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

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CHAPTER 2 THE LEGAL BASIS FOR COMMAND RESPONSIBILITY

2.1 Introduction

The purpose of the present chapter is to explore the legal basis of the command responsibility doctrine as it presently stands and the most recent historical developments of the principle, which have contributed to the legal provisions applicable today. The emergence of the doctrine in the statutes of the ad hoc tribunals and the immediate charges under the command responsibility principle against accused before the tribunals brought a number of publicists to delve into the legal history of the doctrine. Basing themselves on the most comprehensive article on command responsibility before the appearance of the ad hoc tribunals, written by W.H. Parks, several authors use the writings of the Chinese Sun-Tzu as the first ‘legal’ source for the doctrine. However, it seems that these writings discuss and recognise the responsibilities of the commander rather than the criminal liability based on the command responsibility principle as we know it today. On the other hand, the fact that writings that date back hundreds or even thousands of years mention the responsibilities of commanders and even kings and princes, in relation to their subordinates, shows that the development of an international criminal law doctrine of command responsibility as it is known today was based on a common understanding that in armed conflicts, superiors have certain responsibilities towards their subordinates.

The first part of the chapter aims at setting out the phases of the development of the command responsibility doctrine that have directly contributed to the present understanding of the principle and therewith constitutes the legal basis for command responsibility. The latter part of the chapter sets out the presently applicable definitions and interpretation of the principle. These should serve as the foundation for the more complex analysis of the doctrine in the subsequent chapters. This chapter is not aimed at repeating the historical research done by others, but the author recognises the importance of earlier research\(^\text{21}\) and appreciates the availability of detailed documentation of the history of the doctrine.\(^\text{22}\)

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\(^{22}\) The writings of Sun-Tzu have been referred to as one of the first written records dealing with the responsibility of the commander. While demonstrating a military strategy to his King, Sun-Tzu stated the following: “If the instructions are not clear, if the explanations and orders are not trusted, it is the general’s offense. When they [the soldiers, *MNM*] have already been instructed three times, and the orders explained five times, if the troops
2.2 Codification by treaty

2.2.1 Emerging treaty provisions

For the purposes of this study, one international legal provision predating the Second World War is of particular importance for the understanding of the command responsibility doctrine. That is Article 1 of the Hague Regulations annexed to Hague Convention IV of 1907. Article 1 of the Hague Regulations sets out the “laws, rights and duties of war” applying to armies, militia and volunteer corps if they, among other things, fulfil the condition of being “commanded by a person responsible for his subordinates.” This provision reflected the idea of a ‘responsible command’ but did not explicitly set out the responsibility of a superior for criminal acts committed by subordinates. The normative importance of the concept of responsible command was and continues to be the condition that it sets for the legitimacy of a party to the conflict and the status of a combatant as ‘lawful’. At the time of the adoption of the Additional Protocols to the 1949 Geneva Conventions the provision, Article 1 of the Hague Regulations, served to show that the responsibility of superiors who failed to prevent their subordinates from committing crimes was not new in treaty law, although the existing treaty provisions did not treat this responsibility as a criminal concept imposing penal sanctions.

The post-WWII courts based their jurisdiction and decisions regarding the responsibility of superiors for crimes committed by their subordinates above all on national laws and earlier...
national court decisions, as well as on general principles of law or even morality, but not on explicit international treaty provisions.\textsuperscript{25} Neither the Statute of the Nuremberg Tribunal nor that of the Tokyo Tribunal included provisions on command responsibility. Neither did the four Geneva Conventions, adopted on 12 August 1949 and dealing with the protection of various groups of persons during armed conflicts, explicitly mention any criminal responsibility that should be borne by commanders and superiors for acts of their subordinates. An implicit reference to crimes of omission was, however, made in Article 13 of the Third Geneva Convention:

“Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the present Convention.”\textsuperscript{26}

The provision was a general prohibition on unlawful acts or omissions against prisoners of war, but pointed to the responsibility of the Detaining Power as a whole and did not address the personal responsibility of superiors. The previous article of the Convention, Article 12, provided as follows:

“Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.”

The Geneva Conventions set out provisions on the individual responsibility of those who commit crimes or order crimes to be committed, but did not go into specific provisions on the responsibility for acts of omission:

“Each high Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”\textsuperscript{27}

The Geneva Conventions have served as a firm legal basis, both as treaty law and customary law, for the later codification of individual responsibility, but the Conventions did not provide

\textsuperscript{25} With regard to the legal basis for the crimes charged in the indictment presented to the Nuremberg Tribunal, Goodhart in 1946 found that there was such a basis in existing international law, or else the crime was “in accord with the principles found in every civilised system of law.” See A.L. Goodhart, ‘The Legality of the Nuremberg Trials’, in G. Mettraux, ed., Perspectives on the Nuremberg Trial (Oxford, Oxford University Press 2008) pp. 626-637, at pp. 632-636.

\textsuperscript{26} Geneva Convention III of 12 August 1949, 75 UNTS p. 135.

\textsuperscript{27} See the provisions concerning Grave Breaches of the 1949 Geneva Conventions I-IV, Arts. 49, 50, 129 and 146, respectively.
a legal basis for command responsibility, and an important element of that responsibility, the failure to act. The Convention on the Non-Applicability of Statutory Limitations, adopted in 1968, included a provision according to which the provisions of the convention should also apply to superiors who tolerate the commission of crimes. Article 2 of the Statutory Limitations Convention has the following wording:

“If any of the crimes mentioned in Article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.”

The immediate purpose of the Statutory Limitations Convention is not to oblige states to prosecute violations, but to oblige them not to apply statutory limitations where prosecutions have taken place. Nevertheless, Article 2 sends the message that, under international law, not only those who participate in crimes, but also those who tolerate their commission could be held criminally responsible. According to the ICRC Commentary to the Additional Protocols of 1977, the regulation of acts of omission was considered a necessity, as this would bring the so-called Law of Geneva into line with other international law provisions, in particular Article 2 of the Statutory Limitations Convention.

Command responsibility is understood as a basis for criminal responsibility where the superior did not physically commit or give an order to commit a crime, but where he omitted to stop the commission of any such crime, or where he did not take the necessary steps to punish the offenders. Accordingly, the provision in the Statutory Limitations Convention corresponds to the command responsibility concept, as it deals with the toleration of an offence, and mentions representatives of the state authority. The description fits a part of the command responsibility concept. However, as just mentioned, the purpose of the treaty is another one. It does not set a duty on a state to prosecute a superior in accordance with the command responsibility concept. It compels states to refrain from applying statutory limitations in a situation where a representative of the State authority has tolerated the commission of certain crimes, among which are war crimes and grave breaches of the 1949

28 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968, 754 UNTS p. 73.
29 Ibid. (emphasis added by MNM).
Geneva Conventions. The treaty does not specify whether the ratifying states are bound to have included these crimes in their national legislation.

The literature recognises Additional Protocol I to the 1949 Geneva Conventions as the first instance of explicit treaty codification of the concept of command responsibility as it is currently understood: that a superior can be held criminally responsible for not preventing or punishing unlawful acts committed by his subordinates. AP I introduced two provisions with relevance to the concept of superior responsibility – Article 86 entitled ‘Failure to Act’ and Article 87 called ‘Duty of Commanders’.

Article 86 states as follows:

“1. 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 a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”³¹

Article 87 of AP I provides as follows:

“1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and the Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.”³²

³¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS p. 3.
³² Ibid.
Accordingly, by 1977 States had come to agree on the necessity of possible penal sanctions for commanders who failed to prevent or repress crimes committed by subordinates. All the essential elements were included in the AP I provisions and explicitly listed in the Commentary to the Additional Protocols: the superior-subordinate relationship, the awareness requirement and the prevention or repression requirement. Herewith the modern international criminal law doctrine of command responsibility was codified in treaty law.

2.2.2 Treaty definitions further developed

The most significant treaty provisions in the history of the doctrine of command responsibility are, undoubtedly, those included in the Statute of the International Criminal Court, adopted in Rome in 1998. Their importance lies, among other things, in the broad acceptance of the Statute among States and the rapid entry into force of this multilateral convention. Through the ratification of the Statute, the States become bound by its provisions and accept the applicability of the Statute, the treaty, to a situation concerning that particular State. An obligation to bring their legislation into conformity with the Rome Statute was felt by many States, which led to amendments to several national Penal Codes and to the inclusion of the command responsibility doctrine in national legislation, therewith adding to the opinio juris character of the Rome Statute, including the command responsibility doctrine.33

As with other treaty projects, the elaboration of the ICC Statute did not stand on its own but was the consequence of a trend of accepting a broader role for international criminal law to stop horrific atrocities from (re)occurring and to avoid impunity for perpetrators of internationally condemned crimes. It was further a consequence of the earlier development of similar rules. What is true for the ICC Statute as a whole is comparable with the development of the ICC provisions relating to the doctrine of command responsibility. Both earlier codification and case law preceded the ICC provisions on command responsibility.

33 Of course, the acceptance and implementation of the doctrine by states are crucial for the opinio juris character of the doctrine, not the ratification of the treaty by a large number of states, as such. As stated by Heintschel von Heinegg: “[T]he opinio juris as a constitutive element of customary law has to be strictly distinguished from an opinio juris conventionis. While treaties may play an important role in the process of determining rules of customary law, they do not dispense with the necessity of proving that the States concerned do consider themselves bound also vis-à-vis States not parties/signatories to the treaty in question.” See W. Heintschel von Heinegg, ‘Criminal International Law and Customary International Law’, in A. Zimmermann, ed., International Criminal Law and the Current Development of Public International Law (Berlin, Duncker & Humblot 2003) p. 42.
The most notable contributors to the development of the command responsibility definition, besides the ICC Statute, are the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and the judicial decisions delivered by these tribunals. However, as the ad hoc tribunals were not set up by a multilateral treaty, states are not bound by the provisions in these statutes in the same way as they are bound by a treaty through ratification.

The precedent for the ICC, or the first attempts to draw up a Draft Code of Offences Against the Peace and Security of Mankind were presented by the International Law Commission (hereafter, ILC) in 1954.\textsuperscript{34} The command responsibility doctrine was, however, not mentioned in this document. Over the years several versions of the Draft Code were elaborated by the ILC\textsuperscript{35} before it adopted the Draft Code of Crimes Against the Peace and Security of Mankind in 1996.\textsuperscript{36} In the adopted version the command responsibility doctrine was included as Article 6, together with a commentary.\textsuperscript{37} The ILC defined command responsibility as follows:

“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 reason to know, 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 necessary measures within their power to prevent or repress the crime.”\textsuperscript{38}

Two years later, the Rome Conference on the establishment of an International Criminal Court adopted another definition, included in Article 28 of the ICC Statute:

“In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

\textsuperscript{34} Draft Code of Offences Against the Peace and Security of Mankind, UN GAOR, 9\textsuperscript{th} Sess., Supp. No. 9, UN Doc. A/2693 (1954), pp. 11-12.


\textsuperscript{37} Ibid., p. 19.

\textsuperscript{38} Ibid.
(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.  

It is rather obvious that the ICC Statute offered the most elaborate definition of the command responsibility doctrine so far. The most significant novelty in the ICC definition is the explicit differentiation between military and civilian superiors. Comparing it to AP I, Article 86 used the broader concept of superior and Article 87 specifically provided for the responsibility of military commanders but did not mention non-military superiors. In these provisions, there was no explicit mention of superiors not being military commanders. Two remarks may be made in relation to the lack of a provision on civilian superiors, without speculating on the reasons why, at the time, there was no need to include such a provision. On the one hand, the case law from the post-Second World War period includes judgements in which civilian superiors were tried for their omissions. Accordingly, when the word superior was included in Article 86, there was an awareness of the fact that civilians had previously been prosecuted for omissions. On the other hand, AP I is a codification of international humanitarian law in relation to international armed conflicts and it regulated the conduct, primarily, of states’ armed forces and thus concerns primarily military commanders. Considering the development of the command responsibility doctrine since AP I and the different character of the instrument, it is understandable that the ICC Statute is more elaborate on this issue.

2.3 Customary status of command responsibility

2.3.1 Prior to the ICC

"Prior to World War II, legal standards for commanders were practical articulation of the accepted practice of military professionals. This customary international law expressed soldier’s [sic!] standards which were born on the battlefield and not standards imposed upon

40 The Commentary on the Additional Protocols mentions the fact that "people were convicted for omissions" in post-Second World War cases. The Commentary does not, however, specifically point to cases concerning civilians. See Pilloud, op. cit., para. 3531.
41 Consider the more elaborate discussion in Chapter 6.2.1 infra.
them by dilettantes of a different discipline. Undoubtedly, the practicality of these rules led to their general acceptance which in turn was responsible for their codification. Such practical rules were understood and enforced.”

Eckhardt here describes superior responsibility, as it was understood and applied before the Second World War, as an expression of customary international law. There are several documented cases predating the Second World War which concerned omissions by a commander similar to those now falling under the command responsibility doctrine. One of the cases was that against Captain Henry Wirz, who held the position of commander of a POW camp at Andersonville, Georgia, in the United States of America, in the 1860s. He was held responsible before a military commission in Washington for the mistreatment and killing of prisoners at the camp. However, like many of the pre-Second World War cases, the case against Captain Wirz did not charge the accused on the basis of command responsibility or a similar notion, but for “combining, confederating and conspiring” together with others and for “peretration”. Only the circumstances of the case were such that if the accused were to be prosecuted today, the principle of command responsibility may be thought of as a basis for his responsibility. While this and most other pre-Second World War cases that dealt with acts and failures by superiors do not fit the exact concept of command responsibility and, therefore, do not provide direct proof of a customary international law standard, they do show that there was a general acceptance of the responsibilities of a commander in relation to his subordinates and that these responsibilities could become the subject of a criminal prosecution.

A case which has been identified as directly concerning an omission to prevent or punish was the case against Emil Müller before the Supreme Court of Leipzig. In addition to other charges, Captain Müller was convicted of the charge of having “tolerated and approved of” ill-treatment of a prisoner by his subordinates. The legal provision on the basis of which this kind of behaviour could be prosecuted was Section 143 of the Military Penal Code, which read as follows:

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44 Among others, the post-Second World War cases against Hirota and Roechling have been considered in the context of command responsibility, but differ from the present understanding of the doctrine, and would probably not lead to a conviction if tried on the basis of Art. 28 ICC.
45 Judgement in the Case of Emil Müller, 30 May 1921, 16 AJIL (1922) p. 684.
46 Ibid., p. 691.
“Wer als Befehlshaber einer militärischen Wache, eines Kommandos oder einer Abtheilung, oder wer als Schildwache oder als Posten eine strafbare Handlung wissentlich begeht, welche er verhindern konnte und zu verhindern dienstlich verpflichtet war, wird ebenso bestraft, als ob die Handlung von ihm selbst begangen wäre.”

Interestingly, this provision addressed several of the elements of the present command responsibility doctrine that are presently debated by judges and publicists. It specifically defines the *mens rea* required, it requires a duty to act and it defines the nature of the responsibility of the commander.

Considering the accepted view that customary law should be “looked for primarily in the actual practice and *opinio juris* of States,” this case and the national law provision applied provide evidence of state practice and some support for the view that command responsibility as it is applied today was included in customary law even before the Second World War. While neither a piece of legislation, nor a judicial decision, also the report presented to the Preliminary Peace Conference at Versailles by the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties deserves to be mentioned as a source of custom. The Commission in its report recommended the establishment of a tribunal which could prosecute:

“[A]ll authorities, civilian or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing violations of the laws or customs of war.”

The Commission advocated criminal liability both on the part of those who had actively ordered violations of the laws and customs of war, and of those who had failed to prevent or punish the perpetrators of such violations. It may be concluded that by the time the proceedings against alleged war criminals began, in the aftermath of the Second World War,


48 Compare this to the discussion in Chapter 5 infra.

49 *Continental Shelf Case* (Libyan Arab Jamahiriya/Malta), Judgment, 3 June 1985, ICJ Reports 1985, p. 13, at p. 29.


the concept of holding a superior criminally liable for a failure to prevent a subordinate from committing a crime was certainly not internationally unknown.

Additional support for the customary law character of command responsibility before the Second World War can be found when considering how customary law is established. In the Asylum case the ICJ considered that an important part of the recognition of a rule as customary law is that there should not be many instances where state practice is inconsistent with the customary rule. Where there is “fluctuation and discrepancy” in the application of a rule, “it is not possible to discern [...] any constant and uniform usage, accepted as law.” Of the well known cases concerning acts and omissions of superiors both in the pre- and post-Second World War period there are no instances of explicit decisions that would go against the concept of command responsibility. The absence of such cases thereby supports the existence of command responsibility as a rule of customary law in the relevant period. In addition to that, it has been argued that, “[W]here there is no practice which goes against an alleged rule of customary law, it seems that a small amount of practice is sufficient to create a customary rule.”

Albeit controversial because of their victors’ justice character, the post-Second World War cases, and the Yamashita case in particular, confirmed the principle of command responsibility as an accepted basis for criminal liability. The United States Military Commission at Manila, before handing down the verdict, addressed the accused and said:

“The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers; (2) That during the period in question you failed to provide effective control of your troops as was required by the circumstances.”

The Military Commission reasoned that the fact that Yamashita failed to provide effective control over his troops justified a finding of criminal liability. Subsequent post-Second

52 Asylum Case (Colombia/Peru), Judgement, ICJ Reports 1950, p. 266.
53 Ibid., p. 277.
57 Ibid., p. 1597. The United States Supreme Court, considering the Application for leave to file a petition for a writ of habeas corpus and a writ of prohibition, confirmed that the law of war imposed an affirmative duty to
World War cases, such as those brought before the Nuremberg Military Tribunals under Control Council Law No. 10\textsuperscript{58} and before other military courts,\textsuperscript{59} may have strengthened the

\textsuperscript{58} See in particular the following Post WWII cases:

Judgements rendered by the Nuremberg Military Tribunals under Control Council Law No. 10: The Hostages case, TWC, Vol. XI, pp. 1230-1319; in Friedman, Vol. II, op. cit., pp. 1303-1343. The accused were, \textit{inter alia}, charged as principals or accessories to the murder of large numbers of civilians in several countries. With regard to the main defendant, Field Marshal Wilhelm List, the military tribunal held that “[h]is failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility. Instead of taking corrective measures, he complacently permitted thousands of innocent people to die […] He cannot escape responsibility by a claim of a want of authority. The authority is inherent in his position as commanding general of occupied territory. The primary responsibility for the prevention and punishment of crime lies with the commanding general; a responsibility from which he cannot escape by denying his authority over the perpetrators.” Friedman, Vol. II, op. cit., pp. 1305 and 1324.

The High Command case, TWC, Vol. XI, pp. 462-697; in Friedman, Vol. II, op. cit., pp. 1421-1470. The main accused, Field Marshal Wilhem von Leeb, was acquitted of some and convicted of other charges relating to crimes committed by subordinates under his command. The judgement shows that the tribunal considered the various elements of command responsibility in relation to each charge without assuming responsibility based on authority. Considering the criminal responsibility of commanders of occupied territory for crimes committed by various agencies, the military tribunal held that such responsibility is personal and not unlimited. According to the tribunal, “[m]ilitary subordination is [a] comprehensive but not conclusive factor in fixing criminal responsibility. […] A high commander cannot keep completely informed of the details of military operations of subordinates […]. He has the right to assume that details entrusted to responsible subordinates will be legally executed. […] Criminal acts […] cannot in themselves be charged to him on the theory of subordination. […] Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction.” Friedman, Vol II, op. cit., pp. 1449-1450.


\textsuperscript{59} Cases selected by the United Nations War Crimes Commission:

Schonfeld and Nine Others, UNWCC, Vol. XI, pp. 64-73. The accused were charged with committing a war crime in that they were “concerned in the killing of” members of various Air Forces. The case neither charged nor found anyone guilty on the basis of command responsibility. However, the military court did give recognition to the principle by finding that “[c]ommand responsibility might also arise, in the case of a person occupying a position of authority, through culpable negligence,” where that person “had reasonable grounds for supposing that his men were going to indulge in committing a war crime against their opponents […] and he failed to take all reasonable steps to prevent such an occurrence.”

Abbaye Ardenne case, UNWCC, Vol. IV, pp. 97-112. This case, against a military commander, Kurt Meyer, both charged and convicted the accused, although not using that term, on the basis of command responsibility. The accused was held responsible for the killing of POWs, who had been shot by “troops under his command.” The Canadian Military Court even specified which facts and circumstances were of importance for determining the responsibility of the accused: “The rank of the accused, the duties and responsibilities of the accused by virtue of the command he held, the training of the men under his command, their age and experience, 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 action as the circumstances required to endeavour to prevent, the killing of prisoners […]”

Sakai case, UNWCC, Vol. XIV, pp. 1-7. The accused was a military commander in China during the war of 1939-1945, and “one of the leaders who were instrumental in Japan’s aggression against China.” On one charge, concerning war crimes and crimes against humanity, the accused was found to have incited or permitted his subordinates to commit certain crimes, among which were the murder of POWs and the rape of civilians. That this case was decided on the basis of command responsibility seems doubtful when considering the “inciting” and “permitting” as a basis for liability. These modes of liability are on the borderline between today’s individual criminal responsibility and command responsibility. On the other hand, the tribunal in its findings said the following: “That a field Commander must hold himself responsible for the discipline of his subordinates, is an accepted principle. It is inconceivable that he should not have been aware of the acts of atrocities committed
customary law status of command responsibility and provided some clarification to the application of the doctrine. However, it should be noted that post-Second World War tribunals have been severely criticised for their lack of concern for providing sufficient proof when claiming that certain rules constituted international customary law.\(^{60}\)

Considering whether the command responsibility indeed constituted international customary law, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Čelebići case referred to the Medical case,\(^{61}\) the Hostages case,\(^{62}\) the High Command case\(^{63}\) and the Toyoda case,\(^{64}\) all of which explicitly set out that superiors who had stood by or did nothing when subordinates were about to or had committed violations of the laws of war were to be held responsible.\(^{65}\) According to the United States Military Tribunal in the Medical case:

“[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.”\(^{66}\)

The cases served to show the existence of case law accepting the principle of command responsibility, while not all cases had found the accused guilty on the basis of this doctrine.\(^{67}\)

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\(^{64}\) *United States v. Soemu Toyoda*, Official Transcript of Record of Trial, p. 5006.

\(^{65}\) Prosecutor v. Zejnil Delalić et al. (Čelebići), Judgment, Case No. IT-96-21-T, 16 November 1998, para. 338.


\(^{67}\) The Japanese Admiral Toyoda was acquitted on all charges. See *United States v. Soemu Toyoda*, Official Transcript of Record of Trial.
While not entering into a thorough comparative study of the existing national legislation on command responsibility, the Čelebići Trial Chamber, by way of example, mentioned a few provisions which in its view provided evidence of the international customary law character of the principle at the time of the Second World War. In fact, the Čelebići Trial Chamber leaned on the findings by the United States Military Commission in the Yamashita case, according to which at least France, Luxembourg, China and The Netherlands between 1943 and 1947 had enacted legal provisions that made prosecution under the command responsibility doctrine possible.

The need to prove the customary law character of the command responsibility doctrine in 1998 when the Čelebići judgement was rendered, was a consequence of the requirement set out in the report of the UN Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), according to which:

“[T]he application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.”

Accordingly, when the ICTY for the first time assessed the responsibility of an accused on the basis of the command responsibility principle, it was up to the Čelebići Trial Chamber to confirm the applicability of Article 7, and more specifically Article 7(3) of the Statute, as a rule of customary law. As Article 6(3) of the ICTR Statute sets out the same standards of responsibility, this provision equally reflects international customary law as it was at the time of the establishment of the Tribunals.

It should be pointed out here that at present the customary law character of the doctrine of command responsibility in international law is generally accepted. However, Heintschel von Heinegg convincingly questions the customary law character of certain war crimes and the customary law status of the principle of individual criminal responsibility (including command responsibility), in particular in relation to non-international armed conflicts. In his

68 Čelebići, TC Judgement, paras. 336-337.
opinion, too little evidence has been presented that supports such a finding, most significantly
evidence of state practice. At the same time, he recognises that the literature in the field has
accepted the customary law status of individual criminal responsibility.

An additional question that may be asked concerns the customary law status of the specific
interpretation and elaboration of the doctrine. Since they began their work, the *ad hoc*
tribunals have decided a large number of cases. They have had ample opportunity to develop
the specific elements of this form of responsibility, and have done so. But has this particular
interpretation of the doctrine also reached the status of customary law?

In this regard reference can be made to the same report by the Secretary-General of the United
Nations, which set out the customary law requirement of the provisions applied by the ICTY.
With respect to the content of the doctrine the Secretary-General held that:

“A person in a position of superior authority should, therefore, be held individually
responsible for giving the unlawful order to commit a crime under the present statute. But he
should also be held responsible for failure to prevent a crime or to deter the unlawful
behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged
if the person in superior authority knew, or had reason to know, that his subordinates were
about to commit or had committed crimes and yet failed to take the necessary and reasonable
steps to prevent or repress the commission of such crimes or to punish those who had
committed them.”

These elements, which reflect those set out in the Commentary to the Additional Protocols,
can be seen to correspond to the interpretation of the command responsibility by the *ad hoc*
tribunals, in that they contain the requirement of a superior-subordinate relationship, the
knowledge requirement and an element of the failure to prevent or punish the subordinates.
As will be seen further on in this study, these elements are also subject to various possible
interpretations. In its customary law study (ICRC study), the International Committee of the
Red Cross (hereafter, ICRC) “sought to analyse issues in order to establish what rules of
customary international law can be found inductively on the basis of State practice” in

73 Heintschel von Heinegg, op. cit., pp. 27-47. See also G. Mettraux, *The Law of Command Responsibility*
74 Ibid., p. 34.
75 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN
relation to a certain issue. Based on the Additional Protocols, case law from the ad hoc tribunals, the statutes of these tribunals and the Special Court for Sierra Leone (SCSL), military manuals from various states and national case law, the ICRC study sets out that the interpretation of the command responsibility principle as included in customary law covers at least five points: i) Civilian command authority; ii) Commander/subordinate relationship; iii) The commander/superior knew, or had reason to know; iv) Investigation and reporting; and v) Necessary and reasonable measures. These points will be explained and elaborated in Section 4.2 of this Chapter. Based on the findings of the ICRC study, there seems to be support for the view that all these points form part of the command responsibility principle as a rule of customary international.

On the other hand, it is recognised that because of the increase in the codification of international law ever since the Second World War, the role of international customary law has decreased. Now that a period of more than ten years has passed since the establishment of the ad hoc tribunals, and the doctrine has been further developed and defined in many cases, and its existence has not been denied, the practical importance of defining the elements of superior responsibility in customary law prior to the decisions by the ad hoc tribunals has diminished. Codification of the doctrine in several Statutes, those of the ICC, ICTY, ICTR and the SCSL, reduces the relevance as perpetrators of war crimes subsequent to the establishment of these tribunals could probably not claim the lack of law regarding superior responsibility. Nevertheless, as investigations into and trials concerning crimes committed in the 1980s and even earlier still take place, the question remains of some interest.

2.3.2 From ICC until the present

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77 Ibid., pp. 561-563.
78 It may be pointed out that one study, such as the ICRC study, should not be considered as proof of the status of a doctrine as a rule of international customary law. With regard to certain rules, however, a study may present documents showing state practice and opinio juris, which together seem to justify the customary law label given to the rule.
The ICC Statute introduced a provision on command responsibility that slightly differs from those existing before its creation. While the provision is more elaborate than earlier ones, there is no specification for Article 28 like the “Elements of Crimes” document, which set out the more specific interpretation of the crimes under the jurisdiction of the Court.\textsuperscript{81} It has been argued that because the ICC Statute has only been specified in relation to the crimes under its jurisdiction, in the separate Elements of Crimes document, there is “room for interpretation” concerning the specific elements of “liability by omission,” or command responsibility.\textsuperscript{82} For its exercise of jurisdiction, the ICC is to apply the ICC Statute as its primary source.\textsuperscript{83} For the purposes of command responsibility, the Court should apply the principle as laid down in Article 28 of the Statute, but because of the lack of elaborated elements in the Statute, its provisions are insufficient.

But how much room for interpretation will there be? The Court will not only be dependent on the space provided by the lack of specific elements provided in the Statute, but also on the interpretative possibilities that are left when taking other sources of law into account. According to Article 21 ICC the Court should apply:

“(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;”

As concluded above, the existing treaty provisions do not provide any guidance as to the specific interpretation of the doctrine. The Court will then have to turn to international customary law, where such rules can be of assistance.

The previous section showed that at least the ICRC Study found certain elements, or ‘points’, of the command responsibility doctrine to have become part of customary international humanitarian law. If the ICRC study is correct in its findings regarding the customary law status of command responsibility, these elements should be taken into account when applying the doctrine. Not doing so would be a breach of international customary law. However, the restriction that would be put on the Court as a consequence of these ‘points’ established as customary law, is probably marginal. The points mentioned are rather fundamental for the

\textsuperscript{81} Elements of Crimes, ICC-ASP/1/3(part II-B), 9 September 2002.
\textsuperscript{83} Art. 21 ICC (Applicable law).
existence of the principle and can be found in Article 28 ICC. Thus, from the point of view of interpretation by the Court, any nuance to the elements would anyway be made on an even higher level of specification than that included in the elements of the ICRC Study. This is proven by the remaining challenges which the doctrine faces, among which is the application of the doctrine in relation to civilian superiors. As regards the ‘room for interpretation’ left for the Court, it will have to apply the elements that are both included in the formulation of Article 28 and correspond to those mentioned in the ICRC Study, but it may formulate its own opinion on issues that are still unclear or controversial, and thus, by definition have not become part of international customary law.

That being said, will customary law still have a role of importance to play after the codification of the doctrine in the ICC Statute? In order to identify the international rules applicable to a certain question, the primary source of law are international treaties. For the superior responsibility doctrine, the ICC Statute is the most relevant source. However, only states parties to the treaty are bound by these rules. Accordingly, for states not parties to the treaty it would be of interest to know whether the command responsibility doctrine as laid down in the ICC Statute reflects the current rule of international law because of its status as customary law. These states that are not parties to the treaty could be bound by the rules on command responsibility contained in the ICC Statute if the treaty has become customary law or if the command responsibility provision is said to be an expression of customary law or is intended to express a rule of customary law. Taking into consideration the fact that several rather influential states, shown to be involved in events that may give rise to command responsibility, have not ratified the ICC Statute, the question is not just theoretical.

The Statute neither includes an explicit statement that the provisions included in it are an expression of customary law, nor was the Statute intended to be a codification of international customary law. Accordingly, the elements of command responsibility in present international customary law can be sought in the ICC Statute only if the provisions of the Statute have become customary law. The Statute was adopted by a majority of the states of the United Nations and has been ratified by more than the required number of States in order for it to enter into force. It might be argued that this fact gives the treaty a certain authority which in turn could mean that the provisions contained in the Statute might be considered as opinio

Certain States have also taken steps to implement the rules contained in the ICC Statute into their own legal system or have enacted new legislation corresponding to the provisions in the Statute, expressing state practice. The acceptance and application of the provision might or might not be of such a degree as to express customary law.

It is worth noting, however, that also and in particular the international tribunals have rendered decisions, the arguments of which may have or are becoming expressions of international customary law. As long as the ICC has not applied the provisions included in its Statute, these are the only judicial decisions based on provisions of customary law. However, the provisions on command responsibility in the Statutes of the ad hoc tribunals differ from those in the ICC Statute. This means that in fact two different interpretations of the same doctrine may exist at the same time and seemingly both express the doctrine under international customary law. To a state not party to the ICC Statute which has to comply with international customary law, this situation does not seem satisfactory. On the other hand, the fact that the ICC has not applied the provisions to a real case and rendered a judgement in such a case means that it is still not clear whether this difference could become a practical challenge or whether applying different standards to the doctrine is just a hypothetical problem.

2.4 Present definitions by international courts and tribunals

2.4.1 Individual criminal responsibility

The jurisdiction of the international or internationalised tribunals and courts established since 1993, starting with the ICTY, has been restricted to natural persons, and has been based on the basic principle in criminal law that a person is criminally liable, where both 1) the requirements of conduct, which is defined in law and not justified by law; and 2) the requirements of personal culpability are fulfilled.

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The requirements of individual criminal responsibility were set out in Article 7 ICTY and Article 6 ICTR:

“1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of superior responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.”

According to this article, both the commission of a crime referred to in the Statute and the omission to prevent or punish the commission of a crime referred to in the Statute may lead to individual criminal responsibility. The omission set out in paragraph 3 reflects the command responsibility principle, which in the ICC Statute is included as a separate provision. The ICC Statute limited its provision concerning individual criminal responsibility to the modes of participation where the perpetrator either commits or in some other way participates in the commission of the crime. The omission to prevent or punish the perpetrators of a crime was left for Article 28.

Accordingly, Article 25(3) of the ICC Statute provides that the jurisdiction of the Court for holding persons individually responsible for crimes committed covers situations where a person:

“(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.”

While individual criminal responsibility in theory is clearly different from command responsibility, there are situations in which the distinction between the two is not easily discernible. By way of example, this can be the case where a superior, who is on or in the vicinity of the crime scene at the time crimes are being committed, remains inactive in relation to the perpetrators of the crime. Support may be found for the prosecution of the superior for encouraging the act as a mode of participation. Depending on the circumstances, the command responsibility doctrine may also be applied. The lack of consistency in the application of the command responsibility doctrine that is of interest to this study is in many cases caused by the proximity of some modes of liability to superior responsibility. The modes of participation that are of specific relevance to the subject-matter of the present study will be discussed in more detailed in subsequent chapters, in particular in Chapter 5.3.2 on Joint Criminal Enterprise and in Chapter 5.3.3 on aiding and abetting.

2.4.2 Command responsibility

The Statutes of the ICTY and the ICTR include provisions of command responsibility that for the relevant parts are identical. These are included in Articles 7(3) and 6(3) respectively:

“The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

The Akayesu Judgement\(^9\) of the ICTR was the first decision in which one of the \textit{ad hoc} tribunals had to address the command responsibility doctrine. In the two earlier decisions rendered by the ICTY, the Tadić Judgement\(^90\) and the Erdemović Judgement,\(^91\) the accused were not charged with command responsibility, nor did their positions make any considerations as to their liability under the command responsibility doctrine necessary. Tadić himself physically committed the crimes charged or assisted others in the commission of crimes. He was not considered to be acting from a position of superior authority.\(^92\) The same is true for Erdemović, who carried out the orders of his superiors.\(^93\) Accordingly, the Akayesu Trial Chamber had primacy in considering command responsibility as a basis for criminal liability before an international court for the first time since the Second World War.

Considering paragraph 3 of the provision on individual criminal responsibility, the Trial Chamber noted the various elements of command responsibility. It pointed out that there were differing views concerning the \textit{mens rea} of the superior and concluded that command responsibility should not be a form of strict liability. In order to incur responsibility, there had to be at least very serious negligence on the part of the accused. The Trial Chamber did not state what exactly the threshold should be in this regard. The other point addressed by the Trial Chamber was the question whether Article 6(3) should be applicable to both civilian and military superiors. The application of the principle to civilians was considered “contentious” and was to be considered on a case by case basis.\(^94\) Accordingly, it did not set a precedent as to how the doctrine should be applied.

In its legal finding the Trial Chamber found that there was an insufficient basis to hold the accused responsible under Article 6(3). In a few sentences the Trial Chamber considered the elements that had to be fulfilled in order to incur responsibility under the command responsibility provision. It noted that under Article 6(3) a superior-subordinate relationship was one of the fundamental elements of command responsibility. There was evidence that showed such a relationship between the accused and the \textit{Interahamwe}, the armed local militia,

\(^{92}\) \textit{Akayesu}, TC Judgement, paras. 714 et seq.
\(^{93}\) \textit{Erdemović}, TC Sentencing Judgement, paras. 10 and 14-15.
\(^{94}\) \textit{Akayesu}, TC Judgement, paras. 487-491.
but because this relationship had not been alleged in the indictment, the Chamber did not consider the responsibility of the accused under this provision any further.\(^{95}\)

Looked at in a chronological order, the subsequent case decided by the *ad hoc* tribunals was the *Kambanda* case before the ICTR.\(^{96}\) The judgement was based on a guilty plea by the accused, in which he admitted guilt under Article 6(3). The Trial Chamber refrained from elaborating on the interpretation of the principle and did not refer to the considerations of the command responsibility doctrine by the *Akayesu* Trial Chamber. Interestingly, the accused thus admitted to his being responsible on the basis of a principle which had not yet been explained or interpreted by either tribunal.

It lasted until November 1998 before the ICTY in the *Čelebići* case elaborated on the command responsibility doctrine and discerned its elements, which have to be met in order for the accused to be held liable. These elements were very similar to those identified in the Commentary to Article 86(2) of Additional Protocol I.\(^ {97}\) The elements as identified by the *Čelebići* Trial Chamber have subsequently been referred to by the Trial Chambers in all other cases that have dealt with superior responsibility, as well as by the Trial Chambers of the ICTR. The elements introduced in the *Čelebići* judgement, together with the elaborated interpretations in subsequent judgements, serve as a good reference to the present interpretation of the command responsibility doctrine by the international courts.

The essential elements were found to be the following:

“(i) the existence of a superior-subordinate relationship;
(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.”\(^ {98}\)

The elements may best be divided into objective and subjective elements, often referred to as *actus reus* and *mens rea* respectively. The objective elements of command responsibility can

\(^{95}\) Ibid., para. 691.
\(^{97}\) Pilloud, op. cit., paras. 3543-3547.
\(^{98}\) *Čelebići*, TC Judgement, para. 346.
be found in subparagraphs (i) and (iii) of the definition, while the mens rea is the knowledge requirement of the superior, as laid down in subparagraph (ii).

2.4.2.1 Actus reus

In establishing when and where a superior-subordinate relationship exists between the accused and the perpetrator of the relevant crime, the Čelebići Trial Chamber pointed to several factors relevant to this relationship. It was recognised that in order to establish a superior-subordinate relationship, the accused must have been in a position of authority.99

What was not defined, however, was the level of authority that the superior needs to have in order to incur superior responsibility, if any.

The position that the accused occupied could be either one of formal authority or a position that officially had not been established, but could de facto exist in a situation where, for example, a conflict had caused the normal societal or hierarchical structures to break down or at least temporarily to cease being applicable. It was thus established that merely a lack of formal authority could not render the command responsibility doctrine inapplicable.100

However, a de facto position is as such not enough to incur command responsibility, but has to be substantiated by showing that the superior exercised control over his subordinates. On the other hand, a similar qualification is required of the de jure superior, as it has been established that the fact that a person exercised authority formally does not suffice to prove command responsibility. The Čelebici Appeals Chamber stated that, “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.”101

The further assessment that has to be made is, thus, whether the superior had actual ability or powers to control the perpetrators of the crime, or as the recognised standard now states ‘effective control’ over the persons committing the crimes.102

99 Ibid, para. 354.
100 Ibid.
102 Čelebići, TC Judgement, para. 378.
The *de jure* – *de facto* discussion is obviously closely related to the question whether also civilians may incur command responsibility.\(^{103}\) As stated by the *Kordić* Trial Chamber: “A formal position of authority may be determined by reference to official appointment or formal grant of authority.”\(^{104}\) All military positions are usually clearly defined and follow a formal, hierarchical structure and, accordingly, a military commander will operate from a *de jure* position of authority. Where it is argued that a person exercised *de facto* superior authority, the person will have been a military official who had not formally been appointed to the position but because of the circumstances did have the authority and effective control over other persons. In the alternative, the *de facto* superior could be a civilian who in the specific situation had a position of superior authority from which followed his liability as a superior for crimes committed by his subordinates. While, as mentioned above, the Trial Chamber in *Akayesu* held that the application of the command responsibility doctrine to civilians was contentious, the *Čelebići* Judgement and subsequent decisions have determined that the rule that civilians can be held liable under the superior responsibility doctrine cannot be considered controversial. Support for this view was found in post-Second World War jurisprudence.\(^{105}\)

Article 28 of the ICC Statute on the responsibility of commanders and other superiors further confirms the present view that also civilian superiors may incur responsibility under the command responsibility doctrine. The ICC Statute distinguishes between military commanders and civilian superiors by dividing the article into two paragraphs, each provision dealing with one category of superiors. Nevertheless, both military and civilian superiors should be in a position of ‘effective control’, a notion that was also referred to in the *Čelebići* Judgement. However, Article 28 includes a qualification regarding the two groups of superiors. While the military commanders should exercise ‘effective command and control’, the other group needs to have acted from a position of ‘effective authority and control’. The underlying idea seems to be the same as that applied by the *ad hoc* tribunals. Article 28 makes no explicit reference to *de jure* and *de facto* superiors, but determines the applicability of the article to “[a] military commander or person effectively acting as a military commander,” which clearly enough expresses the possibility of *de facto* superiors being held responsible as superiors. The same is true for the second group of superiors, which is described as “superior

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103 See Chapter 4 *infra*, for a more detailed discussion.
104 *Kordić and Čerkez*, TC Judgement, para. 419.
105 *Čelebići*, TC Judgement, paras. 359-363.
and subordinate relationships not described in paragraph (a).” This paragraph (b) creates a possibility to hold civilians, who have not been appointed to a formal position of superior authority, responsible as a superior for crimes committed by their de facto subordinates.

The other objective element of the definition elaborated by the Čelebići Trial Chamber stated that command responsibility would arise where the superior failed to prevent the crimes from taking place or failed to punish the perpetrators of crimes already committed. The fact that a person exercises superior authority over his subordinates means that he has an inherent duty to keep his subordinates from carrying out illegal acts and to take measures where they have done so, in order to maintain order and discipline. Further, with regard to the element of a failure to prevent or punish, the Blaškić Appeal Judgement drew the following, rather obvious conclusion: “The failure to punish and failure to prevent involve different crimes committed at different times: the failure to punish concerns past crimes committed by subordinates, whereas the failure to prevent concerns future crimes of subordinates.” 106 The issue at stake was whether the failure to punish could be ‘a separate head of responsibility’ or whether it was a sub-category of the superior’s liability for failure to prevent. The Appeals Chamber considered that a superior could be held responsible solely on the basis of his failure to punish and that finding him so responsible was not dependent on whether he had also failed to prevent crimes. 107

The Čelebići Trial Chamber pointed out that a failure on the part of the superior cannot amount to strict liability, liability in all cases regardless of whether the superior in fact had a possibility to prevent or punish the crimes. 108 The definition recognises that a superior can be expected to take the necessary and reasonable measures to prevent or punish crimes by his subordinates. Accordingly, in the opinion of the Blaškić Trial Chamber, “it is a commander’s degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator.” 109 It has also been recognised that a determination in abstracto of the meaning of the terms ‘necessary’ and ‘reasonable’ is not desirable and should be done separately for each case. 110

107 Ibid., paras. 78-85.
108 Čelebići, TC Judgement, para. 383.
110 Čelebići, TC Judgement, para. 394.
With regard to this specific issue, the case law of the *ad hoc* tribunals has developed in a different direction compared to the Draft Code of the ILC, which suggested that the responsibility of a superior should be restricted to situations where the superior had the “legal competence to take measures.” The cases before the ICTY referred to above established that where the superior had the ability, be it informal, to prevent or punish, there should not be a threshold to holding a superior liable for his failure to take measures. The ICC Statute, on the other hand, corresponds to the definitions of the *ad hoc* tribunals in this regard, referring to necessary and reasonable measures without mentioning the legal competence of the superior.

2.4.2.2 Mens rea

Liability under the command responsibility doctrine as interpreted by the Čelebici Trial Chamber arises only where the superior knew or had reason to know that his subordinates were going to or had committed crimes.

i) Actual knowledge

There seems to be little controversy around the knowledge requirement of the definition, as far as the actual knowledge of the superior is concerned. It has been broadly recognised that the evidence that the superior knew about crimes being planned or crimes having been committed can be both direct and circumstantial. A list of the indicia that may be used to establish that the superior knew of the crimes, drawn up by the Commission of Experts Established pursuant to Security Council Resolution 780 (1992) in its Final Report, was applied by the Čelebici Trial Chamber and was referred to in several other cases. At the

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113 The following indicia were listed in paragraph 58 of the Final Report:
   (a) number of illegal acts;
   (b) type of illegal acts;
   (c) scope of illegal acts;
   (d) time during which the illegal acts occurred;
   (e) number and type of troops involved;
   (f) logistics involved, if any;
   (g) geographical location of the acts;
   (h) widespread occurrence of the acts;
same time, the Čelebici Judgement followed the Final Report also in concluding that there cannot be absolute responsibility on the part of the superior and, accordingly, if there is no direct evidence of the knowledge, it may not be presumed but must be based on circumstantial evidence. However, the Trial Chamber in the Aleksovski Judgement held that, “[A]n individual’s superior position per se is a significant indicium that he had knowledge of the crimes committed by his subordinates.”114 This supports the view that although the superior position alone is not enough to prove the superior’s actual knowledge of the crimes, the evidence that will have to be brought forward in order to prove superior responsibility may vary depending on the position of authority and level of responsibility of the superior.115

The views expressed by the ICTY on the actual knowledge of the superior reflect the present interpretation of the issue. The ICC definition lacks further provisions on how actual knowledge by the superior should be established.116

ii) Imputed knowledge

The Statutes of the ad hoc tribunals have clearly laid down that where the superior did not know about the crimes being committed, he can also be held responsible if he ‘had reason to know’ that crimes by his subordinates were going to be or had been committed. Nevertheless, the meaning of the ‘had reason to know’ has remained unclear in relation to other standards of knowledge, most significantly the ‘should have known’ standard, as laid down in Article 28 ICC.117 Differing views were presented in the judgements of the two ad hoc tribunals.118 In particular with regard to this discussion it is worth keeping in mind the fact that the ICC Statute had been adopted before any of the judgements relevant to the superior responsibility discussion had been rendered. Although it is not clear what role the ICC Statute may have played in the decision-making process of the Trial Chambers, the judges were at least aware

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115 Kordić and Čerkez, TC Judgement, para. 428.
116 In the only case in which the ICC has addressed responsibility under Art. 28, the Bemba case, Pre-Trial Chamber III did not at this stage examine the interpretation of the provision in any detail. See Prosecutor v. Jean Pierre Bemba Gombo, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, Case No. ICC-01/05-01/08-388, 3 March 2009.
117 Van Sliedregt 2003, op. cit., pp. 159-164.
118 See the discussion in Chapter 5.2.1 supra.
of the different definition in the ICC Statute from that applicable to the ad hoc tribunals in this regard.

The Čelebici Trial Chamber started out from the assumption that a superior may not have known of the crimes being committed by his subordinates. However, if he himself had remained blind to information which would have given him the knowledge, had he wanted to, the superior could in the opinion of the Chamber not be excluded from superior responsibility.¹¹⁹ In order to establish a correct interpretation of the ‘had reason to know’ provision, consideration was given to Additional Protocol I, Article 86(2) of which provides that superiors can be held responsible “if they knew or had information which should have enabled them to conclude in the circumstances at the time” that their subordinates were about to commit or had committed crimes. As interpreted by the Trial Chamber and confirmed by the Appeals Chamber, this provision should be understood to mean that:

“[A] superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.”¹²⁰

While not explicitly stated by the Čelebici Trial Chamber, the Appeals Chamber concluded that ‘had reason to know’ effectively means the same as ‘had information which should have enabled them to conclude’, the latter however expressing the content of the provision more clearly.¹²¹ The Kordić Trial Chamber concluded that therewith the stricter ‘should have known’ standard was rejected.¹²² While both the Blaškić Trial Chamber¹²³ and the ICTR Trial Chambers in the Akayesu¹²⁴ and Kayishema and Ruzindana¹²⁵ Judgements expressed views differing from that expressed in the Čelebici Judgement, it seems that the Appeals Chambers decision in Čelebici settled the ‘had reason to know’ issue.

¹¹⁹ Čelebići, TC Judgement, para. 387.
¹²⁰ Ibid., para. 393.
¹²¹ Čelebići, AC Judgement, para. 232.
¹²² Kordić and Čerkez, TC Judgement, para. 435.
¹²³ Blaškić, TC Judgement, paras. 309-332.
¹²⁴ Akayesu, TC Judgement, para. 489.
With regard to the relationship between the ‘had reason to know’ standard pursuant to Article 6(3)ICTR/7(3)ICTY and the ‘should have known’ standard, as applicable to military commanders under Article 28 ICC, it might be of help to sum up and highlight some of the views expressed by the ad hoc tribunals when discussing the mens rea standard: 1) The ‘should have known’ standard equals negligence;\(^{126}\) 2) the ‘had reason to know’ standard does not equal negligence;\(^{127}\) and 3) “criminal negligence is not a basis of liability in the context of command responsibility.”\(^{128}\) Considered together, these findings do not provide any clarity about the two standards. If negligence cannot result in liability under the command responsibility doctrine and if the ‘should have known’ standard expresses negligence, only ‘had reason to know’ or a higher standard could be used in cases concerning command responsibility. If this is the case and the ICC standard for military commanders is considered stricter, i.e., setting a lower threshold for a conviction, than the ‘had reason to know’ standard,\(^{129}\) the ICC will have to define what the ‘should have known’ standard implies for the purposes of the cases before the court. In Blaškić support was expressed for the application of the ‘should have known’ standard and the Kayishema and Ruzindana Judgement favoured a distinction between military and other superiors. While these judgements favoured an interpretation that would be closer to the ICC provision, the prevailing interpretation by the ad hoc tribunals shows that the relationship between the ‘had reason to know’ standard and that of the ICC provision is not yet settled. A useful comparison between the ‘had reason to know’ standard in comparison with the knowledge standard of the ICC Statute – ‘knew, or consciously disregarded information which clearly indicated’ – as applicable to other superiors, i.e., civilian superiors, has not been made by the ad hoc tribunals.

2.5 Conclusion

The present chapter has laid out the basis for the principle on command responsibility both in treaty law and as an accepted doctrine in international law. As the codification of the principle took place relatively recently, in Additional Protocol I, the application of the principle has relied heavily on the customary law character of the doctrine. Several post-Second World War cases, most importantly the Yamashita case, convicted superiors on the basis of the command

\(^{126}\) Blaškić, TC Judgement, para. 332.
\(^{127}\) Čelebići, AC Judgement, para. 241.
responsibility principle before the principle had been codified by international treaty. Some of the cases show that the elements that form part of the doctrine today were applied in a similar manner to the application at the ad hoc tribunals. On the other hand, in relation to other cases that have been referred to as proving the application of command responsibility in the period after the Second World War, it is doubtful whether brought before an international court or tribunal today, these accused would or should even be prosecuted under the command responsibility provision.

While there is an ongoing debate regarding the emergence of international customary law, in particular concerning rules of international humanitarian law, the ad hoc tribunals accepted the customary law status of the command responsibility principle, at the same time confirming the applicability of the doctrine under the jurisdiction of these tribunals. The constitutive elements of the principle as defined in the Čelebići case were essentially the same as those formulated in the Commentary to the Additional Protocols, and as there seems to be no disagreement as to the necessity of these elements for the application of the command responsibility principle, it is likely that also these elements are part of international customary law. Establishing the superior-subordinate relationship, the mens rea and the failure to prevent or punish the perpetrators of the crimes have shown to be essential for the existence of the command responsibility doctrine as a basis for criminal liability.

Herewith the basis is set for a further elaboration of more specific aspects of the application of the doctrine in the following chapters. While there is agreement among those presently and previously applying the principle as to its most fundamental elements, the existing treaty provisions, customary law and case law have still not reached the stage of general agreement in relation to certain aspects of its application.