

December 14, 2011

Command Responsibility in the International Tribunals: Is There a Hierarchy?

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This essay considers the extent to which the International Criminal Court has drawn on the jurisprudence of other international criminal tribunals in the field of command responsibility. The essay reviews the ICC's first decision interpreting the Rome Statute's provision on command responsibility (Article 28), *Prosecutor v. Jean-Pierre Bemba*, (the decision confirming the charges June 15, 2009). It proceeds to analyze how the *Bemba* decision utilized the case law of the ad hoc tribunals, such as the International Criminal Tribunal for the former Yugoslavia, and other international criminal tribunals in its interpretation of Article 28. The question is then considered whether the ICC's use of this jurisprudence is a positive development. It is argued that this development is positive for a variety of reasons having to do with both the evolution of the doctrine of command responsibility and the institutional nature of the ICC.

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1. Introduction

This essay will examine the evolution of the doctrine of command responsibility in the international criminal tribunals and endeavor to determine whether a hierarchy has emerged in the jurisprudence. Command responsibility holds officers accountable for the crimes of their subordinates even when they were not personally involved in those crimes. By imposing a duty on superiors for the prevention or punishment of illegal conduct, the doctrine aims to protect civilians and noncombatants in armed conflict and promote deterrence¹. Prosecutions based on a theory of command responsibility are complex and invariably reflect a tension between the goals of affording maximum protection to civilians and noncombatants while also protecting the rights of the accused commander. The tension is especially acute where, as in the case of the ad hoc tribunals and the International Criminal Court (ICC), prosecutorial resources are directed at the most senior military and political leaders.² These senior military leaders are often removed from the theatre of operations, limiting the information immediately available to them about the conduct of their subordinates. When efforts are made to hold them accountable, they frequently disclaim knowledge of their subordinates' crimes. The

¹ See A. Danner and J. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', 93 *Calif. L. Rev.* 75, 148-149 (2005).

² See Rome Statute of the International Criminal Court, 17 July 1998, as amended, 2187 UNTS 90, ("Rome Statute"), preamble (referring to jurisdiction "over the most serious crimes of concern to the international community as a whole") and art. 17(1)(d) (providing for the dismissal of cases that are "not of sufficient gravity to justify further action by the court."); see also SC Res 1329 5 December 2000, page 1 ("Taking note of the position expressed by the [ICTY and ICTR] that civilian, military, and paramilitary leaders should be tried before them in preference to minor actors"); J. Martinez, 'Understanding *Mens Rea* in Command Responsibility: Blaskic and Beyond', 5 *J Int'l Crim. Justice* 638, 639 (2007).

challenge of accommodating this tension appeared in the very first prosecution imposing criminal liability on this basis, *In re Yamashita*, and is apparent in subsequent cases.³

An analysis of the jurisprudence in the international criminal tribunals reveals that a hierarchy has emerged, with the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) as dominant. This essay will begin with a brief history of the doctrine which dates from *Yamashita* in the post-World War II era and proceed to the founding of the ICTY in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994. For the first time in several decades, the ad hoc tribunals utilized this theory of liability in prosecuting crimes against humanity, war crimes and genocide, and developed a jurisprudence of command responsibility. The analysis will then proceed to examine the work of the hybrid tribunals, such as the Special Court of Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, which have also contributed to jurisprudence but have largely followed the ad hoc tribunals, especially the ICTY.⁴

*Prosecutor v. Jean-Pierre Bemba Gombo*⁵ is the first decision of the ICC applying the doctrine. Bemba was the leader of the Mouvement pour la Liberation du Congo and the commander of its military, the Armee de Liberation du Congo.⁶ In a preliminary review, a pretrial chamber decided there was sufficient for the case to proceed to trial on charges of crimes against humanity and war crimes but only pursuant

³ *In re Yamashita*, 327 U.S. 1 (1946); Danner and Martinez, *supra* note 1, at 128; Martinez, *supra* note 2, at 641.

⁴ One main distinguishing feature between the ad hoc tribunals and the hybrid courts, accounting for the terminology, should be noted. The hybrid courts incorporate local and international legal features, while the ad hoc tribunals apply international treaties and customary international law. See D. Cohen, 'Hybrid Justice in East Timor, Sierra Leone and Cambodia, Lessons Learned and Prospects for the Future', 43 *Stan J Int'l*, p. 1-2 (2007); See R. MacKenzie, et al., *The Manual on International Courts and Tribunals*, (Oxford: Oxford University Press, 2010), pages 186-87.

⁵ Decision confirming the charges, *Prosecutor v. Jean-Pierre Bemba Gombo*, (ICC 01/05-/1/08), Pre-Trial Chamber II, 15 June, 2009 (*Bemba CD*). Article 28 of the Rome Statute uses the term "superior responsibility" to connote its application military and civilian superiors. I have used both terms in this essay, reflecting the usage of the applicable statute and judicial decision.

⁶ *Bemba CD* §§ 435-443.

to a theory of command responsibility. In reaching its conclusions, the court borrowed extensively from the jurisprudence of the ad hoc tribunals, especially that of the ICTY.⁷ Accordingly, this analysis reveals that a hierarchy has emerged in the jurisprudence of command responsibility, and that of the ICTY is dominant among the international criminal tribunals.

This essay also considers the particular significance of the doctrine of command responsibility for international criminal courts, as well as what the relevance of such a hierarchy may be for these courts. As noted, command responsibility is an important doctrine in the international criminal tribunals because it is essential in the enforcement of international humanitarian law.⁸ A fundamental goal of the international criminal tribunals is the prosecution and punishment of persons responsible for the most serious crimes of concern to the international community.⁹ Indeed, the recent arrests of senior military and political leaders Ratko Mladić and Goran Hadžić, who were both indicted pursuant to this theory of liability, illustrate the continuing utility of the doctrine.¹⁰ Thus, within the context of these courts, the doctrine is an important tool for enforcing the laws of war and protecting civilians in armed conflict.¹¹ The evolution of a hierarchy in the jurisprudence among the international criminal tribunals is a positive development because it provides judges with informed bases for decision making in complex cases where there are many competing interests to accommodate. Ultimately, it will promote

⁷ *Bemba CD*, §§ 409-443.

⁸ Danner and Martinez, *supra* note 1, at 148-149.

⁹ Rome Statute, preamble and Art. 17(d)(1).

¹⁰ The indictments of both accused reflect the use of additional theories of liability, as well. See *Prosecutor v. Mladić*, IT-09-92 and *Prosecutor v. Hadžić*, IT-04-75.

¹¹ The recently issued arrest warrants in *Prosecutor v. Gaddafi et al.*, were not based on superior responsibility. However, that could change if any accused are apprehended and the prosecution develops, as it did in the *Bemba* case. See *Prosecutor v. Gaddafi et al.*, ICC-01/11-01/11, Transcript of 27 June 2011.

predictability, certainty and legality. All of these factors will facilitate deterrence, a benefit which will extend far beyond individual cases and courtrooms.

2. A Brief History of the Doctrine of Command Responsibility

Command responsibility is an ancient doctrine which is frequently traced to 500 B.C., and the writings of the warrior Sun Tzu.¹² References to the doctrine appear throughout European history¹³, in sources as varied as an ordinance issued by Charles VII of Orleans¹⁴ and in the Hague Regulations of 1907.¹⁵ In essence, the doctrine provides that a superior officer is responsible for his orders.¹⁶ In the event the commander issues illegal orders, he shares with subordinates the responsibility for the execution of those illegal orders.¹⁷ Further, in the event the commander is aware of illegal acts about to be committed by his subordinates he is under a duty to prevent them, or to punish them if they have already occurred.¹⁸ Although known for centuries, the doctrine was not used as basis for criminal liability until the war crimes trials which occurred in the aftermath of World War II. General Yamashita of Japan, who assumed command of the Japanese forces in the Philippines in October 1944 was the first to be convicted using this theory of liability.¹⁹ General Yamashita's trial was conducted in the Philippines shortly after the close of military operations.²⁰ The crimes alleged included attacks directed at the civilian

¹² W. Parks, 'Command Responsibility for War Crimes', 62 *Mil L. Rev.* 1, 3-4 (1973)

¹³ *Ibid.*, pp. 4-6.

¹⁴ C. Meloni, *Command Responsibility in International Criminal Law* (The Hague: TMC Asser Press, 2010), pp. 3-4.

¹⁵ See 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Annex, Section I, Article 1 No 1. (Armies and militias must be "commanded by a person responsible for his subordinates".)

¹⁶ See A.P.V. Rogers, *Law on the Battlefield*, p. 189 (Manchester: Manchester University Press, 2004); International Committee of the Red Cross ("ICRC") Customary Rule 152 (Customary Study 2005).

¹⁷ Rogers, *Law on the Battlefield*, *supra* note 16, at 190; ICRC Customary Rule 153 (Customary Study 2005).

¹⁸ Rogers, *Law on the Battlefield*, *supra* note 16, at 190.

¹⁹ *Ibid.*; Parks, *supra* note 12, at 35; Martinez, *supra* note 2, at 647-48. The prosecution was based on The Hague Regulations of 1907. See *Yamashita*, 327 U.S. at 15.

²⁰ Parks, *supra* note 12, at 24.

population without military necessity resulting in the deaths of approximately 25,000 civilians; homicide; pillage; destruction of religious property and starvation of prisoners of war and internees.²¹ There was no doubt that the crimes occurred.²² Rather, General Yamashita asserted that he had no knowledge of the atrocities and that the conditions of war were such that he was unable to apprise himself of the circumstances of the offences.²³ General Yamashita was convicted and sentenced to death by the military commission.²⁴ His defense successfully sought habeas corpus relief in the United States Supreme Court.²⁵

The Supreme Court's review was limited to three issues: (i) was the military commission legally constituted; (ii) did the military commission have jurisdiction over the offenses charged; and (iii) were the trial procedures fair.²⁶ The Court answered all three questions affirmatively and General Yamashita's conviction was affirmed.²⁷

While the impact of the *Yamashita* case has been significant, it has not been a model of clarity for future generations, and decades later many aspects of the case continue to engender debate.²⁸ One of the many aspects of the decision which continues to be divisive concerns the issue of mens rea.²⁹ What, if any, knowledge must a

²¹ *Yamashita*, 327 U.S. at 14.

²² 327 U.S. at 14.

²³ 327 U.S. at 17; Parks, *supra* note 12, at 24.

²⁴ 327 U.S. at 5.

²⁵ 327 U.S. at 4.

²⁶ 327 U.S. at 6.

²⁷ 324 U.S. at 25.

²⁸ K. Ambos, 'Superior Responsibility' at pages 823-872, page 828, in Vol. I., A. Cassese, P. Gaeta, and J. Jones, Eds. *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002); Danner and Martinez, *supra* note 1, at 123-124; Martinez, *supra*, note 2, at 648-649.

²⁹ Ambos *supra* note 28, at 828; Parks, *supra* note 12, at 87-89; Martinez *supra* note 2, at pp. 648-649; B. Landrum, 'The Yamashita War Crimes Trial: Command Responsibility Then and Now', 149 *Military L. Review* 293, 297-98 (1995).

commander have of subordinates' unlawful acts — assuming the commander does not act to prevent or punish — before criminal liability may properly be imposed?³⁰

Some commentators, apparently crediting General Yamashita's denials of knowledge, interpret *Yamashita* as imposing a strict liability standard.³¹ Others view the commissioners' decision as simply a rejection of General Yamashita's claims of ignorance as incredible.³² The limited scope of the Supreme Court review prevented the Justices from addressing this issue.³³ In all likelihood, the debate about the implications of *Yamashita* will continue.³⁴ I believe it is more likely that the military commissioners simply did not *credit* the General's denials of knowledge rather than impose a strict liability standard.³⁵ However, it may not be possible to resolve the issue definitively in view of the limited scope of review and the wording of the military commissioners' judgment.³⁶

Aside from its historical significance, *Yamashita* remains relevant because the debate it enlivened illustrates the complexity of certain issues in the area of command responsibility, notably *mens rea*. A question that has continually challenged courts and

³⁰ See T. Wu and K.S. Yang, 'Criminal Liability for the Actions of Subordinates: The Doctrine of Command Responsibility and its Analogues in United States Law', 38 *Harvard Int'l LJ* 272, 282 (posing this question and analysing numerous options).

³¹ Ambos, *supra* note 28, at 828.

³² Parks, *supra* note 12, at 36-37. Parks suggests that the military commissioners may have inadvertently left the impression that a strict liability standard was used through imprecise language in their decision because none of them were lawyers.

³³ The majority stated: "We do not consider what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the commission and were for it to decide." 327 U.S. at 17 (citation omitted).

³⁴ This is especially true since the inferior quality of the justice as noted by the dissenting Justices. Justice Rutledge critiqued the process as a sordid form of victor's justice which featured, inter alia, the admission of ex parte evidence, failure to give the defence sufficient time to prepare. See 327 U.S. at 41-81 (Rutledge J., Dissenting).

³⁵ Proof of General Yamashita's actual knowledge of the crimes is extensively discussed at Parks *supra* note 12, at pp. 23-28, *see. esp.* fn. 91.

³⁶ Parks, *supra* note 12, at 37; Landrum, *supra* note 29, at 297-298.

scholars is what is and should the standard of knowledge be and how far should liability extend? As a factual matter these issues are difficult to resolve because the cases arise in armed conflict where evidence gathering is challenging, at best. Further, as in *Yamashita*, the senior accused deny knowledge so the cases must be proved circumstantially and indirectly, which presents additional challenges.³⁷ All of these concerns must be accommodated with view to the purpose of the doctrine of command responsibility as the Court observed in *Yamashita*:

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection.³⁸

Subsequent to *Yamashita*, there were numerous prosecutions of senior military officials in the aftermath of World War II using the doctrine of command responsibility.³⁹ The most vexing issue in these cases — although by no means the only difficult one — was that of knowledge.⁴⁰ Some observers who interpret *Yamashita* as imposing a strict liability standard view these subsequent cases as a rejection of the strict liability standard and *Yamashita*.⁴¹ However, it is difficult if not impossible, to determine the precise contours of a developing doctrine based on only a few opinions, especially since the

³⁷ See Danner and Martinez, *supra* note 1, at 124-126.

³⁸ 327 US at 15.

³⁹ See Parks, *supra* note 12, at 58-76 for detailed analyses of these prosecutions.

⁴⁰ See Parks, *supra* note 12, at 87-89; Martinez, *supra* note 2, at 650-651.

⁴¹ Ambos, *supra* note 28, at 828; N. Reid, 'Bridging the Conceptual Chasm: Superior Responsibility as the Missing Link between State and Individual Responsibility under International Law', 18 *Leiden J. Int'l L.* 725, p. 818.

circumstances of these cases varied significantly.⁴² What clearly emerged from these cases was the customary status of command responsibility.⁴³ This was confirmed with the adoption of Additional Protocol I (AP I) in 1977, and specifically Articles 86 and 87 of AP I.⁴⁴ Article 86 provides that where commanders fail to act to prevent illegal conduct by subordinates, they may be criminally liable “*if they knew or had information which should have enabled them* to conclude in the circumstances at the time . . .”, that unlawful conduct was occurring, or about to occur absent intervention.⁴⁵ Article 87 imposes on commanders a duty to prevent and punish illegal acts by subordinates.⁴⁶

The International Committee of the Red Cross’ (ICRC’s) comments to Article 86 acknowledge that mens rea is an especially difficult issue where criminal sanctions may be imposed on a commander as a consequence of a failure to act, particularly where the commander persists in denying knowledge of the subordinates’ crimes.⁴⁷ The comments attempt to provide guidance as follows:

It is not possible to answer this question in the abstract; something that is true may, depending on circumstances, seem unlikely. It is not impossible for a superior actually to be ignorant of breaches committed by his subordinates because he deliberately wishes to remain ignorant. The fact is that in several flagrant cases the tribunals which were established to try war crimes after the Second World War did not accept that a superior could wash his hands of an affair in this way, and found that, taking into account the circumstances, [the] knowledge of breaches committed by subordinates could be presumed.⁴⁸

⁴² See Parks, *supra* note 12, at 58-76 (discussing the specifics of individual cases); *see also* Ambos *supra* 28, at 824 (acknowledging the customary status of the doctrine but its disharmony as well, prior to adoption of the Rome Statute).

⁴³ See Rogers, *supra* note 16, at 190; ICRC Customary Rules 152 and 153.

⁴⁴ Additional Protocol I relating to the Protection of Victims of International Armed Conflicts, 1977, 1125 UNTS 3, Art. 86 and Art. 87 (AP I).

⁴⁵ Art. 86, AP I (emphasis added).

⁴⁶ Art. 87, AP I.

⁴⁷ See ICRC Comment 3541 to Art. 86, AP I.

⁴⁸ ICRC Comment 3546 to Art. 86, AP I. The footnote to this Comment cites, *inter alia*, *Yamashita*.

The cases cited in support of this comment include *Yamashita*, as well as other case prosecuted in the aftermath of World War II. Although commendably pragmatic in approach, this comment does not appreciably enhance clarity.⁴⁹ The opacity evident in this Comment illustrates the difficulty of judging these cases. This difficulty is exacerbated by the paucity of international decisions in construing the contours of command responsibility. From *Yamashita* in 1946 to the advent of the ad hoc tribunals, there were very few international opinions in this area. In 1993 when the ICTY began prosecuting cases, a new era in the development of the jurisprudence commenced.

3. Command Responsibility in the Ad Hoc Tribunals

Both the ICTY and the ICTR were created pursuant to Security Council Resolutions; the former in 1993 and the latter in 1994.⁵⁰ Both the ICTY and ICTR statutes contain provisions relating to command responsibility and the substantive provisions of these statutes are identical.⁵¹ In relevant part, Article 7(3) of the ICTY Statute provides that commission of a crime “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 such necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”⁵² The same provision is found in Article 6(3) of the ICTR Statute.

The Final Report of the UN Commission of Experts, writing about the ICTY’s statute, observed: “The doctrine of command responsibility is directed primarily at military commanders because such persons have a personal obligation to ensure the

⁴⁹ See Martinez, *supra* note 2, at 653-54 (observing that Articles 86 and 87 of AP I did not improve on and clarify the standard of knowledge compared to the post World War II cases).

⁵⁰ See MacKenzie, et al., *The Manual on International Courts and Tribunals*, *supra* note 4, at 185.

⁵¹ See Art. 7(3) ICTYSt., and Art. 6(3) ICTRSt.

⁵² Art. 7(3) ICTYSt. (emphasis added).

maintenance of discipline among troops under their command. . . . Political leaders and public officials have also been held liable under this doctrine in certain circumstances.”⁵³

The analogous ICTR Expert Report observed that command responsibility was a “well-established principle of international law” and cited sources of authority, including the Geneva Conventions of 1949, and Article 86 of AP I.⁵⁴ Both statutes use the language “knew or had reason to know”; thus the language of both statutes varies slightly from that of Article 86 of AP I. In the evolving jurisprudence of the ad hoc tribunals and subsequently the ICC, this variation has created some confusion.

The leading decision on command responsibility from the ad hoc tribunals is *Prosecutor v. Delalić, et al. (“Čelebići”)*.⁵⁵ The opinion first addressed whether a de facto position of authority was sufficient for the imposition of liability. The Appeals Chamber ruled that it was but cautioned that a de facto superior could only be criminally responsible when shown to have “effective control” over subordinates.⁵⁶

The appeal was occasioned in part by the trial chamber’s treatment of knowledge. The Chamber also addressed mens rea under Article 7(3) and attempted to explain the meaning of the phrase “had reason to know”. The debate which began with *Yamashita* acquired renewed significance. The precise question was did a commander have a duty to be informed as the prosecution urged, to prevent the commission of crimes?⁵⁷ Could a

⁵³ See UN Expert Commission Report dated 27 May 1994, S/1994/674, para. 57 (available at www.unoteorg, Resources and Services, Documents).

⁵⁴ See UN Expert Commission Report, dated 4 October 1994, S/1994/1125, paras 129 and 130. (available at www.unoteorg, Resources and Services, Documents).

⁵⁵ Judgment, *Prosecutor v. Delalić, et al.*, (IT-96-21-A), Appeals Chamber, 20 February 2001 (“*Čelebići* AJ”). The case is named “*Čelebići*” for the location where the crimes occurred.

⁵⁶ *Čelebići*, AJ § 197. The Chamber relied in this respect on *Prosecutor v. Aleksovski* which had been decided the previous year. See Judgment, *Prosecutor v. Aleksovski*, (IT-95-14-/1-A), Appeals Chamber, 24 March 2000 (*Aleksovski* AJ), §§ 76-77.

⁵⁷ *Čelebići*, AJ § 226.

failure to fulfill that duty constitute knowledge?⁵⁸ In its analysis the Chamber reviewed numerous sources of customary law, including *Yamashita*, Article 86 of AP I and the attendant commentaries.⁵⁹

The Chamber found that “[a] showing that a superior had some general information in his possession, which could put him on notice of possible unlawful acts by subordinates would be sufficient to prove that he ‘had reason to know’”.⁶⁰ While ruling that the relevant information only has to be provided or available to the commander, not actually absorbed, the Chamber also underscored that the applicable standard was not strict liability, or negligence.⁶¹ It appeared to set the threshold relatively low, however, in the following illustration: “a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.”⁶² Echoing the observation of the ICRC in its commentaries to Article 86⁶³, the Chamber also observed a determination of knowledge would have to be made “in the specific circumstances” of each case.⁶⁴

The first significant ICTR judgment addressing the doctrine of command responsibility, *Prosecutor v. Bagilishema (Bagilishema)*⁶⁵ was rendered by the Appeals Chamber in 2002, one year after *Čelebići*. The prosecution appealed the trial chamber’s

⁵⁸ *Čelebići*, AJ § 226.

⁵⁹ *Ibid.*, §§ 228-235.

⁶⁰ *Ibid.*, § 238.

⁶¹ *Ibid.* § 239.

⁶² *Ibid.* § 238.

⁶³ See discussion at pp. 8-9 above.

⁶⁴ See *Čelebići*, AJ § 239.

⁶⁵ Judgment, *Prosecutor v. Bagilishema*, (ICTR-95-1A), Appeals Chamber, 3 July 2002 (*Bagilishema AJ*).

acquittal on numerous grounds.⁶⁶ With regard to command responsibility the pivotal issue was the accused's knowledge of his subordinates' crimes.⁶⁷ The appeals chamber relied extensively on *Čelebići*⁶⁸, and ruled that the trial chamber should have evaluated knowledge solely with a view to determining whether the accused "knew" or "had reason to know" of the subordinates' crime. Following *Čelebići* the appeals chamber admonished that a third inquiry undertaken by the trial chamber - whether the accused was *negligent* in failing to acquire knowledge - was improper.⁶⁹ The Appeals Chamber affirmed the acquittal because, upon application of the proper, test it found that the prosecution failed to prove knowledge.⁷⁰ It in a comment that has resonated in the jurisprudence of command responsibility the Chamber observed:

References to "negligence" in the context of superior responsibility are likely to lead to confusion of thought ... The law imposes upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed, and to punish crimes which he knows or has reason to know had been committed, by subordinates over whom he has effective control. A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or wilfully disregarding them.⁷¹

⁶⁶ The first was *Prosecutor v. Akayesu*, a trial chamber judgment which features a very brief discussion of command responsibility. See Judgment, *Akayesu*, (ITCR-96-4-T), Trial Chamber, 2 September 1998 § 486. See Martinez *supra* note 2, at 655. (discussing the *Akayesu* Judgment but not the other ICTR decisions). *Prosecutor v. Kayishema, et al.*, (*Kayishema* AJ) an ICTR appeals judgment from 2001 also addressed issues of command issues responsibility, relying on *Čelebići* and citing it approvingly. See Judgment, *Prosecutor v. Kayishema, et al.*, (ICTR-95-1-A), Appeals Chamber, 1 June 2001, §§ 208-209; §§ 333-343 and §§ 510-511.

⁶⁷ *Bagilishema* AJ.

⁶⁸ *Bagilishema* AJ §§ 33-35. The Chamber also noted that the command responsibility provisions of the ICTY and ICTR statutes are identical. See *Bagilishema* AJ § 33, fn 49.

⁶⁹ *Bagilishema* AJ § 37

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, § 35. The prosecution also argued that the trial chamber misapplied the test of effective control for determining whether the accused was a civilian superior as set forth in *Čelebići*. The Appeals Chamber agreed but found the error was inconsequential as the accused had no knowledge of his subordinates' crimes. See *Bagilishema* AJ §§ 53-55.

The ICTR's reliance on the case law of the ICTY is not surprising given the virtual identity of their statutory provisions relating to command responsibility and in view of the fact that they share an appeals chamber.⁷² Their interdependence was again evident when the ICTY Appeals Chamber rendered its judgment in *Prosecutor v. Blaškić* (*Blaškić*) in 2004.⁷³ With respect to command responsibility, the principle issues were: (i) what was the proper standard of knowledge; and (ii) what was effective control for the imposition of liability.⁷⁴

The accused asserted that in applying the “had reason to know” language in the Statute the trial chamber improperly employed a negligence standard. According to the defence, such a standard was untenable because it could in a conviction for murder where the accused was only shown to be negligent.⁷⁵ The Appeals Chamber agreed and ruled that the *Čelebići* Appeals Judgment had authoritatively settled this issue - to extent the trial chamber departed from *Čelebići* it was erroneous.⁷⁶ *Blaškić* also ruled that the Tribunal's statute did not encompass a separate offence for a commander's negligent failure to inform himself about criminal activity by his subordinates.⁷⁷ With respect to negligence, *Blaškić* invoked *Bagilishema's* admonition that “[r]eferences to

⁷² Indeed, Judges David Hunt and Fausto Pocar sat on both *Čelebići* and *Bagilishema*. The *Bagilishema* opinion was unanimous. There was a partial dissent in *Celebici* by Judges Hunt and Bennouna solely relating to the issue of cumulative convictions. The two courts also shared the same prosecutor from their inception up to 2003. See B. Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008), p.56, fn. 32.

⁷³ Judgment, *Prosecutor v. Blaškić*, (IT-95-14/1-A), Appeals Chamber, 29 July 2004 (*Blaškić* AJ).

⁷⁴ The Appeals Chamber found, as a factual matter with respect to a number of the crimes, the accused lacked the effective control to over the units which committed the crimes. *Blaskic* AJ § 421.

⁷⁵ *Blaškić* AJ § 58.

⁷⁶ *Ibid.*, AJ § 62

⁷⁷ *Ibid.*

“negligence” in the context of superior responsibility are likely to lead to confusion of thought ...”⁷⁸ *Bagilishema* had, as noted above, relied upon *Čelebići*.⁷⁹

Citing *Čelebići*, *Bagilishema* and *Blaškić*, and approving the trial chamber’s application of the “effective control” test based on those decisions, the ICTR Appeals Chamber in *Prosecutor v. Ntagerura, et al.*⁸⁰ remarked that the jurisprudence in the ICTY and the ICTR was “settled” in this area.⁸¹

As between the two tribunals, it is not surprising that the ICTY took the lead in developing command responsibility jurisprudence in this area and several factors explain its dominance. First, the former Yugoslavia was the site of traditional military campaigns, which was not the case in Rwanda. The cases prosecuted by the ICTY were therefore better suited to the application of command responsibility.⁸² In addition, the ICTY has indicted and prosecuted more cases over a longer time span.⁸³ After the seminal case of *Čelebići* in 2001, it was plain that the decision would have a lasting impact on the ICTY, the ICTR, and other international tribunals as well. The previous

⁷⁸ *Ibid.* (quoting *Bagilishema* AJ § 35). Although the Appeals Chambers have eschewed use of the word negligence it is far from clear that the standard is not, in fact, a form of negligence. See Martinez supra note 2, p. 658; accord K. Ambos, ‘Critical Issues in the Bemba Confirmation Decision’, 22 *Leiden J. of Int’l Law* 715, 722 (2009). Perhaps the Appeals Chamber has avoided the word out of concern that liability expressly based on negligence would create the perception that proof of the mental state for underlying crimes such as murder would be diluted, thereby trivializing such crimes.

⁷⁹ Judge Fausto Pocar sat on all three cases.

⁸⁰ *Prosecutor v. Ntagerura, et al.*, ICTR-99-46-A (2006). Judges Pocar, Guey, Vaz, Meron, Schomburg sat on this panel with Judge Pocar presiding.

⁸¹ *Ntagerura*, AJ § 341.

⁸² Joakim Dungal, ‘Command Responsibility in International Criminal Tribunals, Paper Presented at the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances—Searching for Solutions’, July 16-17, 2007, available at <http://sc.judiciary.gov.ph/publications/summit/Summit%20Papers/Dungal%20-%20Command%20Responsibility%20in%20ICT.pdf>. When this paper was published in mid-2007, there was only one conviction at the ICTR based on command responsibility, *Prosecutor v. Ntagerura, et al.*, ICTR-99-46-T (2004). This fact, according to the author, is attributable to the difficulty in proving the superior-subordinate relationship in the area where civilian political leaders are prosecuted as opposed to traditional military commanders. See Dungal, pages 11-12.

⁸³ MacKenzie, et al., *The Manual on International Courts and Tribunals*, supra note 4, at 185-186 and at 210.

year, the ICTY appeals chamber ruled that would follow its prior judgments and that trial chambers should do so as well.⁸⁴ In view of this holding, as well as the identity of the statutes and appeals chambers, it was to be expected that the ICTR would follow *Čelebići*, and that the later cases of the ICTY itself would.

In *Blaškić* the ICTY appeals chamber has reaffirmed its fidelity to *Čelebići* as has the ICTR. In rendering its judgment in 1998, the *Čelebići* trial chamber observed that the doctrine of command responsibility had not been applied in any international tribunal since the post-World War II era.⁸⁵ However, since the inception of the ad hoc tribunals there have been many cases addressing the doctrine, which have been fundamentally shaped by the jurisprudence of the ICTY.⁸⁶ The case law of the hybrid tribunals further evidences this trend.

4. The Hybrid Courts

The command responsibility provision of the statute of the Special Court for Sierra Leone (SCSL), founded to prosecute those responsible for war crimes and crimes against humanity arising out of the civil war in Sierra Leone, is identical to the ad hoc tribunals.⁸⁷ The appeals chamber of the SCSL has issued three judgments and all have addressed issues of command responsibility.⁸⁸ To a large extent these three decisions — *Prosecutor*

⁸⁴ *Aleksovski* AJ §§ 89-111.

⁸⁵ Judgment, *Prosecutor v. Delalić, et al.*, (IT-96-21-T), Trial Chamber, 16 November 1998 (*Čelebići TJ*), § 340.

⁸⁶ Although the preceding discussion has focused primarily on the issue of mens rea, this is not the only divisive issue in this area of the law. The other which has provoked great debate within the ICTY's own appeals chamber is that of successor liability. This issue involves the question of whether a commander is liable for a failure to punish subordinates when he acquires knowledge about crimes which occurred prior to his assumption of the command. In two cases, by 3-2 decisions the ICTY appeals chamber has ruled that he is not liable. See Judgment, *Prosecutor v. Hadžinhasanović*, (IT-01-47-A), Appeals Chamber, 3 April 2008, and Judgment, *Prosecutor v. Orić*, (IT-03-68-A) Appeals Chamber, 3 July 2008.

⁸⁷ See D. Cohen, *supra* note 4 at 11 (re the founding of the SCSL); Art. 6(3) of the SCSL Statute is the command responsibility provision

⁸⁸ Judgment, *Prosecutor v. Sesay, et al.*, (Case No. SCSL-04-15-A), Appeals Chamber, 26 October 2009 (*Sesay AJ*); Judgment, *Prosecutor v. Fofana, et al.*, (Case No. SCSL – 04-14-A), Appeals Chamber, 28

v. Sesay, et al., *Prosecutor v. Fofana, et al.*, and *Prosecutor v. Brima, et al* — were concerned with the sufficiency of the trial chamber’s fact finding on the issues of mens rea⁸⁹ and effective control.⁹⁰ Therefore, the opinions did not have occasion to further develop or extend the doctrine of command responsibility. Where the decisions formulate the standards applicable with respect to mens rea and effective control they rely upon *Čelebići*, *Bagilishema* and *Blaškić* as authority.⁹¹ These opinions, therefore, confirm the dominance of the ICTY’s jurisprudence in this area.⁹²

The statute of the Extraordinary Chambers in the Courts of Cambodia (ECCC), which was founded to prosecute the crimes of the Khmer Rouge, has a command responsibility provision which is virtually identical to that of the ad hoc tribunals.⁹³ The ECCC’s one judgment to date *Prosecutor v. Guek Eav Kaing, alias Duch (Duch)*, addressed the doctrine and in doing so relied on the case law of the ICTY.⁹⁴ Initially the chamber noted it was permitted to rely on customary international law in interpreting the ECCC statute⁹⁵ and that the doctrine of command responsibility is part of customary international law.⁹⁶ It outlined the elements under Article 29 of its statute as follows: (i)

May 2008 (*Fofana* AJ); Judgment, *Prosecutor v. Brima, et al.* (Case No. SCSL -04-16-A) Appeals Chamber, 22 February 2008 (*Brima* AJ).

⁸⁹*Sesay* AJ §§ 853-860.

⁹⁰*Brima* AJ §§ 257-258; *Sesay* AJ §§ 496-507.

⁹¹ *Sesay* AJ § 64, § 70 § 853 (mens rea); *Brima*, AJ §§257-258 (effective control); *Fofana* AJ § 174 (effective control).

⁹² One author has questioned the propriety of utilizing the doctrine at all in the context of the conflict in Sierra Leone noting that command structures were often ineffective for various cultural and anthropological reasons. See T. Kelsall, *Culture Under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2009), see esp. pp. 103-104 (criticizing the application of command responsibility in the *Fofana* case).

⁹³ The one substantive distinction is that the ECCC’s provision, which is found in Article 29 of the ECCC law, covers “superiors” as opposed to “commanders”. Presumably this word is used to make clear that Article 29 applies to both military and non-military superiors.

⁹⁴ Judgment, *Prosecutor v. Guek Eav Kaing, alias Duch*, (Case No. 001 /18-07-2007/ECCC/TC), trial Chamber, 26 July 2010 (*Duch* TJ).

⁹⁵ *Duch* TJ § 42.

⁹⁶ *Ibid.*, §§ 475-476 (citing, inter alia, *Yamashita*, and Articles 86 and 87 to AP I). Interestingly, the chamber did not refer to the Article 28 of the Rome Statute or the *Bemba* Decision when it referred to the

the existence of a superior subordinate relationship; and (ii) the accused must have known or had reason to know that a crime was about to be committed or had been committed, and have failed to take necessary and reasonable steps to prevent the crime or punish the perpetrator.⁹⁷

In outlining the test for effective control, the ECCC cited approvingly *Čelebići*, *Bagilishema*, and the SCSL's decision in *Brima*.⁹⁸ With regard to knowledge the chamber also relied principally on the ICTY's jurisprudence, citing *Čelebići* and *Blaškić*, as well as more recent decisions.⁹⁹ Ultimately the chamber did not find it necessary to impose liability on this basis because it found the accused directly participated in, inter alia, crimes against humanity and grave breaches of the Geneva Conventions of 1949.¹⁰⁰

Prosecutors are utilizing command responsibility against one other accused, Ieng Sary. The defence has sought to preclude its application, making the difficult argument that the doctrine is not customary under international law, and additionally asserting that it did not exist under Cambodian law.¹⁰¹ The appeals chamber declined to determine the applicability of the doctrine in advance of trial.¹⁰² Trial of this case began on 27 June 2011.¹⁰³

customary nature of command responsibility, although it referred to ICC practice in other areas of the decision. See *Duch* TJ § 495, § 499.

⁹⁷ *Duch* TJ § 538.

⁹⁸ *Ibid.*, TJ § 540.

⁹⁹ *Ibid.*, TJ § 544. This discussion also cited the trial chamber judgment in *Sesay*.

¹⁰⁰ *Ibid.*, TJ §§ 548-549. The accused has appealed and the appeals chamber heard argument on 31 March 2011.

¹⁰¹ See *Prosecutor v. Ieng Sary*, Case No. 002 /19-09-2007/ECCC/OCIJ, Defence filing of February 25, 2010.

¹⁰² See *Prosecutor v. Ieng Sary*, Case No. 002 /19-09-2007/ECCC/OCIJ, Appeals Chamber Decision, dated 9 June 2010.

¹⁰³ See 'Khmer Rouge Leaders go on Trial in Cambodia', 27 June 2011, available at www.guardianoteco.uk.

The statute of the Special Tribunal for Lebanon (STL) has a provision on superior responsibility in Article 3 of its statute, relating to individual criminal responsibility.¹⁰⁴ Article 3(2) is identical to 28(b) of the Rome Statute which applies to nonmilitary superiors, holding them criminally responsible for the unlawful acts of subordinates under their “effective control” when certain conditions are met.¹⁰⁵ Although it is possible that the chambers of the STL will yield jurisprudence pertaining to command responsibility, as of this writing there is none.¹⁰⁶

5. The International Criminal Court

A. Article 28 of the Rome Statute

Since the ratification of the Rome Statute in 1998, the process of creating the ICC and drafting the Statute have been extensively documented.¹⁰⁷ An analysis of the history the Court’s creation and the Statute is beyond the scope of this essay. However, it is essential to note certain facts regarding the drafting and negotiation of the Statute and Article 28 - the Statute’s superior responsibility provision - for a full appreciation of the legal and policy issues under consideration.

The Rome Statute was modeled on a 1994 draft statute developed by the International Law Commission (ILC).¹⁰⁸ From 1995 to 1998, the ILC’s draft more than quadrupled in length under the auspices of the Preparatory Committee (PrepCom), which

¹⁰⁴ Art. 3.2 STLSt.

¹⁰⁵ See Art. 3.2 STLSt.

¹⁰⁶ The prosecutor has issued only one indictment, *Prosecutor v. Badreddine, et al.*, Case No. STL-11-01/I/PTJ, which does not use superior responsibility as a theory of liability.

¹⁰⁷ See, e.g., M. Cherif Bassiouni, Ed., *The Statute of the International Criminal Court and Related Instruments: Legislative History 1994-2000* (Ardsey, NY: Transnational Publishers, 2002); A. Cassese, P. Gaeta, and J. Jones, Eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) Vols I and II; Schiff, *Building the International Criminal Court*, *supra* note 72.

¹⁰⁸ Schiff, *supra* note 72, at 69.

was appointed by the General Assembly.¹⁰⁹ The Statute was finalized at the Rome Conference in 1998 between June 15 and July 18.¹¹⁰ Many of the delegates at the conference were diplomats who lacked familiarity with international criminal law, comparative criminal law, or the practice of criminal law.¹¹¹ Despite their negotiating authority at the Conference, many had little or no familiarity with the draft Statute.¹¹² Further, as a treaty negotiation the process was unavoidably political.¹¹³

In the early stages of drafting as of February 1997, what was to become Article 28, contained one provision, applicable to commanders with the word “superiors”, bracketed. The notes reflect that most delegations favored applying the provision to any type of superior. One open issue the notes reflect was whether it should be considered a form of liability or a separate offense.¹¹⁴

At the Rome Conference in June 1998, in the process of finalizing this provision, most countries were of the view that it should apply to civilians, with the exception of China.¹¹⁵ Unlike the statutes of the ad hoc tribunals, which were extended to nonmilitary superiors by case law, Article 28(a) expressly applies to military commanders “or a person effectively acting as a military commander”.¹¹⁶ Article 28(b) applies to “superiors”, who are *not* military commanders or effectively acting as military

¹⁰⁹ *Ibid.*, p. 70.

¹¹⁰ *Ibid.*, p. 71.

¹¹¹ M. Cherif Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of the International Criminal Court’, 32 *Cornell Int’l L J.* 443, 460 (1999).

¹¹² *Ibid.* at 446.

¹¹³ Bassiouni, *The Statute of the International Criminal Court*, *supra* note 107, at 91.

¹¹⁴ See Preparatory Comm. on the Establishment of the ICC, Working Group on Gen. Principles of Crim. Law and Penalties, 18 February 1997, A/AC.249/1997/WG.2/CRP.3 (available at www.iccnw.org).

¹¹⁵ Per Saland, “International Criminal Law Principles”, 189, 202 in Roy S. Lee, Ed., *The International Criminal Court: The Making of The Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law Int’l, 1999).

¹¹⁶ Rome Statute, Art. 28(a).

commanders.¹¹⁷ It is unclear from the text of the Statute how to determine the difference; presumably there could be overlap.

The mens rea standard applicable to military superiors in Article 28 provides for criminal liability when the superior knew “or *should have known* about that the forces were committing or about to commit such crimes”.¹¹⁸ That language, which appeared in the February 1997 draft and is modeled on Article 86 of AP I, has been interpreted as a negligence standard.¹¹⁹ The US raised concerns about extension of this provision to civilians for two reasons. First, in view of the US delegation the accompanying mental state of negligence was inappropriate because it did not normally apply to civilians in criminal prosecutions.¹²⁰ Additionally, civilian superiors, it was urged, would necessarily have less control over subordinates than their military counterparts.¹²¹

The final, bifurcated version of Article 28 attempts to accommodate these concerns. The provision of Articles 28(a) retains the “should have known” language. Article 28(b), however, provides for liability in the event the superior “*knew or consciously disregarded information which clearly indicated*, that the subordinates were committing or about to commit such crimes”.¹²²

There is an additional distinction between Article 28 and the statutes of the ad hoc tribunals. Article 28 — for both military and non-military superiors — contains a causation requirement. Both Articles 28(a) and (b) provide for the superior’s liability

¹¹⁷ Art. 28(b) ICCSt.

¹¹⁸ Art. 28(a)(i) ICCSt. (emphasis added).

¹¹⁹ See UN Diplomatic Conference on the Establishment of the ICC, 16 June 1998, A/Conf.183/C.1/SR.1, para. 67 (available at www.iccnw.org).

¹²⁰ *Ibid.*

¹²¹ Saland, *supra* note 115, at 203.

¹²² Art. 28(b) ICCSt. (emphasis added). There is an additional other distinction between the two subsections which appears to address the US delegation’s concerns. Article 28(b) provides that the superior can only be liable if the crimes of the subordinate “concerned activities that were within the effective responsibility of the subordinate.” Art. 28(b)(ii)ICCSt.

where crimes are committed “as a result of his or her failure to exercise control properly over such forces [or subordinates]”. Neither the statutes nor the jurisprudence of the ad hoc tribunals contain a causation requirement.

B. Prosecutor v. Jean-Pierre Bemba Gombo

The June 2009 hearing confirming the charges in *Prosecutor v. Jean-Pierre Bemba Gombo* is the first ICC decision interpreting Article 28 of the Rome Statute. Bemba was the leader of the Mouvement pour la Liberation du Congo (MLC) whose forces were involved in an extended armed conflict in the Central African Republic. Bemba was charged with rape, murder, torture, pillage, and other offences, as crimes against humanity and war crimes.¹²³ Initially, the accused was *not* charged pursuant to Article 28 of the Statute, but only on theories of individual liability under Article 25.¹²⁴ The hearing confirming the charges took place from January 12-15, 2009 and was subsequently adjourned by the Pre-Trial Chamber (the Chamber).¹²⁵ On March 3, 2009, the Chamber asked the Prosecutor to address the application of Article 28 in writing; it did so in an amended document containing the charges.¹²⁶ In its June 2009 decision, the Chamber confirmed the charges against the accused but only on the superior responsibility theory of liability.¹²⁷

The Chamber confronted three significant and several subsidiary issues in interpreting Article 28. The significant issues, which had all previously been considered

¹²³ See Warrant of Arrest, dated 24 May 2008.

¹²⁴ *Bemba CD* § 341.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* In the Amended Document Containing the Charges, Bemba was charged pursuant to Articles 28(a) and 28(b) of the Statute.

¹²⁷ The sole exception to this was the crime of torture which the Chamber found to be cumulative. See *Bemba CD* § 72.

by the *ad hoc* tribunals, were: (i) what is “effective control”¹²⁸; (ii) does Article 28 include a causation requirement¹²⁹; and (iii) what is the standard of knowledge.¹³⁰ As a threshold matter, the Chamber had to determine whether Bemba was military commander under Article 28(a) or a civilian superior under Article 28(b), since the Prosecution charged him under both provisions. The Chamber observed, without elaboration, that it was “satisfied that the suspect falls within the ambit of the first category ...”¹³¹ With respect to military commanders encompassed by Article 28(a), citing the jurisprudence of the ICTY and the ICTR and quoting from the *Čelebići* Trial Judgment, the Chamber ruled that such commanders could derive authority on the basis of de jure or de facto command.¹³²

In interpreting the “effective control” language, the Chamber also turned first to *Čelebići*, and adopted its ruling that the effective control test will only be satisfied where the relationship of a superior-subordinate exists. The Chamber elaborated that “effective control” is the “material ability [or power] to prevent and punish”¹³³ criminal conduct by subordinates. Borrowing liberally from the ICTY’s jurisprudence, the Chamber observed that although effective control is usually a fact-based determination, there are significant factors indicative of effective control.¹³⁴ Those include, inter alia, the commander’s official position; his power to issue or give orders; and his capacity to ensure compliance with those orders.¹³⁵ The Chamber also cautioned that the time frame

¹²⁸ See *Bemba CD* §§ 411-419.

¹²⁹ See *Ibid.*, §§ 420-426.

¹³⁰ See *Ibid.*, §§ 427-434.

¹³¹ See *Ibid.*, § 406.

¹³² See *Ibid.*, §§ 409-410.

¹³³ See *Ibid.*, § 415 (quoting *Čelebići* AJ § 256). In this discussion the Chamber also cited the *Bagilishema* AJ.

¹³⁴ See *Bemba CD* §§ 416-17.

¹³⁵ See *Bemba CD* § 417. In this discussion, the Chamber relied exclusively on the case law of the ICTY.

of the commander's control is significant and following the ICTY¹³⁶, ruled that the commander must have control over subordinates at least when crimes are about to be committed for liability to be imposed under Article 28(a).¹³⁷

Article 28(a) provides that a commander shall be responsible for crimes committed “*as a result* of his or her failure to exercise control properly over such forces” where certain conditions are met. The issue involving this provision was whether it introduced an element of causation into this theory of liability. Amnesty International (AI) filed an amicus brief on the topic of command responsibility and urged the Chamber to reject causation.¹³⁸ The Prosecutor joined in all aspects of AI's submission.¹³⁹ AI argued that causation was not part of the customary law of command responsibility,¹⁴⁰ citing the statutes and jurisprudence of the ad hoc tribunals, as well as Article 86(a) of AP I and the ILC Draft Code of Crimes.¹⁴¹ Causation should be rejected, AI argued, because it would be an extreme departure from the customary law and it was not consistent with the purposes of the Statute.¹⁴² In addition, it was shown that the comparable French and Chinese provisions of the Statute did not include words that could be translated into “as a result of”.¹⁴³ Also, if causation were an element, the provision would not make sense

¹³⁶ This issue of the timing of the assumption of a command and its implications for liability has divided the ICTY Appeals Chamber in *Prosecutor v. Hadžihasanović*, (2008) (3-2) and *Prosecutor v. Orić*, (2008)(3-2). The Chamber in *Bemba* observed that a trial chamber of the SCSL in *Sesay, et al.* had sided with the ICTY minority on this issue – holding the successor commander liable for a failure to punish crimes he learned about which occurred prior to assumption of his command. However, this aspect of the *Sesay* trial judgment was reversed on appeal. See *Sesay* AJ, §§ 874-76.

¹³⁷ See *Bemba* CD § 418.

¹³⁸ Brief of Amnesty International as *Amicus Curiae* dated April 20, 2009, submitted to Pre-Trial Chamber II of the International Criminal Court in connection with the hearing confirming the charges in the case of *Prosecutor v. Jean-Pierre Bemba Gombo* (“AI Br.”) §§ 30-46.

¹³⁹ See Prosecution Statement of 27 April 2009 re Amnesty International's Amicus Curiae Observations on Superior Responsibility filed on 20 April 2009, ICC 01/05-/1/08.

¹⁴⁰ AI Br. §§ 32-37.

¹⁴¹ AI Br. §§ 32-46.

¹⁴² AI Br. §§ 42-43.

¹⁴³ AI Br. § 44.

where the commander was prosecuted under 28(a)(ii), which covers a failure to punish because in such cases the crimes have already been committed.¹⁴⁴ Further, causation was not debated during the drafting sessions - a surprising lapse since it was a clear break with the customary law.¹⁴⁵

Despite its significance, the Chamber did not engage in a detailed analysis of the causation issue. It acknowledged that causation is not in the command responsibility provisions of the statutes of the ad hoc tribunals, the SCSL or the ECCC, and that the case law of the ICTY had expressly rejected it.¹⁴⁶ Ruling that it was bound by the language of the Article 28(a) under the principle of *nullum crimen sine lege* in Article 22 of the Statute, the Chamber found that causation is an element of the Article 28(a).¹⁴⁷ The Chamber did not expressly address and reject AI's detailed arguments opposing causation, and perhaps it did not do so deliberately. Its failure to do so may have enhanced its power to influence and shape the law in this area. For example, upon reaching its finding, the Chamber decided it was obliged to clarify the "actual scope" of causation.¹⁴⁸ In examining the question, the Chamber noted that although a "but for" test was one alternative, it would be difficult if not impossible, to apply such a test where a commander's omission was under consideration.¹⁴⁹ Consequently, the Chamber decided: "There is no direct causal link that needs to be established between the superior's omission and the crime committed by his subordinates ... it is only necessary

¹⁴⁴ AI Br. §§ 42-44.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Bemba CD* § 423 and fn.550.

¹⁴⁷ *Ibid.*, § 423.

¹⁴⁸ *Ibid.*, § 424.

¹⁴⁹ *Ibid.* § 425.

to prove that the commander's omission increased the risk of the commission of crimes charged in order to hold him criminally responsible under Article 28(a)."¹⁵⁰

Ironically, the only jurisprudence cited by the Chamber in support of this test was the ICTY Appeals Chamber's Judgment in *Hadžihasanović*, which expressly rejected causation as an element of command responsibility.¹⁵¹ The Chamber quoted a brief excerpt from *Hadžihasanović*, in a section of the judgment which pertained to knowledge.¹⁵² The result of this somewhat convoluted process was the adoption of a diluted "causation" element which merely requires a showing that the commander's omission "increased the risk" that subordinates would commit crimes.¹⁵³

The Chamber next turned to interpret what "knew or should have known" means for the purposes of Article 28. Initially, the Chamber observed that the standard is not strict liability.¹⁵⁴ Knowledge, according to the Chamber, cannot be presumed but must be proved by direct or circumstantial evidence.¹⁵⁵ To clarify what may be indicia of a commander's knowledge, the Chamber relied predominantly on the ITCY jurisprudence, as well as on the Final Report of the UN Commission of Experts upon which the ITCY statute was based.¹⁵⁶ The relevant factors in those sources include: the number of crimes, their scale and time frame; the type and number of troops involved; the existence of a pattern of similar acts; the quality of communication; and the location of the commander relative to the crime scenes.¹⁵⁷

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.* § 425, fn. 559, quoting *Hadžihasanović* AJ § 31.

¹⁵² *Hadžihasanović* AJ §§ 26-31.

¹⁵³ *Bemba CD* § 426.

¹⁵⁴ *Bemba CD* § 427.

¹⁵⁵ *Bemba CD* § 430.

¹⁵⁶ *Bemba CD* § 431 and fn. 563. The cases cited by the Chamber include the *Orić* Appeals Judgment, as well as the *Čelebići* and *Blaškić* Trial Chamber Judgments.

¹⁵⁷ *Ibid.*

According to the Chamber, the language “should have known” imposes a standard comparable to negligence.¹⁵⁸ Commanders are under an obligation to inform themselves about the activities of their troops, as opposed to civilian superiors. In support of this reading, the Chamber noted the drafting history which revealed an intention to place greater obligations on military commanders than civilian counterparts under Article 28(b).¹⁵⁹ The Chamber recognized that the ad hoc tribunals have eschewed negligence and remarked “despite such a difference . . . the criteria or *indicia* developed by the *ad hoc* tribunals to meet the standard of ‘had reason to know’ may also be useful when applying the ‘should have known standard’ requirement.”¹⁶⁰ The Chamber also ruled that it would take into account the factors utilized by the ICTY in determining actual knowledge in its “should have known” assessment.¹⁶¹ It is noteworthy that in formulating its own jurisprudence of negligence for Article 28(a)(i), the Chamber turned to the *Blaškić* Trial Judgment which, although later reversed, had applied a negligence standard.¹⁶²

Finally, in its analysis of Article 28(a), the Chamber provided examples of what factors it would consider to determine whether a commander fulfilled a duty to prevent, repress or punish crimes.¹⁶³ The only jurisprudence it utilized in listing these factors, which include whether troops are adequately trained in the fundamental principles of international humanitarian law, was that of the ICTY.¹⁶⁴

¹⁵⁸ *Bemba CD* § 432; see also Ambos *supra* note 80, p. 722; and R. Cryer, ‘Command Responsibility at the ICC and ICTY: In Two Minds on the Mental Element?’ July 20, 2009, www.ejiltalk.org, at p.3.

¹⁵⁹ *Bemba CD* § 433.

¹⁶⁰ *Ibid.*, § 434.

¹⁶¹ *Ibid.* The jurisprudence cited by the Chamber in this discussion was predominantly that of the ICTY with the exception of two SCSL trial chamber judgments.

¹⁶² *Bemba CD* § 432; see R. Cryer, *supra* note 158, at 3.

¹⁶³ *Ibid.*, §§ 435-443.

¹⁶⁴ *Ibid.*, §§ 435-443.

6. The Emerging Hierarchy

The ICTY's jurisprudence has played a leading role in the development of the law of command responsibility. With respect to the ICTY and the ICTR, this is unremarkable for several reasons. First, the command responsibility provisions of their statutes are identical.¹⁶⁵ In addition, the ICTY began prosecuting cases first and developed its jurisprudence prior to the ICTR.¹⁶⁶ As the ICTR began prosecuting offenders with this theory of liability, its prosecutors and chambers were able to draw upon the ICTY's case law. Further, it was only natural that the ICTR would follow the ICTY since they shared the same appeals chamber.¹⁶⁷ For nearly a decade, the two courts shared the same prosecutor as well, which explains the use of overlapping legal arguments, strategies and theories.¹⁶⁸ Moreover, the ICTY had an opportunity to develop more case law in the area for two reasons. First, overall it has had a larger case load than the ICTR.¹⁶⁹ In addition, the military conflicts in the former Yugoslavia yielded investigations and cases that were better suited to the application of the doctrine, than the conflicts in the Rwanda. As one author observed, many of the cases prosecuted by the ICTR using the doctrine involved political leaders such as bourgmestres and prefects, which made it more difficult to show the existence of a superior-subordinate relationship than in many of the ICTY cases prosecutions which involved traditional military organizations.¹⁷⁰ Accordingly, the ICTY's leadership role in the ad hoc tribunals is unsurprising.

¹⁶⁵ See Art. 7(3) ICTYSt. and Art. 6(3) ICTRSt.

¹⁶⁶ See MacKenzie, et al., *The Manual on International Courts and Tribunals*, supra note 4, at 185.

¹⁶⁷ *Ibid.* at 191.

¹⁶⁸ See Schiff, *Building the International Criminal Court*, supra note 72, p.56, fn.32.

¹⁶⁹ See MacKenzie, et al., *The Manual on International Courts and Tribunals*, supra note 4, at 210.

¹⁷⁰ See Dungal, supra note 82, at 11-12.

Nor is the dominance of the ICTY surprising with respect to the hybrid courts. The statutes of the SCSL and the ECCC are identical to that of the ICTY. In addition, when the prosecutors at the SCSL and the ECCC began filing cases and the chambers began issuing judgments, the ICTY's jurisprudence in the area of command responsibility was already well-developed. Further, this reliance has doubtless been fostered by a shift in personnel, especially at the most senior levels from the ICTY to the SCSL and the ECCC.¹⁷¹

As the discussion in the preceding section demonstrates, the Chamber in the *Bemba Confirmation Decision* relied on and borrowed extensively from the ICTY's command responsibility jurisprudence. In view of the differences between these institutions and their statutes is this development unexpected? Is it a positive development? The ICC is a permanent court with a distinct statute, having a lengthy drafting history which was the process of extensive negotiations. Why should one of its Chambers, in the Court's first decision addressing the doctrine of command responsibility defer to the ICTY's jurisprudence? Initially, this development is somewhat surprising, especially in view of the substantive differences between the two provisions. However, upon a more detailed analysis it is not entirely unexpected. Moreover, it is a positive development for the jurisprudence of the ICC.

When the Chamber undertook its review and analysis of Article 28 in *Bemba*, it curiously did not consult or refer to Article 21 of the Rome Statute, which includes the sources of law to be applied in the ICC. Article 21 provides, inter alia, that the Chamber “shall” apply in descending order of priority: (i) the Rome Statute, Elements of Crimes;

¹⁷¹ Brenda Hollis, the Prosecutor at the SCSL, previously served as a Senior Trial Attorney at the ICTY; and Andrew Cayley, the International Co-Prosecutor at the ECCC, also previously served as a Senior Trial Attorney at the ICTY. For their biographies see www.sc-sl.org and www.eccc.gov/kh/enote

and the Rules of Evidence and Procedure; and “where appropriate” applicable treaties and principles of international law, including the international law of armed conflict; and general principles of law from national systems that would ordinarily exercise jurisdiction over the crime.¹⁷² Article 21(b) provides that the Court “*may*” apply principles and rules of law interpreted in its earlier decisions.¹⁷³ There is no reference in Article 21 to the case law of other tribunals.¹⁷⁴ Where the Chamber itself acknowledged that Article 28(a) required clarification — for example with respect to the scope of the causation requirement — an analysis of the sources of law to be applied pursuant to Article 21 would be the logical starting point in order to obtain this clarification.¹⁷⁵ Since the decision is silent on this point it is impossible to determine with certainty why the Chamber did not undertake an Article 21 analysis. However, it seems unlikely that it was a mere oversight since the Chamber *did* refer to Article 21 on two other occasions in the decision addressing different issues.¹⁷⁶

Possibly, the Chamber viewed Article 21 as not authorizing its reliance on the jurisprudence of the ICTY to interpret Article 28 of the Rome Statute. Shortly after the completion of the Rome Statute, Cherif Bassiouni, the Chairman of the Drafting Committee, noted the tension between Article 21 and the principle *nullum crimen sine lege*, which is codified in Article 22 of the Statute.¹⁷⁷ Other authorities have criticized the substance of Article 21, noting that under the guise of the principle of legality, the

¹⁷² See Art. 21(1)(a) and (b) ICCSt.

¹⁷³ Art. 21(2) ICCSt.

¹⁷⁴ See Art. 21 ICCSt.; A. Pellet, ‘Applicable Law’ at pp. 1051-1083 in Vol. II., Cassese, Gaeta, and Jones, Eds. *The Rome Statute of the International Criminal Court*, *supra* note 107, at 1078, fn 149.

¹⁷⁵ *Bemba CD* § 424.

¹⁷⁶ *Ibid.*, § 39 and § 218.

¹⁷⁷ See M. Cherif Bassiouni, *supra* note 111, at p. 464, fn. 89 (“Article 21 of the Statute permits recourse to alternative sources of international law. That very norm, however, may pose problems in light of Article 22, which clearly states the principle *nullum crimen sine lege*”).

statute unduly restricts the decision-making authority of the ICC's judges.¹⁷⁸ Such a restriction is inappropriate to international law which has historically had a strong customary element and is especially unsuited to international criminal law which is new and developing area of the law.¹⁷⁹ For example, pursuant to Article 21 the ICC's own jurisprudence is only a subsidiary source of authority and the provision does not include other international tribunals.¹⁸⁰ Professor Pellet described the system of sources in Article 21 as "extremely complex," and commented "[o]ne may, thus, predict that the judges will interpret the text, at least partially, so as to recover the powers inherent in all courts, of which the drafters of the Statute clearly wanted to deprive them."¹⁸¹

This prediction, with a slight variation, was realized in the *Bemba Confirmation Decision*. When the Chamber turned to the command responsibility issues, it simply ignored Article 21 to arrive at interpretive solutions with the guidance of jurisprudence it found useful and instructive. That jurisprudence, as noted above, predominantly derived from the ICTY.

Is this a positive development? For several reasons, I believe it is. First, the issues which confront courts in these cases are complex and implicate many competing concerns. There is a constant tension in cases such as *Bemba* between protecting the rights of the accused and ensuring the maximum protection for civilians and noncombatants in warfare.¹⁸² Enforcing the law in a manner that provides maximum

¹⁷⁸ A. Pellet, *supra* note 174, at 1053 and at 1056.

¹⁷⁹ *Ibid.*, p.1056.

¹⁸⁰ A. Pellet, *supra* note 174, at 1078, fn. 149 ("The case law of other courts and tribunals is ignored by Art. 21 although it is covered by Art. 38(1)(d) of the Statute of the ICJ.").

¹⁸¹ *Ibid.*, p. 1053. Professor Pellet described Article 21 as "discretionary" and observed that the chambers of the ICC doubtless have the right to refer to international custom even without express authority. *Ibid.*, p. 1066 and p. 1072.

¹⁸² See Danner and Martinez, *supra* note 1, at 140 (observing that "deterrence of criminal violations lies at the heart of the doctrine" of command responsibility).

protection to civilians and noncombatants may impose unduly onerous obligations on the accused.¹⁸³ This tension is heightened in a court such as the ICC which was founded with the purpose of prosecuting only the most “serious crimes of concern to the international community”.¹⁸⁴ Those most serious crimes inevitably involve the most senior military (and political) leaders. These senior accused - from *Yamashita* to *Bemba* - frequently allege in defence that they were unaware of their subordinates’ crimes, in part, because of their geographic distance from the theatre of operations.¹⁸⁵ At the same time, Courts adjudicating these cases must vindicate the interests of the international community in these prosecutions, which necessarily involve ending impunity for those who commit crimes against humanity, war crimes and genocide.¹⁸⁶

The difficulty in accommodating all of these interests cannot be underestimated. In adjudicating such cases, courts should have the freedom to consult and rely on the authority they deem most instructive. In a memo to the PrepCom dated 22 March 1996, regarding the elements of crimes and general principles of criminal law, Judge Cassese, who at the time was President of the ICTY, observed: “To date *there have been very few decisions by international or national judicial bodies concerning the implementation of international humanitarian law*. Against this background the work of the [ICTY] may serve to assist the Preparatory Committee in its work on the International Criminal Court.”¹⁸⁷ As the command responsibility issues were sub judice in *Bemba*, the ICTY already had a history of deciding such issues. Indeed, it would have been improvident

¹⁸³ See T. Wu and K.S. Yang, *supra* note 30, at 282.

¹⁸⁴ See Preamble ICC Statute; *see* Article 17 of the ICC Statute which provides that a case shall be inadmissible where “it is not of sufficient gravity”.

¹⁸⁵ See *Yamashita*, 327 U.S. at 17; *Bemba CD* §§ 484-489

¹⁸⁶ See ICC Statute, Preamble.

¹⁸⁷ See Memorandum of Judge Antonio Cassese to the Preparatory Committee on the Establishment of the ICC, 26 March 1996 (emphasis added) (available at www.iccnw.org)

for the Chamber *not* to have consulted and utilized the ICTY's jurisprudence as an interpretive aid in view of the relative paucity of case law in this area.

An example of the failure to utilize this jurisprudence, as well as the consequences, already exists. David Cohen, who has written extensively about the hybrid tribunals, authored a report about the Special Panels for East Timor.¹⁸⁸ In general, his research found the quality of the justice lacking. He noted in many cases the judges did not consult the work of the *ad hoc* tribunals in developing areas of the law such as command responsibility and joint criminal enterprise. Of this he observed:

Such references while not strictly necessary in any sense of 'precedent,' would have greatly assisted in arriving at a more systematic, coherent and accurate interpretation and application of relevant doctrines. Even more important, using them as a model might have helped some of the Judgments avoid misapplying or neglecting to apply the elements of the offenses as defined by the SPSC's own Statute. Instead, in many such Judgments the panel seems to be, jurisprudentially speaking, groping in the dark.¹⁸⁹

Surely it is desirable to avoid a similar destiny.

Although the Rome Statute was drafted, debated and negotiated over the course of more than a decade, no statute can realistically eliminate the need for judicial interpretation, regardless of how comprehensive it may appear. Indeed, the Rome Statute is especially vulnerable in this respect. As those who were most intimately involved in its drafting and negotiation have noted, many aspects of the Statute were the result of political compromise; and many of the diplomats representing various countries at the Rome Conference had no familiarity with the Draft Statute and no knowledge of

¹⁸⁸ D. Cohen, 'Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor', East-West Center Special Reports, Number 9, 2006.

¹⁸⁹ D. Cohen, *supra* note 4, at 46.

international criminal law or criminal practice.¹⁹⁰ The Statute, although drafted over a lengthy interim, was finalized in a very brief time span.¹⁹¹ All of these factors taken together yielded an imperfect instrument. Indeed, one authority on the Statute has described it as “a verbose text that is riddled with inconsistencies, compromises, lacunae and ‘constructive ambiguities’”.¹⁹² Accordingly, in this historical context, it is immanently logical — and preferable — for a chamber of the ICC, to rely upon the work of the judges of the ICTY, who developed an expertise in resolving similar cases, rather than rule without guidance. It should also be noted that in view of the complexity of the process, it is extremely unlikely that the Statute will be amended to resolve any technical deficiencies or inconsistencies.¹⁹³ Thus, it will be the task of the judges to resolve such problems. Both for the accused and the prosecution, it is preferable that the judges be able to draw on the experience of other courts such as the ICTY, which have resolved similar cases and issues.

It could be argued that reliance by a chamber of the ICC on the ICTY’s jurisprudence, such as in the *Bemba Confirmation Decision*, will create uncertainty and delay the development of the ICC’s own jurisprudence in this area of the law.¹⁹⁴ While these are appropriate and legitimate concerns, they are ultimately untenable. First, as noted the Statute is an imperfect instrument and this observation applies to Article 28, a

¹⁹⁰See Bassiouni, Ed., *The Statute of the International Criminal Court and Related Instruments* note 107 above, pp. 75-76 and p. 91; W. Schabas, “‘Customary Law’ or ‘Judge-Made’ Law: Judicial Creativity at the UN Criminal Tribunals”, pp.77-101 in *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, J. Doria, H.Gasser and M. C. Bassiouni, Eds. (Leiden: Martinus Nijhoff Publishers, 2009), p 101.

¹⁹¹ Schiff, *Building the International Criminal Court*, *supra* note 72, at 70-72.

¹⁹² Schabas, *supra* note 190, at 101.

¹⁹³ Pellet, *supra* note 174, at 1059; Bassiouni, *supra* note 111, at 466.

¹⁹⁴ Cf. R. Cryer, *supra* note 158, at 24.

fortiori.¹⁹⁵ In interpreting it, the Chamber required guidance, aside from the travaux préparatoires, which are silent on some significant issues, for example, the addition of the element of causation.¹⁹⁶ When the Chamber considered the issue, it adhered to the language of Article 28 following the principle of *nullum crimen sine lege*, but utilized the jurisprudence of the ICTY in determining the scope of causation. Thus, in this example the use of the ICTY's case law informed and supported the development of the ICC's law. This is true of the Chamber's extensive use of the ICTY's case law throughout its analysis of command responsibility: its use of that jurisprudence facilitated the Chamber's decision making and fostered the development of its law.

Rather than create uncertainty or undermine legality, the Chamber's reliance in *Bemba* upon the ICTY's jurisprudence — as well as that of the other tribunals which derive from that of the ICTY — will enhance legality. Where the Chamber used the ICTY's jurisprudence, it did so transparently. Thus, the litigants were fully apprised as to the sources of law utilized in analyzing the issues and reaching conclusions. Such information is, of course, critical in litigating at the trial level and on appeal. The information will also prove useful to litigants in the preparation of future cases. Further, where Article 28 differed from the ICTY's statute, for example with respect to causation and knowledge, the Chamber adhered to language of Article 28, thereby preventing any prejudice to the accused. Moreover, and most significantly, the numerous ICTY decisions cited by the Chamber in its discussion of, for example, what constitutes

¹⁹⁵ An example where the language of the statute created uncertainty was the drafters' decision to depart from customary law and impose an element of causation. *See* AI Br. 43. Another example is the confusing language in Article 28(a) which uses the terms "effective command and control" and "effective authority and control" to refer to military and military-like commanders. The Chamber decided to disregard the words "effective authority and control" as unnecessary and potentially confusing. *See Bemba CD* § 412.

¹⁹⁶ *See* AI Br. § 43.

reasonable and necessary measures to prevent, repress and punish crimes, will provide guidance to military commanders and officers, as well as their advisors, which will enable them to conform their conduct to the law. Accordingly, the use of this jurisprudence will promote legality both within the ICC, and among the broader international community which will be impacted by its work.

7. Conclusion

There is hierarchy in the jurisprudence of command responsibility in the international tribunals. For a variety of reasons which pertain to the nature of the conflict in the former Yugoslavia, as well as to certain of the ICTY's institutional characteristics, the command responsibility jurisprudence of that court has emerged as dominant among the international criminal tribunals. The *Bemba Confirmation Decision* provides the most recent example of this dominance. On a number of levels this development is positive and should be encouraged. First, the opinions of the ICTY can inform and guide the decision making of judges at the ICC, as they have done at the other tribunals, in complex cases involving many competing concerns which inevitably require guidance. Moreover, continuing this jurisprudential tradition will promote legality and conformity with international humanitarian law and international criminal law, which are among the most significant goals of the ICC.

Bibliography:

Books:

M. C. Bassiouni, Ed., *The Statute of the International Criminal Court and Related Instruments: Legislative History 1994-2000* (Ardsley, NY: Transnational Press, 2002)

M. C. Bassiouni, J. Doria, and H. Gasser, Eds., *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, (Leiden: Martinus Nijhoff Publishers, 2009)

A. Cassese, P. Gaeta, and J. Jones, Eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) Vols. I and II

T. Kelsall *Culture Under Cross-Examination: International Justice and the Special Court for Sierra Leone*, (Cambridge: Cambridge University Press, 2009)

Roy S. Lee, Ed., *The International Criminal Court: The Making of The Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law Int'l, 1999)

R. MacKenzie, C. Romano, Y. Shany and P. Sands, *The Manual on International Courts and Tribunals* (Oxford: Oxford University Press, 2010)

C. Meloni, *Command Responsibility in International Criminal Law* (The Hague: TMC Asser Press, 2010)

A.P.V, Rogers, *Law on the Battlefield*, (Manchester: Manchester University Press, 2004)

B. Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008)

Articles:

K. Ambos, 'Critical Issues in the Bemba Confirmation Decision', 22 *Leiden J. of Int'l Law* 715 (2009)

M. C. Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of the International Criminal Court', 32 *Cornell Int'l L.J.* 443 (1999)

D. Cohen, "'Hybrid" Justice in East Timor, Sierra Leone and Cambodia: "Lessons Learned" and Prospects for the Future', 43 *Stanford Int'l Law J* 11 (2007)

R Cryer, 'Command Responsibility at the ICC and ICTY: In Two Minds on the Mental Element?' (July 20, 2009) (available at www.ejiltal.org)

A. Danner and J. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', 93 California L. Rev. 75 (2005)

B. Landrum, 'The Yamashita War Crimes Trial: Command Responsibility Then and Now', 149 Mil. Rev. 293 (1995)

J. Martinez, 'Understanding Mens Rea in Command Responsibility: From Yamashita to Blaskic and Beyond', 5 Journal Int'l Crim. Justice 638 (2007)

W. Parks, 'Command Responsibility for War Crimes', 62 Mil. Rev. 1 (1973)

N. Reid, 'Bridging the Conceptual Chasm: Superior Responsibility as the Missing Link between State and Individual Responsibility under International Law', 18 Leiden J. Int'l L. 725

K.S. Yang, and T. Wu, 'Criminal Liability for the Actions of Subordinates: The Doctrine of Command Responsibility and its Analogues in United States Law', 38 Harvard Intl L.J. 272 (1997)

Treaties and International Documents:

Hague Regulations Respecting the Laws and Customs of War on Land 1907, Annex to Convention IV, 9 UKTS (1910) Cd. 5030;

Additional Protocol I relating to the Protection of Victims of International Armed Conflicts, 1977 1125 UNTS 3;

Rome Statute of the International Criminal Court, 17 July 1998, as amended, 2187 UNTS 90;

Final Report of the UN Commission of Experts dated 27 May 1994, S/1994/674, on the Establishment of the International Criminal Tribunal for the former Yugoslavia (available at www.un.org, Resources and Services, Documents);

Final Report of the UN Commission of Experts dated 4 October 1994, S/1994/1125, on the Establishment of the International Criminal Tribunal for Rwanda (available at www.un.org, Resources and Services, Documents);

Report of the Preparatory Committee on the Establishment of the International Criminal Court, Working Group on General Principles of Criminal Law and Penalties, 18 February 1997, A/AC.249/1997/WG.2/CRP.3 (available at www.iccnw.org (about the court)(history of the icc));

UN Diplomatic Conference on the Establishment of the International Criminal Court, Report of 16 June 1998, A/Conf.183/C.1/SR.1 (available at www.iccnw.org (about the court) (history of the icc));

Memorandum of Judge Antonio Cassese to the Preparatory Committee on the Establishment of the International Criminal Court, 26 March 1996 (available at www.iccnw.org (about the court) (history of the icc));

Other Authorities:

D. Cohen, ‘Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor’, East-West Center Special Reports, Number 9, June 2006, (available at www.eastwestcenter.org (publications));

J. Dungel, ‘Command Responsibility in International Criminal Tribunals’, Paper Presented at the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances—Searching for Solutions, July 16-17, 2007, available at <http://sc.judiciary.gov.ph/publications/summit/Summit%20Papers/Dungel%20-%20Command%20Responsibility%20in%20ICT.pdf>;

International Committee of the Red Cross Commentaries and Customary Rules available at www.icrc.org;

All statutes, opinions, transcripts, and filings, such as briefs, indictments and arrest warrants are available at the following websites:

Extraordinary Chambers in the Courts of Cambodia: www.eccc.gov.kh/en

International Criminal Court: www.icc-cpi.int

International Criminal tribunal for the former Yugoslavia: www.icty.org

International Criminal Tribunal for Rwanda: www.icttr.org

Special Court for Sierra Leone: www.sc-sl.org

Special Tribunal for Lebanon: www.stl-tsl.org

All websites were last visited on November 19, 2011.