International Humanitarian Law: The place of command and superior responsibility among other modes of criminal liability employed by international criminal tribunals and an overview as to how the jurisprudence of those tribunals has contributed to the development of command responsibility as a mode of penal liability.

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The place of command and superior responsibility among other modes of criminal liability employed by international criminal tribunals and an overview as to how the jurisprudence of those tribunals has contributed to the development of command responsibility as a mode of penal liability.

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Under the doctrine of superior or command responsibility, liability can be imputed upon a superior for actions committed by his subordinates acting under the command authority of that superior. Therefore, military superiors at all levels are under an obligation to prevent the commission of crimes for those acting under their command. Superior responsibility can be distinguished from other forms of penal liability (i.e. indirect/co-perpetration, aiding and abetting, etc.) in that there is a vertical as oppose to horizontal relationship between the person being charged with the crime and the other material perpetrators of that crime. In addition, a specific set of characteristics can be uniquely attributed to the command responsibility theory and distinguish it from any other mode of criminal liability. These attributes can best be identified in the way the various international criminal tribunals have approached this doctrine, as is particularly exemplified in their jurisprudence.

Foremost, it should be noted that different international criminal tribunals maintain many similarities vis-à-vis how they treat command and superior responsibility as a mode of criminal liability. For example, both the ICTY and the ICTR adapt the same approach as per the subjective elements requisite for imputing command responsibility on a superior. The ICC develops a similar albeit unique approach, which can be identified in the wording of art. 28 (3) (i) of the Rome Statute. In addition, a significant number of other tribunals adapt comparable approaches in dealing with command liability. Inter alia the tribunals of Sierra Leone, Lebanon and Cambodia are some examples. They all impute penal responsibility upon commanders if, having possessed knowledge of a crime by their subordinates, those commanders

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3 Art. 87 AP I

4 Note that charging an accused under the mode of instigation requires this vertical relationship but does not require that the superior maintain an authoritative position requisite for command responsibility

5 Compare art. 6 (3) Statute of the ICTR with art. 7 (3) of the Statute of the ICTY. The wording of the two provisions are identical, in that they both attribute criminal responsibility to a commander if “he knew or had reason to know that the subordinate was about to commit such acts”

6 Note that the wording of this provision requires the prosecution to show that a military commander “knew… or should have known” (emphasis added) about the crimes. This seems to imply that the commander is under a duty to know what the forces under his command are doing
fail to implement measures necessary to prevent the crime from materializing. This same “obligation to prevent” imposed upon military superiors is further reflected in Art. 86 AP I. Notwithstanding the importance of these provisionary similarities, however, these international tribunals have developed a unique body of case law that has significantly developed the concept of command and superior responsibility. The jurisprudence of these tribunals is of particular significance because it has been critical in shaping the dynamic of how the courts interpret command responsibility as a mode of individual criminal liability.

The jurisprudence of both the ICTY and the ICTR have recognized the imposition of criminal responsibility upon a superior for actions committed by forces under the command of that superior, regardless of whether that superior possessed an official status. The ICTR has developed case law suggestive to the effect that the relationship between a superior and subordinate can be either direct or indirect. The ICTR trail chamber’s reasoning in the Musema case is of particular merit here. There the court recognized the need to determine whether the accused possessed either/or de jure/de facto authority over his subordinates when they committed the crimes in question. In the Jean de Dieu Kamuhanda Judgment, the ICTR held that there were three concurrent conditions that would need to be satisfied before a superior could be held

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7 See for example, art. 6 (3) of the Statute of the Special Court of Sierra Leone; art. 3 (2) (c) of the Statute of the Special Tribunal for Lebanon; art. 29 (3) of the Law of the Establishment of Extraordinary Chambers in the Courts of Cambodia;

8 International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, available at: [http://www.unhcr.org/refworld/docid/3ae6b36b4.html](http://www.unhcr.org/refworld/docid/3ae6b36b4.html); the wording of this article states that the fact that a breach of the Protocol “was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, 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”

9 The Prosecutor v. Laurent Semanza ICTR-97-20-T, para. 400; The Prosecutor v. Bagilishema, Case No. ICTR-95-1A, paras. 50, 51; The Prosecutor v Clement Kayishema and Obed Ruzindana, ICTR-95-1-A para. 294; The Prosecutor v Alfred Musema ICTR-96-13-A para. 148; etc

10 Semenaza Judgment, para. 400

11 The Prosecutor v Alfred Musema, Judgement, 27 January 2000, ICTR-96-13-T

criminally liable for subordinates under his command: i) there needed to have existed a superior-subordinate relationship between the person against whom the charge is directed and the perpetrators,\(^\text{13}\) ii) the superior knew or had reason to know that the criminal acts were going to be committed,\(^\text{14}\) and iii) the superior failed to exercise effective control to prevent the criminal act or punish the perpetrators thereof.\(^\text{15}\) The first requirement may seem basic, but it is of utmost importance and the courts have spent a considerable amount of time dealing with it. In the ICC, in the Prosecutor v Jean Pierre Bemba, in its decision on the confirmation of charges (DCC) the pre-trial chamber (PTC) reminded the Prosecution that imputing command responsibility pursuant to art. 28 of the Rome Statute was contingent upon establishing the existence of a superior-subordinate relationship between whom had instructed the effectuation of the crimes in question and the perpetrators who materially engaged in its commission.\(^\text{16}\)

Although traditionally employing its own unique doctrine of JCE,\(^\text{17}\) the jurisprudence of the ICTY has produced an authoritative body of case law a propos the criminal responsibility of superiors. In the Celebici case,\(^\text{18}\) the ICTY reiterated the imperativeness of determining the existence of such a superior-subordinate

\(^{13}\) This can also be found in the Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (Commentary), ICRC Martinus Nijhoff Publishers, Leiden, 1987, p. 1013 where it says: “we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control… The concept of the superior… should be seen in terms of a hierarchy encompassing the concept of control.”

\(^{14}\) This is further reflected in Rule 153 of the ICRC’s customary law study. For a more elaborative discussion on this, see: Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Customary International Humanitarian Law, 2 vols., ICRC and Cambridge University Press, Geneva and Cambridge, 2005, I, pp. 558-565

\(^{15}\) The Prosecutor v Jean de Dieu Kamuhanda, ICTR-99-54A-T para. 603

\(^{16}\) The Prosecutor v Jean Pierre Bemba Gombo, Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on Charges of the Prosecutor Against Jean Pierre Bemba Gombo, ICC-01/05-01/08, para. 405

\(^{17}\) The first traces of JCE are identified in the aftermath of WWII, then under the name ‘Common Purpose’ doctrine. For its applications, see Georg Otto Sandrock et al. (Almelo Trial) or the British case of R v Swindall and Osborne (1846) 2 Car. & K. 230

\(^{18}\) The Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, IT-96-21-A 20 February 2001
relationship, but also stressed that the superior would only be criminally liable if he failed to take all necessary and reasonable measures within his “material ability” \(^{19}\). This deviates from the approach taken by the ICTR. However, the ICTY also elaborated on the concept of effective control in the *Celebici* case and stated that in order for “effective military control” to take place, the accused military commander would have had to of had “the material ability to prevent the commission of crimes by subordinates, which is derived from operational control over subordinates as a result of the capacity to issue orders and to have them implemented…” \(^{20}\). In the *Blaskic* case, the Appeals Chamber dealt with another issue. There the question was whether there needed to be an established casual link between the failure of the superior from preventing his subordinates committing the crimes and those direct perpetrators from engaging in its commission. The court ruled in the negative. \(^{21}\) Although the ICC has only tried one person under art. 28 of the Rome Statute, \(^{22}\) it nevertheless played an important part in providing authority as to when an accused can be deemed to possess the mental awareness that his subordinates will engage in criminality. In that ICC case the PTC III was presented with evidence that the accused had engaged and actively participated in the military campaigns that were in question. The PTC held “in light of the relevant considerations and after having thoroughly assessed the evidence” Bemba was “criminally responsible within the meaning of Article 28 (a) of the Statute”. \(^{23}\) In the *Bagilishema* Judgment, \(^{24}\) the Appeals Chamber of the ICTR stated that the Chamber had to satisfy itself that the accused had “some general information in his

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19 Ibid. para. 395

20 Ibid. para. 198 states: “as long as a superior has effective control over his subordinates, to the extent that he can prevent them from committing crimes or punish them after they have committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control”

21 *The Prosecutor v. Tihomir Blaskic*, Appeals Chamber Judgment of 29 July 2004, Case No. IT-95-14-A, para. 77 states: “The Appeals Chamber is therefore not persuaded by the Appellant’s submission that the existence of causality between a commander’s failure to prevent subordinates’ crimes and the occurrence of these crimes, is an element of command responsibility that requires proof by the Prosecution in all circumstances of a case”

22 *The Prosecutor v Jean Pierre Bemba Gombo* ICC-01/05-01/08

23 Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of *the Prosecutor against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, para. 501, d

24 *The Prosecutor v Bagilishema*, Judgement (Reasons), ICTR-95-1A-A
possession, which would put him on notice of possible unlawful acts by his subordinates”. In the Ordic case yet another issue arose. There it was held that “superior responsibility encompasses criminal conduct by subordinates under all modes of participation under Art. 7 (1) [Statute of the ICTY]”. Effectively what this means is that a superior can be held criminally responsible for the criminal conduct of his subordinates through any of the modes of criminal liability. In the Al-Bashir case, the ICC considered the element of “common purpose”. There, in assessing the individual criminal responsibility of the suspect under art. 28 of the Rome Statute, the Pre-Trial Chamber considered the accused having been in control of the “apparatus” of the state and how he “used such control to secure the implementation of the common plan”.

The foregoing concisely demonstrates how the concept of command responsibility has been developed through the case law employed by the international tribunals. Each case gives rise to new issues which have yet to be dealt with elsewhere, or directs attention to past uncertainties and courts are not reluctant to draw on the past jurisprudence of other tribunals as authority for how to approach those issues. This inevitably evolves into a trend, whereby one case from one tribunal elaborates or clarifies a point of law pre-established by a preceding case in another tribunal. Although decisions are not legally binding upon other courts, their jurisprudence is nonetheless authoritative and central to how similar issues dealing with command responsibility are addressed, and it is this very trend that has undoubtedly contributed to the development of the doctrine of command responsibility in the case law of the different international criminal tribunals.

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25 Ibid. para. 28
26 The Prosecutor v. Naser Oric (Trial Judgment), 30 June 2006, IT-03-68-T
27 Ibid. para. 21
28 Decision of the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-3
29 Ibid. para. 222
30 See for example the references to the ICTY in the Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor v Jean-Pierre Bemba Gombo, ICC-01/05-01/08, para. 23, 41, 42, 52, 77, 81, 83, 149, 151, 200, etc.