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Command Responsibility at the ICTY – Three Generations of Case Law and Still Ambiguity

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COMMAND RESPONSIBILITY AT THE ICTY – THREE GENERATIONS OF CASE LAW AND STILL AMBIGUITY

Elies van Sliedregt·

1. Introduction

Superior or command responsibility[1] is the primary mechanism through which superiors can be held criminally responsible for failing to prevent or punish crimes committed by their subordinates. The concept is an important tool in punishing those in superior positions for lack of supervision over persons under their command or authority. It extends to military and non-military (political, civilian) superiors. This liability theory was already described by Hugo Grotius when he wrote, "we must accept the principle that he who knows of a crime, and is able and bound to prevent it but fails to do so, himself commits a crime".[2] In one sentence Grotius captured the essence of superior responsibility.

Prior to the Second World War, superior responsibility was an articulation of military practice.[3] This accounts for the term command responsibility. A position of command generally imposed military-disciplinary responsibility[4], only in a few cases did it entail *criminal* liability.[5] International adjudication in the twentieth century, in

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[1] Command responsibility and superior responsibility are used here as interchangeable concepts.

[2] H. Grotius, *De Jure Belli ac Pacis* (1615), Book II (ed. F.W. Kelsey c.s, New York/London, Oceana Publications Wildy & Son 1964), p. 523.

[3] For a historical overview, see W.H. Parks, 'Command Responsibility for War Crimes', 62 *Military Law Review* (1973), p. 1-20; L.C. Green, 'Command Responsibility in International Humanitarian law', 5 *Transnational Law & Contemporary Problems* (1995), p. 320 - 327; I. Bantekas, *Principles of direct and superior responsibility in international humanitarian law* (Manchester: Manchester University Press, 2002), p. 67 - 70.

[4] Some trace it back to what they refer to as 'the oldest military treatise in the world', written in 500 B.C. by Sun Tzu: S. Tzu, *The Art of War* (ed. S.B. Griffith, Oxford 1963), p. 125.

[5] For an early example see Parks who refers to the trial of Peter Hagenbach in 1474 who was brought to trial

particular after the Second World War, has developed superior responsibility into a concept of criminal responsibility. It was the Second World War and its aftermath that generated the leading cases on superior responsibility.[6] In these cases the first contours of a modern concept of superior responsibility were drawn.[7]

The ICTY built on this legacy. The leading case is the *Prosecutor* v. *Mucić et al*, also referred to as the *Čelebići* case after the camp where the crimes were committed.[8] Two of the accused, Delić and Landzo, in their respective positions as deputy commander and guard, were found guilty as being personally responsible for their direct participation in the crimes against detainees. On the other hand, Mucić, the commander of the camp, was found guilty for crimes committed by his subordinates by virtue of his position as the *de facto* commander of the camp. The Judgment in the *Čelebići* case was the first extensively reasoned decision on command responsibility by an international tribunal after Nuremberg and Tokyo. It was also the first command responsibility case before the ICTY. Until then the accused were charged and convicted for direct participation in crimes under article 7(1) of the Statute. The Trial Chamber in *Čelebići* formulated three elements that should be met before one can be held liable as a superior under article 7(3) of the Statute.[9] Proof is required of, (i) the existence of a superior-subordinate relationship; (ii) that the superior knew or had reason to know that the subordinate was about to or had committed a crime; and (iii) that the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.[10] In *Orić,* the Trial Chamber added a

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by the Archduke of Austria for murder, rape, perjury and other crimes. Hagenbach was tried by an international tribunal composed of judges from the allied states of the Holy Roman Empire. He was convicted of crimes which he, as a knight, should have prevented as he had had the duty to do so. Parks, *supra* note 3, p. 4-5.

[6] *U.S. v. Tomoyuki Yamashita,* Trials of War Criminals (TWC), Vol. IV, p. 3 - 4; *U.S. v. Yamashita*, 327 US 1.; *S. v. Von Leeb* (*High Command* case) in Friedman (1972) Vol. II, p. 1421 - 1470; TWC, Vol. XI, p. 462 - 697; *U.S. v. Wilhelm von List et al*. (*Hostages* case) in Friedman (1972) Vol. II, p. 1303 - 1343;. TWC, Vol. XI, p. 1230 - 1319

[7] See E. van Sliedregt, *The criminal responsibility of individuals for violations of international humanitarian law* (Cambridge/ The Hague: T.M.C. Asser Press, 2003), p. 119 - 135.

[8] Judgment, *Delalić et al.* (IT-96-21-T), Trial Chamber, 16 November 1998 (hereinafter *Čelebić*i Judgment); *Delalić et al*, (IT-96-21-A), Appeals Chamber, 20 February 2001 (hereinafter *Čelebić*i Appeal Judgment) For comments on the *Čelebići* case see *infra* I. Bantekas, 'The contemporary law of superior responsibility, 93 *American Journal of International Law* (1999), p. 573 - 595; M. Lippman, The Evolution and Scope of Command Responsibility, 13 *Leiden Journal of International Law* (2000), p. 139 - 170; Commentary on the *Čelebić*i Judgment by Harmen van der Wilt in A.H. Klip and G.K. Sluiter, *Annotated Leading Cases of International Criminal Tribunals*, Vol. 3 ICTY 1997-1999 (Antwerpen, Groningen, Oxford: Intersentia/Hart, p. 669 - 683.

[9] Art 7(3) ICTY Statute reads: "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

[10] *Čelebić*i Judgment, *supra* note 8, para. 346, confirmed in appeal; *Čelebić*i Appeal Judgment, *supra* note 8,

fourth element; (iv) a subordinate commits a crime under international law.[11]

These elements reflect the basis of the concept of command responsibility as developed in post-Second World War case law and encapsulated in article 86 of Additional Protocol I (AP I) to the 1949 Geneva Conventions. Since the *Čelebići* Trial Chamber's findings on command responsibility have been endorsed in appeal and repeatedly confirmed by ICTY and ICTR Trial Chambers, the groundwork and underlying principles of this doctrine are firmly established in the Tribunals' case law.

Still, some critical aspects of the command responsibility doctrine remain indeterminate. Two reasons account for this. First of all, the complex nature of the concept; command responsibility is a multilayered concept that has traits of a separate offence - a failure to act - and of a mode of liability, a form of participation in subordinate wrongdoing. So far, ICTY case law does not provide for a uniform and unambiguous determination of what the nature of command responsibility is. Secondly, in more recent rulings the ICTY has moved away from some of the (implicit) findings in its earlier case law. This is the result of tailoring command responsibility to a new class of defendants who, compared to the first generation of ICTY defendants, can be referred to as the 'big(ger) fry' and who are generally far removed from the scene of the crimes and the perpetrators.

While the ground work has been laid in *Čelebići*, command responsibility has developed further. The question then is: what is the current scope and meaning of command responsibility in ICTY case law? Moreover, how does it relate to customary international law, national and international statutory and case law, and general principles of criminal law? The aim of this paper is to answer these questions by uncovering the nature of command responsibility in the law of the ICTY. Determining the nature of command responsibility will shed light on the outer limits of this liability theory; limits that seem to have expanded considerably in recent case law.

A lot has been written on command responsibility.[12] This contribution will not go into all the aspects of this liability theory, nor will it discuss the concept in great detail. It will reflect on 15 years of ICTY case law and by necessity remain at a relatively general level.

The chapter starts with an analysis of how command responsibility developed beyond

paras. 189 - 198, 225 - 226, 238 - 239, 256, 263.

[11] Judgment*, Orić*, Trial Chamber (IT-03-68), 30 June 2006 (hereinafter *Orić* Judgment), para. 294.

[12] Only recently three doctoral dissertations were published on command responsibility: G. Mettraux, *The Law of Command Resposnibility*, Oxford: Oxford University Press, 2009; Ch. Meloni, *Command responsibility in International Criminal Law*, The Hague: T.M.C. Asser Press, 2010; L. Nybondas, *Command Responsibility and its Applicability to Civilian Superiors*, The Hague: T.M.C. Asser Press, 2010.

the *Čelebići* case (§2). The analysis focuses on the temporal scope of command responsibility, discussing the case law with regard to 'successor superior responsibility' (§2.1)[13]. The analysis continues with describing how the scope of article 7(3) has been extended in recent case law by adopting a broad interpretation of the terms 'commission' and 'subordinate' (§2.2). The latter development, raises the question as to the limits of command responsibility, which brings us back to the question of the nature of command responsibility: what is a superior actually held responsible for?(§3) To answer the latter question command responsibility outside the ICTY context will be analysed (§4), in international criminal law, most particularly the ICC Statute (§4.1) and national law (§4.2). Discussing command responsibility in national and international criminal law enables us to reflect on its layered structure (§5). Moreover, it assists in understanding the nature of command responsibility at the ICTY (§6) and in suggesting limits to its scope (§ 7).

2. Command Responsibility beyond the *Čelebići* case

Analysis of ICTY case law on command responsibility shows that we can detect a division into first, second and third generation cases. The first generation case law concerns the detention camp cases and the land mark ruling in *Čelebići*. The second generation case law emerges with the ruling in *Hadžihasanović & Kubura* (hereinafter *Hadžihasanović*) on successor superior responsibility.[14] Since the latter decision two views of command responsibility can be identified: command responsibility as mode of liability and command responsibility as separate offence, as a failure to act.[15] The linkage between superiors and culpable subordinates has been gradually loosened in what can be regarded third generation cases, starting with *Blagojević* and *Orić*. These are cases of more senior defendants and of operational commanders - commanders in the field - who are often further removed from the scene of the crimes than the superiors that stood trial in the early cases such as

[13] Term taken from Barrie Sanders who wrote an excellent paper on the issue: B. Sanders, 'Unraveling the Confusion Concerning Successor Responsibility in the ICTY jurisprudence', 23 *Leiden Journal of International Law* (2010), p. 105 - 135.

[14] Decision on Joint Challenge to Jurisdiction, *Hadžihasanović & Kubura* (IT-01-47-AR72), Appeals Chamber, 16 July 2003 (hereinafter *Hadžihasanović* Appeal Decision).

[15] The fact that these views emerged relatively late into the ICTY's existence is because command responsibility as a liability theory was for a long time ignored by the prosecutor who favoured Joint Criminal Enterprise (JCE) as a basis of liability. This had to do with the fact that command responsibility, certainly in early cases, has been regarded as narrowly defined, requiring a close link between superiors and subordinates, which was unappealing for a prosecutor seeking to secure convictions

Čelebići.

The overview of ICTY case law that follows is limited to second and third generation case law. We will start by discussing the divisive *Hadžihasanović* ruling on successor superior responsibility.

2.1 Successor Superior Responsibility

On the basis of superior responsibility we punish *in*activity.[16] Thus, with superior responsibility a military or non-military superior is held responsible for a failure to act. This failure can consist of two scenarios: (i) the superior knew, or has reason to know, that crimes were about to be committed and failed to prevent such crimes, or (ii) the superior did not know of crimes being committed (and cannot be blamed for that lack of knowledge) but once informed failed to punish and/or report such crimes to the proper authorities. In other words, there is a pre-crime and a post-crime scenario of superior responsibility. It follows from the decision by the ICTY Appeals Chamber in *Hadžihasanović*[17] that the post-crime scenario only generates superior responsibility when it can be established that there was a superior-subordinate relationship governed by effective control *at the time of the offence*.[18] The Appeals Chamber found that since there was no effective control at the time of the offence, there was no criminal liability for these crimes under Article 7(3) of the ICTY Statute. It was held that customary international law, the text of Article 7(3) of the Statute and the provision from which it stems, article 86(2) of API, militate against extending liability to the post-crime scenario without the temporal coincidence. Thus, commander Kubura, who had taken up the position of commander on 1 April 1992, was not criminally liable for crimes committed by his subordinates in January 1992 because he had no effective control over his subordinates at the time, i.e. he could not have prevented the crimes. Kubura could not be held liable for past crimes even though he did not punish subordinates once he learnt fro the crimes. The Appeals Chamber reversed the decision of the Trial Chamber, which had accepted successor superior responsibility for Kubura.[19]

[16] Thus, an *act* such as ordering crimes does not generate superior responsibility. An act of ordering can be prosecuted under a separate mode of liability, namely 'ordering' or 'instigation' (art. 6(1)/7(1) ICTR/Y St.)) or 'ordering, soliciting or inducing' (art. 25(3)(b) ICCSt.).
[17] *Hadžihasanović* Appeal Decision, supra note 14, para 51.
[18] Ibidem.
[19] ICTY, *Prosecutor v. Hadžihasanović and Kubura,* Decision on Joint Challenge to Jurisdiction, IT-01-47- (hereinafter *Hadžihasanović* decision, 21 February 2003.

The *Hadžihasanović* Appeals Chamber was strongly divided. Judges Shahabuddeen and Hunt wrote vigorous dissents.[20] Shahabuddeen accepted the argument of the majority that so far there had been no reported cases in which command responsibility had been extended to acts of subordinates before the commander assumed command. Yet, he was of the view that this does not mean that the *principle* of command responsibility as established in customary international law, does not extend to successor superior responsibility. In his view the text of Article 7(3) allows for such an interpretation. He regards command responsibility as a failure to act rather than as a mode of liability.

> I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so. Reading the provision reasonably it could not have been designed to make the commander a party to the particular crime committed by his subordinate.[21]

Judge Hunt argued along similar lines. He pointed out that the specific factual situation in *Hadžihasanović* falls under the principle of command responsibility and that successor superior responsibility may, therefore, be regarded as part of customary international law.[22] He further relied on a purposive reading of article 86(2) of API to argue that post-crime command responsibility without temporal coincidence falls under articles 86(2) API and 7(3) of the Statute. As to the nature of command responsibility he found that,

> [t]he criminal responsibility of the superior is not a direct responsibility for the acts of the subordinate. It is a responsibility for his own acts (or, rather omissions) in failing to prevent or to punish the subordinate when he knew or had reason to know that he was about to commit acts amounting to a war crime or had done so.[23]

In the *Orić case* the Appeals Chamber came close to revisiting the *Hadžihasanović* Appeal Decision. While the majority eventually declined to address the *ratio decidendi* of that decision, Judge Shahabuddeen, appended a declaration to reiterate his disagreement with the *Hadžihasanović* Appeal Decision. By restating his previous (dissenting) position in the *Hadžihasanović* case, he expressed the view that a commander *can* be criminally liable for crimes committed by subordinates before he assumed command. He went as far as discrediting the *Hadžihasanović* findings by claiming that "there is [now] a new majority of

[20] *Hadžihasanović* Appeal Decision, supra note 14, para. 51.
[21] Partial Dissenting Opinion of Judge Shahabuddeen, para. 32.
[22] Ibidem, para. 37.
[23] Separate and partially dissenting opinion of Judge David Hunt, para. 9.

appellate thought". Yet, at the same time, however, he considered that "a reversal should await such time when a more solid majority shares the views of those two judges (referring to Judges Schomburg and Liu who were the minority in the *Orić* Appeal Judgment, *EvS*)". In the meantime "the decision in the *Hadzihasanovic* case continues to stand as part of the law of the Tribunal".[24]

One wonders why Shahabuddeen felt the need to make this point. It only creates uncertainty as to the scope of command responsibility in ICTY law; a Trial Chamber is bound to follow the *Hadžihasanović* appellate decision in the knowledge that a new majority has come into being which would adopt an opposite conclusion and accept successor superior responsibility.[25]

2.2 Broadening the scope of Article 7(3) of the Statute

While the ICTY Appeals Chamber's findings regarding successor superior responsibility that *limit* the scope of command responsibility, at least temporally, ICTY case law regarding the interpretation of the term 'commission' and 'subordinate' in Article 7(3) have considerably *broadened* the scope of command responsibility.

2.2.1 The meaning of 'commission'

To hold a superior responsible under the doctrine of command responsibility requires proof of the commission of a crime by perpetrators who are linked to the superior by a superior-subordinate relationship. This requirement is firmly established in ICTY case law[26], which explains why the *ad hoc* Tribunals often fail to elaborate on this specific point. As was stated by the Trial Chamber in *Orić,* "until recently, both the requirement of a principal crime (committed by others than the accused) and its performance in any of the modes of liability provided for in article 7(1) appeared so obvious as to hardly need to be explicitly stated".[27]

This changed with the *Blagojević* ruling. 'Commission' in article 7(3) has been interpreted as encompassing all modes of participation listed in article 7(1): planning,

[24] Judgment, *Orić* (IT-03-68-A), Appeals Chamber, 3 July 2008, Declaration of Judge Shahabuddeen, para. 15. See also the *Partially dissenting opinion and declaration of Judge Liu* and the *Separate and partially dissenting opinion of Judge Schomburg,* which were appended to the same Judgment.
[25] See Sanders, *supra* note 13, p. 121 - 122.
[26] For the express recognition see, Judgment, *Blaskic* (IT-95-14), Trial Chamber, 3 March 2000 (hereinafter *Blaskić* Judgment) para. 291; ICTR Judgment, *Kayishema & Ruzindana* (ICTR-95-1), Trial Chamber, 21 May 1999, paras. 476 - 516, 555, 559, 563, 569.
[27] *Orić* Judgment, *supra* note 11, para. 295.

ordering, instigating, and aiding and abetting crimes.[28] The Appeals Chamber held that "[t]he meaning of 'commit', as used in article 7(3) of the Statute, necessarily tracks the term's broader and more ordinary meaning, as employed in Protocol I"[29]. In *Orić* the appellate judges held that "a superior can be held criminally responsible for his subordinates' planning, instigating, ordering, committing or otherwise aiding and abetting a crime".[30] The position that superior responsibility covers all subordinates' criminal conduct falling under article 7(1) has also been adopted by the ICTR[31].

A further question is whether a superior can be held criminally liable for the crimes that his subordinates, in turn, failed to prevent or punish. In other words, does 'commission' in article 7(3) extend to superior responsibility and alongside 7(1) also encompass 7(3) liability? In other words, 'superior responsibility for superior responsibility' or 'multiple superior responsibility'.[32] Orić was convicted on the basis of superior responsibility for the failure to prevent the cruel treatment and murder of Serb detainees at the detention facility of Sebrenica. His subordinate Krdzic was the commander of the Srebrenica military police yet no evidence was found that the perpetrators of the murders and cruel treatment were members of the military police.[33] These crimes were committed by 'opportunistic visitors'. The military police, however, being the detaining force assumed all duties and responsibilities under international law with regard to the treatment of prisoners and in particular was "bound to ensure that the detainees were not subject to any kind of violence to life and person".[34] For that reason, the Trial Chamber held that the Military Police "through its commanders....are (sic) responsible for the acts and omissions by the guards at the Srebrenica police station and at the Building".[35] Without stating it expressly, the Trial Chamber, by affirming the responsibility of Orić for the murder and cruel treatment of Serb detainees at the detention facilities in Sebrenica, seemed to have established liability on the basis of multiple superior responsibility.

The Appeals Chamber did not accept the Trial Chamber's ruling on this point since it was not made clear on which *basis* Orić' subordinate Krdzic was liable. The appellate judges

[28] *Blagojevic* (IT-02-60-A), Judgment, Appeals Chamber, 9 May 2007,para 277-285, (hereinafter *Blagojević* Appeal Judgment*)*; See *Orić* Judgment, supra note 24, para. 20;*Boškoski & Tarčulovski* (IT-04-82-T)*,* Judgment, Trial Chamber, 10 July 2008, para 404.
[29] *Blagojevic* Appeal Judgment, *supra* note 28, para. 281 - 282.
[30] *Orić* Appeal Judgment, *supra* note 24, para. 21.
[31] See *Nahimana et al.* (ICTR-96-11), Judgment, Trial Chamber, 3 December 2003, para. 485 et seq.
[32] See E. van Sliedregt, 'Article 28 of the ICC Statute: Mode of Liability and/or Separate Offense, 12 *New Criminal Law Review* (2009), p. 427.
[33] *Orić* Judgment, *supra* note 11, para. 489.
[34] *Ibid.*, para. 490.
[35] *Ibid.*

held that: "[t]he Trial Chamber in its legal findings did not consider whether a superior could possibly be held responsible under article 7(3) in relation to his subordinate's criminal responsibility under the same article.[36]" This ruling leaves undisturbed the (implicit) acceptance by the Trial Chamber of multiple superior responsibility.

Multiple superior responsibility implies a remote link to the perpetrators. In the view of the Appeals Chamber judges in *Orić,* this in itself is irrelevant as long as there is "effective control", i.e. the material ability to prevent the crime or punish, over the subordinate. The appellate judges held that it does not matter "whether the effective control descends from the superior to the subordinate culpable of the crime through intermediary subordinates"[37]. It was felt that whether the superior indeed possesses effective control is a matter of evidence and not one of substantive law.[38]

In the *Karadzić* indictment, the ICTY Prosecutor charged the latter for crimes on the basis of multiple superior responsibility.[39] The Prosecutor has taken the Appeals Chamber's words in *Orić* to heart and explicitly charged Karadzić on the basis of article 7(3) for crimes committed by subordinates, who are themselves liable under article 7(3).[40]

2.2.2 The meaning of 'subordinate'

By now it is accepted in ICTY case law that the direct perpetrator does not have to be a subordinate of the superior. In the words of the Trial Chamber in *Orić*:

> The direct perpetrators of a crime punishable under the Statute (do not need to) be identical to the subordinates of a superior. It is only required that the relevant subordinates, by their own acts or omissions, be criminally responsible for the acts and omissions of the direct perpetrators.[41]

In at least two cases before the ICTY the question arose whether a superior can be held responsible for acts of 'unidentified' subordinates. The judges in *Hadžihasanović* held that in establishing the existence of a superior-subordinate relationship, it is important to be able to identify the alleged perpetrators. This does not mean that the perpetrator needs to be identified exactly. It is sufficient to specify to which group the perpetrator belonged to

[36] *Orić* Appeal Judgment, *supra* note 24, para. 39.
[37] *Ibid.*, para. 20 *et seq.* In the view of the Appeals Chamber the link of the accused to the crime was remote. It held that the Trial Chamber failed to establish the level of control, if any, that the accused exercised over the principal perpetrators.
[38] *Ibid.*
[39] *Karadzic* (IT-95-5/18-PT) Third Amended Indictment, para. 35.
[40] See for further elaboration on superior responsibility for superior responsibility Meloni, *supra* note 12.
[41] *Orić* Judgment, *supra* note 11, para. 478.

and to prove that the accused exercised effective control over that group.[42]

The Trial Chamber in *Orić* went one step further when it held that a superior may be held liable for crimes committed by 'anonymous' persons. This ruling was, however, quashed on appeal mainly because it was found that the Trial Chamber had failed to determine that Orić knew or had reason to know that crimes had been or were about to be committed. With regard to the only subordinate that *was* identified, the Appeals Chamber held that the failure to determine on which basis the subordinate was found responsible, invalidated the conviction of Orić as a superior.[43]

Taken together this means that a superior can be liable for crimes committed by an anonymous perpetrator as long as the perpetrator can be identified by his/her affiliation to a group/unit, there is effective control over the subordinate(s), and it is clear on which basis the latter is (are) responsible for such crimes.

2.3 Observations

The appellate decision in *Hadžihasanović* with regard to successor superior responsibility affirmed existing ICTY case law on command responsibility. Successor superior responsibility stands at odds with first generation ICTY jurisprudence. Applying the prevent and punish scenarios to different superiors would have countered findings with regard to the constitutive elements identified in *Čelebići,* most notably the requirement of proof of a superior-subordinate relationship that is governed by effective control. Requiring temporal coincidence of effective control, as the Appeals Chamber in *Hadžihasanović* did, was fully in line with the *Čelebići* Judgment.[44] It is also in conformity with the finding in *Kunarac* that,

> [t]o be held liable for the acts of men who operated under him on an *ad hoc* or temporary basis, it must be shown that, *at the time when the acts charged in the Indictment were committed*, these persons were under the effective control of that particular individual.[45]

The *Hadžihasanović* Trial Chamber and the two dissenting appellate judges Hunt and

[42] Judgment, *Hadžihasanović & Kubura* (IT-01-47-T), Trial Chamber, 15 March 2006, para.90.
[43] See *Orić* Appeal Judgment, *supra* 24, para. 47.
[44] Ruling that there should be "[e]ffective control over the persons *committing* the underlying violations of international humanitarian law *Čelebići* Judgment, para. 378, endorsed in *Čelebići* Appeal Judgment, paras. 256, and 265-266, supra note 8.
[45] *Kunarac* Judgment, para. 399.

Shahabuddeen accepted successor superior responsibility by adopting a 'separate offence interpretation' of article 7(3) of the Statute. However, it is highly doubtful whether such an interpretation actually 'fits' the text of the Statute and the ICTY sentencing practice. Command responsibility is framed as a corollary of subordinate liability. Consider the wording of article 7(3):

[t]he fact that any of the facts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate *does not relieve his superior of criminal responsibility* if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof [italics added, *EvS*].

The connection between a culpable subordinate and a culpable superior as a result of the same crime suggests that the superior is responsible for the crime committed by the subordinate(s) and should be punished for it. Moreover, in *Čelebići*, the Appeals Chamber rejected a 'separate offence interpretation' of Article 7(3) with regard to knowledge element (the duty to know).

Article 7(3) of the Statute is concerned with superior responsibility arising from failure to act in spite of knowledge. Neglect of duty to acquire such knowledge, however, does not feature in the provision as a separate offence (...)[46]

Similar reasoning can be followed with regard to the failure to punish; it does not feature as a separate offence in the text of Article 7(3). In this context we are reminded of article 87 of API that encapsulates the duty of commanders and as such constitutes the basis of article 86 of API. It reads that

The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

The wording, especially the clause 'where necessary' suggests that the primary task of a commander is to prevent violations of the laws of war. The duty to suppress and report are subsidary and seem concomitant to that primary task. This is confirmed by the authoritative Commentary to Article 87, which makes clear that the delegations when

[46] *Čelebići* Appeal Judgment, para. 226.

drafting this provision were hesitant to accept this semi-prosecutorial function of military commanders.[47] Article 7(3), which closely resembles article 86 and which is directly based on it, may be seen to encapsulate this same 'hierarchy of duties'. Command responsibility is the corollary of such a duty and it is, therefore, highly debatable that a separate 'failure to punish/report' can be read into article 7(3).

Accepting that article 7(3), at least by adopting a strict textual approach, does not include successor superior responsibility does not necessarily mean that a successor-superior would go unpunished. A successor superior who does not punish or report subordinates to the proper authorities can still be liable under a military law or disciplinary framework. This comes with the unity of command; subordinate conduct is covered by 'responsible command' at all times.[48] Thus, when Judge Shahabuddeen argues in favour of successor superior responsibility and refers to the "gap in the line of responsibilities" that would otherwise exist, the response would be that such a gap does not exist when one looks to the military justice and disciplinary framework that governs a superior's responsibility at the national level.[49]

There are three reasons to be critical of the broadening of article 7(3) through the interpretation of 'commission' and 'subordinate' in article 7(3) and to the extent that it may include multiple superior responsibility. First of all, as pointed out by Mettraux, the position of the ICTY in *Blagojević* and *Orić* finds little or no support in relevant legal instruments (e.g. article 86 of Additional Protocol I, ILC draft codes, article 28 of the ICC Statute, the UN Darfur Report)[50] and state practice.[51] All well-known precedents, such as the *Yamashita* case, the *Pohl* case and the *Hostages* and *High Command* cases, relate to the responsibility of superiors for crimes that were committed by their own/direct subordinates as principal

[47] ICRC, Commentary to the Protocol additional to the Geneva Conventions of 12 August 1949 (Protocol I)', Article 87, para. 3562. See also customary international humanitarian law database, Rule 153, p. 562-563 with reference to the *Blaskić* Judgment, para. 709.

[48] As the *Čelebići* Appeals Chamber ruled with regard to a neglect of a duty to know: "It is however noted that although a commander's failure to remain appraised of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability".
Čelebići Appeal Judgment, supra note 8, para. 226.

[49] An example is article 41 of the German Military Criminal Code (MCC) stipulating that a commander is punished for failing to supervise or properly delegate supervision over his subordinates, which results in grave consequences such as 'unlawful subordinate behaviour'. The German Code of Crimes against International Law (CCAIL) provides for command responsibility as a violation of a duty to supervise Article 1 para. 13) and/or report crimes in Article 1 para. 14. Section 5 of the Canadian Crimes Against Humanity and War Crimes Act and Section 9(2) of the Dutch International Crimes Act encapsulate command responsibility as a separate offence; a crime of negligence.

[50] See Mettraux, *supra* note 12, p. 135.

[51] Ibidem.

perpetrators.[52] Secondly, and this is related to what was said earlier on successor superior responsibility, the wording of article 7(3) implies a close link between a superior and subordinate wrongdoing.[53] Accepting command responsibility for crimes perpetrated by unidentified individuals sits awkward with the text of 7(3). This is particularly the case with multiple superior responsibility as charged recently in the *Karadzić* case. The third and probably most fundamental reason to be critical, can be found in the principle of personal/individual culpability. Through superior responsibility wrongdoing of a subordinate is imputed to the superior. This construction complies with the principle of personal culpability as long as there is reprehensible conduct on the side of the superior that can be linked to the subordinate's crimes. In the language of the ICTY Statute this means that the superior has failed his/her duty to either prevent an imminent crime or to punish a subordinate who has committed a crimes. Omission liability, a type of liability that by nature is difficult to circumscribe, as a subordinate's liability that may trigger command responsibility implies a weak link to the underlying offence. Needless to say this is even more so with multiple superior responsibility. Particularly, the latter can be regarded as a concept that stands at odds with the principle of culpability.

Exploring the limits of command responsibility, inevitably requires understanding its nature. What exactly is a superior blamed for when he/she is held liable on the basis of command responsibility? This seems a straightforward question to which there must be a straightforward answer. Not so, as the following makes clear.

3. The Nature of Command Responsibility in ICTY law

The debate on the nature of command responsibility – is it a mode of liability or a separate offence - was triggered by the *Hadžihasanović* interlocutory decision. Yet, to date there is ambiguity as to what command responsibility at the ICTY really means.

One indication of what the nature of command responsibility at the ICTY is, can be found in the charges and the sentencing. Pursuant to article 7(3) the superior is held responsible for the same crime as his subordinate, which would qualify command responsibility as a mode of liability. In more recent case law, however, doubts have arisen

[52] Ibidem, p. 135 - 136.
[53] Van Sliedregt, *supra* note 7, section 5(iii)(b).

as to the meaning of the expression "responsible for the crimes of his subordinates". In the *Halilović* case the Trial Chamber interpreted 'responsible for' as an expression that "[d]oes not mean that the commanders shares the same responsibility as the subordinates who committed the crimes, but rather that….the commander should bear responsibility for his failure to act".[54] In *Orić,* the superior was found to be responsible "merely for his neglect of duty *with regard to crimes* committed by subordinates".[55] The accused was, therefore, found guilty not of the crimes committed by his subordinates (murder and cruel treatment) but of "failure to discharge his duty as a superior".[56] With this change in ICTY jurisprudence, comes a change in formulation. The superior is not "responsible for" but "responsible in respect of" or "with regard to" the crimes of subordinates. These pronouncements, however, have not affected sentencing practice; superiors are still convicted of the underlying/base crime.[57]

This changed with the *Hadžihasanović* Trial Chamber Judgment. The chamber found the accused guilty solely on the basis of superior responsibility. In determining the sentence the Trial Chamber held that superior responsibility pursuant to article 7(3) ICTY St is a type of liability that is distinct from that defined in article 7(1)ICTY St. A commander who has failed to ensure that his troops respect international humanitarian law is held criminally responsible for his *own* omissions rather than for the crimes resulting from them. Such a superior cannot be regarded as participating in the commission of the material elements of the subordinates' crimes. Moreover, he lacks the requisite intent in respect of these crimes. Hence, such responsibility carries a lower sentence than if the superior was found to have participated in a crime pursuant to article 7(1) ICTY St.

The findings of the *Hadžihasanović* Trial Chamber on the nature of superior responsibility were not explicitly rejected on appeal. However, the Appeals Chamber repeated the *Čelebići* Appeals Chamber's finding that, when assessing the gravity of a crime in the context of a conviction under Article 7(3), two matters must be taken into account:

[54] Judgment, *Halilovic* (IT-01-48-T), Trial Chamber, 16 November 2005, para. 54. For a similar approach see *Hadžihasanović* Judgment, paras 74 -75. See also Appeals Chamber in Krnojelac: "It cannot be overemphasised that, where responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control". Judgment, *Krnojelac* (IT-97-25-A), Appeals Chamber, 17 September 2003, para. 171 (hereinafter *Krnojelac* Appeal Judgment).
[55] *Orić* Judgment, supra note 11, paras. 292-293..
[56] See The Prosecution's Appeal Brief, *Orić* (IT-03-68-A), para. 152.
[57] See however an interesting analysis on sentencing at the ICTY which found that sentences under article 7(3) are generally lower than under 7(1), B. Hola, A.L. Smeulers, & C.C.J.H. Bijleveld, Is ICTY Sentencing predictable? An Empirical analysis of ICTY Sentencing Practice', *Leiden Journalof International Law*, 22(1) (2009), p. 79-97

(i) the gravity of the underlying crime committed by the convicted person's subordinate; *and*

(2) the gravity of the convicted person's own conduct in failing to prevent or punish the underlying crimes[58]

By emphasizing that the two conditions are cumulative, the Appeals Chamber confirmed that superior responsibility at the ICTY is more than a superior's failure to prevent or punish; it extends to subordinate wrongdoing as well. Whether the superior is actually blamed for that conduct, in the sense that it is attributed to him, or whether the subordinate's crime is merely a point of reference in sentencing, is not clear.

The most recurrent characterization of superior responsibility in ICTY case law is that of a "*sui generis* responsibility for failure to act"[59], a formula that has the value of clarifying that superior responsibility under article 7(3) is distinct from the modes of liability under 7(1). Still, it does not elucidate the nature or type of superior responsibility. At best, one could say that superior responsibility is recognised as a hybrid form of liability, combining aspects of a mode of liability and a separate offence liability. This, however, is unsatisfactory. The meaning of the constitutive elements of superior responsibility and terms, such as 'commission' and 'subordinate' in Article 7(3), hinge upon how one views superior responsibility.[60] The superior-subordinate relationship can be less proximate when superior responsibility is regarded as a separate offence where the sentence/punishment is not also based on the underlying crime. In other words, with a separate offence interpretation one can afford to loosen the linkage between superiors and subordinates and adjust the sentence accordingly. The problem with the above-discussed broadening of superior responsibility in third generation case-law is that the linkage to subordinate wrongdoing has been loosened while punishment is (still) based on it.

4. Command Responsibility beyond the ICTY

In pursuing the quest of understanding the nature of command responsibility at the ICTY, and hence pronounce on its scope and outer limits, it is instructive to look at command responsibility beyond the ICTY framework. Superior responsibility can take many shapes

[58] Judgment, *Hadžihasanović & Kubura,* (IT-47-A), 22 April 2008, paras. 312 – 318 (hereinafter *Hadžihasanović* Appeal Judgment), para. 313 referring to *Čelebići* Appeal Judgment, para. 313.
[59] *Hadžihasanović* Appeal Judgment, supra note 58, paras 312-318.
[60] For a full elaboration on the subject, Meloni, supra note 12.

and forms.

4.1 International Law

The Statutes of the Special Court for Sierra Leone (SCSL) and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) provide for superior responsibility in a similar way as the Statutes of the ICTY and the ICTR do. The concept is framed as a corollary of subordinate liability or, in the words of Mettraux, as an "exclusionary clause".[61] The Statute of the International Criminal Court (ICC), on the other hand, defines command responsibility in positive terms, as a separate 'ground of criminal responsibility'. In the following, we will take a closer look at Article 28.

4.1.1 Article 28 of the ICC Statute

Article 28: Responsibility of Commanders and other Superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her powers to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[61] Mettraux, supra note 12, at 25.

Article 28 deviates from the ICTY provision on a few conspicuous points. With regard to the *actus reus* it provides for three 'countermeasures': 'prevent and repress' and 'submit to the proper authorities'. The first two are drawn from the wording of Articles 86 and 87 AP I, where the main focus is on prevention of subordinate wrongdoing with repression being a collateral duty of prevention.[62] At first blush, the third counter-measure seems superfluous; it could be brought under the second countermeasure of 'repress'. The Pre-Trial Chamber in *Bemba* views it as an alternative when the commander does not have the power to punish:

> The Chamber wishes to point out that the duty to punish requiring the superior to take the necessary measures to sanction the commission of crimes may be fulfilled in two different ways: either by the superior himself taking the necessary and reasonable measures to punish his forces, or, if he does not have the ability to do so, by referring the matter to the competent authorities. Thus, the duty to punish (as part of the duty to repress) constitutes an alternative to the third duty mentioned under article 28(a)(ii), namely the duty to submit the matter to the competent authorities, when the superior is not himself in a position to take necessary and reasonable measures to punish.[63]

One could, however, argue that 'repress' and 'submit to the proper authorities' are distinct in their underlying duty. Since 'repress', rooted in Article 86 and 87 API, is closely linked to the prevent-scenario, it can be seen as based on a reactive duty with regard to *past* crimes. As such it would accord with the 'punish' alternative in article 7(3) of the ICTY Statute. 'Submitting to the competent authorities', on the other hand, could be regarded as related to the future where the failure to submit to authorities is blameworthy for its potential to trigger *future* crimes (by creating a culture of lawlessness).[64] Here the duty to report is incumbent upon the superior who exercised effective control at the time when the report should have been made; not necessarily at the time when the crimes were committed. This type of liability could be regarded as encompassing successor superior responsibility. The German Act implementing the ICC Statute provides for such a form of command responsibility; a separate offence which criminalises a failure to investigate/report subordinate's crimes.

This brings us to another difference between article 7(3) and article 28: the express

[62] See section 2.3.
[63] *Prosecutor v. Bemba Gombo* (ICC-01/05-01/08) Decision pursuant to Article 61(7)(an) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre B, 15 June 2009 (hereinafter *Bemba* Confirmation Decision), para. 440.
[64] See Th. Weigend, 'Superior Responsibility: Complicity, Omission or Over-Extension of the Criminal Law', in: Ch. Burchard, O. Triffterer and J. Vogel (eds.), *The Review Conference and the Future of the International Criminal Court*, The Hague: Kluwer Law International, 2010, p. 67, 80, at 77.

recognition of a causal link. Causality plays a peculiar role in the context of omission liability. To cite Weigend, "it is better to speak of 'hypothetical' causation"[65], given the fact that the superior did not actively set a causal chain in motion but remained passive. Hypothetical causation requires a fact-finder to determine, in hindsight, whether a certain consequence (subordinate wrongdoing) was objectively probable or not. While the ICTY in *Čelebići* held that superior responsibility does not require (separate) proof of a causal link between a superior's failure to act and the underlying crime[66], article 28 stipulates that the crimes committed by subordinates are *a result of* the superior's failure to exercise proper control over them. This wording stands at odds with the the post-crime scenario of submitting to the competent authorities. In *Bemba*, the Pre-Trial Chamber solved this anomaly by finding that the causality relationship is limited to a duty to prevent future crimes; it would be illogical to interpret article 28 otherwise.[67]

The most striking innovation of article 28, however, is the creation of two concepts of command responsibility: one for military superiors and persons effectively acting as such in subparagraph (a), and one for non-military superiors in subparagraph (b). This innovation, which deviates from prior international jurisprudence, was introduced by the delegation of the United States to the Rome conference. The two concepts of command responsibility differ fundamentally on the cognitive aspect. While they both provide for an intent/knowledge element ('knew') negligence suffices for military superiors by providing for 'should have known' in article 28(a)(i). For non-military superiors there is the stricter 'consciously disregarded information' requirement, which equals a wilful blindness/recklessness test. The U.S. representative who drafted the text of Article 28, stated that the "negligence standard was not appropriate in a civilian context and was basically contrary to the usual principles of criminal law responsibility".[68] The negligence standard for a military commander, on the other hand, "appeared to be justified by the fact that he was in charge of an inherently lethal force".[69]

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[65] Weigend, supra note 64, at 76

[66] See *Čelebići* Judgment, supra note 8, para 399.

[67] *Bemba* Confirmation Decision, supra note 63, paras. 421-423. A low degree of causation suffices according to the Pre-Trial Chamber: "There is no direct causal link that needs to be established between the superior's omission and the crime committed by his subordinates. Therefore, the Chamber considers that it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under article 28(a) of the Statute" (para.425).

[68] U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the 1st Meeting of the Committee of the Whole*, U.N. Doc A/CONF.183/C.1/SR.1 (20 November 1998), para. 67.

[69] Ibidem, para. 68.

The structure of article 28 is rather complex. The provision encapsulates two omissions. There is a general omission in the 'chapeau', phrased as a 'result crime' through the explicit causal link (a superior is liable when he fails "to exercise control properly" as a result of which crimes have been committed) and a more specific omission in subparagraphs (a)(ii) and (b)(ii) (he/she "failed to take all measures…to prevent or repress or submit the matter to the competent authorities"). Both the general/chapeau omission and the specific omission - at least when it concerns the element 'knew'- need to be interpreted in accordance with article 30 of the Statute, which contains a default rule for the mental element.

When the commander has knowledge of the underlying crimes and fails to prevent these crimes, the two omissions coincide. The fact that a superior failed to prevent or repress crimes while he knew of them, implies that he failed to exercise control properly, which resulted in the commission of a crime. Here superior responsibility qualifies as a mode of liability (by omission) where a superior knowingly participates in subordinate's crimes by failing to prevent or repress them. As such, this type of superior responsibility is closely related to complicity/criminal participation.[70]

When the superior lacks knowledge and 'should have known', the two omissions of article 28 cannot be aligned in the same way. A negligent failure to intervene cannot easily be combined with intentional subordinate liability. Ambos refers to it as 'a stunning contradiction between the negligent conduct of the superior and the underlying intent crimes committed by the subordinates'.[71] A way out of this illogical impasse would be to regard superior responsibility as a separate offence, a 'failure to supervise'.[72] Consider Schabas' statement with regard to superior responsibility and the crime of genocide.

> Indeed, even the ICC will probably be required, in practice, to treat command responsibility as a separate and distinct offence. In the case of genocide, for example, it is generally recognized that the mental element of the crime is one of specific intent. It is logically impossible to convict a person who is merely negligent of a crime of specific intent. Accordingly, the Court, if Article 28 of the Statute is to have any practical effect, will be required to convict commanders of a crime other than genocide, and one that can only be negligent supervision of subordinates who commit genocide.[73]

[70] V. Nehrlich, 'Superior Responsibility under Article 28 ICCSt: For What Exactly is the Superior Held Responsible? 5 *Journal of International Criminal Justice* (2007), at 672-3.
[71] K. Ambos, 'Superior Responsibility'in A. Cassese et al. (eds.) *The Rome Statute of the International Criminal Court : a commentary* (Oxford : Oxford University Press 2002), at 852.
[72] Ibidem, at 871.
[73] W.A. Schabas, 'Canadian implementing legislation for the Rome Statute', 3 YIHL (2000), at 342. See also M. Damaška, 'The Shadow Side of Command Responsibility', 49 *AJCL* (2001), at 455

However, the solution suggested by Schabas does not comport with the text of the ICC Statute. After all, article 28 stipulates that the superior is "criminally responsible for *crimes* within the jurisdiction of the Court *committed by forces* under his or her effective command (emphasis added, *EvS*)". As Meloni points out, under article 28 a superior is responsible and punished for the principal crime.[74]

The compromise solution would be to view negligent superior responsibility as generating liability for a failure to exercise control properly where the (intentional) subordinate crime is a point of reference that triggers liability and provides a basis for determining the sentence. Nehrlich formulates it somewhat differently. In his view, negligent superior responsibility provides for parallel liability: it regards the subordinate crime as well as the superior's failure to act.[75] The superior can be blamed for the subordinate's crime as a wrongful consequence of his failure to act, even if it was an unintentional result of that failure to act.

4.2 National Law

According to Werle command responsibility is "an original creation of international criminal law".[76] While the concept may be seen to originate from (national) military law, it has indeed been developed as a criminal law concept in the case law of international courts. With the adoption of the ICC Statute and its implementation at the national level, many States now provide for command responsibility in their domestic legal systems.

German ICC implementing legislation[77] contains three provisions relating to command responsibility and identifies it by its nature and blameworthiness. A superior who intentionally (knowingly) omits to prevent the commission of crimes deserves the same punishment as the subordinate (article 1 para. 4(1)) and can be qualified as an accomplice, whereas the failure to supervise the subordinate (article 1 para. 13) and report crimes (article 1 para. 14) are separate crimes of omission that carry more lenient sentences than intentional command responsibility. Here the general (chapeau) omission of a failure to supervise and the third countermeasure (submit to competent authorities) have been recognised as separate omissions.

[74] Ch. Meloni, 'Command responsibility. Mode of liability for the Crimes of Subordinates or Separate offence of the Superior', *Journal of International Criminal Justice* (2007), at 633.
[75] Nehrlich, supra note 70, p. 682.
[76] G. Werle, *Principles of International Criminal Law*, (The Hague: T.M.C. Asser Press 2005), Margin No. 368.
[77] 'Gesetz zur Einführung des Völkerstrafgesetzbuches', 26 June 2002, *Bundesgesetzblatt Jahrgang 2002* Teil II, Nr. 42, 2254. Available in all UN languages at <http://www.iuscrim.mpg.de/forsch/online_pu.html>.

Similar to the German legislation, article 5 of the Canadian Crimes Against Humanity and War Crimes Act[78] (CAHWCA) separates the pre-crime and post-crime forms of command responsibility into distinct provisions/subparagraphs. The Canadian provision qualifies command responsibility as a separate offence by referring to it as as 'an indictable offence'. This approach is prompted by Canadian constitutional jurisprudence, which considers it contrary to principles of fundamental justice to stigmatise a person with a conviction for a serious crime like murder or rape where the mental element is one of negligence.[79]

On the basis of article 9(1) of the Dutch International Crimes Act[80] a superior is culpable when he/she "(a) intentionally permits the commission of such an offence by a subordinate; or (b) intentionally fails to take measures, in so far as these are necessary and can be expected of him, if one of his subordinates has committed or intends to commit such an offence". Proof of actual knowledge is required for liability under article 9(1)(a) and of constructive knowledge ('must have known') under article 9(1)(b). Section 9(2), on the other hand, provides for command responsibility as a negligent dereliction of duty. It is formulated as a separate offence, which carries a lower sentence than the underlying (subordinate) offence:

> Anyone who culpably neglects to take measures, in so far as these are necessary and can be expected of him, where he has reasonable grounds for suspecting that a subordinate has committed or intends to commit such an offence, shall be liable to no more than two-thirds of the maximum of the principal sentences prescribed for the offences referred to in para. 2.

Section 65 of the UK International Criminal Court Act 2001 almost *verbatim* incorporates article 28 of the ICC Statute to which it adds in paragraph 4: "A person responsible under this section for an offence is regarded as aiding, abetting, counselling or procuring the commission of the offence".[81] This is a clear deviation from the provision in the Draft ICC Bill that had provided in section 48(4) that "A person responsible under this section for an offence is liable to be proceeded against and punished as a *principal* offender (empasis added,

[78] Act 29 June 2000 <http://www.dfait-maeci.gc.ca/foreign_policy/icc/crimes-en.asp.
[79] See W.A. Schabas, 'Canadian Implementing Legislation for the Rome Statute', in 3 *YIHL* (2000), p. 342.
[80] Act of 9 June 2003, Stb 2003, 270. English translation:
<http://www.iccnow.org/resourcestools/ratimptoolkit/nationalregionaltools/legislationdebates/NL.IntCrAct.doc>
For a more elaborate analysis of the ICA: H. Bevers *et al.*, 'The Dutch International Crimes Act', in M. Neuner (ed.), *National legislation incorporating international crimes* (Berlin, BWV-Berliner Wissenschafts-Verlag/Wolf Legal Publishers 2003), pp. 179-197.
[81] <http://www.legislation.hmso.gov.uk/acts/acts2001/20010017.htm>

EvS)".[82] In effect, the Act converted the superior from principal to accessory. This can be taken as an indication that the concept of command responsibility was not readily recognisable as accomplice liability.[83]

Noteworthy are the provisions on command responsibility in U.S. military law. Paragraph 5-1 of the Field-Manual 27-10 (FM 27-10) of the US Army Manual, provides for negligence liability:

> The commander is (…) responsible if he has actual knowledge or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.[84]

Article 77 of the Uniform Code of Military Justice (UCMJ) - that unlike FM 27-10 does not apply to enemy nationals - is much stricter. A superior is punishable "as principle" when he "commits an offense...or aids, abets, counsels, commands or procures its commission" or when he "causes an act to be done which if directly performed by him".[85] Comparing paragraph 5-1 of FM 27-10 to Article 77 UCMJ, it is clear that the latter requires positive personal participation, which implies actual knowledge of the crimes committed by subordinates. In fact, the Manual for Courts-Martial, which reads as a Commentary to the UCMJ, explains that a "mere failure to prevent the commission of an offense" is not enough to create culpability; "there must be an intent to aid or encourage the persons who commit the crime".[86] Article 77 UCMJ penalises encouragement through inaction and qualifies it as complicity. Deviating from classic complicity law, however, the superior who is held liable under 77 UCMJ is considered a principal rather than a secondary party.[87]

5. Command Responsibility: a multilayered concept

[82] <http://www.parliament.uk>
[83] See also R. May and S. Powles, 'Command responsibility: a new basis of criminal liability in English law?', *Criminal Law Review* (2002), 363-378.
[84] US Department of the Army, *Field Manual 27-10: The Law of Land Warfare* (1956) (FM 27-10), para. 501.
[85] The relevant edition of the UCMJ during the Medina court-martial was the 1969 U.S. Manual for Courts-Martial, app.2 (1969).
[86] 1969 U.S. Manual for Courts-Martial, R.C.M. 307(2) (1969), paras. 28-4 and 28-5.
[87] A superior, according to Anglo-American complicity law, is a secondary party to the crime. The crime is committed by the principal/physical perpetrator who directly causes the *actus reus* of the crime. Medina, for instance, was prosecuted as a principal.

The overview goes to show that there is a wide variety of liability concepts that can be referred to as command responsibility. First of all, command responsibility as criminal participation/complicity requiring actual knowledge and intent (article 1(4) of the German ICC Act, article 9(1) of the Dutch ICC Act, and intentional ('knew') pre-crime command responsibility in article 28 ICC Statute). Secondly, command responsibility as criminal participation based on a negligence standard (FM 27-10, UK ICC Act 2001, negligent ('should have known') command responsibility in article 28 ICC Statute). This type of liability is conceptually akward for allowing a superior to be held accountable for intentional crimes on the basis of a negligent failure to supervise. Hence the technique in domestic law of formulating command responsibility as a separate offence (articles 1(13) and 1(14) of the German ICC Act, article 9(2) of the Dutch ICC Act, and section 5 of Canadian ICC implementing legislation). A subdivision can be made between those jurisdictions that provide for negligent command responsibility as a separate offence whilst imposing a lower sentence than the (intentional) principal crime (German and Dutch legislation) and those that do not provide for a more lenient sentence (Canadian legislation). A third type of command responsibility can be discerned when distinguishing between a reactive and a prospective duty to supervise. The former is the 'classic' type of command responsibility, based on article 86 and 87 API, the latter can be taken from the clause 'submitting the matter to the competent authorities' in article 28 of the ICC Statute. It has been implemented as a separate offence in art. 1 para. 14 of the German ICC Act.

What the overview of command responsibility beyond the ICTY framework makes patently clear, is that command responsibility consists of various layers; it encapsulates distinct forms of liability. This becomes most apparent when examining how article 28 has been implemented in domestic legal systems. The German, Dutch and Canadian legislatures have compartmentalized the provision into segments of criminal responsibility, most particularly by criminalizing the specific omissions in subparagraphs 28(a)(ii) and 28(b)(ii) as self-standing omissions. This technique, that has been referred to by Triffterer as the 'splitting solution', may be welcomed for reasons of clarity and coherence.[88] 'Splitting' happens on two levels: on a factual/temporal level and on a moral/fault degree level. The pre-crime and post-crime scenarios are distinguished and criminalized separately as are the intentional and negligent forms of superior responsibility. The latter is particularly relevant

[88] Triffterer (2002), p. 190. See also M. Neuner, 'General Principles of International Criminal Law in Germany', in Neuner, supra note 80, pp. 126-135.

for Dutch and German law where lesser penalties express the lower moral responsibility that attaches to negligence as a fault degree.

Another lesson that can be drawn from the overview of national and international concepts of command responsibility, concerns the nature of superior responsibility. By codifying command responsibility as a separate offence of negligence, national legislatures have found an elegant solution to the incoherence of negligent liability for intentional crimes.

It is noteworthy that command responsibility is difficult to characterize in terms of national criminal law theories. Command responsibility does not readily fit the classic model of Anglo-American complicity law where the superior is an acomplice who participates in the subordinate/principal's crime. In deviating from complicity law, article 77 of the UCMJ specifically refers to a superior as 'principal' as did the UK ICC Bill (that was later changed back to classic complicity terminology).

6. Command Responsibility as Parallel Liability

Returning to the question of the nature of command responsibility in the ICTY context, the picture becomes clearer, especially when we compare article 7(3) to article 28 of the ICC Statute. Superior/command responsibility is most unproblematic, in an intentional ('knew') pre-crime variant. As such it easily fits the complicity format and qualifies as a mode of liability. It fits the complex wording of article 28, with its two omissions and an explicit element of causation. Also at the ICTY, this form of command responsibility fits the wording of 7(3) and the interpretation in case law, especially the first generation cases.

Given the gap that exists between superior and subordinate liability on the fault degree (negligence versus intent) negligent command responsibility in article 28, cannot qualify as complicity or criminal participation. It can be best regarded as a separate offence of a failure to supervise. The text of article 28, however, does not allow a separate offence interpretation since it stipulates that superiors are 'criminally responsible for the crimes ..committed by forces' under their effective command and control. In an attempt to maintain a separate offence reading, the compromise would be to view post-crime superior responsibility as parallel liability where the superior is blamed for the subordinate's crime as a wrongful consequence of his failure to act.

Article 7(3) does not provide for a negligence/'should have known' variant of superior

responsibility, although one could argue that 'had reason to know' comes very close to the negligence form of command responsibility of article 28.[89] The problem of incoherence, of combining a negligent failure to an intentional underlying crime, therefore, does not arise in the ICTY context in the way as it does at the ICC. The need to recognise command responsibility as a separate offence may, therefore, not be as pertinent at the ICTY as it is at the ICC.

Having said that, as a result of a broad interpretation of words such as 'commission' and 'subordinate' in article 7(3), there also exists a gap at the ICTY between superior and subordinate liability. The superior and subordinate relationship, an important element of command responsibility, has been loosened, which makes attribution of subordinate's crimes to the superior difficult. It is against that background that we must understand the attempt of the *Hadžihasanović* Trial Chamber to interpret article 7(3) as a separate offence (failure to supervise) which carries a lower sentence than the principal/underlying crime.

The previous leads to two observations. First of all, command responsibility can be detached from subordinate liability in two ways: (i) through lack of knowledge/intent on the part of the superior ('should have known') and (ii) by way of loosening the superior-subordinate relationship (through a broad reading of 'commission' or 'subordinate').[90] The first two form of command responsibility relate to the ICC context; the second to the ICTY context. Secondly, neither in international statutory nor in international case-law, is command responsibility formulated and recognised as a separate offence.

The nature of command responsibility at both the ICC and the ICTY can be best characterized as parallel liability. As such, command responsibility has traits of both a separate offence and criminal participation. As such it captures the mode of liability variant as parallels of subordinate and superior responsibility that coincide. In the separate offence format, on the other hand, the parallels stay apart but they come together in the sentence. The qualification of 'parallel liability', used by Nehrlich in the ICC context, also accords with ICTY law. We are reminded of the ICTY Appeals Chamber ruling in *Hadžihasanović* where it was held that under article 7(3) both the gravity of the underlying crime as well as the

[89] See Weigend, supra note 65, at 78.

[90] One could identify a third way: by regarding command responsibility as premised on a duty to prevent future crimes; where a successor-superior fails to submit the matter to competent authorities. The 3rd form of *actus reus* or countermeasure in article 28 of the ICC Statute could be viewed as such (and has been viewed as such by national legislatures). 'Submitting to the competent authorities' would then not be regarded as an alternative for 'repress', as was suggested by the Pre-Trial Chamber in *Bemba* (*Bemba* Confirmation Decision, para. 440) but as a separate failure to punish based on a prospective duty. See further section 4.1

superior's own conduct count towards the sentence.[91]

7. Evolving Liability

Having determined that command responsibility in the context of ICTY law can be characterized as parallel liability, and having described how the parallel tracks have widened through the broad interpretation of article 7(3), the question arises how the tracks can be kept together to prevent command responsibility from straying into a form of collective responsibility. One way of preventing a (further) broadening of command responsibility beyond the limits of personal culpability, would be to bolster the knowledge element. Instead of a broad 'had reason to know' requirement[92] it would have to be proved that the superior *knew* of the subordinate's conduct/acts, which includes his/her participation in crimes. A positive knowledge requirement could compensate for a remote linkage between superiors and the underlying crimes. Thus, in case of command responsibility for crimes committed by anonymous perpetrators in which the subordinate participated, it would have to be shown that alongside effective control over the subordinate, the commander knew that his/her subordinate was about to become, or had been, involved in such crimes. Insisting on a strict mens rea/knowledge element can be regarded as maintaining a balance between the three elements underlying the theory of command responsibility. Broadening the superior-subordinate relationship means narrowing the knowledge element. There is a hydraulic relationship between the elements, which in *Čelebići* had equal weight.

How to view command responsibility as a basis for sentencing a superior for crimes that a subordinate participated in rather than commit him/herself? In my view a sentencing discount is appropriate when there is a very lose connection to the underlying crime. As with negligent superior responsibility, moral blameworthiness lies first and foremost in a superior's (own) failure to prevent or punish/repress. Such omission liability is generally less worthy of punishment than the underlying crime.

Regarding superior responsibility as parallel liability is helpful in constructing a sentencing discount. We do not need to interpret superior responsibility at the ICTY as a separate offence to justify a reduced sentence, as the Trial Chamber did in *Hadžihasanović*.

[91] See supra note 58

[92] Where "sufficiently alarming information putting a superior on notice of the risk that crimes might subsequently be carried out by his subordinates and justifying further inquiry is sufficient to hold a superior liable under Article 7(3) of the Statute", Judgement, *Prosecutor v. Strugar* (IT-01-42 A), 17 July 2008, para.304.

The subordinate's offence can be taken as point of reference and a certain portion can be deduced from the sentence that would attach to the principal crime.

8. Concluding observations

Looking back on a decade of ICTY case law on command responsibility starting with *Čelebići*, and evaluating the Tribunal's legacy with respect to this liability theory, one has to conclude that ICTY jurisprudence has been instrumental in developing this concept. Its case law stood at the basis of Article 28 of the ICC Statute. In creating a basic model of command responsibility, entrenched in the three underlying principles identified in *Čelebići*, the Tribunal has done international criminal law a service. It is to be expected that ICTY case law will remain relevant long after the Tribunal closes its doors, if only because unlike other liability theories (aiding/abetting, instigation), command responsibility is truly an *international* law construct that has been given substance for the first time by the ICTY. One cannot rely on national law to fill gaps and further develop the law.

This is not to say that ICTY case law has no flaws and that other courts should follow it uncritically. Command responsibility is one of the most complex liability theories in international law. Article 7(3) of the ICTY Statute, and the case law that ensues from it do not do justice to the complexities of this liability theory. Moreover, its nature remains ambiguous and subject to debate. This is for a large part down to the text of the provision in the ICTY Statute, which in its one-dimensional - mode of liability - wording incapable of providing for a separate offence interpretation.

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