The command responsibility doctrine in international criminal law and its applicability to civilian superiors

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CHAPTER 1 INTRODUCTION

“Command is a sacred trust. The legal and moral responsibility of commanders exceed those of any other leader of similar position or authority.”

1.1 Trigger and motivation

This study is devoted to the command responsibility doctrine under international law. The best way of showing what brought me, the present author, to enter into a study on this topic is by citing a particular scene from the book Band of Brothers, followed by a citation from the Trial judgement in the Musema case of the International Criminal Tribunal for Rwanda (ICTR). First, a scene from the Second World War:

“Winters ordered him to take the prisoners back to the battalion CP and then get himself tended by Doc Neavles.
Then he remembered that Liebgott, a good combat soldier, had a reputation of ‘being very rough on prisoners.’ He also heard Liebgott respond to his order with the words, ‘Oh, Boy! I’ll take care of them.’
‘There are eleven prisoners,’ Winters said, ‘and I want eleven prisoners turned over to battalion.’ Liebgott began to throw a tantrum. Winters dropped his M-1 to his hip, threw off the safety, pointed it at Liebgott, and said, ‘Liebgott, drop all your ammunition and empty your rifle.’ Liebgott swore and grumbled but did as he was ordered.
‘Now,’ said Winters, ‘you can put one round in your rifle. If you drop a prisoner, the rest will jump you.’ Winters noticed a German officer who had been pacing back and forth, obviously nervous and concerned over Liebgott’s exuberance when he first got the assignment. Evidently the officer understood English; when he heard Winters’s further orders, he relaxed.
Liebgott brought all eleven prisoners back to battalion HQ. Winters knew that for certain, as he checked later that day with Nixon.”

Secondly, a quotation from the Musema judgement:

“Witness R testified about an attack which took place around the end of April, or the beginning of May, on Rwirambo hill opposite Muyira hill in Bisesero, during which he was injured.
He explained that this attack started in the morning and came from Gisovu. The leaders of the attack were Aloys Ndimbati, the bourgmestre of Gishyita, and Musema, the Director of the tea factory. Musema, who was armed with a rifle of unspecified length, was within rifle range

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of the witness. Musema had arrived in his red Pajero, followed shortly afterwards by the vehicle of Ndimbati. Other vehicles seen by the witness were 4 tea factory Daihatsu ‘camionettes’ aboard which were Interahamwe. The witness was able to identify the Interahamwe as they wore blue uniforms, on the back of which was printed ‘Usine à thé de Gisovu’. Two of the camionettes were green, one was yellow and one was white. All had ‘Usine à thé Gisovu’ printed on their side panelling.

The witness said he saw that the attackers were armed with clubs, rifles and spears. While in a nearby valley looking for water, Witness R was injured from a shot which came from the direction of Ndimbati and Musema."

"With respect to the Prosecutor’s argument that Musema could also be held responsible under Article 6 (3) of the Statute, the Chamber finds, firstly, that among the attackers at Rwirambo were persons identified as employees of the Gisovu Tea Factory. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, causing serious bodily and mental harm to members of the Tutsi group.

The Chamber finds that it has also been established, as held supra, that Musema was the superior of said employees and that he held not only de jure power over them, but also de facto power. Noting that Musema was personally present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that Musema, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in their commission, by his presence and by his personal participation.

Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack on Rwirambo Hill, Musema incurs individual criminal responsibility, as their superior, on the basis of the basis of [sic] Article 6(3) of the Statute."

The common denominator of these two citations is command responsibility. Can that concept cover situations that seemingly do not have much in common? This was the question that triggered the author. The military commander in the first scene avoids the committing of war crimes by the soldier in his unit when taking the necessary measures to ensure that the prisoners are not harmed before being handed over to the battalion. The witness in the Musema case provided evidence resulting in a legal finding according to which the accused fulfilled the requirements of the command responsibility doctrine as laid down in Article 6(3) of the Statute of the ICTR. Indeed, the scene picturing an event during the Second World War and the factual recollection of certain events by a witness together with the legal findings of the Trial Chamber in the Musema case, share some common features. In both situations there is a person in a position of authority, there are (potential) perpetrators who are not in the same position of authority and the event takes place in an armed conflict. For the purposes of this

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4 Ibid., paras. 898-900.
study, however, what is of particular interest is the fact that two situations, two cases that show even more differences than commonalities, can both be described as cases of command responsibility. In the first case, the superior is a military commander. The perpetrator is a *de jure* subordinate of the superior. The aim of the commander is to bring the enemy soldiers back to the battalion safely. Had the commander not been as sharp and experienced as he was, resulting in war crimes being committed by the soldier, the aim of the commander would still have been the same. In the second case, however, the superior is a civilian, whose power is based on a civilian hierarchical relationship. As it was established that the superior was present and personally participated in the events, his aim cannot have been to ensure the safety of the Tutsi civilians.

The above-mentioned scenes show that, at present, command responsibility may cover a great variety of situations and relationships. While the first example describes an event of a purely military character in a traditional international armed conflict, the second example concerns a more recent situation of a mass atrocity, involving civilians both as the superior, as perpetrators and as victims. How far does the command responsibility doctrine reach? Much attention has been given to this topic in legal writings. At the same time it is recognised that command responsibility is still developing and, therefore, should be given the attention it needs by scholars, including authors of legal literature.

1.2 Terminology

After the brief introduction and before considering the central research question, this section aims at explaining concepts and terms that are used frequently throughout the study. A correct understanding of the terminology at the beginning of the study is necessary, as certain concepts with a slightly different meaning are often used interchangeably.

The subject of this study will be referred to as the command responsibility doctrine. Preference is given to command responsibility instead of superior responsibility, as the doctrine is also frequently referred to. Based on the thesis and the findings in this study, as well as on the findings of other authors, the term command responsibility gives a more accurate impression of the origin and purpose of the doctrine. Whereas the term superior responsibility has been preferred during the last decade because of its neutrality, encompassing both civilian and military superiors, the term command responsibility points to
its applicability primarily to military commanders or superiors who act with authority very similar to that of a military commander.

When discussing the subject-matter of this study in the legal literature, reference is often made to ‘the principle of command responsibility’. For the purposes of the International Criminal Court (ICC), command responsibility is considered as a general principle of criminal law, together with the principle of individual criminal responsibility, the defences and the general principles in the strict sense, including nullum crimen sine lege and nulla poena sine lege. Cassese did not consider the status of command responsibility as a general principle of criminal law necessarily restricted to the Rome Statute, where he held that the general principle had crystallised from Article 86(1) of the First Additional Protocol to the Geneva Conventions (AP I). In this study, the author will refer to command responsibility as the command responsibility doctrine, to emphasise its status as an “officially approved teaching based on accumulated experience.”

Whereas the distinction between the terms ‘liability’ and ‘responsibility’ will be elaborated in Chapter 3, it is of relevance in this context to point out that where the term command responsibility is used without any further explanation or specification, it should be understood as the criminal responsibility of military commanders or other superiors for their failure to prevent or repress crimes committed by their subordinates. It is also of interest to note that while certainly connected to command responsibility, the state responsibility that may arise from crimes perpetrated by subordinates, where these are members of state organs, is not considered in the present study.

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8 While state responsibility for acts of members of the armed forces is not discussed in this study, the proximity of this form of responsibility to command responsibility may be illustrated by an excerpt from the judgement in the Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), where the International Court of Justice addressed Uganda’s alleged responsibility for acts and omissions committed by Ugandan armed forces in the DRC, as referred to by Brownlie: “213. The Court turns now to the question as to whether acts and omissions of the UPDF and its officers and soldiers are attributable to Uganda. The conduct of the UPDF as a whole is clearly attributable to Uganda, being the conduct of a State organ. According to a well-established rule of international law, which is of customary character, “the conduct of any organ of a State must be regarded as an act of that State” […] The conduct of individual soldiers and officers of the UPDF is to be considered as the conduct of a State organ. In the Court’s view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda. The contention that the persons concerned did not act in the capacity of persons exercising governmental authority in the particular circumstances, is therefore without merit.
It may also be pointed out here that throughout this study the author refers to the superior or commander as ‘he’. Considering the still limited number of women in superior or command positions and the relatively speaking even smaller number of female war criminals, the author finds this preference for the masculine form justified. At the same time, it is recognised that two women (out of the approximately 100 accused in total) have been charged before the ad hoc tribunals.

1.3 Central research question

The focus of this research is on the command responsibility doctrine as established in international criminal law. As is revealed by the background to the doctrine as presently applicable, command responsibility has not met with difficulties in relation to its recognition. However, recognition indicates a general acceptance of a concept but may leave some openings for various interpretations. Consider the following statement by Sir Arnold McNair in the case concerning the International Status of South-West Africa:

“International law has recruited and continues to recruit many of its rules and institutions from private systems of law […]. The way in which international law borrows from this source is not by means of importing private law institutions ‘lock, stock and barrel,’ ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of the ‘general principles of law.’ In my opinion, the true view of the duty of international tribunals in this matter is to regard any features of terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.”

The kind of recruitment of rules described here corresponds to the way in which also command responsibility became part of international law. As stated above, and as is well established, the principle of command responsibility was taken from national military practice and was applied by states to their armed forces. Consequently, when introducing the principle

214. It is furthermore irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority. According to a well-established rule of customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol 1 additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.” See ICJ Reports 2005, p. 168, at p. 242, as referred to in I. Brownlie, Principles of Public International Law, 7th ed. (Oxford, Oxford University Press 2008) p. 450.

in international law, it was not ‘ready-made and fully equipped with a set of rules’. It was recognised as a feature and principle of military organisation, but not as a criminal law concept.

By now, a significant amount of judgements have been rendered by international tribunals in cases involving the command responsibility doctrine. Considering the rather skeletal features of the doctrine before the first judgements, the tribunals have managed to add a great deal of meat to the bare bones of this concept. Adding to that an ever growing mass of academic papers, including some in the category of ‘teachings of the most highly qualified publicists of the various nations’, there is enough support for applying the doctrine of command responsibility as a fully-fledged rule of international criminal law.

Nevertheless, a systematic reading of the case law reveals some inconsistencies in the application of the doctrine. Further analysis shows that most of the hurdles and in particular the issues examined in this study relate to the understanding of the purpose of command responsibility. What is it that one wants to obtain by applying command responsibility? Is the doctrine suitable for convicting those most responsible for international crimes?

The purpose of command responsibility becomes particularly relevant in relation to the applicability of the doctrine to civilian superiors, as civilians make up a distinct category of actors in international humanitarian law (IHL). The starting point is that a civilian is a person who is not participating in acts related to the waging of war and is thus not a combatant. It is a fact, however, that civilians can carry out certain tasks that contribute to the war effort. Since a few years, an in-depth discussion has been ongoing in relation to the topic of direct participation in hostilities. A side-effect of this discussion has been the question as to who can be considered a civilian in the context of hostilities. To some extent the same discussion is brought to mind when analysing the command responsibility of civilians. For the purposes of IHL it is important to retain the distinction between combatants and civilians, despite the fact that the acts of a civilian may be identical to those of a combatant. For the purposes of command responsibility, the fact that the acts or rather the omissions of the civilian may be identical or similar to those of the military commander raises questions regarding the

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10 Expert meetings, jointly initiated by the ICRC and the T.M.C. Asser Institute, were held on a yearly basis from 2003-2008 and the ICRC conducted research into the topic during the same period, all of which resulted in the Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (ICRC, Geneva 2009).
applicability of the doctrine in relation to civilian superiors. In both cases the question to be asked is what is reasonable when it comes to the function/position of a civilian. The author takes the view that a successful prosecution of a civilian superior can only be obtained in a very limited number of cases, due to the inherent difference between the military organisation and the civilian society and the different roles that usually are played by the military commander and the civilian superior in an armed conflict.

The lack of consistency in the present application and interpretation of the command responsibility doctrine complicates the effort of ensuring legal certainty in cases of command responsibility. Any misconceptions result in instability concerning the doctrine as a whole, and this works through to the ‘exceptional’ cases of civilian superior responsibility. Therefore, the central questions of this study can be formulated as follows: Which approach should be taken when considering the applicability of the command responsibility doctrine to civilian superiors? When applying the command responsibility doctrine, is a differentiation between military and civilian superiors justified? The aim of the study is to establish whether command responsibility is an effective basis for the prosecution of civilian superiors in relation to international crimes. Factors that should be taken into consideration are the origin of the doctrine; the recent case law relating to civilian superiors; the role of the superior, as this could have an impact on whether command responsibility or another partly overlapping mode of liability is applicable; and the nature of the underlying crime, as most specifically the crimes of aggression and genocide involve civilian superiors but because of their nature are not easily compatible with the command responsibility doctrine.

1.4 Applicable law and sources

The case law of the ad hoc tribunals plays a central role in this study. The research on which the analysis is based covers the relevant judgements from the ad hoc tribunals as well as some other international judicial decisions that shed light on the present subject-matter. Following the list of sources of international law included in Article 38 of the Statute of the International Court of Justice (ICJ), judicial decisions are a “subsidiary means for the determination of rules of law,”\(^{11}\) but even if they are “not strictly speaking a formal source”\(^{12}\) of international

\(^{11}\) Art. 38(1)(d) Statute of the ICJ.
law, “they are regarded as authoritative evidence of the state of the law.”\textsuperscript{13} Indeed, the literature on the command responsibility doctrine provides support for the view that judicial decisions are important evidence of the state of the law, as case law is heavily relied upon for the interpretation of various aspects of the concept. To a limited extent, reference has also been made to decisions of national courts.

In addition to case law, this study makes use of other formal, “important sources” of law, where the label ‘important sources’ is based on the use of the sources in practice by the ICJ.\textsuperscript{14} These sources are international conventions and customary international law, in the present study most prominently represented by the Rome Statute of the International Criminal Court (Rome Statute or ICC Statute).\textsuperscript{15} The importance of Additional Protocol I to the Geneva Conventions of 12 August 1949 for this study should also be noted here, as this instrument contains two provisions – Articles 86 and 87 – that have been valuable for the development of the command responsibility doctrine. As for customary international law, the status of command responsibility as a rule of customary law is addressed in Chapter 2 of this study.

While a subsidiary source, at most, the author of this study has frequently made reference to the writings of publicists. Only teachings of the most qualified publicists of the various nations are mentioned in Article 38 ICJ, but in the present study the use of an opinion has not been based on the status or record of a publicist, but on the reasonableness and utility of the arguments presented by him or her. The author has also used materials other than those explicitly included in Article 38 ICJ. Most of these documents could be categorised as “sources analogous to the writings of publicists,” such as draft articles of the International Law Commission (ILC).\textsuperscript{16}

In the opinion of the author, while any legal analysis is based on written sources in the categories mentioned above, a profound understanding of the mind set of military

\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid, p. 5.
\textsuperscript{15} UN Doc. A/CONF.183/9, 17 July 1998, 37 ILM (1998) p. 999. The statutes of the ICTY and ICTR do not enjoy the same status as a source of international law as does the Rome Statute, as the ad hoc tribunals were established under Chapter VII of the United Nations Charter. “The fact that the Security Council is not a legislative body mandated that the subsidiary organ it created would not be endowed with competence the parent body did not have. Likewise it could not be seen as creating a new international law binding upon the parties to the conflict.” See D. Shraga and R. Zacklin, ‘The International Criminal Tribunal for the Former Yugoslavia’, 5 European Journal of International Law (1994) pp. 360-380, at p. 363.
\textsuperscript{16} Brownlie, op. cit., p. 25.
commanders and of the environment in which military commanders operate cannot be obtained purely through an analysis of legal sources. Considering the argument in this study that command is unique to military commanders, as is the responsibility it brings with it, it is essential, also for a civilian scholar, to at least make an attempt to comprehend the particularities of the military system, which confirm its uniqueness. In order to get a first hand impression of the thoughts and opinions on the command responsibility doctrine from those who have held command positions in conflict situations, the author discussed the topic with some prominent Dutch commanders. The result of the analysis of the essence of these interviews is referred to in the study and is annexed to the study.\(^{17}\) The interviews serve purely as an illustration of the views of these commanders on certain aspects of the command responsibility doctrine, and are not necessarily to be considered as representative of the views of commanders in general.

### 1.5 Scope and structure of the study

The subject of this study is limited to the international level. Insofar as the discussion concerns command responsibility as a form of criminal liability, the publicists who hold the view that command responsibility is “an original creation of international criminal law” are correct.\(^{18}\) Of course, command responsibility figured in national military legal systems before it was applied by international tribunals. However, the role of national military case law will not be given separate consideration here, since in the post-WWII period, especially in the last decade, the developments of the doctrine of command responsibility have come primarily, if not exclusively, through its codification and interpretation in international (case) law. It is logical and inevitable that any application of the command responsibility doctrine by national courts over the past decade has been and in the nearby future will be heavily influenced by the developments that have taken place at the international level. Both case law and literature analysing and commenting on the application of international courts and tribunals serve as a reference point when applying the doctrine at the national level. Whereas national systems may adhere to differing views regarding the applicability of international law in national cases, there is ample evidence of references made by national courts to the command

\(^{17}\) See Annexes I and II.

responsibility doctrine as applied by international tribunals. Perhaps most notable are the judgements rendered by the Court of Bosnia and Herzegovina, in which the doctrine is regularly applied. While recent and future judgements from national courts may affect the doctrine as applied at the international level, this study is limited to the international level and to the decisions and judgements rendered by international courts and tribunals.

Having introduced the topic and presented the relevant research questions in the present chapter, Chapter 2 addresses the legal basis for command responsibility. The chapter begins with exploring the existing treaty provisions and continues by addressing the status of command responsibility in customary law. Setting a basis for the rest of the study, the chapter sets out the present interpretation of individual criminal responsibility and command responsibility by international courts and tribunals. Chapter 2 also examines the actus reus and the mens rea of command responsibility.

Chapter 3 gets to the core of the thesis as it explores the concept of command responsibility in armed conflict. In this chapter command responsibility is not a concept of criminal law, but a principle that is part of the military system and tradition. Different meanings of responsibility and various aspects of command are examined. Chapter 3 finally addresses the compatibility of the military concept of command responsibility with international criminal law. The view defended by the author throughout this study has its foundation in this chapter. The unique character of command responsibility as a military concept should be understood and accepted before entering into further analysis in Chapters 4 and 5, as it directly influences the approach that should be taken when considering the applicability of the command responsibility doctrine to civilian superiors.

Chapter 4 examines the application of the command responsibility doctrine to civilian superiors. First, the concept of the civilian superior is explored. Subsequently, cases concerning civilian superiors charged with command responsibility before the ad hoc

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19 See, for example, the Fujimori case as decided by the Supreme Court of Peru: Corte Suprema de Justicia de la República, Sala Penal Especial, Caso Fujimori, Asuntos Varios 0019-2001 (Barrios Altos, Cantuta, Sotanos SIE), Sentencia: Fundamentos y fallo, 7 April 2009, at Parte IV – Decisión, § 4. La autoría mediata y la responsabilidad del superior en el Derecho Penal Internacional.

20 See, inter alia, Prosecutor’s Office of Bosnia and Herzegovina v. Mitar Rašević and Savo Todović, Verdict, Case No. X-KR/06/275, 28 February 2008; and Prosecutor’s Office of Bosnia and Herzegovina v. Paško Ljubičić, Verdict, Case No. X-KR-06/241, 29 April 2008. It should be noted that the Court of Bosnia and Herzegovina is an extraordinary domestic court, as it includes international judges and prosecutors, and as many of the cases are referred to the Court from the ICTY, pursuant to Rule 11bis of the Statute of the ICTY.
tribunals are analysed. The cases are divided into two categories, the first of which consists of cases that resulted in a conviction of the accused based on his command responsibility. The second category consists of cases which resulted in an acquittal under command responsibility charges. The reasons for the acquittal are explored in more detail. The last part of Chapter 4 offers some observations on the application by the ad hoc tribunals of the command responsibility doctrine to civilian superiors.

In Chapter 5, the remaining hurdles in the application of the command responsibility doctrine are identified and analysed. Having explored the unique function of the military commander in Chapter 3 and having realised the difficulties in trying civilian superiors in the case law of the ad hoc tribunals in Chapter 4, Chapter 5 addresses contentious issues that are of significance to both military and civilian superiors. The issues elaborated are the nature of command responsibility, the possible overlap between individual criminal responsibility and command responsibility and the nature of the crime underlying the charges of command responsibility. The chapter follows logically on from the two previous chapters as the choices proposed are based on the findings in these chapters. The findings give additional support for the view held by the author that the applicability of the command responsibility doctrine in practice is limited to situations that are more likely to involve military commanders than civilian superiors.

Finally, Chapter 6 combines the ideas and findings presented in the previous chapters, and it offers some answers to the question whether the differentiation between military and civilian superiors in codified provisions of the doctrine and as applied by international tribunals is justified. The chapter addresses the consequences of these answers to cases charging civilian superiors pursuant to the command responsibility provision and provides a future perspective on the command responsibility doctrine in international criminal law.