The command responsibility doctrine in international criminal law and its applicability to civilian superiors
Nybondas, M.L.

Citation for published version (APA):
Nybondas-Maarschalkerweerd, M. L. (2009). The command responsibility doctrine in international criminal law and its applicability to civilian superiors

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
Annex I

Interview with Colonel Richard van Harskamp, The Hague, 22 October 2008

I have analysed the essence of the discussion, from the point of view of my PhD research questions on command responsibility, in the following way:

General command responsibility vs. command criminal responsibility

Command responsibility as criminal responsibility is clearly a consequence of responsible command or general command responsibility. Although IHL is not geared towards sanctioning, there is an expectation that commanders act in accordance with the rules. The ability to do that, to carry out your responsibility as a commander is something that is a part of you, or is not. In the latter case, you are not suitable as a commander. Inherent in your position as a commander is the fact that there are no guarantees. You can carry out your responsibilities to the best of your ability and still acts may occur which cause situations that you did not expect or desire. Here the distinction between the general command responsibility and the command criminal responsibility is clearly visible. Even in situations that were not planned or expected and caused by a subordinate on whatever level, the commander is responsible for what has happened, in the sense of his general command responsibility. This responsibility could be compared to Hart’s role responsibility, and should not be confused with liability responsibility.\(^837\)

A more difficult issue is the commander’s guilt or liability in such cases. The command (criminal) responsibility principle is problematic because of the difficulty of establishing exactly at which level of the hierarchy liability should be found. A directly related question is which procedure should be used in order to establish possible blameworthy behaviour on the part of the commander. States seem to use different methods for the establishment of the responsibility when an incident has occurred. Some years ago, when a US soldier was filmed shooting a person who was lying on the ground,\(^838\) the commander of that soldier’s unit was immediately called back to the US. The process of finding out whether the commander had acted in accordance with the applicable rules and regulations followed. Such a procedure implicitly gives the impression of blameworthy behaviour on the part of the commander and requires that if the commander was not to be blamed, his good reputation will have to be restored. As such there is nothing wrong with this procedure, but it is questionable whether this procedure is suitable for all cultural contexts. As a comparison, the Dutch investigation into the incident would directly concern the possibly wrongful act of the soldier. The commander’s responsibility (role responsibility and liability responsibility) would only arise if wrongfulness on the part of the soldier was established. This example may serve to show two things; first, it proves the difficulty of establishing whether somewhere in the chain of command there was wrongful behaviour or whether the wrongfulness was on the part of the one ‘who pulled the trigger’. Secondly, there seems to be a very thin line between the general

\(^{837}\) Hart 1968, op. cit., pp. 210-222.

command responsibility of the commander and his command criminal responsibility. Was the threat felt by the soldier understandable and his behaviour justifiable, or was his shooting a consequence of the commander’s failure to supervise?

**The deterrent effect of the command responsibility doctrine**

From a commander’s point of view, regardless of the command responsibility doctrine, you will always command from your heart. Of course, as a commander, you are supported and restricted by various rules and regulations. The way you carry out an assigned mission will depend on the Rules of Engagement and other established criteria as to when and how you can act. As a commander you should also be able to estimate which impact the three components (conceptual, mental and physical component) of your military ability will have on your task. So while having to take these things into account as a commander, your exercise of command cannot use a legal framework as your starting point. This would lead to a situation where your priority is the rules and your ‘men’ come second. Exercising command in this way is bound to be unsuccessful.

Based on this view, it seems that the command responsibility doctrine does not have a direct deterrent effect on the commander. From a commander’s perspective, if the doctrine were to have a preventive effect it would need to be determined who at which level was to be held responsible in the event that something went wrong. As a commander, it seems strange that an accused (before an international tribunal) is charged and tried for his command responsibility before an investigation has shown at which level the responsibility lies. That means that responsibility could be found at each level of the hierarchy.

**On the elements of command responsibility (superior-subordinate relationship; knowledge requirement; and necessary and reasonable measures to prevent or punish)**

As mentioned earlier, it is inherent in the position of a commander that there are no guarantees, or in other words that regardless of the measures taken, there is always a possibility of some kind of violation, although the procedure when giving orders and keeping abreast of what is happening, as well as the authority to take the necessary and reasonable measures are geared towards the certainty of compliance with the rules.

Orders usually depend on two kinds of operations to be carried out – framework operations and specific operations (gerichte operaties). In the second case, the order is very specific, for instance: ‘We are going to blow up that house’. There is little room for interpretation and input from a subordinate (commander). Concerning framework operations, the order is more general, for instance: ‘Make sure that the area is secure’, and the subordinate commander is expected to consider how the task should be carried out. Clearly, when such an order is given, there is a bigger chance that the commander who gave the order may not know the exact acts of those carrying out the order, despite a reporting procedure.

With regard to orders, a subordinate commander is asked to report back on the measures taken to carry out the order, the effect of the order, the means used etc. This is done at several points in time. To a larger extent than concerning specific operations, orders regarding framework operations are dependent on the mental capacities of the subordinate commander. Despite the reporting, it may be concluded that the commander at this level has to face more uncertainty as to the effect of the order.
Daily contact with subordinate commanders is to make sure that the commander is aware of possible violations that are to be committed or have been committed. A complicating factor in keeping informed is a situation where a violation has occurred, but there is agreement among subordinates that the violation will not be reported to the commander. Such a violation could be of a lesser character, not amounting to a criminal act, and concern the rules set up by the commander of that mission, but shows the possibility of the commander’s lack of knowledge.

It is certainly true that a commander serves as an enabling factor, which means that most acts depend on the commander and that the authority of the commander makes the subordinates able to do what they are supposed to do (including killing).839 To say that without a commander’s order or knowledge, things would not happen, is one step too far. The phenomenon called ‘strategic corporal effect’, which means that at each level of the hierarchy someone may decide to take action on his own, should not be underestimated. It may be impossible for the commander to know of the sudden or planned acts of the individual soldier. The following could serve as an example: If a young man fulfills the requirements concerning education and physical and mental fitness, he will be accepted into the armed forces. The fact that his father is an immigrant and belongs to one of the tribes involved in a conflict to which the armed forces are sent on a mission, will probably not constitute a sufficient reason for not sending the young soldier on that mission, if the soldier is considered sufficiently trained for it. You cannot assume that the commander had knowledge that such a soldier would act in violation of the rules, but there is always a possibility of that ‘strategic corporal effect’.

With regard to the necessary and reasonable measures to prevent or punish a crime, the commander has far-reaching authority. In a situation where a crime is about to be committed by a subordinate, the commander may use force to prevent the subordinate from committing a crime. On the other hand, that authority is also an obligation of every serviceman. Even where someone holding a higher rank is about to commit a crime, the subordinate has an obligation to prevent him from doing so.

From a commander’s point of view, it is clear that also a failure to punish violations may lead to criminal responsibility. In cases like that against Hadžihasanović (ICTY),840 where the commander assumed command after the crimes had taken place, it should be the commander’s obligation to take measures to punish the violators, if he found out that violations had occurred. Another example could be the events at My Lai, where the crimes were covered up. The commander (Capt. Medina)841 should have been held criminally responsible for not taking any measures to prevent or punish the crimes.

Command responsibility and civilian superiors

As mentioned above, the responsibility of the commander for his men must be an integral part of you as a commander. In this regard, the relationship between a military commander and his subordinates may be unique. However, from a commander’s perspective, the possibilities of taking the necessary and reasonable measures to prevent or punish violations in a conflict situation are not so different for a civilian superior than the possibilities of a military commander. Consider the following example: Where a mayor of a city under emergency law has the authority over the local police and possibly even paramilitary units, he can use his

839 This was discussed in Chapter 3.2.6 supra.
authority to order the police to put a stop to any violations taking place. If the police participate in the violations, the mayor, as any military commander, has the possibility of turning to his superiors for assistance. The same could apply to other civilian superiors. Where the superior did not take action, it could be justified to hold him criminally responsible on the same basis as the military commander who did not take the necessary and reasonable measures.

The same reasoning may be applied to military staff officers. While they do not have a position in the line of command, in case of a violation they have roughly the same possibilities to stop a violation and to refer the perpetrators to their superiors. It should not be forgotten that although staff officers do not have hierarchical superiority, they do have functional superiority.

The effect of ‘new warfare’ on command responsibility

The effect of new forms of warfare may be considered as having an indirect effect on command responsibility. Consider the following example: A truck drives in the direction of a group of soldiers/a base at full speed. There may be several reasons for this. The sunset hinders the driver’s visibility; the driver needs immediate help and approaches the soldiers etc. The instructions or procedure followed by the commander in such a situation, and more specifically the permission to shoot at the driver, is changing now that in some conflicts suicide bombing has become a method of warfare by some decentralised fighting organisations. While in traditional warfare the instructions may have been to consider the various reasons for the truck driving into the soldiers, the high risk of suicide bombings has forced the regular armed forces to reconsider their instructions. When is the decision by a soldier to shoot a reasonable measure as opposed to a violation, possibly leading to liability on the part of the commander as a consequence of his failure to prevent (supervise) the soldier?

An even more illustrative example of how new warfare may affect command responsibility is the case of the soldier who shot a person lying on the ground. Was the commander to be held liable for not properly instructing soldiers not to kill persons hors de combat (in the case of an enemy soldier) or can you not blame the commander for having instructed the soldiers always to take out the enemy in case of a suspected suicide bomber?

Maria Nybondas-Maarschalkerweerd
24 October 2008