RETHINKING COMMAND RESPONSIBILITY: A CRITIQUE OF THE APPLICABILITY OF COMMAND RESPONSIBILITY IN THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

MERCY AFANDI OLANDO

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DECLARATION

I**, MERCY AFANDI OLANDO,** do declare that this is my original work and it has not been submitted and is not currently being submitted for a degree in any other University.

SIGNED…… DATE…….

MERCY AFANDIOLANDO

REGISTRATION NUMBER: G62/67786/2013

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

This thesis has been submitted with my knowledge and approval as the university supervisor.

SIGNED……..… DATE……

DR. PETER ONYANGO

LECTURER FACULTY OF LAW

UNIVERSITY OF NAIROBI

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DEDICATION

I dedicate this work to my parents. You are a source of great inspiration.

ACRONYMS

CIL	Customary International Law
CR	Command Responsibility
ECCC	Chamber of the Extraordinary Chambers in the Courts of Cambodia
ICC	International Criminal Court
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IMTFE	International Military Tribunal of the Far East
WWI	World War One
WWII	World War Two

TABLE OF CONTENTS

LIST OF LEGAL INSTRUMENTS

1. International Criminal Tribunal for the Former Yugoslavia Statute

2. International Criminal Tribunal for Rwanda Statute

3. 1998 Rome Statute of the International Criminal Court

4. Treaty of Versailles

5. Hague Convention of 1907

6. Geneva Convention III of 1949

7. Additional Protocol 1 of 1977 to the 1949 Geneva Conventions

LIST OF CITED CASES

1. *Mirosla v Kvocka et al Case No. IT-98-30/1-T*

2. *Prosecutor v Akayesu ICTR 96-4-T*

3. *Prosecutor v Brdjanin IT-99-36-T,*

4. *Prosecutor v Enver Hadžihasanovid, Case No. IT-01-47-AR72*

5. *Prosecutor v Mirosla Kvočka et al. IT-98-30/1-T*

6. *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, Case No. I96-21-A*

7. *Prosecutor v. Alfred Musema ICTR-96-13-T*

8. *Prosecutor v. Bikindi ICTR–01–72–T*

9. *Prosecutor v. Kayishema & Ruzindana ICTR–95–1–T*

10. *Prosecutor v. Nahimana ICTR–IT–99–52–T*

11. *Prosecutor v. Sefer Halilovic (2001) ICTY IT-01-48-I.*

12. *Prosecutor vs,Timohir Blaskic, IT-95-14-T*

13. *US Military Commissions vs. Yamamshita (1945) 327 US 1.*

ABSTRACT

Command responsibility is a form of criminal responsibility that addresses the culpability of superiors who fail to prevent or punish their subordinates committing criminal acts during war. It has been developed through customary international law especially in cases after the second World War (WWII) and in domestic jurisdictions. It dates back almost to the beginning of organized professional armies. The justification for the development of command responsibility in international criminal law was that low-level officials or military personnel often commit crimes because their superiors failed to prevent or repress them. The doctrine aimed at promoting compliance with IHL by obligating commanders to curb the criminal acts of subordinates. Despite the development and application of the doctrine, the doctrine of CR has been subjected to numerous criticisms.

This research shall therefore critique the applicability of command responsibility in the international criminal justice system. It aims at questioning the basis of criminal liability of a commander for criminal acts committed by subordinates. It therefore begs the question: is the doctrine applied as a means of indirectly holding superiors responsible for criminal acts of their subordinates or is a form of liability for a superior's own misconduct?

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background to the Study

The doctrine of Command Responsibility (CR) –also referred to as superior responsibility- is one of the most important concepts developed in international criminal law after the WWII.[1] The law of CR is a unique creation of international law, which has no comparison to national legal systems. It is responsibility for an omission. Under IHL, commanders have a duty to ensure that their troops respect that body of law during armed conflict and hostilities.[2] This duty does not extend to training of troops alone, but also the taking of necessary measures to prevent and punish subordinates committing criminal violations of IHL. Where a military commander fails to prevent his/her subordinates from committing criminal acts while possessing knowledge of such actions, it gives rise to criminal liability referred to as command/superior responsibility.

International recognition of the concept of holding commanders liable for the criminal acts of their subordinates occurred as early as 1474 with the trial of Peter of Hagenbach.[3] As early as the 15th century, King Charles VII of Orleans decreed that his military commanders were to be held liable should those under their command commit crimes against the civilian population, irrespective of the commanders' participation in the crimes.[4] In 1625, it was recognized as part of

[1]GuénaëlMettraux, *The Law of Command Responsibility* (Oxford University Press 2009).

[2]Jamie Allan Williamson, 'Some Considerations on Command Responsibility and Criminal Liability' (2008) 90 International Review of the Red Cross.

[3]William H Parks, 'Command Responsibility in War Crimes' (1973) 62 Military Law Review 1.

[4]Anne E Mahle, 'Command Responsibility: International Focus' <http://www.pbs.org/wnet/justice/world_issues_com.html> accessed 21 January 2015.

the definition of civic duties and military professionalism.[5] However, its legal recognition took place after the WWII.

During the seventeenth century, Hugo Grotius articulated the basic precept that a community, or its rulers, could be held responsible for the crime if they knew of it and did not prevent it when they could and should have prevented it.[6] CR calls for criminal responsibility of commanders for the criminal acts of their subordinates during an armed conflict. The concept of CR and the commensurate duty of a commander to control his troops was developed along two paths.[7] The first path dealt with the question of the general responsibility of command; the second, with the specific criminal responsibility of the commander.[8]

The justification for the development of CR in international criminal law (ICL) was that low-level officials or military personnel often commit crimes because their superiors failed to prevent or repress them.[9]It aimed at promoting compliance with IHL by obligating commanders to curb the criminal acts of subordinates. A superior having an effective command and authority over his or her troops bears the greatest responsibility in ensuring that they do not violate both international criminal law and IHL.[10] In the instance where the commander has or should have knowledge of such criminal acts and does not prevent or punish its subordinates then criminal

[5]Cortney C Hoecherl, 'Command Responsibility Doctrine: Formulation ThroughFord V. Garcia and RomagozaV.Garcia' [2004] Journal of International Law Policy 1.

[6]Arthur Thomas O'reilly, 'Command Responsibility: A Call to Realign Doctrine with Principles' (2004) 72 AM. **U.** Int'l L. Rev 71.

[7]Parks (n 3).

[8]Ibid.

[9]Williamson (n 2).

[10]Ibid.

liability arises. The doctrine of CR is remarkable in different ways because while criminal acts typically involve affirmative commission, it criminalizes omission.[11] In the case of ,Prosecutor vs Sefer Halivovic it was held:

> *Command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. The omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates.*[12]

While most international norms and doctrine diffuse from practices in national jurisdictions, command responsibility doctrine emerged in international cases and could be informative for national practices and legislation.[13]The classical definition of crime is any act or omission prohibited by the law that is enacted for the protection of the public and the violation of which is prosecuted by the state in judicial proceedings in its own name.[14] CR is a recognized form of international criminal liability.[15] Criminal liability also bases on the principle of legality.[16] The legality principle requires that; no conduct shall be held criminal unless it is specifically described in a penal or criminal law statute beforehand.[17] It also requires that no person shall be

[11]Antonio Cassese and others, *International Criminal Law: Cases and Commentry*(Oxford University Press 2011).

[12]The Prosecutor of the Tribunal v. Sefer Halilovic (2001) ICTY Case No: IT-01-48-I. Indictment Para 55

[13]Ibid.

[14]Tibamanya Mwene Mushanga, *Crime and Deviance* (Law Africa Publishing (K) Ltd 2011).

[15]Bert Swart, 'Modes of Criminal Liabilty' in Antonio Cassese (ed) *The Oxford Companion to International Criminal Justice* (Oxford Univeristy Press 2009).

[16]Wiliam Musyoka, *Criminal Law* (Law Africa 2013).

[17]Ibid.

punished except in accordance with or in pursuance of a statute, which fixes the penalty; statues must be construed or interpreted strictly; and the statutes are not of a retrospective or retroactive effect.[18]

CR is a means of demanding accountability from military and non-military superiors for the criminal acts of their subordinates because they failed to prevent or control their subordinates. The commander must have authority over the subordinates, possess knowledge of their criminal acts and fail to take necessary and reasonable measures to prevent the criminal acts. Its modern formulation bases criminal liability on *mens rea* of negligence and *actus reus* of omission.[19] Concisely, its applicability requires fulfilment of the following three conditions:[20]

> *(i) That the superior had the authority to control the actions of his subordinates;*
>
> *(ii) That the superior knew or in the given circumstances should have known that a subordinate had or was about to perpetrate a human rights violation;*
>
> *(iii)That the superior failed to take necessary measures, within the scope of his authority, to prevent or repress the commission of the human rights violations.*

Where the criterion is met, a commander is criminally liable for the criminal acts of their subordinates, even if the commander did not personally participate in the underlying offenses. He or she is accountable as if he or she was a principal as long as the commander has effective control over the subordinates.

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[18]Ibid.

[19]O'reilly(n 6).

[20]Viplav Kumar Choudhry, 'Defence of Superior's Order and Command Responsibility under Criminal Laws in India' (2014) 2 Indian Journal of Public Administration 195.

Elements of the law of CR are codified in statutes and case law from the international criminal tribunals and International Criminal Court (ICC). The case laws provide a growing jurisprudence on the interpretation of CR. The duties of a commander in international law include those laid out in Article 1 of the Hague Convention of 1907 and Article 4(A)(2) of the Geneva Convention III of 1949. In addition, the Customary International Law (CIL) expectations in regards to humanitarian law and the law of armed combat as developed through the ICC, International Criminal Tribunal for the Former Yugoslavia (ICTY) and the other international tribunals provide for duties of a commander during an armed conflict.[21] Article 7(3) of the ICTY statute provides that a commander is criminally responsible for a crime committed by a subordinate, 'if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof'.

Article 28 (a) of ICC statute provides that:

> *A military commander … shall be criminally responsible for crimes …, where (i) that military commander … knew … that the forces were committing or about to commit such crimes; and (ii) … failed to take all necessary and reasonable measures … to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*[22]

[21]Scott James Meyer, 'Responsibility for an Omission? Article 28 of the ICC Statute on Command Responsibility' (2011) 8 Miskolc Journal of International Law 27.

[22]Article 28 (b) of ICC Statute holds a commander criminally responsible for the crimes of subordinate where: he either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or were about to commit such crimes; crimes concerned activities that were within the effective responsibility and control of the superior; and he failed to take all necessary and

The trial of General Tomoyuki Yamashita ***(Yamashita Case)*** was the first international war crimes trial to find a commanding officer criminally liable without any direct evidence linking him affirmatively to the crimes committed by his subordinates.[23] The Japanese forces under the control of General Yamashita occupying Manila, and the island of Luzon in the Philippines, near the end of WWII tortured and brutally slaughtered thousands of civilians including women and children, and engaged in mass rapes.[24] General Yamashita was charged on the ground that he failed in his duty to control his troops, permitting them to commit the alleged crimes. Although there has been a wide acceptance of the Yamashita standard, it is not immune from critique. It has been criticized for imposing a strict liability on a military commander for the actions of his or her subordinates.[25] The ICTY cases in the wake of atrocities committed in Yugoslavia applied a fairly low *mens rea* requirement compared to the Yamashita standard.

In the judgement of the Appeals Chamber in the ***Delalićet al***. case, it is emphasized that CR is not a form of strict objective responsibility:

> *The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine… A*

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reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[23]Mahle (n 4)..

[24]US Military Commission in Manila, Trial of General Tomuyuki Yamashita, Case No 21, United States Military Commission, Manila, 8 October -7 December 1945.

[25]Ibid.

superior may only be held liable for the acts of his subordinates if it is shown that he "knew or had reason to know" about them. The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability.[26]

The doctrine of CR is now established in CIL. Despite its development and application, the doctrine of CR has been subjected to criticism. The first criticism has been on the *mens rea* requirement and 'reasonable and necessary' measures required by a commander in preventing the commission of criminal acts by subordinates.[27]

Based on the growing jurisprudence of the doctrine of CR, this study analyses CR in detail discussing its philosophical foundations. It analyses the key case laws from ICC, international tribunals and domestic courts. It aims at questioning the basis of criminal liability of a commander for criminal acts committed by subordinates and inquires into the issue whether subordinates may escape criminal liability basing on the defence of superior orders. It questions the legal meaning of the doctrine of CR in the international criminal justice system. The three key elements of the doctrine of CR will be key for this study in questioning criminal liability of a military commander.

1.2 Problem Statement

The doctrine of CR though established in the statutes of international tribunals and ICC, is a highly contentious topic in the realm of international law. The philosophy underlying criminal

[26] Case No. IT 96 21 T-ICTY

[27] Joakim Dungel and Shannon Ghdiri, 'The Temporal Scope of Command Responsibility Revisited: Why Commanders Have a Duty to Prevent Crimes Committed after the Cessation of Effective Control' (2010) 17 University of California Journal 1.

law establishes parameters that should constrain legislators in the creation and punishment of crimes. For an accused to be liable for a criminal responsibility he must exhibit *mens rea* and *actus reus.* Criminal liability requires a guilty mind causally linked to some form of affirmative action. However, criminal liability under the doctrine of CR arises through omission.

The rationale of the doctrine of command responsibility is to ensure that those in command do not escape liability based on the absence of *actus reus.* However how does one prove criminal liability in the case of an omission? This is what the doctrine was aimed to do. In the Yamashita case, he was found guilty of failing to prevent his subordinates from committing crimes and violation of IHL. This was based on a strict liability which faced a lot of criticism. The elements of doctrine of CR were later established: existence of superior-subordinate relationship; the knowledge requirement; and the duty to prevent or punish subordinates. Although the three elements are established, they are not well settled. The international tribunals, ICC, national courts and scholars have been involved in the formulation of the legal meaning of these elements.

The most controversial is the legal meaning of the knowledge requirement.[28]The elements of criminal liability are clearly entrenched in criminal law. However, the doctrine of CR is based on omission of the military commander to prevent or punish its commanders. The principle of individual autonomy requires that each individual should be treated as responsible for his or her own behaviour.[29] Apart from the controversy on the legal meaning of the doctrine, the rationale of the doctrine has also been questioned. The question is whether the doctrine has furthered

[28]Parks (n 3).

[29]Ashworth and Horder, *Principles of Criminal Law* (7thedn, Oxford University Press 2013).

international justice or can be used as a political tool. All these questions have to be addressed through a critical analysis of the legal meaning of the doctrine of command responsibility.

1.3 Theoretical Framework

Various theories try to explain the basis of a commander being criminally responsible for the acts of his or her subordinates. The theory of CR argues that, it would be wrong for commanders to escape criminal liability on the basis that they did not wield the weapon that dealt the fatal blow.[30]It places greater responsibility on commanders to prevent and punish subordinates for criminal acts committed during war. The doctrine of CR is rooted in ancient texts – namely in *The Art of War* dating back to the end of the sixth century B.C. when Chinese military philosopher Sun Tzu developed the idea of commanders taking responsibility for the civility of their subordinates in military treatise.[31]

The doctrine of CR if interpreted liberally can have a deterrent effect. O'Reilly argues that the doctrine of CR has a powerful deterrent effect and can help prosecute commanders who are complicit in their criminal activities, but due to their elevated positions are able to elevate liability for individual criminal acts.[32] The scope of the doctrine requires a superior-subordinate relationship with the accused having an effective control or command over the subordinates,

[30]Ibid.

[31]Marx Markham, 'Evolution of Command Responsibility in International Humanitarian Law' [2011] Penn State Journal of International Affairs 50.

[32]O'Reilly (n 6).

having knowledge about the crime, and failing to take reasonable measures to prevent the crime or punish the person behind the criminal act. [33]

Supporting doctrine of CR is the concept of criminal liability. Criminal liability is the strongest formal censure that society can inflict, and it may also result in a sentence which amounts to severe deprivation of the ordinary liberties of the offender.[34] The theory of criminal liability lays grounds upon which an individual may be found criminally liable. It requires a guilty mind causally linked to some form of affirmative voluntary conduct. This is what is referred to as *mens rea* and *actus reus*. Criminal liability for an omission is less common than that of affirmative action. An individual has less control on omissions than commission of crime. Although the doctrine of CR will be the key theory in analysing the criminal liability of a commander, the doctrine does not ground liability in an individual's fault. Criminal liability of a commander is grounded in his/her power in preventing the commission of the crime. This values the deterrence of the crime over the integrity of the person as an individual.

A society lays down norms upon which it is governed. Criminal law aims to protecting those norms and punishing those who go against the societal norms. Durkheim argued that function of punishment in society is an expression of collective sentiments by which social cohesion is maintained.[35] Crime is closely connected to the social values expressed in the collective conscience.

[33]Ibid.

[34]Ashworth and Hodder (n 29).

[35]Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rdedn, Oxford University Press 2012).

Retributive theory of criminal law, requires that society ground liability in individual guilt, and not use the individual solely for the pursuit of societal ends.[36] Under retributive theory, lawmakers should criminalize and punish only wrongful and blameworthy conduct.[37] Retributive theory has its philosophical grounding offered by Immanuel Kant (1724-1804) who argued that any approach to punishment other than retribution would be a deviation from strict requirements of justice, and would be immoral because it treated the subject of punishment disrespectfully, as a means to an end other than as an end in himself or herself.[38] Kant argued that:

> *Even if a civil society were to be dissolved by the consent of all its members…, the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violations of justice.*[39]

The theory of retributivism grounds criminal liability in individual faults unlike the utilitarianism theory. It will be key in questioning the criminal liability of a military commander for acts committed by troop. What is the legality of punishing such a commander? What is the standard of measuring his individual fault based on retributivism theory?

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[36]O'reilly(n6).

[37]Ibid.

[38]S Moore, 'The Moral Worth of Retribution' in F Schoeman (ed), *Responsibility, Character and the Emotions* (Cambridge University Press 1987).

[39]Emmanuel Kant, *The Metaphysics of Morals as cited in Brian Bix, Jurisprudence: Theory and Context* (Sweet and Maxwell 2012).

Utilitarianism theory has its origins in the classical criminology of Beccaria and Bentham. A utilitarian based, deterrence theory of criminal law allows society to use an individual to promote and ensure conformity to its standards. Beccaria in his book, *On Crimes and Punishments* saw individuals motivated by the pursuit of pleasure and avoidance of pain.[40] The aim of punishment was to prevent offenders from committing new harms and deter others from doing so, as opposed to retributivism, which argued called for the wrongdoer to be punished in order to pay for his crime.

Bentham's philosophical approach was quite distinct from retributivism and introduced rationality into all stages of the criminal justice system.[41] The quest for pleasure and the avoidance of pain is the key to understanding human behaviour. Concerning punishment, Bentham argued that punishment is justified only by the good consequences which will result from it and suffering should never be imposed unless it will prevent greater suffering.[42]

The theory of utilitarianism will be relevant in this study in trying to inquire whether criminal liability of a commander through the doctrine of command responsibility has fostered deterrence. What is the function of command responsibility on society? The question that the theory of utilitarianism seeks to answer is whether command responsibility has deterred war crimes by subordinates by superiors being more careful and preventing and punishing criminal acts of subordinates.

[40]Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (3rdedn, Oxford University Press 2012).

[41]Nigel E Simmons, *Central Issues in Jurisprudence* (3rdedn, Sweet and Maxwell 2008).

[42]Easton and Piper (n 40).

1.4 Literature Review

A lot of literature exists on the doctrine of command responsibility. The literature review for this study will be based on two key themes; first, understanding the doctrine of command responsibility; and second, the elements of command responsibility in determining the criminal liability of accused.

1.41 Understanding the Doctrine of Command Responsibility

The doctrine of command responsibility is an inculpatory doctrine accepted as a general principle of international criminal liability under International Criminal Law. It is a doctrine specific to International Criminal Law, which does not have a concomitant general principle of liability at the domestic level.[43]

Parks,[44]discusses historical and comparative analysis of war crimes trials involving command responsibility in order to determine the standards of conduct required of a military commander in combat with regard to the prevention, investigation, reporting, and prosecution of war crimes. This article will be key in discussing the historical development of the doctrine of CR. The concept of CR has however evolved since the writing of this Article in 1973 by Parks.

Abeyratne,[45]examines two recent decisions of the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in the broader context of whether it is fair to

[43]Robert Cryer and Others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2010).

[44]Parks (n 3)

[45]Rehan Abeyratne, 'Superior Responsibility and the Principle of Legality at the ECCC' (2012) 44 The George Washington International Law Review 39.

impose criminal liability on Khmer Rouge leaders for acts committed between 1975 and 1979. The accused argued that based on the principle of legality (*NullemCrimen Sine Lege*), the concept of superior responsibility had not crystallized into International Customary Law by 1970s, and hence the charges brought against them were not legal.[46] The Pre-Trial chamber dismissed this argument. Abeyratne argues that these decisions were based on flimsy legal foundation. The ECCC should have based its decisions on Additional Protocol I to the Geneva Conventions of 1949 (1977), which more clearly defines superior responsibility and reflects broad consensus on the state of international law in the 1970s. The article analyses the elements of command responsibility in defining CR. It however does not discuss them in detail which will be the ambit of this study.

According to **Amnesty International** the failure of express provision enshrining the principle of superior and CR in the Croatian legal system is one of the major factors that contributed to injustice in the prosecution of war crimes in Croatia.[47]**Markham,**[48] investigates the international legal roots and history of the principle of CR, tracing its roots back to Chinese philosopher Sun Tzu's on The Art of War. He argues that the principle of CR has increasingly become a more controversial topic in the context of international law. He examines the specific cases examining and advancing the definition of CR. In particular, he discusses the definition of ICTY, ICTR, ICC and customary international law. Although he discusses the elements of command responsibility,

[46]The principle of legality requires that crimes must be provided for by the law; that the rules governing criminal liability must be written prior to the offence and must be written with a higher level of precision and clarity than the rules governing civil liability.

[47]Amnesty International, *Behind a Wall of Silence: Prosecution of War Crimes in Croatia* (Amnesty International Publications 2010)

[48]Markham(n 31).

he does not question why a military commander must be responsible for the criminal acts of his subordinates.

O'reilly,[49] discusses the philosophical foundations of CR and the need to realign it with principles. He sees no justification for punishing a military commander on the basis of subordinate criminal acts on the retributive theory of criminal law which generally requires that society ground liability in individual guilt, and not use the individual solely for the pursuit of societal ends. While the utilitarianism theory of punishment aims at promoting deterrence, he argues that such an approach allows society to use an individual to promote and ensure conformity to its standards. In the end it does not foster justice. The retributive theory which O'reilly bases his argument is a key theory that forms an inquiry into the criminal liability of a commander under the doctrine of command responsibility. This literature will be used to enrich the philosophical foundations and theoretical framework of the doctrine of command responsibility. It seeks to answer the question why a commander who had no direct responsibility in the commission of crimes of its subordinates should be held liable.

Williamson,[50] argues that the principle of command responsibility has been developed through international criminal jurisprudence, codified in Additional Protocol 1 and forms part of International Customary Law. It would be wrong for commanders to escape criminal liability on the basis that they did not wield the weapon that dealt the fatal blow. The subordinates should not escape liability on the defence of superior liability. However, the jurisprudence of the doctrine of

[49]O'reilly(n 6).

[50]Williamson (n 2).

command responsibility has evolved seeking to strike the balance between the standards placed upon superiors and individual actions of subordinates.

1.42 Elements of Command Responsibility Criminal Liability

Mettraux,[51] gives an account of the state of the doctrine of command responsibility in light of the jurisprudence of the International Military Tribunals (Nuremberg and Tokyo), the ad hoc Tribunals (ICTR and ICTY), and the Hybrid Courts (in particular the Special Court for Sierra Leone). According to Mettraux command responsibility, is a *sui generis* form of liability for culpable omission. The core of the commander's *culpa*, and the basis of his liability, stands not in the contribution that he has made to the crime of the subordinate but in a culpable dereliction of duty. He fails to distinguish more effectively between command responsibility and the other modes of liability. However, this article explains in depth the special features of CR and the elements comprising it. This article will be relevant to this study in analysing what the doctrine of command responsibility entails. It will enrich this study.

Levine,[52] discusses the level of knowledge required for a commander to be criminally responsible for criminal acts of its subordinates. One of the controversial developments of the modern concept of CR is the level of knowledge that commanders must possess before they become criminally responsible. Whilst actual knowledge of subordinates' crimes is sufficient, debate has centered on the appropriate level of "constructive" knowledge required to warrant individual criminal responsibility.[53] Levine argues that the ICC should interpret Article 28 (a) of

[51]Mettraux(n 1).

[52]Eugenia Levine, 'Command Responsibility: The Mens Rea Requirement' 2014 Global Policy Forum.

[53]Ibid.

ICC Statute literally to adopt a "should have known" *mens rea* standard for command responsibility of military superiors. The knowledge element of command responsibility has been a point of contention in international law since WWII. Levine does not discuss the issue of *mens rea* requirement in detail which shall be the scope of this study in trying to question whether constructive knowledge of subordinates' criminal activities should be considered in holding a commander responsible.

Cassese and others,[54] discuss the notion of superior responsibility in their book. They recognize three key elements, which must be met for superior responsibility to suffice. First, the accused must be a superior with effective command and control over the subordinates. Second, the accused must have knowledge or constructive knowledge that the subordinates have committed or are about to commit crimes or have information permitting him to conclude so. Finally, the accused failed to prevent or punish the commission of crimes by the subordinates. In discussing these elements, the authors do it in detail backing it with case law. This literature will be key in enriching the topic under study. However the authors have not questioned why a commander must be held criminally liable for criminal acts of his subordinates.

Ashworth and Horder's,[55]book discusses various principles of criminal law that form basis of this study. The principle of individual autonomy and principles relating to conditions of liability will be relied on in questioning the criminal liability of a military commander for crimes committed by subordinates. The principles relating to conditions of liability include; the

[54]Cassese and Others (n 11).

[55]Ashworth and Horder (n 29).

principle of *mens rea*, the policy of objective liability, the principle of correspondence, constructive liability and principle of fair labelling.

Ormerod,[56]in his book discusses the key elements of crime. He argues that a person is not criminally liable for his conduct unless the prescribed state of mind coincides with prohibited *actus reus* also being present.[57] The *actus reus* involves generally but not invariably, conduct and sometimes its consequences (result), and also involves circumstances in which the conduct takes place.

Cryer and others,[58]discuss command/superior responsibility in their book. They provide a brief overview of the historical development of command responsibility. They discuss the requirements of command responsibility enriching it with case law from ICC, ICTY and ICTR. However, their discussion is very brief and it does not inquire in the basis of a commander criminal liability grounded in the doctrine of command responsibility.

Wood,[59]in his dissertation examines the nature of the doctrine of superior responsibility and its application to the crimes of specific intent. He argues that a superior cannot be held accountable for crimes of specific intent committed by subordinates because he or she does not share the specific intent required for the fulfilment of the definitional elements of specific crimes. He concludes that there exists disconnect in legal reasoning in the formulation of the *mens rea* requirement under the doctrine of command responsibility. This study will refute this claim by

[56]Ormerod, Smith and Hogans (n 30).

[57]Ibid.

[58]Cryer and Others (n 43).

[59]Patrick Shaun Wood, 'Superior Responsibility and Crimes of Specific Intent: A Disconnect in Legal Reasoning?' (Degree, University of Pretoria 2013).

arguing that indeed a military commander or civilian superior has an obligation to ensure that subordinates under his or her command do not violate IHL or ICL.

1.5 Objectives of the Study

1.51 Main Objective

The main objective of the study is to inquire into the legal meaning of the doctrine of command responsibility in international criminal justice system.

1.52 Specific Objectives

This study will be based on four other specific objectives:

1. To discuss the key legal elements established under the doctrine of command responsibility.

2. To question the rationale behind the doctrine of command responsibility.

3. To determine some of the challenges faced in the application and interpretation of the doctrine of command responsibility.

4. To provide recommendations on the way forward in understanding the application of the doctrine.

1.6 Research Questions

This study will be based on two key research questions.

1. What is the rationale of the doctrine of command responsibility?

2. What are the legal criticisms levied against the application doctrine of command responsibility?

1.7 Justification of the Study

IHL and international criminal justice system places great responsibility on superiors to ensure that law is not violated during an armed conflict. Due to their hierarchy positions, superiors have to ensure that IHL is duly respected and breaches appropriately repressed. This study is justified on the ground that it inquires into the applicability of the theory of command responsibility in its quest to administer international criminal justice. Where a commander fails to prevent or punish its subordinates, it creates an impression of tolerance or approval. It provides a legal critique into the doctrine to determine whether it has met its set objectives of punishing superiors for failure to prevent crimes committed by their subordinates.

In the context of military wars, it is presumed that subordinate military personnel will carry out an order without questioning its legality. Where a commander makes an illegal order,the subordinate faces challenge of choosing either to disobey the order or be reprimanded by his superior or obey and risk criminal punishment by acting upon an order which is unlawful. This has led to the defence of superior orders in international criminal law.

This study is justified as it builds on the knowledge of the theory of CR. First it discusses the philosophical foundations of the doctrine hence providing substantive knowledge on the topic. This study is also justified as it aims at building on the knowledge of command responsibility in International Criminal Law. This study therefore opens a debate on the applicability of the doctrine to determine whether it has met its objectives in the international criminal justice system.

1.8 Research Hypothesis

The study will be based on five key research hypotheses:

1) The legal meaning of command responsibility is still a contentious topic.

2) The criminal liability of a commander/superior must be established on the three key elements as established under the doctrine of command.

3) The basis of doctrine of CR is to ensure that justice prevails and superiors/commanders are punished for crimes committed by subordinates where they failed to prevent them.

4) The doctrine of CR ensures that superiors do not escape liability where they fail to prevent commission of crimes by their subordinates that were within their knowledge.

5) The doctrine of CR if well applied and interpreted can be used a deterrent tool where superiors/commanders have a duty of care to ensure that subordinates under their effective control do not commit crimes.

1.9 Scope and Limitation

The discussion on the doctrine of has elicited different debates. The discussion in this study will limit itself to the applicability of the doctrine. In particular, it will discuss the key legal elements that judicial bodies have used to determine criminal liability under the doctrine. These elements include the superior-subordinate relationship, *mens rea* requirement and failure to take necessary and reasonable measures to prevent the commission of those crimes or to punish the perpetrators.

1.10 Research Methodology

The research methodology applied in this study will involve both primary and secondary data.

Primary data will be collected from case law and judicial decisions on the topic under study. Case law will be picked randomly from national jurisdictions, international tribunals and ICC. The objective of primary data is to provide first-hand information on the subject under study. The purpose of primary sources is that the data collected will be used as a basis of analysis into the situation under study.

The secondary data collection technique will entail going through the relevant books, articles, journals, conference papers and information from the Internet on interpretation of command responsibility under international law. The referencing style will be based on OSCOLA.

1.11 Chapter Breakdown

This study shall consist of five key chapters.

Chapter One: Introduction

The first chapter introduces the topic under study. It sets out the agenda of the study, the research questions, problem statement, objectives, the methodology to be employed, hypothesis, justification of the study, background of the study, scope and limitations.

Chapter Two: Philosophical Foundations of the Doctrine of Command Responsibility

The second chapter will discuss the doctrine of command responsibility. It will discuss the theoretical foundation of the doctrine of command responsibility by tracing its origins and historical development. This chapter will provide a clear insight of the origins of command responsibility from medieval times to its development in the 21st century and at the ICC. It will also mention some of the elements of the doctrine which will be discussed in detail in chapter three.

Chapter Three: Elements of Command Responsibility

The third chapter will examine the three elements of command responsibility established under Customary International Law, case law and statutes. The three elements that will be discussed

are: existence of a superior subordinate relationship, *mens rea* requirement and the duty to prevent and punish subordinates. This chapter aims at providing a clear understanding of elements that leads to criminal liability of a commander over the criminal acts of his or her subordinates.

Chapter Four: Questioning the Doctrine of Command Responsibility

Chapter four will discuss issues and concerns that have been raised against the applicability of the doctrine of command responsibility. It will inquire into three key issues; first the purpose and rationale of the doctrine; the knowledge requirement especially between civilian superiors and military commanders; and the meaning of 'reasonable and necessary' measures that a commander is required to take in preventing crimes committed by subordinates.

Chapter Five: Conclusions and Recommendations

The fifth chapter will discuss the conclusions of the study and provides further recommendations on the concept of CR. It will analyse summary of findings.

CHAPTER TWO

2.0 PHILOSOPHICAL FOUNDATIONS OF THE DOCTRINE OF COMMAND RESPONSIBILTY

2.1 Introduction

Command responsibility is a form criminal responsibility that addresses the culpability of superiors who fail to prevent or punish their subordinates committing criminal acts during war. It has been developed through CIL especially in cases after the WWII and in domestic jurisdictions. It dates back almost to the beginning of organized professional armies.[60]This chapter discusses the philosophical foundations of the doctrine of command responsibility in ICL. It analyses the core elements of command responsibility as established in ICL

2.2 Philosophical Foundations of the Doctrine of Command Responsibility in International Criminal Law

The principle of individual criminal responsibility for the violation of a norm that carries penal consequences is well established in all criminal justice systems around the globe. The concept of national and criminal responsibility was declared at an early date. Hugo Grotius articulated the basic precept that a community, or its rulers, could be held responsible for the crime if they knew of it and did not prevent it when they could and should have prevented it.[61] While Grotius limited himself to national criminal responsibility, the concept of international criminal

[60]William J Johnson and Andrew D Gillman (eds), *Law of Armed Conflict Deskbook* (International and Operational Law Department The Judge Advocate General's Legal Center and School, U.S. Army Charlottesville, Virginia 2012)

[61]Oreilly(n 6).

responsibility was recognized as early as 1474 during the trial of Peter von Hagenbach for charges of murder, rape, perjury and other crimes against the laws of God and man.[62]Although the ad hoc tribunal in the Holy Roman Empire did not rely directly on the doctrine of command responsibility, it convicted Hagenbach of the charges, which, 'he as a knight was deemed to have a duty to prevent'.[63] He was found guilty and beheaded.

In 1621 King Gustavo's Adolphus of Sweden promulgated his 'Articles of Military Lawes to be observed in the Warres', which provided under Article 46 that, 'No Colonel or Captain shall command his soldiers to do any unlawful thing; which who so does, shall be punished according to the discretion of the Judges…'. The concept of command responsibility was further explored by the American law during the Civil War by General Order 100, known as the Lieber Code, signed by President Lincoln in 1863 to direct the code of conduct for Union soldiers.[64] The Lieber Code placed responsibility on superiors for allowing mistreatment of prisoners and enemies during war time.[65]

The concept of command responsibility as a doctrinal outline for international or domestic law dates back in centuries. It is rooted in ancient texts – namely in *The Art of War* dating back to the end of the sixth century B.C. when Chinese military philosopher Sun Tzu developed the idea of commanders taking responsibility for the civility of their subordinates in military treatise.[66] Sun

[62]Parks (n 3).

[63]Levine (n 52).

[64]Markharm(n 31).O'reilly (n 6).

[65]Ibid.

[66]Markham (n 31).

Tzu wrote that, 'If the words of command are not clear and distinct, if orders are not thoroughly understood, the general is to blame. But if his orders are clear, and the soldiers nevertheless disobey, then it is the fault of their officers'.[67]

In 1439, Charles VII of France issued the Ordinance of Orleans, which imposed blanket responsibility on commanders for all unlawful acts of their subordinates, without requiring any standard of knowledge.[68] The French Code instituted by Charles VII of Orleans in 1439 is an example of command responsibility similar to modern concept of command responsibility. The French Code provided that:

> *The King orders that each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offences as if he had committed it himself and be punished in the same way as the offender would have been.*[69]

Developments such as the Nuremberg Tribunal, the Tokyo Tribunal, the 1977 additional Protocol, the ICTY, ICTR and ICC have provided guidance on just how far reaching command

[67]Parks (n 3).

[68]Mahle(n 4).

[69]Thodor Meron, *Henry's Laws and Shakespeare's Wars* (Oxford University Press 1993).

responsibility extends and further reinforces its status as a general principle of IHL as well as human rights law.

The Hague Convention (IV) of 1907, Respecting the Laws and Customs of War on Land, was the first multi-treaty to codify the principle of command responsibility on a multi-national level.[70]The foundation of modern law on command responsibility may be found in the Report of the Commission of Inquiry and Responsibility of the Authors of War in 1919.[71] The first major case that dealt with the doctrine of command responsibility was the *Yamashita* case which has encountered reactions and counter-reactions.[72] General Yamashita was held liable for the atrocities committed by his troops in Manila. The US Military Commission held that:

> *It is absurd to consider a commander a murderer or a rapist because one of his soldiers commits a murder or rape. Nevertheless where murder and rape are vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover or control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.*[73]

Yamashita's defence not satisfied with the judgment of US military Commission filed a petition for writ of habeas corpus and writ of prohibition in the Supreme Court of Philippines on the ground that the commission was improperly constituted and lacked jurisdictions, but they were

[70]Levine (n 52).

[71]Report of the Commission of Inquiry and Responsibility of the Authors of War in 1919

[72]US vs Yamashita (1945) 327 US 1.

[73]Ibid.

denied.[74] On appeal to the Supreme Court of US, the Commission held that its task was not to review the guilt or innocence of the defendant but rather only to determine the lawful power of the commission to try an enemy belligerent on the charge alleged. Justice Murphy in his dissenting opinion held ; 'nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or military reality. '[75] The *Yamashita Case* was criticized for failing to identify the *mens rea* standard which was not clear, and it was a case of want of a legal standard leading to General Yamashita being liable paradoxically because of a lack of effective command and control.[76]

The Nuremberg trial in the case of ***United States V Wilhelm Von Leeb*** also known as the ***High Command Case*** was an important case in the evolution of the doctrine of command responsibility.[77]The accused were thirteen high ranking officers who held important command positions in the German Military and were charged with committing war crimes, crimes against peace, crimes against humanity and conspiracy to commit the crimes. The tribunal was faced with determining the standard of criminal responsibility in order to determine individual responsibility of the accused. According to the ICTY case of ***Prosecutor v. Sefer Halilovic***, "Command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because

[74]Ibid.

[75]Ibid.

[76]Cassesse (n 11)

[77]Parks (n 3).

international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates'[78]

Language establishing the doctrine of command responsibility in 1775 existed in Article 11 and 12 of the Massachusetts Articles of War, and was adopted by the Provisional Congress of Massachusetts Bay.[79]The Treaty of Versailles was the first international instrument to articulate in express terms the legal requirement of prosecuting commanders for the illegal acts of his subordinates.[80] Articles 227 and 228 of the Treaty of Versailles envisioned the creation of a tribunal to prosecute high ranking German official for violations of the laws and customs of war during World War I.

As the doctrine of command responsibility began to draw wide attention as result of some notable instances of practice at the end of the Second World War, such attention culminated in the conclusion of Additional Protocol I of 1977 to the 1949 Geneva Conventions.[81]The 1949 Geneva Conventions and the 1977 Additional Protocols to the Convention has a similar clause which states that a commander, who has authority over his troops, is ultimately responsible for the unlawful acts they commit. Article 87 of the Protocol provides that parties to a conflict should require military commanders to prevent, supervise and report breaches of the Geneva Conventions and Protocol by troops and others under their command and, where appropriate, initiate disciplinary action. Article 86(2) provides that the fact that a breach of the convention or

[78] The Prosecutor of the Tribunal v. Sefer Halilovic (2001) ICTY Case No: IT-01-48-I. Indictment Para 55

[79]Parks (n 3).

[80]Mona H Savastano, 'Defining Who is a Subordinate under the International Doctrine of Command Responsibility' (New England School of Law International War Crimes Project Rwanda Genocide Prosecution, Memorandum for the United Nations Office of the Prosecutor 2001).

[81]Bing BingJia, 'The Doctrine of Command Responsibility Revisited (2004) 3 Chinese JIL.

of the Protocol is committed by a subordinate does not absolve his or her 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 or she 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. The Protocol also states that if the military commander contributes directly or indirectly to the unlawful conduct of his subordinates, then he may be individually criminally responsible for the unlawful act along with the subordinate.

Article 28 of the Rome Statute imposes similar liability on commanders as the statutes of the adhoc tribunals and liability on both military and civilian commanders and superiors for crimes within the jurisdiction of the ICC. [82]Contrary to customary and conventional IHL, which imposes the same criminal responsibility on commanders and superiors, Article 28 of the Rome Statute, which applies only to cases in the ICC provides a weaker standard of criminal responsibility for superiors.[83]

2.3 The Doctrine of Command Responsibility during Post WWII

The responsibility of commanders for the conduct of their troops has long been recognized in domestic jurisdictions, as well as in the earliest modern codifications of the law of war, such as the 1899 and 1907 Hague Conventions.[84] It dates back to antiquity, but international prosecutions based on the doctrine of command responsibility in international law did not occur

[82]Criminal responsibility can be imposed upon both military and civilian commanders or superiors.

[83]Amnesty International, 'Ending Impunity in the United Kingdom for Genocide, Crimes Against Humanity, War Crimes, Torture and other Crimes Under International Law: The Urgent Need to Strengthen Universal Jurisdiction Legislation and to Enforce it Vigorously'

[84]Judge Bakone Justice Moloto, 'Command Responsibility in International Criminal Tribunals' (2009) 3 Berkeley J Int'l L Publicist12

until the aftermath of WWII. The establishment of ICTY and ICTR delved further into the international jurisprudence of command responsibility. Currently the doctrine of command responsibility is enshrined in statute of all international tribunals.

After the First World War (WWI) efforts were made to sketch the notion of command responsibility in order to punish commanders for atrocities committed by their subordinates.[85] The 1919 Treaty of Versailles contained a provision relating to the trial and punishment of the former German Kaiser Wilhelm II for not mitigating the barbarities of the war despite having the power to do so.[86]The WWII ushered in a deeper exploration of command responsibility in international law. An important development in this post-WWII period occurred within the International Military Tribunal of the Far East (IMTFE), established by US General MacArthur, as Supreme Commander for the Allied Powers.

In the case of ***Nahimana vs Prosecutor***[87]ICTR Appeals Chamber confirmed the conviction of Ferdinand Nahimana for public and direct incitement to genocide and crimes against humanity, and sentenced him to thirty years imprisonment. Nahimana owned a radio station during the genocide period that was used as genocide media campaign against the Tutsi. Although he never broadcasted on the radio, he was convicted under the doctrine of superior responsibility for failing to stop or punish the broadcasters from inciting the genocide programs or punish them for having done so.[88]

[85]Cassese and Others (n 11).

[86]Cassese (2013).

[87]NahimanaVs Prosecutor Case No. ICTR–99–52–A, Judgment (Nov. 28, 2007)

[88]Sophia Kagan, 'The "Media Case" Before the Rwanda Tribunal: The Nahimana et al. Appeal Judgment, (2008) 3 Hague Justice Journal 83.

The Post WWII tribunals did not apply the doctrine of command responsibility as a tool to be used for holding high ranking officers criminally responsible. This issue was addressed by ICTY in the ***Halilovic case*** where the trial chamber held that, 'a commander is not responsible as though he had committed the crime himself. Instead, the superior incurs criminal liability for his or her failure to comply with the duty that international law imposes on superiors to prevent or punish crimes com-mitted by their subordinates'.[89]

2.4 Elements of Command Responsibility

A fundamental question as to the nature of command responsibility is whether it is a means of indirectly holding superiors responsible for criminal acts of their subordinates or whether it is a form of liability for a superior's own misconduct.[90]In order to hold a military commander/superior criminally liable for war atrocities under the doctrine of command responsibility, the prosecution must prove three legal elements: first, the superior had the authority to control the actions of his subordinates; second, superior knew or in the given circumstances should have known that a subordinate had or was about to perpetrate a human rights violation; and third, superior failed to take necessary measures, within the scope of his authority, to prevent or repress the commission of the human rights violations.[91]Establishing criminal responsibility for a commander's failure to act is based on the commander's failure to act; (a) in order to prevent the unlawful conduct, (b) provide for general measures likely to deter

[89]Halilovic case judgement.

[90]Moloto(n 84).

[91]Ibid.

the unlawful conduct; (c) investigate allegations of unlawful conduct; and (d) prosecuting and punishing the perpetrator of the unlawful behaviour.[92]

2.31 Superior-Subordinate Relationship

There must be a superior subordinate relationship for criminal liability under the doctrine of command responsibility to suffice. The commander must have an effective control of his troops. A military hierarchy is not required. The ICTY, the ICTR, and the Special Court have all held that the doctrine of command responsibility applies not only to military commanders, but also to political leaders and other civilian superiors in possession of authority.[93] It is also not necessary that a formal, *de jure* subordination exist but a superior position for purposes of command responsibility can be based on *de facto* powers of control.[94] Superior responsibility arises when crimes are committed whilst the superior had effective control over the offenders.

2.32 Mental Element

The mental element for command responsibility is one of the most controversial aspects of the doctrine. This is because liability arises through omission. The *mens rea* requirement for command responsibility is "knew, or had information which should have enabled them to conclude" that war crimes were being committed and "did not take all feasible measures within their power to prevent or repress the breach".[95] Not only the possession of knowledge, but also

[92]M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, (2nd edn, Oxford University Press 1999)

[93]Delalic, Mucic, Delic and Landzo ICTY Appeal Chamber 20 February 2001 para 256.

[94]Ibid.

[95]Ibid.

the lack of knowledge resulting from criminal negligence will matter. The mental element required in the doctrine of command case is not strict liability. In the ***High Command Case***, the prosecution tried to argue a strict liability but the court rejected arguing that:

> *Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility…A high commander cannot keep completely informed of the details of military operations of subordinates…He has the right to assume that details entrusted to responsible subordinates will be legally executed…There must be a personal dereliction. that can only occur 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 a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.*[96]

In the judgment of the Appeals Chamber in the ***Delalićet al Case***, it was emphasized that command responsibility is not a form of strict objective responsibility:

> *The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine… A superior may only be held liable for the acts of his subordinates if it is shown that he*

[96]Ibid.

"knew or had reason to know" about them. The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability.'

The ICC Statute sets a different standard for military and non-military superiors, the standard for the former being that the superior 'knew or owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes'.[97] In case of civilians, the civilian superior 'knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes'.[98]

2.33 Failure to Prevent or Punish

The doctrine of command responsibility comprises two legal duties of superiors: the duty to prevent future commission of crimes by its subordinates and the duty to punish subordinates in the instance of committing criminal acts during war. The two types of liabilities are separate. The duty to prevent arises as soon as the commander acquires actual knowledge or has reason to know that a crime is being or is about to be committed, whereas the duty to punish arises once the crime has been committed.[99] The commander must take necessary and reasonable measures

[97]Cryer and others (n 43).

[98]Ibid.

[99]Moloto (n 84).

to fulfil the duties; however failure to prevent commission of criminal acts by subordinates does not relieve the superior of criminal liability by simply punishing the subordinates afterwards.[100]

[100]Halilovic judgement para 72.

CHAPTER THREE

3.0 ELEMENTS OF THE DOCTRINE OF COMMAND RESPONSIBILITY

3.1 Introduction

The theory of command responsibility is premised on the commander's failure to exercise his or her command to control subordinates. A defendant's failure to act does not entirely mean that liability arises in occasions where they did nothing to prevent the commission of crimes.[101] For criminal liability under the theory of command responsibility to arise, the prosecution must prove three primary elements: existence of a superior-subordinate relationship; *mens rea* and *actus reus.* Schaack argues that the finder of fact considers the three elements in logical sequence:

> *The finder of fact's first step is to determine whether the direct perpetrators of the acts that underlie the indictment or complaint were subordinates of the defendant… If this prong is satisfied, then it must be determined whether the defendant was on notice that his subordinates were committing abuses. It is this knowledge, which may be actual or constructive, that triggers the defendant's duty to act. Finally, if the defendant possessed the requisite knowledge, then the finder of fact must determine whether the defendant fulfilled his duty to act in the face of this knowledge...*[102]

This chapter discusses the three elements of command responsibility as developed in case law in detail.

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[101]Ormerod, Smith and Hogan (n 30).

[102]Beth Van Schaack, 'Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia' (2003) 36 UC Davis L Rev 1213.

3.1 Existence of a Superior-Subordinate Relationship

A commander's first duty is to exercise command over his or her subordinates. The first element of command responsibility pertains to the relationship that exists between the superior and subordinates. The prosecution must prove that indeed the superior had control over its subordinates and such a relationship was in existence. The superior must have the actual power to control the acts of his or her subordinates. This element was developed by ICTY in the case of ***Prosecutor v Delalic*** involving the prosecution of four Bosnian Muslim camp guards and commanders for the mistreatment of Bosnian Serb prisoners of war in the Celebici prison camp.[103] The prosecution argued that defendant Delalic exercised considerable control and authority within the Celebici camp, even though there was no official instrument or letter of appointment conferring any formal responsibility over the camp to him.[104] The Trial Chamber setting forth the applicable law held that the required relationship of subordination between the defendant and perpetrators is established if the defendant exercised 'effective control' over the individual perpetrators.[105]

3.21 Determining Existence of a Superior-Subordinate Relationship

The relationship between the superior and subordinate need not be formal or recognized by a statute. A military hierarchy is not required as the doctrine of command responsibility applies to both the military and civilians including political leaders and other civilian superiors in

[103]Case No. IT-96-21-T Jud'gment ICTY.

[104]Ibid.

[105]Ibid.

possession of authority.[106]A superior, whether *de jure* or *de facto*, may be held criminally responsible under the doctrine in relation to crimes committed by subordinates where, at the time relevant to the charges, he was in a relationship of superior-subordinate with the perpetrators.[107]

De Jure control which means formal was defined by ICTY in the ***Delalic case*** as, 'authority to command and control their subordinates; superiors with control over subordinates'.[108] *De Facto* means 'Informal authority and command and control; however in order for the court to consider a *de facto* exercise of authority, the perpetrator of the underlying offence must be the subordinate of the person of higher rank and under his direct or indirect control'.[109] Under this formulation, a showing of *de jure* command over the direct perpetrators within a military hierarchy or formal chain of command is a relevant but not sufficient showing to satisfy the first prong of the doctrine.[110]

This implies even in cases where the commander has the legal authority to control his subordinates by virtue of his rank, criminal liability under the doctrine of command responsibility will only arise where it can be proved that the commander could actually exercise that authority. In the Delalic case, the appeal chamber confirming the decision of the Trial Chamber held that showing a *de jure* command gives rise to a legal presumption that the

[106]Yael Ronen, 'Superior Responsibility of Civilians for International Crimes Committed in civilian Settings' (2010) 33 Vanderbilt Journal of Transnational Law 313.

[107]Mettraux (n 1).

[108]Delalic, Judgment

[109]Ibid.

[110]Schaack(n 102)..

defendant exercised effective control.[111] The perpetrator does not need to be directly subordinated to the superior, but can be several steps down the chain of command.[112]

3.22Effective Control Test

The Trial Chamber setting forth the applicable law held that the required relationship of subordination between the defendant and perpetrators is established if the defendant exercised 'effective control' over the individual perpetrators.[113] The 'effective control' test establishes whether the defendant had the actual material ability to prevent the commission of crime and punish his or her subordinates. Where 'effective control' cannot be established, then the defendant will not be found guilty. Lesser degree of control however substantial the influence does not incur liability.[114] Effective control is different from substantial influence.[115] Moreover, even "official" commanders or superiors may not have actual effective control over their subordinates. A superior vested with *de jure* authority who does not actually have effective control over his subordinates would not be liable under the superior responsibility doctrine, whereas a *de facto* superior who lacks formal letters of appointment or commission but does, in reality, have effective control over the perpetrators of offences, might incur such

[111]Case No. IT-96-21-T Appeal ICTY.

[112]Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, (Nov. 16, 2005).

[113]Ibid.

[114]Ibid.

[115]International Criminal law Services Foundation, 'Modes of Liability: Superior Responsibility' (International Criminal Law and Practice, Training Materials Module 10 2010)

responsibility.[116]In the ***Akayesu case,*** though he was determined to have exercised *de jure* control over his subordinates, he was deemed to not have had effective or structural control.[117]

In ***Hadžihasanovid***, the appeals chamber found that the accused, a senior officer of the Army of Bosnia and Herzegovina, had no effective control over the foreign El Mujahedin forces operating in the same area as the Bosnian forces between August 13 and November 1, 1993.[118] The appeals chamber found that the trial chamber's findings confirmed that the El Mujahedin forces took part in several combat operations during the relevant time, but that was not sufficient to show effective control.[119]In Rwanda, Kayishema was convicted of genocide and related crimes by ICTR, having ordered and orchestrated attacks by both administrative bodies and law enforcement agencies.[120] ICTR held that he was a prefect of a prefecture in Rwanda who had *de jure* authority over the bourgmestre, the communal police and members of the gendarmerie national by virtue of a general power of supervision over the communal authorities. He therefore had an overarching duty to maintain public order and security and a specific power of direct control over the communal police.[121]

The 'effective control' standard ensures that commanders possessing formal command or authority are not held responsible for the criminal conduct of individuals who may be formal subordinates, but who are not under a commander's actual control by virtue of the prevailing

[116]Ibid.

[117]c

[118]Enver Hadžihasanovid, Case No. IT-01-47-AR72

[119]Ibid.

[120]Prosecutor v. Kayishema&Ruzindana, Case No. ICTR–95–1–Appeal Judgment (June 1, 2001).

[121]Clemén tKayishema, Case No. ICTR-95-1-T, Trial Judgement, 21 May 1999,

circumstances.[122] It requires that the party with the burden of proof to demonstrate that the defendant possessed powers he did not properly use to prevent the commission of crimes or punish them. In the case of ***Prosecutor v Musema***, Musema was prosecuted on the basis of his complicity in the Rwandan genocide and his superior responsibility for committing of genocide due to his ownership of a tea factory in the Byumba Préfecture.[123] The ICTR in its appeals judgment found Musema guilty of criminal responsibility based on his *de jure* as well as *de facto* control over his employees.

In the United States of America in the case of ***Ford v Gracia,*** the court defined effective control to include the capability of the commander to possess legal authority and the practical ability to exert control over his or her troops.[124] In this case, the plaintiffs were family members of four United States churchwomen who were raped and murdered by members of the Salvadoran National Guard in 1980. The jury rendering its judgment in November 2000 held that the generals were not liable for the crimes under the theory of command responsibility, as they had not exercised 'effective control' over their subordinates.[125] A sister case to the Ford case, ***Romagoza v Garcia*** was filed by the Center for Justice and Accountability in July 2002.[126] In

[122]Schaack(n 102).

[123]Prosecutor V Musema Case, No. ICTR-96-13-A, Judgment and Sentence (Jan. 27, 2000).

[124]Ford v. Garcia and Vides Casanova, 289 F.3d 1283 (11th Cir. 2002).

[125]Ibid.

[126]Centre for Justice and Accountability, ' Ford v Garcia: Command Responsibility for the Infamous Churchwomen Murders' <http://www.cja.org/article.php?id=326> accessed 5 March 2015.

the Romagoza case, plaintiffs presented evidence of the defendants' *de facto* command, showing that the defendants had on specific occasions, effectively exercised their command.[127]

The ICTY and ICTR required the same level of effective control to hold civ'2ilian and military superiors liable under the doctrine of command responsibility.[128] The ICTR tried cases of non-military nature that involved civilians. The Appeal Chamber in the Delalic case[129] held that, '… a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his de facto position of authority…' In the *Halilovic case,* guidelines for establishing an "effective control' were provided. They include:

1. *The formality of the procedure used for appointment of a superior;*

2. *The power of the superior to issue orders or to take disciplinary action;*

3. *Proof that the members of the group or unit involved in crimes reported to the accused ;*

4. *Control over the finances and salaries of perpetrators;*

5. *The fact that in the superior's presence subordinates show greater discipline than when he or she is absent;*

6. *The capacity to transmit reports to competent authorities for the taking of proper measures;*

[127]RomagozaArce et al. v. Garcia and Vides Casanova s434 F.3d 1254 (11th Cir. 2006)

[128]RehanAbeyratne, 'Superior Responsibility and the Principle of Legality at the ECCC' (2012) 44 The George Washington International Law Review 39.

[129]Case No. IT-96-21-A Appeal Judgment ICTY.

7. *The capacity to sign orders provided that the signature on a document is not purely formal or merely aimed at implementing a decision made by others, but that the indicated power is supported by the substance of the document or that it is obviously complied with;*

8. *An accused's high public profile, manifested through public appearances and statements or by participation in high-profile international negotiations; and*

9. *Proof that an accused is not only able to issue orders but that his orders are actually followed; conversely, if orders were not followed this may undermine a finding of effective control.*[130]

The Rome Statue does not hold the military and civilian on the same level of command responsibility.[131] While a military commander will be criminally liable for crimes committed by forces under his or her effective command and control, a civilian superior will be criminally responsible for the crimes of his or her subordinate where the crimes concerned the activities that were within the effective responsibility and control of the superior.[132] Article 28 (b) of the Rome Statute requires proof of a greater degree of control over subordinates to hold civilians liable. In the case of ***Prosecutor v Brdjanin***, [133] it was held:

The concept of effective control for civilian superiors is different in that a civilian superior's sanctioning power must be interpreted broadly. It cannot be expected that

[130]Halilovic Appeal Judgement Para 207.

[131]Rome Statute of the International Criminal Court UN Doc. 2187 U.N.T.S. 90.

[132]Article 28, Rome Statute.

[133]Case No. IT-99-36-T, Judgement.

civilian superiors will have disciplinary power over their subordinates equivalent to that of military superiors in an analogous command position. For a finding that civilian superiors have effective control over their subordinates, it suffices that civilian superiors, through their position in the hierarchy, have the duty to report whenever crimes are committed, and that, in light of their position, the likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures is extant.

3.3 The Mens Rea Requirement

This element relates to the mental status of the superior. *Mens rea* is the condition or state of mind required by the definition of the offence charged.[134] The issue of mental element in the doctrine of command responsibility has been a contentious one. Liability under the doctrine arises through omission and not commission. The ancient doctrine is that a person should be held criminally liable for anything, which he is proved to have done, meaning that a person cannot not incur liability if harm results for not doing anything.[135] However for omission to amount to an offence or crime a legal duty or obligation must exist.

3.31 The Development of the *mens rea* requirement under the Doctrine of Command Responsibility

The knowledge requirement for the theory of command responsibility was developed during the post-WWII trials. Prior to the post-WWII trials, the Allied Powers' Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties recommended the establishment of an international tribunal, which would try individuals for 'ordering, or, with

[134]Musyoka (n 16)

[135]ibid

knowledge thereof and with power to intervene, abstaining from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war'. [136] This tribunal was never established. The post-WWII military tribunals' judgments explicitly began to discuss the appropriate knowledge required for command responsibility though it was not provided in statutes.[137]However, the cases differed in their approach to the element of knowledge creating ambiguity as to what constituted *mens rea.*[138]

This ambiguity was set in the ***Yamashita case***.[139] In the Yamashita case, the defendant was found guilty of unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes.[140] This case has been criticized for adopting a strict liability, which should not be the case, ant it bred a long-standing debate about the standard of knowledge required to establish command responsibility.

The post-WWII trials following the Yamashita case established that, the doctrine of command responsibility did not require a strict liability. When *mens rea* is not required by the definition of the offence, the offence is said to be one of strict liability and in this case, a person would be convicted merely on the proof of the *actus reus* elements.[141] He would be convicted although his conduct is neither intentional nor reckless nor negligent and he does not have the required

[136]Brandy Womack, 'The Development and Recent Applications of the Doctrine of Command Responsibility: With Particular Reference to the Mens Rea Requirement' (2003) 1 International Crime and Punishment, Selected Issues 101.

[137]Levine (n 52).

[138]Ibid.

[139]US Military Commission vs Yamashita (1945) 327 US 1.

[140]Ibid.

[141]Musyoka(n 16).

knowledge of the circumstances.[142] This is not the exact case in the modern doctrine of command responsibility hence strict liability is not applicable. The defendant must possess knowledge whether actual or constructive that subordinates under his effective control are committing or are about to commit a war crime.

The post-WWII jurisprudence explicitly discussed the requisite standard of *mens rea*, and were unanimous in the finding that a lesser level of knowledge than actual knowledge may be sufficient.[143] The jurisprudence however created confusion as to the exact standard of constructive knowledge that is required to impose responsibility.[144] In the *High Command case,*[145] the US Military Tribunal in rejecting the concept of strict liability held:

> *In order for a commander to be criminally liable for the actions of his subordinates there must be a personal dereliction which can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part.*

The Additional Protocol 1 of the 1977 to the Geneva Conventions of 1949 was the first international instrument to comprehensively codify the doctrine of command responsibility. Article 86(2) of the Additional Protocol 1 addresses the *mens rea* requirement. A literal interpretation of this provision only imposes criminal liability on a commander where he could

[142]Ibid.

[143]Levine(n 52).

[144]Ibid.

[145]Timothy Wu and Yong-Sung (Jonathan) King, 'Criminal Liability for the Actions of Subordinates: The Doctrine of Command Responsibility and its Analogues in United States Law' (1997) 38 Harvard International Law Journal 272.

have learned of subordinates' unlawful conduct from information already available to him.[146] It does provide for negligence occasioned by the commander's failure to establish a proper mechanism for communication with his or her subordinates.

The ICTY trials interpreted the standard of *mens rea a*s it existed in customary law at the time of commission of crimes.[147] The standard of knowledge encompassed under Article 7 (3) of ICTY statute is that the defendant must have 'known' or had 'reason to know' that the subordinates were committing war crimes. The standard the defendant 'knew' connotes actual knowledge that can be established either directly or through circumstantial evidence. The second strand, 'had reason to know' has been the most contentious in the ICTY jurisprudence on knowledge requirement of command responsibility.

In the case of ***Prosecutor V Delalic***, the ICTY held that:[148]

> *'had reason to know' under Article 7(3) requires the commander to have 'had in his possession information of a nature, which at the least, would put him on notice of the risk of…offences by indicating the need for additional investigation in order to ascertain whether…crimes were committed or were about to be committed by his subordinates'*.

The Trial chamber's judgment in the Delalic case differed from the stricter Yamashita standard of 'should have known,' advocating for the less strict 'had reason to know'. The decision in the

[146]Levine (n 52).

[147]Markham (n 31).

[148]The Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, Case No. IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001

Delalic case was not followed in the case of *Prosecutor v Timohir Blaskic.*[149] The Trial Chamber based its decision on the Additional Protocol 1 and held that 'had reason to know' in Article 7(3) of the ICTY Statute also imposes a stricter 'should have known' standard of *mens rea.*[150]

The conflicting decisions in the Delalic and Blaskic cases as to the customary meaning of 'had reason to know' was settled by the Appeals Chamber in the ***Delalic case***, which held that the ordinary meaning of the provision indicated that the commander must have some information available to him, which puts him on notice of the commission of unlawful acts by his subordinates. The Appeals Chamber in ***Blaskic case*** later confirmed the appeals chamber decision in the ***Delalic case*** that there was no consistent trend in the decisions that emerged out of the military trials'8 conducted after the WWII about a defined *mens rea* requirement in customary law.[151]

The trend in the ICTY established that the standard of *mens rea* was to be evaluated on a case-by-case basis setting the standard of due diligence to the superior. The *mens rea* requirement in ICTY decisions established that a superior must have in his or her possession information that would enable him or her know of the activities of the subordinates. The ICTR was established in 1994 by the UN Security Council Resolution 955 to deal with non-military conflicts. The Tribunal also noted that the *mens rea* standard for non-military superiors with established *de facto* power would be held to a lower standard of 'had reason to know,' inso far as that it did not

[149]The Prosecutor v TimohirBlaskic, Case No. IT-95-14-T, Judgment, Trial Chamber, 3 March 2000.

[150]Ibid.

[151]Delalic case, Appaels Chamber Decision; Blaskic case, Appeals Chamber Decision.

"demand a *prima facie* duty upon a non-military commander to be seized of every activity of all persons under his or her control".[152]

The mental element in the Rome Statute differs from the mental element established in the tribunals' jurisprudence. The *mens rea* requirement for command or superior responsibility is codified under Article 28 of the Rome Statute. It differentiates the *mens rea* requirement for civilians and military commanders. The *mens rea* standard for military superiors is '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'.[153] Non-military superiors are criminally liable for the criminal act of subordinates under their effective control and authority where, 'the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes'.[154]

The *mens rea* requirement for non-military superiors is lower than that of military commanders as established in the Rome Statute. A civilian superior's responsibility is also expressly limited to crimes that are related to the activities within his effective responsibility and control.[155]It has been argued that similar to the ICTR ***Kayishema case***, the ICC presents jurisprudence under which non-military superiors with effective control are held to a lower standard of the *mens rea* requirement.[156]

[152]Prosecutor vs. Clément Kayishema&ObedRuzindana 1999).

[153]Article 28, (a) (i), Rome Statute.

[154]Article 28, (b) (i), Rome Statute.

[155]Article 28, (b) (ii), Rome Statute.

[156]Markham(n 31)..

3.32 Knowledge Requirement under the Doctrine of Command Responsibility

The *mens rea* requirement, specifically, has been the subject of huge controversy in its application to superiors in terms of whether guilt can be imputed based on available or ascertainable information, or if guilt can be imputed based on the superior having effective control and hence a duty to know and have access to information regarding his subordinates' actions.[157] There are two forms of knowledge in superior responsibility cases: actual knowledge, established through either direct or circumstantial evidence,; and constructive or imputed knowledge, meaning that the superior possessed information that would at least put him on notice of the present and real risk of such offences.[158]

The actual knowledge of a superior cannot be presumed but must be established through circumstantial evidence. Judge Moloto identifies some of the factors to include:

> *The number, type, and scope of illegal acts committed by the subordinates; the time during which they occurred; the number and type of troops involved; the geographical location; whether the acts were wide-spread; the tactical tempo of operations; the modus operandi of similar illegal acts; the officers and staff involved; and the location of the accused at the time of the crimes.*[159]

Constructive knowledge requires that the superior had in possession information which would put him or her on notice that the subordinates were engaging in some unlawful acts. This "reason

[157]Ibid.

[158]International Criminal Law Services (ICLS), *International Criminal Law & Practice: General Principles of International Criminal Law* (ICLS 2009).

[159]Moloto (n 84).

to know" determination does not require the superior to have actually acquainted himself with the information in his possession, nor would the information compel the conclusion of the existence of crimes.[160] It is sufficient that the information was available to him and that it indicated a need for additional investigation in order to ascertain whether offences were being committed or about to be committed by subordinates.[161]

Knowledge cannot be presumed where the superior fails in his duty to obtain the information, but where the superior had the means of obtaining such information and deliberately refrained from doing so then knowledge can be presumed.[162] This means that a superior must always be aware of the activities of his or her subordinates. Where it can be established that the superior had means of obtaining information about the criminal activities of subordinates and he never took a step to do so, then he or she will be criminally liable under the doctrine of command responsibility.

3.4 Failure to Prevent or Punish

Having established that indeed their existed a superior-subordinate relationship and the superior had knowledge or should have had knowledge of the criminal activities of subordinates, the next element is to determine his actions towards the preventions of such crimes. The doctrine of command responsibility comprises two distinct legal duties for superiors: to prevent future

[160]International Criminal Law Services(n158).

[161]Ibid.

[162]Delalic, Appeal Judgement.

crimes and to punish perpetrators of past crimes.[163] If a superior fails to fulfil his or her duty to prevent, this failure cannot be cured simply by punishing the sub-ordinates afterwards.[164]

The obligation to prevent or punish does not provide a superior with two alternative options, but contains two distinct legal obligations to prevent the commission of the offence and to punish the perpetrators.[165] It means that where the superior had no knowledge that the subordinates were engaging in criminal activities, he has second option of punishing them. This happens when the subordinates have already committed the crimes without the knowledge of the superior.

3.41 Necessary and Reasonable Measures

The superior is under duty to take the necessary and reasonable measures to prevent or to punish the crimes of the subordinates. The statutes of ICTR, ICTY, the Additional Protocol to the Geneva Conventions of 1949 and the Rome Statute requires the superior to take necessary and reasonable measures within his or her power to prevent the commission of the crimes. Where a superior has information or knowledge that his or her subordinates are about to commit a war crime he must use all reasonable means to prevent the commission of the crime. The duty to prevent arises as soon as the commander acquires actual knowledge or has reason to know that a

[163]Moloko(n 84); see Section 7 (3) of ICTY Statute, Section 6 (3) ICTR Statute and Article 28 of Rome Statute.

[164]Halilovic Judgement para 83. (The failure to punish and failure to prevent involve different crimes committed at different times: the failure to punish concerns past crimes committed by subordinates, whereas the failure to prevent concerns future crimes of subordinates)

[165]International Criminla Law Services (n 158).

crime is being or is about to be committed, whereas the duty to punish arises once the crime has been committed.[166]

Necessary measures are those measures appropriate for the superior to discharge his obligation, showing that he genuinely tried to prevent or punish while reasonable measures are those reasonably falling within the material or actual powers of the superior.[167] The superior is only obliged to do what is possible within his effective control over the subordinates. The determination of such measures cannot be construed in the abstract but depends on the evidence before the court or tribunal. The measures under taken by the superior depends on his or her material ability to effectively control the subordinates.[168] Justice Moloto argues that:

> *The kind and extent of these measures depend upon the degree of effective control exercised by the superior at the relevant time, and on the severity and imminence of the crimes that are about to be committed. Relevant factors to consider may include: whether specific orders prohibiting or stopping the criminal activities were issued; what measuresto secure the implementation of these orders were taken; what other measures were taken to ensure that the unlawful acts were interrupted and whether these measures were reasonably sufficient in the specific circumstances; and, after the commission of the crime, what steps were taken to secure an adequate investigation and to bring the perpetrators to justice.*[169]

[166]Ibid.

[167]Halilovic, Appeal Judgement para 63.

[168]Moloto(n 84).

[169]Moloto(n 84).

3.42 The Duty to Prevent

The duty to prevent requires the superior not only to prevent the execution and completion of the crimes but also crimes that are about to be committed. It arises the moment a superior has in possession knowledge or has reasonable grounds to suspect that the subordinates are about to commit a war crime. Once the superior has information that the subordinates are about to commit a war crime, he should not wait for the crime to occur and then punish the subordinates.

In the case of *Prosecution v Miroslav Kvočk and others,* [170]it was held that given the seriousness of international crimes, the superior must act with some urgency from the time of learning of the crime or intended commission of the crime. The superior must always ensure that he or she intervenes as soon as he has knowledge of the subordinates' activities.

3.43 The Duty to Punish

The duty to punish is not an alternative for failure to prevent commission of crimes by superior's subordinates.[171] The obligation to punish includes a duty to investigate possible crimes, establish the facts and where the superior lacks power to sanction, report it to the competent authorities. In the *Nahimana case,* the ICTR found him guilty under the doctrine of command responsibility for failing to prevent broadcasters from inciting genocide in their programs or to punish them for having done so.[172] The International Criminal Law Services puts it that:

[170]MiroslavKvočka et al Case No. IT-98-30/1-T, Trial Judgement, (2 Nov. 2001) para 317.

[171]Blaskic Appeal Judgement para 85.

[172]Prosecutor v. Nahimana, Case No. ICTR–IT–99–52–T, Judgment (Dec. 3, 2003); Prosecutor v. Bikindi, Case No. ICTR–01–72–T, Judgment (Dec. 2, 2008) (concluding that RTLM was a vehicle for anti-Tutsi propaganda asof at least the end of 1993).

The superior need not conduct the investigation or dispense the punishment in person, but he must at least ensure that the matter is investigated and transmit a report to the competent authorities for further investigation or sanction. As in the case of preventing crimes, the superior's own lack of legal competence does not relieve him from pursuing what his material or actual ability enables him to do. Since the duty to punish aims at preventing future crimes of subordinates, a superior's responsibility may also arise from his failure to create or sustain, amongst the persons under his control, an environment of discipline and respect for the law.[173]

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[173]ICLS

CHAPTER FOUR

4.0 QUESTIONING THE APPLICABILITY OF THE DOCTRINE OF COMMAND RESPONSIBILITY

4.1 Introduction

This chapter discusses the validity of the applicability of the doctrine of command responsibility. Although the doctrine is well established under customary law and developed through the international tribunals it is still a controversial topic. The contention has been whether the doctrine should be applied as responsibility of the superior for the crimes committed by subordinates or applied as a separate offence of dereliction of superiors duty to supervise subordinates under his effective control and command.[174]

There is also a contention on the knowledge requirement of a commander's criminal liability, the necessary and reasonable measures that a commander should undertake when preventing the commission of subordinates crime and the rationale behind the doctrine of command responsibility. This chapter discusses the critiques and issues levied against *mens rea* requirement, the rationale of the doctrine of command responsibility in punishing commanders and the meaning of 'reasonable and necessary measures'.

[174]Nicholas Tsagourias, 'Command Responsibility and the Principle of Individual Criminal Responsibility: A Critical Analysis of International Jurisprudence' in William Schabas (ed) Essays in International Law in Honour of Judge NaviPillay (2010).

4.2 Rationale of the Doctrine of Command Responsibility

The purpose for the development of the doctrine of command responsibility was to demand accountability from military commanders and non-military superiors for the criminal acts of subordinates under their control and authority. This was based on the fact that most of the war crimes were committed by low-level officials because the commanders or superiors failed to prevent or suppress them.[175] It was to ensure command diligence at all levels and thus deterring future violations of humanitarian law. It ensures that commanders are not absolved of crimes committed by their subordinates on grounds that they were not following orders or that they were not at the scene of crime.

The rationale for punishing superiors for crimes that they did not commit under the doctrine of command theory has been subject to debate. O'reilly argues that the doctrine is incompatible with a deontological retributive theory of criminal law that values the individual as the necessary unit of moral accountability.[176] The criminal liability under the theory of command responsibility is based on negligence and omissions rather than conduct of the accused and a mental element that reflects a guilty mind.[177] It is based on the position of 'superior' rather than the gravity of the crime.

It's clear that once it is proved that the accused was a superior with an effective command and control over the subordinates, criminal liability arises. Whereas the length of sentencing is to be determined by the gravity and nature of offence, under command theory the position of

[175]Williamson (n 2).

[176]O'reilly(n 6).

[177]Ibid.

'commander' is the aggravating factor.[178] It begs the question as to whether it is the superiority position that is been punished or the offence. It is argued that the doctrine of command responsibility is a utilitarian tool for victor's justice favouring deterrence of crimes and the punishment of superiors over the principle of individualized fault.[179]

Scholars, institutions and even states have voiced their concern about possible abuse of the doctrine for political purposes.[180] States have strongly argued that: prosecution on the basis of the doctrine of command responsibility is contrary to the interests of States in protecting their officials. [181]Heads of State, government members and chiefs of staff may potentially be prosecuted for the actions of persons on the battlefield with whom they have had no interaction; and the ambit of the doctrine has been unnecessarily widened to such an extent that even diligent commanders run the risk of being convicted if one "bad" subordinate violates *jus in bello.*[182]

4.3 *Mens Rea* Requirement.

The actual knowledge required by a superior in order to be criminally liable under the doctrine of command responsibility is well settled. Actual knowledge can be deduced from evidence before the court or circumstantial evidence. However, the concept of 'had reason to know', a form of

[178]Williamson (n 2s).

[179]Major Michael L Smidt, 'Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations', (2000) 164 Military Law Review 155.

[180]ICRC Resource Centre, 'The Interest of State versus the Doctrine of Superior Responsibility' https://www.icrc.org/eng/resources/documents/misc/57jqhp.htm accessed 15 MARCH 2015.

[181]Ibid.

[182]Ibid.

constructive evidence has been controversial and a subject of jurisprudential debate since the decision on the ***Yamashita Case.*** [183]

Article 86(2) of the Additional Protocol 1 to the Geneva Convention of 1977, provides that a superior should have known or had information which should have enabled them to conclude that a subordinate was committing or was going to commit such a breach. This standard of knowledge was used in both the ICTR and ICTY tribunals. However, the Rome Statute introduces two different standards between a military commander and a civilian superior. While the knowledge standard for commanders remains the same, for the non-military superior's to incur liability it must be shown that he or she either knew or clearly disregarded information that clearly indicated that the subordinates were about to commit a crime or were committing the crime. It is not enough to show that a civilian commander had information in his possession, you must prove that he did not act on that information to prevent the commission of crime by subordinates.

Many scholars have questioned the differentiation of criminal liability between military commanders and civilian.[184] Is this differentiation justified? It waters down the purpose of command responsibility which ensures that Heads of States, political leaders are liable for violation of IHL and ICL. Williamson argues that:

> *By requiring it to be shown that non-military commanders "consciously disregarded" information which "clearly indicated" that subordinates were taking certain unlawful actions, the burden of proof to establish superior responsibility for such commanders*

[183]Levine (n 52).

[184]Williamson (n 2).

becomes that much more exigent. Consequently, it might become more difficult effectively to prosecute non-military commanders for violations of IHL through command responsibility.[185]

Including civilians' liability under the doctrine of command responsibility enables the international community to fight impunity. However, the differentiation of knowledge requirement between military and non-military commanders can be justified on the ground that in military situations there is an institutionalized and formal relationship placing the onus on the military to act on information in their possession.[186]

Criminal liability generally requires a guilty mind or "mens rea" causally linked to some form of affirmative voluntary conduct.The law recognizes various degrees of mens rea including intent, knowledge, recklessness, and negligence with differing levels of agreement regarding their appropriateness as a basis for criminal liability.

4.4 The Meaning of 'Reasonable and Necessary' Measures

The requirement that a commander must take 'reasonable and necessary' measures has also been a contentious issue. Article 86(2) of the Additional Protocol 1 requires commanders to take feasible measures, while Article 28 of the Rome Statute requires a commander to take all necessary and reasonable measures within his power to prevent and repress the commission of crimes by subordinates. This begs the question of how to prove that a commander took necessary measures that a reasonable commander in his shoes would have undertaken in the same scenario.

[185]Ibid.

[186]Ibid.

The application of such test can be problematic in IHL and ICL. Such violations occur in situations where the normal fabric of society and recognizable chains of command have been destroyed, with civilians and military, and victims and executioners, commingled.[187] The complexity of events on the ground makes it difficult for a court to identify which measures were necessary and reasonable. [188]The events are usually chaotic. Judges hearing the case with no practical knowledge on complexity of the events on the ground may not be able to deduce what necessary measures the accused should have taken. [189]The desire of vengeance would lead to unfair trial where victors of war would try to prosecute their enemies. Justice Murphy echoed this in his dissenting judgment in the Yamashita case that:

> *Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when the victor in relation to the actions of a vanquished actor makes them. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgment as to deviations from duty.*[190]

[187]Williamson (n 2).

[188]Ibid.

[189]ibid.

[190]Yamashita case.

The ICTR in *Musema Case* in determining whether the accused had taken necessary and reasonable measures the judges based their decision on his effective control of his subordinates.[191] The Trial Chamber held that:

> *Musema exercised de jure authority over employees of the Gisovu Tea Factory while they were on Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory… Musema exercised legal and financial control over these employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory… Musema was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute… by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes.*[192]

[191]Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement, 27 January 2000 para 880.

[192]Ibid.

CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATION

5.1 Introduction

This chapter provides a concluding remark on the doctrine of command responsibility as discussed in the thesis. It also discusses recommendations that should be addressed in order to strengthen the application of the doctrine of command responsibility to foster international criminal justice.

5.2 General Conclusions

The doctrine of command responsibility is a form of omission liability that arises when a superior fails to discharge his duties during war as established under international law. The doctrine is well settled under International Customary Law. It has been established under customary, treaty and selected national laws. It applies to both military and non-military conflicts. In contrast with individual responsibility where liability arises when a person directly commits or contributes to a crime, command responsibility arises out of an omission by a superior to prevent or punish the commission of a crime by his or her subordinates.

Developments such as the Nuremberg Tribunal, the Tokyo Tribunal, the 1977 additional Protocol, the ICTY, ICTR and ICC have provided guidance on just how far reaching command responsibility extends and further reinforces its status as a general principle of International Humanitarian Law as well as human rights law. The Hague Convention (IV) of 1907 Respecting

the Laws and Customs of War on Land was the first multi-treaty to codify the principle of command responsibility on a multi-national level.

The elements of CR are well established under case law and statute law. However case law provides a growing jurisprudence on the theory of CR. The trial of General Tomoyuki Yamashita (Yamashita Case) was the first international war crimes trial to find a commanding officer criminally liable without any direct evidence linking him affirmatively to the crimes committed by his subordinates. It was criticized for failing to identify the *mens rea* standard which was not clear.

The key elements that must be proved for criminal liability to arise through the doctrine of command responsibility are: there must be a superior-subordinate relationship; *mens rea* requirement; and *actus reus.* A superior must have the actual power to control subordinates. A superior's relationship with his or her subordinates needs not to be formal. A superior, whether *de jure* or *de facto*, may be held criminally responsible under the doctrine in relation to crimes committed by subordinates where, at the time relevant to the charges, he was in a relationship of superior-subordinate with the perpetrators. The superior must also exercise effective control over the subordinates. Lesser control or substantial influence over subordinates may not incur criminal liability under the doctrine of command responsibility.

The Rome Statue does not hold the military and civilian on the same level of command responsibility. While a military commander will be criminally liable for crimes committed by forces under his or her effective command and control, a civilian superior will be criminally responsible for the crimes of his or her subordinate where the crimes concerned the activities that were within the effective responsibility and control of the superior.

The knowledge requirement under the doctrine of command responsibility is the most controversial. While the actual knowledge requirement has been well settled and can be deduced from actual evidence or controversial evidence, the issue of constructive knowledge has not been settled. The *mens rea* requirement adopted by the Rome Statute differs from that adopted by the tribunals. It differentiates between the mental elements required military and civilian commanders. The *mens rea* requirement for non-military superiors is lower than that of military commanders. A civilian superior's responsibility is also expressly limited to crimes that are related to the activities within his effective responsibility and control.

The final element requires that superior takes 'reasonable and necessary' measures to prevent and punish subordinates for committing criminal acts. What are 'reasonable and necessary' measures is within the discretionary of the court. A commander/superior duties include the duty to prevent future commission of crimes by its subordinates and the duty to punish subordinates in the instance of committing criminal acts during war. These two types of liabilities are separate.

There are two forms of knowledge in superior responsibility cases: actual knowledge, established through either direct or circumstantial evidence; and constructive or imputed knowledge, meaning that the superior possessed information that would at least put him on notice of the present and real risk of such offences.

5.3 Recommendations

The development of the doctrine of command responsibility will depend on how international and national judicial bodies' interpretation of its legal meaning basing on the three key elements established under the doctrine. The prosecution must prove the three elements of the doctrine

before the court finds the accused guilty of criminal liability under the doctrine. The mental element required in the doctrine of command case should not be based on strict liability.

The prosecution must prove that indeed the superior had control over its subordinates and such a relationship was in existence. The doctrine of command responsibility can be a useful tool for holding high-ranking officials criminally responsible and deterring future violations of international law. However, its application must not only aim at promoting justice but also protecting human rights of parties involved. The doctrine should not only be used as a deterrent tool but the courts should consider the application of the retributive approach to punishment.

The doctrine should be used as a tool to demand accountability from military and non-military superiors for the criminal acts of their subordinates because they failed to prevent or control their subordinates. It should not be used as a means of revenge or pursue political powers.

Countries should be encouraged to apply the doctrine in their national legal systems. This will ensure that commanders/superiors that are not subject to the ICC are found liable where it is proved that despite having knowledge on the criminal activities of their subordinates they failed to prevent or punish them. Countries should also take an initial step to further the doctrine in their jurisdictions. Where it can be established that the superior had means of obtaining such information about the criminal activities of subordinates and he never took a step to do so, then he or she will be criminally liable under the doctrine of command responsibility.

The doctrine of command responsibility although it is well established under customary law and codified, its practical application has been proven cumbersome. There is need to revisit the doctrine. There is need for education awareness on the doctrine in academic institutions. This

will create awareness on the doctrine and ensure that people understand the objectives of the doctrine.

The ICC and national courts should establish a causal link between superior's failure to control subordinates and the crimes committed by subordinates. Such a causal link ensures that the failure by superior to supervise subordinates under his or her effective control is the cause of the criminal acts and violations of IHL and ICL.

The difference of the knowledge requirement for military commanders and civilian superiors should be interpreted with care. In essence both the civilian superior and military commander should be subjected to the same standard of liability. The implementation of the stricter 'should have known' requirement of superiors can be used as a deterrent, strictly establishing the role of a superior in International Criminal Law.

Although criminal punishment through command responsibility may have the added benefit of deterring future conduct, deterrence and other utilitarian objectives of punishment are coincidental and should not override the moral justifications for law and punishment. That justice requires a respect for moral rights, and therefore that criminal law must be rooted in moral justifications need not purge utilitarian thinking.

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