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

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5.1 Introduction

The present chapter addresses the remaining hurdles in the application of the command responsibility doctrine, relevant to all commanders or superiors who may become objects of charges based on command responsibility. In Chapter 3 the author analysed command responsibility in armed conflict and pointed to the unique features of the military commander and the military organisation. Chapter 4 addressed the applicability of the command responsibility doctrine to civilian superiors, based on the outcome of the cases tried before the ad hoc tribunals. Both chapters illustrate that the command responsibility doctrine does not lend itself very easily to the prosecution of civilian superiors. The analysis of certain contentious issues in Chapter 5 is an essential part of demonstrating the limited applicability of the command responsibility in practice, which gives additional support to the view that the doctrine will only lead to a conviction of a civilian superior in exceptional cases.

There are three themes in this chapter which cover the issues most frequently debated in the case law and the legal literature and in relation to which there seems to be the highest degree of uncertainty. First, this chapter discusses the nature of command criminal responsibility. Is the commander/superior who fails to prevent or punish crimes committed by his/her subordinates an accomplice in the crime or should the failure to prevent or punish be considered as a crime of its own? Does either of these approaches satisfactorily describe the role of the commander/superior in the events and the extent to which he is culpable?

While in most cases tried before the ad hoc tribunals it was generally held that a superior convicted under Article 7(3)/6(3) was responsible for the crimes committed by his/her subordinates, more recent judgements, however, show a clear shift in the way the responsibility of the superior is perceived, towards command responsibility as responsibility of its own kind - sui generis responsibility. Considering the variety of ideas both in case law and in scholarly writings, a more detailed analysis of what it is that the superior is held responsible for, is warranted.
Secondly, the chapter discusses the overlap between certain modes of liability that lead to individual criminal responsibility and liability under the command responsibility provision. The modes of liability concerned here are the concepts of joint criminal enterprise (hereafter, JCE) and aiding and abetting, both of which may apply in circumstances similar to those to which command responsibility is applicable. Both case law and literature show signs of inconsistency and uncertainty regarding the distinction between the three concepts and their applicability in relation to superiors’ acts of omission.

The relationship between command responsibility and the modes of liability leading to individual criminal responsibility is not only important when considering when and whether JCE, aiding and abetting or command responsibility should be applied, but also in relation to the question as to whether individual criminal responsibility (as set out in Article 6(1) ICTR/7(1) ICTY/25 ICC) and command responsibility (Article 6(3) ICTR/7(3) ICTY/8 ICC) may be applied cumulatively in relation to the same facts. While the development in the case law has moved towards not allowing ‘cumulative convictions’, this issue still needs consideration, in particular as the attention has moved towards considering the superior position or even established command responsibility as an aggravating circumstance at the sentencing stage of the case.

Thirdly, the nature of the crime underlying the charges of command responsibility will be considered. Those international courts and tribunals which have incorporated a provision on command responsibility in their statutes have not restricted the applicability of the provision to specific crimes, which means that the doctrine should apply regardless of the nature of the crime. Existing case law shows that applying command responsibility in relation to the crime of genocide is rather questionable. The fact that the crime of aggression belongs to the subject-matter jurisdiction of the ICC has raised questions similar to those concerning the applicability of command responsibility in relation to the crime of genocide. As the crimes under the jurisdictions of the various international courts and tribunals vary slightly, the question arises whether command responsibility is applicable only to certain international crimes. What makes the command responsibility doctrine problematic in relation to the prosecution of crimes not qualifying as international crimes?

5.2 The nature of command responsibility
5.2.1 Liability for an international crime

Both national and international criminal law recognise that criminal conduct consists either of an act or an omission.\(^{518}\) That omissions may lead to criminal liability under international criminal law is explicitly set out in the various provisions on command/superior responsibility. It is also recognised in both national legal systems and in international criminal law that criminal responsibility may arise for the perpetration of as well as participation in a crime. The responsibility arising from perpetration is called principal or direct responsibility, whereas participation leads to derivative or indirect responsibility. As set out by Van Sliedregt, direct and indirect responsibility are technical rather than normative terms, as the ‘principal’ who incurs direct responsibility may be less culpable than a ‘secondary party’ who will be indirectly responsible, if the latter is an instigator and does not actually commit the crime.\(^{519}\)

As far as command responsibility is concerned, the subordinates are the perpetrators, the principals, of the international crime for which charges have been laid. The Statutes of the ad hoc tribunals as well as some of their case law give reason for interpreting the superior who failed to prevent or punish the perpetrators as being a participant in the underlying crime, as he/she omitted to prevent or punish the perpetrators.\(^{520}\) For instance, when the Trial Chamber rendered its judgement in the Čelebići case, it found Mucić guilty of, among other crimes, wilful killings as a grave breach of Geneva Convention IV, with respect to murders committed in Čelebići camp. The basis for his responsibility was Article 7(3) of the Statute. The Trial Chamber concluded as follows: “Mr. Mucić is accordingly criminally responsible for the acts of the personnel in the Čelebići prison-camp, on the basis of the principle of superior responsibility.”\(^{521}\)

This way of applying the concept was and still is understandable, both when considering the history of the principle and when reading the international and semi-international statutes in

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\(^{521}\) Čelebići, TC Judgement, para. 775.
which the principle was codified. The historical case always referred to in this respect is that against Yamashita, who was held primarily responsible for the grave and large-scale crimes that had taken place in the Philippines at the time in question. The crimes had taken place and Yamashita was considered to be the main culprit. It would be difficult to sustain that Yamashita was not blamed for the crimes committed and that it was in fact simply his failure in carrying out his duty which justified the conviction and the resulting sentence of capital punishment. The Yamashita case thereby provides support for the line of reasoning of the ad hoc tribunals.

According to Swart, who was a member of the Trial Chamber in the Hadžihasanović case, the structure and formulation of Article 7 ICTY/6 ICTR invite application that holds the superior responsible as a participant in an international crime, where the conditions of the command responsibility provision are fulfilled. However, Swart himself, together with many others, supports the recent ‘development’ of the doctrine, which dissociates itself from the ‘liability for an international crime’ view. The reason for the general change of opinion is related to the biggest downside of that approach - the problems it creates in relation to the principle of culpability. Several authors have challenged the application of command responsibility as liability for an international crime, among them Ambos, who noted that if applied in this way, the superior under the command responsibility doctrine is blamed for the fact that he failed in his supervisory duty, but in addition he is also held liable for the violations carried out by his subordinates. This problem was also noted by Rogers, who was of the opinion that the superior is not to be held responsible for the specific crimes committed by his subordinates. Accordingly, he should not be considered a murderer where others have actually committed the murder. On the other hand, when commenting on the articles relevant to command responsibility of the Additional Protocols, Rogers stated that a commander “becomes liable for a breach committed by a subordinate […].” The hesitation by Rogers does not give a clear answer regarding the character of superior responsibility in international criminal law, which exactly illustrates the situation of the principle in international law at present with regard to this specific point.

525 Ibid., p. 198.
Damaška, whose criticism of the doctrine made a deep impression on both judges and scholars, found that considering the understanding of the culpability principle under national criminal law, the command responsibility doctrine under international criminal law created a gap between the liability of the superior and his guilt.\footnote{526} In other words:

“[A] commander’s liability is divorced from his culpability to such a degree that his conviction no longer mirrors his underlying conduct and his actual \textit{mens rea}.”\footnote{527}

While recognising that not all national systems may contain the same requirements, Damaška firmly opined that:

“[C]onviction for egregious crimes, such as murder or rape, can never result from attribution to a negligent actor of someone else’s wrongdoing.”\footnote{528}

The culpability problem was considered particularly problematic because the ICTY Trial Chamber in \textit{Blaškić} found negligence to be a sufficient \textit{mens rea} standard under the ‘had reason to know’ requirement of Article 7(3).\footnote{529} The Appeals Chamber corrected this interpretation in its 2004 judgement and held, referring to the Čelebici Appeal Judgement, that:

“Neglect of a duty to acquire such knowledge […] does not feature as a provision [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.”\footnote{530}

The points of criticism mentioned above specifically concentrated on the application of the doctrine under Article 6(3) ICTR/7(3) ICTY, as these provisions have been applied in practice. While recognising that the ICC Statute contains a higher \textit{mens rea} standard for civilian superiors, Damaška noted that a ‘should have known’ standard will be retained for

\footnotesize{\begin{itemize}
  \item \footnote{526} Damaška, op. cit., pp. 463-464. See also H.G. van der Wilt, ‘Commentary’, in A. Klip and G. Sluiter, eds., \textit{Annotated Leading Cases of International Criminal Tribunals}, Vol. XIV (Antwerp, Intersentia 2008) pp. 115-122, at p. 120.
  \item \footnote{527} Damaška, op. cit., p. 464.
  \item \footnote{528} Ibid.
  \item \footnote{529} H.G. van der Wilt, ‘Commentary’, in A. Klip and G. Sluiter, eds., \textit{Annotated Leading Cases of International Criminal Tribunals}, Vol. XIV (Antwerp, Intersentia 2008) pp. 115-122, at p. 120.
  \item \footnote{530} \textit{Blaškić}, AC Judgement, para. 62.
\end{itemize}}
military commanders. Of course, the ‘should have known’ standard has so far not been defined by the ICC.

Triffterer, one of the few proponents of command responsibility as participation in the crime, underlines the view that in particular under the ICC Statute, command responsibility is not based on negligence on the part of the superior and, therefore, the superior may very well be held partly liable for the crime committed. Following his interpretation of Article 28, the provision that the superior shall be criminally responsible “as a result of his or her failure to exercise control properly” suggests that the failure of the superior is twofold. In order to become criminally liable, the superior first failed to exercise control and secondly failed to take all necessary and reasonable measures. According to Triffterer, the first failure should fulfil the mental element in Article 30 ICC, “with intent and knowledge.” This approach solves the causality demand, as the crimes would not have occurred without the failure of the superior to control properly, and at the same time the culpability issue. In addition, Article 28 of the ICC Statute could clearly be considered to provide that the superior who fails to prevent or punish his subordinates will be held responsible for the international crimes under the jurisdiction of the ICC. The exact wording is, “shall be criminally responsible for crimes within the jurisdiction of the Court.” In other words, it is in accordance with the letter of the law that command responsibility judgements have found a superior criminally liable for a certain crime under the command responsibility provision of the article.

Interestingly, a very recent example from national law shows that the culpability issue has not constituted an obstacle for implementing Article 28 ICC as a provision which leads to responsibility for the international crime committed by the subordinates. According to the new provision of 11 April 2008 on superior responsibility in Chapter 11 of the Finnish Penal Code, the superior will be held responsible as a perpetrator or for participation in the international crime committed by his subordinates where he fails to exercise control over these persons and where the mens rea requirement and the element of necessary and

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531 Damaška, op. cit., p. 494.
533 Ibid., p. 910.
534 Ibid., p. 919.
535 Ibid., pp. 904-905.
reasonable measures, corresponding to those of Article 28 ICC, were fulfilled.\footnote{536 Finnish Penal Code, Chapter 11, para. 12.} This implementation of the ICC Statute is of much later date than both the German provisions and the \textit{Halilović} case, but seems to have encountered no problems with regard to the issue of the personal guilt of the superior. However, the provision only concerns the failure of the superior to prevent his subordinates from committing the crime. His failure to report the crimes or to submit the matter to the authorities is considered as a lesser crime and the superior will be held liable for an omission to report a crime.\footnote{537 Ibid., para. 13.} This specific example is worth mentioning in that this piece of legislation is based on existing international legal provisions on the principle, and in that it postdates the \textit{Halilović} and the \textit{Hadžihasanović} cases, which were the first to turn away from interpreting command responsibility as the responsibility of a superior for the crime committed by his subordinates.

\textit{5.2.2 An act sui generis}

Where criminal conduct consists of an omission, a differentiation may be made between a genuine crime of omission (\textit{echtes Unterlassungsdelikt}) and commission by omission (\textit{unechtes Unterlassungsdelikt}). Where the commander under the command responsibility doctrine is considered to be liable for an international crime, as in the previous section, the superior commits an act by omission. The present section discusses command responsibility as a genuine crime of omission, an \textit{echtes Unterlassungsdelikt}, where the omission itself constitutes the crime. In the previous section, a slight distinction was noted between the formulation of the command responsibility provisions in the ICTY/ICTR Statutes and that of the ICC Statute. With regard to the discussion on command responsibility as a \textit{crimen sui generis}, this distinction should be kept in mind. The focus will first be on the reasoning of the \textit{ad hoc} tribunals.

Despite the Appeals Chamber’s dismissal of the idea accepted by the Trial Chamber in the \textit{Bagilishema} case that the accused superior could be found criminally responsible under a “third basis of liability” based on gross negligence,\footnote{538 \textit{Bagilishema}, TC Judgement, para. 897; and \textit{Bagilishema}, AC Judgement, paras. 32-37.} the prevalent view since the \textit{Halilović} Trial Judgement has been that command responsibility is a genuine crime of omission. Instead of considering that the superior was a participant in the underlying crime, the \textit{Halilović} Trial Chamber held that what the superior should be held liable for was the failure to prevent or
punish. That the existing jurisprudence of the tribunal found the superior responsible “for the acts of his subordinates” according to the Halilović Trial Chamber:

“[D]oes not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act.”

By reading the discussion on the nature of command responsibility in international law in the Halilović Trial Judgement, it becomes clear that there is admittedly a desire to leave behind the idea of the superior being partly responsible for the crimes committed, but that on the basis of international and national legal provisions and earlier case law, the change of direction was a conscious choice of the Trial Chamber, as such not a necessity. Herewith, the Trial Chamber indirectly recognised that the application of the principle by the ad hoc tribunals in the past was not in contradiction with the principle, which as such was a clever move, because had the Trial Chamber contended that there was a clear recognition of command responsibility as a separate crime of omission, an act *sui generis* in international law, this would have disqualified all earlier decisions of these tribunals on this specific point. The Hadžihasanović Trial Chamber opined that the reason why the ‘object’ of the superior’s responsibility, either the crime resulting from his omission or the omission itself, had never been considered by the tribunal, was that the Halilović case was the first case in which the accused was charged on the basis of command responsibility only. That it has not been done is correct, but it is difficult to see why the ‘object’ could not have been considered earlier, as it has been clear since the Celebići case that command responsibility is not about the superior’s commission of a crime, but about his failure to prevent or punish his subordinates, and that this constitutes one of the elements that have to be proven in order to obtain a conviction.

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539 *Halilović*, TC Judgement, para. 54.
540 Ibid.
541 Compare this reasoning with the *Hadžihasanović* TC Judgement which, while only being the second case to adopt this approach, states that command responsibility “must be conceived as a type of personal responsibility for failure to act.” See *Hadžihasanović*, TC Judgement, para. 2075.
542 See *Hadžihasanović*, TC Judgement, para. 69.
543 It might be concluded that the reason why there was a direct need to consider whether command responsibility is responsibility for the international crime or an act *sui generis* in Halilović, was because the Chamber had to determine a sentence, without having the possibility of using an Art. 7(1) conviction as the basis for the length of the sentence.
On the other hand, the Halilović Trial Chamber was right in holding that there are provisions, most notably Article 86(2) AP I, which do not explicitly state that the superior, when failing to prevent or punish crimes by subordinates, will himself be held responsible for an international crime. The wording of the relevant part of the provision is the following: “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.” The responsibility could be penal or disciplinary, but there is no mention of the superior being held responsible for a certain international crime. Together with a few post-World War II cases which might be said to support the idea that only the failure to prevent or punish, i.e., the omission, is punished under the command responsibility principle, this provision shows that there is some basis for considering the command responsibility principle as a concept which renders superiors criminally liable specifically for their failure to prevent or punish crimes by subordinates. When considering that also national legislation, in particular the German legislation, treats command responsibility as a separate crime of omission, it is understandable that this approach to applying the command responsibility principle has been well received by scholars.544

The most appealing aspect of command responsibility as a separate crime of omission is that the superior is not seen as bearing responsibility for the international crime committed, and the culpability issue is thereby solved. The problem that arose with the Yamashita case concerning the requirement of personal guilt and that has been present ever since gets a satisfactory solution where the superior is only held liable for his own failure to act.545 The concern that “it appears inappropriate to associate an official superior with murderers, torturers, or rapists just because he negligently failed to realize that his subordinates are about to kill, torture or rape”546 is also taken away at the international level, if the appropriateness of the superior’s responsibility can be considered as separate from the culpability issue.

From this it follows that the sui generis approach opens possibilities for imposing sentences that are not dependent on the sentence that would be imposed on the perpetrators of the

546 Damaška, op. cit., p. 466.
crime.\textsuperscript{547} This is clearly to be seen in the \textit{Hadžihasanović} case, where the accused holding superior positions were convicted on the basis of command responsibility only and were sentenced to the most lenient terms of imprisonment in the history of the \textit{ad hoc} tribunals. As mentioned earlier, the Trial Chamber in this case upheld the view of the \textit{Halilović} Trial Chamber that command responsibility should be treated as a crime \textit{sui generis}. It also agreed with the finding in the \textit{Halilović} judgement that the \textit{sui generis} nature of the command responsibility principle allows for “an even greater flexibility in the determination of sentence.”\textsuperscript{548} The accused, Hadžihasanović and Kubura, were sentenced, on appeal, to three and a half years’ and two years’ imprisonment respectively.\textsuperscript{549} Hadžihasanović had failed to prevent or punish cruel treatment during a period of around three months and had failed to punish cruel treatment during a period of about the same length. Kubura, in turn, had failed to punish the plundering of the town of Vareš that took place on 4 November 1993.\textsuperscript{550} The Trial Chamber in the \textit{Orić} case similarly sentenced the accused for his failure to prevent the occurrence of murder and cruel treatment, during a period of almost three months, to two years’ imprisonment.\textsuperscript{551} Compared to a conviction for some form of participation in the murder and cruel treatment during a period of three months or for plundering as a violation of the laws or customs of war, it is obvious that the crime of omission called ‘failure to prevent or punish’ is considered to be less severe than if the responsibility was for the crime committed.

As was suggested above, it is not appropriate to compare the superior who failed to prevent or punish crimes of his subordinates with a murderer or rapist or, in short, the direct perpetrator of the international crime. In addition, as was stated earlier, case law shows that those superiors who have been held responsible solely on the basis of their failure to prevent or punish crimes have been sentenced to relatively short terms of imprisonment. Nevertheless, a conviction of a high-level commander or superior for his failure only unavoidably raises the

\textsuperscript{547} “The terminology of Article 7(1) and (3), however, shows a clear difference between the provisions, in that, under Article 7(1), the commander in our example would be held directly, individually responsible for the offence of ethnic cleansing, whilst, under Article 7(3), he would be deemed responsible, but to an unspecified extent, in respect of the offence committed by his subordinates. His offence under the latter would be failure in his duty as a commander, not murder as a crime against humanity. As he had no direct involvement in the commission of the killings, it may be thought that his share of the liability should be deemed less than if he was charged under Article 7(1).” See B.B. Jia, ‘The Doctrine of Command Responsibility: Current Problems’, \textit{3 YIHL} (2000) pp. 131-165, at p. 143.


\textsuperscript{550} Ibid.

\textsuperscript{551} \textit{Orić}, TC Judgement, para. 782.
question of whether the end result, while perhaps being ‘appropriate’, will also be a satisfactory result. It is a fact that international criminal justice aims at, and the institutions applying it are only capable of prosecuting those most responsible for certain conflicts and crises around that world that are of concern to the international community. Where such high-level superiors, who are chosen for prosecution exactly because of their high rank, are only convicted on the basis of their failure to fulfil their duty as a superior, the question is whether justice is seen to be done.

Additional support for the *sui generis* approach can be found in national criminal law. In their article on the prosecution of international crimes according to German law, Werle and Nerlich pointed out that according to the German Code of Crimes Against International Law, in situations where the superior would have been able to prevent the crimes of his subordinates, the superior will not be prosecuted for an international crime, but for another kind of offence – his failure to perform a duty attached to his position of authority in relation to his subordinates. The omission on the part of the superior is a separate offence from the international crime that was committed by the subordinates.\(^{552}\)

“Gemäß § 13 VStGB werden Befehlshaber und Vorgesetzte bestraft, die vorsätzlich oder fahrlässig ihre Aufsichtspflicht verletzt haben, sofern sie die Straftaten ihrer Untergebenen hätten erkennen und verhindern können. Nach § 14 VStGB machen sich Befehlshaber oder Vorgesetzte strafbar, die Völkerrechtsverbrechen ihrer Untergebenen nicht unverzüglich an die Strafverfolgungsbehörden melden. Wiederum wird dem Befehlshaber oder Vorgesetzten nicht das Völkerrechtsverbrechen selbst, sondern eine Straftat eigener Art zur Last gelegt. Das VStGB bringt damit – anders als Artikel 28 IStGH-Statut – zum Ausdruck, dass das Unrecht, das einem Befehlshaber oder Vorgesetzten bei einer Aufsichtspflichtverletzung oder bei der Nichtmeldung einer Straftat vorgeworfen wird, anderer Art und von geringerem Gewicht ist, als das vom Untergebenen begangene Kriegsverbrechen.”\(^{553}\)

According to Cassese, the German approach seemed “logically and theoretically more correct and also more consonant with general principles of justice (because of its consequences at the level of sentencing),”\(^{554}\) than holding the superior responsible for the international crime itself.

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\(^{552}\) *Bundesgesetzblatt* 2002 I, at 2254, 29 June 2002. The relevant provisions can be found in Sections 3, 13 and 14. A version of the document in English can be found on Professor Ambos’ website, University of Göttingen, [http://lehrstuhl.jura.uni-goettingen.de/kambos/Forschung/doc/VStGB_BGBI_Englisch.doc](http://lehrstuhl.jura.uni-goettingen.de/kambos/Forschung/doc/VStGB_BGBI_Englisch.doc) (accessed 16 July 2009).


\(^{554}\) Cassese 2003, op. cit., p. 206.
Ambos in turn held that, “Article 28 can be characterized as a genuine offence or separate crime of omission (echtes Unterlassungsdelikt), since it makes the superior liable only for a failure of proper supervision and control of his or her subordinates but not, ‘at least not directly’, for crimes they commit.”\(^{555}\) He explained his argument by stating that, “The underlying crimes of the subordinates are neither an element of the offence nor a purely objective condition of the superior’s punishability.”\(^{556}\) This interpretation of Article 28 seems to be in contradiction with the interpretation by Werle and Nerlich, who considered that while the German provisions define the liability as being the responsibility of the failure to act as a separate act, Article 28 provides a different definition. In other words, Werle and Nerlich were of the opinion that while German law provides for command responsibility as an echtes Unterlassungsdelikt, the provision in the ICC Statute does not. This possible contradiction in the reading of Article 28 is interesting. It is likely that these German authors all agree on the desirability of holding the superior responsible for an act of his own instead of the international crime committed, but because of the different perceptions of Article 28 discerned here, the question may be raised as to whether the existing international provisions actually do provide for command responsibility as an act sui generis or whether the desire to interpret the principle as such overrides any strict application of a provision, the formulation of which supports the idea of command responsibility as liability for the crime committed by subordinates.

The opponents of the sui generis approach have mainly found their arguments in the formulation of the doctrine in Article 28, which shows two main differences from the ad hoc tribunal provisions that are of direct relevance in the present discussion. First, there is the phrase “shall be criminally responsible for crimes within the jurisdiction of the Court.” Triffterer has firmly argued that the ICC Statute is very explicit on this point and that superiors cannot therefore be held responsible for another crime, a crime sui generis.\(^{557}\) In the opinion of Triffterer, the fact that some domestic legal systems have adopted this approach is not a sufficient argument to consider command responsibility under the ICC Statute as an act


\(^{556}\) Ibid.

sui generis, because “[i]nternational criminal law […] punishes such conduct only when resulting in the commission of crimes within the jurisdiction of the Court by subordinates.”

Secondly, Article 28 provides that responsibility arises where the crimes were committed by subordinates “as a result of his or her failure to exercise control properly over such forces.” The phrase creates a causal link between the omission of the superior and the crimes, which arguably proves that the superior’s responsibility is based on a form of participation. It may also be asked what international legal basis the sui generis approach rests on. The study of the ICRC on Customary International Humanitarian Law confirms the customary law status of the command responsibility principle in its Rule 153, but discusses the principle as a commander’s criminal responsibility for the crimes committed by his subordinates. As the customary law study was prepared prior to the Halilović case, it does not take into account the crime sui generis approach as developed in that and subsequent cases. On the other hand, had command responsibility as criminal liability for the failure to prevent or punish been established customary law in 2005 when the customary law study was published, the study, which refers to case law, national legislation and military manuals, would have referred to the principle as responsibility for a crime of omission. That this specific interpretation of the principle is established customary law is, thus, doubtful.

It could also be argued that applying the sui generis approach does bring the principle back to its roots as set out in Chapter 3 of this study. When considering command responsibility in its original sense, not as a criminal law principle but as a military concept, it has served as a means to impose discipline throughout the hierarchy of the armed forces. It was in the interest

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559 T. Weigend, ‘Bemerkungen zur Vorgesetztenverantwortlichkeit im Völkerstrafrecht’, 116 Zeitschrift für die Gesamte Strafrechtswissenschaft (2004) pp. 999-1027, at pp. 1017-1018. Weigend considers the ‘as a result of’ phrase as a sign of a causal link, but on the other hand he points out that the provision asks the impossible of the superior. He finds that having considered other options, “bleibt eigentlich nur die Feststellung, dass eine Vorschrift, die die Vorgesetztenverantwortlichkeit anordnet für ‘crimes committed as a result of his or her failure … to submit the matter to the competent authorities for investigation or prosecution’, von dem Vorgesetzten etwas logisch Unmögliches fordert, nämlich dass er eine Tat zur Verfolgung übergibt, die noch gar nicht begangen wurde. Bei richtiger Betrachtung kann es für den Fall der Nicht-Ahndung kein Kausalitätserfordernis geben: für das begangene Verbrechen aus logischen Gründen nicht, und für zukünftige Verbrechen deshalb nicht, weil der Vorgesetzte (jedeffals im Rahmen der völkerstrafrechtlichen Vorgesetztenverantwortlichkeit) nicht ihretwegen bestraft wird.” Ibid., p. 1021.
561 For a critical opinion on the status of international humanitarian law rules as customary law, see Heintschel von Heinegg, op. cit., pp. 27-47.
of the commander to instruct and supervise his subordinates in accordance with applicable rules and practices because he knew that he would be held responsible where they misbehaved and he could have avoided that through supervision and disciplinary action. That the superior is now, under the *sui generis* approach, punished for his failure to prevent or punish instead of as being partly responsible for the international crime committed, strengthens the thesis of command responsibility as a military principle primarily applicable to military superiors.

5.2.3 The bifurcated approach – Act *sui generis* and *sui generis* participation

In the previous sections arguments have been presented in favour of and against command responsibility as liability for a crime and as a *crimen sui generis*. There seems to be agreement that neither approach can satisfy all the demands of criminal law regarding the culpability of the superior and the causality between the omission of the superior and the crime committed. It is apparent that Article 28 ICC, with its requirements that deviate from those in Article 6(3) ICTR/7(3) ICTY, has complicated the issue rather than simplified it, at least when considering the command responsibility doctrine as a whole, not just its specific application by one tribunal or court.

Several authors now point to the possibilities of taking a bifurcated approach to the issue. Command criminal responsibility would not be considered as one or the other, act *sui generis* or participation liability, but as a combination of both. This approach was applied in national criminal law and could be developed to suit the command responsibility doctrine in international criminal law, as well. As has been promoted throughout the present study, the object and purpose of the command responsibility doctrine should be kept in mind when interpreting and applying it.

To put it more simply, the superiors who can be successfully prosecuted under the command responsibility doctrine are commanders, and in specific cases non-military superiors, who were not part of a plan to commit crimes, but at the time of the subordinates’ crimes, did not pay attention to or did not care about what was going on. At most, he approved, in his mind, of the crimes and chose not act. Where crimes had been committed that he could not have

prevented but that he could punish, he either did not pay attention to information about such crimes or did not care about making an effort to report the crimes. At most, he approved, in his mind, of the crimes and chose not to act.

Where the mens rea of the commander/superior was at the level of negligence (should have known), either at the stage of preventing or at the stage of punishment, the commander/superior would be held liable for command responsibility, an act sui generis. Where the mens rea of the commander/superior was at least at the level of ‘consciously disregarded information which clearly indicated’, i.e., ‘higher’ than negligence and implying some kind of intention on the part of the commander/superior, he would be held liable for aggravated command responsibility, a form of sui generis participation. 563

First, holding a superior responsible for a crime sui generis where he ‘should have known’ about the crimes would satisfy the most sensitive issue involved in the discussion – that of liability that should correspond to the culpability of the superior. Although it may be argued that only the crimes under the jurisdiction of the court may be prosecuted and that international criminal law should not be concerned with crimes of this character, it is a fact that the underlying crimes were of concern to the international community, but that the omission to prevent or punish best describes the role of the accused. The question is what should be expected of the doctrine. It is interesting to note the formulation of Article 86(2) AP I in this respect. It provides as follows:

“*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.*” 564

According to the Commentary on the Additional Protocols, this provision “condemns failure to act of superiors in case of breaches which are not grave breaches as well as in case of grave breaches.” 565 The Commentary further explains that, “In the first case the sanction can be disciplinary or penal, while universal jurisdiction understood as aut dedere aut judicare

563 For a categorisation of command responsibility which also pays attention to whether the superior acted negligently or had a higher level of mens rea, see V. Nerlich, ‘Superior Responsibility under Article 28 ICC Statute – For What Exactly is the Superior Held Responsible?’,” 5 Journal of International Criminal Justice (2007) pp. 665-682.

564 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS p. 3.

565 Pilloud, op. cit., p. 1012.
applies in the second case, i.e., in case of a grave breach.” What makes this interpretation of the provision interesting in this context? By providing that a superior may incur penal or disciplinary responsibility, as the case may be, it seems that the drafters of Articles 86 and 87 of AP I wanted to emphasize the fact that the superior had a certain responsibility in relation to the crimes committed, rather than the nature of his responsibility – that he had either committed a separate crime of omission or participated in the crimes committed. As for the argument that only crimes under the jurisdiction of the ICC may be prosecuted, the ICC may borrow the above-mentioned argument from Halilović, according to which responsibility ‘for’ the crimes committed should not be understood as meaning sharing the responsibility of the subordinates. Rather, because of the crimes committed by the subordinates, the commander is to be held responsible for his failure to act.

As only military commanders or persons effectively acting as such are subjected to the ‘should have known’ standard under Article 28 ICC, applying command responsibility as a separate crime of omission to them where they only ‘should have known’ would reduce the concerns of those who saw participation liability as not corresponding to the culpability of the superior.

Secondly, the superior would be held liable for sui generis participation where he ‘consciously disregarded information’ or knowingly omitted to prevent or to punish. By sui generis participation is here meant that the mode of participation does not have to meet the requirements of the other modes as provided for in provisions on individual criminal responsibility, at present most importantly in Article 25(3) ICC. Triffterer pointed to the desirability of prosecuting superiors under Article 28 and not under the alternatives listed in Article 25(3). He stressed the “great influence superiors have in hierarchically structured institutions,” which generates “a great responsibility for the prevention of such crimes.” As Article 28 only covers omissions and “does not trigger responsibility for any active behaviour”, this form of perpetration “does not fit into the framework of Article 25 paragraph 3.”

566 Ibid.
567 A person shall be criminally responsible for a crime if the material elements are committed with intent and knowledge, as provided in Art. 30 ICC.
The idea that a superior could be held criminally responsible in relation to crimes committed by his subordinates on the basis of participation of its own kind has been elaborated and confirmed in Dutch case law and literature, as well as in other domestic legal systems.\textsuperscript{569} In a comparison between the doctrine of command responsibility in international law and a form of criminal responsibility under Dutch law, according to which a superior may be held responsible for crimes committed by others within the framework of a legal person (‘feitelijk leidinggeven’ or ‘functional liability’/functional perpetration\textsuperscript{570}), it was considered as accepted that this form of responsibility in Dutch law, which despite its differences was founded on the same basis as the doctrine on the international level, could best be described as a special form of participation.\textsuperscript{571} Treating the responsibility of a superior as a special form of participation, in the opinion of some Dutch authors, solves some of the inherent problems related to the responsibility of a person for crimes committed by someone else.\textsuperscript{572} It was specifically pointed out, however, that one has to note the difference between the crimes, for example fraud, that are covered by this specific provision in Dutch criminal law, and the crimes covered by the command responsibility doctrine.\textsuperscript{573} Another important difference should be noted. The ‘should have known’ standard as set out in Article 28 ICC sets a lower threshold for conviction than the threshold set by the Dutch ‘feitelijk leidinggeven’.\textsuperscript{574} For a conviction under the latter concept, more than negligence is required. The accused need not have been aware of the specific crimes he is charged with, but awareness is required at least in relation to criminal acts that are similar to and related to those with which the accused is charged.\textsuperscript{575} As has been pointed out, there are some differences between the two concepts. Nevertheless, it has been held that the comparison just mentioned is justified because of the basis that is shared by both concepts.\textsuperscript{576}


\textsuperscript{572} Stolwijk 2002, op. cit., p. 7.

\textsuperscript{573} Ibid. p. 9.


\textsuperscript{575} De Hullu 2000, op. cit., p. 481.

\textsuperscript{576} Stolwijk 2002, op. cit., p. 9.
This view could combine the advantages of the *sui generis* approach and those of the approach considering command responsibility as responsibility for an international crime. As a form of participation of its own kind, the punishment would be defined as being more lenient as it is a separate form of participation, compared to those contained in the provisions on individual criminal responsibility. On the other hand, while calling ‘aggravated command responsibility’ a form of participation *sui generis*, the connection to the international crimes committed would remain. As participation *sui generis*, the principle would require the same elements that have been set out as necessary for proving command responsibility.

### 5.3 Overlap between individual criminal responsibility and command responsibility?

#### 5.3.1 Introduction

As set out in Chapter 2, the basis for criminal responsibility under international criminal law has been divided into individual criminal responsibility and command responsibility. While in principle the distinction between what constitutes individual criminal responsibility as opposed to command responsibility is clear, it is recognised that, “The intricate relationship between Articles 7(1) and 7(3) inevitably means that there will be some overlap between the basis of liability imposed by them.”

Command responsibility arises where a superior is liable for an omission to prevent or punish his subordinates. However, the case law of the *ad hoc* tribunals shows that in cases where the superior failed to act, showed passivity, and subordinates committed crimes under the jurisdiction of the tribunals, the act of omission has in certain cases led to criminal liability for participation in or a contribution to a joint criminal enterprise or for aiding and abetting a crime.

#### 5.3.2 Joint Criminal Enterprise

##### 5.3.2.1 JCE – The Concept

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577 For the advantages of considering ‘functional liability’ as a mode of participation *sui generis*, see the commentary to the judgement of the Dutch Supreme Court in the *Slavenburg* case, 16 December 1986, NJ 1987, No. 321, p. 1205.

With the Appeal Judgement in the Tadić case, individual criminal responsibility for participating in a common criminal purpose was introduced in the case law of the ICTY. What was needed for the existence of such a common criminal purpose, or in other words, the objective elements of this mode of participation were considered to be the following: i) “A plurality of persons”; ii) “The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute”; and iii) “Participation of the accused in the common design.”

While the Statute of the ICTY does not explicitly provide for this mode of participation in the crimes under the jurisdiction of the tribunal, the Appeals Chamber held that the object and purpose of the Statute was to enable the prosecution of “all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations [...]”. The reason for the introduction of the common purpose concept was that it, in the opinion of the Appeals Chamber, reflected the way in which most international crimes were committed, i.e., by a plurality of persons “acting in pursuance of a common criminal design.” The Appeals Chamber recognised that because the Statute did not specify the elements of this mode of participation, there was a need to identify these in customary international law. The question as to whether customary international law actually provides such elements was answered in the affirmative by the Appeals Chamber after having reviewed a number of post-World War II cases. Cassese, a member of the Tadić Appeals Chamber, recently defended this view and pointed out that by referring to the common purpose doctrine, the tribunal only “fulfilled its proper task of finding and interpreting the law,” and did not resort to ‘judicial creativity’, as has been argued in the literature.

Relying on the post-World War II cases, the Tadić Appeals Chamber identified three categories of cases that may constitute a common criminal purpose. Ambos nicely summarised the main aspects of the three categories as follows:

“(i) the basic form, where the participants act on the basis of a ‘common design’ or ‘common enterprise’ and with a common ‘intention’;

580 Ibid., paras. 190-191.
581 Ibid., para. 191.
582 Ibid., para. 220.
(ii) the *systemic* form, i.e. the so-called concentration camp cases where crimes are committed by members of military or administrative units such as those running concentration or detention camps on the basis of a common plan (‘common purpose’);
(iii) the so-called ‘extended’ joint enterprise where one of the co-perpetrators actually engages in acts going beyond the common plan but his or her acts still constitute a ‘natural and foreseeable consequence’ of the realization of the plan.”

While the objective elements (*actus reus*), as set out above, apply equally to all three forms of collective criminality, each of the categories requires a distinct subjective element (*mens rea*). As for the first category, the requirement is that the co-perpetrators all share the intent to perpetrate the crime. The second category requires knowledge of the system of ill-treatment and the intent to further this system. The *mens rea* requirement of the third category demands the intention to participate in and further the criminal activity or purpose of the group and to contribute to the commission of the crime by the group. With regard to the third category, it should be noted that a participant to the common criminal purpose can only incur responsibility in relation to crimes other than those covered by the common plan, if “(i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.”

In subsequent judgements the idea of the common criminal purpose was acknowledged and applied, although the term used has been that of a “joint criminal enterprise.” The acceptance of the concept, however, has not been unanimous. Both the concept itself and certain aspects of its application have proven controversial among judges as well as among scholars.

The most fundamental controversy concerns the legitimacy of the concept. In the *Stakić* case, the Trial Chamber held the view that the traditional forms of participating in a crime should be preferred to applying the concept of ‘joint criminal enterprise’.

In the opinion of the Trial Chamber, using co-perpetration instead of JCE corresponded more to what most legal systems understand by ‘committing’, a term used in the ICTY Statute, and it avoided creating the impression “that a new crime not foreseen in the Statute of this Tribunal has been introduced through the backdoor.” This attempt by the Trial Chamber to avoid the use of the concept, because it was not set out in the Statute, failed when the Appeals Chamber in its

585 Tadić, AC Judgement, para. 228.
586 See, for example, Kvočka, TC Judgement, para. 244.
588 Ibid., para. 441.
subsequent judgement faulted the decision of the Trial Chamber in this regard and returned to
the interpretation of a JCE in the Tadić Appeal. A few months after the Stakić Trial
Judgement was rendered, another rejection of the concept was expressed in the Separate and
partly dissenting opinion of Judge Lindholm in the Simić et al. case. Judge Lindholm
dissociated himself from the concept and considered that in addition to having been a waste of
time, the concept of JCE had neither benefited the work of the ICTY, nor the development of
international criminal law. In the Lubanga and Katanga cases brought before the ICC, the
Pre-Trial Chamber clearly showed that it does not give preference to the concept of JCE,
although it would have the possibility to build on the experience of the ad hoc tribunals.

A greater nuance has been brought into the generally very critical analysis of the concept by
scholars. Besides questioning the usefulness of the doctrine in prosecuting system criminality,
scholars have generally recognised that it is only the extended joint criminal enterprise (JCE
III) that causes serious concerns regarding the culpability of the accused.

5.3.2.2 JCE and Command Responsibility

In some cases that have come before the ad hoc tribunals, where the accused acted in a
superior position and the alleged crimes were committed by their subordinates, the accused
have been prosecuted under the concept of JCE. As command responsibility also arises in
cases of an omission to prevent or punish crimes committed by subordinates, the simultaneous
application of JCE and command responsibility has been an invitation for critical comments
and questions. Most interesting are the reasons behind the choice between either a JCE or
command responsibility as the basis for criminal liability, where applying both bases seem
feasible.

In the Kvočka case, the Prosecution had brought charges under both Article 7(1) and Article
7(3). Except for the accused Zigić, all the accused were charged under both 7(1) and 7(3).
However, the Chamber found that because liability had already been established for the role
of the accused in a joint criminal enterprise under Article 7(1), there was no need to further

589 Prosecutor v. Blagoe Simić, Miroslav Tadić and Simo Zarić, Separate and Partly Dissenting Opinion of
Judge Per-Johan Lindholm, Case No. IT-95-9-T, 17 October 2003, paras. 1-5.
590 See the discussion in Chapter 6.3 infra.
591 See Prosecutor v. Aloys Simba, Judgement, Case No. ICTR-01-76-T, 13 December 2005. The accused was
first charged under both Art. 6(1) and Art. 6(3), but at the end of its case, the prosecution withdrew the charge
pursuant to Art. 6(3). Ibid., para. 4.
consider the issue of responsibility as a superior.\textsuperscript{592} In relation to one of the accused, the Chamber held that, “[H]is participation in the joint criminal enterprise of Omarska camps renders him liable for crimes committed therein and arguably makes Article 7(3) liability duplicative.”\textsuperscript{593} The Chamber did not elaborate on the reason for its decision. In other cases involving both Article 7(1) and 7(3) liability, the Chamber has made a similar assumption to the one in \textit{Kvočka}, namely that responsibility under Article 7(1) makes a finding under Article 7(3) unnecessary.\textsuperscript{594} All cases that have charged a superior both under the joint criminal enterprise theory and under the provision on superior responsibility have resulted in a finding of liability for some kind of participation in a joint criminal enterprise, while the superior responsibility has been dismissed as superfluous or as only constituting an aggravating circumstance to be taken into account only for the purposes of sentencing.

The said cases have not provided a convincing reason for why superior responsibility has been dismissed as superfluous. This together with the fact that the notion of joint criminal enterprise has been dismissed by some judges as ‘superfluous’, in the sense that it does not add anything to the existing forms of participation as laid down in the provisions on individual criminal responsibility, creates that impression that the issue of superior responsibility in relation to joint criminal enterprise has not been satisfactorily clarified.

Some of the cases that have come before the \textit{ad hoc} tribunals are cases of ‘pure’ command responsibility,\textsuperscript{595} where the accused is a commander whose subordinates suddenly committed a crime which he should have prevented or punished. Such a case is the \textit{Hadžihasanović} case, which according to the prosecution clearly concerned the failure to prevent or punish crimes, as responsibility under Article 6(1) was not even in the indictment.\textsuperscript{596} Most cases, however, concern situations where the commander has been described as one of many ‘actors’ involved in the events during which a mass atrocity took place.\textsuperscript{597} In such cases the role of the superior will not be as easily discernible and the prosecution will be inclined to include charges of both individual criminal responsibility and command responsibility in the indictment. The question is: What has caused the preference for JCE?

\textsuperscript{592} See \textit{Kvočka et al.}, TC Judgement, paras. 412, 466-467, 570 and 683.
\textsuperscript{593} Ibid., para. 412.
\textsuperscript{594} See \textit{Štakić}, TC Judgement, para. 466. For a more detailed discussion, see Chapter 4.3.4.2 \textit{supra}.
\textsuperscript{595} The term ‘pure’ command responsibility was used by Bonafé. See Bonafé, op. cit., pp. 616-617.
\textsuperscript{596} \textit{Hadžihasanović}, TC Judgement, paras. 7-11.
The view has been expressed that the use of the term ‘joint criminal enterprise’ in general gives more weight to the seriousness of a superior’s role in the crimes committed.\(^598\) The fact that a certain basis for liability sounds more serious than another mode of liability would, according to this view, stigmatise the perpetrators more than where the superior was convicted under that other heading.\(^599\) This argument is not that foreign when considering that the \textit{ad hoc} tribunals on several occasions have concluded that responsibility under the JCE doctrine best describes the role of the superior in the crimes committed, where command responsibility had also been established.\(^600\) There is an obvious interest in showing that the superior is convicted for his share in the events, but it may be questioned whether a conviction under JCE is perceived as more serious than a conviction under the command responsibility doctrine. Another theory is that the incentives of international prosecutors are, on the one hand, to gain convictions, in particular in cases against high-level accused, and on the other hand, to ensure the development of international criminal law and satisfy the standards set by it. According to this theory, by choosing JCE in the majority of cases – despite the fact that it raises culpability and legitimacy concerns – it seems clear that the most powerful incentive for international prosecutors has been the conviction of high-level accused.\(^601\)

The more neutral and generally recognised reason for a preference for JCE to command responsibility is the ‘effective control’ argument. The concept of effective control is “the threshold to be reached in establishing a superior-subordinate relationship for the purposes of Article 7(3) of the Statute.”\(^602\) The ‘effective control’ requirement is intertwined with the ‘material ability to prevent or punish’ requirement, which should be established when proving that the superior took the necessary and reasonable measures to prevent or punish the crimes. The effective control concept does not require that the subordination be direct or formal, but the accused should either formally or informally have been in a hierarchically higher position than the perpetrators.\(^603\) In \textit{Halilović}, as in other cases, this requirement has been difficult to fulfil. Several scholars have drawn attention to the fact that the charges of command


\(^{599}\) See \textit{Prosecutor v. Mladen Naletilić and Vinko Martinović (Tuta and Štela), Judgement, Case No. IT-98-34-T}, 31 March 2003, paras. 78-81.

\(^{600}\) Osiel 2005, op. cit., p. 1784.


\(^{603}\) Ibid.
responsibility usually fail because of the ‘effective control’ requirement.\textsuperscript{604} The perception of the concept of ‘effective control’ is at present not in line with the reality of actors in situations of armed conflict or mass atrocity. For the purposes of the command responsibility doctrine as presently interpreted, the parties are either being controlled or are themselves controlling others. In reality power relations between parties involved in situations where atrocities take place are not as clear-cut. A relationship may be asymmetrical while being based on mutual influence.\textsuperscript{605}

It is rather obvious that because the prosecution is burdened with proving ‘effective control’, they prefer the JCE alternative, which does not encompass such a requirement. Consequently, where both command responsibility and JCE are included in the indictment in relation to the same facts, the command responsibility charge becomes a theoretical ‘catch-all’ provision, which is of importance for a conviction only where a JCE cannot be established. As JCE has proven easier to establish, the possibility that in some case JCE could not be established and command responsibility would be resorted to in order to ensure a conviction, is only theoretical.

There is an apparent preference for JCE at the \textit{ad hoc} tribunals, but to what extent are JCE and command responsibility interchangeable in relation to crimes of omission by a superior? A look at the elements and the applicability of command responsibility as compared to the JCE concept reveals that command responsibility cannot simply be substituted by the JCE concept, as the two differ considerably. Ambos identified three distinguishing features of the two concepts. Identifying these distinctive features is useful in that most judgements and several commentators, when discussing JCE and command responsibility, consider specific cases and whether command responsibility should be subsumed where both JCE and command responsibility are being applied in that particular case. However, Ambos’ identification of objective, distinctive features shows why a simultaneous application of the doctrines is both practically and theoretically troublesome, but at the same time possible in certain cases.


\textsuperscript{605} See Osiel 2005, op. cit., p. 1783, who discusses the effective control problem and the limits of the command responsibility doctrine in detail. See also H.G. van der Wilt, ‘Halilović on Appeal: The Intricate Concept of “Effective Control”’, p. 8.
The first distinction between JCE and command responsibility concerns the ‘act’ of the superior, as JCE “requires a positive act or contribution to the enterprise.”\textsuperscript{606} This is the exact opposite of command responsibility, which is concerned with an omission of the superior. Considering this distinction, the simultaneous application of the two doctrines seems “logically impossible.”\textsuperscript{607} The second distinctive feature concerns the superior-subordinate relationship, which constitutes one of the required elements of the command responsibility doctrine. Under JCE I, members of the enterprise are considered as co-perpetrators, who normally act on the basis of coordination, not subordination. As regards JCE II and JCE III, however, the relationship between the members of the enterprise is less clear and may resemble that of the relationship required for command responsibility. Thirdly, JCE differs from command responsibility in the mental element or the mens rea required. For the purposes of JCE I, the participants share the mens rea to commit certain crimes and the mens rea regarding the goal of the enterprise. Although the other two forms of JCE are more lenient as to the shared mens rea of the members of the enterprise, even the lowest mens rea requirement for JCE III encompasses an awareness of the purpose of the JCE and of crimes as a foreseeable consequence of the activities of the JCE. As Ambos considers command responsibility an echtes Unterlassungsdelikt, a crime sui generis, the mens rea of the superior is required for the failure to act, but not in relation to the crimes committed by his subordinates.\textsuperscript{608}

On the basis of these distinctions, a simultaneous application of the two doctrines does not seem realistic. However, as was recognised by Osiel and others, the flexibility of the JCE doctrine that makes it an interesting concept for international prosecutors and judges to apply erases some of the seeming differences between the doctrines,\textsuperscript{609} as will be seen in the following.

Cases in which the facts are such that charges can be instigated on the basis of JCE I are likely to never result in a simultaneous application of the two doctrines. As just mentioned, in JCE I cases the participants are usually connected to each other by a horizontal relationship, while command responsibility requires a vertical relationship. In addition, JCE I requires common intent on the part of the participants in the criminal enterprise in relation to the crimes

\textsuperscript{607} Ibid., pp. 179-180.
\textsuperscript{608} Ibid., p. 180.
committed and in this respect resembles co-perpetration. At the same time, because it is clear that the participants share the common purpose of the enterprise, this form of JCE does not coincide with command responsibility. Under the command responsibility doctrine the superior must fulfil the knowledge requirement but does not share the intent of the perpetrators. A simultaneous application is more likely in cases of JCE II and JCE III, where the participants in the JCE may act from hierarchically distinct positions. The accused could have had that superior relationship with the perpetrators of the crimes within a JCE II or JCE III, and therewith meet that requirement of a superior-subordinate relationship of the command responsibility doctrine. As far as the mental element of JCE II and JCE III is concerned, it comes closer to the mens rea requirement of command responsibility in that it does not expect the accused to have intended the commission of the crimes.\footnote{See Ambos 2007, ‘Joint Criminal Enterprise’, pp. 172-176. In his view one possible interpretation is that JCE II only requires membership and foreseeability, which would more closely resemble responsibility under JCE III than JCE I.} However, the mens rea requirements of JCE II and JCE II are disputed and, in fact, the Appeals Chamber in \textit{Kvočka} held as follows: “The Appeals Chamber affirms the Trial Chamber’s conclusion that participants in a basic or systemic form of joint criminal enterprise must be shown to share the required intent of the principal perpetrators.”\footnote{Prosecutor v. Radislav Kvočka et al., Appeal Judgement, Case No. IT-98-33-A, 28 February 2005, para. 110.} If intent is required under JCE II, only JCE III, with its foreseeability standard which is “neither precise nor reliable”,\footnote{See Ambos 2007, ‘Joint Criminal Enterprise’, p. 174.} can theoretically come close to the same requirements as those of the command responsibility doctrine.

At the indictment stage the exact level of the mens rea of the accused will not necessarily be known and as a consequence, it will be a natural prosecutorial choice to use the basis for liability that causes the least evidentiary difficulties. In particular because of the ‘effective control’ requirement that has to be fulfilled for the purposes of the superior-subordinate relationship under the command responsibility principle, prosecution under JCE will be preferred.

Considering the requirement of intent in Article 25(3)(d) ICC, the question arises as to whether the overlap between JCE and command responsibility in practice, and theoretically, will be of a temporary nature. As participation in a ‘common purpose’ as provided in the ICC Statute should be intentional, the provision resembles that of participation under JCE I. The role of the superior in such cases will be a different one than in cases charging the accused

\footnote{Prosecutor v. Radislav Kvočka et al., Appeal Judgement, Case No. IT-98-33-A, 28 February 2005, para. 110.}
under the command responsibility doctrine. Cassese made an attempt at expansively interpreting the intent requirement under Article 25(3)(d) ICC so as to include JCE III liability. In his view, a broad interpretation would be justified “by the need to punish criminal conduct that otherwise would not be regarded as culpable.”\textsuperscript{613} Considering the strong and broad resistance to JCE III liability, this attempt and the reason for its justification will hardly be given general support. The culpability of the accused is not well founded under JCE III, and, as the argument goes, this is exactly why a person should not be held criminally liable.

From the point of view of the object and purpose of the command responsibility doctrine, the most important concern in this context is that the preference for JCE in cases of the simultaneous application of the two doctrines creates the impression that the concept “invades the traditional ambit of command responsibility liability.”\textsuperscript{614} If preference is given to JCE in all cases, even accused whose role was that of a superior failing to prevent or punish a crime will not be convicted under the command responsibility provision. The ‘traditional ambit’ of command responsibility and the ‘threat’ by other modes of liability will be considered more closely in Chapter 6.

5.3.3 Aiding and abetting

5.3.3.1 Aiding and abetting – The Concept

The overlap between 7(1) and 7(3) responsibility is not limited to that between JCE and command responsibility, but is also discernible between aiding and abetting and command responsibility. The main difference is the fact that while JCE in itself constitutes a disputed concept, the idea behind aiding and abetting as a mode of participation is a well known concept to criminal law in general.

International law, in particular as it has developed since the establishment of the \textit{ad hoc} tribunals, recognises that a person may be held criminally responsible for a crime where he/she merely assisted the actual perpetrator in committing the crime and did not share the criminal intent of the perpetrator. The term used for this mode of participation is aiding and abetting. Aiding and abetting, like the other modes of participation applied in international


\textsuperscript{614} Ambos 2007, ‘Joint Criminal Enterprise’, p. 159.
criminal law, have been amply defined/described in the literature and its precise legal history and origin is not the focal point of the present study. It suffices to say that aiding and abetting constitutes the “weakest form of complicity,” which means that in order for an act to amount to aiding and abetting, it should in some way contribute to the commission of a crime or to the attempt to commit a crime. The International Law Commission in its 1996 Draft Code of Crimes against the Peace and Security of Mankind (the ILC’s Draft Code of Crimes) considered that the contribution should be ‘direct and substantial’, which shows that a certain threshold has to be reached where criminal liability should be imposed. Establishing where this threshold lies is in general the challenge in respect of this mode of participation.

In the Orić Judgement of 30 June 2006, the ICTY Trial Chamber reaffirmed the position that an omission may constitute aiding and abetting a crime, and made reference to a number of earlier judgements which took that opinion. It is recognised that contributing to the commission of a crime may take the form of moral support for the perpetrator or sympathy towards the commission of the crime. On several occasions the ad hoc tribunals have considered whether the presence of a person at the scene of the crime without his active contribution to the crime may constitute aiding and abetting. In Orić the Trial Chamber held

616 The Kunarac judgement nicely describes the actus reus and mens rea of aiding and abetting: “As opposed to the ‘commission’ of a crime, aiding and abetting is a form of accessory liability. The contribution of an aider and abettor may take the form of practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime. The act of assistance need not have caused the act of the principal. It may consist of an act or an omission and take place before, during or after the commission of the crime. The mens rea of aiding and abetting consists of the knowledge that the acts performed by the aider and abettor assist in the commission of a specific crime by the principal. The aider and abettor need not share the mens rea of the principal but he must know of the essential elements of the crime (including the perpetrator’s mens rea) and take the conscious decision to act in the knowledge that he thereby supports the commission of the crime.” See Prosecutor v. Dragljud Kuburac, Radomir Kovac and Zoran Vukovic, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001, paras. 391-392.
619 See Orić, TC Judgement, para. 283. However, the Trial Chamber acquitted the accused under the Art. 7(1) charges for wanton destruction of cities, towns or villages not justified by military necessity. See ibid., para. 782.
620 In the following case, aiding and abetting by omission was considered: Prosecutor v. Milorad Knojelac, Judgement, Case No. IT-97-25-T, 15 March 2002, para. 88. Interestingly, in this case the Trial Chamber pointed out that the act of assistance, which may be an omission, can occur “before, during or after the act of the principal offender”. Considering a possible overlap between aiding and abetting and command responsibility, this finding shows that an overlap does not necessarily only arise at the stage of preventing the crimes, but also where the omission took place after the fact. On aiding and abetting by omission, see also, among other cases: Prosecutor v. Mitar Vasiljevic, Judgement, Case No. IT-98-32-T, 29 November 2002, para. 70; Kunarac, TC Judgement, para. 391; Brđanin, TC Judgement, para. 271.
621 Cassese 2003, op. cit., p. 188.
622 Prosecutor v. Jean-Paul Akayesu, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 484.
that presence at the crime scene does not *per se* constitute aiding and abetting, but may be considered as aiding and abetting by omission where the person in question had a duty to prevent the crime.623 “A bystander’s position of authority as a superior or actual leader” may lead to the mere presence of the person being considered as constituting aiding and abetting. Or as found by the Blaškić Trial Chamber: “[T]he mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime.”624

Accordingly, passivity does not equal an omission, which means that in order to consider the mode of participation of a person aiding and abetting, that person must have been under a duty to act.625 As provided in the ILC’s Draft Code of Crimes, the *ad hoc* tribunals have applied a requirement, according to which the act of assistance has to be of ‘decisive’ or ‘substantial’ effect, in order for the accused to incur liability for aiding and abetting the commission of a crime. As in the case of practical assistance, an act, constituting aiding and abetting, the aider and abettor should also have the necessary *mens rea* where his contribution to the crime consists of an omission.

### 5.3.3.2 Aiding and abetting and Command Responsibility

For the purposes of the present chapter, the interesting feature of aiding and abetting is its application to acts of omission. As in relation to JCE, if both individual and superior criminal responsibility could be established for an act of omission, there seems to be an overlap between two applicable concepts. Considering the requirements of an omission constituting aiding and abetting and the requirements of command responsibility, the question arises as to the kind of situations that may lead to the simultaneous application of both aiding and abetting and command responsibility. In other words, when does an overlap between the two occur?

As Van Sliedregt rightly pointed out, both crimes of a limited character, single crimes, and ‘continuing crimes’ or ‘mass crimes’, may create an impression of an overlap between aiding and abetting and command responsibility.626 An example of the first category of crimes can be

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found in the *Furundžija* case. In this case one victim was tortured and another tortured and raped in the presence of the accused.\(^{627}\) The presence of the accused at the crime scene, together with his position of authority, constituted aiding and abetting. The Trial Chamber held that, “[P]resence, when combined with authority, can constitute assistance in the form of moral support.”\(^{628}\) On the face of it, this case justified charges under both the ‘aiding and abetting’ mode of participation and command responsibility. Both bases for responsibility require “a status of authority, a failure to act, and an underlying crime committed by another person.”\(^{629}\) *Furundžija* held a more superior position than the principal offender. He was present at the crime scene and failed to prevent the crimes from taking place. There is a *prima facie* overlap and some closer consideration is needed to confirm the overlap.

Secondly, there are the ‘continuing crimes’ or ‘mass crime’. As found by Van Sliedregt: “Continuing crimes’ often connote the maintenance of a wrongful situation, for instance, cruel treatment in a concentration camp.”\(^{630}\) Both categories of crimes concern situations where a multiplicity of crimes are committed, that may take place over time or in several places.\(^{631}\) The *Čelebići* case may be used as an example of facts which point to the possibility of holding the accused liable for aiding and abetting and under the command responsibility provision. On one charge of the unlawful confinement of civilians in the *Čelebići* prison camp, the prosecution in its appeal challenged the acquittal of two of the accused, Delalić and Delić, both alleged commanders of the prison camp. The prosecution held that the two accused could have been held responsible both for aiding and abetting and under Article 7(3).\(^{632}\) Where subordinates committed the crimes, the elements of command responsibility may be fulfilled here, while also aiding and abetting may be applicable, if the failure of the superior could be seen as support for or encouragement of the crime and the superior knew of the intent of the perpetrators.

There is reason to hold that both crimes on a limited scale and mass crimes may justify charges based on aiding and abetting and command responsibility. The character of the crime is not a determining factor when deciding how to go about the overlap. In the two cases discussed here, however, the overlap was only theoretical. In the *Furundžija* case, command

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\(^{627}\) *Prosecutor v. Anto Furundžija*, Judgement, Case No. IT-95-17/1-T, 10 December 1998, paras. 266 and 273.

\(^{628}\) Ibid., para. 209.


\(^{630}\) Ibid.

\(^{631}\) Ibid.

\(^{632}\) *Čelebići*, AC Judgement, paras. 333 and 335.
responsibility was not included in the indictment. As to the specific charge in the Čelebići case, the Appeals Chamber acquitted the accused of both aiding and abetting and command responsibility. In the opinion of the prosecution, the Trial Chamber in relation to one of the accused had erred in finding that he did not possess the superior authority required for command responsibility. That finding then had an additional effect in that the lack of authority gave the Trial Chamber a reason not to hold him liable for aiding and abetting. As the accused was not the principal perpetrator of the crimes and lacked superior authority, his participation could not have had the ‘substantial effect’ on the participation of the crimes, which is necessary for establishing aiding and abetting.

*Prima facie*, both Furundžija and Čelebići satisfied the requirements of superior authority, *mens rea* and an omission that create the impression of an overlap. In cases where the facts show a conceivable overlap at the indictment stage, the decision as to the most suitable basis for responsibility is primarily made by the prosecution and, thus, is subjected to prosecutorial discretion. With regard to the ICC, also judicial discretion may come into play when deciding whether charges should be brought solely for aiding and abetting or command responsibility, or for both. In the Bemba case, the Pre-Trial Chamber made a decision under Article 67(7)(c) ICC to adjourn the confirmation of charges hearing and to give the Prosecutor the possibility to submit an amended document containing charges under Article 28 ICC, i.e., command responsibility charges. Similar decisions are equally conceivable where aiding and abetting is charged and where the facts of the case could also support charges of command responsibility.

Where the overlap appears at the indictment stage, the choice to keep both charges in the indictment will increase the burden of the prosecution to establish both aiding and abetting and command responsibility. On the other hand, there is no genuine overlap as long as it has not been proven beyond reasonable doubt that both bases for responsibility have been established. While at the indictment stage a superior position, *mens rea* and passivity will suffice to create the impression of an overlap, at the stage of a conviction the judges will have to consider which one of the two feasible situations has been established: a) The accused did not exercise effective control and, therefore, the elements of aiding and abetting were

633 Ibid., para. 333.
634 Ibid., paras. 358.
635 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.
established but not those of command responsibility, or alternatively, the elements of command responsibility were fulfilled but the omission of the accused did not have a substantial effect on the commission of the offences, or b) The accused exercised effective control and the evidence supports a conviction under both provisions. Only with regard to the second situation can one speak of a true overlap.

The Musema case may be used as an illustration of situation (b) which, according to the Trial Chamber, justified a command responsibility conviction, while the circumstances of the case also provides support for a conviction under aiding and abetting. The Trial Chamber made the following finding:

“Considering that Musema was personally present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused nevertheless failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack of 26 April 1994 on Gitwa Hill, Musema incurs individual criminal responsibility, as their superior, on the basis of the provisions of Article 6 (3) of the Statute.”

The Trial Chamber even found that the omission showed that the accused abetted in the commission of the crimes, which shows that the command responsibility conviction was a conscious choice by the judges.

For the purpose of establishing in which situations a real overlap between aiding and abetting and command responsibility is conceivable, the cases where only command responsibility appears on the indictment are of interest. The following paragraph from the Hadžihasanović judgement concerns the co-accused Kubura:

“But, however, with regard to the plundering in the towns of Šusanj, Ovnak, Brajkovici and Grahovčici, the Trial Chamber is of the opinion that the Accused Kubura had knowledge of the plundering committed by the 7th Brigade military police in June 1993, and that he gave his

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consent to members of the 7th Brigade to share the plundered goods. The Accused Kubura failed to punish the perpetrators of these crimes.\textsuperscript{639}

The Trial Chamber found the accused responsible under Article 7(3) because of his failure to punish the perpetrators. A similar finding was made in the following statement by the Trial Chamber:

“The Trial Chamber is satisfied beyond reasonable doubt that, as of 4 November 1993, the Accused Kubura had information that his subordinates were plundering in Vareš. It has been established that the Accused Kubura, in failing to take punitive measures against the perpetrators of the plundering committed in June 1993 of which he had knowledge, failed to prevent plundering in Vareš in November 1993. Furthermore, the Accused Kubura also failed to take action against the perpetrators of these crimes and even organised the distribution of the plundered goods.”\textsuperscript{640}

Similarly, the accused failed to punish his subordinates and thereby incurred responsibility under Article 7(3). With regard to both findings, the question is whether, had they been among the charges, the omissions of the superior Kubura could also have been considered as aiding and abetting the crimes of his subordinates. It should of course be kept in mind that because aiding and abetting was not among the charges, the Trial Chamber did not consider circumstances that would have been ‘favourable’ for aiding and abetting and so the theoretical reasoning here remains speculation, but serves a purpose, more specifically, the following.

The facts in the two examples referred to here, in which Kubura was found responsible, show that he both consented to sharing and organised the distribution of the plundered goods. Although these acts took place after the crimes had been committed, had aiding and abetting been prosecuted, the Trial Chamber might just as well have found that the omission to act on the part of Kubura could either have been considered as facilitating the commission of the crime or as being sympathetic to it. That the accused afterwards gave his approval for sharing the plundered goods is an indication not so much of his neglect and failure to prevent or punish his subordinates, but of his sympathy or encouragement of the crimes.\textsuperscript{641}

In respect of the accused Hadžihasanović, the Trial Chamber made the following findings:

\textsuperscript{639} Hadžihasanović, Judgement Summary, at VII. D.
\textsuperscript{640} Ibid.
\textsuperscript{641} It should be noted here that with regard to the acts of plunder in Vareš, the Appeals Chamber found that Kubura had taken the necessary and reasonable measures to prevent the crimes, and did not find him responsible in relation to those acts. See Hadžihasanović, AC Judgement, paras. 261-272.
“Despite the real risk of his subordinates repeating their previous crimes, the Accused Hadzihasanovic decided in favour of passive negotiations with his subordinates to obtain the release of the abducted civilians. It has been established that the ABiH 3rd Corps never intended to use military means against the El Mujahed detachment. The Trial Chamber considers that the circumstances were such that, as of 20 October 1993, the 3rd Corps should have used force as the sole necessary and reasonable means to prevent the crimes committed at Orasac. The Trial Chamber concludes that the Accused Hadzihasanovic had the material capacity to use force against his subordinates and had sufficient time to put concrete and specific measures into effect in order to obtain the release of the abducted civilians.”

The hypothesis here is that the accused was sympathetic to the subordinates’ acts and transmitted this message to his subordinates by being passive and not effectively taking measures. Therefore, his act of omission contributed to the commission of the crime, and could have been considered as aiding and abetting.

“The Trial Chamber is furthermore of the opinion that, as soon as the El Mujahed detachment was incorporated into his forces, the Accused Hadzihasanovic had information allowing him to conclude that there was a real and reasonably foreseeable risk of violations by members of the El Mujahed detachment. He was familiar with their violent and dangerous behaviour. He did not instruct the members of the detachment in complying with the most basic rules of international humanitarian law. In spite of this alarming information, he decided to gain military advantage with the detachment although nothing compelled the 3rd Corps to use the Mujahedin in combat. It is clear, in the opinion of the Trial Chamber, that the Accused Hadzihasanovic put himself in a situation where he ran the risk of not being able to take appropriate measures as and when required. However, he will not be found guilty of having failed to punish the perpetrators of this crime since he only became aware of it on 6 November 1993 when he had already left his post.”

Although not found guilty as a superior, the accused might have been held responsible for aiding and abetting the crimes committed by his subordinates. The omission to instruct members of his detachment to comply with the relevant rules of law, while aware of the risk of violations, could also have been considered as passive encouragement or being sympathetic and thereby abetting the violations by members of his detachment.

“The Trial Chamber considers that it has been established that, in spite of his knowledge of the cruel treatment of six prisoners of war in the Slavonija Furniture Salon and of the murder of one of them, the Accused Hadzihasanovic applied no more than disciplinary measures to punish the perpetrators of these crimes. In failing to take the necessary measures in this instance, the Trial Chamber believes that the Accused Hadzihasanovic failed to intervene in order to prevent any mistreatment from occurring after 18 August 1993 in the Slavonija

642 Hadžihasanović, Judgement Summary, at VII. D.
643 Ibid.
Furniture Salon, the Vojin Paleksic Elementary School, the Gimnazija School Building and the FC Iskra Stadium."

Also in this example it could be considered that Hadžihasanović, by his omission, expressed his sympathies towards his subordinates and the crimes they were committing, without taking an active part therein. His passive support of the violations could have been considered as aiding or abetting.

The purpose of these examples is to indicate that almost any facts, on the basis of which superior responsibility can be proven, may also be used for proving aiding and abetting where individual criminal responsibility has been prosecuted. Passivity on the part of the superior could often be considered as a form of encouragement. However, what seems like an overlap between aiding and abetting and command responsibility, where both have been established, some closer consideration of the involvement of the accused might remove the overlap and justify a decision favouring either of the two possible forms of responsibility. The Strugar case could be mentioned in this regard. In that case, the Trial Chamber made an effort to explain why a finding based on aiding and abetting was not justified, and decided in favour of command responsibility. It was established that the accused did not take all necessary and reasonable measures to stop an unlawful attack on the Old Town of Dubrovnik, but evidence showed that he issued a ceasefire order and, thus, did not remain entirely inactive. The accused did not initiate an investigation into the events, but, on the other hand, the Trial Chamber found that the fact that the accused did not take steps to investigate, could not have had a “direct and substantial effect on the commission of the offences.” The fact that the accused did not remain entirely inactive, which could be seen as silent encouragement, and that not investigating did not have a substantial effect on the commission of the crimes, together with the fact that the evidence did not satisfy the intent requirement, led to the finding that command responsibility more properly reflected the role of the accused in the events.

On the basis of the above, it can be concluded that the existing case law confirms the overlap between the field of applicability of aiding and abetting, on the one hand, and superior

644 Ibid.
646 Ibid.
647 Ibid.
responsibility, on the other. The way in which this overlap is treated in the judgements gives reason for the following statement: The case law, in particular where the accused is a civilian in a position of superior authority, illustrates that an omission by the accused may easily be brought under the aiding and abetting mode of liability where both individual and superior criminal responsibility are charged for the same offence. Accordingly, where there is reason to indict a superior under individual and superior responsibility, there would in fact be no need to pursue the charges under the superior responsibility provision, as it would anyway be covered by aiding and abetting. That would limit the applicability of superior responsibility to cases where the prosecution decides not to press charges of individual criminal responsibility, for example because there was no evidence of the superior instigating or ordering the crimes. Taking this thought a step farther, there would be no need to use the superior responsibility provision as a ‘catch-all’ provision, as resort could always be had to aiding and abetting.

As in those cases where both JCE and command responsibility are applicable, the cases charging aiding and abetting give reason for questions as to the role of command responsibility. Case law shows that command responsibility in cases of simultaneous applicability leads to its being subsumed under the individual criminal responsibility conviction. According to Van Sliedregt, “the nature of superior responsibility as the specialis of the generalis individual responsibility is expressed” by what seems to be the prosecutorial aim to primarily establish individual criminal responsibility and, secondly, to establish command responsibility. However, if it is true that even the cases where charges were brought only under the command responsibility provision would have led to a conviction under aiding and abetting, had that been on the indictment, then command responsibility, again, seems to be a conscious choice, first on the part of the Prosecutor and secondly on the part of the judges. In Krnojelac and in Musema, the Trial Chambers chose in favour of command responsibility.

5.3.4 Cumulative conviction or aggravating circumstance

The two previous sections have discussed the overlap between modes of individual criminal responsibility and command responsibility in cases where the superior has showed ‘passivity’ in relation to the crimes committed or to be committed by principal perpetrators who were his

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subordinates. An overlap as discussed in these sections resulted in a possibility to choose the basis for liability. The present section is concerned with the overlap that occurs at the stage of a conviction, where enough evidence has been adduced to establish both the individual criminal responsibility and the command responsibility of the superior.

Early case law from the *ad hoc* tribunals did not find cumulative conviction under both individual criminal responsibility and command responsibility problematic, and paid more attention to the concern that an accused should not be cumulatively convicted of two crimes, where the charges were essentially based on the same facts. In fact, in the Aleksovski case, the Trial Chamber made the following finding:

“The Trial Chamber therefore considers that the accused is responsible under Articles 7(1) and 7(3) for the physical detention conditions and the mistreatment to which the prisoners were subjected within the Kaonik compound.”

This conviction was not altered on appeal, and the case is in this respect not at all unique, as several cases have resulted in similar cumulative convictions. It is important to note that the present discussion concerns what may be called ‘true cumulations’, that is conviction under both the individual criminal responsibility and command responsibility provisions in relation to the same facts, as opposed to ‘false cumulation’, where there is a conviction on the basis of both provisions, but in relation to separate crimes. In the Blaškić Appeal Judgement, a cumulative conviction entered by the Trial Chamber was reversed. In the opinion of the Appeals Chamber, a conviction pursuant to both Article 7(1) and 7(3) “in relation to the same count based on the same facts,” i.e., a ‘true cumulation’, constituted a legal error. This approach has been accepted and applied by the *ad hoc* tribunals in more recent case law, the general acceptance being based primarily on the ‘logical argument’ that a person who committed a crime cannot at the same time be held responsible for omitting to prevent or punish the same crime. This argument is connected to the *ne bis in idem*.

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651 Aleksovski, TC Judgement, para. 138.
652 Aleksovski, AC Judgement.
653 See, for example, Kayishema and Razindana, TC Judgement, paras. 568-569.
655 Blaškić, AC Judgement, paras. 91-92.
656 Blaškić, TC Judgement, para. 337.
argument, which is convincing in that a conviction under Article 7(1) and 7(3) would hold the accused liable twice in relation to the same facts.  

In the literature, there has been very little disagreement with the rejection of cumulative convictions pursuant to Article 7(1) and 7(3). Nevertheless, it is interesting to pay some attention to the views of Henquet who does question the decision by the ad hoc tribunals to rule out cumulative convictions. Henquet recognises that where the ‘speciality test’ that was formulated by the Čelebići Appeals Chamber in relation to the cumulation of substantive offences is applied, a conviction will be entered only on the basis of the one offence that contains “an additional materially distinct element.” But where no distinct element could be found, the Chamber could, instead of deciding in relation to which crime a conviction should be entered, enter a conviction under both provisions. In Henquet’s opinion, if the ‘speciality test’ were to be applied to cumulation pursuant to Article 7(1) and 7(3), a conviction under both provisions would be precluded because of the additional elements of a positive act and criminal intent that are required for individual criminal responsibility. The argument is as such not well elaborated, as an overlap only arises where there is an omission, and at most, knowledge in relation to the crimes. However, he rightly draws attention to the distinct elements of importance for the cumulation of substantive offences. If applying the same reasoning to individual and command responsibility, where no materially distinct element can be found, the Chamber could enter a conviction pursuant to both provisions. The justification for doing so is the argument that the substantive offences represent different interests and values, despite the fact that under the ‘speciality test’ the offences may not contain materially distinct elements. For example, wilfully causing great suffering or serious injury and the crime of torture are distinguished by the purpose of the perpetrator of the torture. According to Judges Hunt and Bennouna in their Separate and Dissenting Opinion to the Čelebići Appeal Judgement, this specific feature of the crime of torture would under the speciality test not be considered as a distinct element, although the violation of specific interests and values is expressed by the particular purpose of the perpetrator of the torture. The same is true for

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657 For reflections on cumulative convictions pursuant to Art. 7(1) and 7(3) and the conceivable double jeopardy concerns, see Henquet, op. cit., pp. 821-825.
658 Čelebići, AC Judgement, para. 413.
659 Henquet, op. cit., pp. 826-827.
660 Ibid., p. 830.
661 Prosecutor v. Zejnil Delalić et al., Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, Case No. IT-96-21-A, 20 February 2001, paras. 38-39. The judges were not in favour of cumulative convictions but were nevertheless of the opinion that, “A rigidly imposed preference for the crime charged under a particular Article of the Statute will obviously be less time consuming and more convenient.
individual and command responsibility. Borrowing from Henquet, “[N]either form of responsibility can properly express the criminal conduct of the accused under the other.” 662 In other words:

“The conduct under each provision is criminal because it violates distinct norms under international humanitarian law: a commander is responsible for his own criminal conduct (first norm) and that of his subordinates (second norm). A conviction only for the violation of the first norm does not show that the commander also violated the second norm. Therefore, a conviction under both Articles 7(1) and Article 7(3) must be permissible.” 663

The Trial Chamber in Orić refuted this argument by holding that:

“[P]articipation in the crime means to have made a causal contribution to the impairment of the protected interest, whereas the failure as a superior need not necessarily contribute to the injury as such, but may merely involve the omission of his duty, as is particularly evident in the case of failure to punish.” 664

Nevertheless, the attempt to justify cumulative convictions or dual liability – to distinguish it from the substantive offences 665 – is valuable for the present study, as it puts emphasis on the need to recognise that command responsibility represents other values and interests, as compared to individual criminal responsibility. 666 With regard to the ne bis in idem principle, mentioned above, the approach favouring dual liability could circumvent this difficulty at the sentencing stage. According to Henquet the Chamber should consider the ‘absorption’ of the conduct which underlies the accused’s command responsibility by the conduct that gives rise to individual criminal responsibility. 667 What is suggested is that the overlap between the two bases for responsibility would not be weighed twice at the sentencing stage, and as a consequence the sentence would correspond to the culpability of the accused, while at the same time the command responsibility of the accused would be recognised.

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662 Henquet, op. cit., p. 830.
663 Ibid., p. 834.
664 Orić, TC Judgement, para. 342.
665 The term dual liability, which seems like a more appropriate term, was used in the Orić case. See Orić, TC Judgement, para. 341.
666 See Chapter 3 supra.
667 Henquet, op. cit., p. 834.
Applying ‘absorption’ to reduce the sentence to correspond to culpability is the opposite of applying aggravating circumstances where an overlap between individual and command responsibility occurs at the stage of a conviction.

As such, the process of considering aggravating and mitigating circumstances at the sentencing stage of a criminal case is a well known trait of criminal law and the practice has been present since the first judgement rendered by the ad hoc tribunals.\(^{668}\) In the Tadić case, the aggravating circumstances taken into account did not concern the superior position of the accused, but rather his willingness to engage in crimes and other factors.\(^{669}\) In the Blaškić case, the Trial Chamber expressed the view that the position of the commander should always be considered as an aggravating factor at the sentencing stage.

“Therefore, when a commander fails in his duty to prevent the crime or to punish the perpetrator thereof he should receive a heavier sentence than the subordinates who committed the crime insofar as the failing conveys some tolerance or even approval on the part of the commander towards the commission of crimes by his subordinates and thus contributes to encouraging the commission of new crimes. It would not in fact be consistent to punish a simple perpetrator with a sentence equal or greater to that of the commander. From this viewpoint, the Trial Chamber recalls that in the Tadić case the Appeals Chamber found that a prison sentence above twenty years would be excessive given the relatively low rank of Dusko Tadic within the command structure. Command position must therefore systematically increase the sentence or at least lead the Trial Chamber to give less weight to the mitigating circumstances, independently of the issue of the form of participation in the crime.”\(^{670}\)

This approach, which has been repeatedly accepted by both ad hoc tribunals, is based on the view that the superior position of the accused automatically justifies a harsher punishment, in comparison with a perpetrator in a hierarchically lower position. In the judgements of the ad hoc tribunals, the result has been that where an overlap between individual and command responsibility has been established, or where at least individual criminal responsibility and the superior position of the accused have been established,\(^{671}\) the punishment has been harsher than it would have been had the accused not held such a superior position. Considering the superior position of the accused as an aggravating circumstance at the sentencing stage has even been considered an obligation.\(^{672}\) At first glance, this practice seems both logical and in


\(^{669}\) Ibid.

\(^{670}\) Blaškić, TC Judgement, para. 789.

\(^{671}\) Orić, TC Judgement, para. 343.

\(^{672}\) Kajeljeli, AC Judgement, paras. 91 and 317.
accordance with one of the overarching goals of all international courts and tribunals, to ensure the accountability of those who bear the most responsibility for the crimes committed.

For the purposes of the command responsibility doctrine, however, this practice is unfortunate, in so far as it concerns established liability under both forms of responsibility, after which command responsibility is subsumed and consequently used as an aggravating circumstance at the sentencing stage. Where established command responsibility is considered as an aggravating circumstance at the sentencing stage and, in fact, equals a harsher punishment on conviction, the interests, values or the message involved in a conviction pursuant to the command responsibility doctrine are not expressed. The practical effect or message of these cases to victims, societies and the international community is simply that the accused were convicted on the basis of their individual criminal responsibility for the crimes. However, the role and behaviour of the accused in the events does not find expression in such convictions. That a conviction is ensured and that the sentence is harsher because of this aggravating circumstance called command responsibility are factors that do satisfy the aim of retribution in the individual case, but that do not contribute to the legitimacy of the decision or the institution which rendered the judgement. Neither does such a conviction contribute to a correct remembrance of the events, which arguably is an important factor for deterrence, more so than the actual conviction of one particular person.

The case law on this issue is unclear. While it is generally accepted that a superior position may or should be considered as an aggravating circumstance in sentencing, the reasoning used to justify it is not consistent. There are three issues that have to be addressed in order to make a well reasoned argument as to the use of the superior position of the accused as an aggravating circumstance in relation to cumulative convictions or established dual liability. First, the question arises as to whether it is the superior position itself or the abuse of authority by the accused that should form the basis for the aggravation. On several occasions, the ad hoc tribunals have pointed out that it is not the superior position as such that constitutes an aggravating circumstance. It was clearly stated in the Babić case that:

673 See the discussion and reference to Osiel in Chapter 5.3.3.2 supra.
674 This argument was inspired by views expressed during a presentation by M. Cherif Bassiouni, Professor, DePaul University, ‘Reflections on the Darfur Case’, Supranational Criminal Law Lecture Series, T.M.C. Asser Institute, The Hague, 1 October 2008.
“[A] Trial Chamber has the discretion to take into account, as an aggravating circumstance, the seniority, position of authority, or high position of leadership held by a person criminally responsible under Article 7(1) of the Statute. A high rank in the military or political field does not, in itself, merit a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence. Consequently, what matters is not the position of authority taken alone, but the position coupled with the manner in which the authority is exercised.”

Whereas a policy decision like this is logical and in accordance with Article 24 of the Statute, the more difficult question is which breaches should be considered as an abuse of power. Is the crime for which the accused is prosecuted at the same time an abuse of his power? If so, it seems that the fact that a person who committed a crime while in a position of authority is at the same time an aggravation of that same offence. Consider the Kvočka case in this regard, where the Trial Chamber stated as follows:

“His experience and integrity can be viewed as both mitigating and aggravating factors – his job was to maintain law and order and, although he apparently did a fine job of this prior to working in the camp, he failed seriously to perform his duty to uphold the law during his time spent in Omarska camp. Holding a position of respect and trust in the community, his failure to object to crimes and maintaining indifference to those committed in his presence was likely viewed as giving legitimacy to the criminal conduct.”

Kvočka was, in fact, prosecuted for his role in the crimes that took place in the Omarska prison camp. Holding that these breaches constituted an aggravating factor seems to be duplicative. Various Chambers maintain that they do not use the same factors both to establish responsibility for the crimes and to harshen the sentence of the accused, but in his Opinion to the Galić Trial Judgement, Judge Nieto-Navia submitted that where it was established that the accused had ordered the crimes proved at trial, his position as a military commander could not be considered as an aggravating factor. The majority in this case held that, “[T]he fact that General Galić occupied the position of VRS Corps commander, and repeatedly breached his public duty from this very senior position, is an aggravating factor.” However, in Nieto-Navia’s view “considering his position as a military commander as an aggravating circumstance is analogous to concluding that being a husband is an aggravating circumstance with respect to the crime of uxoricide.”

676 Kvočka et al., TC Judgement, para. 716.
Secondly, it is of importance to consider whether it is the superior position (including the abuse of power) or established command responsibility that constitutes the aggravating factor. For instance in the *Kajelijeli* case, the Appeals Chamber confirmed the view expressed in earlier cases that where an accused has been convicted under the requirements of both Article 7(1) and 7(3) in relation to the same facts, a conviction should be entered on the basis of Article 7(1) only, and the superior position should be considered as an aggravating circumstance in the sentencing. But, in addition, the Appeals Chamber reaffirmed that only matters that are proved beyond reasonable doubt may be taken into account as an aggravating factor, which means that where the superior position of the accused is used as a ground for a harsher sentence, that superior position must have been proven at trial.\(^679\) The consequence of this is that where Article 7(3) responsibility has been established at trial, the superior position has been proven beyond reasonable doubt. Where that is not the case, the superior position will have to be proven separately. In *Stakić*, the Trial Chamber stated that, “[T]he aggravating effect is identical whether the accused is found to have fulfilled the requirements for responsibility under Article 7(3) or is simply proved to have held superior positions.”\(^680\)

This brings the discussion to the third issue, which is actually an assessment of the consequences of this practice by the *ad hoc* tribunals to three possible scenarios to which an aggravating circumstance is applied. In the first case (a) the accused is convicted under Article 7(1) only. As discussed above, a breach of his position of authority may be considered as an aggravating factor, in so far as the breach is not the crime for which the accused is convicted. In the second scenario, (b) the accused is convicted under Article 7(3) only. In the judgements in the *Hadžihasanović* and *Delić* cases, the Chambers held that, “[I]n the context of a conviction under Article 7(3) of the Statute, use of the superior’s position of authority as an aggravating circumstance would be inappropriate since it is itself an element of criminal liability.”\(^681\) Accordingly, established command responsibility cannot be used as an aggravating factor. Only “the superior’s abuse of that level of authority” in addition to established command responsibility could be so used.\(^682\) Having applied this reasoning, Hadžihasanović was convicted under Article 7(3), his superior position having been established, but he did not receive a harsher sentence because no other abuse of authority was

\(^{679}\) *Kajelijeli*, AC Judgement, para. 82.


\(^{681}\) See *Hadžihasanović*, AC Judgement, para. 320; and *Prosecutor v. Rasim Delić*, Judgement, Case No. IT-04-83-T, 15 September 2008, para. 569.

\(^{682}\) See *Hadžihasanović*, AC Judgement, para. 320.
claimed. For the third category (c), where dual liability (both 7(1) and 7(3)) is established, this finding leads to the conclusion that it is not correct to refrain from cumulatively convicting the accused in favour of subsuming Article 7(3) responsibility under Article 7(1) liability, and subsequently to use established command responsibility as an aggravating circumstance. The Appeals Chamber in Hadžihasanović and the Trial Chamber in Delić were right in pointing out that the use of the superior position as an aggravating factor where command responsibility has been established is inappropriate. This finding gives credit to the opinion, stated above, that command responsibility represents other values and interests than those expressed by a conviction under Article 7(1), these not being well recognised where the responsibility is reduced to an aggravating factor of the individual criminal responsibility of the accused.

5.3.5 Conclusion

In some cases the judges have justified their preference for Article 7(1) liability by saying that this basis best describes the role of the superior in the crimes committed. However, the latest development does not even require this justification but assumes that the Article 7(3) liability is anyway subsumed under the individual criminal responsibility finding. This approach removes the possibility, or at least the obligation, that the judges would have to consider the ‘traditional ambit’ of the command responsibility principle and give preference to command responsibility as the basis for liability where the case indeed falls within that – obviously more restrictive – category of cases.

At least two cases, the Aleksovski case and the Krstić case, have been mentioned by commentators in relation to which a different approach favouring command responsibility could have been useful. In relation to the Aleksovski case, Jia found that while the crimes and the situation fitted under Article 7(1), a command responsibility conviction would have been more suitable. The following finding by Jia is interesting:

683 Ibid.
684 See Tuta and Štela, TC Judgement, paras. 78-81.
685 See Prosecutor v. Dragomir Milošević, Judgement, Case No. IT-98-29/1-T, 12 December 2007, para. 984, which refers to a number of judgements sharing that view: Blaškić (AC); Krstić (TC and AC); Kordić and Čerkez (AC); Kvočka (AC); Kajelijeli (AC); and Naletilić and Martinović (Tuta and Štela) (AC).
687 The Aleksovski judgement was rendered before the Tadić Appeals Chamber introduced the JCE concept, but as the accused acted as a warden in a prison camp, a JCE charge could have been expected, had the accused stood trial at a later date.
“At no time in his term of office was he a mere individual. His participation in the offences of his subordinates may be no more than secondary in terms of importance to his failure to prevent the offences from being committed within his sight by others under his control. From a practical point of view, to prosecute him mainly as a commander would not lead to a different result in terms of sentence than if he was convicted under Article 7(1), with his command position as the aggravating factor. However, this possibly alternative approach has to be balanced by the fact that the ICTY in its practice follows the opposite approach.  

Jia favours an approach by which preference is given to command responsibility, despite the possibility of a conviction under Article 7(1), and finds that such an approach would not necessarily lead to harsher or more lenient sentences. This form of ‘affirmative action’ was also considered in relation to the Krstić case. Consider the following opinion of Danner and Martinez:

“Given the Appeals Chamber’s obvious discomfort with the broad liability Krstić incurred under a JCE theory, it is even more curious why the court concluded that Krstić’s conduct amounted to aiding and abetting the JCE when it could have recast his liability on a command responsibility theory, which had been included in his indictment. Since the Appeals Chamber viewed General Krstić’s principal fault as failing to take steps to prevent troops under his command from participating in the genocidal plan hatched by other, command responsibility – rather than aiding and abetting – seems to capture more accurately the basis for the liability that the Appeals Chamber found.”

The role of the accused was such as to allow a finding under Article 7(1), but according to these authors, the emphasis should have been put on his responsibility under the command responsibility principle. Whether the role of Krstić was indeed one that would fall within the ‘traditional ambit’ of command responsibility is a separate issue, but the example illustrates the different approach that may be taken in cases that charge both individual and command responsibility.

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688 See Jia 2000, op. cit., p. 145.
690 Danner and Martinez, op. cit., p. 153.
691 In a footnote the Appeals Chamber gave the following ‘explanation’ with regard to the issue of the superior responsibility of Krstić: “The Appeals Chamber’s determination that General Krstić is responsible as an aider and abettor is also based on Article 7(1). Even if General Krstić is also found to be responsible as a Commander, the Appeals Chamber concludes, as did the Trial Chamber, that the mode of liability under Article 7(1) best encapsulates General Krstić’s criminality. This is because the most he could have done as a Commander was to report the use of his personnel and assets, in facilitating the killings, to the VRS Main Staff and to his superior, General Mladić, the very people who ordered the executions and were active participants in them. Further, although General Krstić could have tried to punish his subordinates for their participation in facilitating the executions, it is unlikely that he would have had the support of his superiors in doing so.” See Prosecutor v. Radislav Krstić, Appeal Judgement, Case No. IT-98-33-A, 19 April 2004, n. 250.
In fact, the Trial Chamber in the *Krnojelac* case took that other approach. The judges made the following finding:

“With respect to aiding and abetting liability pursuant to Article 7(1), the Trial Chamber is satisfied that the Accused knew of the beatings and that, by failing to take any appropriate measures which, as the warden, he was obliged to adopt, he encouraged these acts, at least in respect of his subordinates. The Trial Chamber is satisfied therefore that the Accused’s liability for aiding and abetting the beatings pursuant to Article 7(1) has been established. The Trial Chamber considers, however, that, in view of the nature of the Accused’s participation, the more appropriate basis of liability in relation to the beatings is his responsibility as a superior pursuant to Article 7(3) of the Statute. As the Trial Chamber is of the view that it is inappropriate to convict under both heads of responsibility based on the same acts, it will enter a conviction under Article 7(3) only.”

While it had established that the accused incurred responsibility under Article 7(1), the Trial Chamber found that also the elements of command responsibility had been proven and that the principle should be used for the facts in this case. The subsequent reasoning by the judges serves as an example of the kind of situations to which command responsibility is, indeed, applicable:

“In respect of the actions of the guards of the KP Dom, the Accused is responsible as their superior under Article 7(3) of the Statute. As warden of the KP Dom, the Accused was the *de jure* superior of the guards, and he knew, for the reasons given above, that they were involved in the beating of non-Serb detainees. Not only did the Accused personally see one of his subordinates beat a detainee, he also heard about such incidents, and it must have been clear that, considering that the guards were in direct contact with and controlled the detainees, some of them were involved.”

These examples confirm that with regard to the relationship between individual and command responsibility the challenge is not so much whether there is a basis for the simultaneous application of individual and command responsibility, as it is to find out what the command responsibility should achieve. This broader question will be addressed in Chapter 6.

### 5.4 The nature of the crime underlying the charges of command responsibility

#### 5.4.1 Introduction

Another factor that influences the application of the command responsibility doctrine is the nature of the crime underlying the charges of command responsibility. While the statutes of

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693 Ibid., para. 318.
the presently active international(ized) tribunals and courts set out the applicability of the command responsibility doctrine in relation to all international crimes under their jurisdictions, the specific definitions of certain international crimes necessitate some closer consideration of the applicability of the doctrine to these violations.

With regard to the application of the command responsibility doctrine to war crimes and crimes against humanity, neither case law nor legal writings have identified problems specifically related to the nature of these crimes. As concerns the crime of genocide, the situation is a little different. The crime of genocide is unique in that in its definition it requires *mens rea* on the part of the perpetrator “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” In relation to the application of the command responsibility doctrine this specific intent requirement is generally considered as very problematic, considering the fact that the superior charged under the command responsibility doctrine is not himself the physical perpetrator of the crime. The case law produced shows inconsistencies, which are troubling from the perspective of the jurisprudence of the *ad hoc* tribunals but also for the future decision making of the ICC and other international courts applying the same doctrine. Depending on which approach regarding the nature of the command responsibility doctrine itself is taken, the applicability of the doctrine to the crime of genocide raises various questions that will be addressed in this section (Section 4) of this chapter.

While not yet defined for the purposes or nor applied by the ICC, the crime of aggression has also been a source for debates and negotiations. An aspect which is unsettled and which will be addressed below is aggression and its relationship with command responsibility. Although the two crimes – genocide and aggression – are challenging in different ways, they both raise some questions regarding the significance of the nature of the crime underlying the charges of command responsibility. Can all crimes be charged on the basis of command responsibility?

This question goes further than the crime of genocide and crimes against humanity. As command responsibility is considered to apply to all crimes under the jurisdictions of the various international tribunals, the question may be asked whether the applicability is restricted to international crimes. At present, many states participate in peacekeeping missions

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all over the world that may not be qualified as armed conflicts. There are situations in which
the state is faced with violations that do not qualify as war crimes, but show similarities with
cases in which the commander, had the crime been an international crime, could have been
charged under the command responsibility doctrine. Is there something in the nature of
international crimes that makes the command responsibility doctrine particularly suitable for
liability for these crimes, or could commanders in cases of any unlawful military use of force
be tried under this doctrine? This issue will also be briefly addressed below.

5.4.2 Genocide

5.4.2.1 Applicability

The present definition of genocide applied by international courts and tribunals stems from
the Convention on the Prevention and Punishment of the Crime of Genocide. Having been
included in the initial Draft Code of Crimes Against the Peace and Security of Mankind in
1950 and in the subsequent versions of the Draft Code, the crime of genocide was naturally
incorporated in the statutes of the ad hoc tribunals and in the Rome Statute of the ICC.695 The
Genocide Convention was considered to have become part of international customary law
and, therefore, satisfied the requirement set for the ad hoc tribunals that they could only apply
humanitarian law which had beyond any doubt become part of international customary law.696

Applying the genocide definition as laid down in international customary law is generally
recognised as problematic, due to the special intent requirement, without which there cannot
be criminal liability for the crime of genocide.697 The ‘special intent’ concept is in itself
increasingly contested,698 and raises specific concerns in relation to command responsibility.
As stated by Schabas, a special intent crime “requires performance of the actus reus but in


696 See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN

697 See, for example, Schabas 2000, op. cit., pp. 206-256; L. van den Herik and E. van Sliedregt, ‘Ten Years
Later, the Rwanda Tribunal still Faces Legal Complexities: Some Comments on the Vagueness of the
H.G. van der Wilt, ‘Genocide, Complicity in Genocide and International v. Domestic Jurisdiction – Reflections
“Complicity in Genocide” versus “Aiding and Abetting Genocide” – Construing the Difference in the ICTR and

698 H.G. van der Wilt, ‘Genocide, Complicity in Genocide and International v. Domestic Jurisdiction –
association with an intent or purpose that goes beyond the mere performance of the act." 699
The difficulties arise when assessing the role of the accused in the perpetration of the crime of genocide. Where in the genocidal machinery should the special intent be found? If only the physical perpetrator/principal offender/‘the one who pulled the trigger’ should possess the special intent to destroy one of the specified groups or part of it, the nature of the crime of genocide is not well understood. Schabas noted that in relation to the crime of genocide, the principal offender is often “a small cog in the machine,” while the accomplice is “the real villain.” 700 That same consideration springs to mind when assessing the crime of genocide in combination with the command responsibility doctrine, as the ‘object’ of command responsibility, the commander/superior, is not the physical perpetrator of the crime. 701

There are two relevant questions to be asked here. The first concerns the nature of command responsibility, as discussed earlier in this chapter. The second concerns the applicability of command responsibility to all international crimes included in the various statutes. In relation to the first question, several authors have struggled with the fact that if command responsibility leads to criminal liability for the crime itself, for genocide, also the special intent of the commander/superior will have to be proven. 702 Most authors hold the view, based on convincing arguments, that if command responsibility is to be applied to genocide in the first place, there has to be a lower requirement of the level of intent than the possession of special intent. 703 Where special intent on the part of the commander/superior can be proven, “[T]he commander comes within the easy grasp of Article 6(1)/7(1) and superior-liability charges are redundant.” 704 Schabas came to the conclusion that it is difficult to reconcile the negligent behaviour of a superior with a crime that requires “the highest level of intent.” 705 In fact, he could not offer any other solution to the applicability problem, except to “create an evidentiary presumption by which a commander is deemed to have participated in genocide if his or her subordinates committed the crime.” 706 This answer to the problem can hardly become an option, as liability is then founded on the position of the accused as the superior of

700 Ibid., p. 286.
701 On command responsibility in relation to genocide, see Schabas 2000, op. cit., pp. 304-313.
706 Ibid., p. 313.
those who committed the genocide. This option has repeatedly been rejected, as it comes close to the strict liability of the superior.\textsuperscript{707} According to Zahar, the problem with Schabas’ conclusion is that he treats command responsibility as a negligence crime.\textsuperscript{708} In Zahar’s view, command responsibility is clearly “a special form of complicity,”\textsuperscript{709} which in contrast to negligence offences contains a knowledge requirement.\textsuperscript{710} While the lack of genocidal intent led Schabas to conclude that it is illogical to apply command responsibility to genocide with the evidentiary presumption, Zahar held that there can be a number of forms of participation in the crime of genocide and did not see why the superior could not be convicted under the command responsibility provision for genocide. In his view: “Genocide was, after all, the only crime which the defendant superior, by his or her deliberate acts of omission, associated himself or herself with.”\textsuperscript{711}

The views of these authors, formulated prior to the great amount of new \textit{ad hoc} tribunal case law of the past few years and influenced by the existing case law at the time, very well illustrate the challenges facing command responsibility for the crime of genocide. Cassese briefly addressed the issue of command responsibility in relation to the crime of genocide, but noted that the commander/superior may possess various levels of \textit{mens rea}, and that any consideration as to the applicability of the command responsibility doctrine in relation to genocide should be seen in light of this finding.\textsuperscript{712} The levels of \textit{mens rea} were extracted from categories of command responsibility set out in the German Criminal Code, which were discussed earlier in this Chapter.\textsuperscript{713} In Cassese’s view, there may arguably be a possibility to find command responsibility in relation to genocide, but only in those cases where the commander/superior “knows that genocide is about to be perpetrated, or is being committed, and deliberately refrains from forestalling the crime or stopping it.”\textsuperscript{714} Where he failed to punish subordinates who had committed genocide, according to Cassese, the commander

\textsuperscript{707} See, for example, \textit{Kayishema and Ruzindana}, TC Judgement, para. 229, where the Trial Chamber pointed out that for the purposes of command responsibility, only “those superiors who exercise effective control over their subordinates” may incur liability. It is the material ability that constitutes “the touchstone” of Art. 6(3) responsibility. See ibid. It would not be justified to hold that the fact that the accused happened to be a superior creates a presumption of participation in genocide.

\textsuperscript{708} Zahar 2001, op. cit., p. 615.

\textsuperscript{709} Ibid., p. 614.

\textsuperscript{710} Ibid., p. 615.

\textsuperscript{711} Ibid.

\textsuperscript{712} See Cassese 2003, op. cit., p. 108.

\textsuperscript{713} See Chapter 5.2.2 \textit{supra}.

\textsuperscript{714} See Cassese 2003, op. cit., p. 108.
could not be held responsible, regardless of whether the breach of his duties was intentional, reckless or negligent.715

Allowing a lower level of *mens rea*, in keeping with that described by Cassese, certainly offers an outcome to the cases of ‘aggravated command responsibility’, as discussed previously in this Chapter.716 In these cases the commander is indifferent to or silently approves of the commission of crimes by his subordinates and his liability is based on a form of participation *sui generis*. To require that the commander “knows that genocide is about to be perpetrated, or is being committed” seems like a workable solution. However, instead of completely rejecting the applicability in cases of negligence on the part of the commander, as suggested by Cassese, the ‘act *sui generis*’ option, at least theoretically, offers possibilities to apply command responsibility to genocide in this second category of cases.

It has been held that where command responsibility is considered an act *sui generis*, there may be possibilities for broadening the applicability of the command responsibility principle.717 Where command responsibility is seen as an act *sui generis*, the superior will be held responsible for the failure to act, regardless of the character of the crime which triggers the responsibility. The fact that subordinates commit the crime of genocide and necessarily must have special intent in order to incur responsibility for that crime does not create any requirements with regard to the *mens rea* of the superior, as his responsibility only concerns the failure to act. The only *mens rea* requirement in relation to the superior is whether he knew or ‘had reason to know’ of an unlawful act by the subordinates. In cases where there is no ‘aggravated command responsibility’, the *sui generis* option offers a more justifiable solution than command responsibility as criminal liability for the actual crimes committed by subordinates. Accordingly, applying the two-category approach to command responsibility is a somewhat better way to approach the difficulties caused by the special intent requirement in the definitions on genocide. The inherent incompatibility between genocide and the command responsibility principle remains, despite the theoretical efforts to combine the two.

5.4.2.2 Case law

715 Ibid.
716 See Chapter 5.2.2 supra.
717 Swart, op. cit., p. 234.
The considerations regarding the crime of genocide of this and other authors, as mentioned earlier, have been influenced and inspired by the case law produced by, mainly, the ad hoc tribunals. The issue of command responsibility for the crime of genocide has been addressed in several judgements, primarily in the cases before the ICTR, but also in some important decisions of the ICTY.

One of these cases was the Krstić case. General Krstić was the commander of the Drina Corps, which was involved in crimes of terror committed at Potocari, the subsequent forcible transfer of women, children and the elderly and the mass execution of military-aged Muslim men from Srebrenica, which constituted genocide.\footnote{Prosecutor v. Radislav Krstić, Judgement, Case No. IT-98-33-T, 2 August 2001, para. 606.} The Trial Chamber first found the accused criminally liable as a principal perpetrator in a JCE aimed at committing genocide. In this context the Trial Chamber found the accused to have had genocidal intent.\footnote{Ibid., para. 644.} The Trial Chamber subsequently considered whether the accused could also be found liable under Article 7(3) and concluded that all the elements of command responsibility, the effective control, the mens rea and the failure to prevent or punish, had been shown.\footnote{Ibid., paras. 647-648.} With regard to the mens rea requirement, the Trial Chamber concluded that the accused knew of the ongoing killing campaign and had to have been aware of the genocidal objectives. In the opinion of the Trial Chamber, Krstić could have incurred superior responsibility for the crime of genocide, but instead it held that, “General Krstić’s responsibility for the participation of his troops in the killings is sufficiently expressed in a finding of guilt under Article 7(1),”\footnote{Ibid., para. 652.} and did not enter a conviction based on superior responsibility. On appeal the issue of Krstić’s superior responsibility under Article 7(3) was not as such considered, but it was nevertheless mentioned in the context of the findings of responsibility by the Appeals Chamber. The basis for the liability of the accused was changed on appeal from participation in a joint criminal enterprise to aiding and abetting the crime of genocide.\footnote{Prosecutor v. Radislav Krstić, Appeal Judgement, Case No. IT-98-33-A, 19 April 2004, n. 250.}

In a footnote, the Appeals Chamber agreed with the Trial Chamber that an Article 7(3) conviction would not have encapsulated the criminality of the accused as well as liability under Article 7(1). The reasoning was as follows:

“This is because the most he could have done as a Commander was to report the use of his personnel and assets, in facilitating the killings, to the VRS Main Staff and to his superior,
General Mladić, the very people who ordered the executions and were active participants in them. Further, although General Krstić could have tried to punish his subordinates for their participation in facilitating the executions, it is unlikely that he would have had the support of his superiors in doing so.\textsuperscript{723}

The Krstić case is of value in this context because of its command responsibility charges in relation to genocide. However, the findings are more interesting for the discussion previously in this chapter regarding the overlap between individual criminal responsibility and command responsibility, as the dismissal of the command responsibility charges were not related to the fact that the crimes committed by the subordinates constituted genocide. Neither was there any explanation regarding the relevance of the knowledge of the accused as to the genocidal objectives of the killing campaign. Something that deserves to be mentioned is the note by the Appeals Chamber that the accused, in his position as a commander, would not have been able to prevent or punish because his superiors were involved ‘in the plot’. If this statement had been made only in relation to the crime of genocide, it could support the view that genocide presupposes the involvement of the highest officials and makes command responsibility inapplicable. A similar statement was made regarding imprisonment as a crime against humanity in the Krnojelac case, which shows that this argument is not unique to genocide.\textsuperscript{724}

For the command responsibility doctrine in general, the argument in Krnojelac and in Krstić is interesting, as it could create a presumption of the inapplicability of the command responsibility both in relation to crimes against humanity and genocide. The commander would be hindered in his possibilities to prevent or punish because he would not get support from his superiors. It should be recognised, of course, that this view was expressed in a small minority of the cases.

As in the Krstić case, one of the accused in the ‘Media case’ (ICTR) was acquitted under Article 6(3) charges of genocide, because an Article 6(1) finding had been made.\textsuperscript{725} This finding by the Appeals Chamber reversed the finding by the Trial Chamber, according to which the accused, Barayagwiza, had:

“[S]uperior responsibility over members of the CDR\textsuperscript{726} and its militia, the Impuzamugambi\textsuperscript{727}, as President of CDR at Gisenyi Prefecture and from February 1994 as President of CDR at the

\textsuperscript{723}Ibid.


\textsuperscript{725}Nahimana et al., AC Judgement, para. 667.

\textsuperscript{726}The Coalition pour la Défense de la République party, of which Barayagwiza was a founding member. See Nahimana et al., TC Judgement and Sentence, para. 7.
national level. He promoted the policy of CDR for the extermination of the Tutsi population and supervised his subordinates, the CDR members and Impuzamugambi militia, in carrying out the killings and other violent acts. For his active engagement in CDR, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians by CDR members and Impuzamugambi, the Chamber [found] Barayagwiza guilty of genocide pursuant to Article 6(3) of its Statute.\(^{728}\)

The Chamber established that the accused had the genocidal intent necessary to find him guilty of genocide, concluding the following: “From his words and deeds, Barayagwiza’s ruthless commitment to the destruction of the Tutsi population as a means by which to protect the political gains secured by the Hutu majority from 1959 is evident.”\(^{729}\) The Appeals Chamber did not pronounce on the need, under the command responsibility doctrine, to establish that the superior had genocidal intent. The finding goes against the views, as expressed above, that proven genocidal intent brings the accused within the reach of the individual criminal responsibility provisions. Such responsibility had already been established in this case.

The Serushago case was decided following a guilty plea by the accused, in which he admitted being guilty of genocide and crimes against humanity, crimes that had taken place in the Gisenyi prefecture in Rwanda between April and July 1994.\(^{730}\) The accused acknowledged that he had been one of the leaders of the Interahamwe in Gisenyi and the head of a group of militiamen, over which he exercised authority and control.\(^{731}\) In light of the admissions by the accused, the Trial Chamber noted that it had been admitted by the Defence that:

“Omar Serushago, in the commission of the crimes for which he has been found guilty, played a leading role and that he therefore incurs individual criminal responsibility under the provisions of Article 6(3) of the Statute.”\(^{732}\)

The outcome of the case has rightly been considered ambiguous.\(^{733}\) Although the findings were based on a guilty plea, the accused should not have been convicted under Article 6(3) for

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\(^{727}\) “Those who have the same goal”; Name of the youth wing of the CDR, according to the glossary included in the judgement.

\(^{728}\) Nahimana et al., TC Judgement and Sentence, para. 977. Barayagwiza was also held responsible for incitement to commit genocide pursuant to Art. 6(1).

\(^{729}\) Ibid.


\(^{731}\) Ibid.

\(^{732}\) Ibid., para. 28.

\(^{733}\) Schabas 2000, op. cit., p. 310.
genocide, as he had already pleaded guilty to the commission of genocide. Similarly, the Trial Chamber in the Kambanda case accepted the guilty plea of the accused and found him guilty of genocide by virtue of both Article 6(1) and 6(3).\footnote{Prosecutor v. Jean Kambanda, Judgement and Sentence, Case No. ICTR-97-23-S, 4 September 1998, para. 40.} The accused was the Prime Minister of the Interim Government of Rwanda during the period that the genocide took place and exercised \textit{de jure} and \textit{de facto} authority over both senior civil servants as well as senior officers in the military. The accused pleaded guilty under Article 6(1) but also admitted that he “knew or should have known that persons for whom he was responsible were committing crimes of massacre upon Tutsi and that he failed to prevent them or punish the perpetrators.”\footnote{Ibid., para. 39.}

Further, in the case against Clément Kayishema and Obed Ruzindana the Trial Chamber established liability for genocide pursuant to Article 6(3), in addition to its finding of liability under Article 6(1), in relation to one of the accused, Kayishema. At the time, Kayishema exercised both \textit{de jure} and \textit{de facto} control over all or most of the perpetrators of the crimes. The Trial Chamber found that Kayishema both “knew that his subordinates were about to attack and failed to take reasonable and necessary measures to prevent them, when he had the material ability to do so.”\footnote{Kayishema and Ruzindana, TC Judgement, para. 555.} The number of victims, the pattern or methodology with which the crimes were committed and the utterances of the accused showed Kayishema’s genocidal intent.\footnote{Ibid., paras. 531-540. The judgement was not altered by the Appeals Chamber on this point. See Kayishema and Ruzindana, AC Judgement.} This case, like Serushago and Kambanda, is one of the earlier cases decided by the \textit{ad hoc} tribunals. Judgements of a later date have rejected cumulative convictions under Articles 6(1)/7(1) and 6(3)/7(3).

On the basis of these examples, it seems justified to conclude that both \textit{ad hoc} tribunals have recognised that superiors may be held liable under the superior responsibility provision for genocide.\footnote{Also in more recent cases, such as the Cyangugu case, the accused have, at first instance, been found liable under the command responsibility provision. For reasons other than the applicability of command responsibility in relation to genocide, the Appeals Chamber has overturned these convictions. See, for example, Nagerura \textit{et al.}, TC Judgement and Sentence, \textit{inter alia}, paras. 694-695; and Nagerura \textit{et al.}, AC Judgement, paras. 164-165. On this case, see also S. Kagan, ‘The “Media case” before the Rwanda Tribunal: The Nahimana \textit{et al.} Appeal Judgement’, \textit{3 Hague Justice Journal} (2008) pp. 83-91, at pp. 87-88.} Regrettably, thorough reasoning as to the applicability of the command responsibility doctrine in relation to the crime of genocide is still lacking.
5.4.2.3 Desirability

The two previous sections discussed the applicability in theory and in case law of the command responsibility doctrine in relation to the crime of genocide. In the present section, the desirability of applying command responsibility in relation to genocide will be discussed.

By removing the special intent from the superior charged with command responsibility in relation to genocide, as discussed earlier, the application of this doctrine to the crime of genocide becomes more acceptable. As to the desirability of allowing an interpretation which makes a conviction on the basis of command responsibility for genocide conceivable, the nature of the command responsibility doctrine and its purpose should be reiterated.739 For the purposes of the present discussion, it is useful to consider which purpose the command responsibility doctrine was not intended to serve. On the basis of the elements of command responsibility as defined and applied, it is not meant to apply to facts which support a finding that the commander planned, instigated or incited his subordinates to commit crimes. As regards genocide, this is exactly what is expected of a superior. Consider the following statement:

“The difficulty with genocide is that it tends to be committed along a chain of command. At the top of the chain, the point at which the planning, instigating and directing occurs, the special intent is most evident. But those who plan may not be involved in the commission of a basic act. In contrast, at the bottom of the chain, the point at which the basic acts are committed, it may be difficult to infer special intent.”740

First, under command responsibility the superior is not the one who planned or directed the commission of the crimes. Secondly, the subordinates of the superior, usually those who committed the basic acts, may not have special genocidal intent. On the basis of these findings, it may be held that the doctrine does not lend itself to application in relation to the crime of genocide. Nevertheless, there are at least two important factors that have an impact on the continuing attempts to apply the doctrine and to try to justify its application in cases of genocide. The first factor to keep in mind is the prosecutors and their attitude towards command responsibility in relation to genocide. Statements made by prosecutors at the

739 See Chapter 3 supra.
various tribunals create the impression that genocide may well be charged on the basis of the command responsibility provision and, despite the development of the doctrine in a slightly different direction, that command responsibility is a significant tool when prosecuting “local or central leaders” in relation to “crimes of great magnitude.” Also relatively recent indictments indicate that prosecutors consider command responsibility as a desirable legal basis for liability in relation to genocide.

The second factor is the fact that the statutes of the various courts and tribunals have not specified the applicability of the command responsibility provision to certain crimes. As command responsibility can arise for all crimes mentioned in the statutes, it has been considered that this should not be any different with regard to genocide, or to incitement to commit genocide, and accordingly that, “[E]ven if subordinates merely ‘directly and publicly incite others to commit genocide,’ superiors can be held responsible and liable for punishment for Command Responsibility with regard to genocide, when all the other elements also can be established.” Consequently, where the superior failed to prevent or punish the incitement, he could be held responsible. In that case, those who perpetrated or were incited to commit the crime of genocide need not have been the subordinates of the superior who is being held liable. Accepting that there may be superior responsibility for all crimes defined, including in relation to genocide, the responsibility of the superior and his failure to act is stressed, rather than the difference between the specific crimes.

Taking the view that the command responsibility doctrine should be applied restrictively, it could be argued that such responsibility goes too far in that it does not reflect the actual culpability of the superior in a crime of such great magnitude. Regardless of the nature of command responsibility, the crime of genocide requires an intent to destroy, in whole or in

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744 Whereas the present discussion concerns the crime of genocide, applying command responsibility to crimes against humanity may raise similar concerns, as this category of crimes requires that violations were widespread and systematic and, thus, of a great magnitude.
part, a religious, ethnic or other group of people. Accordingly, a certain group is being killed or seriously harmed with the intent to destroy that group or there is an imminent threat that that is going to happen. In the cases in the past, where the occurrence of genocide was established, the scale of the killing or the harm was very extensive. As the critics in the cases decided by the ICTR have rightly observed, it is difficult to imagine that in such circumstances the superior could fulfil the elements of command responsibility without playing a more active or facilitative role in those large-scale events. This line of thinking is corroborated by the fact that in the ICTR genocide cases the superiors incurring command responsibility have also been found to have, in some way, actively participated in the events (for the purposes of Article 6(1)).

The question remains as to whether there are situations in which the superior could incur command responsibility for genocide, where the special intent of the crime of genocide itself was not required. Imagine the following situation: Killings of a certain group have been carried out over a large area and members of this group are internally displaced. Arriving at a town these persons are brought to a sports complex and the superior and his subordinates are ordered to keep guard. Because he knows that some of his subordinates share the sentiment of those who have killed members of the group with intent being to destroy that group, the superior reminds his subordinates that they are there simply to keep guard, but decides to spend the evening at a bar in the town centre. In the meantime, several persons are taken out of the complex and killed by his subordinates. Because of the unrest in the area, the people are moved to another location the next morning and the superior, together with his subordinates, are reassigned and leave. The superior does not have time to make inquiries into the events of the evening.

In relation to the superior in the present example, the elements of command responsibility could be said to have been fulfilled, for the failure to act, that is. Applying the ‘sui generis option’, there would be no requirement of a special intent for the purposes of genocide on the part of the superior. The application of the command responsibility principle in relation to genocide in such a specific case is conceivable. However, the above example does not correspond to the facts in the majority of the genocide cases tried so far. Because of the scale on which the crime of genocide usually takes place, the most suitable basis for trying a superior will be an act, rather than an omission, on the part of the superior. Even where command responsibility was considered as an ‘act sui generis’, the removed special intent
requirement would not change the difficulty of combining command responsibility and genocide, not least in relation to purely civilian superiors.

Are we to regret this conclusion, or in other words, is it desirable that superiors incur command responsibility in relation to the crime of genocide? Regardless of whether the superior is a military superior or a civilian, command responsibility does not constitute the most suitable basis for responsibility in situations where the crime of genocide has been committed. The lack of a requirement of special intent on the part of the superior would not change the fact that the circumstances under which genocide may occur are such that command responsibility purely as a crime of omission is not the best way of describing the responsibility of the superior.

The command responsibility provisions in the statutes of the ad hoc tribunals and of the ICC apply to all crimes included in the statutes, i.e., also to genocide, and have been applied by the ad hoc tribunals in relation to that crime. However, future criticism is avoided only by treating command responsibility in relation to genocide as a theoretical option to other ways of prosecuting alleged criminals, with the understanding that it is only in highly exceptional cases that charges under that principle would be justified, not least in relation to civilian superiors.745

5.4.3 Aggression

An aspect of the command responsibility discussion which is still not definitely solved is whether the principle and in particular the provision on superior responsibility in the ICC Statute can and should be applied to the crime of aggression. As no case law exists at the international level where a superior has been charged under the command responsibility principle in relation to the crime of aggression, the issue has most notably arisen in the context of the Special Working Group on the Crime of Aggression (SWGCA), which was set up at the first session of the Assembly of States Parties to the Rome Statute of the International Criminal Court.746 In its negotiations on different issues pertaining to the crime of aggression, the SWGCA, which is “open on an equal footing to all States Members of the

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745 See the discussion in Chapter 6.2.3 infra.
United Nations,”747 recognised the need to discuss the applicability of Article 28 ICC, i.e., the superior responsibility provision, in relation to the crime of aggression. Participants at the SWGCA have expressed the view that superior responsibility is “not applicable by virtue of both the essence and the nature of the crime”748 of aggression, or that at most the principle is “of rather theoretical relevance for the crime of aggression.”749 Accordingly, while the definition or description of the crime of aggression is subject to difficult negotiations, it seems clear that the crime of aggression can only be committed by the highest superiors, which means that there is no higher hierarchical level to prosecute under the command responsibility provision.

A practical application of command responsibility in relation to the crime of aggression could be possible if the definition of aggression were to be formulated so that the crime could be committed without the orders of the top officials of the relevant state or other group committing the crime of aggression.

Participants at the SWGCA have expressed a preference to formulate a specific provision which rules out the application of the command responsibility principle to the crime of aggression. For the purposes of the ICC, such a provision would render it unnecessary to further theorise about the applicability of command responsibility in relation to the crime of aggression.

5.4.4 Acts not qualifying as international crimes

The two previous sections discussed the applicability of command responsibility in relation to genocide and aggression, two international crimes with distinct features that make the application of command responsibility arguably less straightforward than where the subordinates committed war crimes. The present section addresses acts not qualifying as international crimes and the question why command responsibility does not constitute the best basis for criminal liability in relation to such crimes. For the purposes of the present discussion, by acts not qualifying as international crimes are meant violations that are committed in or are connected to an armed conflict or mass atrocities, but that do not belong

747 Ibid.
to the core crimes – genocide, crimes against humanity, war crimes and aggression. The aim of this chapter is not to broaden the applicability of the doctrine to crimes committed in other, mostly civilian settings, or to compare it to other forms of responsibility, like the responsibility of corporate officers.\(^{750}\)

At present, the command responsibility doctrine as developed in international law applies primarily to international crimes, but to a limited number of international crimes. As explained by Schabas, the concept of ‘international crimes’ is far from new and covers more crimes than those included in the Rome Statute, such as piracy and trafficking in women and children.\(^{751}\) The crimes included in the Rome Statute are international “because their heinous nature elevates them to a level where they are of ‘concern’ to the international community.”\(^{752}\) There is, however, no provision in international law which limits the applicability of the command responsibility doctrine to these international crimes. The Statutes of the SCSL and the Special Tribunal for Lebanon (STL) both provide for the applicability of command responsibility to the crimes under their respective jurisdictions, although not all of the violations qualify as international crimes, as set out in the Rome Statute.\(^{753}\) Had it not been for the lack of support for the inclusion of certain other international crimes during the negotiation process leading to the adoption of the Rome Statute, also the ICC could have applied the command responsibility doctrine to crimes other than the international core crimes now included.\(^{754}\) There have also been suggestions to amend the Rome Statute to allow the command responsibility doctrine to cover crimes more generally:

“[A] superior is criminally responsible for failure to take such measures as are reasonable to prevent his subordinates from committing such crimes which are reasonable foreseeable in the circumstances of the armed conflict.”\(^{755}\)

\(^{750}\) On this and other analogous concepts, see, for example, Van Sliedregt 2003, op. cit., pp. 199-209.

\(^{751}\) Discussing the criminal responsibility of individuals in the post-Second World War period, Woetzel said the following about international crimes: “[A]n act is an international crime, if it causes grave harm to the international community.” See R.K. Woentzel, The Nuremberg Trials in International Law with a Postlude to the Eichmann Trial (London, Stevens and Sons 1962) p. 110.

\(^{752}\) Schabas 2004, op. cit., p. 29.

\(^{753}\) In addition to international crimes, the Statute of the SCSL contains crimes under Sierra Leonean Law, including “Offences relating to the abuse of girls.” See Art. 5 of the SCSL Statute. Art. 2 of the STL Statute states that the tribunal is to apply “provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences.”


At the international level there seems to be an acceptance of command responsibility as a doctrine which is applicable to those crimes which are considered important enough to be included in the statute of an international tribunal. From a criminal law point of view, the argument that the command responsibility doctrine extends the criminal liability of the subordinates committing the crime to the superior has led authors to consider whether command responsibility should primarily remain a basis for criminal liability for international crimes. Damaška, who in his article expressed very critical views regarding the applicability of command responsibility as such, most importantly because, in his view, it deviates from the culpability principle in domestic criminal law, asked the following question:

“Is there something peculiar in the circumstances in which international criminal tribunals operate, in the nature of massive human rights violations, or in the criminal liability for outcomes of complex organisations, that calls for and justifies the exceptional severity of imputed forms of command responsibility?”

Damaška considered that in spite of reasons such as the deterrent or preventive effect or the symbolic function of international criminal law, which may be different for international crimes than for common crimes, there will have to be a “gradual refinement” of international criminal rules, in order to reach the same level of acceptance under domestic criminal law. This concerns in particular the rule on command responsibility.

Many states have implemented the command responsibility doctrine as being applicable to international crimes in new provisions in their domestic penal codes or as a separate law on international crimes. That, of course, does not mean that they consider the command responsibility doctrine to be applicable to crimes not qualifying as international crimes. The United Kingdom has accepted the doctrine and has included it in the 2004 Manual of the Law of Armed Conflict of the United Kingdom Ministry of Defence, which contains the following wording in relation to the responsibility of commanders:

756 Damaška, op. cit., p. 471.
758 Damaška, op. cit., p. 496.
“Military commanders are responsible for preventing violations of the law (including the law of armed conflict) and for taking the necessary disciplinary action.”

Reference is made to the Fourth Hague Convention, to the Geneva Conventions and to Additional Protocol I, which all set out the general responsibility of the contracting parties to suppress acts contrary to the provision of the conventions. The Manual does not refer exclusively to preventing international crimes, but seems to remind the commanders of their duty to take action in relation to all violations. In accordance with recent developments of international law, the Manual also points out that a failure to prevent such breaches will lead to criminal responsibility. The commander may be held criminally responsible even where the act of the subordinates did not amount to an international crime. The Manual continues with an explanation of the command responsibility doctrine as developed in international law and does not provide for another basis of the criminal responsibility of the commander where the crime was not an international crime. The Manual seems to accept that the applicability of the doctrine of command responsibility is not restricted to international crimes and could be applicable to situations where commanders fail to prevent violations of the law or fail to take disciplinary action. As such, the obligation of the commanders to take action is in accordance with Article 87AP I. The fact that the obligation leads to command criminal responsibility suggests a possibility to apply the command responsibility doctrine to commanders under domestic law, for acts not qualifying as international crimes.

However, the question is whether the applicability of the command responsibility doctrine as a basis for criminal responsibility for crimes not falling under the law of armed conflict is accepted in practice, as well. May and Powles concluded that regardless of the fact that the responsibility of commanders for acts of their subordinates was recognised in English law, there had not been any cases in the United Kingdom of prosecuting commanders for their failure to prevent or punish crimes, international or other crimes, of their subordinates. On the basis of this, just one example of the lack of practice, it is not possible to draw any conclusions. It is, however, interesting to note that a recognition of the idea that a commander bears responsibility for the acts of his subordinates has not translated into a practice of

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760 The Manual refers to 1907 HC IV, Art. 3; GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Arts. 29 and 146; and AP I, Art. 91.
761 See Rogers, op. cit., pp. 201-203.
prosecuting superiors for their failure to act. In addition, May and Powles, who considered that responsibility for a failure to prevent or punish constitutes a new basis for liability in English law, introduced after the adoption of the Rome Statute, held that the reason why such an extension was admitted into the law after the Rome Statute was the extreme character of the crimes.763 Following their reasoning, offences not constituting crimes against the law of armed conflict should not lead to superior responsibility.

Damaška may be right when arguing that command responsibility as presently applied raises issues in relation to the culpability of the accused, the commander, an issue which is completely unacceptable under domestic criminal law. But could it also be the case that both in the past and at present, there is and perhaps should be concerns on the part of the armed forces towards the criminalization of the general command responsibility of commanders. As argued by May and Powles, the legislation including the command responsibility provision “is not aimed at commanders who make a misjudgement in the agony of the moment, during battle.”764 While not concerned with command responsibility, a commentary to a Dutch case, the case against Eric O., explains why command responsibility in relation to violations not qualifying as international crimes may be difficult to introduce in the domestic setting.765 In this case, the accused allegedly fired his weapon during a peacekeeping mission, which allegedly led to the death of a civilian. The circumstances of the case were such that the prosecutor could have charged the accused with a dereliction of duty or, alternatively, murder or manslaughter.766 The prosecutor chose the latter and the accused was acquitted. The case caused general indignation and led to the fear, among members of the armed forces, that any use of force by military personnel may lead to a criminal prosecution.767 Extending the command responsibility doctrine to crimes not qualifying as international crimes may lead to similar concerns.

5.5. Conclusion

763 Ibid., p. 378.
764 Ibid.
The present chapter has addressed questions in relation to the application of the command responsibility doctrine that have regularly been raised and debated both in judgements, dissenting opinions of the judges and in scholarly writings. The approach in this chapter, as in the whole study, has been respect for the origin and purpose of the command responsibility doctrine when finding a solution to contested issues or when making a choice out of several possible ways of applying the doctrine. Section 5.2 elaborated on the nature of command criminal responsibility. While the case law of the ad hoc tribunals during the first ten years of their existence suggests that command responsibility was interpreted as liability for an international crime, more recent judgements insist on applying command responsibility as an act sui generis. The disadvantage of command responsibility as liability for an international crime is the lack of intent on the part of the superior in relation to the crimes committed. Considering command responsibility as a crime of its own kind would remove this disadvantage because it does not require such intent. Considering the situations in which command responsibility can/should be applied, i.e., where the superior did not know but should have known about the crimes, or where he silently approved of the crimes, the suggestion in the present chapter is to apply a bifurcated approach to command responsibility. Where the superior ignored or, in fact, approved of the crimes, his omission would be considered as sui generis participation in the crimes. The causal link with the crimes would stay but command responsibility would not be considered as one of the other forms of participation. The sentence could reflect the severity of the crimes committed. Where the superior should have known, but did not know about the crimes, he would be held responsible for his failure to act as an act sui generis. His lower level of culpability would be reflected by conviction for an act of its own kind, the failure to prevent or punish.

Section 5.3 concerned the overlap between individual criminal responsibility and command responsibility. The overlap is most prevalent where facts allow for charges of participation in a JCE and command responsibility at the same time, or where aiding and abetting and command responsibility can be cumulatively charged. With regard to JCE and command responsibility, it may be argued that only certain cases of JCE may be considered to overlap with command responsibility. The same applies to aiding and abetting. In cases where both bases are established beyond reasonable doubt, a choice should be made between the two. In the opinion of the present author, the choice should not be made automatically in favour of individual criminal responsibility. Rather, it should reflect the involvement of the superior in the events. The choice could, therefore, be made in favour of command responsibility. This
could increase the role of the command responsibility doctrine in present and future cases, a desirable result as more and more emphasis is laid on individual criminal responsibility. The same attitude should be taken when considering cumulative convictions and command responsibility as an aggravating factor in sentencing.

Section 5.4 discussed the nature of the crime underlying the charges of command responsibility and more specifically the question whether command responsibility may be applied to all crimes, regardless of the specific elements contained in some crimes. With regard to the crime of genocide, case law supports the applicability of the command responsibility doctrine in relation to this crime. For convincing reasons this application is seriously criticised, most importantly because the nature of the crime of genocide and the required elements of command responsibility can only be joined with difficulty. The application of command responsibility in relation to aggression is only a theoretical option and having regard to the development of a definition of aggression for the purposes of the ICC, application will most likely remain a theoretical exercise. With regard to crimes not qualifying as international crimes, but resembling international crimes because of their place in the statutes of internationalised tribunals, the applicability of the command responsibility doctrine seems to be accepted. Where crimes resemble international crimes because of the conflict situation in which the crimes take place, the forum for applying the doctrine is a national court. Whereas command responsibility could be the logical consequence of crimes committed by soldiers during, for instance, a peacekeeping mission, the fact that the command responsibility doctrine extends criminal liability to a commander for his omission to an unacceptable degree is not acceptable to domestic criminal law.