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

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SUMMARY

THE COMMAND RESPONSIBILITY DOCTRINE IN INTERNATIONAL CRIMINAL LAW AND ITS APPLICABILITY TO CIVILIAN SUPERIORS

The command responsibility doctrine is applied to both military commanders and civilian superiors before international courts and tribunals. Command responsibility, if established, imposes criminal liability on the superior who is charged on the basis of this doctrine. At the same time, military commanders consider command responsibility as a broader concept, anchored in military tradition, which covers all those responsibilities that are inherent in the position they hold or are part of their assignment. Command responsibility, if considered from these two different perspectives, is not limited to criminal liability as imposed by international criminal law.

Under international law, the command responsibility doctrine is applied to superiors who did not take the necessary and reasonable measures to prevent or punish the perpetrators of international crimes, where these perpetrators were the subordinates of the superior. The provisions on command responsibility in the Statutes of the ICTY and ICTR (the ad hoc tribunals) are identical. The Rome Statute of the ICC (ICC Statute) contains a more elaborate provision on command responsibility, the most significant difference being the division of the provision into two parts, the first being applicable to military commanders and persons effectively acting as military commanders, and the second being applicable to other superiors, i.e., to superior-subordinate relationships not described in the first part.

In this study, the author examines the applicability of the doctrine to civilians, in particular. For the purposes of the command responsibility doctrine, civilian superiors are exceptional in that they (normally) do not share the formal, de jure, hierarchical and disciplinary system inherent in the military machinery. In many instances, if not in all cases, this reality makes proving command responsibility in relation to civilian superiors different from, and usually more challenging than in relation to military commanders. The aim of the study is to discover which approach should be taken when applying command responsibility to civilian superiors. A further aim is to establish whether an explicit differentiation between military commanders and civilian superiors is justified and necessary for a consistent application of command responsibility under international criminal law.

In the introduction – Chapter 1 – to the study, the author gives two examples that illustrate the variety of situations and relationships that may be covered by the command responsibility concept. In the same chapter the aim of the study, as just set out above, is formulated in the form of central research questions. The author discusses the applicable law and the sources consulted. The case law of the ad hoc tribunals plays a central role in discovering how the command responsibility doctrine has been and is applied by these international tribunals. The ICC Statute and the statutes of the ad hoc tribunals are other crucial sources. In addition, the writings of publicists have been frequently consulted. Addressing the scope and structure of the study, the author notes that the study is limited to the international level and only includes national legislation and case law sporadically.

The legal basis for the command responsibility doctrine is examined in Chapter 2. The author recognises that there is proof of the acceptance that a commander has certain responsibilities in relation to his subordinates, which dates back hundreds or even thousands
of years. The first treaty provision of modern times that is of particular significance for the command responsibility doctrine is Article 1 of the Hague Regulations of 1907, which reflects the idea of ‘responsible command’. The idea of command responsibility as a possible basis for criminal liability is explicitly codified in Articles 86 and 87 of AP I to the Geneva Conventions. A further development of the principle can be found in Article 6 of the 1996 Draft Code of Crimes Against the Peace of the ILC. This provision bears a resemblance to the corresponding provisions in the statutes of the ad hoc tribunals, which do not have the status of treaty law because of their origin in UN Security Council Resolutions. The most significant addition to treaty law is Article 28 of the ICC Statute. The chapter continues with a discussion on the customary law status of the command responsibility doctrine before the adoption of the ICC Statute and since. The author presents arguments that support the customary law status of the doctrine already before the adoption of Article 28 ICC. However, the author recognises the fact that the emergence of rules of customary law in the field of international humanitarian law in general has been questioned and this criticism may apply to the command responsibility provision as well. Finally, the author briefly sets out the present definitions of command responsibility in international criminal law.

Chapter 3 explores command responsibility in the broader sense, i.e., command responsibility as a military concept and not limited to a form of criminal liability. The author first examines the concept of command; the definition of command; and the different levels and types of command. The author distinguishes between commanders who exercise actual command and staff officers who do not hold that same position. Importantly, the author discusses the human factor in the command process, which appears to be crucial for the effective conduct of war. Related to this is the distinction between military command, on the one hand, and management in a civilian setting, on the other. The setting and circumstances in which a commander acts prove to be unique and, therefore, command cannot be directly compared to the function held by a manager. The latter part of the chapter examines the concept of responsibility, and in particular how command responsibility can be considered both as ‘role responsibility’ and as ‘liability responsibility’, when applying the terminology used by H.L.A. Hart. The responsibility that commanders experience as part of their position, or what the author calls ‘general command responsibility’, corresponds to role responsibility, while the command responsibility as set out in international criminal law corresponds to Hart’s liability responsibility. The author points to the origin of command responsibility in ‘role responsibility’ and possibly even in moral rules. The relationship between ‘general command responsibility’ and the command responsibility as set out in international criminal law is addressed and the author finds that compatibility between the two can only be reached where those applying the command responsibility doctrine respect the reality of commanders and the origin and purpose of the doctrine. At the same time, command responsibility as liability responsibility will only be part of the ‘general command responsibility’ if it is experienced as realistic, which means that the doctrine may be accepted by military commanders if it sets a workable standard for those who face the challenging realities on the battlefield.

The application of command responsibility to civilian superiors by the ad hoc tribunals is analysed in Chapter 4. The chapter starts with an attempt to identify the civilian superior for the purposes of the command responsibility doctrine. These results are rather unsatisfactory, first of all because of the general lack of a definition of a civilian superior. Arguably, the reason why those who are not military commanders are referred to as ‘civilian’ superiors in case law and in the literature is the division of persons under IHL into only two categories, combatants and civilians. However, the existing provisions on command responsibility at the international level do not use the term civilian superior. The chapter shows that while command responsibility is often connected to a certain level of authority of
the accused, the level of the position of the accused does not constitute one of the decisive factors for establishing command responsibility. Considering Article 28 ICC and the categories of superiors it provides for, the author finds that the superiors that suit each category can only be identified on the basis of their factual function and acts in the case at hand. Analysing a number of cases in which the command responsibility doctrine was applied to accused who could be considered as civilians, the author points to the difficulties both of categorizing these superiors and of applying the command responsibility provision to the civilians identified. Subsequently, the author examines cases decided by the ad hoc tribunals which have either convicted civilian superiors on the basis of command responsibility or acquitted them on these charges. This approach is taken in order to discover what the reasons have been for the conviction or the acquittal. The author notes the large number of acquittals and concludes with the finding that based on the small number of convictions by the ad hoc tribunals in relation to civilian superiors, the command responsibility doctrine has not been successful, at least as a tool for ensuring convictions.

The status of the superior as a civilian is not the only difficulty that prosecutors and judges face when applying the command responsibility doctrine. In Chapter 5 the author addresses a number of issues that are not specific to civilian superiors, but that are absolutely essential for determining how the doctrine should be applied and which cases lend themselves to prosecution on the basis of command responsibility. The analysis demonstrates that the applicability of the command responsibility in practice is influenced by the way it is presently interpreted. At the same time it explains why the doctrine lends itself more easily to the prosecution of military commanders than to the cases concerning civilian superiors.

First, the nature of command responsibility constitutes one of the major issues discussed in case law and literature. The prevailing view for some time was that command responsibility leads to liability for the international crime committed by the subordinates. On its face value, this approach is the right one, as it is well known in criminal law that not only the physical perpetrator of the crime can incur responsibility for a crime, but also a secondary party to the crime. However, this approach raises problems in relation to the principle of culpability, as the superior who only failed to prevent or punish the perpetrators did not act with the requisite mens rea. The more recent case law presents an alternative approach. If command responsibility is considered as an act sui generis, the culpability problem is solved. However, if the failure to prevent or punish itself constitutes the crime, the link to the international crime within the subject-matter jurisdiction of the courts and tribunals is difficult to find. The author takes a bifurcated approach, supporting command responsibility as an act sui generis where the superior should have known about the commission of the crime, and command responsibility as sui generis participation where the superior knowingly omitted to prevent or punish — ‘aggravated command responsibility’.

The second obstacle to a consistent application of the doctrine is the possible overlap between individual criminal responsibility and command responsibility. The author discusses the concept of Joint Criminal Enterprise (JCE) and aiding and abetting as bases for conviction and concludes that where the tribunals find that a conviction could be based on individual and command responsibility, the former is preferred, and command responsibility is reduced to an aggravating circumstance at the sentencing stage. The author rejects this practice and advocates a command responsibility conviction when that is justified, considering the facts of the case.

The third issue that hampers a generally accepted application of the command responsibility doctrine is the nature of the crimes underlying the charges of command responsibility. Both genocide and the crime of aggression show certain characteristics that do not go well with the command responsibility doctrine. Genocide requires special intent, which can hardly be combined with the fact that the superior only failed to prevent or punish the
perpetrators. The problem in relation to aggression is the fact that only top leaders can make the decision to commit a crime of aggression, which renders command responsibility in relation to this crime highly hypothetical.

In the final chapter, Chapter 6, arguments in favour of and against a differentiation between civilian superiors and military commanders when applying the doctrine are presented, but the author concludes that the central issue should be another one. When applying command responsibility in future cases, the discussion should focus on respect for the origin and purpose of the doctrine. The author finds it established that convictions on the basis of command responsibility can almost exclusively be materialised and be justified where the case falls within the ‘traditional ambit’ of command responsibility. The ‘traditional ambit’ represents a more limited range of cases, mostly cases against military commanders who failed in their duties and were, at most, indifferent to the consequences, but played no active part in the commission of the crimes. These cases are true to the purpose of the doctrine. These findings leave little room for trying civilian superiors on the basis of command responsibility. On the other hand, the author emphasises that despite the fact that command responsibility may not give much room for finding civilian superiors liable, there are other modes of liability that better correspond to the role of the civilian superior in large-scale international crimes, such as the concept of Organisationsherrschaft. The author concludes with a discussion pointing out the important distinction between establishing the criminal liability of a superior and establishing his moral responsibility in relation to crimes committed. Important for the future of the command responsibility doctrine is the consideration that a superior who is found morally responsible is not necessarily criminally liable for his role as a military or civilian leader.