The command responsibility doctrine in international criminal law and its applicability to civilian superiors
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CHAPTER 6. SYNTHESIS – JUSTIFIED DIFFERENTIATION BETWEEN MILITARY AND CIVILIAN SUPERIORS?

6.1 Introduction

This study has presented aspects of the command responsibility doctrine that are essential to the present and future application of the doctrine but that have received less attention than they merit in the otherwise rich legal literature on the topic. The aim of the author in this study has been to grasp the essence of the concept by putting it in its evolutionary perspective, without gearing attention exclusively on the authority of the existing case law. The research has focussed on the question which approach should be taken when applying command responsibility to civilian superiors. Another central question was whether a differentiation between military and civilian superiors is justified when applying the command responsibility doctrine.

Chapters 2 and 3 of this study elaborated on the legal basis for the principle of command responsibility and the origin of the concept of command responsibility in the military context. Chapters 4 and 5 addressed the application of the principle, in particular to civilians and to the contentious issues still hampering the consistent use of the command responsibility principle at the international level. What remains in this chapter is to elaborate on the question whether a differentiation between civilian and military superiors offers a solution to the application of the command responsibility principle in practice. Accordingly, does the command responsibility principle need an explicit distinction between military and civilian superiors, or is the distinction rather an academic or artificial one? Having discussed arguments in favour of and against an explicit distinction between civilian superiors and military commanders, and the consequences thereof, the concluding chapter finally addresses selected issues of interest to the application of the command responsibility doctrine in the future, expressing the views of the present author.

6.2 Justified differentiation between military and civilian superiors?

6.2.1 The ICC provision and the ad hoc tribunal case law differentiation

The main thesis/underlying message of this study is that when applying the command responsibility doctrine, the origin and purpose of the concept should be kept in mind. This approach is of specific importance when considering the applicability of command
responsibility to civilian superiors, as discussed in detail in Chapter 4. A question that was left open in Chapter 4 was whether an explicit differentiation between civilian and military superiors in the codified provisions of the doctrine, as most significantly exemplified by Article 28 ICC, should be considered justified. Despite the meagre result in cases where command responsibility has been applied to civilian superiors by the ad hoc tribunals, these tribunals, in accordance with their statutes, did not find a reason to differentiate between civilian and military superiors by way of developing separate elements for the two groups of superiors.

While the ad hoc tribunals have realised the practical differences between civilian and military superiors and the complications these add to the applicability of command responsibility, they did not need an explicit provision to point out the distinction. The explicit division of superiors into two categories in Article 28 ICC focuses on the need for two different knowledge requirements when command responsibility is applied either to military commanders or to civilian superiors. Such an explicit provision aims at creating a higher standard of proof when the superior is a civilian. While a higher standard could arguably be a necessary measure to diminish the possibilities of convicting civilian superiors under the command responsibility doctrine, this measure emphasizes an aspect of the doctrine which will not contribute, at least not on its own, to a more coherent application of the doctrine. A consistent and justified application of the command responsibility principle at the international level is dependent on several factors, among which is the realisation of the object and purpose of the principle.

As many other provisions in the Rome Statute, the command responsibility provision was the result of a compromise. The distinction between military commanders and so-called other superiors in Article 28 ICC came about as a result of a desire expressed by the United States that there should be a higher level of proof for the prosecution of civilian superiors for crimes under the jurisdiction of the ICC. The treaty entered into force some years later, but before the negotiations on Article 28, no judgement had been rendered at the international level on charges of command responsibility since the post-Second World War period. Accordingly, prior to Article 28 ICC, a differentiation between military and civilian superiors had not been

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768 See Chapter 4 supra.
of practical importance.\textsuperscript{770} Of course, what had been recognised was the applicability, in theory, of the command responsibility principle to both civilian and military superiors. In fact, it was the United States that, after the adoption of Security Council Resolution 827, expressed the understanding that the principle was to be understood as being applicable to superiors, both civilian and military.\textsuperscript{771}

Although the \textit{ad hoc} tribunals had not had an opportunity to decide command responsibility cases before the adoption of Article 28 ICC, they were aware of the existence of separate elements for civilian superiors in the ICC provision when deciding their first cases. In the Čelebići case the Defence pointed out that there is a distinction between civilian and military superiors and that this form of criminal liability should not be applied to civilian superiors.\textsuperscript{772}

The applicability of the command responsibility doctrine to civilian superiors was confirmed by the Trial Chamber, however, and the three elements that according to the Chamber needed to be proven for the superior to be held liable, were applicable to all superiors alike.\textsuperscript{773} In the same case, the Appeals Chamber held that

“Civilian superiors undoubtedly bear responsibility for subordinate offences under certain conditions, but whether their responsibility contains identical elements to that of military commanders is not clear in customary law.”\textsuperscript{774}

If we accept that the question of identical elements for military and civilian superiors is not settled in customary law, is the differentiation in Article 28 ICC to be considered useful or even justified?

a) Arguments in favour of a differentiation

Let us first consider the arguments supporting the Article 28 ICC differentiation. This study has shown that there is a fundamental distinction between military commanders and civilians. It is inherent in the profession of a commander that they have to exercise ‘general command responsibility’ over their subordinates and that along with this duty comes another duty, that of ensuring that the conduct of hostilities is in accordance with existing rules and regulations.

\textsuperscript{770} See Chapter 2.2.2 supra.
\textsuperscript{772} Čelebići, TC Judgement, para. 352.
\textsuperscript{773} Ibid., para. 354.
\textsuperscript{774} Čelebići, AC Judgement, para. 240.
In complete agreement with the purpose of having the distinction between civilians and those who take part in hostilities, most civilians are not in a position to exercise general command responsibility over their subordinates. Accordingly, their relationship with their subordinates is a significantly different one.\textsuperscript{775} Considering this fact and the possibility that civilian superiors, despite the different position they are in, could be charged under the command responsibility doctrine, it is understandable that states agreed to separate elements for civilian superiors and, in particular, accepted a higher \textit{mens rea} standard for civilian superiors. Civilians should not necessarily have the same duty to know about the acts of others as the military commander whose hierarchical military organisation enables the commander to acquire knowledge.\textsuperscript{776} Looking at the higher \textit{mens rea} standard from the perspective of criminal law, support for the differentiation can be found in the argument that liability for omissions should be introduced and handled with great care. The duties of the military commander have a firm basis in military tradition and in law, which makes it easier to justify criminal liability for their omissions than for the omissions of civilian superiors. Although there might be a desire to attain doctrinal consistency, the caution needed in cases concerning criminal liability for omissions should arguably take precedence.\textsuperscript{777} In \textit{Kayishema}, the Trial Chamber supported this view. It held as follows:

“On this issue, the Chamber finds the distinction between military commanders and other superiors embodied in the Rome Statute an instructive one. In the case of the former it imposes a more active duty upon the superior to inform himself of the activities of his subordinates when he, ‘knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.’ This is juxtaposed with the \textit{mens rea} element demanded of all other superiors who must have, ‘[known], or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.’ The Trial Chamber agrees with this view insofar that it does not demand a \textit{prima facie} duty upon a non-military commander to be seized of every activity of all persons under his or her control. In light of the objective of Article 6(3) which is to ascertain the individual criminal responsibility for crimes as serious as genocide, crimes against humanity and violations of Common Article 3 to the Geneva Conventions and Additional Protocol II thereto, the Chamber finds that the Prosecution must prove that the accused in this case either knew, or consciously disregarded information which clearly indicated or put him on notice that his

\textsuperscript{775} See the discussion in Chapters 3 and 4 \textit{supra}.


subordinates had committed, or were about to commit acts in breach of Articles 2 to 4 of this Tribunal’s Statute.”

While the differentiation was not explicitly set out in the elements, the ICTR here required the higher mens rea standard as set out in Article 28 ICC. It may be argued that the idea of establishing a higher mens rea requirement for civilians superior and, thus, a differentiation between civilian and military superiors, is understood and supported by other international tribunals.

b) Arguments against a differentiation

The desirability of having separate elements for civilian and military superiors has not met with consensus among legal scholars. The thesis of Vetter was that:

“[T]he civilian command responsibility standard codified in article 28(2) of the ICC Statute reduces the efficacy of the permanent international criminal court. This argument rests on the premise that the new civilian standard is less strict than the ICC military standard and perhaps less strict than the prior law of command responsibility as applied to civilians. It also rests on the presumption that individual accountability in the ICC will help deter human rights abuses and that a less strict standard allows a civilian superior to either exercise less diligence in controlling subordinates, or have less fear of being convicted when intentionally allowing or encouraging subordinates to commit human rights abuses.”

Vetter’s rejection of two separate standards is based on the expected consequence that the provision will have. The threshold for the prosecution to prove the mens rea element of the civilian superior will be higher, which will lead to fewer civilian superiors being convicted or to a lesser deterrent effect on civilian leaders. The concern may be valid, but in the opinion of the present author, the reasoning is not sufficient to abolish the separate standards. The efficacy of the ICC, i.e., the ability of the Court to produce the desired results – according to Vetter the deterrence and accountability of civilian superiors – cannot be more valuable than a fair standard to which the civilian superior is held criminally responsible.

Also Van Sliedregt expressed her regret at the differentiation between civilian and military superiors, in particular through the distinct knowledge requirement, but her criticism was based on the premise that the difference between civilian and military superiors lies in the

778 Kayishema and Ruzindana, TC Judgement, paras. 227-228.
scope of their duty to know. Where this difference in scope is acknowledged by the judges, the same knowledge formula can be applied. This approach leaves the decision regarding the scope of the superior’s duty to know to the judges. The more limited scope of the civilian superior’s duty to know will be established on a case by case basis, but where it has been established that that particular civilian superior had the duty to know, the civilian will be held to the same knowledge standard as the military superior. As such, there is nothing new to this approach, as the \textit{ad hoc} tribunals have had to apply the same knowledge standard to both categories of superiors. The previous section showed that there are also convincing arguments as to why the starting point should be that civilian superiors have a more limited duty to know or acquire information and that this is best expressed by applying different knowledge standards to the two categories of superiors.

Although there are well elaborated reasons as to why there should or should not be a differentiation between civilian and military superiors in the command responsibility provision, focussing on the issue of whether the \textit{mens rea} of all superiors should be the same will make it difficult to decide whether the arguments against a differentiation in Article 28 ICC are outweighed by arguments in favour of the separate elements. The central issue is another one. The formulation of Article 28 ICC in its present form created the idea that it might, indeed, be more accurate to require a higher \textit{mens rea} standard for civilian superiors. Concentrating on the differentiation in Article 28 ICC, however, the discussion has laid the focus of the whole command responsibility debate on the issue of whether civilian superiors should be tried subject to conditions that are different from those for military colleagues, and whether they should be tried under the command responsibility doctrine in the first place, instead of focusing on the object and purpose of the command responsibility doctrine. Considering what should be achieved by applying the existing command responsibility provisions will provide a more convincing answer as to the necessity of the differentiation between civilian and military superiors in the legal provision. The next section will discuss the ‘traditional ambit’ of command responsibility, a discussion which encompasses the object and purpose of command responsibility.

\textit{6.2.3 The ‘traditional ambit’ of command responsibility}

In Chapter 5 of this study, reference was made to the ‘traditional ambit’ of the command responsibility principle. This term was used by Ambos in the context of the overlap between
JCE and command responsibility. Ambos discussed the fact that a JCE conviction has prevailed in cases where the elements of command responsibility have also been fulfilled and that JCE thereby invades the ‘traditional ambit’ of command responsibility. But what exactly is the ‘traditional ambit’ of command responsibility? In Ambos’ article the concept of this ‘traditional ambit’ seems simply to represent those cases where the elements of command responsibility have been fulfilled, or in other words, the cases in which the command responsibility doctrine could be applied. In the opinion of the present author, it may be very useful to refer to the ‘traditional ambit’ of command responsibility when discussing the doctrine, but with the understanding that the phrase refers to a specific type of case, the traditional case, to which the command responsibility doctrine has been applied. Knowing the ‘traditional ambit’ as just explained could give a framework to the application of the command responsibility doctrine.

Chapter 3 of this study analyses command responsibility and its origin as a military concept, but if we take international case law as a starting point for defining the traditional ambit of command criminal responsibility, the result will be disappointing. In the opinion of this author, there is no such thing. From the first judgements onwards, the overlap between individual and command responsibility has caused confusion and the challenge has been to actually find the ambit of what is best described as ‘belonging’ to command responsibility.

It is suggested here that the solution to the overlap between certain modes of liability and command responsibility can only be offered if the ‘traditional ambit’ of command responsibility is defined. This issue is completely separate from the question so often discussed as to whether the aim of holding high military and political leaders responsible for international crimes can be reached by using either JCE or command responsibility or some other mode of participation. The following finding by Van Sliedregt clarifies the issue:

“Accordingly, superior responsibility is not the most appropriate concept to prosecute or even convict military and political superiors. This has already been recognised at the ICTY where joint criminal enterprise has become its alternate. The application of the latter concept is welcomed, if only to allow superior responsibility to have its own place in war crimes law.”

The key here is to ‘find the traditional ambit of command responsibility’, which could mean the same as to ‘allow superior responsibility to have its own place in war crimes law’.

The aspects of the command responsibility doctrine analysed in Chapters 3, 4 and 5 together provide the necessary directions for forming an opinion and drawing some conclusions on the kinds of situations and cases that the doctrine best applies to or should apply to.

The conclusion in Chapter 3 was that the military concept of command responsibility and the doctrine as applied in international criminal law have to be compatible if the command responsibility doctrine is to serve the purposes of international criminal law, in particular accountability and deterrence. Based on the findings in Chapter 3, it was concluded that military commanders will only take the doctrine seriously if it is felt that the provision allows for the effective and efficient conduct of war. For the purposes of discovering the ‘traditional ambit’ of command responsibility, this means that charges and convictions on the basis of the command responsibility provision should take the reality of military commanders in warfare into account. Accordingly, the principle should be more closely associated with situations and relationships to which the ‘general command responsibility’, as mentioned in Chapter 3, applies. Case law from the ad hoc tribunals provides some, but in fact a limited number of examples of cases which take the compatibility issue mentioned in Chapter 3 into account. Of interest in this respect is the Hadžihasanović case, which has been regularly mentioned in the previous chapters. This is a case of ‘pure’ command responsibility, i.e., a case where only charges under Article 7(3) were brought against the accused.

In this context it is of interest to consider the facts of this case and the role of the accused. The fact that in the Hadžihasanović case, both Hadžihasanović himself and his co-accused Kubura were military commanders who were not even charged under Article 7(1), resulted in both the Trial and the Appeal judgement focussing primarily on whether the accused fulfilled the elements of command responsibility, instead of concentrating on the weight of the active and passive role of the superiors, as has been the impression created in cases containing charges under both Article 7(1) and 7(3). In particular the Appeal Judgement is commendable in that it puts the elements of command responsibility, while already weighed by the Trial Chamber, to an additional test. The Appeals Chamber clearly took the reality of the military commander

782 See, for example, Strugar, TC Judgement, para. 355.
783 Bonafé, op. cit., pp. 616-617.
into account in its deliberations. In the grounds of appeal raised by Hadžihasanović each of
the three elements of the doctrine were present and crucial to the findings. With regard to the
murder and cruel treatment committed by the El Mujahedin detachment, the Appeals
Chamber considered the first element (the superior-subordinate relationship) between the
accused and the perpetrators and contrary to the findings of the Trial Chamber, the Appeals
Chamber did not find the relationship to be one of subordination. It found that the only way of
control was by attacking the El Mujahedin detachment “as if they were a distinct enemy
force.” That the findings differed from those of the Trial Chamber does of course not
provide a sufficient reason to say that the Trial Chamber did not take the reality of the
commander into consideration; it simply shows the intricacies of the circumstances under
which the military commander acts. These were brought more to the forefront by the Appeals
Chamber.

As to the second element (the knowledge requirement), the Appeals Chamber considered that
the fact that the accused knew of mistreatment at a certain location did not constitute
sufficient evidence to say that he also had the requisite mens rea for mistreatment that took
place later in time at another location. The geographic proximity of the locations was also
insufficient proof of the mens rea of the accused. The Appeals Chamber here implicitly
stressed the importance of the personal liability of the commander.

The Appeals Chamber also put the third element (necessary and reasonable measures to
prevent or punish) to the test when it reversed the Trial Chamber’s finding, according to
which the accused did not take sufficient measures to punish his subordinates for one murder
and cruel treatment. According to the Appeals Chamber, the accused could not be held
responsible, as he had identified, arrested and imprisoned the perpetrators. They were brought
before a military disciplinary organ and the crimes were reported to the municipal public
prosecutor. While admittedly the crimes could have been reported to a more appropriate
authority, in the opinion of the Appeals Chamber the accused had taken the necessary and
reasonable measures to punish the perpetrators, considering the circumstances prevailing at
the time. As has been shown by these findings on the separate elements, the Appeals
Chamber clearly put emphasis on the factual circumstances in which the commander

784 Hadžihasanović, AC Judgement, para. 230. See also ibid., para. 231.
785 Ibid., paras. 161-163.
786 Ibid., paras. 149-155.
operated. It should be noted, however, that the Appeals Chamber confirmed the conviction of the accused in relation to other crimes.

On the basis of the facts of the case and the role played by the accused, as exemplified through the above discussion on findings relating to the elements, the Hadžihasanović case seems like a case that would typically be decided on the basis of the command responsibility doctrine. From the perspective of the origin of the doctrine in a military concept, this case could be one that exemplifies the typical command responsibility case that respects the realities of warfare when applying the criminal law doctrine of command responsibility.

The question is if the traditional ambit can be discerned by using case law which has convicted superiors under the command responsibility principle only, can the traditional ambit or the object and purpose of the command responsibility principle be considered to encompass civilian superiors? Chapter 4 concluded with the finding that in practice the elements of command responsibility have been very difficult to establish where the accused was a civilian leader. Nevertheless, it is undisputed that the command responsibility doctrine in international law allows for command responsibility as a basis for criminal liability in relation to superiors other than those qualifying as military commanders. In the opinion of this author, the application of the doctrine in relation to civilian superiors should be done in the spirit of the following findings by the ILC in its commentaries to the Draft Code of Crimes against the Peace and Security of Mankind:

“The reference to ‘his superiors’ [in Article 6 of the Draft Code] indicates that this principle applies not only to the immediate superior of a subordinate, but also to his other superiors in the military chain of command or the governmental hierarchy if the necessary criteria are met. The reference to ‘superiors’ is sufficiently broad to cover military commanders or other civilian authorities who are in a similar position of command and exercise a similar degree of control with respect to their subordinates.”

At first glance, the ILC Draft Code contains nothing that has not been discussed before. The ILC recognises the applicability of the doctrine to civilian superiors. But, in fact, what the ILC does is to discuss the applicability of the doctrine in the context of the crimes. The commentary points out that where crimes have been committed the doctrine is not limited to the immediate superior of the perpetrator. Higher superiors may also incur responsibility,

where it can be shown that the perpetration of the crimes by the subordinates and the omission by the immediate superior should have been known to the higher superior and he, too, omitted to prevent or punish either the immediate superior or the perpetrators or both, as the case may be. This approach is logical in that it ensures accountability also at the higher levels and in that it is in accordance with the hierarchical structure of the armed forces and their relationship to the highest political officials of the state. What should not be read into this recognition of the applicability of the doctrine to civilian superiors is that it, by definition, should apply to civilians and that, therefore, it is necessary to provide for a separate category of superiors, as was done in Article 28 ICC.

Adherence to this approach means ruling out cases like Musema and Nahimana, Barayagwiza and Ngeze from the traditional ambit of command responsibility, as the above reasoning does not apply to them. Could the criterion ‘who are in a similar position of command and exercise a similar degree of control’ encompass these superiors? No. This criterion should be exclusively reserved for superiors who were “part of a prima facie legitimate quasi-martial organization, such as a prison-camp, or in control of a militia-like unit with a prima facie legitimate role, such as a police force.” These groups of superiors, while not belonging to the armed forces, are subjected to a military-like hierarchy, with similar duties and responsibilities. Whereas these superiors are called civilians, the superior-subordinate relationships in which they act are not typically civilian. Rather, they are non-military superiors because their organisation does not form part of the armed forces. With the changing character of armed conflicts and parties to an armed conflict, the role of these persons “effectively acting as a military commander” is increasingly important.

In order to fall within the traditional ambit of the command responsibility doctrine, cases brought against civilians should concern superiors who, except for an official position as a military commander, should have the characteristics of a military commander. Referring to the requirements of the legal notion of effective control as set out in the Čelebići case, Zahar and Sluiter said the following:

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789 Art. 28 ICC.
790 In other words, without calling it a duck, it should walk like a duck and swim like a duck and quack like a duck.
“While this proposition does not distinguish between military and non-military superiors, it incorporates the principle that the position of the latter will in practice have to be very similar to that of the former. Several attempts by defence teams to help the ICTY/ICTR Appeals Chamber to see the point have not removed the intellectual blind spot.”

The lack of realisation that in practice the civilian superior and the military commander charged should be rather similar may perhaps be referred to as an intellectual blind spot on the part of the judges. It could also be held that so far the right focus – on the origin and purpose of the command responsibility doctrine – has been lacking.

Discovering the traditional ambit of command responsibility, the fact that some cases are being charged under both the command responsibility provision and under modes of liability such as JCE or aiding and abetting cannot be ignored. The possible overlap between individual criminal responsibility and command responsibility was discussed in Chapter 5, and the conclusion was that unless a conscious choice is made in favour of command responsibility, both at the indictment stage and at the stage of convicting the accused, the liability will almost without exception be based on JCE. However, to think that where available, the prosecutor would not try to apply JCE or aiding and abetting, is not realistic because of their evidentiary advantages. Stopping the invasion by JCE of all cases of command responsibility will, therefore, depend on the understanding by the judges of the necessity of finding the traditional ambit of command responsibility or, in other words, the essence of the principle. On the other hand, having regard to the Hadžihasanović case, as an example of a case which definitely falls within the traditional ambit of command responsibility, consideration should be given to the question whether typical cases of command responsibility encompass cases that prima facie give the impression of a superior whose contribution to the commission of the crimes was more substantial than the role of the superior under the command responsibility doctrine, and thereby justifies that the superior is charged with individual criminal responsibility. A fundamental element of the command responsibility doctrine is the omission by the superior. At most the omission is combined with a higher mens rea than mere negligence – aggravated command responsibility, but the omission will not necessarily be of substantial effect to the commission of the crimes. Where the evidence at the indictment stage shows that the involvement of the superior in the events was more important than the pure failure to prevent or punish the perpetrators, the case should

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791 Zahar and Sluiter, op. cit., p. 265.
792 Bonafè, op. cit., p. 615.
at least not be considered as a typical case of command responsibility. It is conceivable that in some cases charges on the basis of both individual and command responsibility are justified in relation to separate facts or events. In the opinion of this author, however, alarm bells should be ringing where the superior was also actively involved in the events resulting in the commission of international crimes, as the basis for command responsibility charges falls apart where the superior is clearly involved in violations of IHL. Even where the charges concern separate events, the argument that the superior was simply negligent or reckless in relation to some crimes committed by his subordinates, while on another occasion he planned, ordered or aided the commission of other crimes, is not a credible one. The key issue as regards the typical case of command responsibility is the attitude of the superior towards the conflict.\footnote{793} Did he generally conduct hostilities to the best of his knowledge and ability under the orders of his superiors or did he act with the understanding that in reaching the higher goal of his superiors, violations of IHL were an inherent part of the acts?

The discussion in Chapter 5 concerning the applicability of the command responsibility doctrine to cases involving the crime of aggression or the crime of genocide is of importance to the discussion on the traditional ambit of the command responsibility doctrine. It was concluded that the application of command responsibility to the crime of aggression is a hypothetical exercise, necessitated by the incorporation of this crime into the ICC Statute, but without any real practical importance. Chapter 5 also presented arguments to the effect that the crime of genocide, in particular its requirement of special intent, is not easily combined with the requirements of the command responsibility doctrine. What remains for the typical case of command responsibility are cases concerning crimes against humanity and war crimes. While not elaborated in detail in the previous chapter, it was noted that the widespread and systematic character of crimes against humanity is shared, although not by definition, with the crime of genocide.\footnote{794} With regard to genocide, the fact that crimes are planned and committed on a very large scale makes it more difficult to believe that the role of the superior was limited to a failure to prevent or punish the perpetrators. This incompatibility between genocide and command responsibility is shared by crimes against humanity in relation to command responsibility. Cases concerning crimes against humanity should not be considered as typical cases of command responsibility, but the existing case law encompasses several

\footnote{793}{Here the use of the term attitude seems more suitable that using the term \textit{mens rea}, as the attitude of the superior refers to his mindset in general, rather than his state of mind in relation to one specific crime or event.}

\footnote{794}{See Chapter 5.4.2.3 \textit{supra}. See also Schabas 2000, op. cit., p. 10.}
cases of convictions on the basis of command responsibility in relation to crimes against humanity. Most importantly, convictions on the basis of command responsibility in relation to crimes against humanity should concern incidents or violations of a more limited scope within the broader events that, taken together, are widespread and systematic, if the role and the attitude of the superior are to fit the requirements of command responsibility.

The most suitable cases to fall within the traditional ambit of command responsibility are those concerning war crimes. While not necessarily less grave than crimes against humanity, the lack of the requirement of their widespread character is important. Where crimes were committed that were not necessarily part of a plan to carry out a series of atrocities, it is easier to think of possible situations where the role of the superior, his acts or omissions, did not have a substantive effect on the commission of the crime, but where he failed to prevent or punish the perpetrators in accordance with the requirements of the command responsibility doctrine.

The consequence of the search for the ‘traditional ambit’ of the command responsibility doctrine would be a command responsibility principle which is more limited than it is presently assumed to be. The aim of the present section has not necessarily been to set such strict limits to the application of the doctrine, but to show that having established what could be the typical cases of command responsibility, any application of the doctrine to cases not falling within the ‘traditional ambit’ of command responsibility should be accompanied with the awareness that other cases are atypical to the command responsibility doctrine and, therefore, should be done with respect to the origin and purpose of the doctrine.

As an interesting note to this discussion, the sentencing trends by the ad hoc tribunals, as analysed by Judge Harhoff, may be mentioned, most importantly because they seem to offer support for the finding that the cases falling within the ‘traditional ambit’ of command responsibility are limited.

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795 See, for example, the RUF case before the Special Court for Sierra Leone, Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao, Judgement, Case No. SCSL-04-15-T, 25 February 2009, at IX. Disposition.
796 War crimes are here the crimes set out in Art. 8 ICC, but could in general encompass at least Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Art. 2 ICTR), Grave breaches of the Geneva Conventions of 1949 (Art. 2 ICTY) and Violations of the laws or customs of war (Art. 3 ICTY).
797 See Prosecutor v. Pavle Strugar, Judgement, Case No. IT-01-42-T, 31 January 2005, para. 456. Strugar was charged pursuant to both Art. 7(1) and Art. 7(3), but was only convicted on the basis of Art. 7(3). The accused was convicted in relation to ‘devastation not justified by military necessity’, ‘unlawful attacks on civilian objects’, and some other crimes constituting violations of the laws and customs of war, under Art. 3 ICTY. Ibid., paras. 477-479.
responsibility and not high-level civilian leaders have found responsibility on the basis of this
doctrine. Considering the sentences imposed, Harhoff found that while lower-level and
higher-level accused tend to be given harsher sentences, more lenient sentences tend to be
imposed on the accused at the middle level. The more lenient sentences are not errors in the
sentencing policy, but a consequence of convictions under Article 7(3). Typically, the lower-
level accused are direct perpetrators, whereas the middle-level accused are responsible
military commanders or civilian superiors who pursued a plan or followed directions from the
higher-level accused, who are either military commanders at the highest level or the highest
civilian leaders. Lenient sentences tend to be imposed for Article 7(3) responsibility, which
again corresponds to the sentences of the middle-level accused who neither physically

\textbf{6.3 Where does this leave the civilian superior?}

The study shows that in practice the command responsibility doctrine does not lend itself
particularly well for the prosecution of civilian superiors. Cases, and more importantly
convictions, against civilian superiors are to be considered as exceptional. In order not to be
heavily criticised for an unjust interpretation of the doctrine, there should be an additional
argument, or the facts should be such that the case against this specific civilian superior is
motivated, for example because the role of the civilian superior was similar to that of a
military commander that it justifies charges under the command responsibility provision.

The fact remains that where atrocities are committed, more often than not those who did not
physically commit the crimes but are seen as being responsible for them are civilians. If
command responsibility is not the most suitable basis for holding these leaders criminally
liable, what other options are there to ensure that they are held accountable? This section
briefly discusses some alternatives to the command responsibility doctrine where civilian
superiors are the accused in relation to international crimes.

The discussion regarding the best possibilities for dealing with system criminality through
international criminal law, where the ‘big fish’ usually never physically commit crimes
themselves, has been ongoing since the \textit{Tadić} case and the advantages and disadvantages of
the JCE doctrine are quite well known. With regard to civilian leaders, JCE I and II certainly offer more possibilities for the prosecution than the command responsibility doctrine in that they do not require the vertical superior-subordinate relationship between the accused and the perpetrators. As JCE III may show an overlap with command responsibility and at the same does not require a superior-subordinate relationship, this could, in theory, be a better alternative for civilian superiors. However, the general resistance towards JCE III, based on legality concerns, does not make this a practical alternative.

Some of those who expressed their objection to the JCE doctrine sought an alternative to this doctrine in the traditional forms of complicity. In particular aiding and abetting can serve as an alternative where the accused is a civilian superior. Aiding and abetting requires that the act or omission had a substantive effect on the commission of the crime, and as a basis for liability this form of participation has resulted in quite harsh sentences of more than 10 years’ imprisonment. The term aiding and abetting itself points out that this form of participation is not sufficiently representative of the responsibility of the ‘big fish’, often civilian superiors. An interesting option for prosecuting those most responsible is functional perpetration as applied under Dutch law. Interestingly, the Organisationsherrschaftslehre known to German law has been offered as another mode of liability suitable for these purposes. The doctrine is referred to as ‘the control over the crime approach’ and was interpreted by Pre-Trial Chamber I of the ICC as having been incorporated into the framework of the ICC Statute, in two of the cases pending before the court. The main advantage of this approach is that the accused could be considered a principal to the crime, without having physically committed the crime. The Pre-Trial Chamber put it as follows:

“[P]rincipals to the crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene

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799 JCE was discussed previously in this study, see Chapter 5.3.2 supra.
800 Reference to this issue was made previously in this study, see Chapter 5.3.2 supra.
801 See Chapter 5.3.3 supra.
802 See Chapter 5.2.3 supra.
of the crime, control or mastermind its commission because they decide whether and how the
defence will be committed.”

While no judgements have been rendered in these cases and, thus, no definite statement has
been made by the ICC on this mode of liability, it may constitute one of the alternatives for
successfully prosecuting civilian superiors, where they did not physically commit the crimes
themselves. Of course, this approach was immediately criticised for not offering a good
enough alternative to JCE. The criticism was mainly based on the argument that the German
concept focuses too much on hierarchical top-down organisations, an approach which does
not correspond to the realities of present-day armed conflicts.

That being said, what should not be lost sight of in this discussion is the core of the matter, the
origin and the purpose of the command responsibility doctrine, as mentioned in the section on
the ‘traditional ambit’ of the command responsibility doctrine. What has just been presented
as alternatives to the command responsibility doctrine for the prosecution of civilian superiors
in fact constitute the existing possibilities for finding those most responsible criminally liable
under international criminal law. Strictly speaking, where an alternative to command
responsibility is sought for civilian superiors, the focus should be on situations of pure
omissions to prevent or repress by the civilian superior, as this is what the command
responsibility doctrine is concerned with. The purpose of the command responsibility doctrine
is not necessarily to provide for the liability of those ‘most responsible’. In this regard, it is
interesting to note that the drafting history of the Rome Statute contains a provision on actus
reus in addition to the provision on mens rea, which is now Article 30 of the ICC Statute.
This article on the actus reus never ended up in the final version of the Rome Statute,
although it was included in the Zutphen Draft and the Decisions Taken by the Preparatory
Committee at its Session held 11 to 21 February 1997. The provision was to regulate conduct
that constituted either an act or an omission. At the drafting stage this provision included
several optional versions in brackets, and removing some of the alternatives, one version
could have read as follows:

“[A] person may be criminally responsible and liable for punishment for an omission where
the person has the ability, but intentionally or knowingly fails to avoid the result of an offence

805 Prosecutor v. Thomas Lubanga Dyilo, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/06-
806 M. Osiel, ‘Perpetration by Hierarchical Organization’, Guest Lecture Series of the Office of the Prosecutor of
where: (a) The omission is specified in the definition of the crime under this Statute; or (b) In the circumstances, the result of the omission corresponds to the result of a crime committed by means of an act, and the person is either under a pre-existing obligation to avoid the result of such crime or creates a particular risk or danger that subsequently leads to the commission of such crime.”

This provision, while one of many possible alternatives, is interesting in that it provides for criminal liability in relation to an omission, without being restricted by the history and purpose that any interpretation of the command responsibility doctrine carries with it. As was previously mentioned, it is recognised in national criminal law that certain omissions may be criminal and, thus, the insertion of a provision on omissions would not have been groundbreaking. A provision similar to the ones suggested in the drafts to what became the Rome Statute would constitute a possibility to hold any accused, regardless of his civilian or military status, liable for an omission. Of course, it should be recognised that omissions both in national and in international criminal law constitute a cumbersome basis for criminal liability and should be applied with great care. In international courts the prosecution of omissions could create an additional difficulty to the already existing problems of international trials. The question is also whether the accused responsible for an omission would be considered important enough for trial by an international court. The importance of pointing to this draft article lies in the fact that whether prosecuted under this provision or on the basis of command responsibility, omissions constitute a specific type of conduct and should not be mistaken for or mixed up with the conduct of those who control or mastermind the commission of crimes behind the scene of the crime.

6.4 Future perspective on command responsibility

The application of the command responsibility doctrine to civilian superiors under international criminal law and in particular the explicit codification of the applicability of the doctrine to civilians in Article 28 ICC have led to the implementation in national legislation of command responsibility provisions similar to that contained in the ICC Statute. The existence of national legal provisions theoretically increases the possibilities of national prosecutions against civilian superiors for their failure to prevent or repress international crimes. It has even been suggested that by expanding the command responsibility provision under national

808 See Chapter 5.2.1 supra.
809 Danner and Martinez, op. cit., p. 168.
law, the same principle could be applied to civilian superiors even in relation to other crimes than the atrocities covered by the ICC Statute.\textsuperscript{810} Potentially, the existing legal basis and a positive attitude towards an extension of the doctrine to other crimes in the civilian sphere could lead to prosecutions in a number of states, even in states which have not recently been faced with mass atrocities but on which territory persons suspected of international crimes are presently living.

Whereas the application of the doctrine to civilian superiors is explicitly recognised in Article 28 ICC, the idea of an expansion to other crimes in the civilian sphere, unrelated to the armed conflict or the mass atrocities, does not correspond to the idea expressed in the ICC Statute, according to which arguably it should be more difficult to hold a civilian responsible under the command responsibility doctrine. An expansion seems to express the opposite view. Whereas it is recognised that in some circumstances a civilian exercises the same kind of authority over his subordinates as does a military superior, both the ICC Statute and the \textit{ad hoc} tribunal jurisprudence express reluctance as to civilian superior responsibility. It was the reluctance of certain delegations at the Rome Conference to expand the superior responsibility principle that led to the stricter definition of the superior responsibility of civilians.\textsuperscript{811}

At least at the international level, there is a great likelihood that this reluctance towards the command responsibility of civilian superiors will continue. The present author agrees with Bonafé, who found that:

“[D]espite its very broad scope, command responsibility is successfully applied only in more traditional military-like contexts, where, it is easier to demonstrate command responsibility and guarantee a strict adherence to the principle of individual criminal responsibility at the same time.”\textsuperscript{812}

Bonafé bases her conclusion on her calculation that of the approximately 100 accused before the \textit{ad hoc} tribunals, and out of 54 prosecuted under the principle of command responsibility, only 10 persons were convicted on an Article 7(3)/6(3) basis.\textsuperscript{813} The finding strengthens the


\textsuperscript{811} Ambos 2002, ‘Superior Responsibility’, p. 848.

\textsuperscript{812} Bonafé, op. cit., p. 602.

\textsuperscript{813} Ibid. It should be noted that the article was published in 2007 and so does not include judgements rendered by the \textit{ad hoc} tribunals since then. The cases rendered later do not considerably alter the balance between the
position of the present author, which promotes a very limited applicability of the principle to civilian superiors, and the application of the command responsibility doctrine to military commanders and other military-like superiors with respect for the purpose of the doctrine only.

An issue for the future of command responsibility is the challenges posed by the changing means and methods of warfare. An illustration of this can be found in the warrants of arrest issued by the ICC, when taken as a whole. So far, no arrest warrant has included charges of command responsibility. As mentioned previously in this study, the Pre-Trial Chamber in the Bemba case recently requested the amendment of the charges against the accused to include command responsibility. This could partly be due to the changing perception of the doctrine and the realisation that only specific cases are suitable for command responsibility charges. Certainly the answer to why no such charges have been included is at least partly that the situations that are of concern to the ICC at the moment, have not emerged from the classic conflict between states, nor have the conflicts seen organised armed forces opposing each other in the traditional way. The atrocities have been committed in conflicts that are representative of modern warfare – mostly asymmetric and often carried out between armed groups that do not correspond to the organised armed forces as described in IHL.

According to Schmitt, unfortunately “most law applicable in today’s conflicts was designed for yesterday’s.” The question is whether that can also be said of the command responsibility principle. Schmitt found that in asymmetrical warfare, the party with the technological advantage is not inclined to act in violation of IHL. However, the disadvantaged party to the conflict is likely to do so in order to ensure survival, first, and secondly, its

number of accused, those charged on the basis of command responsibility and those actually convicted under this provision.


815 See Chapter 5.3.3.2 supra.

victory over the advantaged party. Lacking the technology, the disadvantaged party will try to use all other means to attain victory, including unlawful ones.\textsuperscript{817} This is where the applicability of the command responsibility principle to modern conflicts will be put to the test. Where the opposing party in modern asymmetric conflicts is a non-state actor, that party is more likely to have committed violations of IHL and, therefore, may at least theoretically face charges under international law. Lacking the hierarchy of state armed forces, the application of the command responsibility doctrine to these cases will prove difficult, as is shown by the ICC arrest warrants, mentioned above.

This, however, is of course not to say that military officers should not continue to be held accountable under the command responsibility doctrine under international law or under domestic law, as held by Schmitt.\textsuperscript{818} Reactions to situations such as that in the Abu Ghraib prison facilities in Iraq in 2004, where prisoners were abused and humiliated and there was a failure to punish senior officers for these violations, could involve prosecutions under the command responsibility doctrine.\textsuperscript{819}

Authors of legal writings who have a military background urge an understanding of the position of the military commander and of the circumstances in which they operate by the civilian jurists who act as prosecutors or judges in cases where international humanitarian law is applied. There is a concern that civilians who do not have “in-depth knowledge of the operational art” fall short in this regard.\textsuperscript{820} While these concerns have been expressed in relation to the application of various principles of the laws of war, they are certainly relevant for the discussion on the command responsibility doctrine, as well.\textsuperscript{821} While the application of international humanitarian law rules and principles by international courts and tribunals may have given more reasons for concern during the last few decades, the sentiments of military officers in relation to the command responsibility doctrine are not new and do not seem to

\begin{footnotes}
\footnote{Ibid., p. 462.}
\footnote{Ibid., p. 475.}
\footnote{Knoops, op. cit., pp. 781-783.}
\footnote{T. Stein, ‘Collateral Damage, Proportionality and Individual International Criminal Responsibility’, in W. Heintschel von Heinegg and V. Epping, eds., International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen (Berlin, Springer 2007) pp. 157-161, p.160. Discussing the assessment of proportionality by international tribunals, Stein held that the tribunal would “have to put itself as best as it can in the position of the commander or soldier concerned, taking all the surrounding circumstances into account, so as to appraise the situation as experienced in real time, before considering the question of culpability. How many judges would be in a position to do that? Would any proper judgement demand that they had witnessed similar situations in place?” Ibid.}
\end{footnotes}
have changed much over the past decades. Describing the situation in the 1980s, Eckhardt stated the following:

“Modern law of war is driven by an idealistic internationally minded community. The soldier sees his iron law of war sweetened, lawyerized, politicalized, third-world-ized, and made much less practical.”

That any future application of the command responsibility doctrine should be more limited and correspond to the reality of the ‘soldier’ is preferable for several reasons was illustrated by Darcy who discussed the implications of imputed criminal liability on the goals of international criminal justice. Darcy stated the following:

“Convicting major figures on the basis of the more controversial aspects of joint criminal enterprise liability or superior responsibility could undermine the contribution of international judgements to the record of history.”

If one of the goals of international criminal justice is to provide a historical record, the ‘truth’ about a certain period or event, the conviction of the ‘big fish’ only on the basis of a failure, not requiring intention on the part of the accused, could give reasons for those who doubted the guilt of the leader in the first place, to deny the role of this person in the atrocities and, ultimately, to deny the occurrence of the atrocities.

Still considering the goals of international criminal justice, command responsibility charges against and the conviction of high-level accused could, for those who consider the accused their hero, have a lower level of psychological impact, as the direct involvement of the accused was not established. The psychological impact of a conviction of a specific leading actor for his personal involvement in the events could hopefully lead to the acceptance of the responsibility for the crimes of one or a few individuals and not of the entire ethnic or other group, and thereby serve one of the goals of international criminal justice - reconciliation. Accordingly, the furtherance of the goals of international criminal justice is served by a command responsibility doctrine that does not focus on the top-level, often civilian, superiors.

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822 Eckhardt, op. cit., p. 3.
824 Ibid., pp. 400-401.
825 Ibid., p. 397.
Another aspect that will remain of importance in the future is the recognition of the distinction between the superior’s, and more specifically the commander’s, moral responsibility and criminal liability. The relevance of this distinction may be illustrated by a few examples. The first example is a situation which was described by Best and concerned the Pacific War. It is recognised that despite the strict discipline applied to the Japanese armed forces during the Pacific War, crimes, both war crimes and ordinary crimes, were committed. Crimes were ordered to be committed, but breaches were also being committed spontaneously. The latter phenomenon is interesting in that the Japanese forces were very well disciplined, and nevertheless they committed more self-directed crimes than the German armed forces. Several reasons have been found that could explain the difference in behaviour, but most interesting is the question that Best formulated as a consequence of these historical findings: “[W]ere commanders whose men did these things culpable for not having trained them better and for not having ordered them not to commit atrocities?”

Best did not give an answer to the question that concerned the specific case of the Pacific War. He only stated that omissions to prevent were condemned in the subsequent Yamashita case, something that does not provide an answer to this question. What was being asked was whether commanders, despite the fact that their forces were well disciplined, were criminally responsible for inadequate training and for their failure to order their forces not to commit crimes.

There are two issues involved here. The first is whether duties falling under the commander’s general command responsibility are part of command criminal responsibility. This issue is intertwined with the second one, which is the feeling that it should have been his responsibility. Case law from the ICTY reveals that there is no simple answer to the problem.

The criminal responsibility is based on the omission of the commander to prevent the crimes. However, when it comes to the stage that precedes the immediate, necessary and reasonable preventive measures, the international tribunals have encountered some difficulties. While the Čelebići Trial Chamber did away with the question by stating that an in abstracto definition

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826 Best, op. cit., p. 191.
827 Ibid.
828 Ibid.
of what measures have to be taken by a commander would not be meaningful. Chambers in subsequent cases have felt a necessity to consider to what extent the commander’s responsibility extends to the training of their subordinates. The conclusion that has been drawn is that where a commander fails in the training of his subordinates, he does not fulfil his responsibilities as a commander, and he may be subjected to disciplinary sanctions. However, it is not possible to draw the conclusion that a failure of the commander to train or control his troops at an earlier stage leads to criminal command responsibility. Nonetheless, the Hadžihasanović Trial Chamber underlined the importance of these measures of the commander by stating that the “general measures,” or in other words the fulfilment of his responsibilities as a commander, may be taken into consideration in the factual analysis of the case at hand. At the same time, the Chamber pointed out that the fact that where the opposite is true, where the commander has taken all so-called general measures, but where crimes nevertheless occur, the commander cannot avoid criminal responsibility by referring to his fulfilment of the general measures. On the basis of the Hadžihasanović case it may be concluded that the failure to train soldiers in general does not fall under command criminal responsibility. Just as in the Pacific War example, this solution leaves an observer or the prosecutor with the feeling that although it might not be command criminal responsibility, the commander is in some other way responsible.

It is evident that the whole discussion, from that concerning the Yamashita case to the reasoning in the more recent case law, concerns the moral responsibility of the commander. It is felt that it should at least be the moral obligation of the commander to ensure the training of his subordinates in accordance with the laws of war. The problem is that the moral component of command responsibility, the moral obligation of a commander, should not be mistaken for command criminal responsibility, as this is likely to create confusion when applying the principle of command responsibility.

The next question is how to deal with the moral responsibility of the commander in a case concerning command responsibility. In the Hadžihasanović case, the Trial Chamber of the ICTY held that because the accused, Hadžihasanović, had trained his subordinates in the laws of war and had worked to enforce the rules of international humanitarian law, these ‘general

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829 Čelebići, TC Judgement, paras. 394-395.
830 Halilović, TC Judgement, paras. 81-88; and Hadžihasanović, TC Judgement, paras. 145-151.
831 Halilović, AC Judgement, paras. 61-65.
832 Halilović, TC Judgement, para. 88; and Hadžihasanović, TC Judgement, para. 151.
measures’ should be considered in the evaluation of the mitigating circumstances. Accordingly, the fact that the commander had in general fulfilled his duties as a commander meant that he had, except for the occasions when the relevant crimes were committed, acted in accordance with his general command responsibility. The Chamber considered that he should be given credit for this, although one should bear in mind that the Blaškić Trial Judgement pointed out that in respect of the criminal responsibility of an accused, the mitigating circumstances “do not in any event mitigate the seriousness of the offence.” Nevertheless, the Hadžihasanović Trial Chamber considered a reward appropriate for his generally speaking appropriate behaviour.

The basis for the reward is a moral consideration. There was nothing morally reprehensible about his behaviour in general. However, considering the characteristics of a moral rule as set out earlier, the Blaškić reasoning is important to keep in mind. As pointed out earlier, compliance with a moral rule is a matter of course and not a matter of praise. The ICTY has usually considered a variety of personal circumstances in mitigation at the sentencing stage. Nevertheless, the reward by the Trial Chamber in the Hadžihasanović case does not do away with the reprehensibility of the acts which constituted the basis for the conviction of the commander under the command responsibility principle.

To sum up, the future of command responsibility should preferably be and is likely to be more sober and low key than its recent past. Despite the possibilities of increasing prosecution, also of civilian superiors, under national law, the doctrine under international criminal law will be more focussed on the purpose of the doctrine, which will be of assistance when facing challenges to the doctrine, such as new methods and means of warfare. While not necessarily limited only to cases falling within the ‘traditional ambit’ of command responsibility, as discussed in the previous section, a doctrine which is less focussed on the leaders of atrocities could contribute to attaining the goals of international criminal justice. An important aspect of a successful future for the command responsibility doctrine is the understanding of the distinction between the moral and the criminal responsibility of the superior.

833 Hadžihasanović, TC Judgement, paras. 151 and 2080.
834 Blaškić, TC Judgement, para. 765.
835 See Chapter 3 supra.
6.5 Final observations

Is there a difference between military and civilian superiors? There certainly is. It is this difference which has complicated the practical application of a doctrine which in theory applies to all superiors subject to the condition that the required elements of the doctrine have been established. What this study has attempted to show is that case law and the voluminous literature on the subject of command responsibility provide us with well elaborated and convincing arguments on the various aspects of the doctrine, not least on the aspect of the applicability of the command responsibility doctrine to civilians. According to this author the missing link in the discussion between the various contentious aspects of the application of the doctrine is a focus on the origin of the doctrine and the possibilities of combining this with the criminal law doctrine as it is today.

The lack of focus could be attributed to the fact that the command responsibility doctrine can be viewed from at least three perspectives. Each of these perspectives has its own focus, which makes the common focus difficult to achieve. First, there is the more theoretical perspective of the international community, international law, and in particular human rights. The emphasis on these aspects actually brought the command responsibility doctrine where it is today. Of course, without the codification of the doctrine and the U.N. Security Council resolutions on the establishment of the ad hoc tribunals, the doctrine would not have developed into its present shape. This perspective sometimes seems to confuse moral responsibility with criminal liability and the purpose that the command responsibility doctrine serves/should serve. Looked at from this perspective, the most important goal of the codified provision is to ensure the accountability of those responsible for human rights abuses. The focus is on the desire for an appropriate reaction to human rights abuses through international law. Secondly, there is the more practical criminal law perspective. Viewed from this perspective, command responsibility is a provision laid down in statutes and conventions that has to be applied in a criminal court. The focus is on a fair and just process and the interpretation of the law. Thirdly, there is the perspective and the concern of the military and civilian actors in the field who have to act in accordance with the law. This is not so much about the deterrent effect of the doctrine on the acts of military commanders as about the practicality of international law/criminal law rules. If rules are meant to contribute to the conduct of warfare in accordance with IHL, they should be practical. A successful future
development and application of the command responsibility doctrine can only be achieved if the importance of all three perspectives is acknowledged.