The command responsibility doctrine in international criminal law and its applicability to civilian superiors
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CHAPTER 3 COMMAND RESPONSIBILITY IN ARMED CONFLICT

3.1 Introduction

It is generally recognised that there are two forms of command responsibility resulting in criminal liability, both mentioned in the previous chapter. The first form of responsibility is the direct responsibility of superiors for orders to commit breaches of international law.\textsuperscript{131} The second form is the superior responsibility \textit{strictu sensu}, the criminal responsibility for omitting to prevent or punish subordinates who are about to commit or who have committed crimes under international law. Both forms of command responsibility, however, originate from the general responsibility of command inherent in the positions of military commanders within the armed forces and their duty to control their troops.

In his widely consulted article on command responsibility from 1973, Parks submitted that looked at from a historical perspective, the concept of command responsibility developed along two paths, one covering the general responsibility of command, just mentioned, and another path encompassing the criminal responsibility of the commander. At the same time he made an interesting submission, stating that either “(a) the natural development of the former would lead to inevitable inclusion of the latter” or “(b) there was in fact an intertwining of the development of the two from the outset.”\textsuperscript{132} He further submitted that, “[T]he development of an international standard was incidental in nature, occurring only where states manifested such conduct as to make it apparent that no satisfactory municipal standard was to be applied, and the other parties to the conflict were in a position to impose what was considered to be an appropriate international standard on culpable commanders of the offending state.”\textsuperscript{133}

Although Parks did not go into an analysis of what exactly is meant by this general responsibility of command, in the conclusion to his article he noted that, “[A]ccepting the position of commander, an officer accepts massive responsibility – responsibility to see that his troops are fed, clothed, and paid; responsibility for their welfare, morale and discipline; responsibility for his unit’s tactical training and proficiency; responsibility for close coordination and cooperation with adjacent and supported or supporting units; and

\textsuperscript{131}This form of superior responsibility has been mentioned both in international case law and by international legal scholars. See Čelebići, TC Judgement, para. 333; and L. Zegveld, \textit{Armed Opposition Groups in International Law: The Quest for Accountability} (PhD Dissertation, Utrecht University 2000) p. 229.


\textsuperscript{133} Ibid., pp. 2-3.
responsibility for accomplishment of his mission.” Almost ten years later Eckhardt asked what ‘command criminal responsibility’ is, and pointed out that this term refers specifically to the criminal responsibility of the commander. Most importantly, he noted that it is not the same as the general responsibility of command, referring to Parks. These authors, both of them military officers, argued that there is this general responsibility of command that is certainly connected with ‘command criminal responsibility’ and is involved in the history of the command responsibility doctrine, but is a different concept with different implications for the commander.

As command responsibility is a doctrine under international criminal law, most of the literature only concentrates on the command responsibility that leads to criminal liability. Considering the fact that not much attention has been given to the concept of the general responsibility of command that does not involve criminal liability it is of interest to elaborate on this concept and to determine whether the acceptance of general responsibility of command as being a part of the command responsibility doctrine possibly influences the applicability of the doctrine. The thesis of the author is that the origin of the doctrine in general command responsibility explains why the command responsibility doctrine lends itself more easily to the prosecution of military commanders and why the applicability of the doctrine in relation to civilian superiors is limited.

The present chapter explores the general responsibility of command as a military concept. It refers to the concept as general command responsibility, to distinguish it from command responsibility *stricto sensu* – command responsibility for a failure to prevent or punish crimes by subordinates under international criminal law. For the purposes of establishing the meaning of general command responsibility, two concepts have to be defined – command and responsibility. First, the chapter discusses various aspects of the concept of command. Secondly, a distinction will be made between role responsibility and liability responsibility. The subsequent section elaborates on general command responsibility and the fact that it does not constitute liability responsibility. Then the moral component of command responsibility will be discussed. Finally, the link will be made between general command responsibility and command responsibility under international criminal law.

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134 Eckhardt, op. cit., p. 4.
3.2 The concept of command

3.2.1 Introduction

According to ancient Chinese military thinking, war was to be appraised in terms of five fundamental factors, the first of which was moral influence. By moral influence was meant, “[T]hat which causes the people to be in harmony with their leaders, so that they will accompany them in life and unto death without fear of mortal peril.”\textsuperscript{135} In order to attain such harmony, strict discipline was needed, and was therefore considered as “a basis for all military action.”\textsuperscript{136} Strict discipline is the military virtue of an army, and in the words of Van Creveld: “[S]ince necessity is not for every private to judge, discipline is the general’s way to impose necessity on his troops.”\textsuperscript{137} In order to exercise the art of war, the armed forces need to be led by commanders who can enforce discipline. This fundamental principle has stayed throughout history, despite the development of technology and the changing strategies used to win wars. The fact that an army needs a structure of responsible command was not even altered by the change from war belonging to the province of art to war being considered as a science, from the end of the 19th century onwards.\textsuperscript{138}

The size of the armed forces and the weaponry and technology used in battle have differed, but the logics behind having “officers whose function is to lead or direct and men whose job is to kill and be killed”\textsuperscript{139} have not changed, at least not with regard to states’ armed forces. An exception to the hierarchical military structure was mainly offered by the medieval armies that were made up exclusively of ‘equal’ officers, knights, but at least in principle also these armies were commanded by a commander in chief.\textsuperscript{140}

While the command structure as an established and efficient system is still recognised by state armed forces, it is increasingly recognised that in so-called ‘new wars’,\textsuperscript{141} which are not fought as classic conflicts between states, the fighting units are less dependent on structure,
discipline and chains of command.\textsuperscript{142} In these ‘new wars’ the combating parties taking part in the conflict may, except for regular armed forces, be paramilitary organisations, mercenaries and local militias.\textsuperscript{143} The less strict structures of such organisations are said to have changed the way wars are conducted and to have caused increasing numbers of violations against the laws of war.\textsuperscript{144} Rather than having a clear chain of command, these organisations seem to be under the direct command of an individual, as opposed to a state or a political grouping.\textsuperscript{145} That some authors refer to ‘new wars’ is by no means a statement that such conflicts constitute a novelty, but are rather referred to in these terms because they represent the typical, most frequent type of conflict of the last decades.\textsuperscript{146} While the fighting units may be structured in a different way in these types of conflicts, this is not to say that command is completely absent.

For the purposes of this study in general and this chapter in particular, command as a unique phenomenon of military fighting units is elaborated. While the point of departure is command as a function of the regular armed forces, this is not to say that command must contain the same elements or features in all armed groups.

3.2.2 Definition of command

The assumption that a commander is a military officer who exercises command raises the question as to what exactly command means. A definition of command can be found in the Glossary of Terms and Definitions of the North Atlantic Treaty Organization (NATO Glossary), in which the term command has been given five different meanings: 1) “The authority vested in an individual of the armed forces for the direction, coordination and control of military forces”; 2) “An order given by a commander; that is, the will of the commander expressed for the purpose of bringing about a particular action”; 3) “A unit, group


\textsuperscript{143} An example of a conflict in which all these groups took part in the fighting is the war in the former Yugoslavia. See Born and Verweij 2001, op. cit., p. 24.

\textsuperscript{144} Ibid., pp. 24-25.

\textsuperscript{145} Ibid., p. 24.

\textsuperscript{146} Kaldor argued that ‘new wars’ are not entirely new, as they show similarities with pre-modern war in Europe, but that they are new because they “take place in the context of the disintegration of states” as opposed to the old wars that “were linked to the rise of the modern nation-state and were state-buiding.” See Kaldor 2005, op. cit., pp. 492-493.
of units, organization or area under the authority of a single individual”; 4) “To dominate an area of [sic!] situation”; 5) “To exercise command.”

It is the exercise of command, in conjunction with the authority vested in an individual of the armed forces for the direction, coordination and control of military forces that will be considered here. The exercise of command, as part of military conduct, means to lead a military organisation towards achieving a military goal. Military conduct comprises many functions – manoeuvre, firepower, intelligence and military information, protection and logistics. The exercise of command is an additional function that links and integrates the other functions. Where this is successful, there will be more synergy in the conduct of the forces, which in turn means an increase in military power. Thus, not only command, but effective command is essential for a successful operation, or for attaining the desired goal.

The need for command depends on the complexity of the army and “increases with the sophistication of the forces.” Van Creveld has identified two main responsibilities of command, the first being the task to ensure the availability of food, sanitation and other necessities without which the army cannot operate. The second responsibility of command includes the “gathering of information and the planning and monitoring of operations”; in other words, everything that is related to the carrying out of the assigned mission by the armed forces.

The function of war that Van Creveld calls command consists of command, control and communications together. In other words, the exercise of command is a process that includes several elements. While Van Creveld calls them command, control and communications, the NATO definition identifies direction, coordination and control as the relevant elements of the same process. The Dutch Army in Militaire Doctrine talks about direction, decision making and control.

149 Ibid.
150 Ibid., p. 1.
151 Militaire Doctrine, LDP 1 (The Hague, Doctrinecommissie van de Koninklijke Landmacht 1996) p. 79.
153 Ibid.
154 Ibid., p. 1.
Van Creveld has described the process of command as follows:

“There is, in the first place, the gathering of information on the state of one’s own forces – a problem that should not be underestimated – as well as on the enemy and on such external factors as the weather and the terrain. The information having been gathered, means must be found to store, retrieve, filter, classify, distribute, and display it. On the basis of the information thus processed, an estimate of the situation must be formed. Objectives must be laid down and alternative methods for attaining them worked out. A decision must be made. Detailed planning must be got under way. Orders must be drafted and transmitted, their arrival and proper understanding by the recipients verified. Execution must be monitored by means of a feedback system, at which point the process repeats itself.”

The same process is well illustrated in *Militaire Doctrine* as consisting of three intertwined circles, all containing one of the elements. The commander is to ensure that action is taken or that his unit refrains from taking action, in order to reach the desired goal. He also motivates and leads subordinates towards taking action. At the same time he has to make informed decisions and control his unit.

### 3.2.3 Levels and types of command

In order to ensure an effective process of command, command is exercised on different levels. Four general levels of command have been identified, these being: policy command, strategic command, operational command and tactical command. On the level of policy command, command is exercised by state leaders. Command on this level relates to the commission and withdrawal of the armed forces as well as to making policy decisions on the objectives aimed at. At the strategic command level, the highest military commanders draw up a plan to achieve the objectives set out on the policy level. Commanders belonging to the operational command level are senior military officers who are responsible for the implementation of the military plan at the actual scene of the war. Commanders on the operational level give orders to commanders on the tactical command level, who in turn exercise direct command over the troops.

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157 Ibid.
The levels of command are sometime referred to using slightly different terms. The Dutch Army uses the term High Command for the highest and Battle Command for the lowest command level. These are said to correspond to strategic command on the one end and tactical command on the other. While differing from the earlier terminology, Battle Command means direct command on the level of the soldiers carrying out an operation.\textsuperscript{158}

In addition to the general levels of command, there are a number of other types of command, which focus on the function exercised or a geographical area, rather than the level of command in terms of the hierarchy of the armed forces. These may overlap with the levels of command identified.

In particular on the operational and tactical command levels, the terms operational control and tactical control are also interesting. According to the NATO Glossary, control in this respect has the following meaning: “That authority exercised by a commander over part of the activities of subordinate organizations, or other organizations not normally under his command, which encompasses the responsibility for implementing orders or directives. All or part of this authority may be transferred or delegated.”\textsuperscript{159} As compared to command, control here involves a more specific, more limited authority than where the commander exercises command on the same level. Control is authority that is delegated to a certain commander.\textsuperscript{160}

### 3.2.4 Commanders

While the perception of a ‘commander’ may have changed over time, there are studies that point to the “[c]ommonality of traits and behaviour” of military commanders, regardless of the period or place in which they operate.\textsuperscript{161} According to an ancient description of a good commander, that is someone who is “temperate, self-restrained, vigilant, frugal, hardened to labour, alert, free from avarice, neither too young nor too old, indeed a father of children if possible, a ready speaker and a man with a good reputation.”\textsuperscript{162} All good characteristics combined in one man, seemed to be the ideal. This picture of an ancient commander does have some things in common with the ideal commander of today, although a number of the

\textsuperscript{158} Militaire Doctrine, op. cit., p. 105.
\textsuperscript{160} Militaire Doctrine, op. cit., pp. 83-84.
\textsuperscript{162} Van Creveld 2000, op. cit., p. 44.
characteristics listed, like that of being a father of children, are not to be considered as requirements for a good commander today.

Present-day commanders should, preferably, also have certain qualities: vision and intelligence, originality, insight and an ability to assess a situation, intuition, initiative, integrity and exemplary behaviour. The overarching quality is the commander’s leadership quality. The way in which the commander acts and exercises his leadership has great influence on the morale of his troops and on the functioning of those troops in difficult, highly dangerous circumstances. The commander should have the courage to take risks and resolute decisions, as military operations are characterised by being unique every time and by the lack of sufficient information, which would allow for the optimal decision. It is considered better to take a quick decision that may be risky than waiting for more information and ideal solutions.

The commander exercises command at the various levels mentioned above. He makes the decisions and exercises control at his level. At the lower levels a commander might be able to do this on his own, but where the troops are larger in number or command is exercised at a higher level, the commander is assisted by staff.

3.2.5 Staff officers

A significant distinction is that between military officers who issue direct orders and those belonging to the staff – commanding officers and staff officers. For an accurate picture of the difference between the two, the following summary of the structure of the armed forces is very illustrative:

“Armies generally adopt a hierarchical structure, divided horizontally into formations, e.g. army, corps, division, and so on. Each formation consists of a specific number of operational fighting units whose activities are directed and coordinated by particular headquarters (HQ). The formation commander, a general, commands the formation but generally delegates command of the headquarters to a deputy chief of staff. Various sections of the formation HQ assist the commander in making his plans and provide a variety of support to the fighting units in carrying them out. The commander of each of these sections is a member of the

163 Dutch: ‘inzicht en inschattingsvermogen’.
164 Militaire Doctrine, op. cit., pp. 117-120.
165 Ibid., pp. 114 and 116-117.
166 Leidraad Commandovoering, op. cit., p. 50.
167 Militaire Doctrine, op. cit., pp. 121-122.
‘staff’. The term ‘staff’ can have a narrow or broad meaning. The former refers to those senior officers who form the commanders’ think-tank, while the latter covers the much larger group of people who work in the various departments that these officers head up. The staff is therefore the nerve-centre of the HQ.\footnote{I. Bantekas, \textit{Principles of Direct and Superior Responsibility in International Humanitarian Law} (Manchester, Manchester University Press 2002) p. 75 n. 25.}

Accordingly, staff can be divided into the broader concept of ‘staff’ and the narrower concept of ‘staff officers’. In the past, when the concept of staff was still being developed, the division of labour between staff officers and commander, i.e., officers with ‘line duties’, was not that rigid, in particular where operations in the field were carried out.\footnote{Van Creveld 1985, op. cit., p. 141.} Nowadays, the staff has an established position. A commander is assisted by staff in the command process at the control stage. The staff provides support in organising, directing and coordinating the troops about to or already carrying out an operation. It makes a contribution at the decision-making stage and in bringing about the plans made.

Staff officers in general do not have command authority, but using the wording of Keijzer: “[A]lthough they may not be authorized to intervene directly, staff officers have often so much power that in practice their advice has the weight of executive orders. Their rank, together with their position as a member of the commander’s staff and the knowledge and the derived distinction inherent in that position, give them an authority which cannot be ignored.”\footnote{N. Keijzer, \textit{The Military Duty to Obey} (Amsterdam, Vrije Universiteit 1977) p. 40.} According to Keijzer, the fact that junior staff officers may sometimes issue orders in the name of their commanders to higher officers and communicate with members of superior staff, thereby bypassing the commander, implies that the principle of the unity of command has lost some of its importance. However, with regard to some operational functions, a linear command structure is still preferred.\footnote{Ibid., pp. 40-41. As an example of such an operational function, Keijzer mentions “the officer on duty on the bridge of a warship.” While other officers may outrank him, only the commander of the ship is superior to him as long as he acts within the scope of his tasks. Ibid., p. 41.}

There are also examples of cases where it is difficult to establish the exact position of an officer as being a staff officer or an officer commanding a certain formation.\footnote{For example, in the \textit{Halilović} case, the ICTY Trial Chamber was not able to clearly establish what the role of the accused was at a certain point in time. See \textit{Prosecutor v. Sefer Halilović}, Indictment, Case No. IT-01-48-I, 12 September 2001, para. 1, and \textit{Halilović}, TC Judgement, para. 111.}
3.2.6 The human factor in the command process

Command structures and the responsibilities at each stage can in theory be well defined. However, to completely understand the process of command in warfare and the realities on the ground is less straightforward, in particular without practical experience of the armed forces. Keegan pointed out that warfare in one society may differ significantly from warfare in another society.\textsuperscript{173} The differences have an impact on the traits and behaviour of the commanders,\textsuperscript{174} and on the command process itself. There is the lack of very specific statistical data on the information flow within the command system.\textsuperscript{175} Another, no less important reason, is the difficulty of grasping the information that is informally or tacitly communicated within the command system. In addition to that, there is the commander himself and the mental processes in his head that are unknown to the outsider, and there is “the tone of voice with which a report is delivered, or an order issued; the look on a man’s face, the glimmer in his eye, when handed this or that message.”\textsuperscript{176}

Osiel has pointed out that, “When the superior wants his troops to engage in atrocities, he has a strong interest in letting them get or appear to get out of his control, for their conduct can then no longer be easily attributable to him. He can accomplish this in many ways, such as by brutalizing them shortly before contact with the enemy, then letting their hostile emotions carry them away in what will appear to be the heat of combat.”\textsuperscript{177} This illustrates the fact that command structures can be described and the responsibilities of the commander defined, but that the command process in reality is a human activity, which depends on the performance and the qualities of the persons taking part in it.

For historians who want to reconstruct past events and come to understand the outcome of an event, the human factor is, in a way, a hindrance. It is difficult to know exactly why certain events took place, because the reasons for certain decisions were only known to the commander himself or to persons within the command process. For international criminal tribunals which have to establish whether one particular military officer was responsible for certain acts, an understanding of the command process is essential. Problems occur in particular where an omission or permission on the part of the commander has to be

\textsuperscript{174} Ibid.
\textsuperscript{175} Van Creveld 1985, op. cit., p. 262.
\textsuperscript{176} Ibid., pp. 262-263.
established. Understanding the informal communication within the command system and the mental processes of the commander can be crucial, but is very difficult to establish.

The concept of command can be made even more complex if one considers the other factors on which the process of command is dependent. The effective exercise of command may depend on: the motivation of the men; the character of the conflict – conventional warfare, war on land, at sea, in the air; weaponry; forces in the field or at base; the level at which command takes place – tactical level to policy level; psychological factors – effective presentation of information within the command system.  

What is easily overlooked when considering the exercise of command is that the authority held by a commander, in combination with his personality and personal charisma, constitutes one of the critical factors that enable ordinary people to carry out their tasks in war, even where orders include killing. The authority serves to make the soldier overcome “an inner and usually unrealised resistance towards killing a fellow man” and to ensure the carrying out of tasks in general. It is held that even if some human beings kill other human beings from time to time, the ordinary man, soldier, wants to avoid killing as much as possible. According to Grossman, who based his findings largely on earlier research into the behaviour of soldiers in war, the soldier – the subordinate – in war is faced with a Catch-22 situation:

“If he overcomes his resistance to killing and kills an enemy soldier in close combat, he will be forever burdened with blood guilt, and if he elects not to kill, then the blood guilt of his fallen comrades and the shame of his profession, nation, and cause lie upon him.”

The order by and authority of a commander constitute triggers to carry out an act which the subordinate in his private life would normally refrain from doing. But most interestingly, it

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180 Ibid., p. 29. The citation is a part of a quote by S.L.A. Marshall. Also Keijzer mentions “the general inhibition against killing other human beings” as a value existing in most civilizations. This value is in sharp contrast to armed military action that expects the soldier to be prepared to kill and even to be killed. See Keijzer, op. cit., pp. 32-33.
181 Grossman, op. cit., p. 87.
182 Ibid.
183 Ibid., p. 143. The impact of authority on the willingness of people to inflict even lethal harm on other people was studied by Milgram. For a practical example of what impact authority can have on a soldier, Milgram used an interview, published in the New York Times in 1969, in which a participant in the My Lai massacre explained how he was able to kill civilian men, women and children. See S. Milgram, *Obedience to Authority* (New York, Harper Collins Publishers 2004) pp. 179-189.
is not the position of authority, as such, that influences the subordinate. Grossman listed four subfactors that are crucial when an order that meets with moral or other resistance has to be carried out: 1) “proximity of the authority figure to the subject”, i.e., the subordinate; 2) “respect for the authority figure”; 3) “intensity of the authority figure’s demands”; and 4) “the authority figure’s legitimacy.”\textsuperscript{184} Where the leader is present, where the subordinates identify themselves with the leader and respect him, where the leader clearly communicates what is expected of the subordinates, and where the leaders expresses legitimate, lawful demands, the chances of obedience are the greatest.\textsuperscript{185} Keegan came to a similar conclusion, his findings being based on research into successful military leadership in the past. According to him, there are five imperatives of command: the imperative of kinship, the imperative of prescription, the imperative of sanction, the imperative of action and the imperative of example.\textsuperscript{186} Successful command is dependent on a bond of kinship between the commander and his followers; on the ability of the leader to speak directly to his subordinates, to raise their spirits and to inspire them; on the courage to impose sanctions; on the commander knowing when to act; and on the commander being present or sharing the risk that he imposes on others.\textsuperscript{187}

It is not just the position of authority of the commander that makes the subordinates comply with orders to carry out violent acts, inherent in the conduct of war. The way he communicates, his personality and charisma will influence the decision of the subordinate/soldier and the whole command process.

3.2.7 Command and management

A comparison is sometimes made between command and management. A manager is someone who initiates and steers the activities of people within an organisation. He/she is a superior who makes decisions on the work that has to be done, how it is to be done and by whom. A manager should also be able to explain why something has to be done. The manager exercises direct authority over some of the employees, at the same time being dependent on the performance of the subordinate employees.\textsuperscript{188} To this extent there are important

\textsuperscript{184} Grossman, op. cit., p. 144.
\textsuperscript{185} Ibid., pp. 144-145.
\textsuperscript{186} Keegan, op. cit., pp. 315-338.
\textsuperscript{187} Ibid.

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similarities between the tasks and responsibilities of the civilian superior in a peace situation and those of a military commander.

The similarities, however, do not justify a comparison of command with management. Van Creveld has said the following on this issue: “Although modern works on military matters are as fond of comparing command with management as their predecessors were of comparing war with science, management and command are by no means identical. Quite apart from the problem of motivation, the difference between them consists precisely in the greater uncertainty governing war, the most confused and confusing of all human activities.”

Managers are dependent on several external factors, such as the economic, demographic, technological and political environment in which the organisation operates.

Thus, a manager has to ensure the desired result despite some uncertainties. This uncertainty, however, cannot be compared with the uncertainties of war, as these come on top of the uncertainty that is present in all peacetime human activity. “War is the realm of uncertainty; three quarters of the factors on which action in war is based are wrapped in a fog of greater or lesser uncertainty.”

Comparing command responsibility with purely civilian activities is difficult for the same reason. One author considered that civilians are subjected to superior-subordinate relationships in the same way as servicemen are, in the tax authorities – taxpayer relationship, for example.

However, the issue of command is then not being considered. In the words of Van Creveld: “For the exercise of command to be possible there must be somebody to obey orders.”

Although used in a different context, the same holds true here. If command is to be exercised, there has to be someone to give the order to. While the relationship between the tax authorities and taxpayers is certainly one of constraint, the taxpayer is not under command, nor subjected to the disciplinary measures only present in the armed forces. According to Holmes Armstead: “The commander both assigns roles and duties as a command function and enforces criminal law upon the military personnel under his or her command. This is purposefully a powerful relationship and is in many ways anathema to the constitutionally

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193 Van Creveld 1985, op. cit., p. 50.
guaranteed individual liberty we so jealously guard through the many institutions of civil society.”

A commander, unlike a manager, “must be able to compel obedience in a fashion totally distinct from organizations recognized in civil society.” The commander is faced with teaching and training soldiers to obey authority, including orders to kill other human beings. However, the training of the subordinates and the obedience must not only serve the purpose of enabling the subordinates to carry out violent acts, but also of compelling the subordinates to refrain from acting, in particular acting in violation of the law. The commander has to be able to use his authority to make subordinates obey his orders not to commit crimes – subordinates who are trained to fight and kill, who may be subjected to fear for their lives, and who may look differently at the world, due to their war experience. This constitutes a substantial difference as compared to the manager in a purely civilian peacetime superior-subordinate relationship.

That being said, there are organisations in which civilians are organised in hierarchical structures resembling that of the military. One example of such an organisation is the police. While the responsibilities of the police commander may correspond to those of the military commander more than those of the purely civilian manager, the most essential differences, still, are the situations in which they operate and, at least to a certain extent, their mandate and authority.

3.3 The concept of responsibility

Familiarity with the command responsibility doctrine presupposes the understanding of the kind of responsibility that is of concern in that specific context. The term ‘responsibility’, however, can be seen to cover a multiplicity of distinguishable “senses”, or in other words, the meaning of the term depends on the way and the context in which it is used. There are several ways in which these ‘senses’ can be divided in order to distinguish what is meant by the term in various situations. Hart speaks of ‘role responsibility’, ‘causal responsibility’,
‘liability responsibility’ and ‘capacity responsibility’. 199 For the purposes of the present study, the role responsibility and the liability responsibility deserve further consideration. Role responsibility will be explored more in detail in section 3.4 of this chapter. In short, role responsibility arises, “[W]henever a person occupies a distinctive place or office in a social organization, to which specific duties are attached to provide for the welfare of others or to advance in some specific way the aims and purposes of the organization.”200

First, however, attention should be paid to the meaning of responsibility and how it differs from liability, or as Hart calls it – liability responsibility.201 More specifically, as the study concerns the doctrine of command responsibility, the general concept of responsibility in relation to criminal liability is of interest here.202 It should also be mentioned that the relationship between the concept of responsibility and liability is explored from the point of view of the individual, not from the perspective of other entities, such as states or corporations.203

According to Duff: “We should understand responsibility as a matter of being responsible (i.e. answerable) for something, to some person or body, within a responsibility-ascribing practice. Liability – to criminal punishment or to moral blame – is grounded in responsibility.”204 In clarifying the distinction between responsibility and liability, Duff considers that, “The relationship between responsibility and liability can be simply stated: responsibility is a necessary but not a sufficient condition of liability. I am liable to conviction or blame for X only if I am responsible for X; but I can be responsible for X without being thus liable.”205 For the purpose of illustrating the correctness of this relationship, it is warranted to cite Duff’s example:

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199 Ibid., pp. 211-212.
200 Ibid., p. 212.
201 Ibid., pp. 215-222.
202 Accordingly, in examining the concept of liability, the author will not consider other forms of liability, such as liability to pay taxes or liability to pay maintenance for one’s children. See R.A. Duff, Answering for Crime – Responsibility and Liability in the Criminal Law (Oxford, Hart Publishing 2007) p. 19.
205 Ibid., p. 20.
“If I wound an assailant, this being the only way to ward off his unlawful attack on me, I have a justification for what I do – a moral justification that saves me from moral condemnation for injuring him, and a legal justification that should save me from a criminal conviction for wounding. In offering this justification, I do not deny responsibility for using violence on V, or for V’s wound. I admit responsibility for that action and its result, as something that I had reason not to do (for we always have reason not to use violence on fellow human beings, and to avoid acting in ways that will injure them). I thus admit that I must answer for my action and its result: I must answer morally to anyone whose business it is, and legally in a criminal court. But, I claim, I have an exculpatory answer: that my action was, in its context, justified as an act of self-defence.”

To be answerable does not imply liability, but both Hart and Duff recognise that in some contexts and to some people responsibility and liability may be almost equivalent. However, Duff explicitly advocates a distinction between the two notions, in order to recognise criminal responsibility - liability - “as a special species of responsibility.”

Concerning liability responsibility in relation to omissions, Ashworth explains why there is and why it is understandable that there is a certain amount of hesitation regarding such responsibility. Criminal law normally prohibits certain acts, which means that as long as one refrains from committing such acts, there will be no criminal responsibility. There is usually no obligation to act. In relation to omissions, however, the criminal law imposes a duty to act. That refraining from acting can lead to criminal responsibility seems to be the exception to the rule. According to Ashworth, there are three reasons as to why that exception should be maintained. First, while a prohibition can be quite clearly defined, a crime of omission can only be defined in vague terms. Whether a failure to act constitutes a crime of omission will be more dependent on the circumstances of the case, which in turn will create more uncertainty regarding the legal obligations of persons. Secondly, because of the uncertainty, the prosecutorial discretion in such cases will be heavily relied on, which may be said to weaken the rule of law. The scarcity of cases concerning omissions in Swedish case law is said to confirm the prudence observed or hesitation by prosecutors in pressing charges in such cases. The third reason for being careful when criminalizing omissions is related to the duty to act that is imposed on a person and to the feeling of a “moral distinction between

206 Ibid., p. 21.
208 Duff, op. cit., p. 36.
210 Jareborg, op. cit., p. 181.
211 Ashworth, op. cit., pp. 45-46.
212 Jareborg, op. cit., p. 186.
acts and omissions.” These two factors led to a need for a greater justification for imposing criminal responsibility for omissions. While there is a moral distinction between an act and omissions, this is not to say that omissions cannot be morally reprehensible. Usually omissions would be considered less serious than acts, but not necessarily without moral blame. The duty to act that an omission imposes is clearly considered as even more problematic. Normally a person is at liberty to “pursue one’s own ends” and if a person is asked to do something, a recognition or compensation will usually be expected in exchange. Where an omission leads to criminal liability, this liberty of a person is restricted. As stated earlier, this thought is exceptional in criminal law, which normally imposes a duty on persons to refrain from acting in a certain way.

In some situations, however, demanding action may be less intrusive than a prohibition of a certain act. Fletcher asked whether statutes that require an act are fundamentally wrong, and gave the example of laws prohibiting homosexual sodomy, on the one hand, and promoting a culture of safe sex, including an affirmative duty to use condoms, on the other. It may be claimed that, if enforced, the law prohibiting an act intrudes more upon the liberty of an individual than the duty to act in a certain way. The answer to Fletcher’s question should arguably be no. While liability for an omission is exceptional in criminal law, there is not necessarily something fundamentally wrong about it.

One way of limiting the possibilities of criminalising omissions has been to limit this liability to certain categories of people – to those who hold a position in which other people are particularly dependent on their good care or in which they most obviously can avoid danger or crime. This idea that there is a duty to act in certain positions is recognised in several national

213 Ashworth, op. cit., pp. 45-46. Interestingly, the ICTR in the Rutaganira case (guilty plea) found that there could be participation in a crime against humanity through complicity by omission. The Trial Chamber pointed out that “determining omission under Article 6(1) of the Statute is a more complex task than showing omission under Article 6(3).” In order to determine liability for an omission under Art. 6(1), the Chamber found it necessary to consider three factors: 1) “Did the Accused have authority and did he choose to not exercise it?”; 2) “Did the Accused have a moral authority over the principals such as to prevent them from committing the crime and did he choose not to exercise it?”; and 3) “Was the Accused under a legal duty to act which he failed to fulfill?” The Chamber answered all questions in the affirmative, but clearly wanted to provide a well grounded finding where liability was based on an omission. See Prosecutor v. Vincent Rutaganira, Judgement and Sentence, Case No. ICTR-95-1C-T, 14 March 2005, paras. 61-84.
214 Ibid., p. 46.
216 Ibid.
218 Ibid.
systems and is known by the term *Garantenstellung*.\(^{219}\) It is, however, not always clearly defined which categories of people could be in such a position or which omissions can constitute a crime. The hesitation to hold those to whom even *Garantenstellung* applies liable for omissions is proven by the fact that considerably lesser sentences are imposed for crimes of omission in national legal systems.\(^{220}\)

The idea of *Garantenstellung* proves the proximity of Hart’s role responsibility to liability responsibility. While role responsibility can be either moral or legal, or neither of the two, by applying the *Garantenstellung* theory to people with role responsibility, an omission on their part may lead to liability responsibility. This thought is interesting when considering how the responsibilities of commanders (general command responsibility) relate to liability under the command responsibility doctrine, which will be discussed in the following sections.

### 3.4 ‘General command responsibility’ as role responsibility

Although admittedly a generalization, Hart expressed the view that, “[W]henever a person occupies a distinctive place or office in a social organization, to which specific duties are attached to provide for the welfare of others or to advance in some specific way the aims or purposes of the organization, he is properly said to be responsible for the performance of these duties, or for doing what is necessary to fulfil them. Such duties are a person’s responsibilities.”\(^{221}\) This definition of role responsibility corresponds to the responsibilities of military commanders. By accepting a position of command, the military officer is bound by certain obligations that are set out by the armed forces for which he engages in military activities. Inherent in his position as a commander is the authority to demand certain action from his subordinates. In short, it is his duty to exercise command. As explored above, to command is to carry out a number of tasks, to direct, to coordinate and to control his subordinates or the task that has to be performed in order to attain the expected goal.\(^{222}\)

A military commander holding a certain position of command is aware that the justification for his position is the general command responsibility that the person accepts when embarking upon his or her duties. Significant in respect of general command responsibility is that it


\(^{221}\) Hart 1968, op. cit., pp. 212.

\(^{222}\) See Chapter 3.2 *supra*. 

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cannot be delegated. A certain position carries with it a certain responsibility within the military organisation. While a commander may give certain responsibilities to his subordinates, who may themselves be commanders at a lower level, the delegation of his own responsibilities would mean that the responsibility moves from that specific superior to someone at a lower level. That is not the case. It is this basis for leadership within the armed forces that explains why command criminal responsibility may, at least theoretically, be applied at all levels, not just at the lowest or the highest level.

General command responsibility comes with the position to which a commander is appointed or otherwise acquires. But what makes commanders comply with their general command responsibility? Does general command responsibility, comprising of the duty to exercise command and its possible consequences, have its origin in a legal norm or are there other motives for complying with a commander’s general command responsibility?

The explanatory memorandum to the Dutch International Crimes Act notes that the origin of the responsibility/liability of superiors is to be found in the laws of war, but also in the fact that military commanders bear a great responsibility for the behaviour of soldiers under their command, including a corresponding supervisory task and authority in relation to their subordinates. This observation points to the issue at stake in the present section. The history of command responsibility as a part of the laws of war is well documented. But as the explanatory memorandum rightly points out, the general responsibility of commanders is a fact, a given. Commanders have a duty to exercise command and acknowledge that they may be blamed if something goes wrong. That is how it is and how it always has been. General command responsibility is essential for the exercise of effective command, and as mentioned previously, effective command is invaluable for attaining a military goal.

Parks argued that, “Command has always imposed responsibility; yet few instances are recorded prior to the end of World War II where that responsibility was either criminal or

224 See the Explanatory Memorandum to the Dutch International Crimes Act [Regels met betrekking tot ernstige schendingen van het international humanitair recht (Wet internationale misdrijven), Memorie van toelichting], Tweede Kamer, vergaderjaar 2001-2002, 28337, nr. 3, p. 30 (“De figuur van de aansprakelijkheid van de meerdere vindt zijn oorsprong in het oorlogsrecht en in het gegeven dat militaire bevelhebbers een grote verantwoordelijkheid dragen voor – en een daarmee corresponderende toezichthoudende taak en bevoegdheid hebben ten aanzien van – het gedrag van de aan hun bevel onderworpen militairen.”).
225 See Chapter 3.2.2 supra.
international in nature.”

History shows that command responsibility was neither a criminal law concept, nor an international law concept for the greatest part of history. It is obvious that general command responsibility was a basic requirement for the conduct of war before becoming either a criminal law or an international law concept. According to Eckhardt: “Prior to World War II, legal standards for commanders were practical articulation of the accepted practice of military professionals. This customary law expressed soldier’s [sic!] standards which were born on the battlefield and not standards imposed upon them by dilettantes of a different discipline.” Accordingly, legal norms were drawn from the ‘accepted practice of military professionals’ and expressed ‘standards born on the battlefield’. This suggests that before legal standards were developed, the armed forces functioned on the basis of accepted practice and battlefield standards. In Eckhardt’s view, it was the practicality of these rules that “led to their general acceptance which in turn was responsible for their codification.”

Parks has concluded that as long as there has been war, “[T]he commander has received the glories of victory and the burden of defeat, whether deserved or not.” The picture sketched here applies to the commander-in-chief, but interpreted to the commanders at all levels of the armed forces, this statement points to an obligation that all commanders have in attaining the goals set out for them. Unless they do so they will receive “the burden of defeat.” But where does the obligation stem from?

Eckhardt mentioned that the practice and the standards on the battlefield constituted rules, but in his view these were rules that only later developed, through acceptance and codification, into legal rules. In his book The Concept of Law, H.L.A. Hart states that if one can say that someone “has or is under an obligation,” this implies “the existence of a rule.” According to Hart rules impose obligations, “[W]hen the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.” General command responsibility fits this description. It is in the interest of everyone within the armed forces, or a part thereof, that the commander acts in conformity with his general command responsibility, in order to attain the expected goal or to maintain stability among the

227 Ibid., p. 3.
228 Ibid.
230 Militaire Doctrine, op. cit., p. 103.
232 Ibid., p. 84.
troops. General command responsibility also corresponds to Hart’s two additional characteristics of an obligation. A rule imposes an obligation when the rule is considered “necessary to the maintenance of social life or some highly prized feature of it.”

Examples of rules that are thought of in terms of an obligation are those which “restrict the free use of violence” or “require honesty or truth or require the keeping of promises, or specify what is to be done by one who performs a distinctive role or function in the social group.” Such an obligation is most certainly applicable to commanders. The third characteristic of a rule imposing an obligation, according to Hart, is that, “[T]hese rules may, while benefiting others, conflict with what the person who owes the duty may wish to do.” Also the third characteristic corresponds to the reality of a commander. For example, the commander knows that he has an obligation to carry out a certain operation, while that may put himself and his subordinates in danger.

Based on this analysis, the obligation felt by commanders to act in accordance with their general command responsibility is imposed by a rule. The next question is what kind of rules are we talking about? What kinds of rules form the origin of the concept of command responsibility? Hart argues that, “[T]here are many types of social rule and standard lying outside the legal system.” In his view:

“Such non-legal rules may be distinguished and classified in many different ways. Some are rules of very limited scope concerning only a particular sphere of conduct (e.g. dress) or activities for which there are only intermittent opportunities, deliberately created (ceremonies and games). Some rules are conceived as applying to the social group in general; others to special sub-groups within it, either marked off by certain characteristics as a distinct social class, or by their own choice to meet or combine for limited purposes. Some rules are considered to be binding by virtue of agreement and may allow for voluntary withdrawal: others are thought not to have their origin in agreement or any other form of deliberate choice.”

General command responsibility would fit the description of such social rules as it applies to a specific group of people, the armed forces. One could also see the similarities regarding some rules not being based on agreement or deliberate choice, bearing in mind the Dutch view that

234 Ibid.
235 Ibid.
236 Ibid., p. 165.
237 Ibid., p. 166.
command responsibility has its origin in the ‘fact’ that commanders are expected to behave in a certain way.

Instead of calling the basis for the concept of command responsibility a social rule, could it not be argued that general command responsibility was born out of tradition, that it is a habit, after all general command responsibility as described in the previous section has always been part of the conduct of war? Following the reasoning by Hart, there are some reasons why the origin of general command responsibility cannot be called a military habit or tradition. A social rule distinguishes itself from a habit in that deviation from a social habit does not result in criticism, while deviation from a social rule does. We have established that inadequate performance by a commander leads to some form of consequence, a sanction, or in other words, criticism. With regard to a social rule, this criticism is considered justified. Another distinguishing feature of a social rule compared to a social habit is that it is considered as a general standard of behaviour within the group. While a habit, like going to the cinema every week, can be observed as a standard by an outsider, a social rule, like the rules of a game, is considered by the social group as “a general standard to be followed by the group as a whole.”

In a similar way, command responsibility cannot be considered a tradition or a social habit, as the whole system of a responsible command is accepted by the armed forces as a whole.

3.5 The moral component of command responsibility

Signs of a moral component of general command responsibility can be found when observing how the behaviour of medieval commanders is pictured. It is said that they fought in person and thereby filled a moral function. Van Creveld has established that the knightly ethos among commanders prevailed as long as commanders continued to fight in person, and only changed with the development of the weaponry used to fight the wars. When killing took place from a distance and made the engagement of the knight/the commander in the fight impractical and unnecessary, the knightly ethos declined. That seems like a natural development, considering the fact that the commander’s personal involvement in the battle diminished when being distanced from the immediate impact of the war and the suffering

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238 Ibid., pp. 55-56.
239 Van Creveld 1985, op. cit., p. 50.
240 Ibid., p. 51.
241 Ibid., pp. 52-53.
caused by the war. However, it is still considered that the remnants of chivalry have an impact on a commander, who is “a representative of a proud military profession lineage and tradition.”\textsuperscript{242} This knightly ethos, together with considerations of military necessity and humanity, is part of the decision making and the responsibilities, the general command responsibility, of the modern commander.\textsuperscript{243} One should keep in mind that only the commander-in-chief and high-level, strategic commanders, were distanced from the front when weaponry developed. Commanders at a lower level, in particular at the technical or the battle-command level, are still involved in carrying out a task together with their units.\textsuperscript{244} The remnants of chivalry still have an impact on all commanders, regardless of the level at which the commander acts.

The Dutch Army seems to confirm this in its book \textit{Militaire Doctrine}, where it discusses various qualities demanded of a commander, in particular integrity and exemplary behaviour. It points out that these qualities are necessary for upholding morale and discipline among the troops and that by showing the subordinates the high demands he expects of himself he wins respect. Interestingly, the book states that these high demands are based on professional and personal values and norms. The examples mentioned are honesty, loyalty and moral courage.\textsuperscript{245} Thus, a good commander is not guided solely by necessity or by pragmatic and functional considerations. It is recognised that there are professional values, moral values, or as some may say, the remnants of the knightly ethos, that should influence the behaviour of the commander.

Could one say that the concept of command responsibility is at least partly based on a moral rule? Hart found that in “all societies which have developed a legal system”\textsuperscript{246} there are some social rules “to which supreme importance is attached, and which in spite of crucial differences have many similarities to its law.”\textsuperscript{247} These are moral rights, moral duties or moral obligations, or simply moral rules. “Moral obligations, like most legal obligations, are within the capacity of any normal adult. Compliance with these moral rules, as with legal rules, is taken as a matter of course, so that while breach attracts serious censure, conformity to moral

\begin{footnotes}
\item[242] Eckhardt, op. cit., p. 3.
\item[243] Ibid.
\item[244] \textit{Militaire Doctrine}, op. cit., pp. 105-106.
\item[245] Ibid.
\item[246] Hart 1984, op. cit., p. 166.
\item[247] Ibid.
\end{footnotes}
obligation, again, like obedience to the law, is not a matter for praise except when marked by exceptional conscientiousness, endurance, or resistance to special temptation.”

In the previous section arguments were presented in support of the idea that the origin of the concept of command responsibility can be found in a social rule. Does this social rule attach such supreme importance that one could speak of the concept of command responsibility as a moral obligation? Hart argues that moral rules vary in different societies and at different times. At least the general command responsibility shares some characteristics of a moral rule. It has what Hart calls “immunity from deliberate change.” General command responsibility cannot be “changed or repealed by deliberate enactment.” Armies have always functioned on this basis and there seems to be no workable alternative to the concept. However, this is a practical rather than a moral issue. There is no obvious moral reason why an army could not function on another basis than on the basis of general command responsibility, if such a system was functional. On the other hand, the concept of command responsibility shares some characteristics of a moral rule in that moral blame will only be a consequence of the commander’s action where he had a choice in acting differently. It is also true that a failure to act in accordance with the general command responsibility may lead to blame of a moral character. However, as set out earlier in this chapter, the consequences may also be of another character, disciplinary measures, for example.

The origin of the concept of command responsibility may not be a moral rule, as described by Hart, but there is a moral component to it. Various armies and some commanders explicitly point out that general command responsibility encompasses more than formal rules and requirements. Command is also exercised with one’s heart. Van Baarda refers to the US Field Manual which covers command responsibility and describes it as being, “[T]he ethical and legal obligation a commander assumes for the actions, accomplishments, or failures of a unit.”

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248 Ibid., p. 167.
249 Ibid.
250 Although this resembles a legal rule, Hart identifies some distinctions between a moral and a legal rule also with regard to this issue. This discussion is restricted to the characteristics of a moral rule.
251 See Leidraad Commandovoering, op. cit., pp. 54-56; and Van Egmond, op. cit., pp. 60-61. See also the interview with Colonel Van Harskamp, Annex I.
The moral element of command responsibility is emphasized in situations where the commander does not incur liability responsibility because the omission on his part is not criminalized, but where the ‘feeling’ remains that what the commander has done or has failed to do was wrong, at least morally wrong. The moral element may be illustrated by two examples:

1) Some soldiers commit rape. An investigation shows that the commander failed in training his subordinates in accordance with the requirements of the armed forces. International case law has not found commanders liable under the command responsibility doctrine for a failure to train their subordinates. Nonetheless, the general command responsibility is breached and the consequence is that, at the very least, the commander is morally blamed for the crimes committed.

2) Guerillas fighting for a warlord commit war crimes, while members of a peacekeeping mission who are aware of this do nothing to stop them. The commander failed to take action, but he is not prosecuted. There may have been a lack of mandate, the elements under the command responsibility doctrine may not be fulfilled or there may be some other reason why the commander is not criminally liable. However, there is a moral responsibility on the part of the commander to prevent war crimes, which is felt as being independent of his legal duty to act.

For the commander, the same obligation arises regardless of whether he could be held criminally responsible or not. He should take all necessary and reasonable measures to prevent war crimes from being committed, also where his part is limited to training his subordinates to act in compliance with the laws and customs of war, or where he only has de facto power to prevent crimes. Even in situations where the inaction of the commander is supported by legal norms, there may be a moral responsibility to act. The foregoing shows that the moral component of command responsibility is inextricably bound up with the rest of the concept.

254 Example taken from Van Baarda, op. cit., p. 100.
3.6 The relationship between general command responsibility and command criminal responsibility

If the concept of command responsibility has its origin in the practice of military professionals and battlefield standards, and constitutes a social rule of the armed forces, where is the link to the legal concept of command responsibility? In other words, what is the relationship between social and legal rules? Following the reasoning of Hart, a primitive society may exist relying solely on such social or primary rules. When that society gets more complex there is a need for secondary rules, which are, in fact, rules familiar to a legal system.255 The origin of command responsibility lies in the primitive army which acted on the basis of a responsible command. As pointed out earlier, legal standards applicable to commanders and to the conduct of war in general were first accepted as applicable standards and then codified. This fits well within the ambit of Hart’s role responsibility. Hart argues that responsibilities “may be either legal or moral or fall outside this dichotomy.”256 The responsibilities may, thus, also be social. Where general command responsibility could lead to disciplinary or other legal sanctions under national military law, society had obviously reached a high level of complexity which required legal sanctions for a breach of the responsibilities. In international law, Article 1 of the Hague Regulations, which provides that one of the qualifications for being a belligerent is “to be commanded by a person responsible for his subordinates,”257 confirmed the legal normative basis for general command responsibility.

As was found in the previous sections, general command responsibility corresponds to role responsibility. Where role responsibility is considered a legal responsibility, the consequence of not fulfilling the responsibilities may be liability responsibility. Applying this theory to general command responsibility, a very specific breach – the failure to prevent subordinates from committing crimes or to punish those subordinates who have committed crimes – may lead to command criminal responsibility. That specific breach has become subjected to liability responsibility. This, however, does not mean that other breaches by the commander of his general command responsibility led to liability responsibility. The general command responsibility as role responsibility may also encompass moral responsibilities. It may be the

256 Hart 1968, op. cit., p. 213.
257 Regulations Respecting the Laws and Customs of War on Land, annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, op. cit.
moral responsibility of a commander to inform the parents of the death of their son during a military exercise. A failure by the commander to do so does not fall under the command responsibility principle and the consequence of this failure may not at all be liability responsibility. Another example can be taken from the failed protection of important architectural and cultural sites in Iraq during the armed conflict that commenced in 2003. The level of violence, the lack of planning and staffing and not having set cultural protection as a priority led to the inability of the commanders on the ground to provide protection at various cultural sites. Although it is considered that commanders have a responsibility in this regard as part of their general command responsibility, the protection of cultural property in Iraq was not one of the priorities of combat. At least the commanders on the ground could not be more than, perhaps, morally responsible for this failure.

Section 3.3 found that criminal law is generally very careful when the liability responsibility concerns an omission. As command responsibility concerns the omission of a commander to prevent or punish subordinates from committing or for committing international crimes, the same hesitation as in national criminal law should apply when finding liability responsibility under the command responsibility doctrine. The general command responsibility of commanders implies certain duties in relation to their subordinates, which gives reason to hold that the theory of Garantenstellung can be applied to military commanders. This makes it more easily justifiable to hold a category of people criminally liable, but as mentioned in Section 3.3, even where Garantenstellung applies, the scarcity of case law in some states indicates that liability for crimes of omission should be charged and imposed with great care.

As such, this is nothing new. In the 1970s Röling, who served as a judge in the Tokyo Tribunal, pointed out that an attitude had developed according to which society could forbid acts, and thereby consider them as crimes, but also require action by people, meaning that a lack of action – an omission – could be considered a crime. Having said that, he continued by noting that the question as to how far the criminal responsibility for an omission goes, was a very difficult one to answer. In his Opinion to the Tokyo Judgement, Judge Röling held that the scope of the responsibility for omissions was extensive and that it should be applied with

259 Ibid., p. 119.
care. He considered the Tokyo Judgement to have gone too far, in this respect, extending the responsibility for mistreatment of POWs to all members of the government, while the Japanese government had an established division of labour.\textsuperscript{261} Although this warning was voiced at a time when the principle of command responsibility as a basis for international criminal liability was relatively new, it is – nevertheless – topical as it stresses the importance of finding a balance between the need to prosecute and the need to keep the principle within reasonable, justifiable limits, and also to pay attention to the realities of war, or in other words, a balance between the interests of criminal law and the interests of the commander and the armed forces.

Section 3.2.2 above showed that the purpose of the exercise of command is to ensure that the military goal is reached. With a commander who exercises command, the efficiency of the armed forces is increased. The responsibilities of the commander exist, first and foremost, to make the military organisation run more smoothly. The commander is expected to make decisions and give orders that benefit the military operation. The purpose of this general command responsibility is clearly different from the purpose of and justification for criminal law and punishment, which are described as being twofold. First, criminal law and punishment are a “deserved response to culpable wrongdoing.” Secondly, criminal law is a “necessary institution to deter such wrongdoing.”\textsuperscript{262} The justification for international criminal law seems to be essentially the same. The purpose of having international criminal law can be found in the Preamble to the ICC Statute, where the States Parties express their determination to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole and to contribute to the prevention of such crimes.\textsuperscript{263} Although the ICC Statute may not be perceived of as an international penal code, the preamble gives an impression of what the majority of states consider to be the purpose of international criminal law. If we transfer this thought to the subject of the present study, command responsibility as a part of international criminal law should be applied as a response to culpable wrongdoing and it should serve to prevent international crimes from occurring.


\textsuperscript{262} Ashworth, op. cit., p. 17.

International criminal law expects that the commander is aware of the requirements of the laws of war. This is generally also the case. According to Best, even officers in eighteenth- and nineteenth-century Europe were well aware of the *jus in bello*. The responsibility for observing the *jus in bello* lay almost exclusively with these officers and, accordingly, “it was simply part of their professional ethic and way of life.” Manuals and other materials may have provided the officers with some knowledge of the subject, but the laws and customs of war were mostly “something the young officer picked up on the job, part of the way his elders thought and talked.”

At the beginning of the 21st century, military officers in most countries are being educated in the laws and customs of war, as part of their training as commanders. Also the consequences of committing breaches of the laws and customs of war are being discussed, which includes the subject of command responsibility as laid down in international criminal law. Commanders and military lawyers are the ones who have to make sure that activities of the military forces are exercised in accordance with the laws of war. In addition to that, commanders are bound by national military law applicable to them as well as other codes of conduct. Every military officer, in his role as a commander, on the basis of the nature of his position, must know and must have considered what his responsibilities as a commander imply.

If criminal liability for an omission is to be imposed with care, as suggested by Röling, not only the interests and expectations of international criminal law should be observed, but also the fact that it should be possible to exercise the art of war without constant fear of prosecution. Just as with Garantenstellung in national criminal law, international criminal law should be reluctant to put categories of people in a position which imposes a duty to act.

In general there is an unwillingness or reluctance on the part of governments to prosecute commanders, exactly for this reason. The commander is considered to make a sacrifice and serves the nation in times of war. The main duty of the commander is to bring the military operation to a successful end. In his article on the evolution of command responsibility, Lippman mentioned the Goldman case, which illustrates this reluctance to prosecute. In this case Captain Goldman, a commander during the Vietnam War, “countenanced the rape,

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265 Ibid.
sodomy and murder of two Vietnamese nurses by members of his company. 266 “The court martial determined that Goldman was an exemplary officer and sentenced him to a reprimand and forfeiture of one hundred dollars pay per month for twelve months, an insignificant sentence given the gravity of his crimes.” 267 Lippman rightly criticized the outcome of this case as not reflecting the seriousness of the misconduct. 268 On the other hand, the case reflects the unwillingness to prosecute commanders for omissions in times of war, even where the crimes committed by subordinates were obvious war crimes.

An important role in ensuring that the link between role responsibility and liability responsibility as laid down in the command responsibility doctrine in international criminal law is maintained is logically played by the prosecutors exercising their prosecutorial discretion and by the judges who decide on which issues emphasis should be placed. A reasonable and justifiable application with attention to the reality of commanders and other superiors is dependent on the decision as to whom, to what crimes and when the command responsibility principle is applied.

3.7 Conclusion

If looked at from a military perspective, the command responsibility concept is not, first and foremost, a principle of international criminal law. Command responsibility, or general command responsibility as opposed to criminal command responsibility, encompasses all responsibilities held/exercised by the commander, while criminal command responsibility concerns a very specific basis for sanctioning a commander whose failure to exercise his general command responsibility is connected to the commission of violations of international humanitarian law. In a sense, command criminal responsibility is the very last step of a commander’s general command responsibility.

The present chapter serves as a basis for the subsequent chapters and shows that the general command responsibility as exercised by commanders is something unique to the armed forces. Any application of the criminal command responsibility doctrine to civilians, or an attempt to ‘broaden’ the scope of command responsibility, will be faced with that uniqueness.

267 Ibid.
268 It should be pointed out here that the fact that the commander ‘countenanced’ the crimes committed by his subordinates could be interpreted as permission and, hence, the commander might be charged on the basis of his individual criminal responsibility before any of the international tribunals.
The chapter has illustrated that relationships outside the armed forces are seldom comparable to those brought about by the command exercised in the military context. The responsibilities that are implicitly or explicitly connected to the various levels of command are not necessarily based on legal provisions, but have their basis in tradition and even in moral rules. The fact that this general command responsibility forms the foundation for the functioning of military commanders points to the link between command responsibility as exercised by military commanders and the international criminal law concept of command responsibility. The compatibility of the military concept with the corresponding notion in international criminal law can only be reached if the latter notion takes the reality of the military commanders into account and also serves the purposes of international criminal law. Rules of international criminal law in general, and the criminal command responsibility concept in particular, will only reduce the number of excesses of warfare if they are not experienced as a threat to the efficient and effective conduct of war.