THE TEMPORAL SCOPE OF COMMAND RESPONSIBILITY REVISITED: WHY COMMANDERS HAVE A DUTY TO PREVENT CRIMES COMMITTED AFTER THE CESSION OF EFFECTIVE CONTROL

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THE TEMPORAL SCOPE OF COMMAND RESPONSIBILITY REVISITED: WHY COMMANDERS HAVE A DUTY TO PREVENT CRIMES COMMITTED AFTER THE CESSATION OF EFFECTIVE CONTROL

Joakim Dungel* and Shannon Ghadiri**

Abstract

Must an outgoing commander prevent his troops from criminal activity even if their crimes will be committed after he ceased to have effective control over them? This question has received scant judicial or academic discussion. Yet, the question is not simply a hypothetical one. In the Sesay et al. trial judgment, the accused Morris Kallon incurred command responsibility for his failure to prevent enslavement, which continued until December 1998, even though his effective control over the culpable troops ended in August 1998. While the trial chamber provided little reasoning for its conclusion, this paper endeavours to fill that gap in research and discussion by explaining 1) that all the elements of command responsibility under customary international law can be met at the same time, without being contemporaneous with the subordinate’s crime; 2) that command responsibility beyond a commander’s period of effective control is consistent with a principled reading of the doctrine of command responsibility which seeks broad compliance with international humanitarian law to prevent violations thereof; and 3) why actual and theoretical arguments against the advocated position, such as those levelled by the majority in the 2003 Hadžihasanović Interlocutory Appeal, do not withstand scrutiny. This paper concludes that the customary law principle of command responsibility obliges a commander to prevent his subordinates from committing crimes at all times when he has the requisite knowledge and material abilities to do so, regardless of whether the crimes were eventually committed after the commander left his position of command.

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I. INTRODUCTION

1. Commanders wield overwhelming influence over others. Where a commander exercises his powers responsibly in relation to his troops’ obedience to international humanitarian law, it vouches for a broad compliance with the law by his soldiers. Where he does not, the consequences are devastating.¹

2. In order to foster the former conduct by commanders, and curb the latter, the customary international law principle of command responsibility imposes criminal liability on military and other commanders who fail to comply with either or both of two distinct duties. First, a commander must punish his subordinates for crimes he has the requisite knowledge that they have committed in the past. Second, he must prevent crimes he has the requisite knowledge that they will commit in the future. According to the principle, a commander is bound by these duties only during the period when he has the material ability to fulfill them (also known as ‘effective control’). However, the principle does not say explicitly whether the subordinates’ crimes, which he is duty-bound to punish and prevent, must be committed within the same period.

¹ See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1018 (Yves Sandoz et al., ICRC 1987). (‘In fact the role of commanders is decisive. ... the necessary measures for the proper application of the Conventions and the Protocol must be taken at the level of the troops, so that a fatal gap between the undertakings entered into by Parties to the conflict and the conduct of individuals is avoided. At this level, everything depends on commanders, and without their conscientious supervision, general legal requirements are unlikely to be to be effective.’) [internal references omitted].
3. This raises two questions: First, must a new commander punish his troops even if their crimes were committed before he assumed effective control over them? Second, must an outgoing commander prevent his troops from criminal activity even if their crimes will be committed after he ceased to have effective control over them? These are very real scenarios, since commanders change on a regular basis in times of war and occupation.

4. The first question was answered in the negative by the ICTY Appeals Chamber in a 2003 decision in the Hadžihasanović case. Others have extensively and persuasively criticized that decision, and a majority of the ICTY Appeals Chamber itself appears to have retracted from it in a subsequent case. This question, therefore, will not be the main focus of the present study, although recourse will be had to the debate surrounding the Hadžihasanović Decision where appropriate. Rather, this paper will concentrate on the second question, namely, whether a commander, during his tenure, has the duty to prevent his troops from committing crimes even if the crimes themselves will be committed after he ceased to have effective control over the culpable soldiers.

5. The second question has so far received almost no judicial or scholarly attention. Yet the issue is not hypothetical; it has arisen in the case-law. In the case of Sesay et al., Trial Chamber I of the Special Court for Sierra Leone (‘SCSL’) found that the accused Morris Kallon had effective control over fighters of the Revolutionary United Front (‘RUF’) in the Kono District of Sierra Leone until August 1998. These fighters enslaved hundreds of civilians in RUF camps throughout...

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2 Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, ¶ 51 (July 16, 2003) (‘Hadžihasanović Decision’).
4 Prosecutor v. Orić, Case No. IT-03-68-A, Judgment, (July 3, 2008) (‘Orić Appeal Judgment’); Prosecutor v. Orić, Case No. IT-03-68-A, Declaration of Judge Shahabuddeen, ¶ 12 (July 3, 2008) (noting that by the time of the Orić Appeal Judgment, a total of fourteen ICTY judges, four of whom were at different times at the appellate level, had expressed judicial views contrary to the decision of the majority in Hadžihasanović (‘Declaration of Judge Shahabuddeen in Orić’); See also Prosecutor v. Orić, Case No. IT-03-68-A, Partially Dissenting Opinion and Declaration of Judge Liu, (July 3, 2008) (‘Dissenting Opinion of Judge Liu in Orić’); Prosecutor v. Orić, Case No. IT-03-68-A, Separate and Partially Dissenting Opinion of Judge Schomburg, (July 3, 2008) (‘Dissenting Opinion of Judge Schomburg in Orić’).
5 Sesay et al. Trial Judgment, ¶ 2141.
the Kono District between February and December 1998. Even though his effective control over the culpable troops ended in August 1998, the trial chamber found that Kallon incurred command responsibility for his failure to prevent the enslavement which continued until December 1998.

6. Although the Sesay et al. trial chamber gave no legal or factual reasons for its conclusion, this paper argues that there was a legal basis for it. It is submitted that the principle of command responsibility obliges a commander to prevent his subordinates from committing crimes at all times when he has the requisite knowledge and material abilities to do so, regardless of whether the crimes were eventually committed after his abilities had ceased. If it were otherwise, the purpose of command responsibility would be defeated in all cases where subordinates are about to commit crimes after their commander has left his position of command, even though the commander had the requisite knowledge about their soon to be committed crimes, and, importantly, could have stopped them.

7. The argument is presented in four steps. First, Section II explains why all elements of command responsibility under customary international law can be met at the same time, without the simultaneous coexistence of the subordinate’s crime. Second, Section III describes how this is consistent with a principled reading of the doctrine of command responsibility. Third, Section IV seeks to rebut traditional and potentially new arguments against the advocated position. Finally, a concluding remark is proffered in Section V.

II. THE ELEMENTS OF COMMAND RESPONSIBILITY UNDER CUSTOMARY INTERNATIONAL LAW

8. The rationale underlying the principle of command responsibility in customary international law—to promote a broad compliance with international humanitarian law by obliging commanders to curb their subordinates’ criminal acts—has been the same since the principle’s inception. The principle itself has evolved as to its details so that customary international law now knows it in terms of three elements. When the three elements coincide, command responsibility ensues. From a plain reading of these elements, as will be shown in this sub-section, it is obvious that they can all be fulfilled at the same time without the subordinate’s crime being committed simultaneously therewith. Therefore, on its face the principle under customary international law allows for

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4 Sesay et al. Trial Judgment, ¶ 1324-1327.
5 Sesay et al. Trial Judgment, ¶ 2151.
6 As a result, the SCSL Appeals Chamber the reversed the trial chamber’s pertinent findings for want of sufficient reasoning and consequently never reached the matter now at issue. Prosecutor v. Sesay, Case No. SCSL-04-15-A, Judgment, ¶ 874-876 (October 26, 2009) (‘Sesay et al. Appeal Judgment’).
command responsibility even if the subordinate’s crime was completed before or after the period during which the commander had effective control over the culpable subordinate, provided the three elements are present during that period. The temporal distance between the subordinate’s crime and that period is only relevant as a matter of evidence regarding the commander’s knowledge of the crime and the measures by which he could have prevented or punished it.

9. Preliminarily, in order for command responsibility to be prosecutable, it is required that a subordinate has carried out a crime.\(^9\) His conduct may be criminal under any mode of liability, such as ‘commission,’ ‘aiding and abetting,’ ‘instigating,’ \(^{11}\) In this paper, therefore, reference to a subordinate’s ‘committing’ a crime is to be understood in a broad sense to encompass all forms of criminal responsibility for a crime.\(^{12}\)

10. Customary international humanitarian law then requires the following three elements to be established beyond reasonable doubt for command responsibility to arise in respect of the crime:

   (i) the existence of a superior-subordinate relationship;

   (ii) that the commander had the requisite knowledge that his subordinate was about to commit a crime or had done so; and

   (iii) that the commander failed to take the necessary and reasonable measures to prevent or punish his subordinate’s criminal conduct.\(^{13}\)

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9 *Infra*, § III.

10 See Orić *Appeal Judgment*, ¶18.

11 Orić *Trial Judgment*, ¶ 299-301. It would appear this approach was at least tacitly accepted by the ICTY Appeals Chamber, as it considered extensively under which mode of liability the Trial Chamber had found Orić’s subordinate responsible. See Orić *Appeal Judgment*, ¶ 38-48. See also ANTONIO CASSESE, *supra* note 3, at 247.

12 This study does not take a position on whether command responsibility can arise in respect of a subordinate commander’s command responsibility, sometimes referred to as ‘double command responsibility.’ See Orić *Appeal Judgment*, ¶ 39.

11. These elements together constitute the principle of command responsibility under customary international law. The first element—a superior-subordinate relationship—exists where one person, whether military or civilian, has ‘effective control’ over another. Effective control means to have ‘the material ability to prevent and punish criminal conduct,’ and can be based on either de jure or de facto powers, or a combination of both. Lesser degrees of control, for example ‘substantial influence,’ are insufficient for command responsibility.

12. Nothing in the first element requires that the superior-subordinate relationship existed at the time of the subordinate’s crime. That the subordinate carried out his crime before the commander assumed effective control, or completed the crime after such control had ceased, does not change the fact that, during the period of effective control, the commander had a subordinate among his troops who had committed or was about to commit a crime.

13. The second element ensures that command responsibility is not a form of strict liability. One of two states of mind is required: actual knowledge or constructive knowledge. In this regard, it is important to distinguish between a commander’s actual or constructive knowledge of crimes generally, which may not have been committed by his troops, and his actual or constructive knowledge of his own subordinates’ crimes, as only the latter can lead to command responsibility. As to the nature of the subordinate’s criminal act, the commander must have the requisite knowledge with regard to the distinguishing elements of the crime, including in particular the specific intent required for some crimes. Accordingly, where two offences have a material element in common, but the first offence contains an additional element not present in the second

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15. E.g. Čelebici Appeal Judgment, ¶ 195; Kajelijeli Appeal Judgment, ¶ 85; Orić Appeal Judgment, ¶ 91; Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 408, 409, 415 (June 15, 2009) (‘Bemba Decision on Confirmation of Charges’).

16. Čelebici Appeal Judgment, ¶ 266.

17. The statutes of the ad hoc tribunals refer to a commander’s ‘reason to know’ about crimes, and the Rome Statute of the ICC requires that military commanders ‘should have known’ about, and that other superiors ‘consciously disregarded information which clearly indicated,’ subordinates’ crimes. ICTY Statute, Art. 7(3); ICTR Statute Art. 6(3); SCSL Statute, Art. 6(3); Rome Statute, Art. 28. As noted by the ICRC, these formulations essentially cover the concept of constructive knowledge. JEAN-MARIE HENCKAERTS and LOUISE DOSWALD-BECK, supra note 13, at 562.


19. Prosecutor v. Milutinović, Case No. IT-05-87-T, Judgment (Vol. 1), ¶ 119 (February 26, 2009) (‘Milutinović et al. Trial Judgment’) (‘in respect of persecution, the accused must have knowledge or reason to know that the relevant subordinates possessed discriminatory intent.’).
(e.g. cruel treatment and torture), the requisite knowledge of the first offence alone does not suffice in law to put the commander on notice of the second offence.\textsuperscript{20}

14. Like the first element, the second element also does not limit command responsibility to crimes committed within the period of the commander’s effective control. To be sure, international criminal statutes variously refer to a commander’s requisite knowledge either of crimes his subordinate ‘was about to commit or had committed,’\textsuperscript{21} or crimes his subordinates ‘were committing or about to commit.’\textsuperscript{22} But neither of these formulations exclusively limit a commander’s requisite knowledge to crimes committed during the period of his effective control.\textsuperscript{23}

15. The third element specifies the commander’s culpable conduct. It provides liability for commanders who fail to comply with one or both of two distinct legal duties, namely, to punish subordinates for past crimes, and to prevent them from committing future crimes.\textsuperscript{24} Again, there is no limitation by reference to the period of the commander’s effective control as to which crimes he must punish and prevent. Rather, the duties are simply that the commander must ‘prevent’ troops from committing crimes in the future, and ‘punish’ them for crimes they committed in the past. It should be mentioned here that a commander is obviously not expected to perform the impossible. He is only obliged to take the ‘necessary and reasonable’ measures to prevent or punish. What those measures are in a given case will depend on the commander’s ‘material ability’ to act, in other words the degree of effective control he wields over the criminal subordinates (c.f. first element).\textsuperscript{25} But in no case do they, as a matter of law, depend on whether the crimes themselves coincided with the commander’s effective control.

16. As far as the temporal boundaries of command responsibility go, the three elements of command responsibility can be summed up as follows: The first element demarcates the period during which a commander is duty-bound to prevent and punish criminal conduct by his

\textsuperscript{21} ICTY Statute, Art. 7(3); ICTR Statute, Art. 6(3); SCSL Statute, Art. 6(3); ECCC Statute, Art. 29. See also JEAN-MARIE HENCKAERTS and DOSWALD-BECK, supra note 13, at 558.
\textsuperscript{22} Rome Statute, Art. 28; STL Statute, Art. 3(2)(a).
\textsuperscript{23} See Dissenting Opinion of Judge Schomburg in Orić, ¶ 13; Dissenting Opinion of Judge Liu in Orić, ¶ 29. For an explanation of why the phrase ‘were committing or about to commit’ in the Rome Statute does not exclude command responsibility in respect of past crimes, see infra § D1(b).
\textsuperscript{24} E.g. Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶ 83 (July 29, 2004) (‘Blaškić Appeal Judgment’). The Rome Statute sets out three duties, namely, to prevent crimes, repress them, and submit the matter to the competent authorities for investigation and prosecution. Rome Statute, Art. 28(a)(ii). However, in substance they are no different than the duties recognized by the ad hoc tribunals; the Rome Statute simply specifies the content of the commander’s obligations in more detail. See Bemba Decision on Confirmation of Charges, ¶ 435-442.
\textsuperscript{25} E.g. Prosecutor v. Boškoski and Tarčulovski, Case No. IT-04-82-A, Judgment, ¶ 230 (May 19, 2010); Blaškić Appeal Judgment, ¶ 72; Bemba Decision on Confirmation of Charges, ¶ 443.
subordinates; the second element triggers those duties, and the third element specifies their content. For example, assume a commander has effective control (first element) over troops between May 1 and May 31. During this period, he will be under a duty to prevent and punish crimes by his troops. On May 30, still within that period, he acquires requisite knowledge (second element) that some of his troops plan to commit a crime on June 2. Between May 30 and May 31, he must thus take all necessary and reasonable measures to prevent them from committing the crime (third element). If he does so, the crime will most probably not be committed. But if he does not, the commander will incur command responsibility liability in respect of the crime, notwithstanding that the crime itself was committed on June 2, after his effective control had ended. As apparent from this example, all elements of command responsibility can be met at the same time, regardless of when the subordinate actually commits the crime.

17. Some might challenge this conclusion by asserting that command responsibility requires the commander’s failure to cause or somehow affect the crime, and that it therefore would be misguided to hold a commander liable for participating in the crime in his capacity as a commander when there is no evidence that the crime resulted from the commander’s failure at a time when he was still in charge over the culprit. Proponents of this view would argue that command responsibility connotes criminal liability not only for the commander’s own failure to prevent or punish the crime, but also for the crime itself.

18. In response, it should be mentioned, first, that the principle of command responsibility under customary international law (in contrast to forms of vicarious liability under international criminal law) does not require any causality between the commander’s conduct, be it his failure to punish the crime.
or prevent,\textsuperscript{30} and the subordinate’s crime. The ICC has found a requirement of causation between the commander’s failure to prevent and the subordinate’s crime,\textsuperscript{31} but that finding was based on an ambiguous interpretation of court’s own Statute\textsuperscript{32} and, given the abundant jurisprudence of the ICTY and the SCSL to the contrary, cannot be said to reflect customary international law.\textsuperscript{33}

Second, there is agreement among both the \textit{ad hoc} tribunals and the ICC that command responsibility is not a form of vicarious liability whereby the commander incurs liability for the crime itself.\textsuperscript{34} Third, and in any event, even on the view that command responsibility is liability for the crime itself and requires a causal link between the commander’s failure and the subordinate’s crime, it does not follow that the subordinate’s crime must coincide temporally with the great deal by essentially endowing commanders with the qualities of omniscience and omnipotence and completely dismissing the possibility that a crime could have been committed by a rogue subordinate acting of his own accord, completely independent of the commander’s influence. \textit{Id.} at 677-680.

\textsuperscript{30} In fact, even those chambers of the ICTY and the SCSL that have disallowed command responsibility in respect of crimes committed before the accused’s assumption of effective control agree that command responsibility is separate from liability for the crime, and that no causation is required. \textit{Hadžihasanović} Decision, ¶ 22 (‘command responsibility looks at liability flowing from breach of [the] duties’ comprised in the idea of command); \textit{Hadžihasanović and Kubura} Appeal Judgment, ¶ 40 (command responsibility ‘does not require that a causal link be established between a commander’s failure to prevent subordinates’ crimes and the occurrence of these crimes’); Prosecutor v. Brima, Case No. SCSL-2004-16-T, Judgment, ¶ 783 (June 20, 2007) (‘Volker Nerlich, Christopher Greenwood, culpable due to the duty imposed by international law upon a commander’ and does not require his involvement in the

\textsuperscript{31} Bemba Decision on Confirmation of Charges, ¶ 423, 424; \textit{See also} Kai Ambos, supra note 27, at 850, 860; Christopher Greenwood, \textit{Command Responsibility and the Hadžihasanović Decision}, 2 J. Int’l Crim. Just. 598, 603 (2004); Volker Nerlich, supra note 29, at 665, 672-673 (2007).

\textsuperscript{32} Art. 28 reads, in relevant parts:

\begin{quote}
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: …
\end{quote}

The wording of Article 28 allows for two different interpretations of the subject matter to which the phrase ‘as a result of’ refers. On the one hand, it could mean that the \textit{crimes were committed because} the commander failed to exercise control properly over his forces. On the other hand, it could mean that the commander is \textit{responsible because} he failed to exercise control properly over his forces. Whereas the former reading implies causality between the failure and the crime, the latter does not.

\textsuperscript{33} \textit{See also} JEAN-MARIE HENCKAERTS and L. DOSWALD-BECK, supra note 13, at 558-563 (setting out the customary principle of command responsibility, while conspicuously omitting any reference to a causality requirement).

\textsuperscript{34} \textit{Krnojelac} Appeal Judgment, ¶ 171 (‘It cannot be overemphasized that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with the failure to carry out his duty as a superior to exercise effective control’); \textit{Halilović} Trial Judgment, ¶ 54; Brima \textit{et al.} Trial Judgment, ¶ 783. \textit{See also} Ćelebić Appeal Judgment, ¶ 239 (stating that command responsibility is not a vicarious responsibility doctrine); Prosecutor v. Bagilishema, Case No. ICTR-95-1-A-A, Judgment (Reasons), ¶ 35 (July 3, 2002) (‘Bagilishema Appeal Judgment’) (describing superior responsibility solely in terms of a breach of duty). \textit{Bemba} Decision on Confirmation of Charges, ¶ 436. Consequently, the fact that Article 28 of the Rome Statute and some cases (and indictments) have expressed command responsibility as liability ‘for’ the subordinate’s crimes should not be taken to mean that the commander himself participated in the crime. Rather, they merely signify that the punishment for the actual crime committed by the subordinate is a measure of punishment of the commander for his failure to control the subordinate. If interpreted otherwise, they would ‘misrepresent the true meaning of the doctrine of command responsibility in international
commander’s effective control. It is perfectly possible that a commander’s failure to prevent a crime during his period of effective control causes or affects a crime eventually committed thereafter. As a result, even assuming that command responsibility is liability for the subordinate’s crime, there is no reason to require that the crime coincide temporally with the commander’s effective control.

19. Rather, command responsibility arises when the commander’s failure is contemporaneous with his effective control over and his discovery of the culpable or potentially culpable subordinate. The timing of the subordinate’s crime is a different matter. There is nothing inherent in a principle which imposes duties to punish or prevent criminal acts that those criminal acts must be simultaneous with the period during which the duties exist. To make the point in the extreme, a prosecutor is obliged to prosecute crimes within his jurisdiction and discretion even if they were committed before he took office, and a policeman is required to prevent crimes even if he believes they will be committed after he leaves his post. As a matter of customary international law, the principle of command responsibility requires only that its three elements—effective control, requisite knowledge, and failure to prevent or punish—coincide. It is that combination which triggers command responsibility. The timing of the subordinate’s crime in relation to these elements is only a question of evidence.

20. In conclusion, the elements of the principle of command responsibility under customary international law do not exclude command responsibility in cases where the subordinate’s crime is committed after the commander’s effective control has ended. The next section explains how this is consistent with a principled interpretation of the customary principle of command responsibility, and indeed how such an interpretation compels command responsibility in such cases.

III. PRINCIPLED READING OF COMMAND RESPONSIBILITY

21. This section traces the origins of command responsibility from Sun Tzu and Hugo Grotius over the aftermaths of World War I and II, to Additional Protocol I, contemporary international criminal statutes and national laws. Three points are evident from this analysis. First, the fundamental purpose of the principle of command responsibility, from its inception to present

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36 See e.g. Swedish Code of Judicial Procedure (1942:740), Ch. 20, sec. 6, none of the exceptions to which in section 7 refers to the fact that the prosecutor was not in office when the crime was committed.
37 See e.g. Swedish Police Act (1984:387), sec. 9 (setting out a policeman’s duty to report crimes, none of the exceptions to which refer to the fact that the crime will be committed after the policeman leaves his post); Danish Police Act (No. 444, 9 June 2004), Ch. 2 sec. 2.
38 Dissenting Opinion of Judge Shahabuddeen in Hadžihasanović Decision, ¶ 29.
times, has consistently been to promote broad compliance with international humanitarian law. The rationale is that, because a single commander has the power to determine the conduct of many subordinates, his response to subordinates who are about to commit crimes will have a direct and considerable effect on the number of crimes committed. As such, commanders play a crucial role in ensuring compliance with international humanitarian law. Second, the rationale is first and foremost expressed through a duty of commanders to prevent their subordinates’ crimes. Third, none of the formulations of this duty is curtailed in a way that would exempt a commander from preventing crimes simply because they may be physically committed after he ceased to have command over the culpable troops. Rather, the purpose of ensuring broad compliance with the law by obliging commanders to prevent subordinate’s crimes mandates command responsibility in such circumstances.

1. History of the Command Responsibility Doctrine

(a) Early foundations of command responsibility

22. The foundations of the doctrine of command responsibility can be found in the writings of Sun Tzu, Hugo Grotius and international instruments such as the 1899 and 1907 Hague Conventions. Sun Tzu, focusing on the military context, wrote that troop insubordination is the fault of the general.\(^\text{39}\) Hugo Grotius expanded the concept to include rulers who “may be held responsible for the crime of a subject if they know of it and do not prevent it when they could and should prevent it.”\(^\text{40}\) The 1899 and 1907 Hague Conventions codified the obligation of armies, militia and volunteer corps that were “commanded by a person responsible for his subordinates” to abide by the “laws, rights and duties of war.”\(^\text{41}\) These early instruments set forth the basis for command responsibility, namely, the notion of responsible command.

(b) Aftermath of World War I

23. After World War I, attempts were made to hold commanders liable in respect of the acts of their subordinates. The Preliminary Peace Conference of 1919 created a commission to “inquir[e]


\(^{40}\) HUGO GROTIUS, DE JURE BELLII AC PACIS LIBRI TRES, Book II, Chapter XXI, 522, 523 (Francis W. Kelsey trans., Carnegie Endowment for International Peace 1925).

into the responsibilities relating to [World War I]."  

The majority of the Commission advocated that each belligerent state try individuals guilty of violating the laws and customs of war, but in certain instances a “high tribunal” should be established. Among these instances of international concern were those where civilian or military authorities ‘abstained from preventing or taking measures to prevent’ violations of the laws or customs of war.

24. As with Hugo Grotius, the Commission’s report focused on the duty to prevent so as to avoid violations of the laws and customs of war, without any limitation as to crimes committed during the commander’s tenure.

(c) Post-World War II Trials

25. The trial of General Tomoyuki Yamashita by the U.S. Military Commission in Manila was the first of the post-World War II trials to make use of the doctrine of command responsibility. Ruling on Yamashita’s habeas corpus petition, the U.S. Supreme Court affirmed the fundamental purpose of command responsibility: “[T]he Law of War presupposes that its violations is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates. ... [the purpose of the Law of War] 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.”

26. The year after Yamashita, the International Military Tribunal for the Far East (IMTFE) formulated an early test for command (or, superior, as it were) responsibility. It held superiors are liable if “[t]hey had knowledge that [war] crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of

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43 Id., at 121-122.
44 Id., at 121.
45 See Id., at 121.
47 Id. at 43. For support, the Court pointed to Articles 1 and 43 of the 1907 Hague Convention, Article 19 of the Hague Convention (X), and Article 26 of the 1929 Geneva Convention for the wounded and sick. Id. at 43. In terms of liability, The Court also referenced and earlier military tribunal and an international arbitration to support the proposition that a breach of the laws of war can be penalized. Id. at 38-49. In particular, the court referenced Gen. Orders No. 221, Hq. Div. of the Philippines, 17th August 1901, where the issue centered on the liability of an officer for failure to take measures to prevent murder committed in his presence. It was held that an officer is not liable for a failure to prevent if he did not have the power to prevent. Id. at 44, fn. 1. As to International Arbitration proceedings, the Court referenced the Case of Jenaud and the Case of The Zafiro. Id. at 44. See also, U.S. v. Pohl et al., V Trials of War Criminals, 1011 (“The law of war imposes on a military officer in a position of command an affirmative duty to take steps as a within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are the violations of the law of war.”)
such crimes in the future, or 2) [t]hey are at fault in having failed to acquire such knowledge.\textsuperscript{48} In the end, the IMTFE in the *Tokyo War Crimes Trial* convicted seven of the twenty-five accused for “having recklessly disregarded their legal duty by virtue of their offices to take adequate steps to secure the observance and prevent breaches of the laws and customs of war.”\textsuperscript{49} While none of the breaches seemed to have occurred after the accused ceased to be in command of the culprits, the test pronounced by the IMTFE—referring to the duty to prevent ‘crimes in the future’—did not exclude command responsibility in such cases.

27. Unlike the IMTFE trials, the trials of Nazi war criminals often centred on a superior or commander’s direct responsibility for atrocities, usually by way of ordering a crime or transmitting a criminal order.\textsuperscript{50} The two most central trials of Nazi war criminals with respect to the command responsibility doctrine, the *Hostage Case* and the *High Command Case*, will be addressed in further detail below.\textsuperscript{51} Suffice it to note here that these trials of Nazi war criminals endorsed the idea of responsible command. For example, it was stated in the *High Command Case* that when faced with illegal orders the commander had the option of countermanding the order, sabotaging its enforcement or resigning.\textsuperscript{52} When the commander “merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal, [he] violates a moral obligation under International Law” and “by doing nothing he cannot wash his hands of international responsibility.”\textsuperscript{53} Also, the *High Command Trial* approvingly noted that *US v. Wilhelm List et al.* found that “[t]he duty and responsibility for maintaining peace and order and the prevention of crime rests upon the commanding general.”\textsuperscript{54} These statements only buttress the notion that commanders play a crucial role in ensuring broad compliance with international humanitarian law by preventing crimes.


\textsuperscript{49} Id. at 1033.


\textsuperscript{51} Supra, § D(1)(a).


\textsuperscript{53} Id. at 512.

28. Charters of post-World War II war crimes tribunals, when addressing the issue of responsible command, similarly focused on a commander’s duty to prevent crimes committed by their subordinates. For instance, the Chinese law concerning war crimes trials expressly stated that superiors should be held accountable when they fail in their duty to prevent crimes of their subordinates.55 The Netherlands law concerning trials for war criminals considered a superior criminally liable in respect of crimes of his subordinates that were being or “would be committed.”56

29. In sum, from Hugo Grotius to the post-World War II trials, the duty to prevent future crimes so as to avoid violations of international humanitarian law is the critical foundation upon which the principle of command responsibility was built. Holding a commander responsible in respect of crimes occurring after he ceased having effective control over his subordinates, but which he had the requisite knowledge that they were about to be committed and which he could have prevented, is consistent with that foundation. Conversely, excluding command responsibility in such situations would defeat the principle at its core, as it would allow commanders with impunity to neglect crimes in the making. As will be seen in the following sections, this is also consistent with the more detailed, recent formulations of the principle of command responsibility.

2. Object and Purpose of Additional Protocol I

30. The duty to prevent future crimes is expressly established in Articles 86(2)57 and 87(3)58 of Additional Protocol I, which seeks to clearly define the responsibility of commanders59 in relation

57 Article 86, ¶ 2, Additional Protocol I, supra note 13. Article 86 holds commanders responsible in respect of breaches of their subordinates if “they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.” Id. (emphasis added).
58 Article 87, ¶ 3, reads: The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate to initiate disciplinary or penal action against violators thereof. Additional Protocol I, supra note 13.
59 Article 86 is pertinent to all superiors, while Article 87 sets out the specific duties of commanders. As suggested by state representatives of Spain and Canada, these articles are closely linked and should be read together. See Summary Record of the Fifty-first Meeting, CDDH/I/SR.51, 5 May 1976, Official Records, Vol. IX, ¶ 12, 18. ICRC Commentary on the Additional Protocol I also suggest that these provisions be read together. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, supra note 1, ¶ 3541.
to breaches of the laws of war committed by their subordinates.\textsuperscript{60} They oblige a commander to prevent crimes a subordinate is going to commit.

31. On its face, this formulation does not exclude command responsibility in situations where the crime was committed after the commander ceased to have effective control over the relevant subordinate. Also, interpreting Articles 86(2) and 87(3) in good faith and in light of the object and purpose of Additional Protocol I, as mandated,\textsuperscript{61} militates against such a limitation. The object and purpose of Additional Protocol I, under paragraph 3 of its preamble, is to “reaffirm and develop provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application.”\textsuperscript{62} Reading Articles 86(2) and 87(3) to include command responsibility in the aforementioned situations is consistent with this purpose as it both reaffirms the rules protecting the victims of armed conflict and reinforces their application. A contrary interpretation which excludes command responsibility simply because the crimes happened to be committed after the commander ceased to have effective control over the relevant subordinate dilutes rather than reaffirms the protections of victims and hampers rather than reinforces their application.\textsuperscript{63}

32. It has been suggested that reading Articles 86 and 87 in light of the object and purpose of Additional Protocol I to analyze the temporal scope of the provisions “give[s] the treaty provision a broader meaning than its wording might suggest and then read[s] that back into customary law.”\textsuperscript{64} This criticism may hold if it were required that the customary law principle of command responsibility positively stipulate liability in factual situations where crimes were committed after an accused commander’s period of effective control. But there is no such requirement. Rather, the pertinent question is whether such a factual situation reasonably falls within the principle of command responsibility established under customary international law. As aptly stated by Judge Hunt in his minority opinion in Hadžihasonović:

Surely it is the purpose of the relevant principle of customary international law which dictates the scope of its application, not the facts of the situation to which the principle is

\textsuperscript{60} See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, supra note 1, ¶ 3524-3528.


\textsuperscript{62} Additional Protocol I, Preamble, ¶ 3. As noted by the ICRC Commentary, this paragraph provides the raison d’être of the entire undertaking to reinforce the measures ensuring the application of the rules of international humanitarian law. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, supra note 1, ¶ 26.

\textsuperscript{63} See the similar arguments with respect to crimes committed before the commander assumed effective control over the culpable subordinate. Hadžihasanović Decision, Dissenting Opinion of Judge Hunt, ¶ 22; Hadžihasanović Decision, Dissenting Opinion of Judge Shahabudden, ¶ 24.

\textsuperscript{64} See Greenwood, supra note 31, at 604.
sought to be applied. … If [it were otherwise], no principle of customary international law could ever be applied to a new situation, simply because it is a new situation.\textsuperscript{65}

On the principled point, the majority in Hadžihasanović agreed, and the same rule has been followed by trial chambers of the ICTY and ICTR.\textsuperscript{66}

33. As this paper aims to show, the factual scenario wherein the subordinate’s crime is committed after the cessation of the commander’s effective control reasonably falls within the customary law principle of command responsibility. As far as Articles 86(2) and 87(3) of Additional Protocol I are concerned, this is shown by the fact that allowing for command responsibility in respect of crimes committed after a commander’s period of effective control fits within a principled reading of Additional Protocol I; it ensures that commanders carry out their duty to prevent all crimes they are able to prevent, crimes committed during their tenure as well as those completed thereafter.

3. Contemporary Formulations of Command Responsibility

34. Contemporary formulations of command responsibility are found in the statutes of the international ad hoc tribunals, the Rome Statute, and various national laws. As will be shown in this section, they do not directly set out the temporal scope of the command responsibility doctrine. This does not, however, lead to the conclusion that command responsibility should be temporally limited to crimes committed during a commander’s period of effective control. First, none of these contemporary formulations expressly disallow command responsibility in respect of subordinate crimes committed after the cessation of effective control. Second, similar to the earlier formulations of command responsibility surveyed above, they show that the purpose of the doctrine is to ensure broad compliance with international humanitarian law by obliging commanders to prevent their subordinates from committing crimes. Against this backdrop, it would be incongruous to interpret the lack of temporal limits in the contemporary formulations as circumscribing the temporal scope of command responsibility to crimes committed within the period of a commander’s effective control. Instead, the absence of temporal limits can be explained by the fact that a commander’s

\textsuperscript{65} Dissenting Opinion of Judge Hunt, ¶ 40 [emphasis in original].

\textsuperscript{66} Hadžihasanović Decision, ¶ 12 (‘where a principle can be shown to have been so established [under customary international law], it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle.’); Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, ¶ 37 (May 11, 2004) (‘Karemera Decision’); Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment, ¶ 715 (September 1, 2004) (‘Brdanin Trial Judgment’). See also infra, § IV.1.a.
duty to prevent crimes about to be committed after his period of effective control may have been so obvious that the drafters did not see the need to make it explicit.\textsuperscript{67}

(a) Statutes of \textit{ad hoc} International Criminal Tribunals

35. All the command responsibility provisions of the statutes of the \textit{ad hoc} tribunals refer to future crimes.\textsuperscript{68} In relation to a superior’s duty with respect to the crimes committed by his subordinates, all statutes refer to a commander’s duty to prevent such violations.\textsuperscript{69}

36. A commander’s duty to prevent future crimes is also featured in the 1994 UN report of the Commission of Experts. The report provided the Secretary-General with analysis as to whether violations of international humanitarian law were committed in the former Yugoslavia and served as a foundation upon which the statute of the ICTY was drafted.\textsuperscript{70} According to the Commission of Experts, superiors, and in particular military commanders, have a duty to prevent or repress breaches they knew that their subordinate “was committing or was going to commit.”\textsuperscript{71}

37. The statutes of the \textit{ad hoc} tribunals, like earlier formulations of the command responsibility doctrine, impose on a commander a duty to prevent future crimes without any limitation as to whether these crimes must be temporally concurrent with a commander’s period of effective control.

(b) Rome Statute and the ILC Draft Codes

38. At the request of the General Assembly, the International Law Commission (ILC) prepared a Draft Code of Crimes against the Peace and Security of Mankind (“ILC Draft Code”) to “formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.”\textsuperscript{72} The 1991 and 1996 ILC Draft Codes both have provisions

\textsuperscript{67} See Dissenting Opinion of Judge Hunt, ¶ 12.


\textsuperscript{69} See ICTY Statute Article 7(3); ICTR Statute Article 6(3); SCSL Statute Article, 6(3); ECCC Statute Article 29; Regulation of East Timor Panel Section 16; STL Statute Article 3(2)(c).

\textsuperscript{70} Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council, UN Doc. S/1994/674, at 1 (May 27, 1994).


relating to the responsibility of superiors that establish criminal responsibility in respect of crimes that a superior’s subordinate “was committing or was going to commit” and which the superior did not take measures in his power to prevent or repress. These draft codes ultimately served as a basis for the work of the Preparatory Committee for the Establishment of an International Criminal Court.

39. The Preparatory Committee on the Establishment of an International Criminal Court met in 1996 to prepare a “widely acceptable consolidated text of a convention for an international criminal court.” Its draft provisions addressing the responsibility of superiors used slightly different wording than the ILC Draft Codes, but similarly recognized command responsibility in respect of crimes that subordinates “were committing or intending to commit.” This phrasing remained unchanged in subsequent drafts before the Preparatory Committee on the Establishment of the ICC.

40. Parties to the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court deliberated in the summer of 1998 to complete the Rome Statute. They had before them the Preparatory Committee’s draft article on superior or commander responsibility which established responsibility in relation to crimes subordinates “were committing or intending to commit.” The exact terminology used to describe future crimes changed in the final draft when a representative for the Netherlands proposed replacing “intending to” with “about to” such that the provision would read: “the commander either knew, or should have known, that the subordinates were committing or about to commit such crimes.” According to the Netherlands

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77 See M. CHERIF BASSIOUNI, LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE FROM 1994-1996, Vol. 2, at 212-214 (Transnational Publisher 2005). Article C presented at the 1996 and 1997 Preparatory Committee meetings and Article 25 presented at the 1998 Preparatory Committee meeting all refer to crimes that forces/subordinates “were committing or intending to commit.” Id.


79 See Id. at xix-xx.

representative, the change in terminology was suggested to “ensure the greatest possible consistency” with the Additional Protocol I, “especially with regard to command responsibility.”\textsuperscript{81} This change to mirror Additional Protocol I did not substantially alter the temporal description set out by the Preparatory Committee and, in the end, Article 28 preserved responsibility in relation to future crimes.\textsuperscript{82}

41. Along with liability in respect of future crimes, the Rome Statute took care to preserve a commander’s corresponding duty to prevent such crimes. A commander’s duty to prevent was so central that the 1996 Preparatory Committee’s Draft Article C considered whether “the imposition of punishment by the commander alone [was] sufficient to relieve a commander of responsibility for crimes committed by a subordinate, which the commander could have, but failed to prevent.”\textsuperscript{83} This primacy of a commander’s duty to prevent is further reflected in the fact that the phrase “prevent or repress crimes” remained unbracketed in the same draft provisions while other terms, such as the duty to punish, remained bracketed and their inclusion up for debate.\textsuperscript{84} The 1996 draft suggests that this differing treatment of the duties to prevent and punish likely resulted from the concern that a commander or superior could quickly absolve themselves of liability by meting out a punishment, however small, to the responsible subordinates when they could in fact have prevented the crimes in the first place.\textsuperscript{85} This policy concern likely carried over to the Rome Conference, where the duty to punish and reference to past crimes were not drafted into final Article 28 of the Rome Statute.\textsuperscript{86} While neither the summary records of the Committee of the Whole or the Plenary Committee provide any insight into the absence of the duty to punish, the draft articles of the 1996, 1997 and 1998 Preparatory Committee meetings suggest that indeed there is a hierarchy of duties, and a commander’s duty to prevent is at the top of that hierarchy, as it cannot be avoided by exercising other duties such as the duty to punish.

42. ILC Draft Codes and the negotiating history of the Rome Statute prioritize the duty to prevent future crimes over the duty to punish past crimes in order to ensure that a commander or superior would not shirk his or her duty to prevent subordinate crimes by simply laying out a

\textsuperscript{83} Bassiouni, supra note 77, at 214, fn. 207.
\textsuperscript{84} Id. at 212-214.
\textsuperscript{85} The 1996 Preparatory Committee’s Draft Article C on the responsibility of superiors, questions what type of failure should lead to liability and whether “the imposition of punishment by the commander alone [was] sufficient to relieve a commander of responsibility for crimes committed by a subordinate, which the commander could have, but failed to prevent.” Bassiouni, supra note 77, 214, fn. 207.
\textsuperscript{86} Article 28, Rome Statute.
punishment after a crime was committed. This policy of prioritizing the duty to prevent future crimes ensures that commanders seek to prevent crimes committed by their subordinates before they take any other (lesser) action. This policy applies with equal force to crimes that happen to be committed after the period of a commander’s effective control and therefore supports command responsibility for crimes a commander who, at the time he had effective control, had the requisite knowledge were about to be committed, regardless of whether the actual commission occurred after the cessation of his or her period of effective control.

(c) National Laws

43. Similar to the other legal sources surveyed thus far, the national laws of states do not expressly address whether command responsibility can attach in respect of crimes committed before or after a commander assumed command. Nevertheless, they do refer to a commander’s duty to prevent future crimes without excluding the possibility of command responsibility beyond the cessation of effective control. This is the case, for instance, in respect of many states’ ICC implementing statutes. Likewise, Cambodia and Bosnia-Herzegovina, state parties to the Rome Statute that have not enacted implementing statutes, currently have laws establishing command responsibility for future crimes, again without limitation to crimes committed during the period of effective control. In addition, non-party states, such as the United States, also have provisions imposing a duty to prevent future crimes absent such limitation.

44. Finally, some command responsibility provisions in national laws do not characterize subordinate crimes in terms of past or future crimes, but more generally espouse a duty to prevent

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87 See e.g. England and Northern Ireland, International Criminal Court Act of 2001, ch. 17, § 65 (“were committing or about to commit”); Scotland, International Criminal Court Act of 2001, ch. 12, § 5 (were committing or about to commit”); Malta International Criminal Court Act of 2002 (“were committing or about to commit”); Australia, International Criminal Court Consequential Amendments Act 2002, no. 42, Subdivision K, § 268.115 (“were committing or about to commit”); Canada, Crimes Against Humanity and War Crimes Act of 2000, ch. 24, § 5 (“about to commit or is committing’’); Uganda, International Criminal Court Bill of 2006, § 19 (incorporating Article 28 of Rome Statute); Trinidad and Tobago, International Criminal Court Act 2006 (incorporating Article 28 of Rome Statute); See also Argentina, Second Draft Law on Crimes under the Jurisdiction of the ICC (“were committing these crimes or would commit these crimes”); Germany, Code of Crimes Against International Law of 2002, § 4 (“A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the same way as a perpetrator of the offence committed by that subordinate.”); Netherlands International Crimes Act of 2003, Article 9 (“has committed or intends to commit”). These laws can be found at http://www.iccnow.org/?mod=romeimplementation.

88 Cambodia, Law on the Khmer Rouge Trials of 2001, Article 29 (“was about to commit such acts or had done so’’); Bosnia-Herzegovina Criminal Code of 2003, Article 180(2) (“was about to commit such acts or had done so”).

89 United States Field Manual 27-10 1956 (“are about to commit or have committed”). See also Armenia Penal Code 2003, Article 391(1) (“was committing or was going to commit’’); El Salvador Amendments to Penal Code 1998, Article entitled “Punibilidad de la comisión por acción y por omissión en delitos contra la humanidad” (“was committing or was about to commit”).
violations of international humanitarian law.\textsuperscript{90} An interpretation of the command responsibility doctrine that establishes command liability in respect of subordinate crimes committed after a commander ceases having effective control fits within the spirit of these laws as they encourage commanders to take serious steps in preventing the commission of crimes, without excluding the possibility that the final manifestation of the crime would not occur until another commander took over.

4. Avoiding the Creation of a Loophole in Command Responsibility

45. As a last step in the principled interpretation of the doctrine of command responsibility, it is useful to consider the consequences of disallowing liability for commanders who fail during their tenure to prevent crimes that are then committed after their command ends. Just as disallowing command responsibility for failing to punish crimes committed before the commander assumed effective control could leave crimes ‘between two stools,’\textsuperscript{91} so too would prohibiting command responsibility for failing to prevent crimes committed after the cessation of the commander’s effective control create a loophole in the law.

46. For example, the period in which the crimes occurred could involve a transition period during which the prior commander is found to no longer have effective control and the successor commander has yet to assume command. Alternatively, the end of a commander’s period of effective control could come toward the end of hostilities when there does not exist a successor commander to whom responsibility can be transferred. Consider, for example, General Masao, who during World War II commanded the 37th Japanese Army from December 1944 until the cessation

\textsuperscript{90} See \textit{e.g.} ICRC \textsc{customary international humanitarian law}, Vol. 2, Practice, Part 2 (Cambridge University Press 2005) setting out: Russia, Military Manual of 1990, § 14(b) (“a commander is obliged to put an end to any violation of the rules of IHL; to prosecute persons having committed a violation of the rules of IHL”); Azerbaijan Criminal Code of 1999, Article 117(1) (providing liability for failure by a commander to prevent violations of the laws and customs of war); Belarus Criminal Code of 1999, Article 137(1) (“a superior or officer intentionally does not take all measures possible in his power in order to prevent or repress the commission by his subordinates of crimes set out in articles 134 [use of weapons of mass destruction], 135 [violations of the laws and customs of war] and 136 [criminal infringement of the norms of international humanitarian law during armed conflicts] of this code [ ] is punishable”); Bangladesh, International Crimes (Tribunal) Act of 1973, § 4(2) (“any commander or superior officer...who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes [crimes against humanity, crimes against the peace, genocide, war crimes, violations of the any humanitarian rules applicable in armed conflicts laid down in the Geneva Convention of 1949 or any other crimes under international law] or who fails to take necessary measures to prevent the commission of such crimes is guilty of such crimes.”).

\textsuperscript{91} Dissenting Opinion of Judge Shahabuddeen, ¶ 14, 15. (‘[C]rimes could fall between two stools. The crimes might have been committed very shortly before the assumption of duty of the new commander – possibly, the day before, when all those in previous command authority disappeared; on the other hand, according to the appellants’ [and the majority’s] view, the new commander is not under an obligation to act, even if he knows that the old commander was thinking of initiating proceedings had he continued in office. That is at odds with the idea of responsible command on which the principle of command responsibility rests and with the associated idea that the power to punish should always
of hostilities. Masao ordered the march of 504 British and American prisoners of war over 165 miles of difficult terrain to Ranau in May 1945. Of the 540 prisoners, only 183 made it to their destination. Another 150 died shortly thereafter, and the 33 remaining prisoners were killed on August 1, 1945 on the orders of a subordinate, around the time General Masao had surrendered to allied troops.

47. As this scenario shows, relying on successor command responsibility does not adequately address accountability concerns as there is not always a successor to hold accountable. But recognizing command responsibility in respect of crimes committed after a commander’s period of effective control, when all the elements of command responsibility are met, ensures that the loophole in accountability is closed.

48. Moreover, even in situations where there is a successor who assumes effective control after the commission of the crime to hold accountable, that commander could only be held liable for failing to punish the culpable subordinates, whereas the purpose of command responsibility ultimately is to ensure that crimes do not occur in the first place. Allowing the predecessor commander to incur command responsibility for failing to prevent crimes committed after his tenure closes this gap. This approach will lead to potential double responsibility in some cases—failure to prevent for the old commander and failure to punish for the new one—but seeing as the duties to prevent and punish are legally distinct from each other and may give rise to separate charges even for a single commander, there is nothing in the law preventing this.

49. Alternatively, it has been suggested that state responsibility be relied on to close the loophole in accountability, as international humanitarian law imposes a duty on belligerent states to prevent and punish crimes of its armed forces. This approach is unconvincing. First, it is not a response to a potential lacuna in the principle of command responsibility that another, legally distinct concept might regulate the situation. Rather, the question is how the particular principle, within its separate paradigm of individual criminal responsibility, can be interpreted to overcome

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92 Trial of Lt. General Baba Masao, Australian Military Court, 28th May- 2nd June 1947, XI LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 56.
93 Id.
94 Id.
95 Id.
97 See Greenwood, supra note 31, at 604.
the defect. Second, on a practical level, even in light of the obligations resulting from international humanitarian law, the alternative approach assumes that states would have the political will and resources to prevent or punish the crimes of its armed forces. The fact that states often lack either or both is one of the very reasons international criminal tribunals have been established and international criminal law has been developed. A defining feature of those institutions from Nuremberg onward is that they adjudge individual—as opposed to state—criminal responsibility. Their creation and adjudication of individual criminal liability is a method of states to enforce their obligations under international humanitarian law. By supporting the operations of international criminal tribunals, both financially and philosophically, states have collectively created a means of ensuring that international humanitarian law obligations are met. To rely on state enforcement alone, would be a step backwards in ensuring that enforcement of international humanitarian law has teeth.

50. In conclusion, neither historical nor contemporary formulations of the principle of command responsibility circumscribe it to crimes committed during the commander’s tenure of effective control. The fundamental purpose of the principle—to ensure broad compliance with international humanitarian law by obliging commanders to prevent crimes—militates against such a limitation as the alternative would create a gap in liability detrimental to that purpose.

IV. REBUTTAL OF CONTRARY ARGUMENTS

51. The debate concerning the temporal scope of the command responsibility doctrine to date has focused on whether command responsibility can arise with respect to crimes committed before a commander’s assumption of command, and not, which is the topic of this paper, whether a commander can be held liable in respect of crimes occurring after the end of his command. However, some of the arguments which have (mis)lead chambers to exclude command responsibility in the former situations are relevant also to the latter cases, inasmuch as they suggest that the subordinate’s crime must generally coincide with the commander’s effective control over that subordinate. These arguments centre on whether command responsibility in respect of crimes committed beyond the scope of effective control falls within the boundaries of customary international law, and seek to interpret post-World War II case law, the Rome Statute, and state practice to exclude command responsibility in those situations. They also relate to whether the principles of *nullum crimen sine lege* and *in dubio pro reo* prevent liability in such cases. The first sub-section below aims at rebutting these arguments.
52. The three sub-sections thereafter address additional arguments that could be made against the position that command responsibility covers crimes committed after the end of the commander’s effective control, namely, that the position: 1) makes command responsibility akin to a form of strict responsibility; 2) is impermissibly ambiguous in relation to the required degree of criminal preparation by the subordinate; and 3) will be exceedingly difficult to prove.

1. Whether customary international law allows for the advocated position

53. The Hadžihasanović Decision was the first decision that explicitly dealt with the issue of whether customary international law allows an accused to incur command responsibility for failing to punish subordinates for crimes they committed before the accused assumed effective control over them. The accused Amir Kubura was charged with command responsibility in connection with inter alia unlawful killings, cruel treatment and wanton destruction allegedly committed by troops of the 3rd Corps 7th Muslim Mountain Brigade of the Bosnian Army.98 Whereas according to the indictment these crimes were committed or started in January 1993, Kubura did not assume command over the alleged offenders more than two months later, on 1 April 1993.99 A 3-2 majority of the ICTY Appeals Chamber held in an interlocutory decision that Kubura could not incur command responsibility for these crimes, because, it found, under customary international law a commander is not obliged to punish his troops for crimes they committed before he assumed effective control.100 This majority decision has drawn extensive criticism. In fact, a majority of current and former judges of the ICTY Appeals Chamber are not in support the Hadžihasanović decision.101

54. Despite criticisms, chambers of other ad hoc tribunals have ruled similarly to the Hadžihasanović decision. Two chambers of the SCSL and trial chambers of the ICTR have followed the Hadžihasanović majority.102 However, one of the SCSL chambers subsequently changed its mind,103 and the ICTR trial chambers have never supported or explained the reasons for or consequences of its holding that command responsibility cannot arise in respect of crimes

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98 Hadžihasanović Decision, ¶ 38.
99 Id., at ¶ 38, 39.
100 Id., at ¶ 51.
101 By the time of the Orić Appeal Judgment, a total of fourteen ICTY judges, four of whom were at different times at the appellate level, had expressed judicial views contrary to the decision of the majority in Hadžihasanović. Declaration of Judge Shahabuddeen in Orić, ¶ 12.
102 Brima et al. Trial Judgment, ¶ 799, 1673; Fofana and Kondewa Trial Judgment, ¶ 240.
103 Judges Boutet, Itoe, and Thompson endorsed the Hadžihasanović majority decision in the Fofana and Kondewa Trial Judgment, ¶ 240, but later rejected that decision in the Sesay et al. Trial Judgment, ¶ 306.
committed before the commander’s assumption of effective control.¹⁰⁴ The matter does not appear to have arisen before the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’).¹⁰⁵

55. As for the ICC, the pre-trial chamber in the Bemba case, based on Article 28(a) of the Rome Statute, held that ‘the suspect must have had effective control at least when the crimes were about to be committed.’¹⁰⁶ Importantly, this holding does not allow for command responsibility where the crimes are committed before the commencement of the commander’s effective control, but it does allow for liability in respect of crimes committed after the end of the commander’s effective control. As a result, the Bemba holding is not inconsistent with our thesis. Even to the extent Bemba intended to restrict the applicability of command responsibility also to future crimes, it did so only with respect to command responsibility under Article 28(a) of the Rome Statute, whereas the ICTY is bound to apply customary international law.¹⁰⁷ Therefore, the following analysis will focus on the Hadžihasanović majority’s opinion.

(a) Misconceptions as to the correct test

56. The Hadžihasanović majority required that command responsibility in cases where the subordinate’s crime was committed before the assumption of effective control be ‘clearly
established under customary law. In other words, the majority would not recognize command responsibility in those cases unless it found an explicit rule of customary international law which positively allowed it. Since the majority found no such explicit support, it rejected command responsibility in respect of crimes committed before the assumption of command.

Based on this approach, it could be argued that command responsibility in respect of crimes committed after the cessation of effective control also can only arise if there is a rule ‘clearly established under customary law’ that explicitly allows for it.

This argument may have persuaded if the ‘clear rule’ test were correct, seeing as the survey of the relevant laws provided above has not found a provision that expressly addresses whether command responsibility can arise in respect of crimes committed after a commander’s period of effective control. However, the test is not correct. Instead, the pertinent question is whether the principle of command responsibility already established under customary international law ‘reasonably encompasses’ the factual situation at hand. Both the majority and the dissenter in Hadžihasanović agreed on this standard in principle, and it has been applied by trial chambers at the ICTY and the ICTR; the latter deemed it a ‘well-established approach in international law.

The literal reading and the principled interpretation of command responsibility under customary international law provided in this paper, it is argued, show that the principle reasonably encompasses the factual situation wherein the subordinate’s crime was committed after the commander’s effective control had ended. But before concluding on the matter, it is necessary to address what on its face appears to be the most forceful argument of the Hadžihasanović majority: that there are indications in customary international law that exclude command responsibility in such situations.

Arguments that customary international law excludes the advocated position

Post-World War II case law

Two World War II cases are worth analysing, the first because it could be misread to imply that the subordinate’s crime must coincide with the commander’s effective control, and the second because it has been referred to in support of a holding to that effect.

108 Hadžihasanović Decision, ¶ 51.
109 Hadžihasanović Decision, ¶ 45, 52.
110 Supra § C (1)-(3).
111 Hadžihasanović Decision, ¶ 12; Dissenting Opinion of Judge Hunt, ¶ 10, 38, 40; Partial Dissenting Opinion of Judge Shahabuddeen, ¶ 10; Declaration of Judge Shahabuddeen in Orić, ¶ 17; Separate and Partially Opinion of Judge Schomburg in Orić, ¶ 14; Karemra Decision, ¶ 37; Brdanin Trial Judgment, ¶ 715.
61. The first is the *High Command Case*. This was the first of the post-World War II trials to peripherally address the temporal application of the command responsibility doctrine. It must be understood, that the Nuremberg Tribunal in this case sought to fashion a form of command responsibility as closely akin to direct responsibility for the crime as possible by seeking to establish a direct a link between the defendant and committed crimes.\(^{112}\) The direct link became tenuous in the eyes of the Tribunal when the defendant assumed command too close to the time the crimes in questions were committed\(^{113}\) or the reports before it covered a wide time period which failed to prove that the crimes resulted from some personal neglect or acquiescence.\(^{114}\) The question before the Tribunal was not whether a defendant could be held liable in respect of crimes occurring before he assumed command, but whether there was a sufficient link between the defendant and the crimes in question to warrant criminal liability.\(^{115}\) Therefore, the *High Command Case* cannot be interpreted to definitively stand either for or against holding a defendant liable where the commission of the subordinate’s crimes does not coincide with the commander’s period of effective control.

62. The *Hostages Case* was the second significant case relating to command responsibility tried by the Nuremberg Tribunal. The majority in the *Hadžihasanović Decision* noted the *Hostages Case* in relation to defendant Kuntze, which in its view recognized responsibility for a failure to prevent crimes after an accused assumed command, but contained no reference to responsibility for crimes committed before that point in time.\(^{116}\) This approach, if correct, could be taken to suggest that the subordinate’s crimes generally must coincide with the commander’s effective control, which would exclude command responsibility also in respect of crimes committed after the end of effective control.

\(^{112}\) *United States of America v. Wilhelm von Leeb et al.*, Nuernberg Military Tribunal, 27 October 1948, XI TRIALS OF WAR CRIMINALS 543-544 (‘criminality does not attach to every individual in this 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. In the latter case, it must be personal neglect amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence.’).

\(^{113}\) See id., at 626-627 (With respect to defendant Von Salmuth, the Tribunal held that the executions of two Commissars, having taken place one month before he assumed command, “from a time element,… cannot be said that they occurred with his acquiescence or approval or due to any order which he distributed.”) Note that the Tribunal cited reports covering a wide time period in relation to Von Kuechler, but the reports coupled with the defendant’s testimony convinced the Tribunal that he had “knowledge and approved” the crimes in question. Id., at 568.

\(^{114}\) See id., at 562 (“the document relied on in this connection is a report to the effect that in a given period, a number of civilians were sent from the Army Group North to the Reich for labor [but] Leeb was in command for only a part of the period covered in the report.”)

\(^{115}\) Id., at 543-544; Expressing a similar sentiment, Judge Shahabuddeen noted that the accused General Hoth in the *High Command* case was not charged with a distinct crime corresponding to a charge of command responsibility as set out in article 7(3) of the ICTY Statute. Dissenting Opinion of Judge Shahabuddeen, ¶ 6.

\(^{116}\) *Hadžihasanović Decision*, ¶ 50, fn. 65.
63. However, as both dissenting Judges Hunt and Shahabuddeen in the *Hadžihasanović* Decision pointed out, the argument relying on the absence of any mention in relation to defendant Kuntze of command responsibility in respect of crimes committed prior to the assumption of command is unpersuasive. This is because Kuntze was not charged with such responsibility, as the crimes in question took place two days after Kuntze had assumed command over the culpable troops. Therefore, the Tribunal could not have been expected to address command responsibility beyond the period of a commander’s effective control. As a result, the *Hostages Case* is not an argument for requiring the subordinate’s crime to be contemporaneous with the commander’s effective control.

(ii) **Rome Statute and the ILC Draft Code**

64. The next argument concerns Article 28 of the Rome Statute and Article 6 of the 1996 ILC Draft Code. More specifically, the phrases ‘in the circumstances at the time’ and ‘were committing or about to commit’ in both articles, and the absence of any reference to a duty to punish past crimes therein. The majority in the *Hadžihasanović* Decision interpreted these phrases to exclude command responsibility in respect of crimes committed before the start of the commander’s effective control over the culpable subordinate. To the extent this interpretation stands for the proposition that the subordinate’s crime generally must coincide with the commander’s effective control, which would also exclude command responsibility in respect of crimes committed after the end of the commander’s tenure, it is worth rebutting.

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117 Dissenting Opinion of Judge Hunt, ¶ 16, 17; Dissenting Opinion of Judge Shahabuddeen, ¶ 3. *See also* Carol T. Fox, *supra* note 3, at 443, 483-484.

118 Dissenting Opinion of Judge Hunt, ¶ 18.

119 Dissenting Opinion of Judge Hunt, ¶ 19.

120 The relevant parts of Article 28 of the Rome Statute read (emphasis by *Hadžihasanović* majority. *Hadžihasanović* Decision, ¶ 46):

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; ....

121 Article 6 of the ILC Draft Code reads:

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary and reasonable measures within the power to prevent or repress the crime. *Hadžihasanović* Decision, ¶ 49 (emphasis added by *Hadžihasanović* majority).

122 *Hadžihasanović* Decision, ¶ 46, 49. In terms of the temporal requirement of command responsibility under the Rome Statute, *see also*, Kai Ambos, *supra* note 27, 849 (“As far as the … mental element [is] concerned, the Rome Statute accepts the traditional temporal restriction “in the circumstances at the time” (Article 86(2) PA I) with regard to military superiors’). In relation to non-military superiors, “it is self evident that *mens rea* can be proven only with regard to the time of the commission of the crimes by the subordinates; therefore, the circumstances of the time always have to be taken into account.” *Id.*
65. First, it is important to note that the ILC drafts and the negotiating history of the Rome Statute do not exclude the possibility of command responsibility for crimes committed after the cessation of a commander’s period of effective control. The policy concern for excluding the duty to punish past crimes from Article 28 of the Rome Statute centred on ensuring that a commander would not shirk his or her duty to prevent subordinate crimes, and avoid their own liability under command responsibility, by simply laying out a punishment to their subordinate after a crime was committed. That concern strengthens the idea, advocated in this paper, that a commander must be held to his duty to prevent crimes even if they are committed after his command ended. A rule which only requires a successor commander to mete out a punishment for crimes that his predecessor could have prevented would not provide a sufficient safeguard against subordinate crimes.

66. Second, the Hadžihasanović majority’s emphasis on the phrase “in the circumstances at the time” is unpersuasive. This phrase, which appears in the 1996 ILC Draft Code, Article 86(2) of Protocol I, and Article 28 of the Rome Statute, modifies the mental element of the command responsibility doctrine. According to the ICRC Commentary on Additional Protocol I, in terms of the requisite knowledge for command responsibility,

every case must be assessed in the light of the situation of the superior concerned at the time in question, in particular distinguishing the time the information was available, the time at which the breach was committed, also taking into consideration other circumstances which claimed his attention at that point, etc.

The phrase “in the circumstances of the time” directs the adjudicating authority to make exactly the assessment advocated by the ICRC. It does not define the temporal limit of subordinate crimes. Rather, the phrase simply cautions against judging the commander’s requisite knowledge with undue advantage of hindsight.

67. Third, the majority’s reliance on this phrase along with the reference to ‘were committing or about to commit’ to confine command responsibility to crimes committed within the period of effective control cannot be correct. In his dissent, Judge Shahabuddeen neatly pointed out the majority’s obvious misconception in relying on these phrases:

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123 See Bassiouni, supra note 77, at 212-214.
124 The 1996 Preparatory Committee’s Draft Article C on the responsibility of superiors, questions what type of failure should lead to liability and whether “the imposition of punishment by the commander alone [was] sufficient to relieve a commander of responsibility for crimes committed by a subordinate, which the commander could have, but failed to prevent.” Bassiouni, supra note 77, at 214, fn. 207.
125 See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, supra note 1, at ¶ 3545.
These words would seem to exclude crimes of subordinates even if committed after the commencement of the commander’s command where the commander knew, or should have known, of the commission of the crimes but only after they were committed; that is scarcely consistent with a theory the reasoning of which accepts that a commander has command responsibility at least in relation to acts committed by his subordinates after the commencement of his command.126

68. Lastly, it is worth noting that two Judges of the ICTY (Judges Bennouna and Robinson), who were members of the ILC in 1996, joined in the statement in the Kordić Trial Judgment that ‘[p]ersons who assume command after the commission [of the crime] are under the same duty to punish.’127

69. Accordingly, the arguments based on Article 28 of the Rome Statute and Article 6 of the 1996 ILC Draft Code do not militate against the application of the command responsibility doctrine to a scenario wherein crimes are committed after the cessation of a commander’s effective control.

(iii) State practice and Opinio juris

70. It has been suggested that, because there is no state practice or opinio juris expressly envisaging that a commander can be held liable in respect of crimes committed outside the period of his effective control, customary international law excludes command responsibility in such cases.128

71. It is true that national laws concerning command responsibility have lacked provisions setting out the temporal application of the command responsibility doctrine.129 But this does not mean that state practice excludes criminal responsibility in such a situation. National laws attempt to be precise, but there is always room for refinement through adjudication. There may also be purposeful breadth in the drafting of the law to encompass multiple factual scenarios. Particular to military manuals, they are usually expressed in fairly general terms which would include command responsibility for crimes committed beyond a commander’s period of effective control.130 In fact, it may very well be that it was so obvious that the situation falls within the principle of command

126 Dissenting Opinion of Judge Shahabuddeen, ¶ 20.
127 Dissenting Opinion of Judge Hunt, ¶ 26, fn. 51, citing Prosecution v. Kordić and Čerkez, Case No. IT-95-14/2-T, Judgement, ¶ 446 (February 26, 2001) (‘Kordić and Čerkez Trial Judgment’). Judge Shahabuddeen also noted this statement, albeit not for the exact same purpose as Judge Hunt and noting it was obiter in Kordić. Judge Shahabuddeen nonetheless noted that the statement ‘seems to accord with basic ideas on the subject.’ Dissenting Opinion of Judge Shahabuddeen, ¶ 35.
128 See Hadžihasanović Decision, ¶ 45.
129 Supra, § C(3).
responsibility that it would be unnecessary to make that explicit. Indeed, it would be absurd for a commander to believe that he could say:

‘Yes, I know that these men who are now my subordinates will commit an atrocious massacre the week after I leave my command – but, as I will not then be their superior, I am under no duty to prevent their crimes.’

The absence of state practice supporting command responsibility in respect of crimes subordinates commit after they cease to be under the accused’s command therefore is not decisive.

(c) **Arguments related to the principles of *nullum crimen sine lege* and *in dubio pro reo***

72. The *Hadžihasanović* majority may have reached its restrictive holding out of a concern not to violate the principle of *nullum crimen sine lege*. This principle provides that ‘a criminal conviction can only be based on a norm which existed at the time the acts or omissions with which the accused is charged were committed.’ It also requires that the criminality of the charged conduct was sufficiently foreseeable and accessible at the relevant time period. However, the principle does not impede the development of the law through interpretation provided the interpretation occurs within ‘the reasonable limits of acceptable clarification’ and no new criminal offence is thereby created.

73. Here, the norm of command responsibility is well-established. The fact that it does not explicitly provide for liability in respect of crimes committed after the end of effective control is not detrimental to the foreseeability and accessibility of its application in such cases. Given the purpose of command responsibility to curb subordinates’ crimes—paramount throughout history and in all contemporary formulations of the doctrine—it would be unreasonable for any commander to claim he was unaware of the criminality of failing to prevent his subordinates’ crimes simply because they are about to be committed after his command ends. Command responsibility in those situations therefore is well within the reasonable limits of acceptable clarification, and there is no violation of *nullum crimen sine lege*.

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131 Dissenting Opinion of Judge Hunt, ¶ 12.
132 See Dissenting Opinion of Judge Hunt, ¶ 12 (making the same statement, but for crimes committed before the commander’s assumption of effective control).
133 *Sesay et al.* Appeal Judgment, ¶ 888; *Milutinović et al.* Decision on Jurisdiction—JCE, ¶ 37.
134 *Sesay et al.* Appeal Judgment, ¶ 888; *Milutinović et al.* Decision on Jurisdiction—JCE, ¶ 37.
135 *Sesay et al.* Appeal Judgment, ¶ 888; *Milutinović et al.* Decision on Jurisdiction—JCE, ¶ 38; *Aleksovski* Appeal Judgment, ¶ 126, 127; *Čelebići* Appeal Judgment, ¶ 173; *Vasiljević* Trial Judgment, ¶ 196.
74. Somewhat relatedly it might be argued, as by the defense in Hadžihasanović, that any ‘uncertainty in the law must be interpreted in favour of the accused.’\textsuperscript{136} Assuming for the sake of argument that the maxim in dubio pro reo applies to interpretations of law (as opposed to only to facts), this argument also fails to convince.\textsuperscript{137} The maxim would only come into play if and when ordinary methods of interpretation produce an ambiguous result.\textsuperscript{138} In the present case, however, there is no residual doubt. The wording\textsuperscript{139} and the purpose\textsuperscript{140} of the principle of command responsibility under customary international law unambiguously show that it reasonably encompasses the factual situation at hand, and the few arguments raised against that position are unpersuasive.

75. Having addressed the arguments traditionally raised against the position that command responsibility is not confined to crimes committed within the period of effective control, the analysis now turns to potentially new arguments against that position.

2. Whether the advocated position makes command responsibility open-ended or a form of strict liability

76. The first argument is that interpreting the temporal scope of command responsibility to include potential liability in respect of crimes committed beyond the cessation of a commander’s period of effective control risks overly expanding the doctrine to include distant crimes about which the commander had no way of knowing. The fear may be that this, for all intents and purposes, would transform command responsibility into a form of over-inclusive strict liability.

77. The interpretation advocated in this paper does not overlook any of the elements of command responsibility—all of them still must be met. In particular, the mental element requiring actual or constructive knowledge ensures that command responsibility is not a form of strict liability. Strict liability is defined as liability without proof of the accused’s mens rea,\textsuperscript{141} and the

\textsuperscript{136} Partial Dissenting Opinion of Judge Shahabuddeen, ¶ 12.
\textsuperscript{137} Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgment, ¶ 77 (November 30, 2006) (‘The principle of in dubio pro reo dictates that any doubts should be resolved in favour of the accused and encompasses doubts as to whether an offence has been proved at the conclusion of a case.’).
\textsuperscript{138} See Partial Dissenting Opinion of Judge Shahabuddeen, ¶ 12.
\textsuperscript{139} Supra, § II.
\textsuperscript{140} Supra, § III.
\textsuperscript{141} See ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW, 164 (Oxford University Press 2003).
claim that the command responsibility doctrine is a form of strict liability has been leveled and rejected since the *Yamashita* decision.\textsuperscript{142}

78. Command responsibility in respect of crimes committed after a commander’s period of effective control, does not alter or diminish the requisite mental element. The period in which the crimes committed by subordinates occurred is simply one of many factors relied upon to assess whether a commander had the requisite knowledge necessary to incur liability.\textsuperscript{143} Only those crimes which a commander has actual or constructive knowledge, that his subordinate is about to carry out will trigger his duty to prevent.\textsuperscript{144} To be liable, a commander must still possess such knowledge and fail in his duty during the tenure of his effective control, because a commander is solely held responsible for his failure to fulfill his duty to prevent the crimes of subordinates during his or her period of effective control—not beyond.

3. Whether the required degree of the subordinate’s preparation of the crime is left impermissibly vague

79. It may be contended that command responsibility in respect of crimes committed after the cessation of the commander’s effective control is nebulous because it leaves open whether the subordinate must have started preparing the crime while he was still under the commander’s effective control, and if so, to what degree. This type of ambiguity as to the subordinate’s preparation of the crime, it would be argued, does not arise where the subordinate’s crime is committed within the period of effective control, as in such cases the crime will always have been completed when the commander is still in charge of the culpable subordinate. As a result, the position advocated in this paper would obfuscate the contours of command responsibility to the detriment of the accused.\textsuperscript{145}

80. This argument is misconceived, because the event which triggers a commander’s duty to prevent is not when the subordinate starts ‘preparing’ the crime. The subordinate’s conduct is only temporally relevant inasmuch as it, at one point or another, must amount to a crime.\textsuperscript{146} Rather, the


\textsuperscript{145} *C.f.* Bagilishema Appeal Judgment, ¶ 34.

\textsuperscript{146} As noted, the subordinate’s conduct can be criminal under ‘commission,’ ‘planning,’ ‘aiding and abetting’ or any other mode of liability. *Supra*, ¶ 10-11.
critical moment at which the duty to prevent materializes is when the commander acquires the requisite knowledge that his subordinate is about to carry out a crime. As long as the commander acquires such knowledge during his tenure of effective control, the subordinate does not even have had to begin preparing the crime in order for the commander to be under a duty to prevent it. As a result, the degree of the subordinate’s preparation is not relevant as a matter of law.

81. Again, however, the level of preparation might be relevant as evidence of the commander’s requisite knowledge that the subordinate was about to commit a crime, and what measures were necessary and reasonable in order to prevent it. But such evidentiary questions present themselves notwithstanding whether the crime was completed during or after the period of effective control. In each instance, there will be a span of time between the commander’s acquisition of the requisite knowledge and the crime’s eventual completion. The only difference is that crimes committed during the period of a commander’s effective control can be prevented from the moment of a commander’s requisite knowledge to the crime’s completion, whereas in the case of crimes committed after that period, a commander’s opportunities to prevent the crimes are cut short by the cessation of his effective control. All the more reason, then, to allow for command responsibility also in the latter cases so as to persuade irresponsible commanders of the urgency of preventing subordinates’ crimes.

4. Whether evidentiary concerns militate against the advocated position

82. It may be argued that the second and third elements of command responsibility will be too difficult to prove when the crimes are committed after the cessation of effective control for the principle to work in practice in such situations. Allowing for command responsibility in the face of such evidentiary difficulties some might say will lead down a slippery slope of tenuous convictions.

83. Evidentiary problems of this sort will no doubt arise. Normally, the further beyond the end of the commander’s effective control the crime is committed, the harder it will be to show that the commander had the requisite knowledge of and could have prevented the crime at the time when he had effective control over the relevant subordinate. As a matter of law, these difficulties do not militate against command responsibility in such cases. They only underscore the burden resting on a trier of fact not to convict unless it is satisfied beyond reasonable doubt that all the elements of

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147 Strugar Appeal Judgment, ¶ 297; Hadžihasanović and Kubura Appeal Judgment, ¶ 27. See also COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, supra note 1, at 1014, ¶ 3545 (Article 86(2), Additional Protocol I):

Every case must be assessed in light of the situation of the superior concerned at the time in question, in particular distinguishing the time the information was available and the time at which the breach was committed, also taking into account other circumstances which claimed his attention at that point, etc.
command responsibility are met on the evidence. That burden weighs equally in cases where the crimes were committed within the period of effective control, as indeed it does whenever a form of liability for individuals who may be temporally or geographically distant from the crime scene is being considered.

V. CONCLUDING REMARK

84. Obliging commanders to prevent their subordinates from committing crimes is of cardinal importance to the practical enforcement of the protections that international law offers civilians, prisoners of war, and other vulnerable persons and objects. Both the historical formulations of command responsibility and the current customary international law principle of command responsibility rest on this rationale, without limiting a commander’s obligation to only those crimes committed during his tenure. It would be wholly inconsistent with this rationale to posit that a commander has no duty to intervene against his subordinates’ crimes at a time when they still could have been prevented, only because the crimes will be committed when he is no longer in command. That simply does not make sense. No responsible commander would seriously think that he could remain passive when he knows that his soldiers are about to commit crimes, as long as the crimes will not be carried out on his watch. For an irresponsible commander who might think otherwise, the principle of command responsibility should apply as an incentive to seriously reconsider his role in ensuring compliance with the law.

148 C.f. Orić Appeal Judgment, ¶ 189 (reversing convictions entered under command responsibility for want of sufficient findings below that the relevant subordinate bore criminal responsibility and that the accused commander knew or had reason to know of the subordinate’s criminal conduct).
149 C.f. Krajišnik Appeal Judgment, ¶ 283, 284; Sesay et al. Appeal Judgment, ¶ 455 (reversing convictions entered under the theory of JCE for want of sufficient findings below that the members of the JCE used principal perpetrators who were not members of the JCE in furtherance of the common purpose). See also Sesay et al. Appeal Judgment, Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher, ¶ 45 (emphasizing the burden resting on triers of fact applying JCE and warning of the unfortunate consequences that ensue when they fail to carry that burden).