COMMAND RESPONSIBILITY IN MULTINATIONAL OPERATIONS

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Under the principle of command responsibility, international courts can hold a commander responsible for crimes committed by his subordinates even though he did not directly take part in the commission of the crimes. However, some circumstances challenge the scope of this rule. One of these limitations proceeds from the increasing number of multinational operations and the lack of clarity in the application of the law when military forces act in coalitions. The different legal standards of states that contribute to multinational operations increase the difficulty of enforcing command responsibility by tribunals and international courts. The ambiguity of the existing rules combined with the lack of case law make it difficult to determine whether or not commanders of multinational operations can be held responsible for crimes committed by soldiers under their authority from other countries. Understanding the legal frameworks that apply in multinational operations is critical for fostering awareness in multinational commanders of their obligations regarding command responsibility and the steps they can take to avoid human rights violations and war crimes by the military forces under their command.

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The opinions and conclusions expressed herein are those of the student author and do not necessarily represent the views of the U.S. Army Command and General Staff College or any other governmental agency. (References to this study should include the foregoing statement.)

ABSTRACT

COMMAND RESPONSIBILITY IN MULTINATIONAL by CPT Babacar A. Diop, 106 pages.

Under the principle of command responsibility, international courts can hold a commander responsible for crimes committed by his subordinates even though he did not directly take part in the commission of the crimes. However, some circumstances challenge the scope of this rule. One of these limitations proceeds from the increasing number of multinational operations and the lack of clarity in the application of the law when military forces act in coalitions. The different legal standards of states that contribute to multinational operations increase the difficulty of enforcing command responsibility by tribunals and international courts. The ambiguity of the existing rules combined with the lack of case law make it difficult to determine whether or not commanders of multinational operations can be held responsible for crimes committed by soldiers under their authority from other countries. Understanding the legal frameworks that apply in multinational operations is critical to fostering awareness in multinational commanders of their obligations regarding command responsibility and the steps they can take to avoid human rights violations and war crimes by the military forces under their command.

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TABLE OF CONTENTS

Page

ACRONYMS

CR	Command Responsibility
DGDP	Directorate of Graduate Degree Programs
ECOWAS	Economic Community of West African States
GDP	Graduate Degree Programs
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IHL	International Humanitarian Law
LN	Liaison Officer
ROE	Rules of Engagement
UN	United Nations

TABLES

Page

CHAPTER 1

INTRODUCTION

Background

"Anarchy is everywhere when responsibility is nowhere to be found."[1] This assertion of Gustave Lebon undoubtedly expresses one of the major concerns of international criminal law, namely how to prosecute people charged with serious violations of the law. The impunity that would result from the absence of culpability of those involved in atrocities remains a breeding ground for future violations of the principles of international law.

Countries and international organizations have developed a number of mechanisms to remind those involved in conflicts of their obligations to respect international law. To prosecute individuals responsible for serious violations of the principles of humanity, international law has developed two approaches. The first approach is individual criminal responsibility, which allows the prosecution of individuals for the commission crimes under international law. This second approach is responsibility of superiors, which broadens individual criminal responsibility to include the duty to supervise subordinates and the liability of superiors who fail to do so. The latter approach refers to the form of responsibility that enables tribunals to convict superiors for acts committed by their subordinates. Superiors fall into two categories: civilians and military commanders. Superior responsibility deals with civilian leaders

[1] Gustave Lebon, *Hier Et Demain, Pensées brèves* (Paris: E. Flammarion, 1918), 250.

while the appellation of command responsibility (CR) refers to the military commanders. Domestic codes and international tribunals such as the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Tribunal of former Yugoslavia (ICTY) established CR as a principle of international customary law.[2]

Similar to the Nuremberg trials after World War II, the 1998 Rome Statute reaffirmed binding norms in international criminal law for CR. [3,4] One of the most important contributions to international criminal law made by the Rome Statute, largely inspired by the jurisprudence of both ICTY and ICTR, was the provision for criminal responsibility of commanders. Under the Rome Statute, a commander cannot escape criminal responsibility when one of his subordinates commits a crime if the superior "(i) has effective authority over his subordinates; (ii) knew or should have known that the subordinates were committing or about to commit such crimes; and (iii) failed to take all necessary and reasonable measures within his power to prevent, repress, or punish the

[2] Article 28 of International Criminal Court (ICC), Article 6[3] of the statute of International Criminal Tribunal for Rwanda and Article 7[3] of the International Criminal Tribunal for the former Yugoslavia.

[3] A diplomatic conference held from June 15-17, 1998, in Rome finalized and adopted the statute for the International Criminal Court (ICC). The statute established a permanent international criminal court with competency to prosecute international crimes. The four internationals crimes are genocide, crimes against humanity, war crimes, and crime of aggression.

[4] Shortly after World War II ended, an Allied international military tribunal prosecuted Nazis Party members for crimes against peace, war crimes and crimes against humanity. Known as the Nuremberg trials, these military tribunals were carried out in Germany between 1945 and 1949.

crimes."[5] This wording of the ICC attempts to synthesize all previous CR standards developed from the Nuremberg trials and subsequent international tribunals.

While CR represents a legal doctrine to hold leaders accountable for international crimes, a number of difficulties limit the application of CR. States often obstruct access to military commanders who might be found guilty. The reasons for these obstructions vary. In some cases, military commanders become government leaders whereas in other cases they obtain immunity from government leaders in attempts to reconcile warring factions. Although the doctrine of superior responsibility seems to be gradually acquiring a clearly defined field of legal application, some states consider it to be a threat to their military and civilian forces. When cases do go to trial, the burden is on the prosecution to prove that the necessary elements of a crime—mental state, conduct, concurrence, causation, harm, and attendant circumstances—were committed before a court finds a defendant guilty.

Another form of these limitations proceeds from the multinational character of military operations. Despite their advantages of cost effectiveness and legitimacy, multinational operations raise a number of challenges applying CR to international law. The International Committee of the Red Cross (ICRC) describes this complexity in its 2011 report of the 31st Conference of the Red Cross and Red Crescent:

> The participation of states and international organizations in peace operations not only gives rise to questions related to the applicable law but also to its interpretation. This is because the 'unity of effort'– in military parlance – sought in peace operations is often impacted by inconsistent interpretations and

[5] International Criminal Court, *Rome Statute of The International Criminal Court (Last Amended 2010)* (The Hague: The International Criminal Court, 1998), 19-20, accessed April 9, 2019, https://www.refworld.org/docid/3ae6b3a84.html.

> application of IHL by troop-contributing countries operating on the basis of different legal standards . . . An important practical challenge is to ensure that peace operations are conducted taking into consideration the different levels of ratification of IHL instruments and the different interpretations of those treaties and of customary IHL by troop-contributing states.[6]

The participating states in a multinational operation will have various levels of commitment to the Rome Statute. While a state may agree in principle on the articles of the statute, it may not allow in practice any interference in its foreign policy including the prosecution of its citizens by an international court. While a non-ratifying state of the Rome Statue may have just as much a conscience on the conduct of an armed conflict as a ratifying one, the standards of proof and the resolve to prosecute at the national and international levels may differ vastly. National courts are more inclined to follow the traditional legal definitions under criminal law such as distinguishing a principle from others who may also be subject to criminal liability but to a lesser extent.

Research Questions

Primary Research Question

How would command responsibility be applied in multinational operations?

Secondary Research Questions

1. What are the foundations of command responsibility?

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[6] International Committee of the Red Cross (ICRC), "International Humanitarian Law and The Challenges of Contemporary Armed Conflicts," in *31st International Conference of The Red Cross and Red Crescent* (Geneva: International Committee of the Red Cross, 2011), 32, accessed April 9, 2019, https://www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf.

2. How does command responsibility differ from other forms of criminal liability?
3. What command responsibility challenges are raised by multinational operations?
4. Does command responsibility doctrine presuppose that the commander and subordinates must be nationals of the same state?
5. In the scope of international law and jurisprudence of the international criminal tribunals, what criteria do international courts apply to military commanders for command responsibility?
6. What are the consequences of command responsibility for commanders of multinational operations?

Assumptions

This thesis is limited in scope and depends on several assumptions. The main assumption is that CR applies to multinational operations. This thesis assumes that multinational operations fall under the scope of the CR principle. Any of the international treaties and domestic codes dealing with CR do not exclude multinational operations from their scope. There is no international case law that exempts commanders from CR in multinational operations. Similar to other principles of international law, CR applies to all military operations. The existence of a subordination link and command relationships are more important criteria than the classification of the type of military operation.

Another assumption is that peacekeeping, stability, and humanitarian operations will continue to be made up of multinational forces. Given the multinational character of

the major operations after the Cold War, future operations will mainly rely on coalitions and alliances. Burden sharing and legitimacy are among other valuable advantages of multinational operations. Coalitions and alliances will be the preferable form of military operations in the foreseeable future.

The third assumption reflects the will of the international community to develop courts of justice for crimes against humanity. The current evolution of human rights will drive the necessity to strengthen the existing international tribunals and create ad hoc courts in order to prosecute the most egregious human rights violations. The Extraordinary African Chambers within the courts of Senegal, created to prosecute international crimes committed in Chad between June 1982 and December 1990, gives credibility to this assumption. This ad hoc court convicted the former president of Chad Hissein Habre for human rights violations and marked the first time an African Union-backed court convicted a former ruler for human rights abuses.[7] Fighting impunity will increasingly mobilize public opinion and the international community.

The fourth assumption is that populations and policymakers will be more reluctant to tolerate violations of humanitarian law. With the ability of news organizations to report on events in real-time, the international community will scrutinize multinational operations; commanders and their troops will have to show exemplary

[7] The case was the first time an African Union special court tried a former head of state for human-rights abuses. On 30 May 2016, the Extraordinary African Chambers in the Senegalese (EAC) court system sentenced Habre to life imprisonment for having committed crimes against humanity, war crimes, and torture against ethnic groups in Chad. *Le Procureur General c. Hissein Habre*, *Arrêt* (Chambre Africaine Extraordinaire d'Assises d'Appel, CAE, 27 Avril 2017), accessed February 16, 2019, http://www.chambresafricaines.org/pdf/Arr%C3%AAt_int%C3%A9gral.pdf.

conduct at all times. The extended media coverage in the area of operations will stress the need for multinational forces to act in conformity with internationally shared values and respect for human rights. The preamble of the Rome Statute shows less tolerance and more accountability for human rights abuses when it affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."[8]

The last assumption is that some nations will continue to exercise sovereign control over their citizens by not ratifying international treaties or accepting the jurisdiction of international courts and tribunals. Contrary to the international consensus for justice for victims of human rights abuses, a number of countries have formally withdrawn their signatures from the Rome Statute and indicated that they would not ratify the agreement. The unwillingness of major military powers such as the United States, Israel, and Russia to ratify the 1998 Rome Statute Treaty supports this observation.

Definition of Terms

Command Responsibility: According to the Rome Statute of the International Criminal Court, a military commander is responsible for genocide, crimes against humanity, and war crimes committed by troops under his command if he "knew or should have known that his troops were committing or were about to commit a crime" and he

[8] International Criminal Court, *Rome Statute,* 1.

exercised insufficient control to avoid the crimes from occurring.[9] After the commission of the crime, a military commander can be held criminally responsible if he did not take the necessary measures to report or punish the authors of such violations.

Multinational Operations: According to the Joint Publication 3-16, "multinational operations are operations conducted by forces of two or more nations, usually undertaken within the structure of a coalition or alliance."[10]

Command and Control: "The exercise of authority and direction by a properly designated commander over assigned and attached forces in the accomplishment of the mission."[11]

Command: According to the definition of Department of Defense Dictionary, the term Command refers to "1. The authority that a commander in the armed forces lawfully exercises over subordinates by virtue of rank or assignment. 2. An order given by a commander; that is, the will of the commander expressed for the purpose of bringing about a particular action. 3. A unit or units, an organization, or an area under the command of one individual."[12]

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[9] International Criminal Court, *Rome Statute,* 20.

[10] Office of the Chairman of the Joint Chiefs of Staff (JCS), Joint Publication (JP) 3-16, *Multinational Operations* (Washington, DC: The Joint Staff, June 2013), ix.

[11] Office of the Chairman of the Joint Chiefs of Staff (JCS), *DOD Dictionary of Military and Associated Terms* (Washington, DC: The Joint Staff, February 2019), 43.

[12] Ibid.

De jure Command: *De jure* authority is that which comes from official appointment to a position of leadership over subordinates within a hierarchical structure A subordinate relationship *de jure* within the scope of CR means that a person has been appointed, elected or otherwise assigned to a position of authority for the purpose of commanding or directing others persons who are thereby legally considered to be his subordinates.[13]

De facto Command: Command relationship in which the superior has acquired over one or more persons enough authority to prevent them from committing crimes or to punish them if they do so. The origin or basis of this de facto command may be diverse, but there is an expectation by the superior of compliance to his orders and authority from those under his command.[14]

Yamashita Standard: A commander is responsible for the atrocities committed by soldiers under his command, even if the circumstances meant he had no effective command over them and had no prior knowledge of the violations.[15]

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[13] *Prosecutor v. Rašević*, Verdict, X-KR-06/275 (BiH Crt, Crim. Div. WCS, February 28, 2008).

[14] *Prosecutor v. Zejnil Delalic*, Judgement, IT-96-21-A (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, ICTY, February 20, 2001).

[15] Christopher N. Crowe, "Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution," *University of Richmond Law Review* 29, no. 1 (1994-1995): 191, accessed March 26, 2019, https://scholarship.richmond.edu/lawreview/vol29/iss1/9.

Doctrinal Research: "Doctrinal research is concerned with the formulation of legal 'doctrines' through the analysis of legal rules. Within the common law jurisdictions, legal rules are to be found within statutes and cases (the sources of law)."[16]

Positive Law: "statutory man-made law, as compared to "natural law" which is purportedly based on universally accepted moral principles, "God's law," and/or derived from nature and reason. The term "positive law" was first used by Thomas Hobbes in Leviathan (1651)." [17]

Mens Rea: Mens rea refers to criminal intent. The literal translation from Latin is guilty mind. A mens rea refers to the state of mind statutorily required in order to convict a particular defendant of a particular crime."[18]

Actus Reus: Actus reus refers to the act or omission that comprise the physical elements of a crime as required by statute.[19]

Sui Generis: Sui generis is a Latin term which means of its own kind/genus. It is something that is unique in its characteristics.[20]

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[16] Paul Chynoweth, "Legal Research," in *Advanced Research Methods in the Built Environment*, ed. Andrew Knight and Les Ruddock (Oxford: Blackwell Publishing Ltd., 2008), 29.

[17] The Free Dictionary, "positive law," Farlex, accessed March 13, 2019, https://legal-dictionary.thefreedictionary.com/Positive+Law.

[18] Legal Information Institute, "mens reus," Cornell Law School, accessed April 22, 2019, https://www.law.cornell.edu/wex/mens_rea.

[19] Legal Information Institute, "actus reus," Cornell Law School, accessed April 22, 2019, https://www.law.cornell.edu/wex/actus_reus.

[20] US Legal, "sui generis law and legal definition," accessed April 27, 2019, https://definitions.uslegal.com/s/sui-generis/.

Causal Nexus: A legal term that in Latin means "to bind." Legally it means to link an event (the cause) and a second event (the effect). A causal nexus exists if the result is a natural and reasonable outcome or consequence of the first event.

Limitations and Delimitations

This study assesses how international courts impute criminal responsibility to military senior officers for war crimes and crimes against humanity committed by their subordinates or soldiers from other countries in the context of multinational operations. The scope of this study is to analyze command responsibility criteria that would apply to multinational operations. Given the variety of multinational operations, one distinction exists between operations that are led by a United Nations (UN) organization and those that are not. This study will follow the framework of multinational operations not under UN Chapter VI or VII authority. Most of the time missions under a UN mandate will have some specificities when it comes to the allocation of responsibility. For example, a specific statute typically applies to soldiers serving under a UN mandate. People serving under a UN mandate have a shield that may prevent the courts from engaging individual liability.

> It has been the long-established position of the United Nations . . . that forces placed at the disposal of the United Nations are 'transformed' into a United Nations subsidiary organ and, as such, entail the responsibility of the Organization, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, "effective." [21]

[21] United Nations, Office of Legal Affairs, Codification Division, "Responsibility of International Organizations," International Law Commission, 63rd Session, Geneva, Switzerland, 2011, 13, accessed April 2, 2019, http://legal.un.org/docs/?symbol=A/CN.4/637/Add.1.

The UN has different standards that determine the criminal responsibility of soldiers serving under its mandates. Operations where the UN is not involved will better describe the criteria necessary for command responsibility in a multinational context.

The most significant limitation for this study is the relative unmapped boundaries of this topic and the lack of case law dealing with the issue of CR in multinational operations. The number of available books on this subject is limited and few comprehensive treatises on command responsibility in multinational operations exist.

This is not a funded study, which limits the possibility to travel to the ICC or other courts to collect information directly from the office of the prosecutors.

The short time available to conduct the research will pose a significant limitation; cases tried in international tribunals and courts often last years with multiple appeals.

Significance of Study

The significance of CR in multinational operations stems from the commander's role in military doctrine. Leaders play a fundamental role in the enforcement of the observation of international law. CR stresses this aspect of the commander's duty to train, educate, and control troops. Certain situations where the command structures are not clearly established can undermine the commander's authority. Multinational operations are one of those situations. Given the recent military engagements in which coalitions and alliances are widely employed, the commander's ability to control troops is more challenging. Consequently, it is worth addressing CR in light of the what authority commanders have in multinational operations. This study is significant because it

addresses a gap in the current literature regarding the application of CR in multinational operations.

Much has been written about CR at the international level but whether or not a commander of a multinational operation is punishable for the wrongful actions of foreign soldiers under his command remains a disputed and ambiguous question. Consequently, military commanders and civilian leadership would benefit from understanding the implications and the scope of CR in contemporary multinational operations. This awareness of how an international court would apply the elements of CR in multinational operations would help commanders properly train their soldiers on the international, conventional, and customary laws they are bound to follow.

CHAPTER 2

LITERATURE REVIEW

Overview

The literature of how CR applies to multinational operations is incomplete. Few scholars have written about the details of CR in multinational operations. In fact, this scarcity of literature on the subject seems to stem from the lack of a general application of the CR principle. Rare are the condemnations derived from the application of CR against military superiors who failed to fulfill their obligations of control and punishment.[22] Since its first significant use after post World War II trials, the principle of the liability of military commanders has not been entirely clear in its application.[23] Fundamentally, CR endorsed condemnations of military leaders in a very limited cases. Before ICTY and ICTR, fifty-four prosecutions for CR resulted in only ten convictions.[24]

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[22] Chantal Meloni, *Command Responsibility in International Criminal Law* (The Hague: T.M.C. Asser Press, 2010), 96.

[23] The London Agreement of August 8, 1945, and the decision of the Commander-in-Chief of the troops of occupation in Japan of January 19, 1946, defined the rules under which the Nuremberg and Tokyo Tribunals operated. For the text of these charters, see United Kingdom of Great Britain and Northern Ireland, United States of America, France and Union of Soviet Socialist Republic, *Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945, 82 U.N.T.C., 280, accessed March 31, 2019, https://www.refworld.org/docid/47fdfb34d.html; and Neil Boister and Robert Cryer, eds., *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments* (Oxford: Oxford University Press, 2008), 5-11.

[24] Beatrice Bonafe, "Finding A Proper Role for Command Responsibility," *Journal of International Criminal Justice* 5, no. 3 (2007): 602.

While the ICTY has used CR extensively to prosecute military leaders directly involved in serious violations of humanitarian law in the former Yugoslavia, its scope has remained limited. The Bemba case is the first conviction of a military superior by the ICC trial chamber.[25] However, the ICC appeal chamber reversed this judgment and postponed the first application of Article 28 of the Rome Statute. [26]

The lack of success of the application of CR doctrine might have influenced the lethargy of lawyers to expand this principle and consequently the issue of CR in multinational operations remains a broad field, insufficiently explored. This state of affairs contrasts with the interest that command responsibility should arouse with the exponential increase of multinational operations in a world where the isolated engagements of states are becoming exceptions.

The case law is almost silent when it comes to the question of this applicability. In ICC and international tribunal case law there is no case involving a commander of a multinational operation held liable for the violations committed by his subordinates from another country. While they represent the majority of military engagements, multinational operations fail to provide examples of situations as a basis for the prosecution of a commander in national or international jurisdictions. As a result, academic work and case law for this thesis is scarce.

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[25] *Prosecutor v. Bemba, Judgment Pursuant to Article 74 of the Statute*, ICC-01/05-01/08-3343 (ICC TC III, March 21, 2016).

[26] *Prosecutor v. Bemba, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute,"* ICC-01/05-01/08-3636-Red (ICC, AC, June 8, 2018).

This thesis will rely on references to the legal *corpus* resulting from the development of international criminal law and the arguments developed by the judges of the international tribunals dealing with the application of the CR principle. The gap in the literature provides additional justification for this research. Thus, this study will seek to identify the constitutive elements leading to the application of CR in the case of a military commander engaged under a multinational banner with forces of different nationalities. The study will primarily use international law and court cases to answer the primary research question.

Early Developments of the CR Principle

The origins of the responsibility of military superiors go back centuries. Around 500 BC, Sun-Tzu evoked in his book *The Art of War* the duty of military leaders to ensure that their subordinates conducted themselves with a certain degree of civility during armed conflict.[27] In 1439, Charles VII of France issued the Orleans Order, which imposed a liability over commanders for all the illegal acts of their subordinates.[28] His *Ordinances for the Armies* stated:

> The King orders each captain or lieutenant to be held responsible for the abuses, ills, and offenses committed by members of his company, and that as soon as he receives any complaint . . . he brings the offender to justice . . . If he fails to

[27] Samuel Griffith, *Sun Tzu: The Art of War* (Oxford: Oxford University Press, 1963), 125.

[28] Meloni, *Command Responsibility*, 48.

> do so or covers up the misdeed . . .the captain shall be deemed responsible for the offense, as if he had committed it himself.[29]

One of the first international examples of the military commander's obligation to act legally took place during the Peter von Hagenbach's trial by an ad hoc tribunal of the Holy Roman Empire. In 1474 von Hagenbach was convicted of murder, rape, and other crimes which as a knight he had a duty to prevent.[30] The court had not, however, explicitly based the sentence on the doctrine of CR, which did not exist at this time, but on the enforcement of the duty of the commanders to observe high ethical standards.

The principle of the responsibility of the military superior developed further during the US Civil War. *The Instructions for the Government of Armies of the United States in the Field*, known as the Lieber Code, imputed on commanders the responsibility to ensure the respect of laws and customs of war by troops under their command.[31]

Following this, some attempts to codify the principle of responsibility of superiors at a multinational level arose, among them the IV Hague Convention in 1907 dedicated to

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[29] M. Cherif Bassiouni, *International Criminal Law*, 3rd ed. (Leiden, Netherlands: Martinus Nijhoff, 2008) 298.

[30] Gregory Gordon, "The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law," (Working paper, University of North Dakota, School of Law, Grand Forks, ND, February 16, 2012), 43-44, accessed January 15, 2019, https://ssrn.com/abstract=2006370.

[31] Francis Lieber, *Instructions for the Government of the Armies of the United States in the Field* (Washington, DC: Government Printing Office, 1898)

"*the laws and customs of war on land."*[32] The first article of the annex of the convention stated that an army must have at its head "a person responsible for his subordinates" without giving further details about the obligations of the military leader. This convention did not expressly establish the doctrine of CR but it suggested that military commanders must account for their subordinates actions.[33]

Undoubtedly, these first evocations of the superior's responsibilities constitute the foundations of the modern CR doctrine. There will be substantial developments of CR doctrine in the wake of World War I.

Command Responsibility Evolution after World War I

At its plenary session on 25 January 1919, the Preliminary Peace Conference decided to create for the purpose of assessing responsibility for World War I the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. This commission recommended to set up an international tribunal that would prosecute the leaders who gave the order or having knowledge of illegal acts and owning the power to intervene, refrained to take measures to prevent, put an end to, or punish

[32] Hague Convention IV – Laws and Customs of War on Land: 18 October 1907, 36 Stat. 2277, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Nouveau Recueil (ser. 3), entered into force January 26, 1910, accessed April 2, 2019, http://hrlibrary.umn.edu/instree/1907c.htm.

[33] Crowe, *Command Responsibility*, 196.

violations of the laws and customs of war.[34] Included in the preliminary report of this commission at the conference of Versailles on March 29, 1919, this recommendation constituted a revolutionary step forward. For the first time there was vigorous advocacy for the criminal liability of the military leaders on the basis of omissions and direct orders. In addition it explicitly acknowledged that a commander could only be found guilty of such an omission if he had knowledge of the illegal actions of his subordinates.[35] A strong sense of justice drove the commission to establish a tribunal for the prosecution of war crimes. The Allies decided to set up a war tribunal to implement the provisions of the Versailles Treaty. They left Germany the opportunity to try its own citizens before the Leipzig Court. The Leipzig War Crimes Trials took place between May 23 and July 16, 1921, and occupied an important place in the history of war trials, especially with their impact on the application of the principle that individuals who have committed war crimes must incur responsibility and must not remain unpunished. The Leipzig trials did not deal with leadership failures to prevent crimes; tribunals that punished leaders who failed to act would not happen until after World War II.

After the World War II, several criminal trials indicted German and Japanese leaders for grave violations of law and customs of war. In the Nuremberg and Tokyo trials, the concept of military superiors' responsibility was invoked as a basis for the

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[34] American Society of International Law, "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," *American Journal of International Law* 14, no. 1/2 (1920): 95–154, accessed April 2, 2019, https://www.jstor.org/stable/2187841?seq=1#metadata_info_tab_contents.

[35] Ibid.

establishment of the criminal responsibility of military leaders. The Control Council Law N°10, which governed the prosecution of war criminals by the Allies in Germany, did not explicitly mention the doctrine of the responsibility of superiors; however, the judges developed arguments during these trials to hold superiors accountable for crimes committed by their subordinates. [36]

Trials after World War II

After World War II, the first international trial prosecuting a military leader on the basis of superior responsibility was the Yamashita case.[37] General Yamashita was the commander-in-chief of the Japanese 14th Army Group in the Philippines, where his troops committed atrocities against thousands of civilians. Five American generals appointed as a commission convicted Yamashita for failing in his duties to control the acts of his subordinates. General Yamashita pleaded not guilty. Despite no evidence that Yamashita ordered or even knew about the commission of war crimes by his subordinates, the military court convicted him and sentenced him to hang.[38] The United States Supreme Court upheld the decision and confirmed the charges against the Japanese commander. This was the first time in the post-WWII era where the CR principle was

[36] Law adopted by the Allied Control Council in Germany provide for the punishment of persons guilty of war crimes, crimes against peace and against humanity, and to establish a uniform legal basis to prosecute war criminals and other similar offenders.

[37] Allan A. Ryan, *Yamashita's Ghost: War Crimes, Macarthur's Justice, And Command Accountability* (Lawrence, KS: University Press of Kansas, 2014), 250.

[38] Ibid.

used to convict a military official for war crimes committed by his soldiers because he failed to supervise them adequately. In this case, the court rigidly interpreted the CR principle and applied a strict liability criterion, which presupposed that commanders are liable for the acts of their subordinates.[39] The tribunal asserted that even if General Yamashita did not know of the atrocities committed in his area of command, he should have.[40, 41] In following cases such as the High Command case, or the Hostage case, the United States military tribunal affirmed the responsibility of a military leader of an occupied territory to ensure the proper application of the principles of international law by the troops acting in his area of responsibility. [42, 43] The application of the CR principle was therefore elaborated with more precision. By holding military superiors responsible for having failed to prevent crimes by subordinates, military tribunals after World War II

[39] William Parks, "Command Responsibility for War Crimes," *Military Law Review* 62 (1973): 62, accessed April 5, 2019, https://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/27508F~1.pdf.

[40] Ryan, *Yamashita's Ghost*, 231.

[41] The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals,* vol. 4, *The Trial of German Major War Criminals at Nuremberg* (London: His Majesty's Stationery Office, 1948), accessed April 2, 2019, https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf.

[42] *Trials of War Criminals before the Nuernberg Military Tribunals,* vol. 11, *"The High Command Case," "The Hostage Case"* (Washington, DC: United States Government Printing Office, 1950), accessed April 3, 2019, https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf.

[43] Ibid., 757.

established the legal precedent for CR. The Geneva Convention would contribute additional clarification and legal code to CR thirty years later.

The Geneva Conventions

Adopted in June 1977, Protocols I and II to the Geneva Convention of 1949 was the first international treaty to codify the doctrine of superior responsibility. [44] Articles 86 and 87 reconfirmed earlier developments of the responsibility of superiors and outlined more precisely the conditions of CR. Article 86 asserts that superiors are not absolved of penal or disciplinary responsibility when subordinates violate international humanitarian law. Article 87 of the Protocol dictates that military commanders prevent, supervise, and report violations of conventions and Geneva protocol by the troops and persons who are under their command.[45] Fourteen years after the Protocol Additional of 1977, another development that strongly influenced CR occurred with the establishment of ad hoc tribunals for Yugoslavia and Rwanda.

The Maturation with the Ad Hoc Tribunals

Subsequently to the atrocities committed in the former Yugoslavia in 1991, the UN Security Council on the basis of Chapter VII of the United Nations Charter created

[44] ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 42-3.

[45] Ibid.

the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993.[46] In the view of the Security Council, there was a strong link between military operations in the former Yugoslavia and enforcement of justice because durable peace was foreseen as an outcome of fair justice. Injustice set the tone for further and more serious violations of international law. These justifications carried the adoption of a statute which conferred to the ICTY jurisdiction over the perpetrators of certain types of criminal activity. The statute of the ICTY provided a legal basis to hold the military commanders accountable by virtue of the acts of their subordinates. As an illustration, Article 7 (3) of the statute states:

> The acts . . . 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.[47]

One year after the creation of the ICTY the United Nations Security Council focused on the humanitarian disaster in Rwanda. Despite the fact that the conflict in Rwanda was internal to the country, the Security Council realized that genocide and widespread human rights violations constituted threats against peace and international security. After a request from the Rwandan government, the Security Council established an international criminal court designed to put on trial "persons responsible for genocide

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[46] United Nations Security Council, Security Council Resolution 827, *International Criminal Tribunal for the Former Yugoslavia (ICTY)*, S/RES/827 (New York: United Nations Security Council, 25 May 1993), accessed March 10, 2019, https://www.refworld.org/docid/3b00f21b1c.html.

[47] Ibid.

and other serious violations of International Humanitarian Law."[48] The ICTR referred to the same standards as the ICTY. Echoing the language of the ICTY, Article 6(3) of the ICTR statute is identical to Article 7(3) of the statute of ICTY. The identical development of the CR principle in both statutes suggested that the standard to hold leaders accountable for the actions of their subordinates have become the same in both internal and international conflicts. These two ad hoc international tribunals had the authority to hold individuals liable for war crimes. The decisions of these tribunals illustrate the development of CR and provide clues on how to apply this principle to multinational operations. The CR principle provides the law necessary for international criminal tribunals to hold superiors accountable for the crimes of their subordinates even if the superior is not clearly identified as a principle in the crime.[49] With the influential Celebici judgment, the ICTY performed a thorough analysis with major clarifications addressing the responsibility of superiors.[50] This thesis will rely mainly on the jurisprudence of the ICTY as it has dealt more extensively with the responsibility of military superiors. The cases before ICTR were mainly in relation to civilian superiors. The interesting developments established by the jurisprudence of the ICTY and the ICTR

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[48] United Nations Security Council, Resolution 955, *Establishment of the International Criminal Tribunal for Rwanda (ICTR)*, S/RES/955 (New York: United Nations Security Council, November 8, 1994), accessed March 10, 2019, https://www.refworld.org/docid/3b00f2742c.html.

[49] *Prosecutor v. Tihomir Blaskic, Appeal Judgement*, IT-95-14-A (ICTY, July 29, 2004).

[50] *Prosecutor v. Zdravko Mucic Aka "Pavo," Hazim Delic, Esad Landzo Aka "Zenga," Zejnil Delalic, Trial Judgement* IT-96-21-T, 117 (ICTY, November 16, 1998).

on the concept of command responsibility would largely inspire the drafters of the Rome Statute of the International Criminal Court.

The ICC Codification

Command responsibility of military superiors gained additional international acceptance with the adoption of the Rome Statute of the International Criminal Court on July 17, 1998.[51] The CR would reach a fundamental milestone with the creation of the International Criminal Court, which began functioning on July 1, 2002, after the minimum of ratifications. Article 28(a) of the ICC holds senior military officers responsible for the prevention and punishment of the illegal actions from their subordinates. According to this publication:

> 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 power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[52]

[51] Greg Vetter, "Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)," *Yale Journal of International Law* 25, no. 1 (2000): 90-134, accessed April 5, 2019, http://digitalcommons.law.yale.edu/yjil/vol25/iss1/3.

[52] International Criminal Court, *Rome Statute*, 19-20.

Although it has been seventy-five years since the Nuremburg Trials, debates, discussions, and judicial decisions continue to shape the legal definition and application of command responsibility. The legal elements of command responsibility include the commission of a crime; command or effective authority and control over subordinates; failure to prevent, punish, or submit the matter to competent authorities; causation; and the *mens rea* consisting of actual or constructive knowledge, including consciously disregarding relevant information about the commission of crimes. The ICC statute brought a significant contribution to IHL with the clarification of CR elements and conditions derived from the case law of ad hoc criminal tribunals. Since the creation of this permanent international court, international laws that held leaders accountable for the crimes of their subordinates were now systematically applied by the international community.

Table 1. Codification of the Command Responsibility Principle

Authorization	Court or Organization	Established	Purpose	Contribution to Command Responsibility
Allies	Nuremberg	1945	Military tribunal to try Nazi Party members	(a) Commanders should know what troops under their command are doing (b) No strict liability and necessary determination of what the superior actually knew.
Allies	Tokyo	1946	Military tribunal to try senior Japanese civilian and military officials	(a) Liability attaching to a superior for the criminal acts of subordinates regardless of any factors attaching to the ability to command and effectively control. (b) Concept of constructive knowledge and the concept of negligent disregard of information
Geneva Conventions and the Additional Protocols	ICRC	1949	Principle of International Humanitarian Law	(a) Actual knowledge that the superior had (1) knowledge that the superior should have had and (2) standards of negligence for not knowing
UN	ICTY	1993	Ad hoc international court	(a) *De jure* or *de facto* superior-subordinate relationship (b) Effective command and control (c) Ability of the superior to impose punishment on the subordinate or to prevent the criminal act from occurring
UN	ICTR	1994	Ad hoc international court	Application of superior responsibility to civilian leaders
Rome Statute	ICC	2002	Investigates and tries individuals charged with crimes against the international community	(a) The knowledge of the criminal actions of the subordinates. (b) The authority to prevent or punish the criminal actions of the subordinates (c) Superior responsibility of civilian leadership

Source: Created by the author using data from *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg October 1946-April 1949 Volume IV*, 52, accessed April 2, 2019, https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IV.pdf; *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 Nuernberg October 1946-April 1949 Volume XI*, 543-4; accessed April 3, 2019, https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf; *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, Article 4, accessed March 13, 2019, https://www.refworld.org/docid/3ae6b36c8.html; UN Security Council, *Resolution 827 (1993) [International Criminal Tribunal for the Former Yugoslavia (ICTY)]*, 25 May 1993, S/RES/827 (1993), accessed 2 April 2019, https://www.refworld.org/docid/3b00f21b1c.html; UN Security Council, *Resolution 955 (1994), Establishment of the International Criminal Tribunal for Rwanda*, 8 November 1994, S/RES/955 (1994), accessed 2 April 2019, https://www.refworld.org/docid/3b00f2742c.html; *Rome Statute of The International Criminal Court (Last Amended 2010)*, 19-20, accessed April 9, 2019, https://www.refworld.org/docid/3ae6b3a84.html.

The Historical and Comparative Analysis of CR

Several texts provide a historical and comparative analysis of CR and introduce problems inherent in multinational force missions in complex environments. Parks provides a historical analysis of war crimes trials involving command responsibility. Through major historic cases, he gives an overview of the required conduct of a military commander. Given the verdicts of major trials after World War II, the military leaders were obligated to prevent, investigate, report, and punish war crimes. [53] He provides analysis and comparative perspectives on the application of CR and describes the historical development of this principle. Meloni offers a more modern perspective on the problems of command responsibility related to its scope and foundations.[54] In exhaustive detail, she reviews various elements of command responsibility in the case law of the ad hoc tribunals and the constitutive elements of CR. The author identifies four major elements: the underlying offense, the superior-subordinate relationship, the *mens rea* requirement, and the failure to adopt necessary and reasonable measures. Besides the analysis of ad hoc tribunals case law, her work explores the provision of Article 28 of the Rome Statute. The author further attempts to answer the question of whether command responsibility is a mode of liability related to the subordinate's crime or a separate and autonomous offense. This distinction is important because it helps to understand the justifications of the commander's condemnation. The second form of liability according to the author is the most suitable to describe the CR and to understand all its implications.

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[53] Parks, "Command Responsibility for War Crimes," 77-101.

[54] Meloni, *Command Responsibility in International Criminal Law*.

Meloni's perspectives are relevant to this study and the analysis of what the doctrine of command responsibility entails.

Arthur O'Reilly, a lawyer in private practice with extensive experience in international law, examines the philosophical foundations of CR.[55] The scope of the doctrine requires a superior-subordinate relationship with the accused having effective control or command over the subordinates, knowledge about the crime, and the responsibility for taking reasonable measures to prevent the crime or punish the person behind the criminal act. According to O'Reilly, these conditions are necessary but not sufficient to trigger the responsibility of the superior. In his view individual criminal responsibility requires the intention of the superior to commit crimes. O'Reilly mentions that there are specific conditions to be met for CR, which if they are not met, make a tribunal nothing more than a tool for the victor to convict the vanquished. He argues that "under this doctrine, liability is established without conduct that exhibits strong individualized choice and without a mental element that reflects a guilty mind."[56] Therefore, CR needs to be realigned with the core principles of individual responsibility. The constitutive elements of CR must include a stronger mental criterion. This approach underlies the legitimacy and justification of CR. This perspective will be significant in questioning the criminal liability of a military commander for acts committed by the

[55] Arthur O'Reilly, "Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Retributive Justice," *Gonzaga Law Review* 40, no. 1 (2004): 127-154, accessed March 11, 2019, http://blogs.gonzaga.edu/gulawreview/files/2011/01/OReilly.pdf.

[56] Ibid., 128.

troops. O'Reilly questions why a commander who had no direct responsibility in the commission of crimes by his subordinates should be held liable and punished. To answer this question, he analyzes the CR under the framework of retributivism. While the retributive theory of punishment holds that the best response to a crime is a punishment proportional to the offense, O'Reilly asserts that deterrence and prevention of future crimes should not determine a court's verdict that negligence is a weak basis for criminal liability.

O'Reilly also examines the philosophical foundations of CR and argues that before a court charges a commander, the prosecution must prove a superior-subordinate relationship, effective control or command over subordinates, knowledge about the crime, failure to take reasonable measures to prevent the crime, or dereliction in punishing the person who committed the crime.[57] According to O'Reilly, these conditions are necessary but should not be sufficient to trigger the responsibility of the superior. In his view individual criminal responsibility requires an assessment of the intention of the superior to commit crimes. He observes that under current command responsibility law, liability is incorrectly established without conduct that exhibits strong individualized choice and without a mental element that reflects a guilty mind.[58] The remedy he suggests is that international courts realign command responsibility with the genuine principles of individual responsibility instead of positivism; the constitutive

[57] O'Reilly, "Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Retributive Justice," 140-2.

[58] Ibid., 128.

elements of CR must include a stronger mental criterion. This perspective is key when determining the criminal liability of a multinational commander for acts committed by foreign troops under his authority.

Ilias Bantekas, professor of International Law and Arbitration at Brunel University Law School, discusses the level of knowledge required for a commander to be held responsible for criminal acts of his subordinates.[59] One of the controversial developments of the modern concept of CR is the level of knowledge that commanders must possess before they become criminally responsible. While actual knowledge of subordinates' crimes is sufficient, the debate is about the appropriate level of knowledge required to warrant the commander's individual criminal responsibility. Bantekas argues that the "should have known" requirement as developed by Art 28 of ICC statute is more suitable to determine the expected level of knowledge for a commander. The commander has the obligation to have accurate information on his subordinates' actions and ignorance cannot be set forth as a mean to escape from CR. His study shows that proof of *mens rea* on the part of the military leader is necessary for criminal responsibility. Additionally, Bantekas considers *de jure* command through the military structure in four levels.[60] At the top of the hierarchy is "policy command," which "involves the power to

[59] Ilias Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester, UK: Manchester University Press, 2002).

[60] Ilias Bantekas, "The Contemporary Law of Superior Responsibility," *The American Journal of International Law* 93, no. 3 (1999): 573-595, accessed March 5, 2019, https://www.jstor.org/stable/2555261.

determine policy objectives and . . . to commit or withdraw a state's armed forces." [61] Next is "strategic command," which he defined as "the highest military authorities" responsible for a "viable military plan." The third level is "operational command" for those who direct troops at corps or division levels. The fourth level is "tactical command" where people have direct command over troops in operations. Then he analyzes the case of a UN force commander who as an operational commander "has been granted "full authority" over their forces and has as a result been held "operationally responsible" for their performance."[62] For the purpose of this thesis, operational command will be applied to multinational commanders as they the authority to enforce compliance through orders and rules of engagement.

As seen earlier in "Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution," Christopher Crowe supports Bantekas' conclusion about the subjective nature of the moral element of the military commander's breach of responsibility. To avoid the risk of holding a person guilty for an offense committed by others, it is necessary to consider separately the different cases of command responsibility, which are based on distinct *mens rea* and *actus reus* requirements. Crowe concludes that a superior could incur punishment for the same crime committed by his subordinates but for different reasons.

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[61] Bantekas, "The Contemporary Law of Superior Responsibility," 578.

[62] Ibid., 579.

Mettraux describes CR as a responsibility *sui generis*, "in a class by itself" where the crime of the subordinate plays a central role in the attribution of responsibility to the superior. [63] It is necessary to consider the relationship between the superior's failure to act and the subordinate's crime, both with regard to objective and subjective elements. His conclusions about CR stem from an exhaustive review of the jurisprudence of international tribunals. According to Mettraux, the omission of the superior represents the cornerstone of the commander's criminal responsibility. This exhaustive work provides key elements for understanding command responsibility and Mettraux supports his findings with examples from international case law.

[63] Guénaël Mettraux, *The Law of Command Responsibility* (Oxford, UK: Oxford University Press, 2009), 38.

Table 2. Scholars' Development of the Command Responsibility Principle

Author	Book/Article Title	Main Contributions
Parks	"Command Responsibility for War Crimes"	- Historical analysis of war crimes involving command responsibility and description of the major trends towards CR. - Overview of the required conduct of a military commander. - Three main duties: Investigate, report, and punish.
Meloni	*Command Responsibility in International Criminal Law*	- Modern perspective on the basic problems of CR related to its scope and foundations. - Analysis of Article 28 of ICC statute. - Four major elements for CR: the underlying offense, the superior-subordinate. relationship, the *mens rea* requirement, and the failure to adopt necessary and reasonable measures.
O'Reilly	"Command Responsibility: A Call to Realign Doctrine with Principles"	- Philosophical foundations for CR. - Specific conditions to be met for CR, which if they are not met, make a tribunal nothing more than a tool for the victor to convict the vanquished. - CR needs to be realigned with the core principles of individual responsibility. - The constitutive elements of CR must include a stronger knowledge criteria.
Bantekas	"The Contemporary Law of Superior Responsibility"	- The best approach to the doctrine of command responsibility should be through the concept of control. - Four levels of command: policy, strategic, operational, and tactical. - The level of knowledge required for a commander to be criminally responsible for criminal acts of his subordinates. - "Should have known" requirement as developed by Art 28 of ICC statute is more suitable to determine the expected level of knowledge for a commander and not the actual level.
Crowe	"Command Responsibility in the Former Yugoslavia: The Chance for Successful Prosecution"	- The subjective nature of the moral element of the military commander's breach of responsibility. - Risk of holding a person guilty of an offense committed by others in violation of the principle of personal and culpable criminal responsibility. - It is critical to separately consider command responsibility and criminal responsibility, the former based on distinct *mens rea* and *actus reus* requirements.
Mettraux	The Law of Command Responsibility	- CR is a *sui generis* form of responsibility. - Exhaustive review of the jurisprudence of international tribunals. - The scope of CR application, constitutive elements, and the evidential difficulties involved in establishing the criminal responsibility of a superior in the context of a criminal prosecution.

Source: Created by the author using date from Kai Ambos, "Superior Responsibility," in *The Rome Statute of the International Court: A Commentary, t. 1,* ed. Antonio Cassese, Paola Gaeta and John R.W.D. Jones (Oxford, England: Oxford University Press, 2002, 823-827); William Parks, "Command Responsibility for War Crimes," *Military Law Review* 62 (1973): 62, accessed April 5, 2019, https://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/27508F~1.pdf; Chantal Meloni, *Command Responsibility in International Criminal Law* (The Hague: T.M.C. Asser Press, 2010); Arthur O'Reilly, "Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Retributive Justice," *Gonzaga Law Review* 40, no. 1 (2004): 127-154, accessed March 11, 2019, http://blogs.gonzaga.edu/gulawreview/files/2011/01/OReilly.pdf; Ilias Bantekas, "The Contemporary Law of Superior Responsibility," *The American Journal of International Law* 93, no. 3 (1999): 573-595, accessed March 5, 2019, https://www.jstor.org/stable/2555261; Ilias Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester, UK: Manchester University Press, 2002); Guénaël Mettraux, *The Law of Command Responsibility* (Oxford, UK: Oxford University Press, 2009).

CHAPTER 3

RESEARCH METHODOLOGY

The research for this thesis will follow a qualitative methodology and specifically a qualitative analysis of legal materials on the CR principle. This methodology examines the mechanisms in international humanitarian law and some domestic codes that help to understand the possible applications of CR in multinational operations. Within the qualitative methodology this study will adopt the doctrinal approach. This approach is the default method of search in law and consists of interpreting the positive sources of law.[64] The positive sources of law consist of the existing treaties and law pertaining to CR. The doctrinal approach assumes that the answers and solutions to every legal problem are available in the underlying logic and structure of rules that can be discovered by exploration and analysis of the legal doctrine. Chynoweth states:

> Doctrinal research is concerned with the formulation of legal 'doctrines' through the analysis of legal rules. Within the common law jurisdictions, legal rules are to be found within statutes and cases (the sources of law) but it is important to appreciate that they cannot, in themselves, provide a complete statement of the law in any given situation. This can only be ascertained by applying the relevant legal rules to the particular facts of the situation under consideration.[65]

This methodology entails a critical and qualitative analysis of materials that support a hypothesis. The essential features of the doctrinal approach involve a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the

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[64] Chynoweth, "Legal Research," 28-37.

[65] Ibid.

law relevant to the matter under investigation. Conventional legal sources such as reports of committees, legal history, judicial pronouncements, and acts passed by legislature and parliament are the sources of doctrinal legal research. This approach will focus on case law, statutes, and other legal sources and will interpret information contained in documents. The research design for this thesis is different from empirical research; the latter deals more with society and the people living in it. This means that a part of this research will analyze the legal rules addressing command responsibility and the logical deductions about its application in multinational operations. This approach enables critically explores the meanings and implications of rules and the principles that underpin them. The doctrinal method is normally a two-part process because it involves first locating the sources of the law and then interpreting and analyzing the text. The use of deductive logic, inductive reasoning, and analogy where appropriate, would constitute the second part of the methodology. The Geneva Conventions and their additional protocols with the statutes of the ICC, ICTY, and ICTR will constitute the primary basis of research. A deductive method will then extrapolate the principles developed in these legal cases to CR in multinational operations.

This thesis will also use case study research methodology. In the case study research, emphasis is placed on the depth study of a particular case or multiple cases. According to Eisenhardt “the case study is a research strategy that focuses on understanding the dynamics present within single setting. Case studies can involve either

single or multiple cases and numerous levels of analysis." [66] This study will consider a single case study on command responsibility using multiple case laws. These cases are the command responsibility trials in domestic and international criminal courts. Researchers focus on cases that can provide critical information or new learning on a less understood phenomenon. This study will focus on major cases concerning CR. This will give the opportunity to analyze criteria used by courts and try to understand how verdicts were reached.

Eisenhardt argues that case studies are "particularly well suited to new research areas or research areas for which existing theory seems inadequate." [67] This aspect is relevant to our study, which considers the application of CR in a context of multinational operations. The analysis of cases dealing with this issue provides a broad understanding of legal considerations underlying various court decisions. Case law study also clarifies the historical parameters. These strengths are appropriate to unpack court decisions in cases concerning military hierarchies, structure, and authority. This study will determine if the same court-applied logic at the international level has a bearing on the command relationships at the multinational level. Command responsibility analysis will rely on judgments where Allied tribunals and international courts punished culpable commanders. Furthermore, a case study helps to generate a new theory, using measurable

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[66] Kathleen M. Eisenhardt, "Building Theories from Case Study Research," *The Academy of Management Review* 14, no. 4 (1989): 532, accessed March 12, 2019, http://www.jstor.org/stable/258557.

[67] Ibid., 548.

constructs and tested hypotheses.[68] This methodology will also be useful to glean from case law suitable ways to prevent multinational commanders from making mistakes in accounting for how soldiers conduct themselves under their authority.

[68] Eisenhardt, "Building Theories from Case Study Research," 547.

CHAPTER 4

ANALYSIS

The Foundations of Command Responsibility

The Reinforcement of the Commander's Duty to Control Troops

The United States Department of Defense concluded in its 2015 *Law of War Manual* that "commanders have duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war."[69] The army as a hierarchically organized institution adopts a strictly established chain of command. This implies the existence of a superior-subordinate relationship, which seeks for the discipline in the execution of the orders by the subordinates and the exercise of control by the superiors. In the light of the Geneva Conventions, a member of an irregular army gains the status of prisoner of war only if the forces to which he belongs is led by a responsible commander.[70] This consideration supports the assumption that where there is a commander there is also control and order. Conversely, where this type of control is impossible, the superior cannot be held responsible for the crimes committed by another party. A commander's first duty is to exercise responsible command with the authority to

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[69] Office of General Counsel, Department of Defense, *Department Of Defense Law of War Manual* (Washington, DC: Department of Defense, June 2015, updated December 2016), accessed April 21, 2019, https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190.

[70] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, Article 4, accessed March 13, 2019, https://www.refworld.org/docid/3ae6b36c8.html.

issue direct orders to subordinates, including senior and junior commanders. The trial chamber of the ICTY noted:

> The purpose behind the principles of responsible command and command responsibility is to promote compliance with the rules of international humanitarian law and to protect the people and property covered by those rules. As emphasized in the Commentary on Additional Protocol I, the role of commanders is decisive in ensuring the proper application of the Conventions and Additional Protocol I, so that a fatal gap between the undertakings entered into by Parties to the conflict and the conduct of individuals under their orders is avoided. By virtue of the authority vested in them, commanders are qualified to exercise control over troops and the weapons they use; more than anyone else, they can prevent breaches by creating the appropriate frame of mind, ensuring the rational use of the means of combat, and by maintaining discipline.[71]

Members of the armed forces who have authority of command are under a duty to maintain discipline within the unit or organization they lead. They must demonstrate by their interest and emphasis on training in peacetime and their behavior in battle that they respect the law. The examples set by commanders are of paramount importance in upholding the law and poor examples have been the cause of grave breaches of the law throughout history. The overriding element about command responsibility is that a person exercising effective command is a commander notwithstanding the fact that he occupies a particular rank. Given his position, not only of influence but of authority, the military chief has the responsibility pertaining to his authority. The supplementary criminal responsibility of the superior intends to encourage him to discourage his subordinates from committing crimes. Those who lead multinational operations are under these same rules and have to ensure control over their subordinates. As recalled during the

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[71] *Prosecutor v. Enver Hadzihasanovic and Amir Kubura, Judgment,* IT-01-47-T (ICTY, March 15, 2006), 21.

Nuremberg trials "The purpose of the laws of war to protect civilian populations and prisoners would largely be defeated if a commander could with impunity neglect to take reasonable measures for their protection."[72] The intrinsic meaning of the requirement of control is twofold. First, the superior is responsible for his own men by protecting them against external dangers. Second, he is responsible toward the international community for the behavior of his soldiers.

The Commander Has to Ensure that Soldiers under His Authority Act in Conformity with the Law of War

The commander has to take all the necessary measures to ensure that soldiers under his authority respect laws and customs of law. To ensure the execution of an ethical command, the CR principle imposes criminal liability on military commanders who fail to comply with three distinct duties: prevent, repress, and submit the violations of their subordinates to the competent authorities. The duty to prevent relates to measures taken to prevent crimes such as training troops to respect human rights and international humanitarian law as well as ordering them not to commit crimes. The duty to repress relates to measures to stop the commission of further crimes when crimes are being or have been committed including issuing orders to stop crimes, disciplining those responsible, or withdrawing them from positions or locations where they are able to commit further criminal acts. The duty to submit the violations of subordinates to the competent authorities for investigation and prosecution relates specifically to taking

[72] The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals,* 52.

measures to ensure effective criminal accountability for crimes that have been committed.[73]

Superiors Are Concerned with the Acts of Their Subordinates

The commander cannot evade responsibility through willful ignorance or negligence of duty. The responsibility of superiors for their subordinates has existed in many domestic codes of military justice. Governments, political leaders, and the public expect military commanders to exercise discipline and good order as core military principles. For example, the Lieber Code set a singular model of delegated authority by giving military commanders "the right to kill subordinates on the battlefield when they continue to commit abuses when ordered to stop."[74] Article 44 of the same code states "a soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior."[75] The military commander holds the authority necessary to enforce the law among his subordinates. Commanders must train and compel their subordinates to observe the laws and customs of the war. As provided by the Geneva Conventions, superiors must, "ensure that the members of the armed forces under their control are

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[73] International Committee of the Red Cross (ICRC), *Protocols Additional to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, 2010), 62, accessed April 5, 2019, https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf.

[74] Lieber, *Instructions for the Government of the Armies of the United States in the Field*, 16.

[75] Ibid.

aware of their obligations under the conventions."[76] Commanders are accountable if they have information that enables them to conclude that a subordinate has committed or was about to commit an offense and if they have not taken all practicable steps in their authority to prevent or stop the offense. International courts have been clear in their judgments that superiors share criminal liability for crimes committed by their subordinates. International and national laws accept this as a foundation of command responsibility.

A Particular Form of Responsibility

Indirect Responsibility

Under the principle of CR the court does not hold a commander individually responsible for a crime in which he did not participate. On the contrary, CR is an indirect responsibility where the commander is obliged to prevent the commission of a crime and to ensure troops under his command conduct themselves with respect for international law. A court justifies indirect responsibility by nature of the commander's duty to ensure the observance of the laws of war and that the commander has the authority to control the acts of his subordinates through orders.[77] A commander's abstention from duty endorses and encourages the violation of law and is consequently seen by the court as an indirect participation. The claim that the superior is responsible for the crimes committed by

[76] ICRC, G*eneva Convention Relative to the Treatment of Prisoners of War*, 75.

[77] Office of General Counsel, Department of Defense, *Department of Defense Law of War Manual*, 1141.

subordinates does not mean that the superior personally committed these crimes, but his failure to exercise proper authority over subordinates is in the eyes of the court comparable to participating in the execution of a crime.[78] This does not transfer the actual criminal conduct from the subordinates to the superior. By principle, in order to impute an offense to someone, that person must realize at least one element constituting the offense. This is often the defense presented to the court by the accused; he simply did not know the crime happened. Such a defense does not alleviate the feasibility of imputing the offense to a superior even though he did not personally carry out the offense; subordinates serve as the connection for the imputation of the crime to the superior and consequently, CR cannot exist without subordinates.

A Responsibility for Omission

Individual liability may not only rise from a positive act, but also from an omission, which is the failure to take the required action to prevent or report a crime. The statutes of ICC, ICTY, and ICTR envisaged two different scenarios to impute responsibility to the superior. First, the commander did not take the necessary measures and reasonable precautions to prevent the crime from happening and second, the commander failed to punish perpetrators after the commission of the crime.[79] In both cases, it is the omission of the superior that is punished, namely his inaction where he

[78] See *Prosecutor v. Dragomir Milosevic, Judgement,* IT-98-29/1-T (ICTY, December 12, 2007), 312-23, for the court's explanation of individual criminal liability and command responsibility. The court convicted Milosevic on both principles and sentenced him to thirty-three years in confinement.

[79] International Criminal Court, *Rome Statute*, Article 28.

should have acted. This omission is the material element of the offense. Although criminal law has traditionally been focused on the actions rather than the omissions, CR results from an omission rather than an action. This aspect is not exceptional and singular. There are various offenses in criminal law such as the offense of non-assistance to a person in danger, the fault of imprudence, non-observance of regulation, or negligence that can trigger criminal responsibility. CR stems from the inaction of the commander who fails to act properly against violations of international law. The omission is criminalized only when the law imposes a clear obligation to act and the person fails to do what is legally required. The actual offense committed by the superior through his negligence is the failure to prevent or punish an offense against IHL; the legal principle he violates is precisely the preexistent obligation to prevent or punish violations. The ICTY Trial Chamber affirms "that punishment is an inherent part of prevention of future crimes."[80] The court reasons that if the superior acted properly, the offenses of IHL would not have occurred.

Negligence as the Basis of Criminal Responsibility

Prior to the ICC, neither the ICTY, ICTR, nor the Additional Protocol to the Geneva Conventions specified negligence as the basis of liability. The Rome Statute clarified the standard of knowledge for criminal liability of military commanders who "owing . . . to the circumstances at the time, should have known that the forces were

[80] *Prosecutor v. Halilovic, Judgement,* IT-01-48-T (ICTY, November 16, 2005).

committing or about to commit such crimes."[81] Courts have reasoned that because of information available to the commander, the existence of a chain of command, and a military staff exercising control, commanders should have a relatively complete picture of what's happening in their areas of operation. As a basis of liability for the military, negligence is assessed case by case for subordinates whereas what a commander knew or should have known has a much broader criminal responsibility aperture.

Negligence is a very broad concept that has many applications and meanings. According to its intuitive meaning, negligence refers to the fact that a person did not accomplish what he should have. The negligence represents a breach of a duty of care. Under command responsibility negligence exists only if there was an opportunity for the commander to predict the result of his inaction and as such, an outcome may have been avoided. Implicit is that the military commander has an obligation to obtain information and act upon it. Kai Ambos, who served on the International Court of Justice in The Hague, writes, "In fact, if knowledge does not exist or cannot be proven, the superior can only be punished for negligently not having known of the crimes, i.e. because he or she should have known."[82] Parks distinguishes three levels of negligence: wanton,

[81] International Criminal Court, *Rome Statute*, Article 28.

[82] Kai Ambos, "Superior Responsibility," in *The Rome Statute of the International Court: A Commentary, t. 1,* ed. Antonio Cassese, Paola Gaeta and John R.W.D. Jones (Oxford, England: Oxford University Press, 2002), 823-827.

recklessness, and simple negligence.[83] From his analysis of jurisprudence after the World War II, Parks draws this conclusion on the degree of negligence required.

> It is submitted that only where there is a showing of wanton negligence has the commander manifested the mens rea to be held criminally responsible for the primary offense, that is, he has through his dereliction sufficiently aided and abetted the principals thereto as to make himself a principal or an accessory after the fact.[84]

A Weak Causation Link between the Crimes and the Superior's Inaction

To justify criminal liability, causation in criminal law matters if the defendant's conduct contributed sufficiently to the prohibited consequence. Under CR this causal link differs from whether the commander's carelessness is related to the duty to prevent or the duty to punish. For the duty to punish, the prosecution does not have to prove a *causal nexus* between the commander's actions and a crime by his subordinates. The causality link is not compulsory to find a commander guilty. In cases of failure to repress crimes or to refer them to the competent authorities for the purpose of investigation and prosecution, the omission occurs by definition after the commission of the crime. Therefore, it cannot cause the crime. In this case, the sanction is not focused on the crime

[83] Parks stated: "(1) Wanton: this degree of negligence involves the doing of an inherently dangerous act or omission with a heedless disregard of the probable consequences. (2) Recklessness: gross or culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable (but not necessarily probable) consequences to others of that act or omission. (3) Simple Negligence is the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances." Parks, *Command Responsibility for War Crimes*, 97.

[84] Ibid.

itself but solely on failing to repress it. In a timeline, the crime occurs before the duty to punish; therefore, the absence of punishment cannot be the origin of the crime's commission. If the court does not require the prosecution to show causality, the prosecution has one less element to prove in a trial; thus, the commander must fully exert his duties because in the course of the trial the prosecutor will not have to show a link between the commander's inaction and a crime. The prosecution's burden of proof is that the military commander did not take all the necessary measures to avoid the commission of war crimes. According to the ICTY, "as a matter of logic, a superior could not be held responsible for prior violations committed by subordinates if a *causal nexus* was required between such violations and the superior's failure to punish those who committed them."[85] Consequently, causality isn't an element of CR. The ICTY Trial Chamber while considering the absence of a causal link requirement stated:

> In contrast, while a causal connection between the failure of a commander to punish past crimes committed by subordinates and the commission of any such future crimes is not only possible but likely, the Prosecution correctly notes that no such causal link can possibly exist between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence. The very existence of the principle of superior responsibility for failure to punish, therefore, recognized under Article 7(3) and customary law, demonstrates the absence of a requirement of causality as a separate element of the doctrine of superior responsibility.[86]

Because it makes the prosecution's job easier to convict, the weak causality link aims to enforce greater accountability in military commanders. International courts still

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[85] Parks, *Command Responsibility for War Crimes*, 397.

[86] *Prosecutor v. Zenjnil Delalic, Judgement*, IT-96-21-T (ICTY, November 16, 1998), 149.

wrestle with to what degree a commander's inaction contributed to an outcome or consequence. A careful examination of the Bemba case shows how the ICC handled causality, which suggests that the principle of command responsibility is very much open to new interpretations. In the Bemba case "The chamber considered 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."[87] According to the court, in order to determine the degree of causation, it would be necessary to apply "a criterion known in common law as a "but for test." This test asks "but for" the superior's failure to take necessary measures, would the subordinates' violations have occurred.[88]

The difficulty to assess causation goes to the fact that the responsibility of the superior is more the result of an omission than an action. Since few can predict the future, it would not be practical for the court to require the prosecution to prove exactly what would have happened if a commander had fulfilled his obligation to prevent crimes. Because one cannot empirically show what effect a commander's omission may have had on a crime, proving *causal nexus* is tenuous at best. In the Bemba case the ICC's Trials

[87] *Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424 (ICC PTC II, Jun. 15, 2009), 150-1.

[88] Ibid.

Chamber decided that it was only necessary to prove that the commander's omission increased the risk of the commission of crimes to secure a conviction.[89]

With regard to duty to prevent, the court determined whether the omission of the superior was the cause of the crime. The Rome Statute deals with this subject in these words:

> 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."[90]

The expression "as a result" confirms, in theory, the requirement of a causal link between the superior's behavior and the commission of the crime. Hence, the commander will be held responsible if the crimes took place as a result of his omission to prevent them. To assess a commander's failure, an action of the superior has to be materially possible as was the case in ICTY's Trial Chamber in the Celebici case stating, "Superiors should be held responsible for failing to take such measures that are within their material possibility."[91]

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[89] The ICC's Appeals Chamber reversed Mr. Bemba's conviction on June 8, 2018.

[90] International Criminal Court, *Rome Statute*, 19-20.

[91] *Prosecutor v. Zdravko Mucic*, 147.

Different Legal Standards and Legal Interoperability

The International Committee of the Red Cross defines legal interoperability "as a way of managing legal differences between coalition partners with a view to rendering the conduct of multinational operations as effective as possible, while respecting the relevant applicable law."[92]

International humanitarian law is applicable in any armed conflict. In the case of military coercive measures during multinational operations, the question arises about the rules that should apply, since troop-contributing countries do not subscribe to the same treaty commitments to international law. This situation regularly leads to divergences in the planning of multinational missions, in particular in the choice of targets. As stated by Samuel Goddard:

> States may differ not only in their substantive legal obligations, but in the way that they understand and interpret those obligations, in how they apply them to concrete situations, and in the amount of risk they are willing to bear that they subsequently might be judged as having been wrong. It follows that even where States' substantive obligations are the same, there is still significant latitude for divergence in the positions they adopt. Such differences may not be obvious and may not be known—or even knowable—in advance of a particular operation. However, they lead ultimately to situations where specific conduct may be deemed lawful by some States within a coalition, but unlawful by others [93]

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[92] ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 32-3.

[93] David Goddard, "Understanding the Challenge of Legal Interoperability in Coalition Operations," *Journal of National Security Law & Policy* 9, no. 2 (2017): 228, accessed April 7, 2019, http://jnslp.com/2017/08/04/understanding-challenge-legal-interoperability-coalition-operations/.

Given this fact, commanders in multinational operations play in an ambiguous situation. While they may be comfortable with the laws of their own country, they must also have a clear understanding of international law, the local laws, and the laws and customs of the various contingents working with them. Commanders need to sharpen their awareness of the legal environment. One of the main domains where the issue of different legal standards intersect is with the definition of military objective. For example, the definitions from the Additional Protocol I and the Manual for Military Commissions are quite different. The former defines military objectives as:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[94]

The Manual for Military Commissions states:

> Military objectives are those potential targets during an armed conflict which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack.[95]

While the Geneva Convention's definition is more restrictive, the Manual for Military Commissions broadens military objectives to war sustaining capabilities. The meaning given to the expression "effective contribution to military action" differs from

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[94] ICRC, *Protocols Additional to the Geneva Conventions of 12 August 1949*, 38.

[95] Secretary of Defense, *The Manual for Military Commissions, United States,* rev. ed. (Washington, DC: Department of Defense, January 12, 2017), IV, accessed March 26, 2019, https://www.mc.mil/Portals/0/pdfs/2016_Manual_for_Military_Commissions.pdf.

country to country. According to some states, only those objects directly involved in the enemy's combat effort are legitimate targets. The Manual for Military Commissions goes beyond the war fighting effort and includes anything that effectively contributes to the enemy's ability to sustain itself.[96]

According to Zwanenburg, issues related to this definition occurred in Afghanistan between the United States and its allies.[97] Some allies were reluctant to participate in air strikes when the targets did not fit their definition of a military objective. These differences in defining targets, which is of paramount importance for operations in a military coalition, show the complexity of the commander's position. Would a commander be responsible for violations of international law if the soldiers he commanded were from a different nation than his own and who had different interpretations of the law? Other possible issues include proportionality, combatant status, the notion of "enemy combatant," direct participation in hostilities, and detainee policies.

Command Structure: Geographical Remoteness and Non-traditional Command

Coalitions are complex systems. They are systematically marked by friction between political and military leaders across the spectrum of operations including

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[96] Marten Zwaneburg, "International Humanitarian Law Interoperability in Multinational Operations," *International Review of the Red Cross* 95, no. 891/892 (2013): 692, accessed April 7, 2019, https://www.icrc.org/en/international-review/multinational-operations-and-law.

[97] Ibid., 694.

strategic, operational, and tactical aspects. The presence of multiple lines of control complicates multinational operations, especially those under the control of an international organization. Sovereignty and national interests are of great importance to any troop contributor. Military forces are often under the influence of orders emanating from various sources. One of the biggest problems of command structures are the three chains of command in the theater of operations: orders from the country of origin, orders from the command of the operation, and directives from the leadership of the international organization sponsoring the coalition. Procedurally, the command lines are confusing. As sovereignty dictates it, states retain authority over their deployed forces.[98] From my own perspective, I explored this complexity while deploying in an ECOWAS (Economic Community of Western African States) mission in The Gambia. While all forces were under the command of a force commander, each contingent received orders from its national chain of command and multiple restrictions from the political leadership of ECOWAS. This state of affairs completely blurred the relations of subordination between the different units. It also considerably lessened the force commander's room for maneuver.

Another difficulty was the task organization of the multinational forces. The political considerations and restrictions prevented the force commander from setting the best grouping of contingents. Each contingent wanted to have a certain autonomy, which diminished the capacity of commander to enforce his control. The issue of command,

[98] Ian Wood, "Preparing for Coalition Command – The Three Ps: People, Processes, And Plans," *Canadian Military Journal* 8, no. 4 (2007): 46-52, accessed April 8, 2019, http://www.journal.forces.gc.ca/vo8/no4/doc/wood-eng.pdf.

control, and communications was one controversial aspect of the Yamashita case. Yamashita's defense maintained that the pressure from invading American forces prevented him from communicating with his forces and thus controlling his troops.[99]

The commander of a multinational operation can overcome this issue by conducting regular inspections of the areas under his command and exercising his duty to control troops and prevent abuses.

State Sovereignty

Some scholars credit the Peace of Westphalia and the rise of the modern state system with the concept of regional sovereignty. On the surface CR appears to present a challenge to the nearly 400-year-old concept of national sovereignty; while international courts claim the right to arrest those who commit war crimes, states resist the notion of handing over their citizens to an international body even for the most egregious crimes. This becomes even more of an issue when states link their cultural and political identities with their leaders. As pointed out by Bantekas, states rarely invite international surveillance, intrusion, or judgment of their military leaders and in some cases for good reason.

> It has been strongly argued that (i) prosecution on the basis of the doctrine of command responsibility is contrary to the interests of States in protecting their officials; (ii) heads of State, government members and chiefs of staff may potentially be prosecuted for the actions of persons on the battlefield with whom they have had no interaction; (iii) the ambit of the doctrine has been unnecessarily

[99] Parks, "*Command Responsibility for War Crimes*," 33

> widened to such an extent that even diligent commanders run the risk of being convicted if one "bad" subordinate violates *jus in bello.*[100]

Some states have not ratified the Rome Statute of the International Criminal Court because the court lacks accountability to a higher international body such as the United Nations Security Council. The judgments of the court can also run contrary to a state's foreign and security policies. For example, the court and a state may not hold the same criteria for *jus ad bellum* thus imperiling that state's military and civilian leadership. George W. Bush argued against Rome Statute ratification for the following reason:

> The United States cooperates with many other nations to keep the peace, but will not submit American troops to prosecutors and judges whose jurisdiction we do not accept ... Every person who serves under the American flag will answer to his or her superiors and to military law, not to the rulings of an unaccountable International Criminal Court.[101]

Commander's Limited Authority: Loosen Superior-Subordinate Relationship

One primary source of friction between coalition participants centers on the issue of command and control. Colonel Anthony Rice, a British army officer observes:

> The most contentious aspect of coalition operations is command and control. This sensitivity reflects the participants' concern over who will command their forces and what authority that commander will have. The converse is equally significant to military and political leaders in each nation contributing forces to a

[100] Ilias Bantekas, "The Interests of States Versus the Doctrine of Superior Responsibility," *International Review of the Red Cross* 82, no. 838 (2000): 391-402, accessed April 8, 2019, https://www.icrc.org/en/doc/resources/documents/article/other/57jqhp.htm.

[101] George W. Bush cited in Marlene Wind, "Challenging Sovereignty? The USA and the Establishment of the International Criminal Court," *Ethics & Global Politics* 2, no. 2 (2009): 83-108, accessed April 8, 2019, https://www.tandfonline.com/doi/full/10.3402/egp.v2i1.1973.

coalition: the degree of day-to-day control national authorities will have over the employment of their own forces.[102]

Political and Cultural Differences

Command tends to be more challenging in larger multinational forces owing to the increased requirement to build and manage relationships among a number of nations. The cultural challenges can encompass a variety of problems. One problem is the language differences. In the majority of international operations English is the official language. During the mission the commander will have to deal with different levels of language proficiency. The commander should assess the level of language knowledge among his subordinates and adjust his communications accordingly. Orders have to be written in a clear and understandable way. Simplicity and clarity are critical for good understanding between subordinates and commanders. Language misunderstandings can sometimes lead to tragedy and the inadvertent violation of international law. Moreover, political considerations influence the conduct of operations. Contributing countries can and frequently do place restrictions on the employment of their contingents.

Citizenship Differences in Multinational Operations

Not an Exemption for War Crimes

Before international tribunals existed, immunities of "acts of function" were generally invoked. Defendants argued that they performed their actions on behalf of their country. While this defense was frequently made before the International Military

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[102] Anthony Rice, "Command and Control: The Essence of Coalition Warfare," *Parameters* 27, no. 1 (1997): 152-67, accessed April 8, 2019, https://ssi.armywarcollege.edu/pubs/parameters/articles/97spring/rice.htm.

Tribunal at Nuremberg and the ICTY, all the statutes defining the jurisdiction of the international criminal tribunals expressly excluded this form of defense. Article 7 of the Charter of the Nuremberg Tribunal states "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment"[103] The Nuremberg tribunals held individuals responsible for carrying out wars of aggression but denied state acts as a defense that would have justified such actions on grounds that they were within the prerogatives of a sovereign state. The Nuremberg trials represented a radical change in the classic model of international responsibility. In rejecting the so-called defense of the State Act, the Nuremberg Tribunal recognized the individual as subject to international obligations. The creation of international tribunals followed this trend. According to the terms of the ICTY in the Blaškić case "the primary jurisdiction of the International Tribunal, namely its power to exercise judicial functions, relates to natural persons only. The ICTY can prosecute and try those persons who are allegedly responsible for the crimes defined in Articles 2 to 5 of the ICTY statute." [104]

By principle, the violation of international law leads to individual responsibilities. Persons commit crimes, not abstract entities such as states. The citizenship is not

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[103] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"),* 8 August 1945, accessed March 16, 2019, https://www.refworld.org/docid/3ae6b39614.html.

[104] *Prosecutor v. Blaškić Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)*, IT-95-14 (ICTY, AC, October 29, 1997.

relevant; individuals are prosecuted without consideration of their nationality. Some states may have some legal dispositions to prevent the condemnation of their military personnel by international justice. Senator John Ashcroft, a U.S. Foreign Relations Committee member and later the Attorney General in the George W. Bush administration, argued that an international criminal court will compromise sovereignty in a fundamental manner and stated: "If there is one critical component of sovereignty, it is the authority to define crimes and punishment. This court strikes at the heart of sovereignty by taking this fundamental power away from individual countries and giving it to international bureaucrats."[105]

While Ashcroft doesn't argue for the immunity of military leaders from international prosecution, he does vigorously oppose any international body encroaching on the authority of a state to govern itself.

Irrelevance of Official Capacity (Article 27, ICC)

The term "official capacity" is used in Article 27 of the Rome Statute to describe a principle that titles cannot be used as a reason for immunity against prosecution. The Rome Statute states:

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal

[105] David Nill, "National Sovereignty: Must It Be Sacrificed to the International Criminal Court?", *Brigham Young Journal of Public Law* 14, no. 1 (1997): 134, accessed March 15, 2019, https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1257&context=jpl.

> responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[106]

The ICC Statute expressly denies the existence of privileges that may impede the implementation of liability. There is no ambiguity that these rules exclude immunity or protection for the wrongdoer. The accused cannot plead that he was acting on behalf of the state as a criminal defense. The historical development of this article must be understood in the context of individual criminal responsibility for crimes punishable under international law. Such crimes are mostly committed with the direct or indirect involvement of persons acting in their official roles. For example, military leaders who either take an active part in the commission of such crimes or order their subordinates to execute a punishable act cannot hide behind their official status. The official capacity cannot in any way justify impunity of a military leader. This simply confirms that no exception is accepted, since no official function, *de jure* or *de facto*, constitutes a barrier to criminal liability. The ICTY in the Blaškić case confirmed this position by stating that according to the norms of customary international law, those responsible for war crimes cannot invoke immunity from national or international jurisdictions, even if they committed these crimes as part of their official duties.[107] The procedural consequence is that the court does not have to make specific inquiries as to the position held by the defendant when he committed the crime. Since heads of state are not afforded immunity based on position, one can infer that military commanders are not granted it either. Since

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[106] International Criminal Court, *Rome Statute*, 19.

[107] *Prosecutor v. Blaškić,* IT-95-14, Section II, para. 40.

no function can serve as a basis for immunity, it is not necessary to distinguish between functions exercised legally, de facto, or simply claimed. The persons mentioned must be treated like all other suspects.

State Sovereignty Should Not Prevent the Prosecution of War Crimes

There are concerns among some states that have a critical view of the ICC that entrusting so much power in an international organ infringes the sovereignty of a state. Seeking to address this, the Rome Statute includes the mechanism of "complementarity" whereby the state in question has the priority to prosecute cases that it has jurisdiction over. The jurisdiction of the ICC intervenes when the state in question is "unwilling or unable" to prosecute a case.[108]

Necessity to Designate the Competent Tribunal for CR Trials before the Deployment of Multinational Operations

The different legal standards between troop contributing nations drive the necessity to decide the type of tribunal for crimes under CR. The decision should address the jurisdiction that will try CR cases. Three choices are possible. A tribunal from the country of the commander can be designated. In this case, a national jurisdiction will investigate and prosecute the commander while soldiers will be tried in a court from their respective countries. This solution respects the sovereignty of each country. This approach has some shortfalls if one considers that the CR is not an autonomous offense. The responsibility of the commander cannot be engaged if the offenses of the

[108] International Criminal Court, *Rome Statute*, 13.

subordinates are not confirmed by a court. The trial of the superior must wait until the conviction of the subordinates.

The second way to set a competent tribunal is to prosecute the superior within the jurisdiction of the soldiers' country. This is less desirable because it doesn't consider the sovereignty of states and implies the superiority of one state over another one.

The third option is to set the ICC as a neutral tribunal to hear all cases dealing with CR. In this instance the ICC will investigate and prosecute all parties charged with an international crime. This can be a workable solution if the countries involved have ratified the Rome Statute. If one country doesn't belong to the ICC, this solution would require an authorization from the country who is not a member. Designating competent tribunals prior to employment of a force is of paramount importance as it represents the first step in applying CR in multinational operations. This decision should not wait until violations of CR happen.

The Criteria of CR Application in Multinational Operations

A Commission of a Crime under International Law

The question is whether the commander's responsibility is tied to the completion of a subordinate's crime. With regard to several national laws, the question would be whether the offense concerned is either what is known as a material offense or a formal offense (offense of endangerment). The first category encompasses the offenses that contain as a constituent element of the crime the violation of a specific interest, insofar as behavior to be criminally punishable must have produced effects. The formal offense refers to those behaviors that are criminally punishable for the simple fact of being

dangerous even if they did not have negative effects. One example is drunk driving, which is punished for the simple act of being dangerous without the need for anybody to be hurt.

In view of the ICC, the simple failure of a commander in the exercise of adequate control over his subordinates is not criminally punishable if such failure does not result in the commission of a crime. The same cannot be said under certain codes of military justice, which allows disciplinary proceedings against a superior who has not properly performed his duties. The question is of interest in the case of genocide. According to the *Elements of Crimes*, genocide is constituted when there has been the murder of one or more non-combatants. [109] It is not required that millions of people die. If a superior knew or had reason to believe that his subordinates were acting in a genocidal manner, he could be held criminally responsible for the killing of just one person. The term "committed" must always be interpreted in light of the constituent elements of the crimes within the jurisdiction of the court. This interpretation is also interesting in relation to the question of the removal of the principal. It follows from the Rome Statute that abandonment of the commission of the crime by the principal perpetrator may acquit the superior of his criminal responsibility.[110] The commander incurs no responsibility in a situation where he intervened to stop the commission of crimes as soon as he knew or had reason to know that the crime was happening.

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[109] International Criminal Court, *Elements of Crimes* (The Hague: International Criminal Court, 2011), 2, accessed March 20, 2019, https://www.refworld.org/docid/4ff5dd7d2.html.

[110] International Criminal Court, *Rome Statute*, 19.

The same conclusion follows when a commander remains passive but where the withdrawal of perpetrators averted a crime. Can a commander still be charged in this instance? As noted earlier, the commander's responsibility is not a crime in itself: it requires the commission of a crime by subordinates. On this subject the Rome Statute is clear: participation is always the accessory to the main crime. Holding a superior more accountable than the principal author of the crime would not be justice.

A Violation of the Rules of Engagement (ROE) Settled within the Multinational Operation

In order for the military commander to be sanctioned under CR, he must also violate the ROEs of the operation. In fact, only violations of ROEs can serve as a basis for prosecution of war crimes. In this case the authority that issued the ROEs would be criminally responsible if the ROEs contradicted international law. If the commander has not broken any rules established by the coalition, he does not incur responsibility in the same way his subordinates do.

Effective Subordinate Relationship

For a court to hold a superior criminally responsible for failing to prevent or punish the crimes of a subordinates, a prosecutor first must show that one was in a relationship of subordination with those who committed the crimes.[111] Such a relationship may exist either *de jure*, a relationship established by law, or *de facto*, in the

[111] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic, Judgement,* IT-96-23-T & IT-96-23/1-T (ICTY, TC, February 22, 2001), 132.

sense of a relationship of subordination forged in factual and personal factors connecting the accused to the perpetrators.[112] The requirement of a subordination relationship between the commander and the perpetrators does not require a direct or formal subordination. A hierarchical relation within the framework of CR is between two individuals: a superior on one hand and a subordinate accused of a crime on the other.

A superior-subordinate relationship relevant to the CR principle is interpersonal in substance. The fact that the defendant was in charge of a particular entity or was responsible for a particular mission is not sufficient to establish such a link. Given their position and functions, the perpetrators and the commanders must establish a subordination relationship known to both parties. This awareness means that a person cannot become a superior without being aware of his position of authority vis-à-vis other people.

In multinational operations, this affiliation is critical. Before a multinational commander can be subject to CR, he must be aware of his hierarchical position towards subordinates and therefore conscious of his duty to prevent and punish crimes of those subordinates. He must also accept or actually occupy his position. By accepting such a hierarchical position, the commander may be presumed to have consciously adhered to the duties under international law which are the corollary of such positions, including the duty to ensure that subordinates do not commit crimes or to punish them when they do.

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[112] *Prosecutor v. Laurent Semanza, Judgement and Sentence,* ICTR-97-20-T (ICTR, TC III, 15 May 2003), 122.

The Exercise of Effective Control

As soon as there is this kind of relationship between the chief and the subordinates, the first may incur a responsibility for the acts committed by the second. However, belonging to a chain of command is not sufficient in itself. The superior must have formal authority over the units accused of having committed the crimes and be able to exercise control over them. Otherwise we would face a form of objective responsibility, as was the case with Yamashita. According to the Tokyo trial charter, a superior is criminally responsible for the acts committed by his subordinates without the necessity to prove his effective control and to consider the circumstances in which the facts took place. The Nuremberg trials, however, rejected the notion commander's responsibility without effective control of forces by stating

> Criminality does not attach to every individual in the chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part."[113]

If applied today, the courts would rule the Yamashita standard unjust. Under this standard, a leader would incur responsibility for the simple act of holding a high office and for failing to prevent the commission of crimes despite the ineffectiveness of his command and control. General Yamashita was held responsible for the atrocities committed by members of the Japanese armed forces even though at the time of the events he might not have been in a position to exercise effective control over them. In the

[113] *Trials of War Criminals before the Nuernberg Military Tribunals,* vol. 11, *"The High Command Case," "The Hostage Case,"* 543-4.

light of current international criminal law, CR requires evidence that the powers are sufficiently effective for criminal liability to be connected to them. A superior can be held responsible only for the activities that were under his actual responsibility and control. A multinational commander would have to answer only for actions that were under his competence and where he could actually intervene.[114] It is possible that a person notwithstanding his status on paper does not exercise *de facto* command; under such conditions he could not be prosecuted under the CR principle. In the Halilovic decision the ICTY Chamber noted that when a command position is not accompanied with the duty and authority to prevent and punish crimes, it cannot serve as a basis for determining whether the person was in a position to exercise effective control over the perpetrators.[115]

In coalitions alliances this is particularly true for senior officers such as generals, for whom there is a tendency to attach responsibility for any crime committed by the lowest ranking subordinates. It is therefore important to distinguish moral obligations from legal obligations.

Effective Control either by Command or by Authority

A chief in a multinational operation incurs responsibility for crimes committed by a subordinate only if he exercises effective command and control over him. Forces under the effective command and control of a commander are the forces subordinate to that

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[114] *The Prosecutor v. Ignace Bagilishema, Judgement,* 95-1A-T (ICTR, TC I, June 7, 2001).

[115] *Halilovic, Judgement,* November 16, 2005.

commander within a *de facto* or *de jure* chain of command and to whom he may give orders. These orders may be transmitted directly or through a subordinate intermediate commander. When several chains of commandment coexist like in multinational operations, the responsibility should be assigned to the chain of command that holds the authority to issue orders relating to the conduct of operations.

The requirement of effective control and authority was introduced in order to deal with situations where a person exercises *de facto* authority, command, or control over other persons who do not belong to his chain of command or his army. The High Command case makes an interesting distinction between the duties of a tactical commander and a territorial commander.[116] In this case, the court addressed the question of a territorial commander who unlike a tactical commander, is not in charge of the troops assigned to him, but a territory. In addition to their operational responsibility, territorial commanders have authority as commanders of occupied areas and as such may issue orders to all forces in the occupied territory. These dispositions can be extrapolated to the situation of the multinational commander who, sometimes according to the agreements setting the operation, does not have effective command and authority over his subordinates from foreign countries. However, like the territory commander, he will still have the duty to enforce international laws within his area of responsibility.

[116] *Trials of War Criminals before the Nuernberg Military Tribunals,* vol. 11, *"The High Command Case," "The Hostage Case,"* 543-4.

Knowledge of the Commission of a Crime

The Existence of an Effective Knowledge

Effective knowledge can be defined as the consciousness of the commander that crimes were committed by his subordinates or about to be committed. Either direct or indirect evidence can establish this actual knowledge and must show that the commander was aware of the commission by one of his subordinates of the crime in question.[117] Concerning the question of whether this knowledge can be presumed, the Bemba decision brings a dichotomy in argument.[118] In its decision, the Pre-Trial Chamber affirmed that this knowledge cannot be presumed and rejected the argument developed in Brdanin case that "Knowledge may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so."[119]

Knowledge Cannot Simply be Inferred from the Position Occupied by the Superior

For example, to establish that the superior in a multinational operation had the required knowledge, one could take into account the type and scope of the illegal acts, the period during which they occurred, the number and type of soldiers who participated in them, the logistical means that were used, the geographical location of similar illegal acts,

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[117] *The Prosecutor v. Jean-Pierre Bemba Gombo, Judgment,* ICC-01/05-01/08 (ICC, TC III, March 21, 2016), 206.

[118] Ibid.

[119] *Prosecutor v. Radoslav Brdanin, Judgement,* IT-99-36-T (ICTY, TC II, September 1, 2019), 119.

the officers and the personnel involved, and the location of the commander at the time the acts were performed.[120] In the case against Delalic, the prosecution established his superior responsibility through his territorial authority over the Konjic region of Bosnia Herzegovina, his command of the Celebici prison camp, which was within the region, and his direct participation in the torture and murder of prisoners. In rendering its guilty verdict, the court determined that Delalic had effective knowledge through direct participation of crimes committed at Celebici, the authority to issue orders for the prison camp and the region, which meant he was involved with camp operations, and influence through his personal wealth. [121]

Another form of knowledge recognized under customary law requires the prosecution to show that the superior had some information indicating the commission of crimes by his subordinates. Showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates, would be sufficient to prove that he had reason to know. The information does not need to clearly indicate the commission of crimes, but it must be clear and alarming enough to indicate the high probability that violations of international law were committed. General knowledge of an environment in which crimes are committed does not provide sufficient evidence to engage the responsibility of a superior.[122] The psychological element of the

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[120] *Prosecutor v. Delalic*, IT-96-21-T.

[121] Ibid.

[122] *Prosecutor v. Ignace Bagilishema, Judgement,* ICTR-95-1A-A (ICTR, AC, July 3, 2002).

"had reason to know" criterion is what determines the information that was actually available to the superior at the time. The ICTY Appeals Chamber stated that "a superior can be held criminally responsible if he had at his disposal particular information warning him of the offenses of his subordinates."[123]

A Failure of Duty to Prevent, Report, and Punish the Crimes

The Duty to Prevent

As pointed out in Article 87 of the Protocol Additional I, the commander must take all possible measures to ensure his forces comply with the law of armed conflict.[124] Commanders must at least take all necessary measures to prevent the commission of crimes by their subordinates, or if these crimes have already been committed, punish them. The spectrum of measures can be very wide. In the Bemba case the ICC provided some indications of conceivable measures. They consisted of:

> (i) to ensure that superior's forces are adequately trained in international humanitarian law; (ii) to secure reports that military actions were carried out in accordance with international law; (iii) to issue orders aiming at bringing the relevant practices into accord with the rules of war; (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command.[125]

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[123] *Prosecutor v. Tihomir Blaskic, Judgement,* IT-95-14-A (ICTY, AC, July 29, 2004), 22.

[124] ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),* 43.

[125] *Prosecutor v. Jean-Pierre Bemba Gombo, Claim for Compensation and Damages,* ICC-01/05-01/08 (ICC, PTCIII, March 19, 2019), 156.

The duty to prevent crimes begins before a violation of law happens. It belongs to the operational and tactical superiors on the ground to discern the early clues of indiscipline. The obligation of multinational commanders and their staffs to prevent crimes is essential for the preservation of law and good order. When a superior gains awareness that subordinates are about to commit an offense, duty requires effective measures to prevent the criminal action. The duty to prevent is distinguished from the duty to punish by the fact that these responsibilities are two distinct categories of offense. While the duty to punish focuses on crimes already committed, the duty to prevent centers on actions taken to prevent injury.

The duty to prevent a crime starts when a superior gains knowledge of the planning or preparation for committing a crime. The multinational commander must act to discourage the criminal intentions of his subordinates so the crime is never carried out. The duration of the obligation to prevent crimes lasts for as long as the superior is aware of criminal intent or his hierarchical position with allied subordinate's ends.

The Duty to Punish

The duty to punish requires the superior to take the necessary and reasonable steps to ensure that the crimes committed by his subordinates are investigated and the culprits punished. This does not require the superior to personally carry out the punishment. He may delegate this responsibility to a competent subordinate from the same country to which the offenders belong or refer it to the competent hierarchy. A military superior's duty to punish starts after the commission of a crime and only when

there has been sufficient information gathered to conclude a crime has taken place.[126] Once the commander knows that a subordinate has committed a crime, the commander has the obligation to act. The commander's duty to punish stops when he is relieved of his duties by his superior or when the responsibility for conducting an investigation has been transferred to an authority that is not subordinate to him. In multinational operations, the commander of foreign troops must be conscientious in his duty to punish violations of international law. He has to set the proper tone for all the contingents under his command and control. This discipline enables him to show the binding character of ROEs within the coalition. The ICTY states that "this failure to punish on the part of a commander can only be seen by the troops to whom the preventative orders are issued as an implicit acceptance that such orders are not binding."[127]

The Duty to Refer the Matter to the Competent Authorities for Investigation and Prosecution

The relationships between the different troops within a coalition can sometimes prevent a commander from punishing soldiers from a different country. If a superior lacks authority to punish a subordinate who has committed a crime, then he must refer the case to competent authorities. As the ICTY Trial Chamber points out, "A commander may

[126] *Prosecutor v. Fatmir Limaj, Haradin Bala, and Isak Musliu, Judgement,* IT-03-66-A (ICTY, AC, September 27, 2019), 92.

[127] *Prosecutor v. Halilovic, Judgment,* IT-01-48-T (ICTY, TC IA, November 16, 2005), 38.

fulfill his obligation to prevent or punish by reporting the matter to the competent authorities."[128]

Necessary and Reasonable Measures

A violation of command responsibility requires evidence of a failure on the part of the chief to "take the necessary and reasonable measures to punish or prevent the crimes of his subordinates."[129] What is "necessary and reasonable" in a particular situation will depend largely on the specific circumstances of the case and the real or perceived material ability of the superior to prevent or punish criminal acts.[130] In the Strugar case, the decisive factors considered by the trial chamber included:

> Whether specific orders prohibiting or stopping the criminal activities were issued, what measures to secure the implementation of these orders were taken, what other measures were taken to secure that the unlawful acts were interrupted and whether these measures were reasonably sufficient in the specific circumstances, and, after the commission of the crime, what steps were taken to secure an adequate investigation and to bring the perpetrators to justice.[131]

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[128] *Prosecutor v. Tihomir Blaškić, Judgement,* IT-95-14-T (ICTY, TC, 3 Mar 2000), 106.

[129] *Prosecutor v. Delalic*, IT-96-21-T, 66.

[130] *Prosecutor v. Tihomir Blaškić, Judgement,* IT-95-14-T (ICTY, TC, 3 Mar 2000), 96.

[131] P*rosecutor v. Pavle Strugar, Judgement,* IT-01-42-T (ICTY, TC II, 31 January 2005), 157.

The commander in a multinational operation has to perform these actions in order to avoid condemnation under CR. If a superior were to omit a step, then the omission must be reasonable within the circumstances of the situation to avoid prosecution.[132]

The Implications of CR for Commanders of Multinational Operations

Ensure All the Troops Have the Proper Training to Prevent War Crimes

Some governments and militaries do not adequately train troops to recognize and avoid violations of IHL. In countries where troops receive little or no education about the law of war, abuses can be unintended, accidental, unpremeditated, and involuntary. Consequently, it is incumbent for commanders to train soldiers about acceptable conduct in war.

State governments in connection with high-level military officials should work to develop and implement legal training as a prerequisite for all those seeking to join a coalition. Commanders must be responsible for ensuring that it occurs vigorously, properly, and regularly. High standards of training on violations of international law must exist among the contributing forces even if those forces are added late in the operation.

> a . . . commander operating with a realistic and pragmatic approach would acknowledge that he will seldom be able to choose coalition members and designated forces, so it is vital at the outset that he learns to effectively assess, and thus, better employ the national forces that have been contributed to the coalition mission[133]

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[132] *Prosecutor v. Milorad Krnojelac, Judgment,* IT-97-25-T (ICTY, TC II, March 15, 2002), 38.

[133] Wood, "Preparing for Coalition Command – The Three Ps: People, Processes, and Plans," 46-52.

While the commander cannot choose his forces, he must be aware of their level of training and implement corrective action even if in a field environment.

Strict Interpretation of ROE

The ROE are directives issued by a competent military authority and specify the circumstances and limits under which military forces may undertake and continue operations. ROE reflect compliance with international law and the amount of military force needed to accomplish the mission. ROE are the commander's directives for regulating the use of force and serve as the cornerstone for good order and discipline without forfeiting the right to defend oneself and others. The legal sources that provide the foundation for ROE include customary and principles from the laws of war.[134]

The rules of engagement are typically set at the beginning of an operation. These rules define in detail the conditions under which military force is used. The designated commander of the operation proposes the rules of engagement. Rules of engagement (ROE) are essential to the planning and execution of operations without the use of excessive force. In a multinational framework executives of the participating countries review ROE and adopt them by consensus. Consensus among participating military forces are not always smooth and easy. Military commanders of national forces may think the ROE are either too restrictive or permissive especially when standards do not

[134] International and Operational Law Department, The Judge Advocate General's Legal Center & School, U.S. Army, *Operational Law Handbook,* 16th ed. (Charlottesville, VA: The Judge Advocate General's Legal Center & School, 2016), accessed April 9, 2019, https://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2016.pdf.

coincide with national objectives or public sentiment. Goddard offers a solution when allies disagree over the amount of force permissible.

> Participants may all agree to operate according to a common set of rules, each rule defined by the most restrictive position from amongst the coalition members. In theory, this should then mean that any conduct undertaken under the auspices of the coalition will be lawful with respect to the legal position of every participant.[135]

This restrictive position is the most suitable for avoiding issues with command responsibility. Settling on the most restrictive standards ensures cooperation among allies and a common understanding of conduct."[136]

[135] Goddard, "Understanding the Challenge of Legal Interoperability in Coalition Operations," 229.

[136] Alan Cole, "Legal Issues in Forming the Coalition," in *The War in Afghanistan: A Legal Analysis*, vol. 85, ed. Michael Schmitt (Newport, RI: US Naval War College International Law Studies, 2009), 147, accessed April 9, 2019, https://apps.dtic.mil/dtic/tr/fulltext/u2/a605283.pdf.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

Reaffirmed by the Rome Statute, the responsibility of the military superiors is the result of a long building process. This principle was most famously used to sentence to death General Yamashita of Imperial Japan for crimes committed against civilians in the Philippines. Since that time, it has been included in a number of international law instruments, including the rules for the international ad hoc tribunal and the Rome Statute of the International Criminal Court. Article 28 of the Rome Statute is a synthesis of the different developments and evolutions since World War II regarding superior responsibility.

Today, a strict legal regime frames the implementation of Article 28. According to the existing case law, the applicability of CR is tied to four major elements. First, individuals who were about to commit or who had committed an offence. Second, a superior-subordinate relationship exist between the individuals. Third, the superior knew or had reason to know that the offence was about to be committed or had been committed. Finally, the superior failed to take necessary and reasonable measures to prevent the commission of the offence or punish the perpetrators. Although CR has a precise legal nature, it still open to a variety of interpretations. Multiple questions arise among scholars such as responsibility for complicity; dereliction of a superior's duty to control, prevent or punish; liability for the crimes committed by subordinates; and applying CR in multinational operations. This last item deserves special focus and

attention as coalitions are becoming the norm rather than the exception in military operations. Like national commanders, coalition leaders carry an obligation to comply with international law.

The liability of the commander of a multinational force for acts committed by soldiers from another country may vary depending on the type and degree of command he exercises over the national contingents during the operation. For example, a commander exercising operational command and control over forces from another country would not have enough authority to administer some disciplinary sanctions over these forces. The possibility also exists for the commander of multinational forces to require the cooperation of the national disciplinary channel to punish a soldier.

Ultimately, extending the CR to multinational commanders raises some substantive issues. Imposing criminal responsibility on a commander for the misconduct of subordinates reinforces the assumption that the commander possesses the authority to control subordinate conduct. However, coalition commanders lack prescriptive and disciplinary authority over subordinate forces from other nations. While these commanders can issue directives, they generally rely on national command authority for the imposition of sanctions for non-compliance with these directives. In this regard, the command authority of a coalition commander is not as far reaching as that of a national commander.

Applicability of CR to multinational commanders will require sufficiency of control over non-national subordinates that is normally vested in a coalition commander. The extent of this control would arguably dictate the legitimacy of imputing

responsibility for the misconduct of those subordinates to the coalition commander. An aspect of this analysis may include an assessment of the ability of the coalition commander to influence disciplinary actions over subordinate forces.

In multinational operations, national contingents are under operational command or operational control of a supreme force commander. His authority over the troops will depend on national restrictions, which may manifest themselves through rules of engagement, targeting limits, and participation in non-combat roles. In many cases, nations will retain and exercise disciplinary and penal authority, reducing multinational authority to influencing behaviors. Whether influence alone could ever justify criminal prosecution under command responsibility has not been tested in the courts. The recent successful appeal of Jean-Pierre Bemba Gombo along a similar argument gives the indication that international courts and especially their appeals chamber will side with the defendant where command and control cannot be proven. While the level of command and control may not in itself be sufficient for a successful defense, as was seen in the Yamashita case, it does dictate the options available to a commander when faced with the responsibility of a subordinate's poor conduct.

The effective authority over national contingents will be a strong point of debate for command responsibility. If past decisions of international courts are any indication of future verdicts, command, control, knowledge, and action will be the key elements in the legal doctrine of hierarchical accountability for war crimes.

Recommendations

Necessity of Clear Command Structure

The troops in a multinational operation are not always fully under the control of the lead nation. Contributing nations retain some control over disciplinary matters, hold exclusive criminal jurisdiction, and maintain the right to withdraw their troops from an operation. States can even place some restrictions on the use of their troops; these restrictions are binding upon the Force commander. In a multinational operations, it is often the command and control at the operational level that is transferred between the contributing and lead nation. Command and control provisions should be clearly defined and agreed upon prior to deployment. It is necessary to establish the responsibilities at all levels of the command structure by specifying the procedures and working relationships in the context of the mission.

A reports mechanism is also critical to establish. The key element within the structure of command is the necessity of the commander to acquire all the information about the activities of the different contingents. The tasks they perform in their areas of operations must be directed through the lead nation. During the mission, the Force commander should be free to use the international resources at his disposal as efficiently as possible and within the limits of the mission's mandate. Command and control must meet the requirements of responsiveness and flexibility with the delegation of authority to the most appropriate level of command.

Unity of command is of paramount importance for upholding international law while operating within a multinational force. Joint Publication 3-16 stresses unity of

command by stating that "participating nations should strive to achieve unity of command for the operation to the extent possible, with missions, tasks, responsibilities, and authorities clearly defined and understood by all participants."[137] The most important element to consider is that the commander of a multinational operation must retain enough command and control over his assigned forces to accomplish the mission while maintaining good order and discipline. National restrictions and conditions placed on a coalition have an adverse effect on achieving a common purpose. While multinational operations create opportunities, they also carry limitations; commanders must be able to work within that paradox and find a balance between operational effectiveness and compliance with international law.

Integrated Staff and Appointment of Liaison Officers

Development of a mutual understanding of the operation is crucial to the success of multinational operations. Preventing issues in command responsibility relies on effective communication among the contingents. Barriers to effective communication include language difficulties and differences in the way national contingents interpret information, ROEs, and professional conduct. Establishment of an integrated multinational military staff with representation from all member states is essential for exercising effective command of a combined military force. Liaison officers (LNOs) play a critical role in facilitating multinational command and control through enhancing the quality of awareness and communications among coalition partners. Command and

[137] JCS, JP 3-16, II-7.

control arrangements should include ways to organize liaison teams and the selection of headquarters elements with which close cooperation is required. LNOs should be well-informed on the expectations of the Force commander and should have a sound understanding of the senior headquarters legal standards and mission priorities. The establishment and continuance of the link between the headquarters and the different contingents rely primarily on the LNO's daily activities. The LNO also serves the purpose of providing updated information about his national contingent.

Request the Presence of Legal Advisor

In multinational operations it is crucial for commanders to have legal advisors deployed with their staffs. The complexity of the law of armed conflict drives the need for the leadership to rely on legal expertise. Contributing forces have to consistently include a legal officer to advise the multinational commander on legal matters including the application of international humanitarian law. For example, in Senegal, in recent years, the practice of sending a legal officer to accompany the Force commander was not observed. This situation led to major issues if the commander has to solve complex cases requiring legal expertise on his own. The integration of a legal advisor in the deployed staff has to become habit. Legal advisors can provide advice on legal standards, military operations, and on issues such as targeting, military objectives, detainees, and self-defense. The addition of a legal advisor from each contingent could also assist the Force commander's counsel understand a contributing nation's legal codes. Understanding another nation's laws and sentiments has the benefit of achieving practical solutions that all forces can live with. Should differences prove challenging, counsel could define

procedures on the best way to solve disagreements amicably. The legal advisor may assess for the commander whether or not a national commander is operating within the legal boundaries of the operation. As legal standards become increasingly complex for the non-expert, the legal advisor could provide useful support for the commander to resolve interoperability friction.

Investigate all Violations and Report them to Higher Echelons

The commander has to develop concrete strategies focused on the investigation and prosecution of crimes and facilitate the flow of information to the competent authorities if his own authority is insufficient to take adequate measures. It is important that the commander conducts investigations and reports findings in a manner that maintains good order and discipline. In cases where the multinational commander lacks the authority to prosecute criminal behavior, he always has the option of reporting the results of his investigation to the authority who can mete out justice. While there is always the likelihood that unfavorable news will trigger an investigation or disciplinary action at the national level, this is the obligation that international law and courts place on commanders.

Multinational commanders must also report infractions they do not have the authority to adjudicate to their higher command. Reporting cases to a staff or liaison officer from the offending contingent is not sufficient to exonerate a commander from his command responsibilities. The report must go to the echelon that has the authority to take corrective steps.

ROE Clarity and Common Understanding of the Legal Framework

Multinational operations require extensive coordination in all areas including ROE. Operations face significant challenges in developing and maintaining an effective level of collaboration and coordination, notwithstanding the inherent differences between national approaches to issues from detention to the use of force. Incompatibilities with regard to ROE can prove to be one of the most difficult obstacles that multinational operations face. ROE must provide detailed guidance on the use of force. Given the nature of coalitions and the sovereignty of the contributing states that do not share the same domestic laws, developing ROE requires negotiation and consensus. In multinational operations, commanders and staffs should establish enduring relationships with their counterparts from partner countries. Harmonious relations among participants in multinational operations will improve teamwork, overall unity of effort, and accountability.

Include the CR Principle in Leadership Training for Military Commanders

Discussing my thesis with colleagues reveals a fair amount of misunderstanding about CR. My observation is that CR is not well known among professional military officers, the very group who would benefit the most from additional training. CR should be part of professional military education as few courts are inclined to accept ignorance as a competent defense. The commander's checklist at the end of this chapter offers a kind of ontological truth regarding the fundamental nature of command responsibility in multinational operations. While it is certainly not a fail-safe method for keeping commanders out of trouble, it does serve as a starting point for situational understanding

and planning. Although CR does not rise to the level of importance in professional military education as does the military decision making process or the Joint planning process, perhaps it should. The violation of international law, even if unintentional, could result in prosecution of the perpetrator, national embarrassment, and grave and lasting harm to the victims of the crime.

Commanders Check List

1. ROEs must be clear, concise, and understood down to the soldier level
2. Distribute of ROE cards to all coalition forces and in their language.
3. Develop situational training exercises focused on the application of ROE. Use ROE during war gaming to test for unacceptable levels of force.
4. Establish reporting mechanisms to be executed on a daily basis
5. Deploy local law enforcement officers with all the contingents
6. Conduct a prompt inquiry into all cases where lethal force was used.
7. Promptly and accurately record the facts and report them to the competent authorities.
8. Initiate legal investigations into all suspicious activities
9. Focus attention on the treatment of detainees and civilians.
10. Include legal counsel in all targeting planning.
11. The commander must have contact with the national level of command for each contingent, especially where disciplinary authority has been withheld from the commander.

12. Ensure that soldiers have clear standing operating procedures (SOPs) on the treatment of detainees and the use of the lethal force
13. Adequately supervise military forces including regular visits to the subordinate commanders
14. Enforce military discipline throughout the command. Most of the time, abuse starts when discipline is lax.
15. Take corrective action regarding ineffective subordinates especially those in command or who serve in critical positions.
16. Take vigorous action against soldiers who violate the ROE, local laws, or the laws of land warfare.
17. Institute inspections to gain situational awareness and understanding; conduct the necessary checks to show soldiers that leadership cares about them and how they conduct themselves.
18. Ensure that the soldiers responsible for sensitive duties such as detainee interrogation know, understand, and follow the requirements of the Geneva Conventions.
19. Establish a command climate of zero tolerance for violations of the laws of land warfare.
20. Acquire and review information about coalition leadership, unit records, and deployment history
21. Assess unit training and awareness of the laws of armed conflict and the Geneva Conventions

22. Ensure national caveats do not raise issues that would lead to violations of international law.
23. Set effective report mechanisms to document and enforce the flow of information.
24. Build relationships with local authorities and NGOs. Use information sharing platforms to keep the civilian population and its leaders informed and that creates confidence and trust in coalition forces.

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