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Do Not Tell Me Soldier…

A review of the requirement for knowledge in the Command Responsibility doctrine

Master thesis
30 credits

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Field of study
International Criminal Law

Semester
Spring/Summer 2012

Contents

Summary

Command responsibility is a mode of criminal responsibility that developed mostly during the 20th century and provides the opportunity to charge military commanders and other superiors for war crimes and crimes against humanity committed by their subordinates by proving three criteria. To begin with, the commander must have exercised effective control over the subordinate, moreover the commander must have had a degree of knowledge about the crime being committed and lastly he or she must have failed to prevent and /or punish the crime.

The knowledge criterion provides that a commander can be charged with actual or imputed knowledge of a crime that is about to be or has been committed. Within international criminal law there are two different interpretations of imputed knowledge. The International Criminal Tribunals of Rwanda and former Yugoslavia stands behind the so called *had reason to know* standard and the Rome Statute of the International Criminal Tribunal stands behind a *should have known* standard.

The main dilemma of imputed knowledge is to provide a standard that is efficient in that it can be used to charge those commanders who can be considered at fault for not discharging their duty to supervise and control their subordinates diligent enough, without violating any of the basic legal principles designed to protect individuals from excessive criminalization.

This thesis sets out to analyze imputed knowledge to find if either of the two standards provides a balanced solution, being efficient without transgressing the border into excessive criminalization.

To reach a conclusion, the development and purpose of command responsibility has been investigated as well as the obligations of a commander to wield responsible command as provided for by international humanitarian law. Furthermore, case law from foremost The International Criminal Tribunals of Rwanda and former Yugoslavia and the International Criminal Tribunal provides an in-depth analysis of the knowledge criterion. Finally, argumentation that supports either the need for more efficiency or less to promote the adherence to legal principles has been put forth. By presenting a comprehensive base of facts I have been able to find the *should have known* standard to represent a more balanced solution than the *had reason to know* standard however the deficiencies of this standard has been addressed as well and suggestions to improve the balance has been given.

Sammanfattning

Förmannaansvar (command responsibility) är en form av straffansvar som utvecklats till största delen under 1900-talet och ger möjlighet att åtala militära befälhavare och andra överordnade för krigsbrott samt brott mot mänskligheten genom att bevisa tre rekvisit. Inledningsvis måste befälhavaren ha effektiv kontroll över den underordnade som begått brottet. Vidare krävs att befälhavaren innehar en viss grad av vetskap om att brottet begåtts eller håller på att begås och slutligen krävs att befälhavaren misslyckas med att förebygga brottet eller straffa förövaren.

Vetskapsrekvisitet innebär att en befälhavare, för att kunna bli åtalad, antingen måste haft faktisk vetskap om att brottet begåtts eller att det var på väg att begås, alternativt att han eller hon borde ha vetat om det eller hade anledning att anta att det begicks (tilldelad vetskap – imputed knowledge). Inom den internationella straffrätten finns två tolkningar av tilldelad vetskap. Den standard som beskrivs genom att befälhavaren antas ha haft anledning att anta att brottet begicks står de Internationella Krisförbrytartribunalerna för det forna Jugoslavien och Rwanda för medan den Internationella Brottsmålsdomstolen i Haag och Romstadgan propagerar för en standard där befälhavaren blir ansvarig om han eller hon borde ha vetat om brottet.

Det stora dilemmat med tilldelad vetskap är att hitta en standard som är tillräckligt effektiv så att det blir möjligt att åtala de befälhavare som kan sägas vara skyldiga genom att de försummat sin skyldighet att övervaka och kontrollera sina underordnade utan att kränka grundläggande juridiska principer som är designade för att skydda individer från överdrivet långtgående kriminaliseringar.

Det här examensarbetet är tänkt att analysera den tilldelade vetskapen för att finna om någon av de två standarderna som nämnts presenterar en balanserad lösning genom att vara effektiv utan att skapa en för långtgående kriminalisering.

För att nå fram till en slutsats så har utvecklingen och syftet med förmannaansvar undersökts och likaså de förpliktelser som en befälhavare har att utöva ett ansvarigt ledarskap såsom internationell humanitär rätt ger. Vidare så har rättsfall från, mestadels, de Internationella Krisförbrytartribunalerna för det forna Jugoslavien och Rwanda samt Internationella Brottsmålsdomstolen använts för en djuplodande analys av vetskapsrekvisitet. Slutligen så har argumentation för att den tilldelade vetskapen behöver bli mer effektiv eller mindre för att vara i linje med juridiska principer lagts fram. Genom att gå igenom en sådan omfattande faktabas har det varit möjligt att komma till slutsatsen att en standard baserad på vad en befälhavare borde ha vetat representerar en mer balanserad lösning än vad en standard baserad på vad en befälhavare hade

anledning att anta gör. Dock så har även en ”borde ha vetat” standard brister som har adresserats och förslag på förbättringar som skapar en mer balanserad lösning har getts.

Preface

Apart from being a law student in the final stages of his education I am also an officer of the Swedish Armed Forces and have been now for nearly ten years. This is why, when the time came to choose the topic of my master thesis I was determined to find a subject related to the laws of war.
An interesting aspect of serving as a military officer is the leadership. I have seen good and bad examples of leadership both at home and being deployed abroad as a part of the Swedish endeavor in Afghanistan, and how commanders can affect the discipline and behavior of both subordinate officers and soldiers. It was thus appealing to find that the doctrine of command responsibility after, at least, 100 years in service was still being the object of discussion within the law community. The choice of topic became easy.

I would like to express my appreciation towards Britta Sjöstedt, my supervisor, whose inputs have made this thesis readable, thank you.

On a, maybe, less serious note I would also like to thank the Microsoft Corporation for providing the Format Painter and the F3+Shift command. Lastly a thank you to the Green Man of Philadelphia, USA.

Abbreviations

art.	Article
BG	Brigadier General
ECMM	European Community Monitor Mission
FOB	Forward Operating Base
Gen.	General
HRW	Human Rights Watch
ICC	The International Criminal Court
ICJ	The International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	The International Criminal Tribunal for Rwanda
ICTY	The International Criminal Tribunal for former Yugoslavia
ICTY/R	Referring to both ICTY and ICTR
ILC	International Law Commission
Lt. Gen.	Lieutenant General
MP	Military Police
para.	Paragraph
PFC	Private First Class
SCSL	The Special Court for Sierra Leone
Sgt.	Sergeant
St. (e.g. ICTYSt.)	Statute
WWI	First World War

WWII	Second World War

1 Introduction

Command responsibility is an outsider of international criminal law, it allows for the possibility to punish those commanders that did not take a part in and neither encouraged crimes committed by his or her subordinates. Command responsibility builds on the notion that the commander is at fault when not preventing or punishing the offender of a crime that has been, or were about to be committed. The construction may seem odd since the commanders did not intend for the crimes to be committed. To understand the rationale behind command responsibility it is important to point out the extraordinary powers a military commander can wield and the responsibility that comes attached. A military commander is responsible for the leadership of a unit; be it a group, platoon or a division within an armed force; a unit designed to, as efficient as possible, destroy the enemy's will to fight using lethal force. When leading a unit equipped and trained for the purpose of inflicting damage it is not sufficient that the officer in his or her leadership aims at promoting efficiency, he or she must also promote adherence to international law, a duty which in international law is referred to as responsible command. Without the control exercised by a commander there is a possibility that the discipline of the unit will deteriorate to a degree where there is a risk of violations of international humanitarian law being committed.

A commander's supervision and control presents an efficient way of preventing the members of a unit from committing crimes when war or armed conflict can dull a soldier's sense of right and wrong. A failing to fulfill his or her duties under responsible command may under certain conditions transgress into criminal liability, i.e. the omission of a duty will be measured against the doctrine of command responsibility. Criminal liability for a commander who fails to uphold the respect for international humanitarian law could be considered an extra incentive for a commander to maintain discipline and orderly conduct within his or her unit.

Command responsibility includes three criteria to charge a commander with criminal liability; he or she must know to a certain extent that subordinates were about to commit crimes (the knowledge criterion), there must be a superior-subordinate relationship between the culprit and the commander (the effective control criterion) and the commander must have failed to prevent or punish the culprit (the failure to prevent and/or punish criterion). This thesis however, is not designed to elaborate on command responsibility as a whole but rather to focus on the mental element. Out of three criteria necessary to impute a commander with criminal liability under command responsibility the knowledge criterion i.e. the *mens rea* is by far the most disputed amongst legal scholars and thus provides enough space to present an argumentation on whether or not the knowledge criterion comprises a good balance between the will to criminalize unwanted behaviors and not crossing the line of what can be considered justified.

I would like to conclude this introduction by presenting you with two well-known scenarios from real life where soldiers have committed despicable acts. This to promote a process of thought; when and why should their respective commanders be held responsible for the unlawful acts committed?

Between October and December 2003 in the Abu Ghraib confinement facility (a US Forward Operating Base, FOB, in Iraq) several detainees became victims of criminal abuse by the military police of 320th Military Police (MP) Battalion, acting as guard force in the facility. A well-known image that many may remember, from the outrages committed at Abu Ghraib is private first class (PFC) Lynndie England holding a naked Iraqi detainee in a dog collar.

According to reports following in the wake of the incidents, the criminal acts were not isolated.[1] Brigadier General (BG) Jane Karpinski, commander of the 800th MP Brigade which included the 320th MP Battalion claimed to have been unaware of the crimes. She was neither aware of the lack of training and poor discipline of the 320th MP Battalion, a fact that the general tasked with investigating the incidents remarked on.[2] In the end BG Karpinski was not charged with criminal responsibility but was demoted to the rank of Colonel.[3] As no criminal charges were filed there can be only speculation whether she would have been convicted under a command responsibility charge or if her claims of ignorance towards the crimes committed had been accepted. One may ask if a commander responsible for the training and discipline of her troops should be aware of what her subordinates were about to do. Did she have a duty to know that her subordinates had been involved in the abuse of detainees?

Another more recent example is the heinous act of one soldier in Kandahar province, Afghanistan. What in media has been called the massacre in Kandahar a Sergeant (Sgt.) Robert Bales murdered 17 civilians in a small Afghan village. Sgt. Bales, a member of the 3rd Stryker Brigade, 2nd Infantry Division, US Army, was sent to serve in the Kandahar province, southern Afghanistan, in the beginning of 2012. In March, Sgt. Bales killed 17 civilian Afghans for which he is presently under trial.

The case raises the issue of what responsibility the commanders of Sgt. Bales had. Media reported that Sgt. Bales already had done three tours to Iraq where he had been exposed to multiple combat situations; he had trouble with his family at home and also might have felt resentment towards a promotion opportunity going him by. Furthermore, he was supposedly

[1] Article 15-6 *Investigation of the 800th Military Police Brigade* (a.k.a. the Taguba report after Major-General Taguba, investigating officer) US Army
[2] Article 15-6 *Investigation of the 800th Military Police Brigade* (a.k.a. the Taguba report after Major-General Taguba, investigating officer) US Army, p. 36ff
[3] http://www.washingtonpost.com/wp-dyn/articles/A13114-2004May9.html, (2012-08-09)

drunk when committing the murders.[4] No superior of Sgt. Bales has to present date been charged under the grounds of command responsibility. The question arises, if charged under international criminal law, and if the same information that was reported through media was available to them, could any of Sgt. Bales commanders have been criminally liable for the acts committed by Sgt. Bales?

The scenarios will be presented and discussed again by the end as a way of illustrating the findings of this thesis. Keep them in mind as you read.

1.1 Purpose

The purpose of this thesis is to analyse the so-called knowledge criterion, one of the three criteria in command responsibility doctrine required to become criminally liable as a commander. Specifically the purpose considers the term imputed knowledge (a standard of knowledge described as the commander having *had reason to* or *should have known*).

Command responsibility is at times referred to as a failsafe, a last resort, presenting an opportunity to make a commander liable for his actions or omissions when direct participation or other modes of liability such as aiding and abetting cannot be proved. Imputed knowledge is in turn a minimum requirement of *mens rea* to charge a commander under command responsibility doctrine thus, it provides the lowest threshold for when a commander can be criminally liable under international criminal law. Furthermore, the Rome Statute[5] and the Statutes of the International Criminal Tribunals of former Yugoslavia and Rwanda (ICTY/RSt.)[6] does not share the same description of imputed knowledge making it possible to compare their differences.

For the given reasons the purpose is to analyse and compare if either (or neither) international customary law (as it is interpreted by the tribunals of ICTY and ICTR a.k.a. the *ad hoc* tribunals[7]) or the Rome Statute presents a balanced solution of the knowledge criterion. A balanced solution, in the sense, that it criminalizes all unwanted behaviours so they may be the subject of prosecution and doing so without transgressing the boundaries international criminal law. To put it in other words; a balanced solution shall

[4] http://www.telegraph.co.uk/news/worldnews/northamerica/usa/9150641/Sgt-Robert-Bales-The-story-of-the-soldier-accused-of-murdering-16-Afghan-villagers.html# (2012-08-02) and http://www.bbc.co.uk/news/world-us-canada-17484186 (2012-08-02)
[5] The Rome Statute of the International Criminal Court
[6] The International Criminal Tribunal for former Yugoslavia and the The International Criminal Tribunal for Rwanda are two separate tribunals with two separate statutes but their provision of command responsibility is identical thus they will sometimes be referred to as one entity.
[7] *Ad hoc*, signalling their limited jurisdiction of crimes committed in the conflicts of former Yugoslavia and Rwanda

be effective but may not ignore principles of law set up to protect the individual from unjust and excessive criminalization.

1.2 Questions

Derived from the purpose these questions are at the core of this thesis:

- Is the current standard of imputed knowledge in customary law, as interpreted by the *ad hoc* tribunals[8], balanced or can the knowledge requirement be criticized for being inadequately efficient or too widely applicable?

- Is the standard in the Rome Statute balanced, and what differentiates it from the customary law standard, as interpreted by the *ad hoc* tribunals?

- Comparing the Rome Statute and customary law, is one or the other standard better suited to promote the purpose of criminalization without violating basic principles of criminal law?

Besides the questions directly relevant to the purpose there are some descriptive questions that provides a foundation. Breaking down and analyzing the doctrine of command responsibility, how it is construed is essential, therefore an answer must be given to *what are the criteria (the requirements) for criminal liability under command responsibility? and how are these criteria defined?*

Concerning the knowledge criterion, a deeper analysis than for the other two criteria is needed, specifically the following questions are important for defining the borders of it. W*hat does a commander need to know? And how specific is his or her knowledge required to be?* As well as, *is there a duty to know?*

A short analyze of responsible command is also helpful since it can be instrumental in disclosing the underlying purpose of the command responsibility doctrine providing guidance to what kind of actions or omissions that are unwanted. Responsible command may be a benchmark to what should be considered as an effective criminalization. Thus, *what duties does responsible command impose on a commander and how does it affect the knowledge criterion?*

Finally, a balanced solution may not go beyond what is reasonable to criminalize keeping basic legal principles of international criminal law, such

[8] When the text refers to the *ad hoc* tribunals it is the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) that is meant.

as the principle of legality, in mind. Hence, *is there any legal principles of international law who restricts the use of a broad knowledge criterion?*

1.3 Method

This thesis sets out to analyse a concrete legal issue thus the method for analytical/doctrinal study of law or as it is usually referred to in Europe; legal dogmatics will be applied.[9] Legal dogmatics is a qualitative method based on systematic analysis of relevant sources to interpret legal norms. The dogmatic method finds its use across different legal systems as well as within different areas of law.

The method of legal dogmatics separates itself from a mere qualitative analysis of literature in that it provides guidance to the hierarchy of legal sources such as treaties or precedents and interpretative "tools" such as analogic or teleological interpretation models.[10] While the method of legal dogmatics discloses that there is a hierarchy amongst sources, the hierarchy differ depending on the field of law. Thus, the field of law must be defined and the norm establishing the hierarchy must be located.

The doctrine of command responsibility exists as a part of international criminal law and humanitarian law; both of which lies under the heading of international law where the relevant provision establishing the hierarchy of legal sources is art. 38 of the Statute of the International Court of Justice (ICJSt.)[11]:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

> *a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
>
> *b. international custom, as evidence of a general practice accepted as law;*
>
> *c. the general principles of law recognized by civilized nations;*
>
> *d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

The primary sources of international law consist of treaties, customary law and general principles of law (art. 38 a-c ICJSt.). Treaties, or international conventions, bind the ratifying nations and the rules for interpretation of these primary sources are found in art. 31 of the Vienna Convention on the Law of Treaties (1969), an article that will be presented more thoroughly

[9] A. Peczenik, *On Law And Reason* (2009), p. 13
[10] A. Peczenik, *A Treatise of Legal Philosophy and General Jurisprudence Vol. 4* (2005), p. 13
[11] See e.g. M. Dixon, *International Law*, 6th edn. (2007), p. 23-26

later on. Customary law, also a primary source, is binding to all nations and exists through state practice (the practice of a certain rule) and an opinion juris (the recognition by states of that rule as binding).[12] The last primary source, the general principles of law is better explained as the rules and principles common to all legal systems, e.g. the principle of res judicata (the matter is already judged).[13] Concerning the general principles of law, the field examined in this thesis is, as pointed out, international criminal law, hence it is proper to make note of that general principles of law includes those principles specific to international criminal law, such as the principle of legality or the presumption of innocence.[14]

The secondary sources as formulated by the ICJSt. include judicial decisions and legal doctrine. These secondary sources does not amount to law *per se*, however, jurisprudence and legal writings can, by presenting a well-built argumentation, have an impact on the interpretation of the existing law.[15]

To summarize, the command responsibility doctrine builds upon international conventions, customary law and general principles of international law. Jurisprudence and legal doctrine may supplement the primary sources in order to interpret law that may be ambiguous in its primary form.

The method used in this thesis is as provided for above, legal dogmatics, which effectively makes this hierarchy important. It may therefore be somewhat confusing when the reader is presented with a text that significantly takes note of the jurisprudence of the ICTY, ICTR, Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC) to present a detailed analyse of the knowledge requirement in command responsibility doctrine. A couple of reasons can be given in support for such an approach; firstly, the primary sources and their *travaux préparatoires* do not provide enough detail on command responsibility in general and the knowledge criterion in particular. It is through the interpretive function of the courts that such detail is added to the *corpus* of law. Secondly, a brief examination of doctrine concerned with international law reveals that legal researchers within international criminal law are inclined to present rulings of international courts as precedence, which states also have been inclined to accept.[16] Thus, it is safe to assume that the jurisprudence is capable of interpreting the primary sources in a correct manner accepted by states, the primary creator of international law.

The fact that jurisprudence from the international tribunals does not amount to a primary source of law needs to be specifically addressed if, as is the case, the analysis and argumentation relies heavily on case law. There is no legal obligation to abide by a judgment (arguably the courts themselves are

[12] *Ibid*, p. 30ff
[13] *Ibid*, p. 40-42
[14] A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 20
[15] M. Dixon, *International Law*, 6th edn. (2007), p. 46-47
[16] G. Mettraux, *The Law of Command Responsibility*, (2009), p. 11

not bound by their own findings in subsequent trials).[17] However as stated, even nations are inclined to accept the case law of international tribunals as correct interpretations of law. So, it is plausible that jurisprudence from international courts reflect applicable law however, being aware that a ruling of an appeals chamber do not constitute law *per se* but merely interprets it, is crucial. Addressing the issue, the solution has been to review as much case law as possible to find consistencies and discrepancies within the body of case law. By adopting such an approach, the aim has been to find consistent argumentation likely to represent a correct interpretation of customary law. Furthermore, to find case law applying command responsibility, references in the legal doctrine and by courts have been used to find relevant rulings. In applying such a method, the hope is to have found all existing judgments who contributed to command responsibility doctrine.

The case law of the *ad hoc* tribunals have been of crucial importance to interpret the aspects of command responsibility and the knowledge requirement. Consequently, for the purpose of this thesis an assumption has been made. The statutes of the *ad hoc* tribunals, including the provision of command responsibility[18], stem from decisions by Security Council and are presented as being representative of customary law.[19] The courts, has therefore in their argumentation, striven to find "what is customary law?" Thus, it is barely feasible to argue for a standard of customary law and one of the *ad hoc* tribunals and a study to disprove the *ad hoc* courts findings of customary law would require extensive research of state practice and *opinio juris*, a feat not possible in a master thesis. To conclude, I will assume that it is proper to *consider consistent case law of ICTY/R as well as the SCSL to be representative of international customary law.*

The Rome Statute provides a different standard of imputed knowledge, one that cannot be consistent with customary law for reasons that will be put forth below under section 3.2. Therefore, it will represent, solely, the correct interpretation of the command responsibility provision in the Rome Statute.

Finally, the purpose of this thesis includes assessing the law to find if its balanced or not. This thesis is not alone in providing an opinion on the matter and articles written by legal scholars will be used in the analysis. The databases of Westlaw International[20] and HeinOnline[21] contributed more than any other service in finding those articles, searching for "command and superior responsibility". Besides database search, references in doctrine and judgments have contributed to the library of articles.

[17] *Rome Statute*, art. 21(2) […]may apply[…]
[18] Art. 7(3) *ICTYSt.*, art. 6(3) *ICTRSt.*, 6(3) *SCSLSt.*
[19] G. Mettraux, *The Law of Command Responsibility*, (2009), p. 22
[20] http://www.westlawinternational.com/
[21] heinonline.org/

1.4 Delimitation

Some limitations must be drawn in order to fully focus on the key component in this thesis, the knowledge requirement.

The mental element is in focus hence, when other criteria of command responsibility are presented it is made exclusively to get an understanding of the context and where necessary, because the criteria cannot be separated from each other.

Furthermore, criminal liability may attach to a commander for any international crime, i.e. crimes against humanity, war crimes in both international and non-international armed conflicts and genocide.[22] There may exist arguments that it is not so, however, for the purpose of this thesis it is irrelevant to provide an answer of exactly when command responsibility is applicable, thus the issue will henceforth not be taken into consideration.

Proceeding, this thesis will consider command responsibility in both regular and irregular forces but if nothing is said it is to be assumed that what is referred to; is a commander of a regular state-controlled armed force.

To finish, no consideration will be made towards what commonly is referred to as superior responsibility i.e. the civilian counterpart of command responsibility. Although some jurisprudence cited or referred to in this thesis will concern a civilian superior such judgments will only be used when the argumentation of the court can be applied to a military commander as well. In the *ad hoc* tribunals there has been no significant difference in applying the command responsibility doctrine to a military or civilian superior but in the Rome Statute the two has different requirements of *mens rea* (see section 3.2 for a brief overview). To not complicate this thesis more than necessary, leaving aside superior responsibility and focusing on military commanders is sensible.

[22] A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 247. For Command Responsibility in non-international armed conflicts see e.g. *Prosecutor v Hadžihasanović and Kubura*, Case No. IT-01-47-AR72, "Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility", 16 July 2003, para. 31

2 Responsible Command

Command responsibility may be easily mistaken for the similarly sounding term of responsible command, however, they are intimately connected. Command responsibility is the criminal dereliction of duties that is derived from the notion of responsible command[23], i.e. the purpose of command responsibility is to provide a reason to uphold a responsible command and failing that could result in criminal liability. To give a proper answer to the questions of this thesis it is important to understand, not just why failures of command are criminalized, but also why it is important to ensure that armed forces are under responsible command. In order to accomplish this, we will begin with analyzing the rationale behind responsible command.

The view that an armed force and its units must be led by a commander that is responsible for making it adhere to the rules of war has been around for a long time and it is codified in the earliest modern codification of the laws of war. In the annexed; Regulations concerning the Laws and Customs of War on Land to the Hague Convention of 1899 with Respect to the Laws and Customs of War on Land (II Hague Regulations) art. 1 states on the qualifications of belligerents:

"The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
[…]"

This article was subsequently transferred to the Hague Regulations.[24] Another article which confirms that a commander has a responsibility for the conduct of his subordinates is art. 43(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I)[25]:

"The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates[…]"

At this point it is fairly easy to conclude that a commander is responsible for the conduct of his or her subordinates, however, the question remains to what extent this duty applies? To find the answer, a look at the purpose of responsible command is necessary.

The ICRC commentary on the Additional Protocols I and II describes the role of the commander (in connection to art. 87 of Protocol I[26] Duty of Commanders) as instrumental in enforcing the treaty provisions in the field

[23] *Prosecutor v Halilović*, Case No IT-01-48-T "Trial Judgment" 16 Nov. 2005, para. 40
[24] Convention (IV) *respecting the Laws and Customs of War on Land* and its annex*:* Regulations concerning *the Land and Customs of War on Land.* The Hague, 18 October 1907. art. 1 of the annex.
[25] See also art. 18 and 33 of the Geneva Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929.
[26] Protocol Additional to the Geneva Conventions of 12 August 1949, *and relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977.

(field as in battlefield). The commentary continues in finding the role of the commander important because he or she is instrumental in making individuals at the lowest level adhere to the provisions of the protocol, thus saying:

"[…] at this level, everything depends on commanders, and without their conscientious supervision, general legal requirements are unlikely to be effective."[27]

The purpose of assigning commanders this duty is therefore to promote general adherence to the laws and customs of war and, as the ICRC Commentary for the Additional Protocols says, this is dependent on the commander.[28] In laymen terms; the military commander represents the last line of defense to insure there are no breaches of law.

Of all the treaties that impose a duty to be responsible for the actions of subordinates Protocol I elaborate the most on what this duty includes. From art. 87 Protocol I the duty to prevent, suppress and report breaches of the Geneva Conventions is articulated. Furthermore, the same article obliges the commander to educate his or her subordinates of their obligations under the Geneva Conventions and the Protocol. Article 43 of Protocol I, which concerns the definition of an armed force require that the force is under responsible command as quoted above and that the force is subject to an internal disciplinary system which shall enforce compliance with international law of armed conflict.

The ICRC commentary for Additional Protocols I and II describe the purpose of responsible command and the duty it puts on a commander at different levels in the military hierarchy so well that it deserves to be cited:

"In adopting these texts, the drafters of the Protocol justifiably considered that military commanders are not without the means for ensuring respect for the rules of the Conventions. In the first place, they are on the spot and able to exercise control over the troops and the weapons which they use. They have the authority, and more than anyone else they can prevent breaches by creating the appropriate frame of mind, ensuring the rational use of the means of combat and by maintaining discipline. Their role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose. Finally, they are in a position to establish or ensure the establishment of the facts, which would be the starting point for any action to suppress or punish a breach.

Every commander at every level has a duty to react by initiating "such steps as are necessary to prevent such violations". By way of example, a noncommissioned officer must intervene to restrain a soldier who is about to kill a wounded adversary or a civilian, a lieutenant must mark a protected place which he discovers in the course of his advance, a company commander is to have prisoners of war sheltered from gunfire, a battalion commander must ensure that an attack is interrupted when he finds that the objective under attack is no longer a military objective, and a regimental commander must select objectives in such a way as to avoid indiscriminate attacks."[29]

A conclusion to be drawn is that the purpose of imposing responsible command on an armed force and its officers is plainly that it is the most effective way in which to assure compliance with international humanitarian law because the military system is dependent on a high level of control

[27] *Commentary on the Additional Protocols I and II of 8 June 1977* (1987) para. 3550
[28] See also e.g. *Prosecutor v Halilović*, Case No IT-01-48-T "Trial Judgment" 16 Nov. 2005, para. 39
[29] *Commentary on the Additional Protocols I and II of 8 June 1977* (1987), para. 3560-3561

exercised through commanders to effectively conduct military operations. This military trait is taken advantage of to promote law obedience in war. Protocol I, more than other treaties, presents responsible command with a higher level of detail. The commander is obliged to prevent, suppress and punish crimes committed or about to be or at the minimum report such to competent authorities. To be considered an armed force in the eyes of Protocol I there must also be a disciplinary system in place to boost compliance with international law, this must fall on the higher commanding officers tasked with the operational command of divisions, corps or even armies. What is lacking is an expressive statement that there must be an effective reporting system in place or that there is a *duty to know* of actions of subordinates. However, this must be implied, there can be no efficiency in an obligation to punish or prevent if there is no obligation to find out if there has been any crimes committed, to reiterate the ICRC Commentary on the Additional Protocols again; *"everything depends on commanders, and without their conscientious supervision, general legal requirements are unlikely to be effective"*[30]. Furthermore it is in the nature of military operations to have an effective reporting system. The commander must in order to solve his or her tasks, be aware of progress and limitations of the units subordinate to him or her. In the same way as responsible command takes advantage of the inherent benefits of military authority the same must be meant to apply for the reporting system and so, for a commander there is a *duty to know* enshrined within the notion of responsible command, however it cannot be said that a failure to know is criminal since criminal responsibility is provided for in the command responsibility doctrine.

[30] *Commentary on the Additional Protocols I and II of 8 June 1977* (1987), para. 3550

3 Command Responsibility

3.1 The Development

To get a basic understanding for the doctrine of command responsibility, its structure and how it came to be, a short history of its development is in order. The origin of command responsibility is somewhat disputed, some authors traces the doctrine back to the 15th century[31] others trace it as far back as to Sun Tzu in 500 B.C.[32] The most common understanding of the doctrine though is that it emerged in the first half of the 20th century and that the evolution began with the Hague Regulations and X Hague Convention[33] of 1907.[34] The articles that initially were used to promote the notion of a criminal liability for commanders' failure to properly suppress criminal acts committed by subordinates, state:

Hague Regulations (the annex)
"Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
1. To be commanded by a person responsible for his subordinates;
[…]"

"Art. 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

X Hague
"Art. 19. The commanders-in-chief of the belligerent fleets must see that the above articles are properly carried out; they will have also to see to cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention."

The articles of the Hague Regulations and X Hague Convention created an obligation to follow and respect the laws of war and implicitly imposed the responsibility to enforce those obligations upon a commander by requiring armed forces to be commanded by a person who was responsible for his or her subordinates. The conventions did provide the obligation but the obligation did not provide for an individual criminal responsibility for those in command. Since the Hague Regulations and X Hague convention were agreed upon in 1907 it is not farfetched to believe that a command responsibility would have been created in the wake of the First World War (WWI), however that was not to be the case. No military commander was convicted on the basis of knowingly having omitted to prevent or punish

[31] L.C. Green, *Command Responsibility in International Humanitarian Law*, Journal of Transnational Law & Contemporary Problems, Vol. 5, Issue 2 (Fall 1995), p. 321
[32] W. Parks, *Command Responsibility for War Crimes*, Military Law Review, Vol. 62 (1973), p. 3
[33] Convention (X) *for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention.* The Hague, 18 October 1907.
[34] e.g. I. Bantekas, *The Contemporary Law of Superior Responsibility*, American Journal of International Law, Vol. 93, Issue 3 (July 1999), p. 573 and A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 238

crimes of subordinates. Those who were tried and punished for war crimes were found liable for the ordering of them.[35] Some authors has described the ordering of a war crime as a part included in the doctrine of command responsibility which seems to be faulty since the ordering is to be considered a *sui generis* mode of responsibility on par with that of the principal.[36] Hence the doctrine of command responsibility did not continue to evolve until after the Second World War (WWII) although during the interim between the great wars another convention of significance was formed. In 1929 the Geneva Convention for the Wounded and Sick contributed by giving, in art. 26:

"The Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding articles as well as for cases not provided for in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention."

This further emphasized the duty of commanders to lead the units under his or her command in accordance with international law. The Hague and Geneva Conventions were all to be a part of the argumentation when a military commission sentenced General (Gen.) Yamashita to hang for his crimes.[37]

3.1.1 Second World War

In the wake of WWII an effort was made to try and convict alleged war criminals from foremost Germany and Japan. Of all the indictments tried three trials stand out as being of significant importance for the evolution of command responsibility. Of the three cases two were judgments from the famous Nurnberg tribunal including the Hostages and High Command cases, additionally, the Yamashita trial, judged by a military commission[38] of laymen in Manilla contributed to the evolution of command responsibility. Although the trial against Gen. Yamashita is considered to be less authoritative than the Nurnberg trials (the judges consisting of military officers rather than jurists) it was the first case who confirmed that a commander could be criminally liable for the crimes committed by subordinates. The mentioned trials at Nurnberg subsequently established that the military commission was correct in finding that command responsibility existed as a figure of law and provided further detail to this new mode of criminal liability.

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[35] W. Parks, *Command Responsibility for War Crimes,* Military Law Review, Vol. 62 (1973), p. 13

[36] A. Cassese, International Criminal Law, 2nd edn. (2008), p. 230

[37] B. Landrum, *Yamashita War Crimes Trial: Command Responsibility Then and Now*, Military Law Review, Vol. 149 (1995), p. 296

[38] The purpose of a military commission is usually to provide the means to try individuals during or in close connection to an armed conflict. A military commission is usually composed of military officers as was the case in the trial against Yamashita. The United States of America has made frequent use of military commission throughout its history and they are commonly referred to as "common law war courts". P. Philbin, *Memorandum for Alberto R. Gonzales, Counsel To The President* 2001.

3.1.1.1 Gen. Tomoyuki Yamashita

Towards the end of WWII, in 1944, General Yamashita took command over the 14th area army; a Japanese force defending the Philippines from the US invasion. During the short period of time that Yamashita was in command atrocities performed by Japanese troops led to a large number of civilian casualties. Gen. Yamashita surrendered in 1945 and was shortly thereafter faced with criminal charges, tried and sentenced by a military commission for failing to control his troops and thus allowing war crimes to be committed.[39] The judgment was later reviewed by the US Supreme Court on a *habeas corpus*[40] petition filed by Yamashita's defense who did not find that the commission had erred in law.[41] The military commission and there judgment against Gen. Yamashita thus affirmed that there is a duty for a commander to control his troops and their find was upheld by the US Supreme Court who in their decision wrote:

"[…] Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

This is recognized by the […]"[42]

The US Supreme Court noted that this responsibility for commanders could in part be derived from arts. 1 and 43 of the Hague Regulations, art. 19 X Hague Convention and art. 26 of the 1929 Geneva Convention for the Wounded and Sick.

To summarize, the Yamashita trial affirmed that there was a responsibility for commanders to control his or her subordinates but it still remained unclear just how far that responsibility reached. The judgment can be interpreted as imposing a strict liability for commanders to know and prevent crimes by his or her units or making the commander liable for omissions stemming from what he or she actually knew.[43] The evolution of command responsibility continued and the doctrine was further detailed by the jurisprudence of the Nurnberg tribunal.

[39] M. Smidt, *Yamashita, Medina, and beyond: Command Responsibility in Contemporary Military Operations*, Military Law Review, Vol. 164 (2000), p. 180
[40] Habeas Corpus, latin for "you must present the person in court" is a protection against unlawful imprisonment requiring the authorities to present the accused before a court of judges.
[41] *Yamashita*, No 61, Misc., Supreme Court of the United States, 317 U.S. 1; 66 S. 340, 4 February 1946 (1946 U.S. LEXIS 3090 ; 90 L. Ed. 499) (*Yamashita v Styer*, Supreme Court, 4 February 1946)
[42] *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission* Vol. IV (S. Hein & Co 1997), p. 43
[43] M. Smidt, *Yamashita, Medina, and beyond: Command Responsibility in Contemporary Military Operations*, Military Law Review, Vol. 164 (2000), p. 181

3.1.1.2 The Hostages Trial

Case No. 47 the Trial of Wilhelm List and Others[44], better known as the "Hostages Trial" (stemming from the question whether it was lawful to take civilian hostages in order to control the population) tried twelve high-ranking officers of the Wehrmacht including Generalfeldmarschall List who was the commander of the 12th Army during their invasion of Yugoslavia and Greece. Later in June 1941, he became commander of Wehrmacht Southeast. During the time that List held command; insurgency began to grow in Yugoslavia and Greece which prompted a response from the Wehrmacht resulting in the killings of a large number of civilians. Connected to the killings other atrocities were also committed. Concerning some of the other defendants the location of similar crimes had been committed in Norway and Albania.[45]Although most of the legal benefits of the judgment concern the law of reprisals, the courts also give a valuable argumentation concerning the doctrine of command responsibility.[46] Concerning the responsibility, in this case, Gen. List was the occupying commander of a territory which gave the court reason to say that he was not only responsible for the conduct of his own subordinate troops, he was responsible for maintaining peace and order as well as preventing crimes within his whole area of responsibility[47] in line with art. 43 of the Hague Regulations thus confirming that there undeniably was a responsibility of commanders to prevent unlawful acts committed by subordinates and, depending on the circumstances, even actions by other units.

Having concluded and reaffirmed what had been provided by the Yamashita judgment, that there is an obligation to prevent and punish unlawful acts and that the failure to do so can make a commander criminally liable, the court stressed that there has to be causation between the crime committed and the commander's dereliction to act as well as knowledge about the unlawful acts.[48] Gen. List argued that he had no knowledge of the crimes committed which provided the court with an incentive to address the issue in particular.[49] Although some authors interpret the ruling as one prescribing actual knowledge[50] parts of the court's argumentation tends to infer knowledge on the commander on basis of his position:

" An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit." […] Neither will he ordinarily be

[44] *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission* Vol. VIII (1949)
[45] *Ibid*, p. 36-40
[46] W. Parks, *Command Responsibility for War Crimes*, Military Law Review, Vol. 62 (1973), p. 59
[47] *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission* Vol. VIII (1949), p. 69-70
[48] A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 240
[49] J. Bing Bing, *The Doctrine of Command Responsibility Revisited*, Chinese Journal of International Law, Vol. 3, Issue 1 (2004), p. 4
[50] A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 240

permitted to deny knowledge of happenings within the area of his command while he is present therein."[51]

The passage cited can be read as an attempt by the court to set a standard closely resembling the command responsibility doctrine wielded by the *ad hoc* courts in present day hence if the commander had reports but declined to read them it would not constitute an excuse. However, the phrase can be equally supportive of the argument that the court tried to confirm, by providing an evidential chain, that Gen. List had actual knowledge about the crimes committed in his area of responsibility. This was further discussed in the so called "High Command Trial".

3.1.1.3 The High Command Trial

In the case known as the High Command Trial the Nurnberg tribunal held trial against fourteen high ranking German military commanders.[52] The crimes of which the defendants had been accused of was alleged to have been committed by them either as being principals, by aiding or being accomplices to perpetrators of war crimes committed through unlawful treatment of prisoners of war and crimes against humanity committed by torture, murder and extermination.[53] The indictment also included crimes against peace, where the tribunal approached the issue if the commanders at trial were responsible for Germany's war of aggression (this part of the indictment fell because none of the defendants were on the German policymaking level).[54] As mentioned some of the defendants were charged with direct participation in the crimes committed while others were charged with other modes of responsibility. When regarding criminal liability for failing to stop crimes committed by subordinates the court stated:

"Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be 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."[55]

The court thus drew a line saying that the inability to act upon crimes committed by subordinates was not always such as to make the commander criminally liable, he needed to have a culpable mind either by criminal negligence (to not supervise properly) or intentionally neglect to prevent or punish the crime. The court also elaborated on the question of knowledge stating:

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[51] *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission* Vol. VIII (1949), p. 70
[52] Case no. 72 The German High Command Trial: *Trial of Wilhelm Von Leeb and Thirteen others*, United States Military Tribunal, Nuremberg, 30th December, 1947 - 28th October, 1948
[53] *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission*, Vol. XII (1949), p. 4
[54] *Ibid*, p. 2-3
[55] *Ibid*, 1949, p. 76

" We are of the opinion, however, as above pointed out in other aspects of this case, that the occupying commander must have knowledge of these offences[…]"[56]

and

" And it is further pointed out that to establish the guilt of a defendant from connection with acts of the SIP0 and SD by acquiescence, not only must knowledge be established, but the time of such knowledge must be established."[57]

From the statements it appears as if the court adopted a requirement of actual knowledge opposed to the less strict standard of the Hostages case.

3.1.1.4 Findings of Post WWII Trials

The post WWII trials presents the first findings of that it is possible to hold commanders criminally liable for crimes committed by his or her subordinates. Although the judgments differed in regard to what is required to trigger command responsibility they drafted three distinctive features of the doctrine; the requirement of knowledge, superior-subordinate relationship and the failure to prevent and/or punish the perpetrator all of which still stands at the core of the doctrine of command responsibility today.

The Yamashita, Hostage and High Command judgments represents just a part of the precedence which built the command responsibility doctrine in the wake of WWII however they provided the greatest contribution of all the post WWII trials to the understanding of command responsibility and its origin.

3.1.2 Protocol I

Apart from a single trial, considering Captain Medinas[58] (United States Army) involvement in the massacre of My Lai, Vietnam, the development of command responsibility stalled after WWII (the trial of Captain Medina has been criticized, and rightly so, for not adhering to the post WWII jurisprudence and erring in the application of command responsibility). There were to be no significant advances in the doctrine until the creation of Protocol I in 1977.

During the 1960s it became apparent that the Geneva and Hague conventions needed to be supplemented in order to increase the protection against human suffering in conflicts. The International Committee of the Red Cross (the ICRC), following its mission to promote the development of humanitarian law,[59] began drafting on proposals for the development of

[56] *Ibid*, 1949, p. 77 (the statement made obiter dictum)
[57] *Ibid*, 1949, p. 79-80
[58] Trial, United States v. Medina, C.M. 427162 (1971). A review of the trial can be found in; M. Smidt, *Yamashita, Medina, and beyond: Command Responsibility in Contemporary Military Operations*, Military Law Review, Vol. 164 (2000), p. 192ff
[59] Excerpt from the ICRC's Mission Statement: *"[…] It also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian*

humanitarian law as early as 1968. Between 1968 and 1977 the ICRC arranged a number of international conferences for states to discuss additional treaties to complement those already in place, in 1977 the final act was signed.[60] The endeavor resulted in the Additional Protocols I and II coming into effect, Protocol I complemented existing rules on international armed conflict and Protocol II provided new rules for regulating non-international armed conflicts.[61] The provisions relevant to command responsibility doctrine are found within Protocol I. In the *travaux préparatoires* to Protocol I it can be found that some experts and states opted to include a provision to handle the issue of omissions.[62] The final provision for which the drafters agreed upon is implemented as article 86 of Protocol I and concerns the failure to act:

"1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."[63]

The article provides for both state and individual criminal responsibility. Article 86 of Protocol I constitutes the first time a codification of the command responsibility doctrine existed in international law. As previously noted, the post WWII tribunals produced three requirements or criteria for criminal liability to occur, those were adapted in Protocol I and defined in paragraph 2. The details and scope of art. 86 will be presented in more detail in a section below. Sufficient to say at this point is that the codification of the command responsibility doctrine into Protocol I were to become significant for the continuing evolution of the doctrine and Protocol I would be one of the cornerstones of argumentation put forth by the *ad hoc* tribunals.

3.1.3 ICTY and ICTR

In 1993 the UN Security Council adopted resolution 827[64] effectively creating the International Criminal Tribunal for the Former Yugoslavia (ICTY). The resolution was taken as an answer to reports telling that breaches of humanitarian law were all too common during the conflict in the former republic of Yugoslavia.[65] The ICTY was thus established to try war criminals of the war in former Yugoslavia in the 1990s. In the same manner

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*principles. […]"*http://www.icrc.org/eng/who-we-are/mandate/overview-icrc-mandate-mission.htm, Last checked 5 August 2012.

[60] *Commentary* on the Additional Protocols I and II of 8 June 1977 (1987), the Introduction

[61] Protocol Additional to the Geneva Conventions of 12 August 1949, *and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977.

[62] *Commentary* on the Additional Protocols I and II of 8 June 1977 (1987), para. 3526

[63] Art. 86, Protocol I

[64] UN Security Council Resolution, *S/RES/827* (1993)

[65] *Ibid*, p. 1

and for the same reasons as in Yugoslavia the Security Council adopted resolution 955[66] creating the International Criminal Tribunal for Rwanda (ICTR) but for the intensified conflict in Rwanda in 1994. The statutes of the new tribunals were annexed in connection to the respective resolution.

The provision of command responsibility is found under article 7, ICTYSt. and article 6, ICTRSt., the language of the articles is a copy/paste product, thus, they are identical. The articles formulate requirements for individual criminal responsibility as a whole and command responsibility as a mode of criminal liability is found under para. 3:

Article 7 [ICTYSt.]
Individual criminal responsibility
1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

A Security Council resolution cannot be considered as having the power to create international law thus, the statutes of the *ad hoc* tribunals were designed to reflect applicable treaty law as well as the breaches of international humanitarian law which was already considered to be criminal under international customary law.[67] Art. 7 of the ICTYSt. is a product of consideration where the argumentation is mainly derived from the precedence of those post WWII judgments which was considered to have had such an impact on international law that they formed a part of customary law. The reliance on post WWII precedence was further reinforced by the fact that the same criteria of command responsibility were included in Protocol I.[68] It is not surprising that, when command responsibility was included in the ICTRSt., the argumentation was the same as when it was included in ICTYSt.[69]

[66] UN Security Council Resolution, *S/RES/955* (1994)
[67] *Report of the Secretary-General* Pursuant to Paragraph 2 of Security Resolution 808 S/25704 (1993) and Corrigendum S/25704/Corr. 1 (1993), para. 33-35.
[68] V. Morris and M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis* Vol. 1, p. 98 and Vol. 2, p. 14.
[69] V. Morris and M. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 2, p. 174 and Vol. 1 p. 249ff, citing the *Final Report of the Commission of Experts* established pursuant to Security Council Resolution 935 (1994), para. 172-174

As with Protocol I the three criteria, evolved from WWII trials, still remain present in the statutes of the *ad hoc* tribunals and the language of Protocol I contra the *ad hoc* tribunals' statutes include just minor differences, e.g. art. 7 ICTYSt. states the lowest requirement of knowledge as *had reasons to know* while Protocol I describes the same as *had information that enabled them to conclude in the circumstances at the time*.

3.1.4 The International Criminal Court

The ICC is governed by the Rome Statute which came into force 1 July 2002 following the ratification by 60 states.[70] The statute provides its criminal provisions with further detail than the statutes of the *ad hoc* tribunals which become evident when looking at art. 28, solely committed to describe the application of command responsibility:

*"**Responsibility of commanders and other superiors***

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

The Rome Statute separates and provides for different requirements to the criminal liability of military commanders and other superiors. The most notable difference between the responsibility of a military commander and other superiors is the knowledge requirement. A military commander will be responsible for what he or she *should have known, owing to the circumstances,*[71] while other superiors will be liable when they *consciously*

[70] http://www.icc-cpi.int/Menus/ICC/About+the+Court/, (2012-04-20)
[71] Art. 28(a)(i) Rome Statute.

disregarded information which clearly indicated[72]. The standard of liability expressed for others superiors require them to be less vigilant than military commanders since the knowledge requirement is not as harsh. It also bears more resemblance to the jurisprudence of the *ad hoc* tribunals and their interpretation of the term *had reason to know* than the standard of knowledge for military commanders in the Rome Statute, a fact that could point to the possibility that there is a difference in application of the command responsibility doctrine between the *ad hoc* tribunals and the ICC.

A final remark on the relationship between the standard of command responsibility provided for in the Rome Statute contra the *ad hoc* tribunals which has previously been touched in the Method section. The Rome Statute is international law derived from a treaty, a primary source of law, which is binding to the contracting state parties and no others. In contrast to the ICTY/RSt. which is a product of the Security Council attempts to replicate international customary law.[73] However large parts of the Rome Statute attempts to do the same.[74] So, if both the Rome Statute and the statutes of the *ad hoc* tribunals propose that their provision merely codify existing law, the differences in the used wording of the command responsibility knowledge requirement must be explained. When analyzing the negotiations concerning the creation of art. 28 of the Rome Statute and how the final draft was agreed it appears as if the drafters' main concern was not to provide a standard as closely resembling customary law as possible. Rather than following customary law, the negotiations revolved around finding a standard of criminal liability that could be accepted by the negotiating states thus, art. 28 is a compromise rather than an expression of customary law.[75] The conclusion to be drawn is that the *ad hoc* tribunals' jurisprudence is more likely to express the standard of customary law as already assumed[76] in this thesis. The Rome Statute cannot yet be expressing customary law, it merely expresses the requirements for criminal liability of a commander that is binding to the contracting parties of the statute. However, the impact of the ICC on international criminal law is yet to be seen, the jurisprudence of the court may in the future influence the customary standard of command responsibility.

3.2 Elements of Command Responsibility

Summing up the development of command responsibility, from the Hague Conventions in the beginning of the 20th century to the jurisprudence of international courts of today, three criteria required for a commander to be criminally liable under command responsibility doctrine has been established. There must exist a superior/subordinate relationship, a failure to

[72] Art. 28(b)(i) Rome Statute.
[73] K. Kittichaisaree, *International Criminal Law*, 2001, p. 23
[74] A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 114
[75] Further support for this statement can be found under section 3.2 of this thesis were the issue is discussed in detail.
[76] See the Method section, 1.3

prevent/punish/report or suppress a crime committed, or about to be, by a subordinate and a culpable state of mind including a level of knowledge of the crimes (*mens rea*). Of course, an underlying offence committed by a subordinate is necessary, however, that is not a criteria that directly relates to the actions or omissions by a commander.

The *mens rea* criterion will be presented in its own section so following, the two other criteria will be presented briefly.

3.2.1 Superior-Subordinate Relationship and Effective Control

To be liable under the command responsibility doctrine the prosecution must show that those who committed a criminal act are subordinate to the indicted commander and that he or she had *effective control* over them.
The statute of ICTY provide in art. 7(3) that:

"[…]acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility […]."

The article does not provide enough detail to answer where the criminal liability begins and ends other than that the culprit needs to be a subordinate. To get a more precise definition and to explain how the effective control criterion evolved a look at the precedence of the ICTY is necessary. A judgment that has made a large contribution to the interpretation of command responsibility is that of the so called Čelebići case. The Čelebići trial chamber was the first court to interpret and establish the effective control criterion.[77] In the Čelebići case, a number of persons in commanding positions at a detention facility in the village of Čelebići were charged with numerous crimes committed inside the prison camp, under various modes of criminal liability including charges under art. 7(3) ICTYSt. i.e. command responsibility.

In its findings the court in Čelebići recalled precedence from post WWII trials and furthermore relied heavily on Protocol I for guidance as to what current customary law said. The court reiterated Protocol I and that it in art. 87(1) provided *"[…] military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent […]"*. Noteworthy in art. 87 are the words *under their control* which enabled the court to find that a superior-subordinate relationship existed where there were effective control. In the words of the court:

"Accordingly, it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences."[78]

[77] *Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 Nov. 1998, (a.k.a. the Čelebići case).
[78] *Ibid*, para. 378

Thus, when a commander has the material ability to prevent and punish he or she is considered to have effective control, a conclusion also accepted by the appeals chamber.[79] The criterion of effective control has been further defined by subsequent judgments as not including those instances where the commander wields *substantial influence*, hence, providing for a more distinctive border between what is, and what is not; effective control amounting to criminal liability.[80]

In the jurisprudence of the *ad hoc* courts, not only commanders who have been appointed by domestic law (*de jure* commanders) are eligible to be charged with command responsibility, commanders that in fact are able to prevent and punish without a de jure appointment may also be held liable (*de facto* commanders).[81] The wording of art. 28 the Rome Statute describing that *"A military commander or person effectively acting as a military commander shall be criminally responsible"* leads to the conclusion that both de jure and de facto commanders may be charged under the ICC as well. The question arises of whether it is enough to prove that a commander had a *de jure* appointment and that effective control could be presumed solely from that fact? In Čelebići, the court briefly touched the subject but did not make a sufficiently clear statement to if *de jure* powers were enough to prove effective control. It has since been clarified in subsequent judgments after Čelebići that the effective control criterion stands to be proven regardless if the command is of a *de jure* or *de facto* nature.[82]

To describe the superior-subordinate relationship required for criminal liability in the terms of effective control rather than the need to prove a *de jure* appointment is beneficial since it expands the field of where command responsibility is applicable i.e. paramilitary leaders that might not have formal or legal authority will still be possible to charge under command responsibility .[83] It is an important aspect as conflicts of today rarely consists of just state parties and their respective armed forces.

3.2.2 Prevent and Punish

A commander's failure to prevent and/or punish crimes committed by subordinates is, in a sense, the *actus reus* of command responsibility i.e. it is an omission of a duty which falls upon a responsible commander.[84] Prevent and punish describes a wide range of actions that a commander may be

[79] *Prosecutor v Mucić et al.* Case No IT-96-21-A "Appeals Judgment" 20 Feb. 2001, para. 256.
[80] e.g. *Prosecutor v Halilović*, Case No IT-01-48-T "Trial Judgment" 16 Nov. 2005, p. 25.
[81] *Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 Nov. 1998, para. 377
[82] e.g. *Prosecutor v Hadžihasanović*, Case No IT-01-47-A "Appeals Judgment" 22 Apr. 2008, p. 8-9
[83] G. Mettraux, *The Law of Command Responsibility*, (2009), p. 143
[84] Although, to say that failure to prevent and/ or punish is the only possible actus reus of command responsibility may be wrong since a failure to know could amount to a criminal omission. A more thorough analysis of this issue is found under the heading of "Mens Rea".

forced to take, e.g. report crimes to a competent authority, disciplinary actions against the subordinate, make further inquiries and launch investigations, penal actions or removing a subordinate from his duty etc. The duty to prevent and punish is described in Protocol I, art. 86(2) as a duty that*;"[…] does not absolve his superiors from penal or disciplinary responsibility, […] if they did not take all feasible measures within their power to prevent or repress the breach.".* The ICTYSt., art. 7(3), articulates the duty in a similar fashion, so that *"[…] the superior failed to take the necessary and reasonable measures to prevent […]"*.

Hence, the prosecution must provide evidence that the commander failed in applying necessary and reasonable measures to prevent and punish the subordinate. So, how to define what is necessary and reasonable (or feasible in the words of Protocol I)? The jurisprudence of the *ad hoc* courts have uttered that; what is necessary and reasonable measures is not constant but will vary on a case by case basis depending on the circumstances.[85] In short, what is considered reasonable and necessary depends foremost on what measures the commander actually has at his or her disposal i.e. the law cannot require what the commander cannot do.[86] Furthermore, a distinction must be made for charging a commander with the failure to prevent a crime and the failure to punish since a crime about to be committed requires different action than a crime already committed.

Finally, there are no alternative obligations, the commander cannot choose to either prevent or punish. Depending on the circumstances it might be considered necessary and reasonable to have done both.[87]

3.2.2.1 A Crime of Omission?

As described in the section above it seems as if a crime committed by reference to command responsibility is based on the omission to prevent and/or punish the perpetrator, this is certainly true for the *ad hoc* tribunals although as will be seen ahead there has been some dissent to if not the omission to be properly informed also constitutes a criminal dereliction of duty.[88]

The *ad hoc* tribunals have established that it is the commander's own dereliction of duty, whether it is the omission to punish or to know, that is criminal. It has not mattered whether a commander has made any impact on the original crime and no causation between the crime and the commander has been required to charge a commander under command responsibility doctrine.[89] Even so most of the jurisprudence of the *ad hoc* tribunals has

[85] e.g. *Prosecutor v Orić,* Case No IT-03-68-T "Trial Judgment" 30 June 2006, p. 127 and *Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 Nov. 1998, p. 147.
[86] *Prosecutor v Blaškić*, Case No IT-95-14-T "Trial Judgment" 3 Mar. 2000, para. 302 and *Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 Nov. 1998, para. 395.
[87] *Prosecutor v Blaškić*, Case No IT-95-14-T "Trial Judgment" 3 Mar. 2000, para. 336
[88] See section 4.1.2.2 Dissent of a Trial Chamber
[89] *Prosecutor v Orić,* Case No IT-03-68-T "Trial Judgment" 30 June 2006, para. 338

charged the commander under the same label as the primary perpetrator, i.e. if a soldier committed a murder as a violation of the laws and customs of war, the commander has been charged under the same label. The exception is a trial judgment of the ICTY (Prosecutor v Hadžihasanović and Kubura) where the label was *"failure to take reasonable and necessary measures to prevent or punish".*[90] This issue will be further dealt with under section 6.3.1 below.

[90] *Prosecutor v Hadžihasanović and Kubura*, Case No IT-01-47-T "Trial Judgment" 15 March 2006, p. 620 (Disposition)

4 Mens Rea

In this section the knowledge requirement of command responsibility will be thoroughly analyzed. The first part provides an analyze of the standard of knowledge given by customary law as it has been described and specified by the *ad hoc* tribunals and the second part will be devoted to the requirement of knowledge given in the Rome Statute.

4.1 Customary Law and the ICTY/RSt.

Command responsibility in customary law today has established that in order to impute criminal liability on a commander he or she must have had knowledge that his or her subordinates committed, or were about to commit crimes (this is often referred to as a requirement of actual knowledge). However, there is also a possibility to charge a commander with liability when he or she *had reason to know* about the actions of the subordinates, this is often referred to as imputed knowledge.

4.1.1 Actual knowledge

If it is possible to provide evidence that a commander in fact had knowledge about crimes committed by his subordinates the prosecutor will. The *had reason to know* standard is only necessary to apply if it is not possible to prove to the requisite standard that a commander had the necessary knowledge. The jurisprudence of the *ad hoc* tribunals have established that actual knowledge can be proven by either direct or circumstantial evidence and furthermore, that there can be no presumption of that a commander had knowledge.

To find that a commander had actual knowledge of his subordinates committing or about to commit crimes is a much easier feat when the prosecutor can present direct evidence to support, e.g. witnesses testifying that the accused was on location when the crimes were committed or documents signed by the commander mentioning the crimes. With sources of strong direct evidence, finding of actual knowledge will rarely cause any problems for the prosecutor. It is more problematic when direct evidence is lacking, however, the jurisprudence of the *ad hoc* tribunals has allowed for the possibility to use circumstantial evidence in proving that the accused had actual knowledge. Some courts have called knowledge proven through circumstantial evidence as a *must have known* standard while others have not separated circumstantial evidence from direct. No substantive difference

between these can be found, just different ways of articulating the finding of knowledge through circumstantial evidence.[91]

Circumstantial evidence can be described as any evidence pointing towards the commander having knowledge about the criminal activity of his or her subordinates but fails to support that notion directly. As an example; a commander was in the vicinity of crimes committed, he was seen there by a witness, furthermore; the crimes in the region were proven to be grave and widespread. Thus, evidence may prove sufficient if it was impossible to reside in the area without knowing that the acts were committed.

In the Čelebići judgment the court took special notice to a list of indicia given in the "Final Report of the Commission of Experts".[92] The Commission of Experts had the task to collect evidence and conclusions about violations of humanitarian law within former Yugoslavia. The list includes twelve points (indicia) which may serve to guide what circumstantial evidence should aim to prove and in turn these indicia may suffice to say that a commander had actual knowledge:

(a) The number of illegal acts;
(b) The type of illegal acts;
(c) The scope of illegal acts;
(d) The time during which the illegal acts occurred;
(e) The number and type of troops involved;
(t) The logistics involved, if any;
(g) The geographical location of the acts;
(h) The widespread occurrence of the acts;
(i) The tactical tempo of operations;
(j) The modus operandi of similar illegal acts;
(k) The officers and staff involved;
(1) The location of the commander at the time.[93]

Since the Čelebići judgment, these indicia have been firmly established as evidence that may prove that the commander had actual knowledge.[94] The list merely contains examples of what circumstantial evidence can be put forth to show, it is not exhaustive list of indicia that a prosecutor should prove through circumstantial evidence. The jurisprudence of the *ad hoc* tribunals is plentiful of other indicia that have been given importance in the finding of knowledge.[95] One of the stronger indicia for finding knowledge is

[91] For the former see; *Prosecutor v Kordić and Čerkez (a.k.a. the 'Lašva Valley' Case),* Case No IT-95-14/2-T "Trial Judgment" 26 Feb. 2001 para. 427, and for the latter; *Prosecutor v Boškoski and Tarčulovski,* Case No IT-04-82-T "Trial Judgment" 10 July 2008, para. 413

[92] *Final Report of the Commission of Experts*, Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674

[93] *Ibid*, p. 17

[94] *Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 November 1998, para. 386 cited by other courts in e.g. *Prosecutor v Kordić and Čerkez,* Case No IT-95-14/2-T "Trial Judgment" 26 Feb. 2001, para. 427, *Prosecutor v Blaškić,* Case No IT-95-14-T "Trial Judgment" 3 Mar. 2000, para. 307 and *Prosecutor v Strugar,* Case No IT-01-42-T "Trial Judgment" 31 Jan. 2005, para. 368 also *Prosecutor v Brima et al.* Case No SCSL-04-16-T "Trial Judgment" 20 June 2007, para. 792

[95] See G. Mettraux, *The Law of Command Responsibility* (2009), p. 214-215 for an extensive list of indicia both from *ad hoc* tribunals and other sources.

the position of the commander. Prosecutor has numerous times admitted to the court that a superior position should be considered as a presumption of the accused having knowledge about the actions of his or her subordinates. This presumption has not been accepted in the jurisprudence. In the Aleksovski case, where the accused, Zlatko Aleksovski were charged as a commander of the Kaonik prison, with crimes related to the abuse of Bosnian Muslim prisoners in 1993, the court admitted that a superior position is a significant indicium for actual knowledge but that there can be no presumption of such.[96] The court argued that such a presumption could automatically entail guilt coming too close to making liability under command responsibility strict.[97]

Finally, regarding findings of actual knowledge by means of circumstantial evidence, the jurisprudence differentiate commanders which operate within a military system with well-functioning monitoring and report systems and those commanding a less formal military structure. The *ad hoc* courts have found that the strength of the evidence needs to be less for the former commander since his position in itself is a strong indicium of knowledge.[98] It is thus easier to prove a commander of an efficient state army than an ill-equipped guerilla leader to be at fault.

4.1.1.1 Knowledge of what?

It is not enough to ask when a commander had knowledge of a crime committed, or about to be, by his or her subordinate; the knowledge must consist of specific elements of the crime to allow for responsibility to occur under the command responsibility doctrine. The formulation that has been used and established in the *ad hoc* courts since Čelebići asserts that a commander's knowledge must concern a criminal act that had been or was about to be committed.[99] Since there is a duty to both prevent and punish crimes the knowledge criterion encompasses both crimes to be and those already committed. To prove actual knowledge of a subordinate's crime the prosecution must bring forth evidence that the commander had knowledge about both the *actus* and *mens rea* of the perpetrator as well as any special circumstances such as awareness of an armed conflict[100] necessary to convict for grave breaches under the Geneva conventions of 1949 as well as for violations of the laws or customs of war (i.e. war crimes).[101]

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[96] *Prosecutor v Aleksovski*, Case No IT-95-14/1-T "Trial Judgment" 25 June 1999, para. 26-27

[97] *Prosecutor v Aleksovski*, Case No IT-95-14/1-T "Trial Judgment" 25 June 1999, para. 80, concerning the definition of strict liability see below in section 5.2.

[98] *Prosecutor v Hadžihasanović and Kubura*, Case No IT-01-47-T "Trial Judgment" 15 March 2006, para. 94

[99] *Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 November 1998, para. 346

[100] The test to whether there is an armed conflict were defined in the trial against Tadić; *Prosecutor v Tadić*, Case No IT-94-1-T "Trial Judgment" 7 May 1997

[101] The presence of an armed conflict is necessary for crimes against humanity charged under the ICTYSt. (art. 5) but not under the ICTRSt. (art. 3)

To exemplify the extent of the knowledge requirement, murder committed as a crime against humanity (crimes against humanity differ from war crimes but command responsibility encompass these crimes as well, the only reason for choosing this crime is that it constitutes a clear and easy example of the difficulties to prove actual knowledge) consist of an *actus reus*, the objective element, which is the killing of another human being, an element easy to assert if the commander had knowledge of (provided the prosecution has access to requisite evidence). The commander may e.g. have been on the scene of the killing or it can be proved that the commander received reports that a subordinate has shot another man to death. The subjective element (the *mens rea*), may present a greater challenge to prove. In the case of murder as a crime against humanity there are two mental elements that the commander must be shown to have knowledge of, firstly, the subordinate must have had the intent to kill the other person or that he or she, in intending to cause serious injury to another person, was in reckless disregard of human life. Moreover, an element that is common to all of the crimes against humanity; the culprit must be aware of the existence of a widespread and systematic practice, e.g. he or she must be aware of that he or she is a part of larger scale of attack against a civilian population.[102] Thus, a commander's knowledge must encompass that his or her subordinate had this state of mind when committing the act which, if there is no direct evidence such as confessions, may be difficult to prove without reasonable doubt and will likely require, a less than small effort, on part of the prosecutor, that not only did the commander understand that there was a widespread and systematic practice of violence in place but that the commander must have known that the subordinate understood this as well.[103] However, even if the knowledge must be present for both subjective and objective elements of a crime that has been, or about to be, committed the elements can still be proven through circumstantial evidence. Hence, it is possible through providing evidence of say, several illegal acts being committed, that both the primary culprit and the commander must have known that the violence was widespread and systematic.

In the jurisprudence of the *ad hoc* tribunals there are examples of the difficulties to prove that a commander had knowledge about a subordinate's culpable state of mind. In the Krnojelac appeal[104] the issue arose, whether Milorad Krnojelac (alleged to be the commander of a detention camp located at the prison KP Dom) had knowledge about tortures being committed within the detention camp. Krnojelac had witnessed at least one beating (of a man by the name of Zeković) supposedly to punish him for attempting to escape; the court found that Krnojelac was aware of this.[105] The awareness of that the beating was for the purpose of punishing was significant since the crime of torture in relation to an armed conflict requires

[102] A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 114-115
[103] G. Mettraux, *The Law of Command Responsibility*, (2009), p. 200 with reference to *Prosecutor v Naletilić and Martinović,* Case No IT-98-34-A "Appeals Judgment" 3 May 2006, para. 109ff.
[104] *Prosecutor v Krnojelac*, Case No IT-97-25-A "Appeals Judgment" 17 Sept. 2003.
[105] *Ibid*, para. 169

that the infliction of severe pain and suffering must be for the purpose of punishing, intimidating, humiliating, coercing or discriminating.[106] Although the court concluded that Krnojelac had actual knowledge about both the objective element (the beating) and the subjective element (intent to inflict severe pain and suffering for the purpose of punishing) of torture no conclusion could be made to say that Krnojelac had knowledge of other beatings (which he knew of) being performed for any of the purposes amounting to torture and as such could not be said to have actual knowledge of torture being committed by his subordinates.[107] The conclusion being that it can be quite problematic to prove knowledge of foremost the *mens rea* of a crime and even more so when there is an additional purpose as with the crime of torture, which might be why courts frequently relies on the *had reason to know* standard instead.[108]

4.1.2 She or he Had Reason to Know

The standard of imputed knowledge, described in the ICTY/RSt. as the commander having *had reason to know*[109], is, as the other criterions of command responsibility, interpreted in the Čelebići trial although some divergence in opinion between the chambers exists as will be shown. The Čelebići trial chamber arrived after a lengthy discussion around case law from WWII and treaty law to a phrase defining *had reason to know* so that:

"a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates."[110]

This standard is still in use by courts that either reiterate or use a similar phrase as that provided by Čelebići.[111] The Čelebići judgment did set a standard of *had reason to know* so, how did the court reason when it came to the conclusion that it was necessary for the information to be available to the commander?

The Čelebići trial chamber began by proclaiming that a commander cannot remain willfully blind so that he or she ignores information in his or her possession that would enable him or her to conclude that subordinates

[106] See *Prosecutor v Furundžija,* Case No IT-95-17/1-T "Trial Judgment" 10 Dec. 1998, para. 162, for the crime of torture in armed conflict.
[107] *Prosecutor v Krnojelac,* Case No IT-97-25-A "Appeals Judgment" 17 Sept. 2003, para. 169
[108] The Appeals Chamber in Krnojelac relied on imputed knowledge since it found that the trial chamber had erred when establishing that Krnojelac had actual knowledge. The appeals chamber found that Krnojelac had reason to know of the crime of torture was being committed by his subordinates; *Prosecutor v Krnojelac,* Case No IT-97-25-A "Appeals Judgment" 17 Sept. 2003, para. 169-170.
[109] Art. 7(3) and 6(3) ICTY/RSt.
[110] *Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 November 1998, para. 393, upheld by the appeals chamber; *Prosecutor v Mucić et al.* Case No IT-96-21-A "Appeals Judgment" 20 February 2001, para. 241
[111] *Prosecutor v Perišić,* Case No IT-04-81-T "Trial Judgment" 6 Sept. 2011, para. 149

committed or were about to commit criminal acts.[112] The trial chamber called this such a serious dereliction of duty that it must result in criminal liability under the command responsibility doctrine. This is interesting since it seems as if the court argued in term of personal dereliction which might suggest that they had found that the *had reason to know* standard amounted to some sort of negligent or reckless *culpa* standard. This is the only time that the Čelebići trial chamber implies such a standard, other courts has come closer to set up a standard based on negligence, foremost chambers of the ICTR, the question of whether or not there exists a possibility to culpably fail in acquiring knowledge will be further dealt with later.[113]

After making this initial observation, the Čelebići trial chamber proceeded with analyzing the jurisprudence of WWII. A number of cases were cited including;

The Hostage Case
If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence.[114]

The trial against Admiral Toyoda
[…] the principle of command responsibility applies to the commander who "knew, or should have known, by use of reasonable diligence" of the commission of atrocities by his subordinates.[115]

The Pohl case
[…] "it was his duty to know".[116]

The Roechling case
[…] for it is his duty to know what occurs in his organization, and lack of knowledge, therefore, can only be the result of criminal negligence.[117]

By examining the jurisprudence including the quotes above, the trial chamber came to the conclusion that after WWII the knowledge criterion in command responsibility was consistent with the meaning which was advocated by the prosecution; that a commander may be held liable under command responsibility not only when he had information that would enable him to conclude that crimes had been committed but also when his or her lack of knowledge was a result of the absence of proper supervising of the subordinates, i.e. a *duty to know*.[118]

The trial chamber did however not stop and accept this standard of imputed knowledge set by the WWII case law and found that the standard might

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[112] *Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 November 1998, para. 387
[113] See e.g. *Prosecutor v Akayesu, Case* No ICTR-96-4-T "Trial Judgment" 2 Sept. 1998, para. 488-489 and *Prosecutor v Bagilishema,* ICTR-95-1A-T "Trial Judgment" 7 June 2001, para. 46.
[114] *Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 November 1998, para. 389 citing *United States v Wilhelm List* et al., Vol. XI, TWC, 1230, 1271.
[115] *Ibid*, para. 389 citing *United States v Soemu Toyoda* [Official Transcript of Record of Trial], p. 5006.
[116] *Ibid*, para. 389 citing *United States v Oswald Pohl et al*, Vol. V, TWC, 958, 1054.
[117] *Ibid*, para. 389 citing *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others.*
[118] *Ibid*, para. 382, 390

have changed over the years so that customary law did hold a different standard when the charged offences was committed. Most importantly the trial chamber noticed that since WWII, the command responsibility doctrine had been codified in Protocol I art. 86, who defined imputed knowledge as having *"had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach"*.[119] Concerned with the interpretation of art. 86(2); the trial chamber noted that when drafting the protocol the notion of a "pure" *should have known* standard was rejected (the ICRC draft contained the words "if they knew or should have known") and even a less imposing standard put forward by the US, *they knew or should reasonably have known in the circumstances at the time,* got rejected.[120] Because the trial chamber found that Protocol I had changed the command responsibility doctrine in customary law from what had been just after WWII and that it was clear from negotiations during the drafting of Protocol I that the states did not want to include a *should have known* standard, it meant that there could not be a standard in customary law imposing a *duty to know* on a commander.

Instead the trial chamber interpreted the standard of customary law as similar to the language of Protocol I and thus found that:

> *[…] a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates.*[121]

The implication of this interpretation is that there must in fact be some information available to the commander and that a dereliction of duty to properly supervise his or her troops falls outside of command responsibility, however, the statement that a commander could not be willfully blind without incurring criminal liability still applied. The conclusion to be drawn from Čelebići is in essence that a prosecutor must at least show that the information was available to the commander but he or she choose to ignore it to show that he or she *had reason to know*. The trial chamber standard of imputed knowledge was confirmed by the appeals chamber[122] to be correct in that it reflected customary law.

The appeals chamber did although it agreed with the trial chamber in principal however, disagree to some extent in the interpretation of the case law from WWII. The appeals chamber held that in the jurisprudence which the trial chamber referred to, the courts had actually found that the accused possessed knowledge proposing that the statements of those courts that there was a *duty to know* included in the concept of imputed knowledge, was in fact *obiter dictum* and as such the value of such jurisprudence were significantly lower.[123] Apart from case law and Protocol I the appeals

[119] Protocol I art. 86(2)
[120] *Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 November 1998, para. 391.
[121] *Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 November 1998, para. 393
[122] *Prosecutor v Mucić et al.* Case No IT-96-21-A "Appeals Judgment" 20 February 2001, para. 239
[123] *Ibid*, para. 229

chamber also took notice of state practice in the form of military manuals, specifically in this case, the US Army field manual which defined imputed knowledge as a commander being responsible when he *"should have had knowledge, through reports received by him or through other means"*[124] As seen, the field manual (as evidence of state practice) gives a similar description of imputed knowledge as Protocol I which made the appeals chamber rule out that the customary law standard includes a *duty to know*. Although the trial chamber touched the subject the appeals chamber clarified that the phrase *in possession of* or *available to* meant that the commander did not have to have actually be acquainted with the information, i.e. he or she did not have to have read or heard an oral report. According to the appeals chamber it was sufficient to provide evidence that the relevant information was available to the commander and that he or she had the opportunity to read or listen to it if he or she wished to do so.[125] Both chambers of the Čelebići trial thus agreed on the knowledge standard as to when it could be said that a commander *had reason to know*.

4.1.2.1 Alarming Information

As with actual knowledge the kind of information required is as important as when the commander can be considered to have information available to him or her, the Čelebići trial chamber proposed the following:

> *"This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates."*[126]

It is clear that the precision of the information needs not be as high as when finding that a commander had actual knowledge. What is needed to prove that a commander *had reason to know* is evidence, not that crimes had been or were about to be committed, but rather evidence that some information was available to the commander. That information should have enabled the commander to conclude that he or she needed to make further inquiries to affirm or discredit the information. This has in some judgments been labeled as *alarming information*, a term which will be used from here on.[127] This *had reason to know* standard may be described as a *duty to investigate*. The appeals chamber built upon the findings of the trial chamber and added further detail to what kind of information that was required by referring to the ICRC commentary for the Additional Protocols. Interpreting the ICRC commentary the appeals chamber clarified that there is no need for the

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[124] *Ibid*, para. 230, citing *Field Manual of the US Department of Army* 1956 (No. 27-10, Law of Land Warfare).
[125] *Ibid*, para. 239
[126] *Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 November 1998, para. 393
[127] e.g. *"[…] whether the Accused Krnojelac had alarming information (which need not necessarily be specific) which would have alerted him of the risk that acts of torture might be committed subordinates." Prosecutor v Krnojelac*, Case No IT-97-25-A "Appeals Judgment" 17 Sept. 2003, para. 132

information to show that crimes are being or has been committed. To exemplify the court wrote:

"For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge."[128]

The statement shows that the *had reason to know* standard has a significantly lower threshold than actual knowledge, not demanding knowledge or that the information available encompassed the *mens rea* and *actus reus* of a crime as required by actual knowledge.

The conclusion so far is thus that a commander *has reason to know* when there is some specific information available that should have put him or her on notice of crimes being committed. The jurisprudence has not provided further guidance in the abstract so to provide more clarity of where information reaches the threshold and becomes alarming it is necessary to reiterate judgments where the issue has been applied to the specific circumstances of each case.

4.1.2.1.1 Hadžihasanović and Kubura

In the Hadžihasanović and Kubura case the court (in assessing the inability of Amir Kubura ,as commander of the 7th Brigade[129], to prevent plundering in the town of Vareš) contributed to the jurisprudence with an example of what the implication of past crimes could have to a *had reason to know* standard.

The trial chamber found that Kubura had knowledge of that troops from his brigade had committed acts of plunder five months earlier than the Vareš incident, in a town called Ovnak about 40km from Vareš (Ovnak, June 1993, Vareš, November 1993). Since Kubura did not take punitive actions against his personnel in June he could not ignore that members of the 7th Brigade were likely to repeat the acts of plunder.[130] The trial chamber gave as a general rule stating that:

"Over and beyond the conclusions of the Appeals Chamber, the Chamber is of the opinion that by failing to take measures to punish crimes of which he has knowledge, the superior has reason to know that there is a real and reasonable risk those unlawful acts might recur."[131]

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[128] *Prosecutor v Mucić et al.* Case No IT-96-21-A "Appeals Judgment" 20 February 2001, para. 238

[129] The *Brigade* is a military unit consisting of 5-6 *Battalions* in turn consisting of 4-5 *Companies*. A brigade is made up of somewhere between 3-5000 officers and soldiers.

[130] *Prosecutor v Hadžihasanović and Kubura*, Case No IT-01-47-T "Trial Judgment" 15 March 2006, para. 1982 (As a fault of translation, instead of the word "ignore" the trial judgment contains the word "know". This was noted and changed in the appeal; *Prosecutor v Hadžihasanović and Kubura*, Case No IT-01-47-A "Appeals Judgment" 22 April 2008, para. 262 (footnote 791).

[131] *Prosecutor v Hadžihasanović and Kubura*, Case No IT-01-47-T "Trial Judgment" 15 March 2006, para. 133

Unfortunately the court did not say if this was enough to constitute alarming information. Instead the court relied on an order issued by 6th Corps[132] that provided for that all unlawful activity had to stop immediately and the 7th Brigade was ordered to take measures to halt the removal of property from Vareš. The court found this sufficiently alarming to impute knowledge on Kubura.[133] Fortunately the appeals chamber subsequently clarified; it agreed with the trial chamber that the order from 6th Corps did indeed was at least sufficiently alarming for conducting further inquiry and thus reaching the requirement for imputed knowledge[134] but they also gave that under the circumstances of the case, the knowledge and failure to punish past crimes was not sufficient to reach the liability threshold. Although previous knowledge and inability to punish could suffice, in the Hadžihasanović and Kubura case the acts of plunder were committed five months apart. Furthermore there was no geographical link between the incidents, Vares and Ovnik was 40km apart and besides the plunders in Vares and Ovnik, plundering was not something Kuburas' forces were known to commit.[135] The conclusion here would be that in order to suffice as giving the need for further investigation the knowledge must be of a character that to boost somewhat of a probability for crimes to be committed not only a risk of.

4.1.2.1.2 Strugar

The Kubura judgment was affirmed by the court in the trial against Lieutenant-General (Lt. Gen.) Pavle Strugar concerning crimes committed by the Yugoslav Peoples' Army (JNA)[136] during operations in an area around the city of Dubrovnik in Croatia, 1991. The relevant part of the judgments revolved around if Strugar had reason to know that in the course of an attack against mount Srd (in the vicinity of Dubrovnik) the artillery, when carrying out combat operations, also was going to shell[137] the Old Town of Dubrovnik, a criminal act due to the fact that such shelling targeted civilian, religious and cultural structures.

The factual circumstances from which the trial chamber founded their decision were in short; the unit shelling Old Town the day in question (6 December, 1991) had participated in an earlier unlawful shelling of the same area in November. On both occasions orders had been given that the Old Town was not to be targeted but alas it was. Furthermore the unit engaged in the attack was equipped with substantial artillery capacity. Lt. Gen. Strugar knew all of the above and that the order, not to shell Old Town, did not have an effect in the previous shelling in November. Also, no measures had been

[132] A *Corps* consists of two or more *Divisions* which in turn are composed of *Brigades* such as Kubura's 7th Brigade
[133] *Prosecutor v Hadžihasanović and Kubura*, Case No IT-01-47-T "Trial Judgment" 15 March 2006, para. 1986
[134] *Prosecutor v Hadžihasanović and Kubura*, Case No IT-01-47-A "Appeals Judgment" 22 April 2008, para. 269
[135] *Ibid*, para. 267
[136] Jugoslovenska Narodna Armija
[137] In the military vocabulary shelling is the firing of artillery.

taken to discipline or punish the perpetrators.[138] The conditions were similar to those of the Kubura case with the difference that the unlawful acts had been committed much closer in time and at the same location. From these circumstances the court concluded that Strugar *had reason to know* that an unlawful attack on Old Town *might* be committed by his forces however the court found that evidence fell short to prove that the commander *had reason to know* that the crimes *was* about to be committed.

The trial chamber expressed that the language of the article suggested that the commander must have had a definitive expectation that the crime would be committed but the court reiterated that the standard previously given in the jurisprudence (*i.e. information in possession that would put the commander on notice of the risk of offences about to be committed indicating the need for additional information/investigation)* to show that such a definitive expectation of crimes were not needed and the court instead interpreted the standard as, when assessed, the information would show that there was a *clear and strong risk* or a *substantial likelihood* that the artillery would commit the same offence again. [139] Nonetheless, the information available to the commander was not deemed to be sufficient although the court came to that conclusion later when additional information, that had been given to Lt. Gen. Strugar by a Gen. Kadijević who had received protests of the shelling from the European Community Monitor Mission (ECMM), provided that Strugar had sufficiently alarming information.[140]

In the appeal the appeals chamber found that the trial chamber had given the imputed knowledge standard a too strict application and that requiring the information to show a clear and strong risk of crimes to be committed was not in line with the jurisprudence.[141] The appeals chamber found that Lt. Gen. Strugar had reason to know on account of the factual findings in the case, this excluding the information given by Gen. Kadijević.

The conclusion to be drawn between the cases of Kubura and Strugar is that the significance of a prior crime committed by subordinates and not properly addressed by punishing the perpetrators may constitute alarming information. The earlier crime committed needs to be connected in time and place to the new offence in so that it is to an extent foreseeable that the perpetrator/s may commit new offences.

4.1.2.1.3 Orić

Another clarification came from the trial of Naser Orić who was the commander of (at least) an entity, similar to that of the US National Guards or the Swedish "Hemvärn", called Territorial Defense (TO)[142] located in the

[138] *Prosecutor v Strugar,* Case No IT-01-42-T "Trial Judgment" 31 Jan. 2005, para. 415
[139] *Ibid*, para. 416-418
[140] *Prosecutor v Strugar,* Case No IT-01-42-T "Trial Judgment" 31 Jan. 2005, para. 418
[141] *Prosecutor v Strugar,* Case No IT-01-42-A "Appeals Judgment" 17 July 2008, para. 304
[142] Teritorijalna Odbrana

city of Srebrenica. He may also have been the commanding officer of parts of the Army of Bosnia and Herzegovina operating in the vicinity of Srebrenica.[143] Orić was charged with criminal liability for amongst other things, murders and cruel treatment against detained Serbs, crimes which had been committed in the Srebrenica police station.[144]

In short the trial chamber divided the charges of what took place at the police station into two separate parts, an occasion for which he had knowledge and the time thereafter.[145] As stated, on the first occasion concerning one murder and multiple charges for cruel treatment the court found that Orić had actual knowledge of the crimes committed. This, as in the cases referred above, was an indicium that he had reason to know about the crimes committed thereafter.[146] The court eventually came to the conclusion that Orić *had reason to know* about the crimes committed at the police station, a verdict that later would be changed by the appeals court. What was noteworthy in the trial chamber verdict is that there was not much information that was specific to the crimes committed, the knowledge of Orić was imputed, besides the fact that he knew of earlier crimes at the same location, through his deputy's (Zulfo Tursunović) frequent visits to the police station[147], the resignation letters of two officers in charge of detainees (because of the unacceptable manner in which the detainee issue was handled) and lastly, in the words of the trial chamber; *"the accused must have been aware that severe malnutrition and the psychological effects of being under siege were causing the people of Srebrenica to behave erratically[…]"*[148]

As mentioned the appeals chamber changed the verdict but not on account that the information available to the commander was insufficient in proving that he *had reason to know* of crimes being committed. The appeals chamber contested that the trial chamber had erred because they had not shown that the knowledge of Orić encompassed that the crimes had been committed by his subordinates, i.e. the trial chamber had not erred in the conclusion that the evidence could prove Orić *had reason to know* about the crimes being committed but the prosecution had not provided evidence that Orić had reason to know that the crimes were committed by his subordinates.[149] The appeals chamber also clarified that the degree of specifics regarding the primary culprit need not be down to the individual if it is shown that the crimes committed, were so, by individuals identified as belonging to a group under the accused's command.[150]

The Orić trial enriches the case law by providing that the information available to the commander need not be specific to the crimes but can be

[143] Prosecutor v Orić, Case No IT-03-68-T "Trial Judgment" 30 June 2006, para. 2
[144] *Ibid*, para. 5-7
[145] *Ibid*, para. 560
[146] *Ibid*, para. 550
[147] *Ibid*, para. 554
[148] *Ibid*, para. 559
[149] *Prosecutor v Orić,* Case No IT-03-68-A "Appeals Judgment" 3 July 2008, para. 57
[150] *Ibid*, para. 34-35

circumstantial, much like actual knowledge can be found through the use of such. Furthermore the appeals chamber clarified that it is crimes committed or about to be committed by the commander's subordinates that the commander has to have reason to know about not just crimes in general. Thus, a general lack of adherence to international humanitarian law in an area cannot mean that a commander must be extra cautious to the actions of his or her subordinates. It is when there is some information that suggests that the commander's own force is involved in unlawful behavior that he or she may have *had reason to know*.

4.1.2.1.4 Boškoski and Tarčulovski

In the trial against Boškoski and Tarčulovski the question arose if Ljube Boškoski (Minister[151] of the Ministry of Interior in the former Yugoslav Republic of Macedonia) *had reason to know* of murders and beatings of ethnic Albanians in the village of Ljuboten during an armed conflict between Macedonian security forces and the Albanian National Liberation Army in 2001.[152] The evidence showed that Boškoski did visit Ljuboten during the time when the crimes occurred. It was also shown that during that visit Boškoski saw detainees laying on the ground and some houses that were burning in the village. Boškoski was told that the detainees were captured terrorists and concerning the houses burning, this was not considered abnormal by the court since it was a plausible outcome of an armed engagement between two factions. The court concluded that what Boškoski had seen on location did not amount to alarming information.[153] Instead, it was information in the media, which the court was certain had come to the attention of the accused, rumors that had circulated about shelling of Ljuboten and killings of civilians that together with a report concerning the Ljuboten incident, by a representative of the Human Rights Watch (HRW), that enabled the court to find that Boškoski had reason to know in terms that the matter required further investigation.[154]

This case is fairly unique in that there was no crime committed before the incident as in the other cases so there was no indicium that Boškoski *had reason to know* until after the crimes (for which he was accused of) had been committed. This shows that the information stemming from a single event can be enough. Furthermore the case shows that it is not only reports from the commander's own organization that can be available to the commander. However in this case the court was satisfied that Boškoski had taken part of the media reporting and the report from HRW making it uncertain if the jurisprudence claims that media reporting is considered available to a commander even if he or she has not taken part of it. Another conclusion to draw is that information in some cases would amount to

[151] Ljube Boškoski was not a military commander but the ICTYSt. does not separate the duties of civilian and military superiors like the Rome Statute does.
[152] *Prosecutor v Boškoski and Tarčulovski*, Case No IT-04-82-T "Trial Judgment" 10 July 2008, para. 1
[153] *Ibid*, para. 523-525
[154] *Ibid*, para. 527

alarming such as houses burning, can in other cases fail to be alarming considering the specific circumstances of the case.

4.1.2.1.5 Alarming Information in the Abstract[155]

A quote from the International Law Commission's (ILC) work on a Draft Code of Crimes against the Peace and Security of Mankind provides a better definition in the abstract of when information is to be considered alarming:

"The superior incurs criminal responsibility even if he has not examined the information sufficiently or, having examined it, has not drawn the obvious conclusions."[156]

As the phrase shows criminal liability occurs if the information available is of such strength that upon examination it must be *obvious* to the commander that there was a further need for investigation. It seems as if information that a reasonable person could use to conclude that there is further need for inquiry amounts to alarming, hence, *had reason to know* amounts to a culpable disregard for what the commander should have deduced.

4.1.2.2 Dissent of a Trial Chamber

The trial chamber in the trial against Blaškić is the only chamber of the ICTY or the ICTR that has extensively diverged from the judgment of the Čelebići trial when defining the scope of command responsibility and imputed knowledge. Although the appeals chamber found that the trial chamber in its interpretation of command responsibility, had erred in law, the judgment is important in so that it shows that their understanding of the knowledge criterion was a possible interpretation of customary law until the Čelebići judgment was further cemented in the case law of the ICTY/R.

The trial chamber, although disagreeing with, used Čelebići as a start off point finding that both the submissions of the prosecution and defense differed from the Čelebići standard and so the trial chamber found it necessary to make further inquiries to assess if Čelebići had constructed the knowledge standard correctly.

The Blaškić trial chamber began in the same fashion as in Čelebići, to assess the case law from WWII and through the trials against Toyoda, Pohl, Roechling, the Hostage and High Command cases the court came to a similar conclusion as the Čelebići trial chamber; that the commander had a duty to remain informed of the activities of his subordinates and that failure to do so did not excuse him or her from criminal liability.[157] The Blaškić trial chamber also found that the customary standard of the WWII

[155] For this thesis abstract means the description of a term (e.g. alarming information) in general wordings rather than what constitutes alarming information in a specific case, i.e. abstract is opposed to factual.
[156] *Report of the International Law Commission on the work of its fortieth session*, 9 May - 29 July 1988, Official Records of the General Assembly, Forty-third session, Supplement No. 10, A/43/10 p. 71
[157] *Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 Nov 1998, para. 388

jurisprudence spelled that if a commander fails to exercise the means available to him or her to learn of the offence and under the circumstances, he or she should have known, he or she becomes criminally liable under command responsibility if the *failure to know amounts to criminal dereliction.*[158]

The difference between the Čelebići and the Blaškić trial chamber is found in the way they interpret the impact on customary law by Protocol I. As shown above, in Čelebići the court found that Protocol I changed customary law and the standard of *had reason to know* to require that information is available to the commander; the Blaškić trial chamber disagreed and found that there was no such demand.

Art. 86(2) Protocol I states that the requisite knowledge for liability is when commanders *"had information which should have enabled them to conclude in the circumstances at the time". W*hat was relevant to the Blaškić trial chamber were the words "had information". Those words enabled the Čelebići chambers to conclude that the current standard of customary law did not include liability for failure to acquire information. The Blaškić trial chamber, arguing for a different standard noted that the words "had information" was to be interpreted in accordance with art. 31 of the Vienna Convention;

"in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".159

In light of the Vienna convention the court presented a contextual approach to art. 86(2) Protocol I with reiterating art. 43(1) Protocol I, giving in the rough, that armed forces of a party to a conflict consist only of those units under a command responsible for the conduct of subordinates. The court proposed that since the responsibility to control the conducts of subordinates is a requirement for an entity to be considered an armed force, a distinction important for the application of Protocol I, art. 86(2) needs to be interpreted broadly as to fit the context to all of Protocol I.

Furthermore the court cited the commentary of Protocol I (which in turn cited WWII jurisprudence) who gave that information relevant for establishing what a commander should have known includes level of training of his troops etc. and that the commander cannot claim to be ignorant to such information.[160] A note must be made of this statement; the Blaškić trial chamber refers to the commentary as accepting the WWII jurisprudence of a commander not being able to claim ignorance, however, when reading paragraph 3545 of the commentary in whole it is obvious that it is only referring to the case law as an example of information that can impute knowledge on a commander if it was available to him or her thus the

[158] *Prosecutor v Blaškić*, Case No IT-95-14-T "Trial Judgment" 3 Mar 2000, para. 322
[159] *Vienna Convention on the Law of Treaties* 1969
[160] *Prosecutor v Blaškić*, Case No IT-95-14-T "Trial Judgment" 3 Mar. 2000, para. 328-329 citing *Commentary on the Additional Protocols I and II* of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1986) para. 3545.

Blaškić trial chamber was wrong to conclude that the commentary suggested a *duty to know*.

The court continued to argue for a broad interpretation of the words *had information* and gave that art. 86(2) Protocol I must also be read in conjunction with art. 87 which provides the essential elements of a commander's responsibilities i.e. to prevent, suppress and report breaches of the convention. Concerning art. 87 the court found that the Commentary on the Additional Protocols I and II defines, as an element of the responsibility of a commander, that he or she needs to be constantly informed of his or her subordinates actions.[161]

The trial chamber also cited the Commission of Experts and their interpretation of the command responsibility doctrine. The court cites two sections of this work; the first showing that the responsibility of a commander is far-reaching in that he or she has a:

"duty to do everything reasonable and practicable to prevent violations of the law. Failure to carry out such a duty carries with it responsibility"[162].

The second citation is concerned with the *mens rea* requirement, reading:

Apart from circumstances in which knowledge can be proved or deduced, the Commission considered "such serious personal dereliction on the part of the commander as to constitute willful and wanton disregard of the possible consequences"[163].

Although this seems to present the possibility that the Commission of Experts found that knowledge could be imputed when the accused has been proven to fail in his duty at a level described as willfully or wantonly disregarding, looking at the original text this is not the case. The Commission of Experts gives the different *mens rea* requirements listed as a, b and c[164]; firstly you have actual knowledge and willfully or wantonly disregard, these constitute a) and b) but they are in fact parts of the same standard as indicated by the word "or" in front of the second *mens rea* standard given in c) which is the imputation of constructive knowledge which lacks the element given in b) since one cannot willfully disregard consequences of actual knowledge if you do not possess it. The suggestion of the Commission of Experts is twofold; either the commander has actual knowledge and willfully or wantonly fails to prevent and/or punish or the commander is criminally liable for the inability to deduce from available information that crimes were about to be committed. Thus, the interpretation of command responsibility given by the Commission of Experts does not support the finding of the Blaškić trial chamber that the standard of imputed knowledge does not include a *had information* requirement.

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[161] *Ibid*, para. 329 citing *Commentary on the Additional Protocols I and II* of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1986) para. 3560.
[162] *Ibid*, para. 330 citing the Final Report of the Commission of Experts para. 59.
[163] *Ibid*, para. 330 citing the Final Report of the Commission of Experts para. 58
[164] *Final Report of the Commission of Experts*, Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, para. 58

The last argument presented by the Blaškić trial chamber was the findings of the Israeli Commission of Inquiry which in 1982 investigated the atrocities perpetrated in the Shatilla and Sabra refugee camps in Beirut, the court found that the commission held the *mens rea* requirement to a negligence standard.[165]

The trial chamber in Blaškić eventually found that they could interpret art. 86(2) Protocol I so broadly that the words "had information" did not require that a commander must have had information in his or her possession but could also include those cases where the absence of knowledge was the result of a negligent discharge of duties.[166]

The difference between the Blaškić and Čelebići judgments are not attributed to them presenting different sources of primary and supplementary law, both courts agreed that Protocol I did have an impact on customary law, the disagreement concerned the interpretation of Protocol I and the result was that; Čelebići found that a commander could only be liable if information was available to him or her, the Blaškić judgment did not demand that information was available if the prosecutor could provide evidence that the commander would have known if it was not for the commanders negligent disregard for his or her duty.

Reviewing the Blaškić judgment it is obvious that the court went to great lengths in establishing a standard that did not depend on a commander having information. The Blaškić trial chamber, in bringing its argumentation forth, took authoritative statements out of context and presented only fractions of them, hence faulty; they could be read as supporting the argumentation of the court. The ordinary meaning of the term *had information* cannot include circumstances were the commander did not have information, however broadly it is interpreted, unless the parties to the agreement intended a special meaning for the term (art. 31(4) Vienna Convention) or if *had information* had been ambiguous, obscure or if the result of the interpretation would have led to a manifestly absurd or unreasonable result (art. 32 Vienna Convention), however, the term is perfectly clear. The Blaškić appeals chamber did not argue against the standard given by the trial chamber, it plainly put forth that the issue had been settled by the Čelebići appeal judgment and found that the trial chamber had erred in applying the correct standard of law[167]

4.1.3 What about negligence?

A crime cannot be committed without a culpable state of mind; that is a basic principle of criminal law with few exceptions. In the analysis of the command responsibility doctrine three criteria has shown to be required for

[165] *Prosecutor v Blaškić*, Case No IT-95-14-T "Trial Judgment" 3 Mar. 2000, para. 331
[166] *Prosecutor v Blaškić*, Case No IT-95-14-T "Trial Judgment" 3 Mar. 2000, para. 332
[167] *Prosecutor v Blaškić,* Case No IT-95-14-A "Appeals Judgment" 29 July 2004, para. 62-64

criminal liability to occur; the existence of a superior-subordinate relationship (effective control), the failure to prevent and/or punish and the need for knowledge, actual or imputed. In most cases the argumentation laid forward by the *ad hoc* tribunals does not explicitly connect any of these criteria with a requirement of a culpable mindset as it is usually presented, in terms of intent or negligence. However, the issue has been elaborated by a couple of trial chambers of the ICTR and those judgments will be properly analyzed below.

The first court that presented *mens rea* in terms of requiring the prosecution to prove that a commander acted negligently was the trial chamber in the trial against Jean-Paul Akayesu, a bourgmestre in the Taba commune, Rwanda.[168] Although the accused was not found liable under command responsibility the court presented their view of the applicable law, including art. 6(3) ICTRSt. Besides reiterating the provision and the requirements for criminal liability the court noted that the *mens rea* requirement was disputed. According to the trial chamber, there were two views; one of them being that command responsibility was derived from a rule of strict liability, i.e. as long as the objective criteria of art. 6(3) was met there was no need to prove a culpable mindset (the court did not present any argument for the possibility of a strict liability). The other view was cited from the Commentary to the Additional Protocols stating that:

"[...] the negligence must be so serious that it is tantamount to malicious intent, apart from any link between the conduct in question and the damage that took place. […]"169

The court noted that criminal intent is the moral element required for any crime and that for crimes which the ICTR had jurisdiction over, such as genocide etc., it is proper to demand a *mens rea* standard of at least malicious intent or negligence tantamount to acquiescence or malicious intent due to the gravity of the offences, thus presenting a view coinciding with the cited commentary.[170] The Akayesu trial chamber did not elaborate further on the *mens rea* standard and their silence poses two questions; firstly intent towards what and secondly, how to describe negligence, acquiescence and malicious intent?

To answer the first question a look at the Commentary on the Additional Protocols I and II and the paragraph which was cited by the trial chamber proves useful. The *mens rea* standard given in the commentary is in relation to an argumentation whether or not the Geneva Conventions provides grounds for criminal liability on a negligence basis. The authors of the commentary remarks that the phrase in art. 86(2) of Protocol I "information which should have enabled them to conclude" *"was undoubtedly a case of responsibility incurred by negligence".*[171] It was in relation to this the

[168] *Prosecutor v Akayesu*, Case No ICTR-96-4-T "Trial Judgment" 2 Sept. 1998, para. 4
[169] *Ibid*, para. 488, *Commentary on the Additional Protocols I and II* of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1986) para. 3541
[170] *Ibid*, para. 489
[171] *Commentary on the Additional Protocols I and II* of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1986) para. 3541

commentary notes that not every case of negligence can be considered to be criminal and that the negligence must be tantamount to malicious intent. The Akayesu trial chamber relied on this text to set the standard of *mens rea* in their judgment; so a likely conclusion would be that the court meant the *mens rea* was in relation to the knowledge criterion as to say that a commander that negligently (tantamount to malicious intent) ignores or fails to conclude that his or her subordinates committed or were about to commit crimes.

The second question, the description of intent etc. is not easy to answer. There is no unified approach to the different levels of *mens rea* in international criminal law and domestic law shows a wide variety of different ways to describe the different levels of *mens rea* and the line between these may differ.[172] Without providing any detail about the different levels of *mens rea* some guidance to how they are defined; the term *intent* can be described as *awareness* that a certain conduct will bring about a certain result in the ordinary course of events and the *will to obtain* that result.[173] *Negligence* consists in various degrees but in essence it is the *acting in disregard of a standard of conduct* which, in the case of command responsibility, a commander must abide by.[174] Transforming this in to the standard presented by the Akayesu trial chamber *had reason to know* could plausibly be interpreted as a commander either having information almost making it impossible for a reasonable person to conclude that the subordinates are involved with criminal acts or that he or she disregards the duty to keep him-, herself informed of the subordinates doings to the extent that it almost seems as if the commander intentionally keeps him- or herself uninformed.

The argumentation of the Akayesu trial chamber was subsequently adopted by the trial chamber in the trial against Alfred Musema[175], the director of Gisovu Tea Factory (a Rwandan public enterprise) and as such he was amongst other charges, indicted for not preventing workers of the Gisovu Tea Factory from committing crimes.[176] As in the Akayesu trial there was an appeal but the *mens rea* standard of command responsibility was not challenged.

A similar approach was provided by the trial chamber in the trial against Ignace Bagilishema, the bourgmestre of Mabanza Commune.[177] The court reiterated the standard of knowledge from the Čelebići trial, i.e. actual knowledge of crimes committed or about to be and the imputed knowledge

[172] See e.g. A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 56ff and G. Werle, *Principles of International Law*, 2nd edn. (2009) para. 390ff
[173] A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 58
[174] *Ibid*, p. 70
[175] *Prosecutor v Musema*, Case No. ICTR-96-13-A "Trial Judgment" 27 Jan 2000, para. 129-131
[176] *Prosecutor v Musema*, Case No. ICTR-96-13-A "Trial Judgment" 27 Jan 2000, para. 12-14
[177] *Prosecutor v Bagilishema*, ICTR-95-1A-T "Trial Judgment" 7 June 2001

standard requiring information indicating need for further investigation.[178] Besides these, the court found that:

"The absence of knowledge is the result of negligence in the discharge of the superior's duties; that is where the superior failed to exercise the means available to him or her to learn of the offences, and under the circumstances her or she should have known."[179]

The Bagilishema trial chamber thus combined the decisions of the Čelebići trial and the Blaškić trial chamber judgment to find that there was a negligent standard for the knowledge criterion. The argumentation in Bagilishema differs from the Akayesu and Musema trials and in some aspects the finding is different in Bagilishema. The Akayesu and Musema judgments proposes that negligence (tantamount to malicious intent) must be proven to be present in the mind of the accused whether he or she is deemed to have actual or imputed knowledge. In Bagilishema negligence needs only be proven in reference to the failure to acquiring information. Still, these three judgments are comparable in that they present negligence as a prescript or option for imputing the proper level of knowledge on a commander.

As stated above, the judgments of Akayesu and Musema were appealed but there was no submission made that the courts erred in applying the relevant law of command responsibility. The Bagilishema trial however, went to appeal where the prosecution challenged the findings of the trial chamber that criminal negligence could be a third basis of liability. The appeals chamber elaborates on the issue to some length and began, as so many courts before, by establishing that the Čelebići judgment had settled the issue in pronouncing that *had reason to know* meant that the commander had some general information in his possession that would put him on notice for possible unlawful acts.[180] Concluding that the Čelebići jurisprudence correctly interpret art. 6(3) ICTRSt. and 7(3) ICTYSt. the appeals chamber found that the statute (ICTRSt.) did not provide for any other form of liability than those expressed therein, and as such the third form of liability that the trial chamber expressed could not exist.[181]

The appeals chamber continued, referring to the correct interpretation of *had reason to know* that it imposes a duty on the commander that if he fails to prevent or punish under those conditions it is possible to pronounce them in the form of intent (deliberately failing to perform them) or willful/culpable disregard of them. Subsequently, the court found that there is a threshold where, above it, the mentioned breaches of duty makes the commander criminally liable and below, becomes a matter for the military discipline system. The appeals chamber remarked that; this threshold can only be

[178] *Ibid*, para. 46 with reference to *Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 November 1998, para. 390-39.
[179] *Ibid*, para. 46 with reference to *Prosecutor v Blaškić*, Case No IT-95-14-T "Trial Judgment" 3 Mar. 2000 para. 314-332 compared (cf.) to *Prosecutor v Aleksovski*, Case No IT-95-14/1-T "Trial Judgment" 25 June 1999, para. 80
[180] *Prosecutor v Bagilishema*, Case No ICTR-951A-A "Appeals Judgment" 3 July 2002, para. 33
[181] *Ibid*, para. 34

drawn in the abstract with difficulty. So, although it was possible the court found that reference to negligence when it concerns command responsibility was likely to lead to confusion and so it was better to not describe the *mens rea* requirement in the form of negligence at all.[182] A note to be made is; when the appeals chamber describes the line between disciplinary and criminal failure of duty it must be assumed that they advocate a finding of *mens rea* on case by case basis assessing factual circumstances of a case against the Čelebići standard which would be consistent with the case law which in turn firmly established the Čelebići standard.

Finally concerning the question of negligence, in the trial against Naser Orić (ICTY), the defense of the accused submitted that the standard given in the Akayesu and Musema trials requiring the negligence of the commander to be tantamount to malicious intent made it necessary for the Orić trial chamber to dwell on the matter. The court had two objections to the submission; to begin with they agreed with the Bagilishema appeals chamber that reference to malicious intent or negligence would *"likely lead to confusion of thought"*[183] and that it was better to define the standard in the words of the article as *had reason to know*. Moreover, the court noted that art. 7(3) ICTYSt. cannot be read as requiring malicious intent and found that the article was more similar to a standard of negligence although with the requirement that the commander had factual awareness of information that should have enabled him to know of crimes being committed.[184]

In conclusion the attempts that have been made by the ICTR trial chambers of Akayesu, Musema and Bagilishema to pronounce the *mens rea* requirement in command responsibility have not been well received. What is correct is that there is a requirement for a culpable mind otherwise command responsibility would go against the very foundation of criminal law but this has not been articulated in the normal fashion as a demand for criminal intent or negligence on part of the commander, instead the phrase *had reason to know* and *failure to prevent and/or punish* serves that purpose in connection with the interpretation made by the jurisprudence of Čelebići.

4.1.4 Concluding Remarks

The knowledge criterion is, as seen, divided into actual and imputed knowledge. When actual knowledge can be proven the culpable mindset can be said to consist of a commander knowingly disregarding his duty to prevent and punish crimes committed or about to be committed by his or her subordinates. When actual knowledge cannot be proven the prosecutor will have to resort to imputed knowledge, i.e. the *had reason to know* standard, where the culpable mindset can be described as a failure to properly assess

[182] *Ibid*, para. 36
[183] *Prosecutor v Orić,* Case No IT-03-68-T "Trial Judgment" 30 June 2006 para. 324 citing; *Prosecutor v Bagilishema,* Case No ICTR-951A-A "Appeals Judgment" 3 July 2002, para. 35
[184] *Ibid*, para. 324

the situation when presented with sufficiently alarming information or failure to even utilize the available information. In the end command responsibility is responsibility for the omission to prevent or punish subordinates crime whether the failure is attaining knowledge or the actual preventing and/or punishing.[185]

There is no disagreement between the courts how to define actual knowledge and it seems as the opportunities where the prosecutor has evidence enough to prove such knowledge are scarce. Instead the interesting issues concern the borders of imputed knowledge. As shown above there is consensus in the appeals chambers that the standard set out by the Čelebići trial is authoritative in interpreting the phrase *had reason to know* although a couple of trial chambers have interpreted the standard differently. The Blaškić trial chamber, which favored a lower threshold without the need for information, a standard that is similar to the attempts in explaining imputed knowledge in terms of negligence and intent as the ICTR trial chambers in Akayesu, Musema and Bagilishema. However those judgments were subsequently changed in the appeals process (the exception being Akayesu and Musema for which the corresponding appeals chambers did not touch the issue). The standard given by Čelebići still stands as of 2011 in the judgment against Momčilo Perišić.[186]

Furthermore, there is no *duty to know;* it is clear that the current standard does not include the possibility to impute knowledge on a commander because he has failed in establishing an efficient reporting system or plainly order that no reports shall be filed up the command chain, this since there is an absolute requirement that the prosecutor must prove information to be available to the commander. The foremost reason for this is that the courts have found that Protocol I has influenced customary law and changed the standard contributed by post WWII case law in making the standard stricter. Additionally, the courts have been careful in getting too close to a standard of strict liability for a commander. As said, this amounts to that there is no *duty to know* for a commander without actual access to relevant information.

Lastly, a remark to what constitutes alarming information, when defining what kind of general information that is necessary for a commander to possess for being under a duty to make further inquiries the judgments of the *ad hoc* tribunals frequently refer to is a statement by the Čelebići appeals chamber giving that a military commander that has received information about a soldier with a violent unstable character or has been drinking prior to a mission may be considered to be in possession of alarming information.[187] Although courts reiterate this as a possibility, when looking at the factual circumstances of the cases none has made a commander liable on such vague information, in fact, there are few cases where the base of the information available to the superior does not consist of previous crimes

[185] *Prosecutor v Halilović,* Case No IT-01-48-T "Trial Judgment" 16 Nov 2005, para. 54
[186] *Prosecutor v Perišić*, Case No IT-04-81-T "Trial Judgment" 6 Sept. 2011 para. 149
[187] *Prosecutor v Mucić et al.* Case No IT-96-21-A "Appeals Judgment" 20 February 2001, para. 238

which the commander knew about. This said, it cannot be excluded as a possibility to impute knowledge on a commander with such information, however it is more likely that more information indicating the possibility of crimes having been, or about to be, committed is needed to impute knowledge on a commander.

4.2 Knowledge and the Rome Statute

There is no need to reiterate the whole of art. 28 Rome Statute as it can be found in the first section of this thesis, the part concerned with knowledge of a commander is found in paragraph (a)(i) of the article and states:

"That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes;"

The language is in part similar to that of ICTY/RSt. however the Rome Statute describes imputed knowledge as a commander having knowledge when *owing to the circumstances at the time [he or she] should have known* which is quite the different language than the ICTY/R phrase *had reason to know*. Another significant difference is that the Rome Statute separates the responsibility for commanders and that of superiors (i.e. non-military leaders). The knowledge criterion for superiors is given in art. 28 (b)(i) Rome Statute:

"The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;"

The two standards were separated during the Rome proceedings (leading up to the draft of the ICC statute). There was hesitation among the participants to include a responsibility for superiors at all, however, since there also was a strong interest for including such responsibility the delegate from United States of America put forward a proposal to differentiate between military and other superiors. The difference between commanders and superiors was justified by the basis of their authority, the commanders relying on the military discipline system contra the civilian superior who did not have a disciplinary system to rely on. Another argument was that a commander possessed control over soldiers and units wielding lethal force. The conclusion was that the authority of a commander is much stronger and the consequences of soldiers committing crimes can generally be greater than when a civilian superior fails to prevent and punish.[188] A *should have known* standard as presented in the Rome Statute, described as one of negligence by the representative of the United States of America, was not appropriate in a civilian context since it contradicted the usual principles of criminal law where negligence could not be a basis for criminal liability.[189] The text that came to be art. 28 were the subject of extensive negotiations and represented

[188] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome*, 15 June - 1 7 July 1998 Official Records Volume II UN Doc. A/CONF.183/13 (Vol.11) p. 136-137 para. 67-68
[189] *Ibid*, para. 68

a delicate compromise, the Working Group who contributed the initial draft specifically pointed this out when they presented there draft to the Drafting Committee.[190]

By examining the negotiations concerning command responsibility the reasonable conclusion is that the focus was not to define and codify customary law rather than finding a standard of criminal liability that the nations, present at the negotiations, could adhere to. This conclusion is shared by, amongst others, the ICC pre-trial chamber in the case against Jean-Pierre Bemba Gomba[191] and Dr. Guénaël Mettraux who describes the standard of knowledge for a civilian superior as being in line with customary law and the military standard as setting a looser *mens rea* standard.[192]

The Rome Statute still lacks case law to interpret the language of its articles which is true for art. 28 as well. To date the only decision of the ICC that has presented the issue of command responsibility is the one concerning the trial of Gomba as mentioned above. However the pre-trial decision does shed some light on the issue. The court began by stating that the term *should have known* is a form of negligence.[193] The court proceeded by referring to the *amicus curiae,* submitted by Amnesty International, proposing that the negligent conduct must be in relation to a failure of acquiring knowledge.[194] Furthermore the court noted that the standard of *should have known* coincides with the findings of the Blaškić trial which was based on the jurisprudence of WWII trials and Protocol I, the court thus found the following passage from the Blaškić trial chamber to be informative:

"In conclusion, the Trial Chamber finds that if a commander has exercised due diligence in the fulfillment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties […]"[195]

With the Blaškić judgment, the *amicus curiae* from Amnesty International and the above mentioned drafting history that showed the intent to have a more stringent approach to military commanders, guiding the court, it found that:

"Thus, it is the Chamber's view that the "should have known" standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of

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[190] W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), p. 457

[191] *Prosecutor v Bemba Gomba,* Case No ICC-01/05-01/08 "Pre-trial decision" (pursuant to art. 61(7)(a) and (b) of the Rome Statute), 15 June 2009, para. 433-434

[192] G. Mettraux, *The Law of Command Responsibility*, (2009), p. 195-196

[193] *Ibid*, para. 429

[194] *Ibid*,para. 432 in reference to *Amicus Curiae observations on superior responsibility submitted pursuant to rule 103 of the rules of procedure and evidence*, Case No *ICC-01/05-01/08*, 20 Apr 2009 (Amicus Curiae - someone not a party to the case which offers its opinion) submitted by Amnesty International, para. 3 and 6.

[195] *Prosecutor v Bemba Gomba,* Case No ICC-01/05-01/08 "Pre-trial decision" 15 June 2009, para. 432 citing *Prosecutor v Blaškić,* Case No IT-95-14-T "Trial Judgment" 3 Mar. 2000, para. 332

his troops and to inquire, regardless of the availability of information at the time on the commission of the crime."[196]

Lastly, the court noted that the *should have known* standard for military commanders is different than the standard of *had reason to know* of the ICTY/RSt. and SCSLSt. but the court declined to further elaborate on the difference since the purpose of a pre-trial encompasses *"[…] whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged[…]"*[197] and the level of detail given to article 28 was enough to find that Gomba could be believed to have committed the crimes charged.[198] However the court proposed that the indicia used by the *ad hoc* courts could also be used to find that a commander *should have known*. Thus, general information to put the commander on notice of crimes committed by subordinates, or the possibility of occurrence of unlawful acts justifying further inquiry may, depending on the circumstances of the case, amount to that a commander *should have known*. Furthermore a failure to punish past crimes by the same group of subordinates may indicate a future risk of unlawful acts being committed.[199]

Considering the above, command responsibility as given by the Rome Statute has not yet been scrutinized by the chambers of ICC to an extent that provides the same amount of detail as the standard provided by the *ad hoc* courts. Moreover, art. 28 is not to be considered an attempt to codify customary law but rather a compromise between ratifying nations to ensure that command responsibility became a part of the Rome Statute. It may also be deduced that the knowledge criterion sets a lower threshold for military commanders to be liable than the *had reason to know* standard of the *ad hoc* tribunals. It is probable that the *should have known* standard do not include a requirement that the commander needed to have information available or in his or her possession since the threshold is lower (the pre-trial chamber finding that the phrase *should have known* was a form of negligence), the court reiterates the Blaškić trial chamber judgment as defining a *should have known* standard which did not include this demand and finally, art. 28 do not codify customary law and as such it is not bound to take Protocol I into consideration.

The failure to acquire knowledge can, roughly, depend on one of three causes; the commander did have adequate information but did not make the obvious conclusion, the commander had the means to obtain relevant information but did not use them and the failure to acquire knowledge depends on that the reporting system in place is poor and inadequate. The *had reason to know* standard covers only the first case and it seems as if the *should have known* standard of art. 28 of the Rome Statute may encompass

[196] *Ibid*, para. 433
[197] Rome Statute, art. 61(7)
[198] *Prosecutor v Bemba Gomba*, Case No ICC-01/05-01/08 "Pre-trial decision" 15 June 2009, p. 184-185
[199] *Ibid*, para. 434

the others as well, having more in common with the judgment of the Blaškić trial chamber than the Čelebići judgments.

5 Principles

General principles of international law are one of the primary sources of international law according to art. 38 of the ICJSt., presented shortly in the beginning of this thesis. Concerning command responsibility there is a couple of principles that has made a mark when courts have established the extent of criminal liability that command responsibility may charge upon the commander. The principle of legality, *in dubio pro reo* (when in doubt, for the accused) and the basic principles of individual criminal responsibility have all in some way affected the doctrine of command responsibility.

5.1 The Principle of Legality and *In Dubio Pro Reo*

The principle of legality or *nullum crimen sine lege* (no crime without law) has proved important when the *ad hoc* tribunals have considered the standard of command responsibility. The ICTY and to some extent the ICTR have, in the course of their existence, showed to be progressive in the interpretation of command responsibility and has taken steps to evolve the doctrine. As a symptom of this progressive evolvement, the defences of indicted commanders have often submitted that one or multiple parts of the doctrine of command responsibility are not a part of the body of law that may be used by the *ad hoc* tribunals. This has e.g. been the case when courts have found that command responsibility is applicable when crimes were committed before the commander assumed command and also, when found that the doctrine is applicable in the context of non-international armed conflicts.[200]

The argument that the courts have transgressed the principle of legality in their interpretations of command responsibility has, as well, ben put forth in concern of the knowledge criterion. The defence in the case against Bagilishema (ICTR) and Blaškić (ICTY) submitted that the trial chambers of the respective courts constructed the *mens rea* standard too loose. In the case of the Bagilishema trial it was the objection against the courts finding of criminal liability pursuant to the negligent disregard of duty[201] and in the Blaškić trial the defence objected against the finding that the *had reason to know* standard did not contain a requirement for information to be available

[200] See e.g. *Prosecutor v Kordić and Čerkez,* Case No IT-95-14/2-T "Trial Judgment" 26 Feb. 2001, para. 446, *Prosecutor v Hadžihasanović and Kubura,* Case No. IT-01-47-AR72, "Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility para. 11-31, 37-56 and *Prosecutor v Hadžihasanović and Kubura*, Case No IT-01-47-A "Appeals Judgment" 22 April 2008, para. 23ff.
[201] *Prosecutor v Bagilishema,* ICTR-95-1A-T "Trial Judgment" 7 June 2001, para. 46

to the commander.[202] In the appeals process the Bagilishema appeals chamber, in examining the alleged negligence standard proposed that:

"The Statute does not provide for criminal liability other than for those forms of participation stated therein, expressly or implicitly. In particular, it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law."[203]

The Bagilishema appeals chamber thus found that the trial chamber did expand the notion of command responsibility outside of what was stated in the ICTRSt. furthermore, the court noted, that command responsibility was not sufficiently defined in international law as to say that customary law did include a negligence standard. In other words, since the standard of knowledge was not clearly defined the stricter approach must be adhered to since lack of clarity always must be interpreted in the favour of the defendant (*in dubio pro reo*), thus there was no negligence standard and consequently the finding of the trial chamber breached the principle of legality, no law, no crime. The appeals chamber in Blaškić affirmed the finding of the Bagilishema appeals chamber when it referred to the appeals judgment confirming that the standard of *had reason to know,* put forth by the Blaškić trial chamber, could not be accepted in favour of the Čelebići standard.[204]

Concluding, the legality principle and in *dubio pro reo* have been, and is, significant in assessing the borders of criminal law provisions and especially, as in the case of command responsibility, when the provision is unclear. Under such circumstances, courts must tread carefully to not define criminal liability too wide.

5.2 Individual Criminal Responsibility

The principles of individual criminal responsibility are the basic condition, the requirement that needs to be upheld for criminal liability to attach. The conditions are threefold; firstly, there needs to be a material or an objective element (the *actus reus*), secondly, a mental or subjective element is required (the *mens rea*) and thirdly, none of the grounds for excluding responsibility (such as self-defence) may apply.[205]

The element that may affect the application of the knowledge criterion is, not surprisingly, the principals of *mens rea* and more precisely, the level of culpability that is required for criminal liability. In art. 30(1) the Rome Statute states that the requisite *mens rea* is intent and knowledge (together not separate). Intent is the standard and required for most international

[202] *Prosecutor v Blaškić*, Case No IT-95-14-T "Trial Judgment" 3 Mar. 2000, para. 332
[203] *Prosecutor v Bagilishema*, Case No ICTR-951A-A "Appeals Judgment" 3 July 2002, para. 34
[204] *Prosecutor v Blaškić,* Case No IT-95-14-A "Appeals Judgment" 29 July 2004, para. 63
[205] G. Werle, *Principles of International Law,* 2nd edn. (2009), para. 376-379

crimes, thus meaning that command responsibility, whatever form of negligence or recklessness that may characterize it, is an exception.[206]

A matter that has been given much attention in case law is if command responsibility was to be considered one of few exceptions that provided for so called strict liability (i.e. criminal liability without the need for proving that the accused had a culpable mindset). The purpose of enforcing a strict liability for an action or omission is the protection of a victim, not the punishment of a culprit and it would be a stretch to say that the respect for international humanitarian law falls into the category of victims.[207] An example of where strict liability commonly applies is the statutory rape where intercourse with a person underage constitutes a crime whether or not the offender knew of his or her age or not.[208]

Command responsibility cannot be a candidate for strict responsibility and from the judgment of the *ad hoc* tribunals, from Čelebići to the latest judgment against Momčilo, it has been firmly established command responsibility does not include a form of strict liability.[209] This is important for a mode of criminal liability that is not based on the actual participation or aiding a crime. The trial chamber in the Orić trial stated:

"[…]Without any such subjective requirement, the alternative basis of superior criminal responsibility by having had 'reason to know' would be diminished into a purely objective one and, thus, run the risk of transgressing the borderline to 'strict liability'. This is not the case, however, as soon as he or she has been put on notice by available information as described above."[210]

Thus, giving that even the risk of transgressing into strict responsibility has been of importance when the chambers engaged in interpreting the term *had reason to know*.

A final note related to the principles of individual criminal responsibility is the relationship with domestic law. In an attempt to fit the notion of command responsibility into regular criminal law it is compared and measured against other modes of liability. The closest "relative" to command responsibility would be different forms of complicity as aiding or abetting and those forms often require intent in order to make an accused

[206] A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 60
[207] V. Galson, *Constructive Knowledge Standard of Command Responsibility*, Dartmouth Law Journal, Vol. 7, Issue 3(2009), p. 227-228
[208] W. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, New England Law Review, Vol. 37, Issue 4 (2002-2003), p. 1015, see also the Swedish Penal Code (SFS 1962:700) 6 Ch. 4, 13§§ for a statutory rape that is not strict but lowers the bar for mens rea by allowing for criminal liability where the requirement incidentally is "had reason to know".
[209] See e.g. *Prosecutor v Mucić et al.* Case No IT-96-21-A "Appeals Judgment" 20 February 2001, para 239, *Prosecutor v Perišić*, Case No IT-04-81-T "Trial Judgment" 6 Sept. 2011, para. 149, *Prosecutor v Naletilić and Martinović*, Case No IT-98-34-T "Trial Judgment" 31 March 2003, para. 70, *Prosecutor v Kajelijeli*, Case No. ICTR-98-44A-T "Trial Judgment" 1 Dec 2003, para. 776, Prosecutor v Kamuhanda, Case No. ICTR-95-54A-T "Trial Judgment" 22 Jan 2004, para. 607 and *Prosecutor v Boškoski and Tarčulovski*, Case No IT-04-82-T "Trial Judgment" 10 July 2008, para. 412
[210] *Prosecutor v Orić,* Case No IT-03-68-T "Trial Judgment" 30 June 2006, para. 324

criminally liable.[211] This may to some extent explain the difficulties, which has been discussed above, to negotiate a standard of command responsibility in the Rome Statute that all of the ratifying states could agree on.

[211] M. Damaška, *Shadow Side of Command Responsibility*, American Journal of Comparative Law, Vol. 49, Issue 3 (Summer 2001), p. 462-463

6 Imputed Knowledge, as good as it gets?

Nearing the end of this thesis the final analysis is divided into two sections, this section who presents the argumentation and the section below where the final conclusion can be found. As a reminder the focus of this thesis was the following questions:

- *Is the current standard of imputed knowledge in customary law, as interpreted by the ad hoc tribunals[212], balanced or can the knowledge requirement be criticized for being inadequately efficient or too widely applicable?*

- *Is the standard in the Rome Statute balanced, and what differentiates it from the customary law standard, as interpreted by the ad hoc tribunals?*

- *Comparing the Rome Statute and customary law, is one or the other standard better suited to promote the purpose of criminalization without violating basic principles of criminal law?*

From what has been presented in this thesis a conclusion to be made is that, although the standard in the Rome Statute has not been applied to the extent that the borders of application has become clear it presents a looser standard in the sense that it is easier for the prosecutor to prove that a commander *should have known* than it is under the application of the *had reason to know* standard. The foremost concern of the analysis must therefore be if a stricter (higher *mens rea* threshold) or looser standard of the knowledge criterion is needed to gain a balanced knowledge requirement. Below arguments for holding a stricter (*had reason to know)* or looser (*should have known*) *mens rea* requirement will be presented; some of which have been voiced in judgments of the *ad hoc* tribunals, some by legal scholars as well as some deduced from what has been presented in this thesis. Most of the arguments are material in the sense that they are concerned with the effects of using the different standards of knowledge in practice while some arguments are legal in that they target e.g. if the application of a standard is sensible or legal, if the interpretation was correct etc.

6.1 Criminalize More

Under this heading, the argumentation for broadening the application of command responsibility doctrine is given, i.e. promoting or go beyond what a knowledge criterion under a *should have known* standard requires to impute knowledge.

[212] When the text refers to the *ad hoc* tribunals it is the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) that is meant.

6.1.1 Enforcing International Humanitarian Law

The first and foremost reason for widening the criminal responsibility of commanders is to satisfy the purpose of the criminalization, that is, to ensure that all armed forces abide by the rules of international humanitarian law.

Under section 3.2 above, three possible scenarios where a commander fails to acquire knowledge was found; (a) the commander did have adequate information but did not make or did not want to make the obvious conclusion, (b) the commander had the means to obtain relevant information but did not use them and (c) the failure to acquire knowledge depends on that the reporting system in place is poor and inadequate.

If the less invasive approach of the *ad hoc* tribunals is chosen a commander cannot be accused of having *had reason to know* without the prosecutor proving that he or she had certain information available. Thus, out of the three scenarios that would undermine the concept of responsible command only where the commander neglects information or fails to act on it (a) may be punished. This leaves the scenarios where a commander fails to ensure that there is a mechanism of proper reporting and discipline in place (c) and where the commander had the means to acquire information but did not (b). In both the (b) and (c) scenarios it is the commanders own failure that prevents him or her from attaining knowledge of crimes about to be, or having been committed albeit, without becoming criminally liable.

Concerning scenario (b) it can rarely depend on a culpable failure since, if there were means i.e. reporting routines etc. the commander is much more likely to fail in deducing the proper conclusion, in other words an (a) scenario. However, when a commander deliberately severs the reporting routes and declines to receive information in order to avail him or herself from criminal responsibility the provision of *had reason to know* cannot be applied since there was no information available. To clarify, this is not the same as when courts have announced that willful blindness is not allowed. Willful blindness is the case when a commander has access to information but declines to take part of it in order to avoid acquiring knowledge, such behavior is punishable under a *had reason to know* standard. To avoid criminal liability the commander must effectively sever communication as to show that no reports could have made it to him or her thus he or she could not have information available. Such behavior must be considered very harmful to the purpose of ensuring that commanders adhere to the principles of responsible command in order to prevent breaches of humanitarian law. This is so, because it gives incompetent and lazy commanders the means to circumvent having to apply responsible command since there is no way of indicting a commander that has no information. A standard that would base the knowledge criterion on a *should have known* standard will at the very least make it possible to punish the gravest of failures of pursuing responsible command as well as the intentional prevention to obtain information by using command authority to sever reporting mechanisms. A

should have known standard thus complies better with the purpose of command responsibility, i.e. it acts as a better deterrent for making the commander comply to responsible command as well as an incentive to especially give some effort to enforce an effective system for reports.[213]

6.1.2 Inconsistency of the Mens Rea

Another view which lends itself to advocate a lower threshold of *mens rea* is to compare the *failure to know* with the *failure to prevent and/or punish*. In the case law of the *ad hoc* tribunals there is no *duty to know* but a *duty to prevent and /or punish*. If a commander fails to know, i.e. he or she did not have sufficiently alarming information, the duty to prevent and/or punish vanishes. It may be argued that this is wrong and that the failure to know must be equally culpable as the failure to prevent and/or punish because the outcome will be the same. A subordinate will not be punished and in the long run, the adherence to international humanitarian law may suffer. The argument is subjective and it would be wrong to measure the culpability of an action or omission solely on the result. It is down to personal conviction whether or not failing to gather sufficient information is as bad as having that information and fail to draw the right conclusion.

6.1.3 Strict Liability and *Should Have Known*

The argument that a *should have known* standard is too close or transgress into a strict liability is found below under section 6.2. In rebutting that it does not, an argument may be that the idea of *should have known* imposing strict liability, builds on a misconception. Strict liability is when criminal liability follows on purely objective criterion. Thus, those believing that the *should have known* standard falls into that category is of the conviction that whenever the commander fails to acquire knowledge it does not matter if he or she has been negligent or not when he or she failed. This is not the case, firstly a standard of what a reasonable person should have known must and will be established by a court which wants to impute a commander with knowledge for not acquiring information and secondly the effective control criterion must be taken into consideration as the actions of a responsible commander cannot go past what he or she could actually do thus, if there is no effective control to demand information or establish a reporting system then there can be no criminal liability since the effective control criterion falls.

[213] M. Stryszak, *Command Responsibility: How Much Should a Commander be Expected to Know?*, Journal of Legal Studies (United States Air Force Academy), Vol. 11 (2002) p. 63

6.1.4 Erred Interpretation of State Practice

Furthermore, a reason to depart from the standard set by the *ad hoc* tribunals is that they erred in the interpretation of military manuals that was used to conclude that there was no *duty to know* or a *should have known* standard where a commander could be liable for failure of obtaining knowledge. The military manuals which were used in interpreting the standard of knowledge were issued by developed countries of which wield efficient armed forces with the inclusion of a functional reporting system. When the military manuals of countries such as the United States of America propose that command responsibility is the liability for preventing or punish subordinates if the commander had knowledge of the acts it must be read in context. The United States Army's reporting system (as well as that of any other developed armed force) is and most probably was efficient when the manual was written and thus one may assume that a commander could only with much difficulty avoid getting sufficient information of his or her subordinates actions. There is no public travaux préparatoires to the field manuals to support this view however, as when reading any publication, not all things are explicitly said but it does not mean that the authors did not mean for it to be included.

The conclusion of the argumentation is that such context must be taken into account when searching for a unified state practice and an *opinio juris*. The findings that military manuals did not support a *duty to know* was, in the jurisprudence of the *ad hoc* tribunals, reinforced by protocol I which must be looked upon as the argument that tipped the scale. The ICC will most likely look into Protocol I and military manuals when it interprets art. 28 in the future, if so, the military manuals should not be interpreted as promoting a standard where *should have known* dictates a demand for information to be available.

To consider military manuals of developed armies, as the *ad hoc* tribunals have, will mean that the standard of conduct for different armed forces may come to vary. There must of course be a difference between a guerilla group and the army of a nation but it is more suitable to put that difference in relation to the effective control criterion. A minimum standard of supervision and reporting must be equal to all armed forces only to be disregarded if there was not sufficient effective control and increased when a developed reporting and discipline system enables the court to beyond reasonable doubt conclude that the commander must have known, i.e. had actual knowledge, otherwise the implication is that there will be large variations for when a commander can be held criminally liable requiring less diligence from some in performing their duties as commanders.

6.2 Wait…, You Cannot Criminalize That

Contrary to the heading above the argumentation for restricting the application of command responsibility doctrine is given here, i.e. the

argumentation that command responsibility in customary law or in the Rome Statute does violates principles of law and therefore making it wrong to apply them to an accused commander.

6.2.1 Nullum Crimen Sine Lege

The principle of legality has already been discussed. It is the main argument for maintaining a strict approach to defining the borders of command responsibility. The standard of *had reason to know* as interpreted by the *ad hoc* tribunals is in part a product of applying the principle of legality and *in dubio pro reo* to an ambiguous term. In the light of those principles, what is to say that the term *should have known* are not to be interpreted as holding the same standard as *had reason to know*, the language of the articles is not that different from each other and it is possible to draw the conclusion that both of them should be interpreted *in dubio pro reo* to the strictest possible *mens rea* standard which fits within the terms; thus, a standard closely related to the *ad hoc* tribunals interpretation of customary law is the only valid interpretation, any looser standard would infringe on the principle of legality. This is an extreme interpretation of this argumentation since it has been shown above that there are strong incitements to consider the standard of knowledge in the Rome Statute as pursuing a looser *mens rea* standard. However, *should have known* is not less ambiguous than the term *had reason to know* and a cautious interpretation to not transgress the borders of the legality principle is called for.

6.2.2 Bordering Strict Liability

Another concern of the courts has been to stay clear from any standard that risked transgressing into a strict liability for command responsibility, i.e. as explained earlier, criminal liability occurring as a consequence of committing an unlawful act or omission regardless of having a culpable mindset. It has been argued that if the requirement for the commander to have information available was to be taken away, what is left is *a duty to know*, being hypothetic to the point where it is hard to draw the line on where the commander has failed due to own negligence or if the courts merely provides an objective tests of when a commander is considered to have failed. If the latter happens then the border into strict liability has been transgressed.

Another issue in setting a low threshold for *mens rea* is that certain countries and their domestic law does not allow for criminal liability under a *mens rea* requirement amounting to negligence or even recklessness, thus, if the *should have known* standard in the future will allow for a broader application of the knowledge criterion there is a chance that it will be marginalized and insignificant apart from the usage within, as in this case, the ICC. Thus a lower threshold of *mens rea* is less likely to influence future international customary law because states are not likely to burden own

armed forces and its officers with a stricter responsibility for subordinates actions.

6.2.3 Had Reason to Know; Sufficiently Effective

If the standard of imputed knowledge, imposed by the *ad hoc* tribunals, can be used to charge most of the commanders that have had problems with subordinates not respecting humanitarian law it is not necessary and wise to widen the criminal responsibility of commanders by requiring them to be even more vigilante under a should have known standard.

As it is now a commander can be made criminally liable under a *had reason to know* standard when he or she has alarming information available. To not have information available of a subordinate committing a crime is hard by default in the average military unit and furthermore a commander cannot remain willfully blind towards the information so a prosecutor only needs to prove that a reasonable person would have come to the conclusion based on the information that further investigation was needed. Such a standard is due to catch most cases since, as said, it is by default not easy to be kept in the dark for a commander of a military unit.

Since the standard of *had reason to know* is sufficiently effective there is no reason to widen the knowledge criterion to include when a commander fails to acquire information, knowingly or negligently. The argument is strengthened even more by pointing to that even the *had reason to know* standard has been criticized for being excessive since it may target commanders being poor or dull, lacking expertise or experience rather than being targets for disregarding humanitarian law, they are just being lousy commanders not having a guilty mindset.[214] One may argue that the purpose is not to convict commanders who intentionally wanted to disregard humanitarian law but those, no matter if the omission was contributed by stupidity, incompetence or spite, who did not effectively insure him or herself that subordinates adhered to the law.

A consideration that must also be taken into consideration, if wanting to broaden the responsibility for superiors to better coincide with the purpose, is that a standard too harsh may end up crippling the purpose. A commander that feels he or she do not have enough control or experience to properly supervise his or her subordinates may choose to resign in fear of becoming criminally liable and thus effectively cancelling the positive effects of a leadership keeping discipline and adherence to humanitarian law.

[214] A. Ching,.*Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia*, North Carolina Journal of International Law and Commercial Regulation, Vol. 25, Issue 1 (Fall 1999), p. 204.

6.2.4 Convenince

An argument put forth by some authors is that command responsibility exists for the convenience of the prosecutor.[215] A more nuanced view of such an argument would be that since command responsibility already is to be considered as mode of criminal liability in the outskirts of what could be accepted in criminal law, to further loosen up the *mens rea* requirement would not ensure a better compliance with the underlying purpose, it would merely make the finding of guilt easier helping the prosecutor in the difficult task of providing enough evidence for actions committed in a former warzone. So, instead of providing evidence that the commander had some information in his or her possession that would amount to alarming information the prosecutor only needs to prove that if he or she would have acted as a responsible commander should that information would have come in his or her possession.

The argument in conclusion would be that those promoting *a should have known* standard wants more convictions for those considered to have been at fault, since a *had reason to know* standard is sufficiently effective, better compliance with the purpose of the criminalization is not an argument. Thus, the promoters of a lower mens rea requirement may believe that a *should have known* standard is easier to provide proof for and will land more convictions. To ease up the burden of proof is not a valid argument for broadening a criminalization and so, a *should have known* standard must not be accepted.

6.2.5 Politics

Finally, when providing arguments for a looser or stricter standard consideration must be made to what states may approve and what is unacceptable. The lower threshold a term or a standard provides, the more likely it will be disputed as unacceptable by states and thus it has no future and no possibility to influence customary law. It will not be applied outside of the treaty it resides in. This is so because states tend to be cautious when exposing its citizens to international jurisdiction, the compromise that is art. 28 of the Rome Statute and the fact that there were extensive negotiations before the compromise was settled, speaks for, that at least some states considered it a delicate issue.

Even if a *should have known* standard better promotes the purpose of the criminalization the courts should not interpret it any different than *a had reason to know* standard because a too broad application may be disapproved by states. The states may shun back and isolate themselves and their citizens so that international justice may suffer. A more lenient

[215] B. Bonafé, *Command Responsibility between Personal Culpability and Objective Liability: Finding a Proper Role for Command Responsibility*, Journal of International Criminal Justice, Vol. 5, Issue 3 (July 2007), p. 617

knowledge requirement does not risk invoking such behavior by states thus, better promotes the adherence to international law in general.

6.3 Consider This as Well

A couple of things must be considered when finding the appropriate standard of imputed knowledge that does not necessarily promote a stricter or looser application *per se* but do have an impact nonetheless.

6.3.1 A Murderer or a Negligent Preventer?

It has been settled in the jurisprudence that a commander is not responsible for the act of his or her subordinate, he or she is criminally liable for an own omission of preventing or punishing the offender. All the same, in the sentencing of commanders that have been found responsible under command responsibility they are still convicted for crimes against humanity or violations of the laws and customs of war based upon the crime of the subordinate, e.g. murder or torture etc.[216] Some courts, however, have presented the conviction as "failing to take the necessary and reasonable measures to prevent or punish the [e.g.] murder"[217] as was done in the Hadžihasanović trial. A great number of authors have objected to the jurisprudence of the courts when they have convicted a commander for e.g. murder as a war crime.[218] The argument is that the connection between the subordinate's crime and the omission of the commander is too vague that to make it appropriate for a commander to be convicted under such a title. In fact, the commander had neither the *mens rea* nor the *actus reus* for committing the crime of murder. An author that visualizes the problem this imposes is David Nersessian with the title of his article being; "Whoops, I Committed Genocide!"[219]

If the courts continues to label the criminal liability, through command responsibility, as murder etc. it must be considered an argument to avoid lowering the *mens rea* threshold further since the lower threshold of *should have known* migrates even further from the original crime and focuses on the culpability of a commander who failed to acquire information, conclude

[216] *Prosecutor v Krnojelac*, Case No IT-97-25-T "Trial Judgment" 15 March 2002, p. 228 (Disposition)
[217] *Prosecutor v Hadžihasanović and Kubura*, Case No IT-01-47-T "Trial Judgment" 15 March 2006, p. 620 (Disposition)
[218] C. Greenwood, *Command Responsibility and the Hadžihasanović Decision*, Journal of International Criminal Justice, Vol. 2, Issue 2 (June 2004), p. 605., E. Langston, *Superior Responsibility Doctrine in International Law: Historical Continuities, Innovation and Criminality: Can East Timor's Special Panels Bring Militia Leaders to Justice*, International Criminal Law Review , Vol. 4, Issue 2 (2004), p. 159 and S. Trechsel, *Command Responsibility as a Separate Offense*, Publicist, Vol. 3, Issue 1 (2009), p. 34-35
[219] D. Nersessian, *Whoops, I Committed Genocide - The Anomaly of Constructive Liability for Serious International Crimes*, Fletcher Forum of World Affairs, Vol. 30, Issue 2 (Summer 2006)

crimes were about to be committed or to prevent or punish. However if convictions would to be given the headings proposed by the Hadžihasanović trial, focus would turn to the dereliction of duty which the commander was found guilty of, thus it being fair to punish such derelictions without commanders accidently being punished for having committed genocide.

6.3.2 Responsibility for a Drunken Soldier

The arguments for proposing a looser, respectively stricter *mens rea* standard has been for the difference between the *had reason to know* and *should have known* standard which does not contain a demand for information to be available thus, it is possible to use this standard when a commander fails to acquire information. However it is as important to look at what kind of information that will result in a finding that the commander should have been put on alert and at least to inquire more information.

The Rome Statute standard does not have any detailed case law but it is safe to conclude that for imputing knowledge on a commander the prosecution must show that he or she could have, if performing his or her duties with due diligence, acquired information that should have put him or her on alert that subordinates were about to or had already committed crimes. What we do not know is where the ICC will draw the line when developing its case law.

The *ad hoc* tribunals seem to have set the bar relatively low when in Čelebići the court found that even information of that a soldier is prone to violence or drinking may be enough to constitute alarming information. This statement however, has never come to be tested by a court since there has always been a plethora of further information that has been accounted for as to providing alarming information, i.e. the statement is still *obiter dictum.*

The point to be made here is that if information of a drunk soldier may be enough to make a commander liable that must be considered as a very low threshold. If the ICC subsequently states that the *should have known* standard does not require information to be available (as must be considered plausible) and furthermore states that the culpable failure to acquire knowledge which would have, if it had been available to the commander, put him or her on notice such as he or she should have made further inquiries, i.e. in all other parts accepts the jurisprudence of the *ad hoc* tribunals, then you are left with a standard where the *mens rea* threshold requires that the commander should have acquired information showing that a subordinate has violent or addictive tendencies.

So, it is not as simple as one standard *requiring available information* and the other including a *duty to know*. The threshold for alarming knowledge may already be considered to be too low to be fair, especially if the crime is labeled as murder etc. A similar threshold under a *duty to know* standard may cross the line of what is acceptable to criminalize.

6.4 Rome v *Ad Hoc* Jurisprudence

If one where to conclude (which is reasonable) that the Rome Statute will be able to accommodate criminalization of the three situations previously discussed; the commander did have adequate information but did not make or did not want to make the obvious conclusion, the commander had the means to obtain relevant information but did not use them and the failure to acquire knowledge depends on that the reporting system in place is poor and inadequate.. It is also clear that the *had reason to know* standard encompasses one of the three, i.e. the failure to acquire information cannot be criminal however the failure came to be. A criminalization that can act as deterrence in all of the three situations must be presumed to satisfy the purpose better than a criminalization only encompassing one of them. There are trade-offs to a more effective knowledge criterion; the court which applies a *should have known* standard must justify the choice by presenting a persuasive argumentation why the standard does not transgress into strict liability and why the term *should have known* is clear enough so it is not necessary to interpret the term in favor of the accused. It must also be clear that a *should have known* standard will not only target the commanders who just do not care if their subordinates comply with humanitarian law or not, it will also target those commanders who may have the will to have his units adhere with the law but cannot comply with his or her duties due to incompetence.

Other arguments that have been put forward above may tip the scale in favor of either interpretation of imputed knowledge to be the more balanced approach but the main stand to be taken is if further efficiency of command responsibility is worth it when it means approaching the edges of what can be considered fair and allowed considering the principles of criminal law.

7 Conclusion

To summarize the conclusion given below, when comparing the standard given in the Rome Statute and the standard provided for by the *ad hoc* tribunals, the Rome Statute provides a better balance in that its broader application better promotes adherence to responsible command and international humanitarian law without violating any principles of criminal law. *The had reason* to know standard falls short to the *should have known* standard in efficiency. It is also close to violate principles of individual responsibility when providing a very low threshold for the kind of information that needs to be available, so low that it could be discussed if a failure to conduct further inquiries is even negligent. Since nothing is known of where the ICC will set the threshold for culpable disregard for information or failure to know it cannot be said to be more balanced in this regard but it has the possibility to set a more appropriate standard.

The ability to charge commanders who just do not care enough or is too incompetent to enforce an efficient reporting system is important. He or she is no less culpable than the commander who fails to prevent and/or punish crimes to be or those who have been committed. This is true because the duty of a commander, as given by responsible command is not only to prevent crimes from being committed; implied and by default in a military system there is a duty to be appraised of the actions of subordinates. The duty to know and the duty to punish are equally important; the dereliction of one duty cannot be considered less culpable than the other when the result will be the same. Furthermore a *should have known* standard will provide further incentives for commanders to uphold the discipline of his or her unit and maintain a high degree of supervision.

The mistreatments of the prisoners in Abu Ghraib detention facility proved to have been widespread and extended through time, BG Karpinski claimed that she had no knowledge. The investigators characterized the leadership and discipline of her brigade and subordinate battalions as poor. Imagine BG Karpinski being charged with command responsibility as it is under both the Rome Statute and the *ad hoc* tribunals. There can be only speculation of whether she had information available, but say she did not, then she would have been found guilty (pending that the other conditions for liability under command responsibility could be satisfied) under the Rome Statute but not under the jurisprudence of the *ad hoc* tribunals. Is it not so that her failure to properly maintain discipline and failing to punish the perpetrators was equally culpable whether or not she had information available to her? If BG Karpinski had been eligible for prosecution under the Rome Statute knowing that she could have been charged with failure to know if her underlings committed crimes she might have made an extra effort to prevent what happened inside of Abu Ghraib. The point being that criminal liability for her failure to know is a better incentive to wield

responsible command than only failure to deduce (from alarming information) and failure to prevent and or punish.

A *should have known* standard may, if not constructed properly, transgress the boundaries of criminal law principles which of course is not acceptable, however, as the post WWII trials show it is possible to uphold a *should have known* standard and still adhere to principles of criminal law. The jurisprudence of the *ad hoc* tribunals who found that the post WWII standard could not be upheld were overly cautious, shunning for even exposing the standard of knowledge to the risk of being confused for a strict liability. However, it is understandable that the knowledge standard had to evolve so to require that information was available, there was no way around the language of Protocol I. The protocol is the only source that can be used to promote such a standard, the military manuals that has been cited in the jurisprudence could just as well be read as including a *duty to know* (implicitly). Thus, Protocol I is the only treaty to include an explicit demand for available information and there is nothing to support that there is a resistance amongst the community of states for a *should have known* standard, on the contrary the Rome Statute has seen a fair amount of state ratifications despite the lower *mens rea* threshold for military commanders.
So, the *had reason to know* standard is not preferable since the *should have known* standard better promotes the enforcement of international humanitarian law. Apart from this, there is a possibility to correct the labelling of a crime committed under the mode of command responsibility and find a proper standard of what kind of information that should have enabled a commander to know.

To begin with, it is wrong to label a commander as responsible for the crime of his or her subordinate. The connection to the crime of the subordinate is in most cases to distant, it may be that the connection under a *had reason to know* standard is a bit stronger due to the emphasis on the failure to punish and/or prevent. When failing to prevent there is a clear nexus between the commission and the commander's role since the crime would have not been committed, a failure to know includes one more link in the chain of events to get to that nexus. However, it is still wrong under a *had reason to know* standard to label the crime as e.g. murder. Hopefully the ICC will correct this and label command responsibility as the failure of a duty, as the court did in Hadžihasanović. Take BG Karpinski, the commander of a brigade, as an example. In her case the primary culprits were soldiers and non-commission officers at the company level, there were at least three levels and commanders[220] between her and the perpetrator. It does not make her any less culpable, she had the responsibility to ensure discipline, that she received proper reporting and to ensure to punish acts that she should have gained knowledge of. However, her crime is far apart from the heinous acts committed at the soldier level thus making it inappropriate to charge her under the label of those acts.

[220] At least a platoon commander, company commander, and a battalion commander stood between her and the perpetrator.

Moreover, a correction that should be made to improve the standard of imputed knowledge; the threshold of what amounts to alarming information must be changed. Under a *should have known* standard it will no longer be proper to impute knowledge on the basis of information that should have enabled the commander to pursue further inquiries if it means that a drunk and disorderly soldier is sufficient to say that a commander *should have known*. To exemplify, Sgt. Bales who was responsible for the massacre in Kandahar was supposedly drunk when he committed the deeds. Using the same threshold as for a *had reason to know* standard the prosecutor would only need to prove that a commander of his, *should have known* that he was drunk to be imputed with knowledge which would be unacceptable. The ICC should avoid making such an analogy and see the statement in Čelebići in context. The court found that a commander must have had information available hence, it would have been necessary to provide a low threshold of what kind of information that was sufficient. If a higher threshold had been chosen in the Čelebići judgment, imputed knowledge would have been similar to actual knowledge. Under a *should have known* standard that will not be an issue since the court can consider circumstances that a responsible commander should have known about but failed to acquire. Thus raising the threshold to a level where it might be said that the information that the commander should have had would have enabled him or her to conclude that a crime were about to or had been committed by a subordinate would be sensible.

If the thoughts above were to be applied on Sgt. Bales and the massacre in Kandahar, a superior of his would not be held responsible under a correct and sensible *should have known* standard differentiated by setting a different threshold than what constitutes alarming information under the *had reason to know* standard. The information that should have been available to a commander may have been that Sgt Bales was instable due to his earlier deployments and experiences in Iraq, which maybe should have raised concerns for Sgt Bales health, but not result in knowledge being imputed on any of his commanders. Nor would the circumstance that Sgt Bales was drunk when he committed the murders be accredited to a commander as knowing that a crime were about to be committed. These kinds of "freak" acts cannot be predicted by higher command without further indications that the soldier is planning to commit unlawful acts and it is reasonable that a commander is not made liable for such knowledge which could be the case under a *had reason to know* standard if the *obiter dictum* statement in Čelebići is applied.

Thus, if the *had reason to know* standard was applied to Sgt. Bales' superiors they may actually have been responsible for his acts. The possibility that his closest superior knew of his instability and that he drank is quite high on an enclosed military camp in Afghanistan; there is little privacy under those circumstances. To take the leap from having information about Sgt. Bales problems to be responsible for his crimes is a long leap and shows a deficit in the *had reason to know* standard. Hence, it

is important that this deficit is not transferred into a *should have known* standard.

As stated in at the top of this section, in comparing the standard of the Rome Statute and that of the *ad hoc* tribunals, the Rome Statute presents a more well-balanced solution. Although it is somewhat depending on if the ICC embraces the opportunity to raise the all to low threshold of what constitutes a culpable failure to deduce and decline to label the crime of a commander as the same crime committed by the primary commissioner.

Having reached the end state of this thesis I would like to, somewhat *obiter dictum* present an alternative way of looking upon the command responsibility doctrine. The statutes of the *ad hoc* courts as well as the Rome Statute has been around for a while and the development of law never ceases to progress both for better and worse. With the inclusion of command responsibility in the Rome Statute nations had to adapt domestic law to it and so did Germany. The German *Act to Introduce the Code of Crimes against International Law* includes the command responsibility doctrine and the rules governing it is separated into three sections or articles[221]:

Part 1 General Provisions

Section 4
Responsibility of military commanders and other superiors

(1) A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the same way as a perpetrator of the offence committed by the subordinate […].

Chapter 3
Other Crimes

Section 13
Violation of the duty of supervision

(1) A military commander who intentionally or negligently omits properly to supervise a subordinate under his or her command or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the commander and he or she could have prevented it.

Section 14
Omission to report a crime
A military commander or a civilian superior who omits immediately to draw the attention of the agency responsible for the investigation or prosecution of any offence pursuant to this Act, to such an offence committed by a subordinate, shall be punished with imprisonment for not more than five years.

This German construction of command responsibility is quite intriguing because section 4 provides that the *failure to prevent or punish* amounts to liability in direct connection with the subordinates crime much like the provisions of the ICTY/R and Rome Statute. The *failure to supervise* (there

[221] *German Act to Introduce the Code of Crimes against International Law*, Berlin, 2002 (English translation by Brian Duffett) URL; http://www.unhcr.org/refworld/country,,NATLEGBOD,,DEU,,4374af404,0.html Last checked on 2 August 2012.

is a duty to know in the German Code of Crimes against International Law) and the *failure to report* constitutes separate offences and not a mode of liability in connection with the commission by the principal.[222] A very tasteful solution that allows for all culpable aspects that infringes on responsible command to be prosecuted but with a differentiation of the acts making the instrument less blunt than a *should have known* standard.

How the future of command responsibility will unravel is most intriguing since the ICC merely has begun to touch the concept and there is domestic law that further innovates it. However command responsibility evolves a broader interpretation of the knowledge criterion to include failures of acquiring information and a duty to know is desirable.

[222] E. van Sliedregt, *Article 28 of The Icc Statute: Mode of Liability and/or Separate Offense?,* New Criminal Law Review Vol 12, no. 3, (Summer 2009) p. 427-429

Bibliography

Books

Mettraux, Guénaël	*The Law of Command Responsibility*, Oxford University Press, Oxford, (2009).
Peczenik, Aleksander	*On Law And Reason*, Springer Science + Business Media B.V., Lund, (2009).
Peczenik, Aleksander	*Methods of Legal Reasoning; A Treatise of Legal Philosophy and General Jurisprudence Vol. 4*, Springer, Dordrecht, (2006).
Dixon, Martin	*International Law*, 6th edn., Oxford University Press, Cambridge (2007).
Cassese, Antonio	*International Criminal Law*, 2nd edn., Oxford University Press, Oxford, (2008).
Werle, Gerhard	*Principles of International Law*, 2nd edn., TMC Asser Press, the Hague, (2009).
Morris, Virginia, Scharf, P. Michael	*An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis Vol I*, Transnational Publishers, New York, (1995).
Morris, Virginia, Scharf, P. Michael	*An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis Vol II*, Transnational Publishers, New York, (1995).
Morris, Virginia, Scharf, P. Michael	*The International Criminal Tribunal for Rwanda Vol I*, Transnational Publishers Inc., New York, (1998).

Morris, Virginia, Scharf, P. Michael — *The International Criminal Tribunal for Rwanda Vol II*, Transnational Publishers Inc., New York, (1998).

Schabas, William A. — *The International Criminal Court: a commentary on the Rome Statute*, Oxford University Press, Oxford, (2010).

UN War Crimes Commission — *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission*, Volumes I-V (IV), William S. Hein & Co., Inc. Buffalo, New York, (1997).

UN War Crimes Commission — *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission*, Vol. VIII, His Majesty's Stationery Office, London, (1949).

UN War Crimes Commission — *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission*, Vol. XII, His Majesty's Stationery Office, London, (1949).

Sandoz Yves, Swinarski Christophe, Zimmermann Bruno (Editors) — *ICRC Commentary on the Additional Protocols I and II of 8 June 1977*, (1987), collected from http://www.icrc.org/ihl.nsf/CONVPRES?OpenView, 2012-08-01.

Kittichaisaree, Kriangsak — *International Criminal Law*, Oxford University Press, Oxford (2001).

UN Documents

Security Council Resolution — UN Security Council Resolution, *S/RES/827* (1993) 25 May 1993.

Security Council Resolution — UN Security Council Resolution, *S/RES/955* (1994) 8 November 994.

Official Records — *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome*, 15 June - 1 7 July 1998 Official Records Volume II UN Doc. A/CONF.183/13 (Vol.11).

Articles

Green, Leslie C. — *Command Responsibility in International Humanitarian Law*, Journal of Transnational Law & Contemporary Problems, Vol. 5, Issue 2, University of Iowa, (Fall 1995).

Parks, William H. — *Command Responsibility for War Crimes*, Military Law Review, Vol. 62, United States; Judge Advocate General's School, (1973).

Bantekas, Ilias — *The Contemporary Law of Superior Responsibility*, American Journal of International Law, Vol. 93, Issue 3, American Society of International Law, (July 1999).

Landrum, Bruce D. — *Yamashita War Crimes Trial: Command Responsibility Then and Now*, Military Law Review, Vol. 149, United States; Judge Advocate General's School, (1995).

Smidt, Michael — *Yamashita, Medina, and beyond: Command Responsibility in Contemporary Military Operations*, Military Law Review, Vol. 164, United States; Judge Advocate General's School, (2000).

Bing Bing, Jia — *The Doctrine of Command Responsibility Revisited*, Chinese Journal of International Law, Vol. 3, Issue 1, Beijing, China, (2004).

Galson, Victor	*Constructive Knowledge Standard of Command Responsibility,* the Dartmouth Law Journal, Vol. 7, Issue 3 (2009).
Schabas, William A.	*Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, New England Law Review, Vol. 37, Issue 4 New England School of Law, (2002-2003).
Damaška, Mirjan	*Shadow Side of Command Responsibility*, American Journal of Comparative Law, Vol. 49, Issue 3 (Summer 2001).
Stryszak, Michal	*Command Responsibility: How Much Should a Commander be Expected to Know?,* Journal of Legal Studies (United States Air Force Academy), Vol. 11 (2002).
Ching, Ann B.	*Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia,* North Carolina Journal of International Law and Commercial Regulation, Vol. 25, Issue 1 (Fall 1999).
Bonafé, Beatrice I.	*Command Responsibility between Personal Culpability and Objective Liability: Finding a Proper Role for Command Responsibility,* Journal of International Criminal Justice, Vol. 5, Issue 3 (July 2007).
Greenwood, Christopher	*Command Responsibility and the Hadžihasanović Decision*, Journal of International Criminal Justice, Vol. 2, Issue 2 (June 2004).
Langston, Emily	*Superior Responsibility Doctrine in International Law: Historical Continuities, Innovation and Criminality: Can East Timor's*

Special Panels Bring Militia Leaders to Justice, International Criminal Law Review, Vol. 4, Issue 2, The Netherlands (2004).

Trechsel, Stefan — *Command Responsibility as a Separate Offense*, Publicist, Vol. 3, Issue 1 (2009).

Nersessian, David L. — *Whoops, I Committed Genocide - The Anomaly of Constructive Liability for Serious International Crimes*, Fletcher Forum of World Affairs, Vol. 30, Issue 2 (Summer 2006).

van Sliedregt, Elies — *Article 28 of The Icc Statute: Mode of Liability and/or Separate Offense?*, New Criminal Law Review Vol 12, no. 3, (Summer 2009).

Reports

US Army Investigation Report — Article 15-6 Investigation of the 800th Military Police Brigade, US Army (2005)

Report of the UN Secretary-General — *Report of the Secretary-General* Pursuant to Paragraph 2 of Security Resolution 808 (1993) S/25704, 3 May 1993 and Corrigendum S/25704/Corr. 1, 30 July

Report of the Commission of Experts — *Final Report of the Commission of Experts* established pursuant to Security Council Resolution 935 (1994), para. 172-174

Report of the Commission of Experts — *Final Report of the Commission of Experts*, Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674

Report of the ILC — *Report of the International Law Commission on the work of its fortieth session*, 9 May - 29 July 1988, Official Records of the General Assembly, Forty-third

session, Supplement No. 10, A/43/10 p. 71

Philbin, Patrick (US Attorney General) *Memorandum for Alberto R. Gonzales, Counsel To The President, Office of the Deputy Assistant Attorney General,* 2001. Found at URL: http://www.fas.org/irp/agency/doj/olc/commissions.pdf, Last checked 5 August 2012.

Websites

The Washington Post *General information on BG Janis Karpinski,* URL; http://www.washingtonpost.com/wp-dyn/articles/A13114-2004May9.html, Last checked on 9 August 2012.

The Telegraph *General information on Sgt. Bales and the Kandahar Massacre, URL;* http://www.telegraph.co.uk/news/worldnews/northamerica/usa/9150641/Sgt-Robert-Bales-The-story-of-the-soldier-accused-of-murdering-16-Afghan-villagers.html#, Last checked on 2 August 2012.

BBC *General information on Sgt. Bales and the Kandahar Massacre, URL;*http://www.bbc.co.uk/news/world-us-canada-17484186, Last checked on 2 August 2012.

ICRC *Excerpt from the ICRC's Mission Statement* http://www.icrc.org/eng/who-we-are/mandate/overview-icrc-mandate-mission.htm, Last checked on 5 August 2012.

Treaties

The Vienna Convention *Vienna Convention on the Law of Treaties*, (1969).

Rome Statute	*Rome Statute of the International Criminal Court*, (1998).
ICTY Statute	*Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, (2009).
ICTR Statute	*Statute of the International Criminal Tribunal for Rwanda*, (2009).
SCSL Statute	*Statute of the Special Court for Sierra Leone* (2002).
Geneva Convention, 1929	*Geneva Convention relative to the Treatment of Prisoners of War*. Geneva, 27 July 1929.
Geneva Convention, 1929	*Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.* Geneva, 27 July 1929.
Hague Regulations	*Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Land and Customs of War on Land*, The Hague, 18 October 1907.
X Hague Convention	*Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention*, The Hague, 18 October 1907.
II Hague Regulations	*Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 29 July 1899.
Protocol I	*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977.

Protocol II	*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977.

National Legislation

Swedish Penal Code	SFS 1962:70
German Penal Act	*Act to Introduce the Code of Crimes against International Law*, Berlin, 2002 (translation by Brian Duffett) URL; http://www.unhcr.org/refworld/country,,NATLEGBOD,,DEU,,4374af404,0.html, Last checked on 2 August 2012.

Table of Cases

Post WWII Cases

Yamashita, Tomoyuki	Yamashita, No 61, Misc., Supreme Court of the United States, 317 U.S. 1; 66 S. 340, 4 February 1946 (1946 U.S. LEXIS 3090 ; 90 L. Ed. 499) (Yamashita v Styer, Supreme Court, 4 February 1946).
Von Leeb, Wilhelm et al.	Case no. 72 The German High Command Trial: *Trial of Wilhelm Von Leeb and Thirteen others*, United States Military Tribunal, Nuremberg, 30th December, 1947 - 28th October, 1948

International Criminal Tribunal for the former Yugoslavia

Aleksovski, Zlatko	*Prosecutor v Aleksovski*, Case No IT-95-14/1-T "Trial Judgment" 25 June 1999.
Blaškić, Tihomir	*Prosecutor v Blaškić*, Case No IT-95-14-T "Trial Judgment" 3 Mar. 2000.
	Prosecutor v Blaškić, Case No IT-95-14-A "Appeals Judgment" 29 July 2004.
Boškoski Ljube, Tarčulovski Johan	*Prosecutor v Boškoski and Tarčulovski*, Case No IT-04-82-T "Trial Judgment" 10 July 2008.
Furundžija, Anto	*Prosecutor v Furundžija,* Case No IT-95-17/1-T "Trial Judgment" 10 Dec. 1998.
Hadžihasanović Enver, Kubura Amir	*Prosecutor v Hadžihasanović and Kubura*, Case No IT-01-47-T "Trial Judgment" 15 March 2006.
	Prosecutor v Hadžihasanović and Kubura, Case No IT-01-47-A

	"Appeals Judgment" 22 April 2008.
	Prosecutor v Hadžihasanović and Kubura, Case No. IT-01-47-AR72, "Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility.
Halilović, Sefer	*Prosecutor v Halilović*, Case No IT-01-48-T "Trial Judgment" 16 Nov. 2005.
Kordić Dari,Čerkez Mario	*Prosecutor v Kordić and Čerkez (a.k.a. the 'Lašva Valley' Case)* Case No IT-95-14/2-T "Trial Judgment" 26 Feb. 2001.
Krnojelac, Milorad	*Prosecutor v Krnojelac,* Case No IT-97-25-T "Trial Judgment" 15 March 2002.
	Prosecutor v Krnojelac, Case No IT-97-25-A "Appeals Judgment" 17 Sept. 2003.
Mucić, Zdravko et al.	*Prosecutor v Mucić et al.* Case No IT-96-21-T "Trial Judgment" 16 November 1998, (a.k.a. the Čelebići case).
	Prosecutor v Mucić et al. Case No IT-96-21-A "Appeals Judgment" 20 February 2001.
Naletilić Mladen, Martinović Vinko	*Prosecutor v Naletilić and Martinović (a.k.a. Tuta and Štela*), Case No IT-98-34-T "Trial Judgment" 31 March 2003.
	Prosecutor v Naletilić and Martinović, Case No IT-98-34-A "Appeals Judgment" 3 May 2006.
Orić, Naser	*Prosecutor v Orić,* Case No IT-03-68-T "Trial Judgment" 30 June 2006.

	Prosecutor v Orić, Case No IT-03-68-A "Appeals Judgment" 3 July 2008.
Perišić, Momčilo	*Prosecutor v Perišić,* Case No IT-04-81-T "Trial Judgment" 6 Sept. 2011.
Strugar, Pavle	*Prosecutor v Strugar,* Case No IT-01-42-T "Trial Judgment" 31 Jan. 2005.
	Prosecutor v Strugar, Case No IT-01-42-A "Appeals Judgment" 17 July 2008.
Tadić, Duško	*Prosecutor v Tadić* Case No IT-94-1-T "Trial Judgment" 7 May 1997

International Criminal Tribunal for Rwanda

Akayesu, Jean-Paul	*Prosecutor v Akayesu, Case* No ICTR-96-4-T "Trial Judgment" 2 Sept. 1998.
Bagilishema, Ignace	*Prosecutor v Bagilishema,* Case No ICTR-95-1A-T "Trial Judgment" 7 June 2001.
	Prosecutor v Bagilishema, Case No ICTR-951A-A "Appeals Judgment" 3 July 2002.
Kajelijeli, Juvénal	*Prosecutor v Kajelijeli,* Case No ICTR-98-44A-T "Trial Judgment" 1 Dec 2003.
Kamuhanda, Jean de Dieu	*Prosecutor v Kamuhanda,* Case No ICTR-95-54A-T "Trial Judgment" 22 Jan 2004.

International Criminal Court

Bemba Gomba, Jean-Pierre	*Prosecutor v Jean-Pierre Bemba Gomba,* Case No ICC-01/05-01/08 "Pre-trial decision" (pursuant to art.

	61(7)(a) and (b) of the Rome Statute), 15 June 2009. *Amicus Curiae observations on superior responsibility submitted pursuant to rule 103 of the rules of procedure and evidence*, Case No *ICC-01/05-01/08,* 20 Apr 2009 (Amicus Curiae - someone not a party to the case which offers its opinion) submitted by Amnesty International.

Special Court for Sierra Leone

Brima, Alex Tamba et al.	*Prosecutor v Brima et al.* Case No SCSL-04-16-T "Trial Judgment" 20 June 2007

Other

Medina, Ernest	United States v. Medina, C.M. 427162 (1971).