduct an investigation of the matter as he had not been shown to have had the capacity either to conduct such an investigation or to influence an investigation that was being conducted at the time.⁶⁶³

The extent of a superior’s ability to adopt certain measures will, in turn, depend a great deal on the nature of his role and the means at his disposal at the time to respond to risk of crimes to which he has been alerted. The ICRC commentary to Article 87 of Additional Protocol I notes, in particular, that this duty to react varies for each level of command. By way of example, the ICRC notes that this duty may imply that ‘a lieutenant must mark a protected place which he discovers in the course of his advance, a company commander must ensure that an attack is interrupted when he finds that the objective under attack is no longer a military objective, and a regimental commander must select objectives in such a way as to avoid indiscriminate attacks.’⁶⁶⁴ The same would be true of a civilian structure. A minister, for instance, has duties and obligations which differ greatly in both nature and scope from those of bureaucrats and state officials that work within his ministry.

The court will also have to take into account any such factors as might have limited, or instead, expanded the range of measures which were at the disposal of the superior at the time when he should have acted to prevent or punish crimes of subordinates. Those would include, for instance, on-going combat operations or difficulties with communication as might have made it more difficult or impossible for him to adopt a particular course of action. A particular course of action could not be regarded as ‘necessary and reasonable’ where the circumstances have rendered such a course meaningless or disproportionate.

⁶⁶³ See *Hadzihasanovic* Trial Judgement, par 1061.

⁶⁶⁴ ICRC, *Commentary on the Additional Protocols*, pars 3560-3561, p 1022.

Furthermore, the steps or measures taken by the superior will be considered not in isolation, but in light of what was being done by others to prevent or punish crimes of his subordinates. Where, for instance, a superior is aware of the fact that other authorities have taken certain steps to prevent or punish crimes of his subordinates, he would be entitled to take them into consideration when deciding what additional steps, if any, are required so as not to un-necessarily duplicate matters or entangle an investigation in the knots of competing agencies. Thus, the Commission of Inquiry into the *Shatilla and Sabra* incident found with regard to the Israeli Defence Minister at the time (Ariel Sharon) that responsibility could not be imputed to him for not ordering the removal of the Phalangists from the refugee camps when the first reports reached him that they had committed crimes in that camp. The Commission came to that conclusion based on the fact that, at the time when Minister Sharon received those reports, he had also heard from the Army Chief of Staff that the Phalangists' operation had been halted, that they had been ordered to leave the camp and that their departure would be taking place early the next morning. 'These preventive steps', the Commission held, 'might well have seemed sufficient to the Defence Minister at that time, and it was not his duty to order additional steps to be taken, or to have the departure time moved up, a step which was of doubtful feasibility.'⁶⁶⁵ In such a situation, and to the extent that there are no indications that the measures which have been adopted by subordinates or other agencies are inadequate or carried out in bad faith, the commander would be entitled to leave it to them to deal with this matter.⁶⁶⁶

10.2.4.4 What measures should be adopted?

As already noted, international law does not provide for a detailed list of mechanisms or modes of punishment or prevention of crimes which a superior would be bound to adopt lest he could be held criminally responsible. Nor does it explicitly exclude, *a priori*, any particular course of action from the arsenal of responses from which a

⁶⁶⁵ *Sabra and Shatilla* report.

⁶⁶⁶ See, e.g., *Hadzihasanovic* Trial Judgement, pars 1061-1062 (at par 1062, where the Trial Chamber noted that the existence of a criminal investigation into allegations of crimes (as conducted by others) demonstrates that the accused did not fail to take necessary and reasonable measures to punish the perpetrators).

commander could choose to respond to allegations of crimes.⁶⁶⁷ That question is left mostly to domestic law and considerable latitude is given to the superior in that respect.⁶⁶⁸ Referring to the *High Command* case, the United Nations War Crimes Commission noted that ‘just as a commanding general has wide responsibility under International Law, so also is he allowed considerable latitude in the ways in which he fulfils these responsibilities’.⁶⁶⁹

International law only requires of a superior that he should adopt measures that were ‘necessary and reasonable’⁶⁷⁰ in the circumstances and that he should act in good faith when doing so. This requirement implies that his response should be proportionate and adequate to the risk which these measures seek to prevent or proportionate and adequate to the crime which they are deemed to punish. In practice, the propriety and desirability of a particular course of action will vary a great deal from one situation to another:

It is well established these measures may ‘vary from case to case’. When determining whether the necessary and reasonable measures have been taken, the relevant factors to be considered include: whether specific orders prohibiting or stopping the criminal activities were issued, what measures to secure the implementation of these orders were taken, what other measures were taken to ensure that the unlawful acts interrupted and whether these measures were reasonably sufficient in the specific circumstances, and, after the commission of the crime, what steps were taken to secure an adequate investigation and to bring the perpetrators to justice.⁶⁷¹

A superior may not be held criminally responsible under international law for failing to adopt a particular measure or for failing to adopt a specific course of action, but only because he failed to adopt *any* measure or where the measures which he adopted could not reasonably be regarded as an adequate and proportionate response.⁶⁷² Also, a

⁶⁶⁷ See, in particular, ICRC, *Commentary on the Additional Protocols*, pars 3542-3543, 3547-3548, 3550, 3558-3563.

⁶⁶⁸ See, e.g., LRTWC, vol XII, 110.

⁶⁶⁹ *Ibid.*

⁶⁷⁰ See Rule 153 of ICRC, *Customary Study*, pp 562-563.

⁶⁷¹ *Halilovic Trial Judgement*, par 74, footnotes omitted.

⁶⁷² See, again, ICRC, *Customary Study*, pp 562-563.

commander is not to be held criminally responsible merely because he has failed to take each and every measure which could theoretically have helped prevent or punish the commission of a crime but only because his response was grossly inadequate to the risk sought to be prevented or to the crimes sought to be punished.⁶⁷³

Thus, if the commander has failed to take *any* step to prevent or punish crimes of which he had notice, he may, all other conditions being met, be held criminally responsible unless some imperative reasons prevented him from taking any such step. If, however, the commander has adopted certain measures but not all of those which might have been available to him at the time, the court will have to decide whether, in light of all relevant circumstances, his failure to adopt other measures – which he had a legal duty and material ability to adopt and which were also ‘reasonable and necessary’ – amount to gross and deliberate dereliction of duty on his part.⁶⁷⁴

The propriety of the measures would also have to be assessed in light of the nature and structure of the entity the members of which are alleged to have committed the underlying offences. In *Brima*, for instance, the Special Court for Sierra Leone noted that the Armed Forces of United Council (‘AFRC’) was not a traditional military organization and that its disciplinary system was not advanced in the sense of being properly codified and formally sanctioned by competent authorities.⁶⁷⁵ Nevertheless, the Trial Chamber in this case concluded that the primitive nature of the disciplinary system that was in place within the ranks of the AFRC could have been used by the accused to punish his subordinates as required under the doctrine of superior

⁶⁷³ Thus, although a diligent commander should attempt to adopt all those measures which are available to him in the circumstances to seek to prevent and punish crimes of subordinates, the mere failure to adopt one (or several) such measure(s), would not have the effect of triggering his criminal responsibility: the U.S. representative to the Security Council during the adoption of the ICTY Statute put it correctly and concisely when he said that command responsibility could only be entailed where he fails ‘to take reasonable steps to prevent or punish’ such crimes (Provisional Verbatim Record of the 3217th Meeting, 25 May 1993, S/PV.3217, p 16).

⁶⁷⁴ See below concerning the degree of fault required to engage his individual criminal responsibility as a commander.

⁶⁷⁵ *Brima* Trial Judgment, pars 1738-1739.

responsibility.⁶⁷⁶ Concerning more specifically the accused's duty to prevent crimes, the same Chamber noted that due to the rather un-elaborate nature of the structure that linked the accused to the perpetrators, the ability of the accused to prevent crimes might have been somewhat reduced when compared to highly disciplined troops in a regular army.⁶⁷⁷ The Chamber added, however, that the accused would be required in such a case to use those powers that he effectively could have used in relation to the troops under his control, including 'more brutal' or 'arbitrary' measures as might normally be encountered in more traditional structures.⁶⁷⁸

10.2.4.4.1 Preventive measures

Whether a superior has discharged his duty to prevent the commission of a crime which he knew might be committed will depend primarily on his material ability to act effectively upon such notice in the circumstances which ruled at the time.⁶⁷⁹ The court will, therefore, have to consider each situation individually to determine whether, in the circumstances, the superior could – and, the author says, was legally competent – to adopt those measures which the Prosecution claims he culpably failed to adopt.

The measures and steps relevant to establishing the criminal responsibility of a superior are only those which he failed to adopt after he had received sufficient information putting him on notice that a crime was about to be committed. In other words, a failure on his part to adopt general preventative measures to limit the risk of crimes prior to that time (such as training or instructions in the laws of war) could not

⁶⁷⁶ *Brima* Trial Judgment, par 1739.

⁶⁷⁷ *Brima* Trial Judgment, par 1740.

⁶⁷⁸ See, in particular, *Brima* Trial Judgment, pars 789, 1740-1741. The Trial Chamber in *Brima* noted, however, that a system of 'jungle justice' whereby rapes were prohibited during operations or during certain periods of time did not demonstrate the accused's efforts to prevent or punish crimes but, instead, was evidence of 'the tolerance and institutionalized nature of the commission of the crimes within the AFRC forces' (*Brima* Trial Judgment, par 1741); see also, *ibid*, par 1790, where the Trial Chamber notes that 'the limits placed by the Accused Brima on the permissible excesses of his troops [is] indicative of his ability to control their behaviour'.

⁶⁷⁹ *Limaj* Trial Judgement, par 528; *Strugar* Trial Judgement, par 374: 'What the duty to prevent will encompass will depend on the superior's material power to intervene in a specific situation.'

form on their own the basis of a criminal conviction based on the doctrine of superior responsibility.⁶⁸⁰ In the *Strugar* case, for instance, the Trial Chamber held that a failure on the part of a superior to clarify an order of attack by specifying that a protected area should not be targeted was not sufficient to give rise to superior responsibility although such an order might have contributed to avoiding the commission of a criminal offence.⁶⁸¹ In the *Halilovic* case, the Trial Chamber likewise appeared to reject the prosecution's suggestion that superior responsibility could be entailed regardless of the duty or obligation that has been breached.⁶⁸²

Military tribunals set up in the aftermath of World War II have identified the following measures as steps which a commander might be required to adopt with a view to prevent subordinates from committing crimes:⁶⁸³

[T]he superior's failure to secure reports that military actions have been carried out in accordance with international law,⁶⁸⁴ the failure to issue orders aiming at bringing the relevant practices into accord with the rules of war,⁶⁸⁵ the failure to protest against or to criticize

⁶⁸⁰ See, e.g., *Halilovic* Trial Judgement, pars 79 *et seq.*, and authority cited therein.

⁶⁸¹ *Strugar* Trial Judgement, par 420, cited with approval in *Halilovic* Trial Judgement, par 88 and footnote 201. The Trial Chamber in *Strugar* pointed out, however, that the failure of the commander to issue such an order by way of 'wise precaution' remained relevant to evaluate the overall factual matrix relevant to assessing his responsibility (*Strugar* Trial Judgement, par 420; and also *Halilovic* Trial Judgement, par 88).

⁶⁸² See *Halilovic* Trial Judgement, pars 79 *et seq.* See also the list of factors mentioned by the Trial Chamber in the *Mrksic* case (*Mrskic* Trial Judgment, par 567).

⁶⁸³ *Strugar* Trial Judgement, par 374, footnotes in the original. See also *Limaj* Trial Judgement, par 528.

⁶⁸⁴ *Hostage* case, 11 TWC 759, p 1290. The defendant Rendulic was held responsible for acts of his subordinates for reprisals against the population, in the light of, *inter alia*, the fact that he made no attempt to secure additional information (after receiving reports indicating that crimes have been committed). Similarly, in holding the defendant Dehner responsible, the military tribunal considered the fact that the defendant made no effort to require reports showing that hostages and reprisal prisoners were shot in accordance with international law (*ibid.*, pp 1298, 1271).

⁶⁸⁵ *Ibid.*, p 1311. With respect to the responsibility of the defendant Lanz for reprisal carried out by his subordinates the Military Tribunal held: 'This defendant, with full knowledge of what was going on, did absolutely nothing about it. Nowhere an order appear which has for its purpose the bringing of the hostage and reprisal practice within the rules of war [...] As commander of the XXII Corps it was his

criminal action,⁶⁸⁶ the failure to take disciplinary measures to prevent the commission of atrocities by the troops under their command,⁶⁸⁷ and the failure to insist before a superior authority that immediate action be taken.⁶⁸⁸

The steps required of a superior to prevent crimes must be capable in all cases to prevent a risk from materializing into the actual commission of a crime. As noted above, they must also have laid within the scope of his material ability or material possibility. The International Military Tribunal for the Far East noted in that regard that a superior's duty may not be discharged by the issuance of routine orders and that more active steps may be required:

The duty of an Army commander in such circumstances is not discharged by the mere issue of routine orders. [...] His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out.⁶⁸⁹

Also, the measures which the superior must be shown to have failed to adopt must have been directly intended to prevent the crime in relation to which the superior had

duty to act and when he failed to do so and permitted these inhumane and unlawful killings to continue, he is criminally responsible' (*ibid.*).

⁶⁸⁶ *High Command* case, 11 TWC 1, p 623. In finding the defendant Hans von Salmuth responsible, the military tribunal held *inter alia* that 'it appears that in none of the documents or the testimony herein that the defendant in anyway *protested against or criticized* the action of the SD or requested their removal or punishment' (emphasis added). Similarly, in the *Hostage* case the military tribunal found the defendant Wilhelm List responsible *inter alia* in the light of the fact that 'not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts' (*ibid.*, p 1272).

⁶⁸⁷ See *The Tokyo Judgement, The International Military Tribunal for the Far East*, Volume I, p 452. The International Military Tribunal for the Far East held with respect to the defendant Kimura that 'he took no disciplinary measures or other steps to prevent the commission of atrocities by the troops under his command.'

⁶⁸⁸ *Ibid.*, p 448. The Tokyo Tribunal found that the defendant Hirota 'was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented...'

⁶⁸⁹ *The Tokyo Judgement, The International Military Tribunal for the Far East*, Volume I, p 452, cited with approval in *Strugar* Trial Judgement, par 374.

received notice. A failure on his part to take ‘wise precaution’ is thus not conducive to command responsibility.⁶⁹⁰ Nor would a failure on his part to adopt measures which might have prevented, but which were not intended to prevent, the crimes which he knew were about to be committed.

10.2.4.4.2 Investigatory and disciplinary measures

The superior’s ‘duty to punish’ is somewhat of a misnomer. First, this duty, and the liability that may ensue from its breach, is not limited to a duty to ‘punish’ the perpetrators. It also includes a duty to investigate allegations of crimes with a view to identify the culprits and, eventually, to have those punished for their crimes. Secondly, a superior might not in fact have any power to punish the perpetrators himself. In such a situation, he could fulfil his duty, not by imposing any sanctions or punishment upon the perpetrators, but by reporting their crimes to the relevant authorities or by requesting that appropriate sanctions be imposed upon them: ‘a commander may discharge his obligation to prevent or punish an offence by reporting the matter to the competent authorities’.⁶⁹¹ Other steps in the disciplinary or penal process might thereafter be the responsibility of other people or agencies.

However, a superior could not be said to have failed to take necessary and reasonable measures because he failed to report crimes to his own superiors if he knew that those superiors were themselves involved in the commission of such crimes.⁶⁹² An accused

⁶⁹⁰ See *Strugar* Trial Judgement, par 420.

⁶⁹¹ See ICRC, *Customary Study*, Vol I : Rules, p 563, citing with approval the finding of the *Blaskic* Trial Chamber on that point (*Blaskic* Trial Judgement, pars 302, 709 and 757). The same position was adopted by the Appeals Chamber of the ICTY (*Blaskic* Appeal Judgement, par 72). The Report on the Practice of Bosnia and Herzegovina, although dated 2000, relevantly provides that, under Bosnian law and practice: ‘the superior officer is obliged to instigate proceedings for taking legal sanctions against the persons violating the rules of the international laws of war.’ Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.6, referred to in ICRC, *Customary Study*, Vol II: Practice, Part 2, par 667, p 3761. See also *Kvočka* Trial Judgement, par 316.

⁶⁹² See *Ntagerura et al* Appeal Judgement, par 345. The prosecution would thus have to establish that there were indeed authorities to which the accused could have reported at the time, and that those had not themselves been involved in the commission or otherwise of the crime (*ibid.*).

should indeed not be blamed for failing to take a step which was evidently of no value or would have been incapable in the circumstances of preventing or punishing those crimes.

International law does not require a superior to set up special procedures to investigate allegations of crimes. If a procedure is in place at the time to deal with those crimes, or if the accused's own superior has set up such a mechanism, a superior need not take additional positive steps to investigate that matter:

[A] commander may be relieved of the duty to investigate or to punish wrongdoers if a higher military or civilian authority establishes a mechanism to identify and punish the wrongdoers. In such a situation, the commander must simply do nothing to impede nor frustrate the investigation.⁶⁹³

According to one ICTY trial chamber, the superior's duty to punish the perpetrators of a crime includes 'at least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities.'⁶⁹⁴ In its Customary Law Study, the ICRC cites with approval the finding of the *Kvocka* Trial Chamber that the superior does not necessarily have to dispense the punishment himself but 'must take an important step in the disciplinary process'.⁶⁹⁵

Further guidance as to what the duty to punish may entail in practice is provided by Additional Protocol I.⁶⁹⁶ Article 87(3) of AP I requires a commander who is aware that his subordinates have committed a breach of the Geneva Conventions or the Protocol

⁶⁹³ U.S., Federal Court of Florida, *Ford v Garcia*, Judgement, 3 Nov 2000, 289 F.3d 1283, 52 Fed R Serv 3d, referring to Jury Instructions at 6-7, 9-10; the case is also referred to in the ICRC's *Customary Study*, Vol II: Practice, Part 2, par 661, p 3758 and in the *American Journal of International Law*, April 2001, Vol 95(2), 394, 395.

⁶⁹⁴ *Strugar* Trial Judgement, par 376. See also *Kordic* Trial Judgement, par 446; *Limaj* Trial Judgement, par 529; *Mrskic* Trial Judgment, par 567, referring to an obligation on the part of the superior to conduct 'an effective investigation with a view to establishing the facts'.

⁶⁹⁵ *Kvocka* Trial Judgement, par 714, cited in ICRC, *Customary Study*, Vol I: Rules, p 563. See also *Hadzihasanovic* Trial Judgement, par 1240; see also, *ibid.*, pars 1960 and 1993 (concerning the adoption of contradictory positions in relation to the sanctioning of crimes by subordinates). See also *Halilovic* Trial Judgement, par 98; *Limaj* Trial Judgement, par 529.

⁶⁹⁶ *Strugar* Trial Judgement, par 377.

‘where appropriate to initiate disciplinary or penal action’ against them. The ICRC commentary to that provision suggests that this action may include informing their superior officers of the situation, ‘drawing up a report in the case of a breach, [...] proposing a sanction to a superior as disciplinary power, or – in the case of someone who holds such power himself – exercising it, within the limits of his competence, and finally, remitting the case to the judicial authority where necessary with such factual evidence which is possible to find’.⁶⁹⁷ Relevant in this respect could also be whether the superior has called for a report on the incident and the thoroughness of the investigation.⁶⁹⁸

The way in which culprits will be prosecuted or sanctioned for their actions is mostly left to domestic law and international law does not limit the range of disciplinary or criminal sanctions available to superiors. In the *High Command* case, for instance, the Tribunal noted the following:

[T]he duty imposed upon a military commander is the protection of the civilian population. Whether this protection be assured by the prosecution of soldiers charged with offences against the civilian population, or whether it be assured by disciplinary measures or otherwise, is immaterial from an international standpoint.⁶⁹⁹

As with steps taken by a superior to prevent crimes, the measures adopted by a superior to punish perpetrators or investigate a criminal incident must be ‘effective’ in

⁶⁹⁷ ICRC, *Commentary on Additional Protocol I*, par 3562, p 1023.

⁶⁹⁸ The International Military Tribunal for the Far East found the defendant Tojo responsible for not taking adequate steps ‘to punish the offenders and to prevent the commission of similar offences in the future. [...] He did not call for a report on the incident. [...] He made perfunctory inquiries about the march but took no action. No one was punished.’ See *The Tokyo Judgement, The International Military Tribunal for the Far East*, Volume I, p 462. See also *Strugar Trial Judgement*, par 376, citing this holding with approval. The mere failure to call for such report would not be enough, without more, to attract the superior’s individual criminal responsibility.

⁶⁹⁹ See, e.g., LRTWC, vol XII, 110. See also ICRC, *Commentary on the Additional Protocols*, pars 3542 and 3562.

the sense of being capable of contributing to that end.⁷⁰⁰ Although he may be unsuccessful, the superior is required to make a genuine attempt to fulfil his duties. The Military Commission which tried General Yamashita noted that ‘where murder and rape and vicious, revengeful actions are widespread offences and there is no effective *attempt* by a commander to discover and control the criminal acts, such commander may be held responsible, even criminally liable, for the lawless acts of his troops’.⁷⁰¹

A commander who knowingly starts or takes part in a sham investigation could under no circumstances be said to have complied with his duty to punish.⁷⁰² Nor would the duties of a commander be discharged by the mere issuance of routine orders, if those orders were clearly incapable of having the effect which they purported to have and where the commander is aware of the fact that those orders are being disregarded or where he is grossly negligent in ignoring that fact.⁷⁰³

10.2.4.4.3 Use of force

Evidence that a superior could not control troops which were formally under his authority short of using force against them would provide strong, though not necessarily conclusive, evidence of his absence of effective control over those troops. Where the court is satisfied, however, that such a superior maintained effective control over those troops despite the fact that he had to use force against them, the question

⁷⁰⁰ See, e.g., *Strugar* Trial Judgement, pars 376 and 378 and authorities cited therein, concerning the need for an ‘effective investigation’ and ‘adequate investigation’. See also *Kvočka* Trial Judgement, par 714; *Limaj* Trial Judgement, par 529; and ICRC, *Customary Study*, pp 562-563.

⁷⁰¹ Trial of General Tomoyuki Yamashita, The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Volume IV, p 35. See also *The Tokyo Judgement, The International Military Tribunal for the Far East*, Volume I, p 458. The Tokyo Tribunal found that the defendant Shigemitsu ‘took *no adequate steps* to have the matter investigated. [...] He should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged.’ See, again, *The Tokyo Judgement, The International Military Tribunal for the Far East*, Volume I, p 458

⁷⁰² See, e.g., *Strugar* Trial Judgement, pars 435-436, 439.

⁷⁰³ Tokyo Judgement, re-printed in B. Röling (ed.), *The Tokyo Judgement, The International Military Tribunal for the Far East* (IMFTE), Vol 1, p 452, finding regarding the accused Heirato Kimuar.

may arise as to how far he was required to go in attempting to prevent or punish crimes of subordinates and whether he could ever be held criminally responsible where he failed to use force against them to achieve either of these goals.

One ICTY trial chamber expressed the view that where a superior has the material ability to use force to prevent or punish crimes, he has the duty to use it.⁷⁰⁴ The facts of the case were as follows. A number of Bosnian-Croat soldiers had been taken prisoner by Mujahideen forces which were, formally, under the command of General Hadzihasanovic although they enjoyed a great deal of independence *vis-à-vis* their chain of command. Upon learning of the detention of these prisoners at the hands of these forces, General Hadzihasanovic ordered his troops to release them and, when they ignored his orders, he threatened to use force to ensure the prisoners' release. Instead of releasing them, however, the Mujahideens executed six of the prisoners. As a result, General Hadzihasanovic was charged with failing to prevent the murders of those prisoners. The Prosecution argued that it was 'necessary and reasonable' in the circumstances for General Hadzihasanovic to use force against his men to prevent them from killing any of the Bosnian-Croat prisoners.

In its Judgement, the *Hadzihasanovic* Trial Chamber said that the mere threat to use force did not satisfy the requirement of 'necessary and reasonable measures' where that threat is not accompanied by a genuine willingness to use force should orders continue to be ignored.⁷⁰⁵ The Trial Chamber said that General Hadzihasanovic had taken the conscious decision not to use force against his troops when trying to negotiate a peaceful resolution to the matter and that he had thereby demonstrated his unwillingness to take all appropriate measures to prevent these crimes. The Trial Chamber concluded that he had therefore failed in his duties and could be regarded as criminally responsible for this failure.

The position of the Trial Chamber appears to suffer from a number of serious flaws, not least the complete absence of authority or explanation to support its position that international law might require a commander to use force against his own troops to

⁷⁰⁴ *Hadzihasanovic* Trial Judgement, par 1406. See also, *ibid.*, pars 1457-1461.

⁷⁰⁵ *Ibid.*, pars 1438 *et seq.*, in particular 1446-1448.

prevent or stop crimes of subordinates lest he might engage his criminal responsibility. In the absence of any authority or precedent that would provide express support for its position, the Chamber must have considered that this requirement could be regarded as being subsumed into the general requirement that a commander should adopt 'reasonable and necessary measures' to prevent and punish crimes by subordinates. Considering the fact that the requirement of 'necessary and reasonable measures' does not, *a priori*, exclude any particular category or type of measures from the arsenal of the commander, this position does not appear to be an unreasonable one.

Contrary to the Chamber's suggestion, however, the matter to be determined in this instance was not concerned with the 'willingness' of a commander to act upon his word or threat (to use force), although evidence of unwillingness on his part could have been relevant to establishing his acquiescence with the crimes (a matter not discussed by the Trial Chamber). Instead, the true issue was about the material 'ability' of that commander to achieve the desired result through the use of force, the likelihood of his being able to effect a desired end in the form of the prevention of a crime and the legality and proportionality of such a course.

Starting with the issue of 'legality', where a commander has been charged with a failure to use force to prevent or punish crimes, he must be shown to have been empowered by domestic law to use force against his men or to so request. If the law forbids him to do so, or if the law only authorizes others to use force in such manner (e.g., the military police), he may not, in principle, be faulted for failing to use it himself. In this instance, the Trial Chamber does not appear to have considered whether General Hadzihasanovic was legally competent to use force against his own troops.

Secondly, as the *Hadzihasanovic* Chamber itself recognized, to be charged with a failure to use force, the accused must have had the actual capacity to use force effectively against his subordinates.⁷⁰⁶ However, the Trial Chamber in this case refrained from making a finding as to whether the use of force in the circumstances relevant to this case might in fact have saved the victims' lives. Instead, it stated,

⁷⁰⁶ *Hadzihasanovic* Trial Judgement, pars 1466-1472.

incorrectly and contrary to its own earlier finding,⁷⁰⁷ that the existence of a nexus between Hadzihasanovic's failure to act and the commission of crimes was 'implicit' and was, therefore, to be 'presumed'.⁷⁰⁸ No such presumption exists under international law.⁷⁰⁹ Therefore, instead of being proved on the evidence, it was merely assumed that recourse to force on the part of Hadzihasanovic could have contributed to the prevention of those crimes. It was also assumed, but was not proved, that such recourse to force formed part of his 'material ability' to prevent those crimes.⁷¹⁰

Furthermore, recourse to force could only be required of a commander where such step is both feasible and proportionate in the circumstances, a matter which the Chamber again failed to consider.⁷¹¹ In particular, a commander would be entitled to weigh into his considerations the likely consequences for him, his troops and any relevant third parties of his decision to use force against his men. In this instance, the Chamber would have had to consider whether, for instance, it would have been militarily possible for Hadzihasanovic to open a 'third front' against his own men whilst at the

⁷⁰⁷ See *ibid.*, par 192, where the Trial Chamber held that superior responsibility may only arise where there is proof of 'a pertinent and significant link' ('un lien pertinent et significatif', in the French original) between the underlying offence and the omission attributed to the superior. The Trial Chamber pointed out also that a superior may be held responsible, all other conditions being met, because his omission has created or increased a real and reasonably foreseeable risk that crimes would be committed, that he has accepted that risk and that a crime was indeed committed (*ibid.*, par 193).

⁷⁰⁸ *Ibid.*, par 1465.

⁷⁰⁹ At Tokyo, Judge Bernard of France expressly referred to the un-availability of such a presumption (B. Röling and C. Rüter, *The Tokyo Judgement*, Vol II, University Press Amsterdam, 1977, Dissenting Judgement of the Member from France, p 482, 492-493).

⁷¹⁰ This artificial presumption also allowed the court to assume, again without establishing it, that recourse to force, in the circumstances, would have been 'proportionate' to the desired end. A particular course of action could only ever be 'proportionate' if it is at least potentially capable of achieving the desired end. No such determination was made by the chamber.

⁷¹¹ Such an evaluation must be made in light of the means available to the superior, the likely consequences – in terms of likely casualties on both sides, impact on moral, risk to civilians or those sought to be protected – of the use of force, the proportionality thereof (Does the end justifies the means? Are there any alternatives to the use of force reasonably capable of achieving the same end? Can recourse to force be delayed until that time when a more peaceful solution may be found to the conflict?), and the possibility or likelihood that recourse to force could contribute to the end sought.

same time fighting two other – Serb and Croat – military forces.⁷¹² Unless the urgency of the situation required a commander immediately to use force against his men, he would generally be permitted to seek to resolve the dispute by using less extreme measures. The fact that such steps proved unsuccessful and that crimes were committed by his subordinates does not mean that he should be held responsible unless the course which he took in the circumstances demonstrates a wanton, immoral disregard for the actions of his subordinates.⁷¹³

In sum, to the extent that international law could warrant that a superior is required, in some circumstances, to use force against his subordinates to prevent them from committing crimes or to punish them for such crimes, the court would have to be satisfied that such a course was (i) legal, (ii) within the sphere of competence of the accused, (iii) feasible, (iv) capable of preventing (or punishing) the commission of the crime, and (v) proportionate, in the sense of being capable of achieving its end without the negative consequences of doing so outweighing the desired ends and that no alternative course short of using force could reasonably have been regarded by the commander as a legitimate and appropriate path to seek to prevent or punish crimes.

10.2.4.4.4 Resignation

Some case law dating back to the Second World War suggests that there may be situations where a superior might be required to resign his position to avoid being held responsible, where all other measures have proved insufficient or inadequate to prevent or punish crimes of subordinates.⁷¹⁴

⁷¹² See *Hadzihasanovic* Trial Judgement, pars 555, 1446, 1471 and 1472.

⁷¹³ *High Command* case.

⁷¹⁴ See, e.g., *Tokyo* Judgement, re-printed in B. Röling (ed), *The Tokyo Judgement, The International Military Tribunal for the Far East (IMFTE)*, Vol 1, p 30: ‘A member of a Cabinet which collectively, as one of the principal organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent

It is difficult to identify a valid rationale that would support their requirement. Such an approach would in fact seem to be dangerously counter-productive as the resignation of one superior could facilitate or invite the commission of additional crimes by creating a power-vacuum and could serve as a way for superiors to shun their responsibilities in regard to crimes committed by their troops. It has been noted in the literature that a 'duty to resign' would be impracticable in combat operations and 'might also encourage officers to "walk away" from on-going subordinate crimes or policies.'⁷¹⁵

Furthermore, if indeed the view of the majority of the *Hadzihasanovic* Appeals Chamber is correct regarding the need for a perfect temporal overlap between the time of the commission of the offence and the position of authority of the accused, a requirement of resignation as a last resort might mean that no one would be required to punish crimes after the superior has resigned from his position, and no one could be held criminally responsible if and where crimes remain un-punished: the commander who was in place at the time of the crimes could not be held responsible since he resigned and thus shed any responsibility in regard to investigation and punishment; nor could the commander who is assigned to replace him since he was not the commander of the perpetrators at the time when the crimes were committed.

Therefore, it seems fair to conclude that a failure to resign a position of authority could not, in principle, be regarded as a measure that would be 'necessary and reasonable' and which may engage a superior's criminal responsibility where he fails to resign his position upon learning of the commission of crimes by his subordinates.

10.2.4.4.5 Concluding remarks

In every situation where he learns of the commission or intended commission of a crime by subordinates, a superior must act honourably, effectively and in good faith

future ill-treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill-treatment in the future.' See also the finding of the Tribunal in relation to the accused Mamuro Shigemitsu, *ibid.*, pp 457-458.

⁷¹⁵ See 'Note. Command Responsibility for War Crimes', 82 *Yale Law Journal* (1973) 1274, 1297.

with a view to prevent or punish those crimes. He would be required to act in such a way that makes it possible though rarely certain for the process set in motion, by him or by someone else, to prevent and punish the crimes of his subordinates. In other words, the response of the commander must be ‘adequate’ in the circumstances, although it might be unsuccessful in preventing the crimes or in punishing those responsible for those crimes by no fault of the superior.⁷¹⁶

10.3 Seriousness of the breach of duty relevant to superior responsibility

10.3.1 Criteria relevant to assess the gravity of the breach

As noted by Nuremberg Chief Prosecutor Justice Robert H. Jackson, international law is only interested in punishing that class of offenders ‘that affects the peace of the world’.⁷¹⁷ To have criminal consequences under international law, a superior’s breach of duty will, therefore, have to be particularly serious. A minor failure will be insufficient. The dereliction of duty would have to be such as to amount to a ‘gross’ violation of a superior’s duties.⁷¹⁸ Short of that threshold, a breach of duty would fall outside the scope of the doctrine of superior responsibility.

The seriousness of the superior’s failure will be measured against two factors:

- (i) the gravity of his failure to act (i.e., the extent to which his conduct departs from the standard of behaviour that was required of him); and
- (ii) the gravity of the consequences of his failure.⁷¹⁹

⁷¹⁶ *Strugar* Trial Judgement, par 378: after the commission of the crime, the court must consider ‘what steps were taken to secure an adequate investigation and to bring the perpetrators to justice’.

⁷¹⁷ Cited in A. Tusa and J. Tusa, *The Nuremberg Trial* (New York: Atheneum, 1983), p 428.

⁷¹⁸ See, e.g., *Bagilishema* Appeal Judgement, par 36.

⁷¹⁹ *Ibid.*. See also *Halilovic* Trial Judgement, par 54. Under international law, the nature of the crime committed by subordinates is therefore relevant to assessing whether the doctrine could apply. The same is true at the national level. For instance, U.S. case law suggests that the doctrine of command responsibility could only apply where a norm of *jus cogens* has been breached by the accused’s

10.3.2 Gross violation of duty

To be relevant to the doctrine of superior responsibility, a breach of duty must be shown to have been ‘gross’ lest the disciplinary, not the criminal, responsibility of a superior might be engaged.⁷²⁰ Minor violations of his duties or more serious violations which do not rise to the level of a ‘gross’ failure on his part would not engage his individual criminal responsibility. That would be so even where the underlying offences that form the basis of the charges are serious. Thus, in the *Toyoda* case, the court recognised that General Toyoda’s failure to take certain ‘objective steps to correct the Ofuna sins’, a prison camp under his command at which prisoners were being mistreated, indicated ‘a measure of moral guilt’ on his part, but was not sufficient to entail his criminal responsibility as commander.⁷²¹ Incidentally, the court considered it to be relevant to any inference drawn about the responsibility of the accused to consider his record in discharging his duties as commander prior to the time relevant to the charges:

Then, in light of the magnitude of the task with which he was faced, we examine his opportunities for seeking objectively the information he needed in order to assure the proper conduct under law and regulation, and the discipline of those under his command to the lowest echelon. We find that the Ofuna Camp was insignificant in size and number, and in purpose far removed from any position of contribution to the mission of the command. It was incidental to his responsibility, and served him no purpose. It was under his command only as a geographical happenstance. But by the fact of its existence within his command, he was charged with its efficient and proper management as a housekeeping function. The Tribunal recognises this responsibility, but the Tribunal, in assessing guilt, must take into full account his legal means of discharging that responsibility, through all its ramifications and concurrent difficulties. It has been shown that in this phase, as throughout his career, the defendant, when he had authority and the knowledge, discharged his duty. His measure of guilt therefore becomes his measure of ability, considering all factors, to discharge his responsibility. The Tribunal

subordinates (see, e.g., *Paul v Avril*, 901 F.Supp.330, 335; *Siderman de Blake v Republic of Argentina*, 965 F.2d 699, 714-717 (9th Cir. 1992).

⁷²⁰ *Bagilishema* Appeal Judgement, par 36. Other, less serious, violations of his duties could entail his disciplinary, as opposed to his criminal, responsibility (*ibid.*).

⁷²¹ *Toyoda*, p 5019.

therefore recognises a measure of moral guilt in his failure to take objective steps to correct the Ofuna sins. But in the view of the Tribunal, it is a small and remote guilt indeed; and the Tribunal, in justice,⁷²² does not find the Specification proved beyond reasonable doubt.

In relation to allegations of a failure to prevent crimes, this requirement has been interpreted as meaning that ‘the superior failed to take *any* meaningful steps to prevent the commission of the subordinate crime’.⁷²³ It could well be the case, however, that where the likelihood of a crime was such and the criminal conduct that was about to occur was so serious that a commander could be held criminally responsible even when he has taken some steps to prevent those crimes but where his response was grossly inadequate or completely incapable of preventing the likely harm.

In relation to his duty to punish crimes, the failure of the superior should be such that the measures which he adopted were in fact incapable of contributing to the investigation or punishment of those who committed the crimes or where those measures were so inadequate as to render the superior’s obligation – to punish crimes – meaningless.

As for the gravity of the consequences of his failure, the other factor relevant to assessing the gravity of his conduct, the court would have to look into the actual underlying crime that was committed by the superior’s subordinates. A failure to prevent murders is, all things being equal, more serious than a failure to prevent acts of plunder.⁷²⁴ Also relevant to this assessment is the number of criminal incidents which the superior failed to prevent or punish, as well as the number of victims concerned by such failure. The dereliction attributable to a superior would be more serious in principle and, all things being equal, where he failed to prevent or punish many crimes rather than few and where such crimes were committed over a long period of time rather than over a short time span.

⁷²² *Ibid.*

⁷²³ *Kordic Trial Judgement*, par 444 (emphasis in the original).

⁷²⁴ See *Celebici Appeal Judgement*, par 732.

10.3.3 Disciplinary vs. penal sanctions

One of the reasons for the high threshold which international law sets for superior responsibility is the fact that international law offers only a very limited, and rather blunt, set of alternative responses to a failure by a superior to comply with his duties: acquittal or criminal conviction in relation to very serious criminal offences.

Unlike what is the case in many national systems, international law does not provide for disciplinary, administrative or even political sanctions against errant commanders and political leaders, but only for criminal conviction. When it comes to sanctions, international law thus provides a one-size-fits-all response to violations of duties: where the requirements of superior responsibility have been met, the accused is then convicted in relation to the underlying offence committed by his subordinates and is to be sentenced in relation to that offence.⁷²⁵

The line that separates those violations of a superior's duties which might attract his criminal responsibility and those which might have disciplinary consequences is, therefore, a very significant one. But it is a line that can only be drawn in the abstract with great difficulty.⁷²⁶ The court will, therefore, have to determine in light of the facts relevant to each case whether the dereliction attributable to the accused was such as to attract his criminal responsibility or whether his actions fell short of that threshold. Ultimately, the court will have to determine whether, in light of all the evidence and in

⁷²⁵ Nothing, it would seem, would preclude international judges from ordering a suspended sentence of imprisonment where the breach of a commander's duty is such that it does not warrant a prison sentence. No such precedent appears to exist however. It should also be noted that some of the sentences handed in relation to a finding of guilt pursuant to the doctrine of command responsibility have been rather lenient. Thus, Mr Hadzihasanovic was convicted pursuant to Article 7(3) of the ICTY Statute ('superior responsibility') and sentenced to five-year imprisonment. Mr Kubura was also convicted pursuant to Article 7(3) of the Statute and handed a two and one-half-year sentence (see *Hadzihasanovic* Trial Judgment, pp 620-628).

⁷²⁶ See *Bagilishema* Appeal Judgement, par 36. At a lower threshold of negligence, disciplinary measures (but not penal ones) could be envisaged under domestic law (*ibid.*). Under French law, for instance, the declared purpose of military disciplinary law is to punish negligence or failures of duties (Article 30(1) of the RGDA – 'le manquement au devoir ou la négligence entraînent des punitions disciplinaires'). The same is true of the German military code.

light of all relevant circumstances, the effort made by the accused to prevent or punish crimes by subordinates was so inadequate as to be akin to acquiescence or approval of the crimes of his subordinates.⁷²⁷

Thus, where the conduct of a commander falls short of perfection, or even where it falls short of the required professional standards, but it does not demonstrate a degree of disregard for his responsibilities amounting to gross negligence and acquiescence with the crimes, the accused would have to be acquitted, even where it is found that he could have done more to prevent or punish the crimes of his subordinates.⁷²⁸

10.4 Requirement of causality between the failure of the superior and the crimes

As noted above, superior responsibility finally depends on the establishment of a relationship of causality between the failure of the superior and the underlying crimes.⁷²⁹ Where the accused is charged with a failure to prevent crimes of subordinates, it would have to be established that his failure was a significant – though not necessarily the sole – contributing factor in the commission of the crime. Where a superior has been charged with a failure to punish crimes, it would have to be established that his failure was a significant contributing factor in the failure of the competent authorities to investigate the crimes, identify and punish the perpetrator.

⁷²⁷ See ICRC, *Commentary on the Additional Protocols*, p 1010, par 3547. In its 1994 Final Report, the UN Commission of Experts Established Pursuant to Security Council 780 [1992] noted that in similar fashion that liability as a commander would only be incurred in case of ‘such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences’ of his acts or conduct. See UN Commission of Experts Established Pursuant to Security Council 780 [1992], Final Report, UN doc S/1994/674, 27 May 1994, par 58. See also *Halilovic Trial Judgement*, par 95; *Musema Judgment*, par 131.

⁷²⁸ In the *Toyoda* case, for instance, it was considered that a superior could only have been held responsible where he failed ‘to take any action to punish the perpetrators’, whilst Toyoda’s conduct had merely been found to be imperfect and wanting in some respects. General Toyoda was, therefore, acquitted (*Toyoda*, p 5006).

⁷²⁹ See above, 3.5.4.

10.5 Concluding remarks

Under international law, where the commander has adopted some, but not all of the measures which (i) he was legally competent to adopt and that (ii) he had the material ability to adopt in the circumstances, a conviction could be entered only where it has been established, all other conditions being met, that:

- (i) The superior deliberately failed to perform his duties or he must have culpably or wilfully disregarded them, in full awareness of the criminal character of his actions and the likely consequences thereof; and that
- (ii) His failure amounted to a gross violation of his obligations under international law which is tantamount to toleration of the crimes or acquiescence therewith; and that
- (iii) His failure is causally linked to the commission of a crime ('failure to prevent') or to the perpetrators remaining un-punished ('failure to punish').

IV CONCLUSION

As noted at the outset, the doctrine of command responsibility can only be effective in preventing and sanctioning crimes if it provides a sufficiently clear and detailed standard of conduct for military commanders and other superiors. The foregoing discussion suggests that the doctrine has now reached a degree of clarity and specificity which would allow military commanders and other superiors to act in compliance with their obligations under international law if they wish to do so. Though there remain a number of uncertainties in respect of particular aspects of that doctrine, they are not such that they would render its application unfair or make it impracticable for commanders to adapt their conduct to that standard.

International law recognizes command or superior responsibility as a *sui generis* form of liability for omission that now forms part of customary international law. Liability pursuant to that doctrine is based on a grave and personal dereliction of duty on the part of a superior. The omission relevant to this form of liability consists of a gross, culpable and intentional failure on the part of an individual in a position of sufficient

authority to comply with his legal duties to prevent and punish crimes of his subordinates, as provided under international law and as might be specified by that superior's domestic law. There remain certain issues, however, as regard the relationship that must exist between that culpable omission or dereliction of duty and the underlying offence in relation to which the superior could be held responsible.

The dilution in the jurisprudence of the United Nations war crimes tribunals of the linkage between the culpable conduct of the superior and the offence for which that superior may be convicted has had the effect of expanding the range of conduct which could theoretically come within the scope of the doctrine of superior responsibility. This expansion is most evident in the rejection by the United Nations war crimes tribunals of a requirement of causality between the dereliction of duty that is attributable to the superior and the crime for which he may be convicted. As a result, the doctrine has been made to apply to certain types of dereliction of duty that are often far removed from the underlying offence with which a superior is charged. In some cases, the prosecuting authorities have tried to build their case on certain categories of derelictions of duty that simply had no or little relationship, causal or otherwise, with the crimes that formed the basis of the charges. One of the consequences of that state of affair has been a lowering of sentencing patterns in superior responsibility cases. In the absence of a clear linkage between the culpable conduct of the accused and the underlying offence for which he is convicted, courts and tribunals have found it hard at times to regard such conduct as justifying a heavy sentence even where the superior's dereliction might have been a grave one. In the *Oric* case, for instance, the accused was found guilty of failing to discharge his duty as a superior to take necessary and reasonable measures to prevent acts of murder and cruel treatment that were committed over a period of three months. He was handed a sentence of two-year imprisonment.⁷³⁰ The Trial Chamber in this case appears to have taken the view that although the conduct of Naser Oric was such that it met all the requirements of the doctrine of superior responsibility, the connection between his culpable failure and the crimes of his subordinates was so remote that it justified no more than the lowly sentence that was imposed upon him. This explains, as well as

⁷³⁰ See, generally, *Oric* Trial Judgment, Disposition.

justifies, the need to maintain the basic requirement of criminal law that there must exist a sufficient causal linkage between the culpable conduct of the superior and the underlying crime in relation to which he could be convicted. The nature and the extent of that causal relationship will in turn vary, as regard the doctrine of superior responsibility, depending on the nature of his alleged dereliction of duty. Where the superior has been charged with a failure to prevent crimes, it would have to be established that his failure to act with the necessary diligence was a significant – though not necessarily the sole – contributing factor in the commission of the crime. Where a superior has been charged with a failure to punish crimes, it would have to be established that his conduct was a significant contributing factor in the failure to engage the competent authorities to investigate the crimes, identify and punish the perpetrators.

Although the doctrine of superior responsibility has borrowed elements from other forms of criminal liability, there are now clear lines of demarcation between command responsibility and other types of criminal responsibility, in particular the various kinds of accomplice liability known to domestic and international law. As pointed out, individual criminal responsibility pursuant to that doctrine is incurred, not as a result of any direct or personal involvement in the commission of a crime, but for a failure on the part of a superior to take necessary and reasonable measures to prevent or punish such a crime. The superior need not, therefore, participate in the *actus reus* of the underlying offence, nor does he need to share the *mens rea* of the perpetrator. And although it need not be established that the superior in fact materially assisted the principal of the offence, his conduct – in the form of a failure to act – is related, in several ways, to the underlying offence for which he may be convicted. First, the superior must be shown to have been in effective control of the perpetrators at the time of the crime. The superior must further be shown to have known that his subordinates had committed or were about to commit the crime with which he has been charged. Command responsibility is not incurred in the absence of such knowledge and international law does not impose upon commanders a ‘duty to know’. Knowledge of a crime is not sufficient, however, to attract superior responsibility. It must be shown, furthermore, that through his acts or otherwise, the superior acquiesced with the crime of his subordinates.

Whilst drawing many of its features from the principle of responsible command, the doctrine of superior responsibility has developed its own substrate of requirements which a commander must satisfy if he is to escape the reach of that form of liability. Although the determination as to whether a particular conduct falls within the reach of that doctrine remains, to a large extent, case-specific and, to a more limited extent, somewhat uncertain, the multiplication of cases and the increase in relevant judicial practice has now brought some necessary clarity as to the sort of failures which the law of command responsibility is trying to capture. Command responsibility, it must be said, is a form of liability for fault. The fault that is relevant to this doctrine, and which is thus capable of attracting penal consequences for a superior, is necessarily a grave and culpable one. As noted above, the dereliction of the superior must be gross, deliberate and personal. It must further be shown to have been causally linked to the crimes of the subordinates or, in the case of a failure to punish, to the resulting impunity of the perpetrators.

The doctrine has been shown to apply in principle to any individual who is able to exercise ‘effective control’ over someone else, that is, someone who has the material ability to punish or prevent the commission of a crime by another person. In addition, the law of command responsibility adds a requirement that the superior must have had the ability to punish or prevent a crime as a result not of any sort of powers or authority, but of a hierarchical relationship which linked him to the perpetrators.⁷³¹ In other words, the fact, for instance, that a policeman may have the material ability to contribute to the prevention or punishment of a crime does not render the doctrine of superior responsibility applicable to him on that basis alone.⁷³² As a matter of principle, the doctrine of command responsibility could apply to a civilian or to a military superior or to any other category of superiors who wield sufficient authority over others (‘effective control’), whether they hold their authority from the law itself (‘*de jure* superiors’) or from other factors that give them the required degree of authority (‘*de facto* superiors’). In particular, in the context of armed conflict or in a situation of armed violence falling short of an armed conflict, the doctrine is likely to

⁷³¹ See, e.g., *Halilovic* Appeal Judgment, pars 59 and 210-213.

⁷³² *Halilovic* Appeal Judgment, par 59.

apply and to evolve together with the structure of the parties which are involved in such violent incidents. International law has already recognized that the doctrine could apply, for instance, to paramilitary leaders. There is good reason to believe that the doctrine would also be applicable to the leaders of terrorist organizations.

As already noted, the doctrine of superior responsibility could apply in the context of an armed conflict, whether internal or international, and perhaps also in the absence of such a conflict.⁷³³ The fact that the doctrine might apply in all these circumstances and to those various categories of superiors does not mean, as noted above, that it will apply in the same way in all contexts. But the general elements that make up the doctrine of superior responsibility remain the same regardless of the context relevant to the charges.

Under international law, a superior may, therefore, be held criminally responsible pursuant to the doctrine of superior responsibility where the following conditions are met:

- (i) A relationship of superior-subordinate existed between him and the perpetrators of the underlying offence. This requirement will be met if the following matters are established:
 - (a) A *de jure* or *de facto* relationship of subordination between the accused and the perpetrators;
 - (b) The power of the accused to exercise 'effective control' over the perpetrators in the sense of a material ability to prevent offences or to punish the principal offenders;
 - (c) The superior-subordinate relationship between the accused and the principal perpetrators existed at the time when the crimes were committed;

⁷³³ Concerning the applicability of that doctrine to 'internal' armed conflicts, see, *inter alia*, *Fofana* Trial Judgment, par 233.

- (d) A chain of command, albeit an informal one, linking the accused and the perpetrators vertically.
- (ii) A culpable state of mind, which consists of the following elements:
- (a) The accused
 - ‘Knew’ that his subordinates had committed or were about to commit a criminal offence, *or*
 - ‘Had reasons to know’, in the sense that he had in his possession information which would at least put him on notice of the risk of such an offence, such information alerting him to the need for additional investigation to determine whether such crimes were or were about to be committed by his subordinates;

or, in the case of military(-like) commanders appearing before the ICC,

 - ‘Should have known’, in the sense of having had information available to him from which he should reasonably have concluded that crimes were being or were about to be committed by his men;
 - (b) Though he need not have been aware of the legal qualification of the crimes of his subordinates, the accused must have been aware of the specific constitutive elements of the offence committed by subordinates with which he is charged;
 - (c) When charged with a failure to prevent crimes, the accused must be shown to have been aware of the substantial likelihood that a crime was about to be committed;
 - (d) The accused must further be shown to have intended not to act as he was required to, with or despite that knowledge, or to have been reckless as to the likely consequences of his failure to act. His actions must, therefore, have been both voluntary and

deliberate and he must have been aware of the criminal character of his inaction;

(e) Finally, the court must be satisfied that his failure was tantamount to acquiescence with the crimes.

(iii) A culpable failure to adopt necessary and reasonable measures, which requires proof of the following matters:

(a) A failure to prevent crimes of subordinates; or

(b) A failure to punish crimes of subordinates;

(c) A gross, personal and deliberate dereliction of duty whereby the accused culpably and deliberately failed to adopt

– ‘necessary’, and

– ‘reasonable’

measures to prevent or punish crimes of subordinates, which he was legally competent to adopt;

(d) The conduct of the superior is causally related to the crimes of his subordinates in the sense that his failure to act was a significant – though not necessarily the sole – contributing factor in the commission of the crime (‘failure to prevent’) or a significant contributing factor in the failure to engage the competent authorities to investigate the crimes, identify and punish the perpetrators (‘failure to punish’).

The law of command responsibility, as outlined above, provides for a clear standard of criminal liability that is both reasonable and sustainable and which is strongly rooted in existing practice and precedents. Importantly, it is a standard that strikes a fair balance between the demands and responsibilities of command and the fundamental necessity of ensuring compliance with humanitarian standards. It does not exaggerate the importance of one set of considerations at the expense of others, but gives both of them their due weight. In that sense, the standard laid down in this work has the

potential to be accepted by those to whom it should apply, whilst guaranteeing at the same time the ends that underlie the doctrine of command responsibility.

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- ICTY official website: www.un.org/icty
- ICTR official website: www.icttr.org
- International Criminal Court: www.icc-cpi.int
- Sierra Leone Special Court: www.sc-sl.org
- Bosnian State Court: www.sudbih.gov.ba (Court); www.registrarbih.gov.ba (Registry); www.okobih.ba/?jezik=E (Criminal Defence Section)
- Extraordinary Chambers in the Courts of Cambodia: www.eccc.gov.kh and www.unakrt-online.org
- East Timor: <http://Socrates.berkeley.edu/~warcrime/ET.htm>

Other useful websites containing material relevant to the issue of command responsibility

- Crimes of War Project: www.crimesofwar.org
- International Committee of the Red Cross: www.icrc.org
- International Humanitarian Law Research Initiative: www.ihlresearch.org.
- Nizkor project: www.nizkor.org.
- *Avalon* Project at Yale University: www.yale.edu/lawweb/avalon.
- Project on International Courts and Tribunals: <http://www.pict-pcti.org/news/archvie.html>.
- War Crimes and War criminals: www.ess.uwe.ac.uk/genocide/war_criminals.htm.
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- Electronic resources regarding international courts and tribunals (particularly ICTs and SLSC)
http://www.nyulawglobal.org/globalex/International_Criminal_Courts.htm
- Sources and information regarding international courts and tribunals:
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<http://sim.law.uu.nl/sim/Dochome.nsf>
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APPENDIX – TABLE OF CASES

Judgments and Decisions – Pre-Second World War

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