

**Consistency of the Interpretation and
Implementation of Command Responsibility and its
Components in International Criminal Law**

by

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Abstract

This thesis is designed to dissect the interpretations and implementation of 'command responsibility' in international criminal law. It closely examines the development of command responsibility as a norm under international criminal law. It then scrutinises the consistency of interpreting and implementing this doctrine under the current jurisprudence and case-law of various international criminal courts and tribunals.

Unlike other forms of criminal responsibility, command responsibility was developed through judges' interpretations following the post-Second World War trials, which formed the customary nature of this doctrine. In these trials, judges established the unique nature and requirements of command responsibility and then it was successfully implemented as a *sui generis* form of liability. Recently, however, this doctrine was vaguely codified under various international statutes, without taking into account its unique creation and development. This resulted eventually in the current inconsistent application of command responsibility under international criminal law. This is primarily because of the recent deviation from its customary nature. Such inconsistency raises therefore two questions: (a) whether the current interpretation and implementation of command responsibility be accurate; and (b) whether this has had an impact on its effectiveness as a form of individual criminal responsibility in international criminal law.

This thesis argues that the current interpretations and implementation of command responsibility are inconsistent with its purpose of creation in international criminal law. It therefore analyses the precise nature of command responsibility. It then scrutinises the reasons for, and the impact of, the current controversial and inconsistent implementation of command responsibility by various international criminal courts and tribunals. This thesis examines the extent of such inconsistency and its impact on this doctrine's future in international criminal law and concludes with a new prospective direction.

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While acknowledging these contributions, I hereby declare that the work is my own.

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❖ Introduction

In international criminal law (ICL), an accused person might be found liable for international crimes in one of two forms: direct or indirect (responsibility).¹ The direct responsibility may stem from active conduct of the accused in relation to the crime committed; whereas the indirect liability results from passive conduct with regard to the underlying crime. Pursuant to the direct responsibility, “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in planning, preparation or execution of a crime ... shall be individually responsible for the [international] crime”.² Through indirect liability, individuals may also be held responsible for international crimes. This responsibility results, however, from their passive conduct; more precisely as a result of their failure to prevent the commission of crimes. Command responsibility (CR) is the only statutory form of indirect responsibility (by liability for omission) in ICL.³

The nature and requirements of direct responsibility are consistently interpreted and implemented by international criminal courts and tribunals.⁴ This consistency is primarily attributable to the fact that, through direct responsibility, the accused is responsible for his active participation in the crime committed. This responsibility was consistently endorsed under various national criminal law systems prior to the incorporation into ICL.⁵ Judges at international criminal courts, therefore, confront no difficulties in interpreting the nature and requirements of the direct responsibility.⁶

Unlike forms of direct liability, CR was not derived from national law systems. This is primarily because CR has been created under international law

¹ Allison M Danner and Jenny S Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’ (2005) 93 Cal. L. Rev. 75, 120.

² ICTY, ICTR & SCSL Statutes, Arts. 7 (1), 6 (1) & 6 (1) respectively. These forms were also stated in Art. 25 of the ICC Statute.

³ Elies van Sliedregt, *Individual criminal responsibility in international criminal law* (OUP 2012) 54.

⁴ Robert Cryer, *Prosecuting International Crimes* (CUP 2005) 311-312.

⁵ Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2 edn., CUP 2010) 361.

⁶ There is debate about the standard of *mens rea* of some direct forms; nonetheless, its nature is clear and consistently implemented in ICL. Cf. Sabine Michalowski, ‘The *Mens Rea* Standard for Corporate Aiding and Abetting Liability – Conclusions from International Criminal Law’ (2014) 18 UCLA J. Int’l L. Foreign Aff. 237, 254-7.

and, as a result, has no equivalent in domestic law.⁷ This could be attributed to its complex nature.⁸ In fact, CR was created and developed by international case-law following the Second World War. Nonetheless, CR was not considered in a number of international conventions that were expected to codify this doctrine. In other words, its having no root in national criminal law traditions had an impact on drafters, which could account for the delayed codification.

Under CR, superiors may be held responsible for crimes committed by their subordinates as a result of the superiors' failure to act.⁹ Establishing a superior's culpability pursuant to the doctrine of CR "depends on an affirmative duty on the part of the superior, whereby an omission may constitute the *actus reus* of the crime".¹⁰ The accused commander becomes, therefore, liable pursuant to this doctrine for the result of his failure to act or to comply with international laws to prevent the illegal act or *punish offenders*¹¹ who committed the crime under his command.¹² This is applicable only when the required *mens rea* was proved.

CR is one of the most controversial principles in ICL because of its unique and complex nature.¹³ The controversy is primarily because of the nature of liability under CR, which renders commanders responsible for crimes committed by their subordinates. The commander is responsible for his subordinates' crimes not because of his action of direct participation, rather as a result of his failure to act.¹⁴ The duty to act in international law obliged commanders – particularly those in superior positions – to take all reasonable measures to control and command their troops. Consequently, commanders are obliged to prevent their subordinates from committing crimes against international law.¹⁵

⁷ Chantal Meloni, *Command Responsibility in International Criminal Law* (T.M.C. Asser Press 2010) 247.

⁸ Ilias Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 Am. J. Int'l L. 573, 574.

⁹ Guénaél Mettraux, *The Law of Command Responsibility* (OUP 2009) 270-1.

¹⁰ Timothy Wu and Young-Sung Kang, 'Criminal Liability for the Actions of Subordinates: The Doctrine of Command Responsibility and its Analogue in United States Law' (1997) 38 Harv. Int'l. L. J. 272, 290.

¹¹ This failure to punish is problematic. Chapter 5 (n. 97) *et seq.*

¹² Kai Ambos, 'Superior responsibility' in Antonio Cassese and others (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 806.

¹³ N Karsten, 'Distinguishing Military and Non-military Superiors: Reflections on the Bemba Case at the ICC' (2009) 7 J. Int'l Crim. Just. 983.

¹⁴ Judge Bakone Justice Moloto, 'Command Responsibility in International Criminal Tribunals' (2009) *Publicist* 12, 12-3.

¹⁵ Additional Protocol to the Geneva Conventions of 12 August 1949, and Related to the Protection of Victims of International Armed Conflicts, 8 June 1977 [API hereafter], Art. 87.

Interestingly, the formulation of various provisions of CR seems to be vaguely drafted; thus, the nature of CR was not adequately declared. As a result, CR was poorly codified under various international statutes. The first codification of CR was under the Additional Protocol of 1977 to the Geneva Convention (API);¹⁶ which was ambiguously formulated. For example, Art. 86 (2) of the API concerning CR stated that: “[t]he fact that [a crime]... was committed by a subordinate does not absolve his superiors from” responsibility. The question then arises whether the responsibility is for his omission (dereliction of duty) or for the crime resulting from his omission (the underlying crime).

On the one hand, the *ad hoc* tribunals - ICTY, ICTR and SCSL - had, under their Statutes, identical provisions concerning CR, which were based on this already vague codification by the API. The *ad hoc* tribunals, in order to clarify the nature and requirements of CR, resorted therefore to the principle of interpretation. The process of interpretation, however, seems to have resulted eventually in more vagueness and greater inconsistency. On the other hand, the Rome Statute specified a more precise formulation of CR.¹⁷ Judges at the *ad hoc* tribunals frequently attempted to articulate the precise nature and requirements of this doctrine. The *ad hoc* tribunals’ interpretation of CR resulted, however, in its inconsistent implementation.

The nature of CR was, accordingly, re-characterised and inconsistently implemented. The ICTY, for example, in some cases interpreted CR as a crime *per se*; whereas in other cases it was implemented as a separate form of liability. Other *ad hoc* tribunals, however, lacked the required clarity and certainty in their application of the nature of responsibility under this doctrine. Because of their failure to clarify this nature, the implementation of the requirements of CR was particularly inconsistent at these *ad hoc* tribunals.¹⁸

¹⁶ Matthew Lippman, 'The Evolution and Scope of Command Responsibility' (2000) 13 LJIL 139, 158; see also API of 1977, Art. 86 (2).

¹⁷ Although the nature of CR is precisely stated under Art. 28 of the ICC’s Statute, there is uncertainty in the literature as to its precise nature. See for example, William A Schabas, *An Introduction to the International Criminal Court* (4th edn., CUP 2012) 233; also Cf. Alejandro Kiss, 'Command Responsibility under Article 28 of the Rome Statute' in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015) 609-610.

¹⁸ For instance, the issue of “effective control” and constructive knowledge. V Hategekimana, *Command Responsibility and the International Criminal Court* (VDM, UK 2009) 14-22.

International criminal courts and tribunals were created to prosecute and punish individuals *for crimes* committed under international law.¹⁹ However, due to the inadequate interpretation of the nature of this doctrine of CR, some courts seem to have punished commanders for their dereliction of duty alone (CR as a crime *per se*). This means that the actual crime went unpunished, as CR replaced the underlying crime. Such practice is contrary to the true purpose of creating CR as a form of liability in ICL.²⁰ Most importantly, implementing CR *per se* as a crime might be in violation of various statutes of these international tribunals and their applicable laws.²¹

The inconsistent implementation of CR has attracted the attention of scholars, questioning the nature of this doctrine as a criminal theory.²² The controversy at the recent case-law as well as in the literature evolved mainly from misunderstanding of the precise nature of responsibility. The question is, therefore, for what should an accused commander be blamed and prosecuted: his omission or the result of his omission?²³ Such controversy is argued in this thesis to have resulted from the failure to specify the components from which the precise nature of this doctrine could be formulated.

These components – which can be deduced from the historical development of CR - are: (a) ‘military values’; (b) ‘customary rules’; and (c) ‘criminal responsibility’. These are regarded - in this thesis – as the distinctive components that, together, constitute the nature of CR.²⁴ Recognising these components would

¹⁹ See preambles of international criminal courts’ and tribunals’ statutes, such as that of the ICC. See also, ICTY Art.1, ICTR Art. 1 and SCSL Art. 1.

²⁰ Chantal Meloni, ‘Command Responsibility, Joint Commission and ‘Control over the Crime’ Approach in the First ICC Jurisprudence’ in Triestino Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity* (Routledge 2015) 43-44.

²¹ The *ad hoc* tribunals have adopted a broad method of expanding the laws, whereas the ICC has implemented a more cautious approach. F O Raimondo, ‘General Principles of law, Judicial Creativity, and the Development of International Criminal Law’ in S. Darcy and J. Powderly (eds.), *Judicial creativity at international criminal tribunals* (OUP 2010) 54, 57 & 59.

²² Cf. Elies van Sliedregt, ‘Command Responsibility at the ICTY – Three Generations of Case-law and still Ambiguity’ in Bert Swart *et al.*, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 388; also D Robinson, How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution’ (2012) 13 *Melb. J. Int’l L.* 1; see also J. G. Stewart, The end of “modes of liability” for international crimes (2012) 25 *LJIL* 165.

²³ See Volker Nerlich; Elies van Sliedregt; Scott James Meyer; and Christine Bishai. Chapter 3 (n 98).

²⁴ Some scholars considered the nature of CR to be a mixture of ICL and IHL. They argued that CR became controversial because the IHL was not recognised as part of its nature in the case-law. Although this could be related to the current problem, this thesis goes beyond this aspect, to discuss the actual reason for the inconsistent interpretation and implementation. Cf. Rogier Bartels, ‘Discrepancies Between International Humanitarian Law on the Battlefield and in the Courtroom: The Challenges of Applying International Humanitarian Law During International Criminal Trials’ in Marielle Matthee and others (eds.), *Armed Conflict and International Law: In Search of the*

resolve the controversy surrounding the codification of the nature of responsibility under CR. Recognising the precise nature of CR can, subsequently, resolve the inconsistent interpretation²⁵ and implementation of this doctrine. Consistency and compatibility in interpreting and implementing CR are significant for this doctrine's future as an operative form of liability. Several writers have recently proposed expanding the scope and application of CR.²⁶ However, this problem of inconsistency seems to have impacted on the effectiveness of the current implementation and would inevitably affect any potential expansion in the future, unless such inconsistency were resolved.

1. The purpose:-

The main purpose of this thesis is to examine the precise nature of CR, and dissect the reasons for, and the impact of, the inconsistent interpretation and implementation of CR in ICL.

In doing so, this thesis analyses the historical creation of this principle for articulating the precise nature of this doctrine. It then discusses the early implications of the nature of CR. It goes on to examine the accuracy of the interpretation process and to scrutinise the doctrine's recently inconsistent implementation. These discussions are significant to illustrate the extent of the re-characterising of CR.

It analyses, thereafter, the inconsistency of the interpretation method employed by judges at the *ad hoc* tribunals. It then examines the impact of the inconsistent interpretation on the requirements of CR and the potential violation of an accused person's rights. In conclusion, it highlights the reasons which have

Human Face (T.M.C. Asser Press 2013) 339 *et seq*; ; see also Ilias Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law' (2006) 6 *Int'l Crim. L. Rev.* 121, 131-133.

²⁵ Robert Cryer, 'The Boundaries of Liability in International Criminal Law, or "Selectivity by Stealth"' (2001) 6 *J. Conflict & Sec. L.* 3, 28-9.

²⁶ J Fussnecker, 'The Effects of International Human Rights Law on the Legal Interoperability of Multinational Military Operations' (2014) 2014 5 *Army Law.* 7, 7-20; see also Jody Prescott, 'The Law of Armed Conflict and the Responsible Cyber Commander' (2013-2014) 38 *Vt. L. Rev.* 103; see also Markus Wagner, 'The Dehumanization of International Humanitarian Law: Legal, Ethical, and Political Implications of Autonomous Weapon Systems' (2014) 47 *Vand. J. Transnat'l L.* 1371, 1407-8; see also Jasna Hasanbasic, 'Liability in Peacekeeping Missions: A Civil Cause of Action for the Mothers of Srebrenica Against The Dutch Government and The United Nations' (2015) 29 *Emory Int'l L. Rev.* 415, 446-7.

exacerbated this problem of inconsistency, followed by a prospective view to resolve this issue.

2. The Methodology:-

For the purpose of this study, three types of methodology will be adopted to accomplish the objectives mentioned above. First, a doctrinal method is mainly followed, which aims to examine the legal theories and implications of CR as well as to analyse the case-law. This methodology is significant for considering varying international tribunals' interpretations of CR; and then articulating the controversial issues accordingly.

Secondly, a comparative method is adopted, where relevant, for comparing and contrasting the different approaches to interpreting and implementing CR. The importance of this method is fundamentally to scrutinise the legal implications and to examine the legitimacy and extent of the inconsistency. Overall, a theoretical method is followed, to shape the main arguments and articulate the proposed solutions.

3. The structure:-

This thesis is divided into three main parts. Part I analyses the evolution and development of the three elements of the precise nature of CR. This part consists of three chapters. Chapter 1 examines the origins of CR, to analyse the establishment of this doctrine and to determine its precise nature. Chapter 2 discusses the implementation of CR as a mode of criminal responsibility. This Chapter evaluates also the impact of the components of the precise nature of CR during its early implementation. Chapter 3 examines the codifications of CR under various international statutes, and discusses the extent of the inconsistency in implementing CR.

Part II examines the legitimacy/accuracy of the interpretation process of CR and the impact of its inconsistent implementation at the *ad hoc* tribunals. This part is divided into three chapters. Chapter 4 examines the process of interpreting

the nature of CR. Chapter 5 discusses the impact of this interpretation on the requirements of CR. Chapter 6 examines the consequent impact of such inconsistency on the rights of the accused.

Part III discusses the future of CR as an operative form of criminal responsibility under ICL. Chapter 7 highlights, therefore, the key issues behind the inconsistency, in both the case-law and the literature. It then proposes a prospective view that may well resolve problems when interpreting CR. This is followed by the concluding remarks of this thesis.

Part I

The Evolution of Command Responsibility

It is argued, generally, that CR is an international law standard created by judges during the judgments after the Second World War. It is almost impossible, however, to understand where judges would find the nature of CR, if not found in national law systems. In fact, it is generally acknowledged however that CR evolved conceptually from the military context.

Therefore, this part examines, first, the establishment of CR in military laws and codes before its incorporation into ICL. This part dissects the components of the nature of CR, through analysing the developments of these components historically. Accordingly, it examines (a) the 'values' component, that reflects the military values where this doctrine originated; (b) the 'custom' element, which declares the customary law in which the doctrine was recognised to be an international principle under IHL; and (c) the 'criminal responsibility' component, that expresses the criminal theory from which CR was crystallised as a mode of individual criminal responsibility in ICL. Military values examined in this study are only those of individuals in command position (commanders).

This Part consists of three chapters. Chapter One examines the genesis of the unique nature of this doctrine. It analyses the precise nature of CR through examining its historical development. Chapter Two examines the successful implementation of CR during precedents set after WWII. Chapters One and Two, together, aim to verify and vindicate the precise nature of CR. Chapter Three illustrates various codifications of CR as a mode of individual criminal responsibility under ICL. It analyses the recent judicial implementations of the codified nature of CR, to examine whether various international criminal courts interpreted and implemented CR consistently with its precise nature.

However, it is beyond the scope of this study to examine all policies that might be of some relevance to CR. Therefore, only the most relevant precedents and legislation are discussed.

I. Chapter One

The genesis of command responsibility: the concept, nature and origins

Command responsibility (CR) in international criminal law (ICL) is a mode of liability that was created to hold a commander responsible for the commission of crimes by his subordinates as a result of his failure to prevent them. Theoretically, CR is a liability for an omission (responsibility for the failure to discharge a duty) whereby individuals in superior positions might be liable for the result(s) of their failure. Nevertheless, confusion can (and did) occur between the role of a duty and criminal liability for omission regarding CR. It is significant to examine its historical applications and illustrate the components of the nature of liability under CR.

Chapter One aims to reveal the “roots” of these components and to examine more precisely their developments and relevance to its contemporary nature and requirements. It argues that CR has a hybrid nature as a result of its unique establishment and development, rather than that of a creation in international law alone¹. It therefore discusses that CR existed as a military concept – forming the ‘military values’ element - before being recognised as a rule under the laws and customs of war – forming the ‘customary rule’ element. CR was, thereafter, developed to be a separate form of individual criminal responsibility – forming the ‘criminal responsibility’ element – in ICL.

This chapter is accordingly divided into four parts. First, it discusses the philosophical background to the first element from which the nature of CR derived. Secondly, it illustrates the evolution of the ‘values element’ in conjunction with the nature of CR through ancient military regulations. Thirdly, it examines the developments of this unique element to form the second component, the ‘customary rule element’, and its relation to the first element. Finally, it analyses early attempts to constitute the third component, ‘the criminal responsibility’, for the purpose of implementing CR as a mode of criminal liability.

¹ Cf. Guénaél Mettraux, *The Law of Command Responsibility* (OUP 2009) 43.

1. The concept:

A) An overview of the nature:-

The doctrine is constructed from distinctive requirements regarding *actus reus* and *mens rea* elements;² but these requirements may share similar characteristics with other types of individual criminal responsibility that could result in misunderstanding of the actual concept.³ Generally, under CR individuals in superior positions may be found responsible for crimes under international law committed by their subordinates as a result of the failure to control these subordinates if: the superior knew or should have known; and failed to prevent or repress the commission of such crimes.⁴

CR is, therefore, a distinguished form that differs from other forms of liability, being the only form of indirect liability for omission (failure to act). Although recent judgments included the direct responsibility forms to be a potential basis of liability for omission under CR.⁵ This doctrine remains, however, the only pre-existent customary norm of the liability for omission under international law.⁶ Therefore, CR when referred historically to as a form of accomplice liability for failure to act, this was most probably as a result of the nature of military laws and values of commanders only, as examined below.

The contemporary CR is regarded accordingly a distinctive mode of responsibility under ICL. It was argued however that CR is a form of strict liability, particularly its first implementation at the *Yamashita* Trial.⁷ However, a person “is guilty of a strict liability offence if by a voluntary act he or she causes the prohibited result or state of affairs. There is no need to prove that the defendant had a particular state of mind”.⁸ In other words, an accused person under strict

² For the *actus reus* and *mens rea* requirements, see Chapter 5.

³ Mettraux (n 1) 39.

⁴ Rome Statute, Art. 28.

⁵ This was through broadening the concept of ‘crimes’ commission’ by subordinates. *Prosecutor v. Blagojević et al.*, TC, IT-02-60-T, 17 January 2005, para 788; also *Prosecutor v. Naser Orić* TC Judgment, IT-03-68-T, 30 June 2006, paras 299-300; see also for the criticism of this broad interpretation; see E Sliedregt, ‘The Curious Case of International Criminal Liability’ (2012) 10 J. Int’l Crim. Just. 1171, 1181-1182.

⁶ Gideon Boas, ‘Omission Liability at the International Criminal Tribunals – A Case for Reform’ in Shane Darcy and Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) 207.

⁷ Cf. Theodor Meron, *War Crimes Law Comes of Age* (OUP 1998) 85; also Cf. Matthew Lippman, ‘Humanitarian Law: the Uncertain Contours of Command Responsibility’ (2001-2002) 9 Tulsa J. Comp. & Int’l L. 1, 14. Cf. Chapter 2 (n 9).

⁸ Jonathan Herring, *Criminal Law: Text, Cases, and Materials* (6th edn, OUP 2014) 213.

liability is punished for harm resulting “without proof of intent, knowledge, recklessness, or negligence”.⁹

Strict liability is, therefore, a problematic mode of criminal liability, as an accused may be held responsible merely because the harm occurred. Command responsibility generated controversial debates about its nature as it was confused with other modes of liability, although it is the only type of liability for omission which exists explicitly under ICL.¹⁰ In this, CR is similar to strict liability, as both punish for the resultant harm, but CR requires a degree of knowledge with regard to the resultant harm. Nevertheless, controversy also emerged between scholars in defining the distinctive root and nature of CR.¹¹ Accordingly, it is important to distinguish the elements from which the nature of CR was – and should be always – regarded a distinctive mode of liability.

B) The *sui generis* nature of CR:-

The true *sui generis* nature of CR, as proposed in this thesis, consists of three legal components: values, customary and criminal elements. Only when these three elements existed simultaneously could CR be acknowledged then implemented. Initially, CR evolved only in a military context.¹² Military society is recognised as distinctive, governed by the values of its unique ethics, training, discipline and laws.¹³ Military values examined in this study are concerned with those of individuals in command position (commanders).

These military values –also known as military society’s: moral values, norms, principles, rules or laws, which are related directly to the military discipline - were the “gist” of applying CR at the *Yamashita* trial as well as the Nuremburg and Tokyo Tribunals. The *re Yamashita* case relied particularly on these values mainly duty, responsibility and leadership.¹⁴ The current practices of international criminal

⁹ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 160.

¹⁰ E Sliedregt, *Individual criminal responsibility in international criminal law* (OUP 2012) 54.

¹¹ Damaška, *infra* n. 25.

¹² M Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (CUP 2011) 528; see also Chantal Meloni, *Command Responsibility in International Criminal Law* (T.M.C Asser Press 2010) 1.

¹³ Although military societies may vary in the method of applying the military principles, values and training, they share almost identically the basic values. Cf. Jassica Wolfendale, ‘What is the Point of Teaching Ethics in the Military?’ in Paul Robinson and others (eds.), *Ethics Education in the Military* (Ashgate 2008) 161.

¹⁴ This is discussed further below. Chapter 2 (n 72).

tribunals rarely discuss the impact of these values when interpreting CR, although domestic military laws and justice systems recognised these values as determinate factors currently for placing the criminal responsibility particularly for international crimes.¹⁵

Under the customary element, CR is recognised as a rule of customary international humanitarian law (CIHL) that is traditionally known as the laws and customs of war. Through CIHL rules, commanders' responsibility was considered in two separate rules: first, commanders' liability for orders to commit war crimes¹⁶, addressed under international criminal law as responsibility for "orders"¹⁷; and, secondly, command responsibility for failure to act¹⁸.

ICL developed as a multi-source legal system that encompasses procedures and principles deduced from different legal systems such as customary international law, international humanitarian law and international human rights,¹⁹ as well as national systems, primarily those with common law and civil law traditions.²⁰ CR as a doctrine under ICL was developed, interpreted and implemented by judges as will be discussed in Chapter (2).²¹ However, under the rules of CIHL, there was no specification for the nature of criminal responsibility under this doctrine.²² This is because of the differences between ICL and IHL regarding their nature and purpose of creation.²³

Most importantly, most of the forms of individual criminal responsibility under ICL were deduced from the domestic law where the nature and requirements of these forms are well established. However, CR was – at least when

¹⁵ See Róisín Burke, Troop Discipline, the Rules of Law and Mission Operational Effectiveness in Conflict-Affected States' in Morten Bergsmo and SONG Tianying (eds), *Military Self-Interest in Accountability for Core International Crimes* (Torkel Opsahl Academic EPublisher 2015) 389.

¹⁶ Jean-Marie Henchaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I Rules* (CUP 2009) Rule 152; see also Hiromi Sato, 'International Criminal Responsibility Concerning 'Control over and Organization' and Command Responsibility *Lato Sensu*' (2012) 12 Int'l Crim. L. Rev. 293.

¹⁷ Ordering a subordinate to commit a crime is a mode of individual criminal responsibility that is provided for under most of the international criminal Statutes, such as the ICTY Statute; Art. 7 (1) ICTR Statute Art. 6 (1); and the Rome Statute, Art. 25 3 (b).

¹⁸ Henchaerts and Doswald-Beck, n. 16, Rule 153.

¹⁹ Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn., CUP 2010) 11-15.

²⁰ *Prosecutor v. Delalic et al.*, TC Judgment, IT-96-21-T 16 November 1998, [Čelebići], para 159

²¹ Note that its military nature was the dominated element, See *infra* (n 82); also chapter 2 (n 1).

²² Nonetheless, under the IHL responsibility existed in the general sense; more importantly, the responsibility of individuals "who plan or decide upon an attack" (i.e. superiors) perceived to be greater than those who "carry them out". A Rogers, *Law on the battlefield* (2nd edn., MUP 2004) 111.

²³ W J Fenrick, 'Some International Law Problems Related to Prosecutions before the International Criminal Tribunals for the Former Yugoslavia' (1995-1996) 6 Duke J. Comp. & Int'l L. 103, 104.

it was created - the only mode of liability to be established as a norm of international law.²⁴ Note that, originally under military values and thereafter CIHL, commanders obliged to command and control their subordinates' conduct. Accordingly, under ICL, subordinates' crimes would trigger the commander's criminal responsibility if he failed to fulfil his duty to control.

The questions, however, arise whether commanders' duties and responsibility have any origins and, if so, to what extent their nature corresponded to the modern CR.²⁵ In discussing – below - policies and origins of CR, these issues will be examined. But, before this, it is essential to shed light on some legal philosophies and their extent of development, as this carries some implications of CR's historical development as well as its contemporary nature.

C) Law and liability: philosophical reflections

This is not an attempt to explore philosophies of law; rather it is to lighten the theoretical side of some potential problematic aspects of CR. In this morality for CR is twofold: (a) inner morality that is part of the criminal liability as an element or theory and (b) military values as another element of the nature of CR. These two concepts of morality are dissimilar in this study but both related to CR as discussed below. Generally, the essence of responsibility is a mixture of both moral values and the rule of law, a person being held responsible for violating the law by permitting immoral conduct.²⁶ Therefore, it is generally accepted that both moral values and legal rules exist to channel individuals' behaviour.²⁷ Nevertheless, these concepts generated dispute among philosophers. Some rejected any connection, for example, with the extreme legal positivism claim that only imposed legal rules are relevant to

²⁴ Category Three of Joint Criminal Enterprise (JCE 3) is controversially recognised as being created under international law. Allison M Danner and Jenny S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 Cal. L. Rev. 75, 111.

²⁵ For example, Damaška argued that the historical survey of command responsibility is irrelevant to the contemporary doctrine. M. Damaška, 'The Shadow Side of Command Responsibility' (2001) 49 Am. J. Comp. L. 455, 485. Note that Green argued against this view. *Infra* (n 48).

²⁶ Responsibility in the sense of criminal responsibility is the essence of this thesis that should not be confused with any form of liability such as the moral responsibility. *Cf.* Peter Cane, *Responsibility in Law and Morality* (Hart Publishing 2002) 12-5.

²⁷ Steven Shavell, 'Law versus Morality as Regulators of Conduct' (2002) 4 Am. L. & Econ. Rev. 227.

applying law.²⁸ Others support the ‘natural law’ theory that legal rules need to meet a moral standard to be regarded as the applicable law.²⁹

Although it appears that one theory is conflicts with the other, they may interact. It is argued, therefore, that some natural law principles gradually became the highest positive law in national law.³⁰ This impacted, more precisely, on some rules of international law which concerned some principles of natural law. Although these international rules are ‘natural’ by establishment, they gradually came to constitute positive law governing all nations and known as ‘general principles of law’.³¹

These theories were gradually developed, in general, as a result of societies’ development. In this, some developments (or philosophers) were in favour of: bridging the gap between these two main theories or establishing now theory, which may be more applicable to justify or interpret some problematic rules.³² In this regard, Cryer stated that with regard to interpreting CR, it is “[f]or good reasons, not all areas of law are necessarily subject to the same interpretative canons”.³³ This can also be seen through – and particularly after - the notable debate between Lord Devlin and Professor Hart in the sixties.³⁴

The Devlin-Hart debate is relevant to CR because it was mainly about justifying a criminal liability in conjunction with social values.³⁵ Devlin argued that values should be enforced as rules under criminal law, to protect the existence of society.³⁶ In his view, society’s moral values are *per se* sufficient for criminalising conduct if such conduct is against the mainstream values of that society. Hart, however, argued that, although law is influenced and developed by morality,³⁷ in criminal law wrong/harm is that for which a person is punished.³⁸ In Hart’s view, even if conduct is considered to be against a society’s mainstream values, unless it

²⁸ Alan D Cullison, ‘Morality and The Foundations of Legal Positivism’ (1985-1986) 20 Val. U. L. Rev. 61; see also Reginald Parker, ‘Legal Positivism’ (1956-1957) 32 Notre Dame Law. 31.

²⁹ *Ibid.*

³⁰ W Friedmann, *Legal Theory* (5th edn, Steven & Sons 1967) 95-7.

³¹ *Ibid.*

³² Perhaps Fuller’s concept of the “inner morality of the law” is an example of the tendency of bridging the gap. Lon L Fuller, *The Morality of Law* (2nd edn, YUP 1969) 42.

³³ Robert Cryer, ‘The *Ad Hoc* Tribunals and the Law of Command Responsibility: A Quiet Earthquake’, in Shane Darcy and Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) 182.

³⁴ In this Devlin was favouring natural law, while Hart was for positive law.

³⁵ Wolfenden Report, Report of the Committee on Homosexual Offences and Prostitution, 1957.

³⁶ Patrick Devlin, *The Enforcement of Morals* (OUP 1965) 22-5.

³⁷ H L A Hart, *Law, Liberty, and Morality* (OUP 1963) 1.

³⁸ *Ibid* 21-4.

causes harm to (an) identified individual(s), the conduct is not criminalised³⁹. In sum, neither the mere imposition of rules nor the immorality of a conduct is alone sufficient for criminality; both are needed during the formation of an applicable rule under criminal law.

Slidregt argued, however, that moral responsibility is an important factor in shaping ICL. Slidregt suggested that “[t]o insure an effective and legitimate international criminal justice system, we should strive towards a rapprochement of moral and legal responsibility” because “judgments are made in a context of moral views that live in society”.⁴⁰ Note that morality was considered – so far- as part of the criminal liability as a theory, which is one element of CR’s threefold nature (i.e. criminal responsibility, military values and customary rules). But CR was born conceptually in a military context, therefore the moral-legal responsibility of military society concerning CR is examined below.

D) CR and the military concept:-

The philosophical debate about these concepts is relevant to CR, particularly regarding its nature and development being an international law creation. Hart argued that international and national laws are “morally quite indifferent”.⁴¹ But this is inaccurate, as some of the general principles of international law are dependent on moral considerations. For instance, the principle of good faith in international law requires a higher degree of morality for legal implementation.⁴² Isolating morality from responsibility or values from rules can, accordingly, result in a moral failure in applying rules of law.⁴³

³⁹ Hart’s view was in line with John Stuart Mill about the necessity of harm to others for criminality; Mill’s central argument was, however, about individuals’ liberty rather than criminal accountability. See Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 35-8.

⁴⁰ Elies Slidregt, ‘Criminal Responsibility in International Law: Liability Shaped by Policy Goals and Moral Outrage’ (2006) 14 *Eur. J. Crim. L. & Crim. Just.* 81, 113.

⁴¹ Hart argued that a rule is established because it is legally fixed and cannot exist because of “any moral importance (is) attached to the particular rule”. H L A Hart, *The Concept of Law* (2nd edn, OUP 1994) 228-9. *Cf.* Chapter 2 (n 119) *et seq.*

⁴² Carl Wellman, *The Moral Dimensions of Human Rights* (OUP 2011) 99-100.

⁴³ Steven J Burton, ‘Law, Obligations, and Good Faith Claim of Justice’ (1985) 73 *Cal. L. Rev.* 1956, 1982.

Bantekas, shed lights on the *moral considerations pertaining CR*; however, this was from the IHL perspective.⁴⁴ Newton and Kuhlman, although touched upon moral compasses of commanders and the interaction between moral and legal responsibilities,⁴⁵ this was not concerning the military values as an element of the nature of CR.⁴⁶ Joshua Root, a military Lieutenant, discussed morality as part of the criminal theory of the liability for omission in general rather than the military values in relation to CR.⁴⁷

Green although did not consider the relevance of the military origin to the modern CR, he criticised “the tendency in military and even academic circles to assume that the concepts of superior orders and command responsibility only became important, from the point of view of the law of armed conflict”.⁴⁸ Therefore, the importance of military values to the doctrine of CR seems to have been undermined or confused with the inner morality of the criminal responsibility in the literature.⁴⁹

Values, as Pound suggested, must be balanced with or weighed against law, particularly while interpreting legal rules,⁵⁰ which was missing in the interpretation process of CR under ICL.⁵¹ These values in civilian societies may be somewhat difficult to define. Nevertheless, values are important to justify “what would be a just rule or decision, even though not ‘objective’ in the sense of being based on absolute truth, may, nevertheless, be relatively true, in the sense of corresponding to the existing moral standard of the community”.⁵² Thus, relevant values cannot be disregarded in interpreting rules of law or in the judgment of a case; Freeman

⁴⁴ Ilias Bantekas, *Principles of direct and superior responsibility in International Humanitarian Law* (MUP 2002) 70.

⁴⁵ Moral compasses were referred to by: R Puckett, *words for Warriors: A Professional Soldier's Notebook* (Wheatmark Press 2007) 112.

⁴⁶ Michael A. Newton and Casey Kuhlman, ‘Why Criminal Culpability Should Follow the Critical Path: Reframing the Theory of ‘Effective Control’ (2009) 40 *Netherlands Year of International Law* 3, 9.

⁴⁷ Joshua L. Root, ‘Some Other Men’s Rea? The Nature of Command Responsibility in the Rome Statute’ (2014) 23 *J. Transnat’l L. & Pol’y* 119, 151.

⁴⁸ Leslie C. Green, ‘Fifteenth Waldemar A. Solf Lecture in International Law: Superior Orders and Command Responsibility’ (2003) 175 *Mil. L. Rev.* 309, 310.

⁴⁹ Cf. Arthur O’Reilly, ‘Command Responsibility: A Call to Realign Doctrine with Principles’ (2004-2005) 20 *Am. U. Int’l L. Rev.* 71, 98-99.

⁵⁰ Roscoe Pound, cited in Michael Freeman, *Lloyd’s Introduction to Jurisprudence* (9th edn., Sweet & Maxwell 2014), para 8-101; also Cf. J W Harris, *Legal Philosophies* (2nd edn, Butterworths 1997) 197-205.

⁵¹ See the discussions in chapter 4.

⁵² Freeman, n. 50, para 1-017.

therefore argues that “to analyse the meaning and use of legal rules ... it will be found impossible to disregard the role of value judgements”.⁵³

Values are, generally, the factors that constitute what a person should do or ought to do in certain societies, informing “right” and “wrong” conduct.⁵⁴ At their lowest level, these values would inform “duties of aspiration”.⁵⁵ Those values or duties of aspiration vary in application between societies.⁵⁶ In the military, however, values are much more important for constituting not only rules of legislation but, more precisely, the military character. These values “embody the principles, standard, and qualities considered essentially for successful Army leaders”.⁵⁷ Leadership or ‘officership’ is an essential value for commanders, alongside other values required for all military personnel particularly: “loyalty, duty, respect, selfless service, honor, integrity and personal courage”.⁵⁸ These values play a significant role in forming rules of law.

These values are core reasons for justifying or interpreting criminal responsibilities in general, but more significantly in conjunction with superiors’ criminal liability. Military values for especially commanders are essentially: duty, responsibility and leadership.⁵⁹ The commander is therefore expected to be responsible for the conduct and activities of his subordinates. Historically, as discussed below, as a result of this general responsibility (under the military values), commanders were held directly responsible for crimes committed by their subordinates. These values aggravate the commanders’ liability, therefore, the commander was held responsible based on the accomplice liability.

During the Diplomatic Conference, when the Additional Protocol I of 1977 to the Geneva Convention (API) was drafted,⁶⁰ military values were determinant factors. For example, as a result of ‘loyalty’ being a military value, the proposed

⁵³ *Ibid.*

⁵⁴ R A Duff, ‘Rule-Violations and Wrongdoings’ in S Shute and A P Simester (eds.), *Criminal Law Theory* (OUP 2002) 47.

⁵⁵ This is of analogy to Fuller’s theory, *infra* (n 92) *et seq.*

⁵⁶ For example, personal obligations for military personnel, *infra*, n. 66; see also the status of the general duty to rescue as between Common and Civil Law traditions. See Chapter 7 (n 34).

⁵⁷ Diane H Mazur, ‘Military Values in Law’ (2007) 14 *Duke J. Gender L. & Pol’y* 977, 994.

⁵⁸ *Ibid.*

⁵⁹ Ryan, for example, explained the importance of responsibility as a values and stated that “[r]esponsibility is the very DNA of Military” commanders. Allan Ryan, *Yamashita’s Ghost: War Crimes, MacArthur’s Justice, and Command Accountability* (UPK 2012) 62. Cf. Paul Robinson, ‘Introduction: Ethics Education in the Military’ in Paul Robinson and others (eds.), *Ethics Education in the Military* (Ashgate 2008) 7.

⁶⁰ The ‘Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict’ operated between 1974 and 1997 by the ICRC.

standard of the liability for superior order was rejected.⁶¹ In this case, the proposed standard was contrary to ‘obedience’, which under military values⁶² compelled soldiers to obey orders.⁶³ The proposed standard was not, accordingly, included under Protocol I. Thus certain values are significant to CR mainly duty and ‘officership’.

Generally some of these values are general by nature; however, for military commanders those values are significant morally and legally. For example, on the one hand, duty *per se* is a military value, that of a moral obligation to be fulfilled; on the other, a specific duty constitutes legal obligation. Thus, in military society, the failure of duty raises first moral culpability and then legal liability; and these two constitute the underlying responsibility. These values practically constitute moral obligations: failure to discharge those obligations raises moral responsibility that could be considered the essence of the notion of individual criminal responsibility in general.⁶⁴

In ICL, moral values may be considered as an integrated part of imposing legal liability. Alongside the IMTs’ judgments,⁶⁵ the UN Commission of Experts, for instance, emphasised that in finding accountability for genocide the *legal and moral responsibilities* are equally important, and stated that “civilian and military personnel...must be treated equally.... As individuals, they are subject to prosecution like any other individual violator... The legal and moral responsibilities are the same” regardless of the accused’s position.⁶⁶ This was also supported by the *ad hoc* tribunals: for example, the ICTR, whilst examining the application of CR, stated that “it is necessary to recall that criminal intent is the *moral element* required for any crime and that, where the objective is to ascertain the individual criminal responsibility of a person Accused of crimes” under ICL.⁶⁷

The UN Commission of Experts also emphasised that CR “is directed primarily at military commanders because such persons have a personal obligation

⁶¹ Charles Garraway, ‘Superior Order and the International Criminal Court: Justice Delivered or Justice Denied’ (1999) *International Review of the Red Cross* 836.

⁶² Rogers considered obedience as a requirement under military discipline from which soldiers “have a duty to obey”. *Cf.* Rogers (n 22) 208-9 and 211.

⁶³ See, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977), Volume IX, CDDH/I/SR. 51, paras 20 *et seq.*

⁶⁴ R A Duff, ‘Who is Responsible, for what, to whom?’ (2004-2005) 2 *Ohio St. J. Crim. L.* 441, p. 443.

⁶⁵ Chapter 2 (n 119) *et seq.*

⁶⁶ The UN Commission of Experts, Established Pursuant to Security Council Resolution 780, Final Report, UN Doc. S/1994/674, para 100.

⁶⁷ *Prosecutor v. Akayesu*, TC Judgment, ICTR-96-4-T, 2 September 1998, para 489.

to ensure the maintenance of discipline among troops under their command”.⁶⁸ The UN Commission seems to have resorted to military values, as ‘personal obligation’ encompasses both moral and legal obligations. Thus violating these values evoke an inner responsibility part of the overall criminal liability under CR.

Although the origins of CR have been repeatedly examined in the literature,⁶⁹ the following discussions examine the development of these three components rather than merely listing examples of CR’s origins. The following dissects the chronological development of these elements (values, custom and ‘criminal responsibility’).

2. The ancient nature: military values

As discussed above, the historical origins of CR are to be examined for scrutinising the threefold *sui generis* nature of this doctrine. Note that the responsibility of a commander (“responsible commander”) as a concept could be regarded as a deep-rooted concept from which CR was created.⁷⁰ Although it might be argued that the ancient concept is distinct from the contemporary CR, some aspect of the earlier notion could be considered the other side of the later coin. Hence, it is essential to examine the origin of the military values to adequately identify the nature of CR. The following discusses the three essential values of commanders (duty, leadership and responsibility) and examines their impact on the nature of CR.

A) Sun Tzu, “The Art of War”:-

CR is essentially considered to be a military concept. Thus, the earliest reference to this concept was about 500 BC in *Sun Tzu’s* military manual, which is generally recognised as the “oldest” military treatise.⁷¹ With regard to the responsibility of a commander it stated that:-

⁶⁸ The UN Commission of Experts, n. 66, para 57.

⁶⁹ See for instance, Lippman (n 7); see also Meloni (n 12) 33-74; also L C Green, ‘Command responsibility in International Humanitarian Law’ (1995) 5 *Transnat’l L. & Contemp. Probs.* 319; see also E. van Sliedregt, *The criminal responsibility of individuals for violations of international humanitarian law* (T.M.C. Asser Press 2003) 119-136.

⁷⁰ Bantekas (n 44) 67-68.

⁷¹ David C. Nelson, ‘On Military Strategy and Litigation’ (2006-2007) 31 *Vt. L. Rev.* 557, 560.

“[W]hen troops flee, are insubordinate, distressed, collapse in disorder or are routed, it is the fault of the general. None of these disasters can be attributed to natural causes.”

Also:-

“If the words of command are not clear and distinct, if orders are not thoroughly understood, the general is to blame.”⁷²

This ancient instrument is of significance for two essential factors. It stated, first, that troops (subordinates) are to be monitored by a commander. Accordingly, this commander is under a *duty* to command and control his troops.⁷³ Secondly, if the commander were to fail in his duty to command he would be responsible for the resulting misconduct of his subordinates.

These statements could be considered as the first to recognise the commander’s most affirmative obligation currently: the duty to control subordinates. Nevertheless, it is still inadequate to allow us to conclude that what was intended was holding commanders criminally responsible for crimes committed by troops under their command. However, the second extract added emphasis on both: first the subordination relationship and then the responsibility of commanders.

Although it does not indicate criminal responsibility, it suggests that the commander is to be blamed as a result of the disorder of his subordinates. This is the key element of responsible commander under the laws of war and a core value for effective military leadership currently.⁷⁴ In other words, *Sun Tzu* provided that: (a) whenever there are troops there must be a commander; and (b) this commander shall be responsible for the misconduct of his troops accordingly.⁷⁵ *Sun Tzu* used accordingly the three values of a military commander to formulate the above mentioned treatise.

⁷² Sun Tzu, *The Art of War* (Samuel B. Griffith tr, OUP 1971) 125; see also W.H. Parks, *Command Responsibility for War Crime* (1973) 62 *Mil. L. Rev.*1, 4. It stated also that “[t]he consistent enforcement of commands promotes a complementary relationship between the commander and his men”. Sun Tzu, *The Art of Warfare* (Roger T. Ames tr, Ballantine Books 1993), 144.

⁷³ This is tantamount to the “superior-subordinate relationship” and important element for ‘responsible command’ at its first codification. Cf. Max Markham, ‘The Evolution of Command Responsibility in International Humanitarian Law’ (2011) *Penn State Journal of International Affairs* 50, 51.

⁷⁴ Major Michael L. Smidt, ‘Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations’ (2000) 164 *Mil. L. Rev.* 155, 156-9.

⁷⁵ It is important to read these two ancient texts in their actual nature and context: (a) military nature; and (b) war context. Green (n 69) 371.

B) King Charles VII's Ordinances for the Armies:-

The negative aspect of the *Sun Tzu* can be attributed to not specifying the form under which commanders are held responsible. Therefore, the following instrument is considered an important historical point regarding commanders' responsibility for the conduct of troops under their command. In 1439, King Charles VII of France issued *Ordinances for the Armies*, in which his military commanders were warned that they would be liable for any crimes against civilians committed by those under their commands,⁷⁶ and which stated that:-

“The king orders that each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offence as if he had committed it himself and be punished in the same way as the offender would have been.”⁷⁷

This provision - from 1439 - is very much relevant to the contemporary doctrine of CR. This Ordinance is remarkable because it shares the characteristic of the current CR as a norm of customary law.

i) Relevance to the modern CR:-

The Ordinance stated that a commander should be responsible for crimes committed by his subordinates, if he knew (received any complaint) about the commission of those crimes,⁷⁸ and failed to prevent their commission⁷⁹ by the relevant subordinates as a result of his failure to act⁸⁰. Note that this is not a form of

⁷⁶ Stuart E. Hendin, 'Command Responsibility and Superior Orders in the Twentieth Century-A Century of Evolution' (2003) 10 *MurUEJL* 4, para 6.

⁷⁷ Leslie C. Green, 'War crimes, crimes against humanity and command responsibility', in *Essays on the Modern Law of War* (2nd edn., Transnational Publisher 1999) 283.

⁷⁸ This is the *mens rea* requirement for criminal responsibility.

⁷⁹ This is the first indication of the requirement of failure to prevent. See Chapter 5 (n. 82) *et seq.*

⁸⁰ Note that the responsibility was a criminal form of liability for omission.

strict liability, because it required the knowledge element.⁸¹ However, it provided that the commander should be punished similarly to the main offender, which might arguably constitute a form of accomplice liability.⁸² Conversely, this could be attributed to the age of this ancient instrument and the domination and rigidity of the military values of commanders.

However, the Ordinance was drafted with significant accuracy, considering its mediaeval date. It stated that the commander shall “bring the offender to justice so that the said offender be punished”.⁸³ Interestingly, CR– more recently - was formulated inaccurately, transferring judicial functions to be exercised by commanders.⁸⁴ For instance, Articles 7 (3), 6 (3), 29 and 6 (3) of the ICTY, ICTR, ECCC and SCSL respectively, stated that the commander is to be held responsible if he fails “to prevent [subordinates from committing crimes] or *punish the perpetrators*”.⁸⁵

The Ordinance specified also the rank of commander to whom this provision issued. In this it stated that the “captain or lieutenant” was to be held responsible, corresponding explicitly to what is now known as “officership or leadership”.⁸⁶ The “officership” as a group consists of officers whose ranks are sufficient to enable them to command troops. Therefore, the expectations, duties and responsibilities of this group are always higher than of individuals occupying other positions. This is primarily because certain values are required in military society to be fulfilled particularly by members of this elite group of ‘commanders’.⁸⁷

In this context, Sarkesian, for instance, regarded these values as the “absolute-relative values”.⁸⁸ He stated that these values “are certain core principles of professionalism that are rarely questioned”.⁸⁹ An officer, therefore, “perceived his relationship to [his military society] as directly linked to his personal values system and performance”.⁹⁰ This is consistent with the UN Commission of Experts’

⁸¹ *Cf. supra* (nn 7-11).

⁸² Pursuant to accomplice liability, the accused is held responsible as a direct participator in committing the crime with the principal perpetrator(s). See *Prosecutor v. Kordić & Čerkez*, TC, IT-95-14/2-T, 26 February 2001, para 373.

⁸³ The Ordinance, *supra* (n 77).

⁸⁴ Articles 7 (3), 6 (3), 29 and 6 (3) of the ICTY, ICTR, ECCC and SCSL respectively.

⁸⁵ Even though courts interpreted this ‘failure to punish’ as a failure to investigate, this did not resolve the problem; see Chapter 5 (nn 91) 102 and 238.

⁸⁶ Sam C Sarkesian, *Beyond the Battlefield: New Military Professionalism* (Pergamon Press Inc. 1981) 204. These ranks were most probably occupying positions of operational command.

⁸⁷ *Supra* (nn 59-68).

⁸⁸ Sarkesian (n 86) 11.

⁸⁹ *Ibid.*

⁹⁰ Sarkesian 10.

justification of holding military commanders primarily responsible pursuant to CR.⁹¹ Accordingly, holding the commander responsible for the crimes committed by his subordinates, coupled with violating these values, could partly justify the gravity of the commander's punishment under this Ordinance.

Fuller, for instance, attributed his theory of inner or internal morality to be part of the "basic morality of social life [and] duties".⁹² In this, Fuller argued, morality is twofold and these are connected but distinctive: (a) morality of duty; and (b) morality of aspiration. The morality of aspiration is the central focus of natural law, where morality is in the top aspiration of human achievements.⁹³ The morality of duty, however, is at the bottom forming the basic requirements of governing social living.⁹⁴ Accordingly, violating those basic rules will generally cause harm to others, hence it is punishable.⁹⁵ In a military setting, these two moralities are in higher demand than in civilian societies. Thus, the morality part of the concept of responsibility is more relevant to CR, not only as part of the criminal theory but, more precisely, as a separate part of the nature of CR as a principle.

C) American Articles of War:-

A third historical policy illustrates the impact of these values on increasing the responsibility in military society. The American Articles of War of 1775 stated that:-

"Every officer commanding in quarters, garrisons, or on a march, shall keep good order, and, to the utmost of his power, redress all such abuses or disorders which may be committed by any officer or soldier under his command; if, upon complaint made to him of officers or soldiers beating, or otherwise ill-treating, any person; of disturbing ... markets, or of committing any kind of riots to the disquieting of the good people of the United States; he the said commander, who shall refuse or *omit* to see justice done on the offender or offenders, and reparation made to the party or parties injured, as far as part of the offenders' pay shall enable him or them, shall, upon proof

⁹¹ *Supra* (n 59) *et seq.*

⁹² Fuller (n 32) 42.

⁹³ *Ibid* 5.

⁹⁴ *Ibid* 6.

⁹⁵ *Ibid* 30-1.

thereof, be punished, by a general court-martial, as if he himself had committed the crimes or disorders complained of.”⁹⁶

This Article particularly required the commander to exercise his duty to command and to exercise control over his subordinates. It explicitly stated that commanders would be criminally responsible for subordinates’ crimes, as a result of failure to exercise this duty. The provision not only shares some very important characteristics of the modern CR, but also it articulates the form of this responsibility as liability for omission.⁹⁷

In spite of this acknowledgment of the nature of liability as an omission, the provision considered the commander an accomplice – and then increased the punishment as if he himself had perpetrated the crime. If one reads this provision and associates it with the military values of commanders, the gravity of the punishment would be foreseen appropriately at that time.⁹⁸ On a separate note, this provision obliged commanders to prevent their troops from committing crimes. But if crimes were committed, it was the commander’s duty to transfer the perpetrator to justice. In other words, this provision never required the commander to punish the perpetrator directly, as this is a function only of the judicial authority.⁹⁹

D) Lieber Code:-

This military instrument was promulgated as “Instructions for the government of United States armies in the field”.¹⁰⁰ The significance of this Order evolved from forming the basis of the criminal responsibility of commanders for crimes committed by their subordinates. Article 71 therefore stated that:-

“Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs

⁹⁶ Section (IX) Art. (1) available at Journals of the Continental Congress – Articles of War; September 20, 1776 <http://avalon.law.yale.edu/18th_century/contcong_09-20-76.asp> accessed (12 November 2012); also E Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (T.M.C. Asser Press 2003) 210.

⁹⁷ *Cf. supra* (n 7) *et seq.*

⁹⁸ This is because the values element took priority over other elements at this time.

⁹⁹ *Cf.* Carol Fox, ‘Closing a Loophole in Accountability for War Crimes: Successor Commander’ duty to Punish Known Past Offenses’ (2005) 55 Case W. Res. L. Rev. 443, 448.

¹⁰⁰ Also known as the Lieber Code, created by Dr. Francis Lieber in 1863.

to the Army of the United States, or is an enemy captured after having committed his misdeed”.¹⁰¹

This provision is not directly relevant to the nature of CR; rather it solidified the commander’s duty to exercise command in accordance with the military values.

3. The evolvement of the customary element:-

The ‘Lieber Code’ although a national instrument, it was not only recognised to be one of the regulations that were utilised in forming the Hague Conventions,¹⁰² but function also as the basis for these Conventions’ establishment.¹⁰³ This illustrates the importance of these values to these fundamental Conventions regarding CR. The Hague Conventions are regarded as the first international instruments that govern and codify successfully the laws and customs of war through utilising the *Lieber Code*.¹⁰⁴ Although CR as a mode of liability was not codified by the Hague Conventions, the latter formed the basis for codifying and implementing CR judicially.¹⁰⁵ Note that the Hague Conventions functioned as customary law for the post-WWII trials,¹⁰⁶ thus, it is evident that military values were integral to the nature of CR as a norm of customary law.

Accordingly, for the nature of CR, military values influenced the law and developed the concept of ‘responsible command’. The concept of ‘responsible command’ and generally rules of IHL “were designed to guide the actions of the military during an international armed conflict”.¹⁰⁷ However, rules under IHL “are not only universal but often reminiscent of the values or ethics” of the military society.¹⁰⁸ These values - mainly duty, responsibility and officership - are sources for

¹⁰¹ American General Order No. 100, (*Lieber Code*), Article 71.

¹⁰² The Grotius Society stated that the Second & Fourth Hague Conventions had been “modelled” on *American General Order No. 100 “Lieber Code”*. The Grotius Society, *Problems of the War: Papers read before the society in the year 1916*, Vol. II (London, Sweet and Maxwell Limited 1917) 39.

¹⁰³ E Wallach and I Marcus, ‘Command responsibility’, in C Bassiouni (ed.), *International Criminal Law* (3rd edn., Martinus Nijhoff Publishers 2008) 460.

¹⁰⁴ Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice and Policy* (CUP 2015) 28; also Howard Levie, ‘History of the Law of War on Land’ (2000) I.R.R.C. 838.

¹⁰⁵ *Infra* (n 114).

¹⁰⁶ Chapter 2 (nn 114-117).

¹⁰⁷ Richard Goldstone, ‘Ownership of International Humanitarian Law’ in Morten Bergsmo and SONG Tianying (eds), *Military Self-Interest in Accountability for Core International Crimes* (Torkel Opsahl Academic EPublisher 2015) 37.

¹⁰⁸ SONG Tianying, ‘The International Humanitarian Law Implementation Paradigm and the Idea of Military Self-Interest in Accountability’ in Morten Bergsmo and SONG Tianying (eds), *Military Self-Interest in Accountability for Core International Crimes* (Torkel Opsahl Academic EPublisher 2015) 52; see also chapter 7 (n 17).

deducing not only the commander's duty but also part of forming his responsibility. Philosophically, Hart - although a positive law thinker - emphasised that: if the question is: "Has the development of the law been influenced by morals? The answer to this question plainly is "Yes".¹⁰⁹ With regard to military society, these values occupy a higher degree of fulfilment, therefore, playing a more important role in shaping the law than in civilian society.¹¹⁰

An associated issue is the current formulation of the nature of the liability for CR. Between the French and American formulations mentioned above there are similarities. Both oblige the commander to prevent the commission of crimes by his troops and to bring the perpetrator to justice. Interestingly, this agreement between the two was not successful when formulating the modern CR doctrine during the drafting of the API of 1977, as the American representatives argued for a duty to be imposed on the commander to punish the perpetrator. This was confronted by the French argument that punishing the perpetrator is a judicial power that cannot be transferred to the commander.¹¹¹

A) The early recognition under international instruments:-

i) The Hague Conventions:-

As observed above, the responsibility of commanders for the result(s) of their failure to act was established as a military concept before being imposed under the laws and customs of war. This concept - 'responsible command' - was developed primarily to oblige commanders to exercise command and control over troops, although few historical instruments provided for the criminal responsibility of a commander that is partly relevant to contemporary CR. Nevertheless, 'responsible command' was not codified as an international principle until 1899.

Several attempts to codify the laws and customs of war - prior to 1899 - failed to constitute international agreements. For example, the Conference of Brussels was an early attempt to establish an international agreement for "the Laws and Customs

¹⁰⁹ H L A Hart, *Law, Liberty and Morality* (OUP 1963) 1.

¹¹⁰ Cf. Sliedregt (n 40).

¹¹¹ Chapter (5) (n 99).

of War”.¹¹² In this, the Brussels Declaration of 1874 - although it was not ratified - provided for the right and duty of the commander in Article 9, which was later adopted in Article 1 of the Hague Convention.¹¹³ The Hague Conventions were the first successful attempt to codify the duty and responsibility of a commander. The Hague Convention (II) of 1899 in its Annex, Article 1, stated that:-

“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;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."¹¹⁴

This provision was also adopted in 1907 by the Hague Convention (IV), which emphasises its importance.¹¹⁵ The provision first lays down the commander’s duty to command; and, secondly, affirms the commander’s responsibility for subordinates’ conduct, although it did not specify the form of liability. Overlooking the form of liability indicates the influence of these military values. Moreover, Article 43 of the Hague Convention (IV) provided that:-

“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.”¹¹⁶

¹¹² Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874. The Brussels Declaration of 1874 hereafter.

¹¹³ The Brussels Declaration of 1874, Article 9, provided that: “The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: 1. that they be commanded by a person responsible for his subordinates”. Successfully, this provision has been identically adopted by The Hague Convention (IV) Annex of 1907; of which the Preamble stated that: “. . . have deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land”.

¹¹⁴ The Hague Convention (II), 1899, Annex, Sec.1 Chap.1 Art.1.

¹¹⁵ Convention (IV), 1907, Annex, Sec.1 Chap.1 Art.1.

¹¹⁶ Convention (IV), Annex, Sec.3 Art.43.

This provision directly imposes duties to positively “take all the measures in his power” to prevent crimes and restore order,¹¹⁷ which should enable commanders to fulfil the essential duty of command and control.

Note that the lack of explicit reference to the nature of the responsibility does not exclude criminal liability, and it is more precisely resulted for the general recognition of responsibility under the military context and society that attributed to the conduct of the subordinates. Most significantly, these Conventions, although treaties by nature, encompass pre-existing rules. Concurrently, the Hague Conventions have currently the character of customary international law, which is binding not only upon the treaty’s parties, but also upon non-signatory states.¹¹⁸ It should be in mind, therefore, that the military values, though not the only basis, are fundamentally part of developing the responsibility under CR as a norm of customary law.¹¹⁹

After the adoption of the Hague Conventions, the first practical attempt to hold superiors responsible pursuant to CR was after World War I. The post-WWI period was a turning point, from creating the principle (under international humanitarian law) towards implementing it judicially (under international criminal law). However, a number of historical events of value to CR as a concept occurred before and around the First World War. The following section discusses those most relevant to this doctrine.

4. Criminal responsibility: judicial origin and implementation:-

The historical origins generally (a) emphasise the duty to exercise effective control over subordinates; and (b) create a subsequent responsibility for subordinates’ conduct. Nevertheless, placing such international responsibility on individuals has not been implemented judicially.¹²⁰ This could be ascribed to the lack of the required mechanism that is needed to be widely recognised as an International Criminal Court. However, some historical precedent structured through international tribunals relevant to CR can be examined in what follows.

¹¹⁷ M. N. Shaw, *International Law* (6th edn, CUP 2008) 1178.

¹¹⁸ See Chapter 2 (nn 116-117).

¹¹⁹ *Supra* (n 102) *et seq.*

¹²⁰ In other words, so far the commander’s responsibility is merely a general principle under the laws and customs of war. *Cf.* Rogers (n 22). Holding a commander to account for failure to comply with such a principle, however, has yet to be successfully attempted.

A) Peter von Hagenbach:-

The early international precedent that recognised the concept of CR, for the failure to act, was at 1474 in the trial of Peter von Hagenbach.¹²¹ Initially, Hagenbach was appointed as a knight and Governor of Breisach by Charles, Duke of Burgundy. Hagenbach was charged with various brutal crimes committed by his subordinates that constituted international, or transnational, crimes.¹²²

This is because of the location of the city of Breisach on the border (it is now in modern Germany, but very close to the French border); and offences had been committed within neighbouring territories at that time. Therefore, these neighbouring cities and states established a coalition which resulted in Hagenbach's defeat. These allies brought Peter von Hagenbach before an international tribunal,¹²³ and he was convicted for failure to act and prevent crimes committed by his subordinates and sentenced to death.¹²⁴ Although contemporary CR differs in its requirements, the Hagenbach trial is important for the unprecedented enforcement of the commander's criminal responsibility for subordinates' crimes by a court that could, in its structure, be considered an international tribunal.

Peter von Hagenbach was executed as a result of being the executive commander – the Governor - who failed to fulfil his duty to control subordinates. The fact that he was brought before an international court is remarkable. In fact, the Hagenbach Trial was referred to – as a precedent - by the International Military Tribunal at Nuremberg.¹²⁵ The Hagenbach case (a) emphasised the commander's duty to control subordinates; (b) laid down that failure to fulfil such a duty

¹²¹ Ivan Simonovic, 'The role of the ICTY in the development of international criminal adjudication' (2000) 23 *Fordham Int'l L.J.* 440, 452.

¹²² Green, n. 48, 311.

¹²³ For instance, Bassiouni suggested that this court is the first international tribunal which consists of more than twenty-five Judges from the "allies". M. Cherif Bassiouni, 'Repression of Breaches of the Geneva Conventions under the Draft Additional Protocol to the Geneva Conventions of August 12. 1949' (1976-1977) 8 *Rutgers-Cam L.J.* 185, 189.

¹²⁴ E. Greppi, 'The evolution of individual criminal responsibility under international law' (1999) *International Review of Red Cross* 835.

¹²⁵ *The High Command Case*, *Trials of War Criminals before the Nuremberg Military Tribunals*, Vol. XI, 476.

constitutes criminal responsibility; and (c) makes clear that the crime with which he was charged was the equivalent of the crime against humanity currently.¹²⁶

More precisely, Hagenbach was charged with “crimes against the laws of nature and God”.¹²⁷ This corresponded to the natural law philosophy, where both morality and legality constitute responsibility under the applicable law.¹²⁸ In this case, crimes were committed by subordinates and the commander was held responsible as a result of his failure to act. The nature of these crimes – being international or transnational offences – resulted in and justified the creation of such unprecedented form of liability.

The applicable law at this international tribunal was natural law;¹²⁹ and so the responsibility-basis of those crimes is of violating that international society’s values at the time of commission.¹³⁰ Thus, it could be argued that the responsibility of commanders for the conduct of their subordinates was developed under natural law. However, the military values may have been the reason for convicting Hagenbach as a principal perpetrator. Schwarzenberger suggested that the nature of the operation was military, therefore the military laws and values seems to be the reason.¹³¹

Grotius in 1625 attempted also to regulate duties and rights during war time.¹³² He stated that the commander “may be held responsible who was able to prevent a crime but did not do so”; therefore, he “must not only have knowledge of it but also have the opportunity to prevent it”.¹³³ This statement not only provided for criminal responsibility for a commander’s failure to act but also provided for the *mens rea* requirement.¹³⁴ Note that, unlike the current formulation of the *ad*

¹²⁶ George Schwarzenberger, Cited in Gregory S. Gordon, ‘The Trail of Peter von Hagenbach: Reconciling History, Historiography, and International Criminal Law’ in Kevin Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials* (OUP 2013) 16-17.

¹²⁷ M. Cherif Bassiouni, ‘The Perennial Conflict Between International Criminal Justice and Realpolitik’ (2005-2006) 22 Ga. St. U. L. Rev. 541, 551.

¹²⁸ *Ibid* 543-4.

¹²⁹ George Schwarzenberger (n 126) 4.

¹³⁰ *Cf.* chapter 2 (n 119) *et seq.*

¹³¹ See I Bantekas, *International Criminal Law* (Hart Publishing 2010) 384. Erik Andersen suggested that the sentence was more of “Christian values” and the applicable law was “supranational rather than international”. Erik Andersen, ‘The International Military Tribunals in Nuremburg and Tokyo’ in Cedric Ryngaert (ed.) *The Effectiveness of International Criminal Justice* (Intersentia Publishers 2009) 5.

¹³² Bassiouni (n 123) 186-187.

¹³³ Stephen C Neff, *Hugo Grotius on The Law of War and Peace* (CUP 2012) 292-293.

¹³⁴ *Cf. supra* (n 8).

hoc tribunals, the commander was never required to punish the perpetrator throughout the history of CR.¹³⁵

The above discussions illustrate that the nature of the underlying crimes play a significant role in developing the associated liability. The society's values accordingly function to not only shape and justify the applicable law, but more precisely, determine the relevant form of liability.¹³⁶ Despite the importance of both the Hagenbach case and Grotius' contribution, the contemporary CR explicitly became a mode of liability after the First World War.

B) The Paris Conference¹³⁷:-

The casualties of the First World War were unprecedented: the number of dead and wounded people was in millions.¹³⁸ Thus, a suggestion was put forward for holding individuals responsible for these crimes committed during that War. This was initially through the British proposal to prosecute the German Kaiser before an Allied Court to hold him responsible for these crimes.¹³⁹ This proposal was initiated after the event, when Germany bombed British ships in British territorial waters, which was considered a breach of international law. The United Kingdom therefore established a Commission of Inquiry, which concluded that not only the German military commanders should be convicted for crimes committed, but also political leaders should likewise be prosecuted.¹⁴⁰

In spite of its significance in establishing the criminal liability of individuals - whether civilians or military personnel - for war crimes, the British Commission did not introduce the forms of responsibility that are required for such prosecution.¹⁴¹ If, for instance, the German Kaiser and other officials had been

¹³⁵ Cf. *supra* (n 84).

¹³⁶ Cf. Chapter 2 (n 111) *et seq.*

¹³⁷ The Preliminary Peace Conference, known as the Paris Conference, commenced on January 18, 1919. See Erik Goldstein, *The First World War Peace Settlements, 1919 – 1925*, (1st edn., Routledge 2002) 9; see also The Preliminary Peace Conference: Minutes of The Plenary Sessions, Preliminary Peace Conference, Protocol No. 1, Session of January 18, 1919, 307088-43-vol. III-11, Paris Peace Conf. 180.0201/1.

¹³⁸ Francis A. March and Richard J. Beamish, *History of The World War: An Authentic Narrative of the World's Greatest War* (The United Publishers of the United States and Canada 1919) 31-32.

¹³⁹ John Horne and Alan Kramer, *German Atrocities 1914: A History of Denial* (YUP 2001) 331; see also Benjamin E. Brockman-Hawe, 'Supranational Criminal Tribunals for the Colonial Era: The Franco-Siamese Mixed Court', in Kevin Jon Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials* (OUP 2013) 74.

¹⁴⁰ Meloni (n 12) 37-38; also see Horne and Kramer (n 139) 329.

¹⁴¹ See Brockman-Hawe (n 139).

prosecuted for the crimes committed during the war, under what form of liability would they have been charged? This issue of identifying the mode of liability had not been discussed until the creation of the preliminary Peace Conference.

The conference was therefore established in Paris¹⁴² for this purpose. Accordingly, the Paris Conference established a commission to investigate potential responsibilities, known as “*The Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties, 1919*” which is recognised as the “first international investigative commission”.¹⁴³

C) The 1919 Commission: ‘criminal responsibility’ element:-

The *Commission’s* main function was to investigate and examine liability for First World War offences. It also tried to place the responsibility on individuals directly for the first time.¹⁴⁴ Therefore, the Commission reported that:-

“...the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of Heads of States”.¹⁴⁵

It is evidently clear from this statement that the Commission sought to abandon any form of immunity that could be claimed as a ground of excluding liability. Accordingly the Commission placed more emphasis on this issue, where it stated subsequently that:-

“All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of State, who

¹⁴² The conference first started in Paris and concluded in Versailles. As a result, the Treaty of Versailles was created in 1919. See (n 162).

¹⁴³ M. Cherif Bassiouni, ‘From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court’ (1997) 10 Harv. Hum. Rts. J. 11, 14.

¹⁴⁴ M. Cherif Bassiouni, ‘Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal’ (1994-1995) 18 Fordham Int’l L.J. 1191, 1194.

¹⁴⁵ The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, report presented to the Preliminary Peace Conference, 29 March 1919, (1920) 14 Am. J. Int’l L. 95, 116.

have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.”¹⁴⁶

This was a brave leap, to consider non-military personnel able to be convicted pursuant to an exclusively military doctrinal concept at that time. More importantly, the Commission relied on the Hague Conventions as the authority to hold individuals criminally responsible for crimes committed by troops.¹⁴⁷ This could be regarded as the first reference to include not only civilian superiors, but also allowing a Head of State to be held responsible for crimes committed by subordinates.

D) The Commission and the nature of CR:-

The Conference consisted of a number of Allied members, of which the five Great Powers were the only members authorised to participate in every session, each Great Power having two representatives.¹⁴⁸ The Commission concluded within sixty days, during which intensive meetings occurred to investigate criminal responsibilities.¹⁴⁹ In spite of the significant conclusion that established individual criminal responsibility within an international framework with regard to the liability of the high-ranking individuals, two dissenting opinions were of considerable significance with regard to CR. These are discussed below.¹⁵⁰

The Commission was asked to investigate and assess the “degree of responsibility” of the alleged offenders. Their purpose was, *inter alia*, to investigate the responsibility of individuals for the crimes committed by others during the war. The Commission Report therefore established the criteria under which individuals can be held responsible, reporting that:-

¹⁴⁶ *Ibid* 117.

¹⁴⁷ Bassiouni (n 144).

¹⁴⁸ The United States of America, the British Empire, France, Italy and Japan. See Geo A. Finch, ‘The Peace Conference of Paris 1919: Its Organization and Method of Work’ (Apr., 1919) 13 Am. J. Int’l L. 159, 165.

¹⁴⁹ James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of The First World War* (Greenwood Press 1982) 68.

¹⁵⁰ M. Cherif Bassiouni, ‘Justice and Peace: The Importance of Choosing Accountability Over Realpolitik’ (2003) 35 Case W. Res. J. Int’l L. 191, 194.

“All authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the Heads of States, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war (it being understood that no such abstention should constitute a defence for the actual perpetrator)” should in principle be potentially liable for violations of the Laws and Customs of War.¹⁵¹

Accordingly, this Report established a form of liability that is unique in nature and in its requirements from other criminal modes of responsibility. This ‘liability for abstention’ applied to military and non-military personnel alike. Under this form, criminal responsibility may arise for acts committed by others. Hence, such responsibility arises when the accused has or have (1) knowledge of the offences; (2) possessed the authority to prevent them; and (3) subsequently failed to repress such crimes. Finally, omission in fulfilling these norms shall be recognised as a liability for *abstention* (meaning command responsibility).¹⁵²

This concept of *abstention* (CR) was debatable, as the Japanese and the American representatives were against such a proposition. Overall, the Japanese supported the concept of holding high-ranking individuals criminally responsible.¹⁵³ However, the Japanese were against the *Doctrine of abstention* as described above, and also against commanders being convicted "on the sole ground that they abstained from preventing, putting an end to, or repressing acts in violation of the laws and customs of war".¹⁵⁴ Accordingly, they proposed modifying, or omitting, any inclusion of this form of liability.

The American representatives were also against the *Doctrine of abstention*. They questioned the nature of the proposed forms of liability, arguing that the Commission proposed two responsibilities, one of a legal nature and the other of a moral nature. Those offences with a legal nature are admissible and so may be

¹⁵¹ The Commission (n 145) 121.

¹⁵² This term was used in the ICTR during judgments of its early cases. See *Akayesu*TC, para 479.

¹⁵³ Memorandum of reservation by the Japanese Delegation April 4, 1919, Annex III to Report of The 1919 Commission, (n 145) 151.

¹⁵⁴ Memorandum of the Japanese Delegation, 152.

prosecuted through the prospective court. However, the moral or “indirect” responsibility is inadmissible, as it lacks legal consistency.¹⁵⁵

Therefore, the US representatives differentiated between two principles: (a) responsibility for ordering others to commit a crime, which was recognised as a principle under international law. The second is responsibility for omission, which was unrecognised by the law.¹⁵⁶ However, this is inadequate, as the concept was recognised (but somewhat vague due the lack of clear precedents) and applied mainly to the military commanders under the Hague Conventions, as discussed above. The representatives, thus, stated that:-

“Neither knowledge of commission nor ability to prevent is alone sufficient. The duty or obligation to act is essential. They must exist in conjunction, and a standard of liability which does not include them all is to be rejected.”¹⁵⁷

Accordingly, the representatives required: (1) knowledge of the crime; (2) ability to intervene; and (3) a pre-existing duty to do so. Thus, the United States’ representatives were against this form of liability, as it lacks legal recognition and contradicts the legality principles.¹⁵⁸ They concluded that such a form of liability would lead to the exclusion of the principal perpetrator from punishment, as the indirect accused would illegitimately replace the perpetrator.¹⁵⁹

Note that the American and Japanese representatives seem to be against the association between morality and legality in developing responsibility under international law.¹⁶⁰ It seems also that because this provision aimed for prosecution of non-military individuals, applying the military values were difficult. Conversely, other states (the majority) seemed to be in favour of developing rules of law through interpreting the forms of responsibility that were associated with such violation of the laws and customs of war, thus the military values of commanders were perceived applicable for any individual who was in a position of command.

¹⁵⁵ Memorandum of The United States Delegation to the Report of the Commission on Responsibilities April 4, 1919, Annex II to the Report The 1919 Commission, (n 145) 128.

¹⁵⁶ Memorandum of the United States Delegation, 143.

¹⁵⁷ *Ibid.*

¹⁵⁸ In fact, The US Delegation argued that the Commission’s report constituted an “*ex post facto*” and should therefore be amended. See John P. Cerone, ‘Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Court and Tribunals’ (2007) 18 EJIL 277, 281.

¹⁵⁹ Memorandum of The United States Delegation, 143.

¹⁶⁰ *Cf.* (nn 40 and 109).

Nevertheless, until this point no duty to punish perpetrators was imposed on commanders.¹⁶¹ These dissenting opinions by the American and Japanese representatives were reported to the Commission. The Commission then submitted its Report to the Paris Conference (which was concluded at Versailles).

E) The Treaty of Versailles:-

The Paris Conference - or the Peace Conference - was concluded at Versailles in France by creating “the Treaty of Peace between the Allied and Associated Powers and Germany”.¹⁶² The Treaty of Versailles contained principles that had been suggested by the Commission’s Report and was signed on June 28, 1919.¹⁶³ The Treaty consisted of a large number of Articles (440 in total) and, under it, Germany was required to hand over the alleged criminal individuals.¹⁶⁴

Even though the Treaty excluded a number of suggestions made by the Commission's Report, it encompassed and emphasised the responsibility for the offences committed by German individuals.¹⁶⁵ The Treaty paved the way for subsequently created Tribunals and Commissions internationally.¹⁶⁶ For the purpose of CR, the Treaty is a milestone, as it encompasses a number of provisions relevant to this doctrine.

First, Article 227 was considered one of the most important provisions in the Treaty, in that it named the German Kaiser, William II, as responsible for the crimes committed, and called for a special tribunal to be created for the purpose of putting him on trial.¹⁶⁷ The relevant provision said that the Kaiser, as the Executive

¹⁶¹ Cf. (n 135).

¹⁶² See (n 137).

¹⁶³ Lassa Oppenheim, *International Law: A Treatise Volume I – Peace*, by Ronald F. Roxburgh, (The Lawbook Exchange Ltd. 2006) 91.

¹⁶⁴ James W. Garner, ‘Punishment of Offenders Against the Laws and Customs of War’ (1920) 14 *Am. J. Int’l L.* 70.

¹⁶⁵ See in this regard George W. Egerton, ‘Britain and the ‘Great Betrayal’: Anglo-American Relations and the Struggle for United States Ratification of the Treaty of Versailles, 1919-1920’ (1978) 21 *The Historical Journal*, 885-911.

¹⁶⁶ Bassiouni (n 143) 13-14.

¹⁶⁷ The Treaty of Versailles, Art. 227, stated that: “The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan. In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers

Commander, should be held responsible for the crimes committed by his troops. This Article is considered to be one of the fundamental bases for the international criminal responsibility of individuals.¹⁶⁸

This provision should be read in conjunction with Article 228, which provided for the Allies to have the right of prosecuting and punishing German individuals liable for “violation of the laws and customs of war”.¹⁶⁹ This provision entitled the Allied Powers to prosecute individuals as international criminals for War Crimes.¹⁷⁰ Additionally, Article 229 provided that the Allies should prosecute any responsible person before military tribunals.¹⁷¹ These provisions are significant as they recognised the principle of individual responsibility, which potentially encompasses CR. Although the Treaty was ratified, Article 227 was not enforced as the Kaiser was in The Netherlands, where he was considered to be a refugee.¹⁷² In fact, The Treaty of Versailles was not implemented as it was replaced by the infamous and unsuccessful trials under the Leipzig Proceedings.¹⁷³

should be imposed. The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.”¹⁶⁸ Richard L. Griffiths, ‘International Law, the Crime of Aggression and the Ius Ad Bellum’ (2002) 2 Int’l Crim. L. Rev. 301, 304.

¹⁶⁹ *Ibid.* Art. 228, provided that: “The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies. The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.”

¹⁷⁰ Salim A. Nakhjavani, ‘International Crimes’ in Max du Plessis (ed.), *African Guide to International Criminal Justice* (Institute for Security Studies 2008) 73 & 93.

¹⁷¹ The Treaty of Versailles, Art. 229. Additionally, Articles 230 & 231 obliged Germany to accept full responsibility for crimes committed during the war and to surrender all alleged criminals within its jurisdiction.

¹⁷² Max du Plessis, ‘The African Guide to International Criminal Justice: purpose and overview’ in Max du Plessis (ed.), *African Guide to International Criminal Justice* (Institute for Security Studies 2008) 14.

¹⁷³ Mohamed M. ElZeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’ 2002) 23 Mich. J. Int’l L. 869, 872; also The United Nations War Crimes Commission, *The History of the United Nations’ War Crimes Commission*, (His Majesty’s Stationary Office 1948) 437; also M. Cherif Bassiouni, ‘World War I: “The War to End All Wars” and the Birth of A Handicapped International Criminal Justice System’ (2002) 30 Denv. J. Int’l L. & Pol’y 244, 281; also M. Cherif Bassiouni, ‘The United Nations’ Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)’ (1994) 88 Am. J. Int’l L. 784-805 & 786.

5. Conclusion:-

This chapter has surveyed and discussed the genesis of the nature of CR. Although CR is generally considered a creation by judges under international law, states are the founders of international law. Particularly, the nature of contemporary CR - at least some of its elements - could be found in states' national systems. The foregoing discussions illustrated that CR was created in a military context; therefore, only the most relevant military systems were examined in this study. The aim, of doing so was not merely to show examples of the existence of CR in national systems but, more precisely, to distinguish the elements from which this doctrine can be seen as a *sui generis* form of responsibility.

Accordingly, the chapter argued that the *sui generis* nature of CR is threefold: the values of military society, the rules of customary law and responsibility pursuant to criminal law. These three elements should be considered simultaneously in holding commanders responsible for their subordinates' crimes. The historical developments of these elements demonstrated that the "military values" element was fundamental and the first to be established under various historical military codes, which generally required the commander to be responsible for his troops' conduct according to the essential values of commanders (duty, leadership and responsibility).

This was the foundation of the "customary rule" element forming the concept of 'responsible command' under the Laws and Customs of War. However, the historical origins and policies of CR struggle to constitute "criminal responsibility" when examining the judicial implementation of CR internationally. This was manifest through the debates in the 1919 Commission about the nature of this form of liability and its requirements. As a result of such difficulty, the first judicial attempt to implement contemporary CR as a mode of criminal responsibility was unsuccessful.

This chapter found that the history of CR was important regarding the constitution of the three elements of this doctrine's nature. The violation of military values dominated the nature of liability under CR; however, the problem was, historically, that 'criminal responsibility' as an element was not successfully implemented as part of the nature of CR. Having examined the historical nature of CR, the following chapter analyses the evolution of the contemporary nature of CR

and the development of these three elements simultaneously by judges, which established CR as a distinct form of individual criminal responsibility under ICL.

II. Chapter Two

Customary nature of the contemporary doctrine

As illustrated above, CR is inherited – conceptually - from military regulations, where the “military values” predominated. Military laws and values dominated the nature of CR as a principle in various national law systems until WWII,¹ although CR as a military concept was adopted as a rule under international agreements governing the Laws and Customs of War such as the Hague Conventions. These conventions, however, were mainly concerned with the commander’s duty to command rather than with criminal accountability for commanders’ violations of the law.

The violation of this law was interpreted mainly as an infringement of military values and basic principle; this, therefore, was the determinate element for the commander’s liability for crimes committed by his subordinates. Thus, commanders were, historically, held responsible as principal offenders or as being directly complicit. Recognition of the commander’s potential form of criminal responsibility with regard to subordinates’ crimes was not internationally discussed until the Paris Conference.² This occurred through “The 1919 Commission”, where it was addressed as the responsibility for *abstention*. Nevertheless, reliance on military values alone for criminal accountability was controversial during this Commission, and CR was not successfully implemented.

¹ For example, in order to demonstrate evidence of state practice regarding CR, the ICTY cited the “French Ordinance of 1944, Article 4” and the “Chinese Law of 1946, Article IX”. See *Čelebići Judgment*, para 336-7. Article 4 of the French Ordinance of 28 August 1944 stated that “Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates”. Article IX of the Chinese Law of 24 October 1946 Governing the Trial of War Criminals provided that: “Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals”. Noteworthy, due to the domination of the military laws and values CR was considered under these national regulations as a form of accomplice liability. Cf. Bantekas (chapter 1 n 44) 70 *et seq.*; also Cf. Gideon Boas *et al.*, *International criminal Law Practitioner Library: Volume I* (CUP 2013) 149. Art. 28 of the ICC, was recently incorporated under national laws and some scholars advocated *Yamashita* therefore proposed that the commander is to be responsible under accomplice liability. But was *Yamashita*’s standard an accomplice liability? Cf. Constantine Mortopoulos, ‘Kobayashi Maru: Arduous Effort and Scan Incorporation of the Yamashita Standard to the Hellenic Law’ (2011) 19 *Eur. J. Crime Crim. L. & Crim. Just.* 199, 234.

² This is with the exception of the *Hagenbach case*, Chapter 1 (n 121) *et seq.*

This chapter, therefore, aims to examine the early successful judicial implementation (precedents) of contemporary CR as a mode of criminal responsibility under ICL. It illustrates the true meaning of regarding CR as a *sui generis* form of responsibility. This *sui generis* attribution – as discussed thus far – is ascribed not solely to the doctrine’s creation by judges internationally but, more precisely, to the development and implementation of the three elements (military values, customary law and criminal responsibility) during the evolution of the contemporary CR doctrine.

This chapter examines the impact of these three elements on the early judicial interpretation of the nature and requirements of CR. It focuses mainly on precedents following the Second World War (as customary precedents). It consists of two parts. First, it analyses the evolution of the nature and requirements of CR during the trial of the Japanese General Yamashita, where CR was born as a separate mode of liability. It then examines, secondly, the crystallisation of the contemporary nature and requirements of CR by the Nuremburg and Tokyo Tribunals, concentrating on the interaction between the three elements and their impact on the development of the nature of CR.

1. Command responsibility: its contemporary nature:-

During WWII, The Allied Powers held a meeting in London for constructing the legal mechanism (resulting in the London Agreement of August 1945,³ which formed the basis of the International Military Tribunals (IMT)) and drafting the Charter of the International Military Tribunal for the Nuremberg trials then the Charter of the Tokyo Tribunal subsequently.⁴

The Allies then issued Control Council Law No. 10 to enforce the rules of the Agreement and the Charter in relation to Germany and subsequently Japan.⁵ Some cases were, however, conducted differently by Military Commissions just before

³ Nuremberg Trial Proceedings Vol. 1, London Agreement of August 8th. 1945.

⁴ The Agreement provided for the Nuremberg Charter. See Agreement for the Prosecution and Punishment of the Major War Criminals Of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945. The creation of the Tokyo Tribunal was, pursuant to an order by General MacArthur, based on the Nuremberg Charter. The Tokyo Charter, Article 3 (a).

⁵ The Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Berlin, 20 December 1945.

establishing the already agreed International Military Tribunals.⁶ One of those cases was the core case for developing the contemporary doctrine of CR.

During the War, the Japanese authorities were warned by the Allies that crimes committed against Americans and Filipinos would be punished, whoever might be responsible for these offences.⁷ Accordingly, General MacArthur's General Headquarters announced he would hold them "immediately responsible for any failure to accord prisoners of war and civilian internees proper treatment" as well as other offences.⁸ The following section scrutinises one result of MacArthur's immediate action - the case where the contemporary doctrine of CR emerged.

A) General Tomoyuki Yamashita⁹:-

The *Yamashita* trial is one of the most important and influential trials so far for the doctrine's development. In this, contemporary CR was successfully implemented for the first time as a mode of individual criminal liability; thus *Yamashita* is recognised as an important precedent.¹⁰ Several issues surrounding this trial, mainly the procedure of conducting and establishing it, were controversial. Therefore, the problematic procedure and its legitimacy was confused with, and used to criticise, the nature of CR. As a result, confusion accrued between the nature of CR and the conduct of the *Yamashita* trial, as discussed below.

General Yamashita became the commanding general of the 14th Army Group of the Imperial Japanese Army in the Philippine Islands on the 9th. October 1944. He was also regarded as the executive commander of the Islands until he surrendered on 3rd. September, 1945.¹¹

⁶ See (nn 18, 68 and 225).

⁷ R. John Pritchard, Donald Cameron Watt and Sonia M. Zaide, *The Tokyo war crimes trial : index and guide, v.2* (Garland 1981), (p. 49,749 at the official record).

⁸ *Ibid*, 49, 750.

⁹ See John C. Fredriksen, *America's Military Adversaries: From Colonial Times to the Present* (ABC-CLIO 2001) 534-5.

¹⁰ *Infra*, n. 107; see also *Čelebići* TC, para 338.

¹¹ Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission, Volume IV, London 1948 (hereafter Law Reports) 3.

The 14th Army Group came under his command about 10 days after the U.S. invasion of Leyte in the Philippines.¹² U.S. advances forced him to move from Leyte to Luzon, where his Army was divided into several groups and widely dispersed.¹³ This also affected all means of communications between Yamashita and his troops. The offences in respect of which he was tried were committed after this division, including the killing of thousands of prisoners and civilians in Manila¹⁴ and of about 25,000 civilians in Batangas Province in the south¹⁵. Note that Yamashita headed north with his Division and appointed General Yokoyama¹⁶ to be responsible for the southern area. In fact, the vast majority of the offences committed took place within the southern area, including Manila.¹⁷

B) The Trial:-

After Yamashita's surrender on 3rd. September 1945, the US authority was determined to prosecute him before a military commission¹⁸, even though the establishment of the International Military Tribunal of the Far East (IMTFE) would be decided upon in January 1946.¹⁹ (He would be executed on 24 February 1946, after being found guilty by the U.S. Military Commission).²⁰ The Commission was established in Manila in October 1945 by General MacArthur,²¹ the Commander-in-Chief of the US Army in the Pacific, who appointed General Styer, the US West Pacific commander, to structure the Commission.²²

¹² Yamashita reached Leyte on the date of the US invasion of 20 October 1944. Nevertheless, he managed to restructure, plan and prepare his staff for its defence. See Bruce D. Landrum, 'The Yamashita War Crimes Trial: Command Responsibility Then and Now' (1995) 149 Mil. L. Rev. 293.

¹³ P. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951* (University of Texas Press 1979) 49; Yamashita commanded the northern area, General Yokoyama was responsible for the southern area where the atrocities were committed and General Tsukada was responsible for the Bataan Peninsula.

¹⁴ The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Volume IV, London (H.M. Stationery Office, 1948), ["Yamashita"] 5-6.

¹⁵ *Yamashita* 5.

¹⁶ General Yokoyama, although tried before a military tribunal and sentenced to death, served only five years' imprisonment and was then pardoned by the Philippines' President. Spencer Tucker, *Who's Who in Twentieth-Century Warfare* (Routledge 2001) 366.

¹⁷ See Landrum (n 12) 294.

¹⁸ This Commission comprised five American Army officers; the trial started on 19th. October 1945 ["The Commission" hereafter].

¹⁹ This led to criticism of this trial's standard of fairness. See Meloni (2010) 43.

²⁰ *Yamashita* 2.

²¹ *Law Reports*, Volume III, 105.

²² General Styer assigned five military officers as judges and six officers as defence. Christopher Crowe, 'Command Responsibility in the Former Yugoslavia: the Changes for Successful Prosecution' (1994-1995) 29 U. Rich. L. Rev. 191, 197.

i) The nature of CR:-

Yamashita's trial was before a U.S. Military Commission, where the procedure differed from that in normal criminal proceedings. However, the rudimentary nature of the charges (under CR) was the essence of the debate between the prosecution and the defence. Initially, Yamashita requested two of his subordinates to act as counsellors, which was successful and the Commission stated that:-

“...since it was the desire of the Commission to conduct a *fair trial*, the request of the Defence would be granted.”²³

Apparently the Commission desired a fair procedure. After that, Yamashita was accused of being responsible for the crimes committed and he was convicted of having:-

“...unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes.”²⁴

This charge encapsulated the nature of CR, in that: commanders can be held responsible for crimes of their subordinates as a result of the commanders' failure to discharge the duty to control their subordinates.²⁵ The prosecutor submitted, therefore, the Bill of Particulars, which contained forty-six charges laid against the accused.²⁶ Accordingly, Yamashita pleaded not guilty²⁷ and the defence asked for a period of 3 weeks for preparation²⁸.

On 29th. October 1945, the prosecutor submitted another Bill, with an additional 59 crimes.²⁹ The defence argued that the Supplementary Bill lacked clarity, being too broad and too vague;³⁰ however, this argument was dismissed.

²³ *Yamashita* 3.

²⁴ *Yamashita* 3-4.

²⁵ Cf. the ICC Article 28. Chapter 3 (nn 78-82).

²⁶ *Yamashita* 4; see also Crowe (n 22) 197.

²⁷ The defence argued that Yamashita should not be held responsible because of his lack of knowledge. *Yamashita* 7; see also Landrum (n 14) 296.

²⁸ *Yamashita* 8.

²⁹ The offences increased to 123 crimes in total. *Yamashita* 4.

³⁰ *Yamashita* 9-10

ii) Actus reus:-

The defence argued that the Supplementary Bill did not clearly provide information for the main charge, particularly about the phrase "permitting them to commit brutal atrocities"³¹. The prosecution claimed that, from the evidence, it was clear that Yamashita had allowed – as a result of his failure to act - the crimes to be committed, which was in accordance with the US Constitution and applicable law of evidence.³² The defence argued that, according to the source of law referred to by the prosecutor, rather more emphasis should have been put upon the right of the accused person, pursuant to the "constitutional rights" of an accused.³³ The Commission rejected this argument on the basis that these rights cannot be applied to enemy offenders.³⁴

The defence then urged that the case be dismissed, primarily on two grounds: (a) that the Bill of Particulars failed to prove the accused's breach of the Laws and Customs of War; and (b) that the Commission had no jurisdiction to try the accused.³⁵ The defence first argued that the main allegation was that the accused's failure to control had permitted crimes to be committed. However, the Bill did not provide any information about, for example, the accused's 'neglect' or 'omission' that had presumably resulted in permitting the crimes (as a causal link).³⁶ The defence, accordingly, stated that:-

“...the accused was not accused of having done something or having failed to do something, but solely of having been something, namely commander of the Japanese forces.”³⁷

The defence also argued that the accused had not ordered, the crimes being committed.³⁸

³¹ *Yamashita* 12.

³² The prosecutor argued that under the US Constitution and applicable laws there are no requirements upon prosecutors to “disclose their evidence”. *Yamashita* 10.

³³ *Ibid.*

³⁴ *Ibid.* The Fifth Amendment of the US Constitution provides fundamental rights for any accused person and accordingly it was claimed that Yamashita should be entitled to these rights.

³⁵ *Yamashita* 12.

³⁶ *Yamashita* 5. In this, sometimes, it was specified that “such omission caused” crimes.

³⁷ *Yamashita* 12; *Cf. Meloni (2010)* 44.

³⁸ The defence also stated that: “No one would even suggest that the Commanding General of an American occupation force became a criminal every *time* an American soldier violated the law”. *Yamashita* 12.

Interestingly, the prosecutor stated that this Commission was not a court; it rather functioned as an “executive tribunal”.³⁹ Nevertheless, the prosecution brought 286 witnesses before the Commission, then considering 423 statements of evidence.⁴⁰ The prosecutor’s aim was to establish “subordination”, a link between troops who had committed crimes and Yamashita. On the one hand, the defence did not argue against this contention and generally agreed that these crimes had been committed by troops under Yamashita’s authority, thus satisfying *the subordination requirement*.⁴¹ On the other, the defence denied the accused’s actual knowledge of those offences.⁴²

The defence argued that Yamashita himself was a subordinate but, in doing so, overlooked the fact that Yamashita had been appointed to the executive command in that territory.⁴³ The defence argued that, as a result the American victory, death had spread between the soldiers and prisoners, which had contributed to the disorder among the Japanese forces, resulting in those crimes being committed.⁴⁴

The defence claimed that Yamashita had done his utmost to control the situation,⁴⁵ arguing that a considerable number of these offences were committed by Philippine guerrillas. These guerrillas were then being fought by the Japanese forces and Yamashita had therefore acted in accordance with International Law.⁴⁶ However, these arguments were insufficient to show that Yamashita had taken *measures to prevent* the widespread occurrence of *those crimes*. Hence, besides the commission of *crimes* and *subordination* requirements, the defence arguments allowed the prosecutor to establish – although not explicitly – the other requirements of this liability: (a) that Yamashita had *failed to act* to prevent those crimes; and (b) that his failure to control his troops had *permitted* his subordinates

³⁹ The prosecutor stated that “This Commission...is ... set up ... for the purpose of hearing the evidence on this charge, and of advising ... as to the punishment.... It is an executive body, and not a judicial body”. *Yamashita* 17.

⁴⁰ *Yamashita* 18.

⁴¹ *Yamashita* 18-20.

⁴² *Yamashita* 21-23.

⁴³ *Yamashita* 23; see also *Cf.* Michael Kelly, ‘Grafting the Command Responsibility Doctrine onto Corporate Criminal Liability for Atrocities’ (2010) 24 *Emory Int’l L. Rev.* 671, 676.

⁴⁴ *Yamashita* 24. *Cf.* Judge Murphy’s opinion, (n 103).

⁴⁵ *Yamashita* 25.

⁴⁶ *Yamashita* 26.

to commit atrocities, which was sufficient to establish a causal link⁴⁷ between his failure to act and those crimes.

iii) *Mens rea*:-

The defence argued that Yamashita did not know about those offences. In answer to this, the Commission stated that Yamashita “must have known about” the atrocities.⁴⁸ The defence therefore contended that Yamashita had tried to gather as much information as he could,⁴⁹ but that it had not been possible at that time because of the lack of equipment and resources.⁵⁰ Under such circumstances, therefore, the assumption that Yamashita “must have known about” the atrocities could not be substantiated, because he had had no means of obtaining the knowledge on which such an assumption could be based.⁵¹ This is the core of criticising CR at the Yamashita trial and also in the literature.⁵²

The prosecutor, accordingly, emphasised that a commander is obliged constructively to control his subordinates according to International Law,⁵³ and that his failure to act is recognised as a breach of the Laws of War.⁵⁴ The prosecutor quoted Yamashita saying that if he had had the knowledge he would have prevented the crimes, which meant that Yamashita had known about his duty to control and to acquire information accordingly.⁵⁵ The prosecution, therefore, submitted that Yamashita’s failure to know about the widespread crimes should be considered as equating to permission to violate the law, resulting in the atrocities.⁵⁶

The prosecutor contended that Yamashita has been informed that a considerable number (thousands) of "children and women" had been killed.⁵⁷

⁴⁷ Causation seems to be tantamount to raising the risk of crimes. Curt Hessler, Note, ‘Command Responsibility for War Crimes’ (1972-1973) 82 Yale L. J. 1274, 1283.

⁴⁸ *Yamashita* 17, 26 & 27. Cf. The ‘should have known’ standard at the ICC. Cf. William Eckhardt, ‘Command Criminal Responsibility: A Plea for a Workable Standard’ (1982) 97 Mil. L. Rev. 1, 19.

⁴⁹ *Yamashita* 27.

⁵⁰ *Yamashita* 26-27.

⁵¹ *Yamashita* 28.

⁵² See (nn 92 and 94).

⁵³ The standard of constructive knowledge resulted from the nature of the crimes and then the responsibility in accordance with the military values. Cf. Joshua Joseph, ‘Rethinking Yamashita: Holding Military Leaders Accountable for Wartime Rape’ (2007) 28 Women’s Rts. L. Rep. 107, 116-7.

⁵⁴ *Yamashita* 29.

⁵⁵ *Yamashita* 29-30.

⁵⁶ *Ibid* 31; see also *Akayesu*, TC, para 489.

⁵⁷ *Ibid*.

Moreover, his decision to trace the guerrillas had resulted in the commission of more crimes, which had to be also recognised as equating to a permission to commit atrocities with his knowledge.⁵⁸

The prosecutor therefore argued that Yamashita's omission could not be used as an excuse, when it had been the reason for the crimes being committed.⁵⁹ The Prosecutor referred to Moore, which stated that, "[i]t is true that soldiers sometimes commit excesses which their officers cannot prevent; but in general, a commanding officer is responsible for the acts of those under his orders".⁶⁰ This finding, as well as the above-mentioned illustration, explains the extent of domination of the military values on CR.⁶¹ Above the customary law, the military values (duty, responsibility and leadership) were the determinate factors.⁶²

Accordingly, the prosecutor in conclusion asserted that Yamashita could have informed his highest commander of his situation, at least to "relieve him" from the duty.⁶³ The Commission, accordingly, rejected the denial of knowledge, supporting the prosecutor's arguments, *inter alia* the "widespread" crimes and general information about these crimes to satisfy the knowledge requirement.⁶⁴ Although *Yamashita* was widely criticised in the literature, few *distinguished* scholars supported the nature of liability under CR. Lauterpacht, for instance, supported the liability for failure to act under which Yamashita was found responsible.⁶⁵

⁵⁸ *Ibid* 32-35, also Geert-Jan Knoops, 'The Transposition of Superior Responsibility onto Guerrilla Warfare under the Laws of the International Criminal Tribunals' (2007) 7 Int'l Crim. L. Rev. 505, 512.

⁵⁹ *Ibid*. The Prosecutor cited *Wharton's Criminal Evidence*, Volume I, Section 88, that he: "...is not supposed to have known the facts of which it appears he was ignorant; but if his ignorance is negligent or culpable . . . then his ignorance is no defence".

⁶⁰ *Ibid*, see also The Prosecutor cited Moore's *International Law Digest*, Volume VI, page 919.

⁶¹ This domination of the values element is –in this thesis– the reason behind the loose application of Yamashita. *Cf.* Mortopoulos (n 1) 213. This domination was also the reason for *Yamashita* being described as absolute command responsibility. *Cf.* Franklin Hart, 'Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised' (1980) 62 Int'l L. Stud. Ser. US Naval War Col. 397, 408.

⁶² See Ryan (chapter 1 n 59) 62; also René Värk, 'Superior Responsibility' (2012) 15 C.E.E.O.L. 143, 146. As a result of unrecognizing the values element, CR was seen as a strict liability. *Cf.* Avi Singh, 'Criminal Responsibility for Non-State Civilian Superior Lacking De jure Authority: a Comparative Review of the Doctrine of Superior Responsibility and Parallel Doctrines in National Criminal Laws' (2005) 28 Hastings Int'l & Comp. L. Rev. 267, 271.

⁶³ *Yamashita* 33.

⁶⁴ *Yamashita* 35. *Cf.* Wallach and Marcus (chapter 1 n 103) 464-5.

⁶⁵ L. Oppenheim, *International Law. A Treatise: Vol. II: Disputes, War and Neutrality* (6th. revised edn. by H. Lauterpacht, Longman's 1944) 454.

C) The U.S. Supreme Court: *in re Yamashita*:-

On December 7, 1945, the Commission announced its verdict: General Yamashita was "... guilty as charged and sentenced ... to death by hanging".⁶⁶ The defence therefore submitted a petition, to the US Supreme Court, requesting "a petition for writs of *habeas corpus* and *prohibition*" on the grounds: (1) that the Commission did not have the authority to try Yamashita; (2) that the Commission had failed to prove breach of the Laws of War; and (3) that the Commission had no jurisdiction to convict Yamashita.⁶⁷

The U.S. Supreme Court stated that General Styer was entitled to create this Commission under the instructions of General MacArthur, who was directed by the U.S. Authority.⁶⁸ The Court provided that International Law recognised such military tribunals to prosecute violations of the Laws of War. The Court referred to "The *Commission on the Responsibility of the Authors of the War*" and the Treaty of Versailles as precedents and authorities.⁶⁹ It ruled therefore that the Commission had been legitimately established.⁷⁰

The Court, most importantly, asserted that the charges were in accordance with the Annex to the Fourth Hague Convention of 1907, the 1929 Geneva Red Cross Convention and the Annex to the Fourth Hague Convention of 1907.⁷¹ The Court concurred with the Commission's conclusion and stated that the defence:-

"...overlooks the fact that the *gist* of the charge is an unlawful breach of *duty* by petitioner *as an army commander to control* the operations of the members of his command by 'permitting them to commit' the extensive and widespread atrocities specified".⁷²

⁶⁶ *Yamashita* 35.

⁶⁷ *Ibid.*

⁶⁸ This was established by President Roosevelt's Executive Order for creating a Military Commission to try those accused of being war criminals. See 7 Fed. Reg. 5103 (July 2, 1942), cited in Jack Goldsmith and Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes* (Public Law & Legal Theory Working Papers No. 27, 2002) 4.

⁶⁹ *Re Yamashita* 11 (at footnote 1).

⁷⁰ *Yamashita v. Styer*, Case Adjudged in the Supreme Court of the United States, 327 U.S. 1 (1946). [Hereafter *Re Yamashita*] 11-13.

⁷¹ *Re Yamashita* 15-6.

⁷² *Ibid.*

Note that the court relied on ‘customary rules’ and ‘military values’ as elements for interpreting and justifying the liability under CR.⁷³ The Court emphasised that, according to the findings, the Commission was required to “establish guilt” pursuant to the evidence presented.⁷⁴ Nevertheless, the ‘criminal responsibility’ element was not examined by the court, as it merely supported the Commission’s ruling. This is also ascribed to the domination of the values element on the nature of CR.

i) Justice Murphy Dissent:-

Judge Murphy criticised the Commission’s argument about the 5th Amendment to the U.S. Constitution, as this Constitution maintained the "rights of an accused person".⁷⁵ He suggested that the Commission’s interpretation of this fundamental right was inappropriate, as these rights applied to any person, no matter what his nationality. Therefore, he argued that the Commission had failed to maintain the accused’s rights according to the Constitution.⁷⁶

Judge Murphy also argued that the Commission had failed to determine Yamashita’s knowledge, in respect of “ordering or permitting” subordinates to commit crimes.⁷⁷ Moreover, under International Law there is no explicit liability of commanders for failure to control.⁷⁸ Justice Murphy also criticised the Commission’s procedure, the unprecedented charge and the way in which the case had been conducted.⁷⁹ With regard to the standard of liability, Justice Murphy’s main criticism was the lack of precedent.⁸⁰

⁷³ Cf. Ann Ching, ‘Evolution of the Command Responsibility Doctrine in Light of the *Celebici* Decision of the International Criminal Tribunals for the Former Yugoslavia’ (2000) 25 N.C.J. Int’l L. & Com. Reg. 167, 182.

⁷⁴ *Re Yamashita* 16.

⁷⁵ *Yamashita* 49.

⁷⁶ *Yamashita* 50; see also *re Yamashita* 27 and 40.

⁷⁷ He stated that Yamashita “was rushed to trial under an improper charge”. *Re Yamashita* 27.

⁷⁸ *Yamashita* 51.

⁷⁹ He stated that the case was contrary to the “common ideas of mankind”. *Re Yamashita* p. 28; also *Yamashita* 54.

⁸⁰ He argued that “The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history.” *Re Yamashita* 40.

ii) Justice Rutledge Dissent:-

Judge Rutledge's dissenting opinion was also significant regarding the nature of CR. He emphasised the legitimacy of the law's being developed, but argued that the Court "to go forward with caution".⁸¹ He questioned fairness of this trial, arguing that no one can be convicted for a crime committed without his knowledge that is afterwards defined and recognised (the legality principle).⁸² He argued that the rights of the defence to have sufficient time to prepare for the trial and the accused's rights to examine witnesses were jeopardised.⁸³

Justice Rutledge criticised the establishment of Yamashita's trial, in that an appointed authority should not conduct, investigate and prosecute such a trial.⁸⁴ This was against the Act of Congress and the Constitution; therefore, this Commission lacked "credibility and admissibility", he claimed.⁸⁵ Accordingly, he asserted that the conduct of this trial precluded the rights of the accused; therefore, this had not been a fair trial.⁸⁶

Justice Rutledge argued that the Commission had charged Yamashita with having "*permitted*"⁸⁷ the offences, but that it had failed to prove his knowledge of these crimes.⁸⁸ The Commission had therefore selected some evidence in order to justify its own theory, without adducing proper evidence about his knowledge.⁸⁹ This evidence was also a basis for the impression that indications had been everywhere around the accused and that he therefore should have known.⁹⁰ This alone made the Commission's allegation very vague, from creation to verdict, he ruled.⁹¹

⁸¹ Justice Rutledge first stated that "Precedent is not all-controlling in law. There must be room for growth...". *Re Yamashita* 43.

⁸² He stated that "It is not in our tradition for anyone to be charged with crime which is defined after his conduct, alleged to be criminal, has taken place; or in language not sufficient to inform him of the nature of the offense or to enable him to make defense". *Re Yamashita* 43.

⁸³ *Yamashita* 55.

⁸⁴ *Yamashita* 56.

⁸⁵ *Yamashita* 55; see also *Re Yamashita* 45.

⁸⁶ He considered that the procedure departs "from constitutional norms inherent in the idea of a fair trial". *Re Yamashita* 45.

⁸⁷ *Yamashita* 58.

⁸⁸ *Yamashita* 59.

⁸⁹ *Ibid.*

⁹⁰ The (should have known) is the standard of knowledge under the ICC; however, it differs, as satisfying this requirement in Yamashita's case was questionable. *Cf.* Chapter 3 (nn 75 and 78).

⁹¹ *Re Yamashita* 51; see also *Yamashita* 60-1.

D) The Yamashita case and fair trial:-

The key criticism in *Yamashita* was about the standard of fair trial and the *mens rea*⁹² adopted by the Commission.⁹³ These were the essence of the problem, as this impacted on scholars' views of the procedure, the judgment and the applicable law. Eventually, such a problem resulted in questioning the nature of CR as an applicable mode of liability primarily because of three reasons.⁹⁴

i) The composition of the Commission:-

As articulated by Justice Rutledge, judicial interpretation is a means for developing the law, but should be carried out by a judicial body and with caution.⁹⁵ Here, on the contrary, the Commission had stated that it had been created “for the purpose of hearing the evidence on this charge, and of advising ...”: accordingly, “It is an executive body, and not a judicial body”.⁹⁶ The Commission was neither a judicial body nor authorised to develop the law. More precisely, the Commission consisted of a number of respectable military personnel, of whom none, however, had been trained as (a) “lawyer(s)”.⁹⁷ This cannot, of course, be said of the U.S. Supreme Court, even though it is not an international mechanism.

ii) Interpretation:-

The U.S. Supreme Court referred to the Treaty of Versailles as an authority.⁹⁸ The court did not, however, consider the argument about the CR standard discussed as *abstention* by *The Commission on the Responsibility of the Authors of the War* of 1919.⁹⁹ The U.S stance at the *1919 Commission* had been against adopting a standard of *mens rea* similar to that in *Yamashita*.¹⁰⁰ In fact, in 1919 the American representatives had argued against this “constructive

⁹² The *mens rea* problem impacted on the development of CR, therefore, some scholars refer to this issue as “the ghost of Yamashita”. See Jenny Martinez, ‘Understanding *Mens Rea* in Command Responsibility: from Yamashita to *Blaškić* and Beyond’ (2007) 5 J. Int’l Crim. Just. 638, 641; Cf. David J Cohen, ‘The Singapore War Crimes Trials and their Relevance’ (2013) 31 Sing L Rev 3, 15 (in footnote 18).

⁹³ Note “the desire of the Commission to conduct a *fair trial*”. See (n 23).

⁹⁴ See Chapter 5 (n 58).

⁹⁵ See (n 81).

⁹⁶ See (n 39).

⁹⁷ Harlington Wood, ‘Real Judges’ (2001-2003) 58 N.Y.U. Ann. Surv. Am. L. 259, p.272. Wood criticised the Commission because the appointed judges were not “real” judges. Wood 274.

⁹⁸ The Supreme Court also referred to *The Commission on the Responsibility of the Authors of the War*. See (n 69).

⁹⁹ See Chapter 1 (nn 155-159).

¹⁰⁰ The U.S. Delegation stated that this principle of “indirect responsibility” is inadmissible as it lacks legal consistency. See Chapter 1 (n 155).

knowledge”, which corresponded to the defence argument in the Yamashita case.¹⁰¹

Nevertheless, the Court relied mainly on The Hague Conventions and the commander’s duty and responsibility to control his subordinates, which implicitly required acquiring knowledge about troops’ activities. The constructive knowledge standard adopted in *Yamashita* shares some features of the ICC knowledge requirement;¹⁰² nevertheless, the ‘criminal responsibility’ element remained unclear.

iii) Victors’ justice:-

The composition of the Commission, taken together with the interpretation of CR, was characterised as victors’ justice. In this, Judge Murphy notably stated that:-

“We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control... In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them.”¹⁰³

From another perspective, the Commission’s, and ultimately the U.S. Supreme Court’s, findings were described as “extremely racist”.¹⁰⁴ The Yamashita trial was indeed controversial; however, CR was, more importantly, enforced through a legal framework. Although, the Commission in *Yamashita* lacked experienced lawyers, the defence team particularly functioned as lawyers seeming

¹⁰¹ See Chapter 1 (n 144). Note that, this U.S stance was inconsistent as in *Medina* only actual knowledge was required for CR. See Chapter 7 (nn 145-147).

¹⁰² The *Yamashita* standard was “must have known” and the ICC standard is “should have known” both impose a duty to know and the failure to know is not an excuse. *Cf. Prosecutor v. Bemba*, Pre-TC II, Amicus Curiae Observations on Superior Responsibility Submitted Pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/05-01/08, 20 April 2009, para 3.

¹⁰³ *Re Yamashita* 34-35.

¹⁰⁴ Ann Marie Prévost, ‘Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita’ (1992) 14 Hum. Rts. Q. 303, 323.

to perform as proper practitioners.¹⁰⁵ The knowledge requirement was the highlight of the defence, which appears to be the most problematic element of the Yamashita case and CR as a form of liability under ICL currently.¹⁰⁶

Cassese, for example, attributed the importance of this Trial to the fact that it fleshed out the notion of the contemporary command responsibility.¹⁰⁷ The foregoing discussion provides the reason for the importance of the Yamashita case, which is interpreting the customary rules in accordance with the military values. It also provides the reason why *Yamashita* does not reflect the current CR.¹⁰⁸

2. International Military Tribunals:-

Neither the Nuremberg nor Tokyo Charters included a provision with respect to CR as a mode of liability. Therefore, it was essential, for articulating CR, to employ judicial interpretation for clarifying its nature and requirements. Nevertheless, interpretation should be limited, used for this purpose and not exceeded for creating new law.

A) Means for legitimately developing the law:-

The Nuremberg Tribunal, particularly, recognised interpreting law as an essential principle and asserted that:-

“In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of

¹⁰⁵ Crowe (n 22); also Edward H. Buehrig, ‘The Case of General Yamashita, by A. Frank Reel’ (1950) 25 Indiana Law Journal 408.

¹⁰⁶ Chapter 5 (n 58).

¹⁰⁷ A Cassese *et. al*, *International Criminal Law: Cases and Commentary* (OUP 2011) 422.

¹⁰⁸ Cf. Brian Parker, ‘Applying the Doctrine of Superior Responsibility to Corporate Officers: a Theory of Individual Liability for International Human Right Violations’ (2012) 35 Hastings Int’l & Comp. L. Rev. 1, 9-10.

justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.”¹⁰⁹

This illustrates the demand for such a principle.¹¹⁰ As a result, interpreting the law should be implemented beyond the written provisions, as the latter are normally created to provide the general framework only.

The Tribunal, for the purpose of interpreting rules for modes of individual criminal responsibility, stated that:-

“[t]he Pact...was a political agreement of undoubtedly very great moral importance, but just as certainly it had nothing to do with the establishing of a crime, from which a criminal responsibility could be derived”.¹¹¹

The Tribunal, to justify its demand for interpretation, stated that the Hague Conventions “neither expressly stated that certain actions were crimes, nor created courts for their trial” or even for interpreting those rules.¹¹² As a result of not recognising rules, *inter alia* CR, by the Tribunal’s Charter, it stated that the “law is not static, but by continual adaptation follows the needs of a changing world”; therefore, “[t]he view which the Tribunal takes of the true interpretation of the Pact is supported by the international history which preceded it”.¹¹³

The Hague and Geneva Conventions, accordingly, emphasised commanders’ position and duty, in that the commander is to ‘*be responsible for his subordinates*’ and has a number of more specific *duties to command* ¹¹⁴ under international law that eventually constituted customary law. This also implies the values element of commanders being: duty, responsibility and leadership.¹¹⁵ In this, the Nuremberg Tribunal stated that “by 1939 these rules laid down in the

¹⁰⁹ Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Volume I, 12 November 1945 – 1 October 1946, [Nuremberg] p. 221. The Nuremberg Tribunal influenced not only Tokyo tribunals but also developments of ICL and IHL. See David Scheffer, ‘Nuremberg Trials’ (2008) 39 Stud. Transnat’l Legal Pol’y 155, 180-181.

¹¹⁰ See Chapter 4 (n 8) *et seq.*

¹¹¹ Law Reports Vol. X, p. 365.

¹¹² Law Reports Vol. X, p. 366.

¹¹³ *Ibid.*

¹¹⁴ The commentary on the API stated that: “[T]he first duty of a military commander, whatever his rank, is to exercise command”. The API Commentary, para 3549. See also Articles 1 and 43 of the annex to the Hague Convention (IV), Article 5 of the Hague Convention (IX), Article 19 of the Hague Convention (X), Article 26 of the Geneva Convention of 1929.

¹¹⁵ Chapter 1 (n 59).

Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war”.¹¹⁶ The ICRC, thereafter, reinforced this interpretation, stating that The Hague and Geneva Conventions “are considered as embodying rules of customary international law. As such they are also binding on States which are not formally parties to them”.¹¹⁷

Accordingly, the tribunal specified and justified the rationale for the use of judicial interpretation. The court would not, therefore, be limited in its judgment to the immediate Charter. The court would interpret the customary rules and previous practices, including military courts’ practices. This was to enable the law continuously to meet the needs of the times in accordance with the legality principle.¹¹⁸

B) Developing the nature of command responsibility:-

Generally, developments of the nature of CR should be read in conjunction with those of the requirements discussed hereafter. Prior to the first judgment related to CR - *High Command* - and as a reply to the defence’s objections to this standard of liability, the court explained the nature of the underlying crimes and the associated form of criminal liability. The Tribunal noted, first, that the nature of crimes was inherently punishable and that even the:-

“official Nazi publication, on 28 May 1944, contained the following correct statement of the law:-

‘It is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he passes the responsibility to his superior, especially if the orders of the latter are in evident contradiction to all human morality and every international usage of warfare.’¹¹⁹

The Tribunal accurately illustrated that such responsibility (particularly under military values and laws) resulted from the commander’s conduct if that conduct should contradict *all human morality* and that even the Nazi regime recognised

¹¹⁶ Nuremberg, Volume XXII 497.

¹¹⁷ See <<http://www.icrc.org/ihl/INTRO/195>>, accessed 14 August 2014.

¹¹⁸ Arajärvi (Chapter 4 n 37).

¹¹⁹ Trials of War Criminals before the Nuremberg Military Tribunals, Volume XI, Oct. 1946-Apr. 1949. [High Command hereafter] 509.

the criminal responsibility that could result from violating a personal obligation and military values.¹²⁰ Most importantly, it asserted that:-

“For a defendant to be held criminally responsible, there must be a breach of some moral obligation fixed by international law, a personal act voluntarily done with knowledge of its inherent criminality under international law.”¹²¹

The Tribunal further illustrated that an accused may be responsible under CR specifically, because the commander’s:-

“[c]onnection may however be negative. Under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility.”¹²²

Accordingly, the nature of responsibility was interpreted in line with the nature of those crimes committed that were against all human *morality* (i.e. international crimes).¹²³ It asserted, further, that breaching moral obligations may occur by negative conduct (omission or failure to act), raising CR. Thus, determining such responsibility is dependent on violating not only international norms, but more precisely basic principles of command authority and responsibility (i.e. military values).¹²⁴ This interpretation method should not be misread so as to make CR *per se* a war crime.¹²⁵

The court, therefore, regarded *Yamashita* as a precedent though not binding, because the facts of *Yamashita* were not applicable to the instant case.¹²⁶ In this, besides the knowledge standard, subordination was an issue of criticism

¹²⁰ Not that this does not suggest a moral responsibility as to replace the legal responsibility. Cf. Elies Sliedregt (Chapter 1 n 40) 103-4.

¹²¹ *High Command* 510.

¹²² *High Command* 512.

¹²³ Cf. Joakim Dungal and Shannon Ghadiri, ‘The Temporal Scope of Command Responsibility Revisited Why Commanders Have a Duty to Prevent Crimes Committed after the Cessation of Effective Control’ (2011) 17 U.C. Davis J. Int’l L. & Pol’y 1, 15-16.

¹²⁴ This constitutes the rationale of CR. Cf. Andrew Mitchell, ‘Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes’ (2000) 22 Sydney L. Rev. 381, 382. See also discussions in the previous Chapter.

¹²⁵ Cf. Mettraux (2009) 37-8.

¹²⁶ Law Reports Vol. XII, 76. See Edward O’Brien, ‘The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood’ (1995) 149 Mil. L. Rev. 275, 287.

that factually required an actual ability to control.¹²⁷ Yamashita had in fact been unable to exercise control as a result of the US advance.¹²⁸ Accordingly, the Tribunal stated that:-

“The President of the United States is Commander-in-Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. 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.”¹²⁹

Accordingly, the test of the actual ability (material ability) to control is important for establishing the subordination requirements.¹³⁰ For example, assume that Yamashita had the actual knowledge about crimes; this would not change the facts, as he was in practice unable to control his troops, due to the US advance. The Tribunal emphasised that the commander’s subordination link and knowledge should be associated with an omission recognised as a failure to act: “*There must be a personal dereliction*”.¹³¹ The court, therefore, after articulating the ‘customary rules’ connection with the ‘military values and ‘criminal responsibility’ elements of CR; stated that:-

“The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means co-extensive. Modern war such as the last war, entails a large measure of de-centralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed.”¹³²

¹²⁷ As in Reel’s argument, for instance, that, according to the standard of responsibility adopted in *Yamashita*, every U.S. commander would be responsible for any crime committed by the troops. A. F. Reel, *The Case of General Yamashita* (University of Chicago Press 1949) 8.

¹²⁸ See (n 103).

¹²⁹ Law Reports Vol. XII, 76.

¹³⁰ *Čelebići* TC, para 351.

¹³¹ Law Reports Vol. XII, 76.

¹³² *Ibid.*

The court examined, therefore, situations in which an illegal order issued by a higher authority required the commander in question to pass it down to subordinates.¹³³ The Tribunal, after acknowledging the military nature of the operations, articulated measures which a commander can take in accordance with military values and basic principles;¹³⁴ nevertheless, the commander should bear responsibility in accordance with these values.¹³⁵ This is consistent with the military values of the commander being: duty, responsibility and leadership.

The military nature of those operations was essential in determining criminal responsibility; the court therefore stated that a chief of staff “has no command authority over subordinate units. All he can do in such cases is calling these matters to the attention of his commanding general.”¹³⁶ The Tribunal, by recognising and differentiating between the commander’s position and his actual ability to control, did not ask commanders to do the impossible. Accordingly, the tribunal examined and interpreted the criminal responsibility - beyond the laws and customs of war - through resorting to the military society and its values.

The Tribunal, thereafter, in the *Hostage* trial, discussed the responsibility of a commander for crimes committed by troops not under his direct command.¹³⁷ *Hostage* adopted the conclusion of the *High Command* trial that, on the one hand, a tactical commander is responsible only for his subordinate’s crimes.¹³⁸ On the other hand, the occupational or executive commander will be responsible for the crimes committed within his occupational territory.¹³⁹

The IMTFE,¹⁴⁰ under Counts 54 and 55, sought to impose individual liability, in the “ordering, authorizing or permitting atrocities” and the “disregard of duty to secure observance of preventing breach of laws of war”, respectively.¹⁴¹

¹³³ Law Reports Vol. XII, 23, 29 & 30.

¹³⁴ Law Reports Vol. XII, 74.

¹³⁵ *Ibid.*

¹³⁶ Law Reports Vol. XII, 81.

¹³⁷ *Hostage Case*, 1260.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ B.V.A. Röling and A. Cassese (eds.), *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Polity Press 1994) 3. Neil Boister and Robert Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (OUP 2008) 63-69.

¹⁴¹ It is worth mentioning that *Sengheiser* argued that the latter count seems to be a form of complicity rather than of command responsibility. Jason Sengheiser, ‘Command responsibility for Omissions and Detainee Abuse in the “War on Terror”’ (2007-2008) 30 T. Jefferson L. Rev. 706.

These counts were controversial, because CR was not a form of liability under the Tribunals' Charters and the Tribunal hold the Japanese Government collectively responsible for the underlying crimes. The IMTFE in its interpretation, therefore, first emphasised the direct role of the governmental authority in protecting prisoners of war,¹⁴² and asserted that responsibility:-

“...rests therefore with the Government having them in possession. This responsibility is not limited to the duty of mere maintenance but extends to the prevention of mistreatment. In particular, acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by Conventions are to be prevented by the Government having responsibility for the prisoners.”¹⁴³

The Tribunal interpreted this form of responsibility as encompassing a wider scope of culpability, including that of individuals whose function is governmental, whether military or civilian. Thus, it ruled that the Japanese authorities had been under an affirmative duty to ensure the safety of those prisoners, having the power of creating legislation for such a purpose.¹⁴⁴

C) Developing the requirements:-

The requirements of CR as recognised and implemented generally by the IMT required: (a) the commission of crimes, (b) a subordination, (c) knowledge, (d) failure to act, and (e) causation. Note that those commanders were appointed *de jure* command; accordingly, the subordination requirement was directly identifiable in both IMTFE and IMT. More precisely, as a result of particularly the Nazi reporting system, the prosecutor's task of proving these requirements was easy because the evidence put forward was unquestionable. The IMT stated, therefore, that the Nazi “documents consist mostly of orders, reports and war diaries which were captured by the Allied Armies at the time of the German collapse”.¹⁴⁵

¹⁴² William H. Parks, ‘Command Responsibility for War Crimes’ (1973) 62 Mil. L. Rev. 1, 65.

¹⁴³ *Ibid.*

¹⁴⁴ B.V.A Röling and C.F Rüter (eds.), *The Tokyo judgment: the International Military Tribunal for the Far East (I.M.T.F.E.) 29 April 1946-12 November 1948* (University Press, Amsterdam 1977) 30.

¹⁴⁵ *Hostage case*, 1258.

The Law Report also stated that “In the *Yamashita Trial* few if any reports of atrocities committed were found to prove the knowledge of the accused”. However, in the Nuremberg proceedings the “task of the Prosecution ... was made easier by the fact that reprisal actions were often reported by lesser officials to various of the accused, and many such reports were quoted in the Judgment”.¹⁴⁶ The Tribunal emphasised that these “reports offered consist generally of those made or received by the defendants and unit commanders in their chain of command”.¹⁴⁷ Accordingly, these requirements were directly established. Thus the following discussions are limited to two requirements: the knowledge and causation; as they were more difficult to prove.

i) Knowledge

Field Marshal Wilhelm von Leeb was the highest-ranking commander among the defendants in the *High Command Trial*.¹⁴⁸ Before addressing the offences against von Leeb, the Tribunal asserted that he “must be shown both to have had knowledge and to have been connected with such criminal acts, either by way of participation or criminal acquiescence”.¹⁴⁹ Such a finding could be assumed to form a general condition of criminal liability that there should be actual knowledge alone for criminal responsibility. However, this finding particularly should not be confused with the CR’s knowledge standard. This was limited to the execution of unlawful orders as a form of transmission, in respect of which von Leeb was found responsible for those transmitted orders and not CR.¹⁵⁰

More precisely, regarding the requirements of CR, the IMT, at the trial of Field Marshal Georg von Kuechler, distinguished this doctrine’s requirements from those of others. First, the Tribunal found from the evidence that he was responsible for the Commissar Order, which, contrary to international law, instructed German units invading the Soviet Union in June 1941 that all captured

¹⁴⁶ Law Reports Vol. VIII, 89. It is, therefore, as a result of this system of reporting these five requirements were directly identifiable. The *ad hoc* tribunals’ jurisprudence, which ask for three requirements instead, does not reflect the customary precedents i.e. post-WWII trials. Cf. M Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (CUP 2011) 551.

¹⁴⁷ Law Reports Vol. VIII, 37.

¹⁴⁸ *High Command*, 553.

¹⁴⁹ *High Command*, 555.

¹⁵⁰ Law Repots, Vol. XII, 106. Cf. Michal Stryszak, ‘Command Responsibility: How Much Should a Commander be Expected to Know?’ (2002) 11 U.S. A.F. Acad. J. Legal Stud. 27, 46-7.

political commissars of the “Red” Army should be summarily executed.¹⁵¹ Initially, von Kuechler denied knowledge of this unlawful Order.¹⁵² The Tribunal, however, found a number of reports from his subordinates that confirmed the execution of the Order, of which the defendant denied any knowledge.¹⁵³

The Tribunal, significantly, concluded that von Kuechler was responsible, as he should have known about the reports at least, since these were available to him.¹⁵⁴ The Tribunal resorted to military values and considered that, as a commander, he had had a duty to control, from which he should have known about his troops’ activities, stating that “[i]t was his business to know”.¹⁵⁵ The Tribunal found, also, “numerous reports” available to the defendant about the commission of those crimes by his subordinates.¹⁵⁶ It therefore concluded that von Kuechler “must, therefore, be held responsible for the acts committed by his subordinates”.¹⁵⁷

Lieutenant General Karl von Roques was held responsible for crimes committed when he was General of Rear Area of Army Group South and Group A as the commanding general (executive command) of the occupied territory.¹⁵⁸ The defence argued that “[t]here is no obligation under International Law to assign this task”.¹⁵⁹ The Tribunal emphasised that the defendant was the “commanding general of occupied territory”, thus “[t]he duty and responsibility for maintaining peace and order, and the prevention of crime, rest upon” him.¹⁶⁰

Accordingly, the Tribunal, referring to the judgments of *re Yamashita*,¹⁶¹ concluded that:-

¹⁵¹ Law Reports, Vol. XII, 18 and 41.

¹⁵² He argued that although he passed the order, he was unaware that the order was illegal. *High Command* 566.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid* 566-7. Cf. Matthew Lippman, ‘War Crimes: American Prosecutions of Nazi Military Officers’ (1995) 6 *Touro Int’l L. Rev.* 261, 298-299.

¹⁵⁵ *Ibid* 567.

¹⁵⁶ *Ibid* 568.

¹⁵⁷ Law Reports, Vol. XII, 107. *High Command* 568. Likewise, the Tribunal charged General Kurt von Salmuth with crimes committed by his subordinates and ruled that he must have known about them. *High Command* 617.

¹⁵⁸ *High Command* 630-1.

¹⁵⁹ Law Reports, Vol. XII, 107.

¹⁶⁰ *High Command* 631-2.

¹⁶¹ Therefore, he should have implemented the necessary measures ‘to protect prisoners of war and the civilian population’. *High Command* 632.

“...command authority and executive power obligate the one who wields them to exercise them for the protection of prisoners of war and the civilians in his area; and that orders issued which indicate a repudiation of such duty and inaction with knowledge that others within his area are violating this duty which he owes, constitute criminality”.¹⁶²

Therefore, the commander’s failure to fulfil such a duty was the reason behind these subordinates’ crimes (causally).¹⁶³ Accordingly, the court concluded that failure to control or to prevent, taken together with the knowledge, subordination and the nature of the underlying crime, raised commanders’ liability for the crimes committed by subordinates.¹⁶⁴

The *Hostage* judgment supported the preceding judgment of the *High Command* trial. The *Hostage* judgment, therefore, emphasised, first, the military values element – since the ‘customary rules’ element was articulated already by the preceding judgment - and stated that: “We have been confronted repeatedly with contentions that reports and orders sent to the defendants did not come to their attention. Responsibility for ... [international] crimes have been denied because of absence from headquarters at the time of their commission”.¹⁶⁵ The Tribunal therefore ruled that:-

“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 permitted to deny knowledge of happenings within the area of his command while he is present therein”.¹⁶⁶

In this regard, the Tribunal asserted that “the German Wehrmacht was a well-equipped, well-trained, and well-disciplined army. Its efficiency was demonstrated on repeated occasions throughout the war”.¹⁶⁷

¹⁶² *Ibid.*

¹⁶³ *Ibid.* The causal link was most probably weighed against the responsibility as a military value of commanders rather than a requirement of causation in criminal law. *Cf.* John Douglass, ‘High Command Case: A Study in Staff and Command Responsibility’ (1972) 6 *Int’l L.* 686, 699.

¹⁶⁴ Law Reports, Vol. XII, 110.

¹⁶⁵ *Hostage* 1259.

¹⁶⁶ *Ibid* 1260.

¹⁶⁷ *Ibid* 1259; *Cf.* Emily Langston, ‘The Superior Responsibility Doctrine in International Law’ (2004) 4 *Int’l Crim. L. Rev.* 141, 152.

The Tribunal emphasised that commanders were therefore supposed to acquire information constructively about their troops; and that, as a consequence, commanders are assumed to have knowledge of subordinates' activities. The Tribunal continued as follows:-

“It would strain the credulity of the Tribunal to believe that a high-ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime.”¹⁶⁸

The Tribunal, therefore, emphasised the requirement of knowledge to hold a commander responsible on the ground that he ‘should have known’ about the crimes based on the values element.¹⁶⁹ In *High Command*, the knowledge requirement was believed to be favouring actual knowledge of the commander.¹⁷⁰ *Hostage*, however, explicitly adopted the ‘should have known’ test as well as the actual knowledge, more appropriate to this standard being derived from the obligation to know subsidiary to the duty to command, depending on cases’ circumstances.¹⁷¹

In *Hostage*, Field Marshal Wilhelm List denied awareness of these reports as he had been absent at the time.¹⁷² The Tribunal emphasised that not only is a commander under an obligation to be reported to, but also his actual responsibility is to examine those reports and Orders.¹⁷³ Accordingly, List had failed to fulfil his duty as a commander to command and control. The Tribunal therefore concluded that “[h]is failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility”.¹⁷⁴

¹⁶⁸ *Ibid* 1260.

¹⁶⁹ See the ICC Article 28 about “should have known”. Chapter 5 (nn 75-81).

¹⁷⁰ Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2012) 267-8.

¹⁷¹ *Hostage* 1260.

¹⁷² *Ibid* 1261; see also Lippman (n 154) 342.

¹⁷³ The Tribunal stated that “[i]f 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 defense.” *Hostage* 1271.

¹⁷⁴ *Hostage* 1272. The *Čelebići* judgment supported the *Hostage* findings about the quality of the reports. See *Čelebići*, para 389.

The IMTFE judgments also laid down that commanders may be held responsible for the crimes of subordinates if: “(1) They had knowledge that such crimes were being committed... [or] (2) They are at fault in having failed to acquire such knowledge. If such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his office required or permitted him to take any action to prevent such crimes.”¹⁷⁵ In other words, based on the duty to command the commander may be presumed to have such knowledge if he has failed to fulfil his sub-duty to know by failing to acquire knowledge.¹⁷⁶

ii) Causation

It is important to reiterate that the Nazi reporting system was the reason for the easy task of proving the CR requirements.¹⁷⁷ *High Command* recognised the requirement of a causal link between the commander and the committed crimes. This issue was significant particularly for the responsibility of General Otto Woehler under CR when the defendant was serving as a staff officer.¹⁷⁸

The Tribunal addressed the charge of implementing the Commissar Order by subordinates, committed while the defendant was a staff officer who lacked the executive power, actual authority or ability to control.¹⁷⁹ The Tribunal stated that the defendant “has no command authority over subordinate units nor is he a bearer of executive power. The chief of staff must be personally connected by evidence with such criminal offenses of his commander in chief before he can be held criminally responsible”.¹⁸⁰

Accordingly, the Tribunal concluded that, with regard to this charge, the commander should be held responsible for those crimes, if the commander possessed the required authority to control¹⁸¹ for his omission to raise the risk (causally) of committing those crimes. It thus implicitly required a connection

¹⁷⁵ Boister and Cryer (n 140) 83. This was supported by *Čelebići*, para 388.

¹⁷⁶ *Cf.* Joseph (n 53).

¹⁷⁷ See (nn 145-147).

¹⁷⁸ *High Command* 683-4.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid* 684.

¹⁸¹ *Ibid.*

between the crime and the commander's omission. *Hostage* specified, most importantly, that:-

“In determining the guilt or innocence of these defendants, we shall require proof of a *causative*, overt act or *omission* from which a guilty intent can be inferred before a verdict of guilty will be pronounced.”¹⁸²

The Tribunal explicitly required causation as *a condition* to establish CR as a distinct form of criminal liability.

As a result of being recognised as a separate form of liability, CR was applicable also to non-military commanders. The fact that military values are part of the nature of CR did not - and should not – preclude this form from implementation if individuals have, or had, assumed such positions of command.

D) Non-Military Superiors:-

The *1919 Commission* is considered to be the first attempt to hold civilian superiors criminally responsible pursuant to CR.¹⁸³ It reported that the responsibility should not be limited to military commanders, but should be extended to include civilian officials.¹⁸⁴ In this regard, the IMTs dealt with the responsibilities of non-military superiors for paramilitary commanders and civilian superiors' responsibility. The rationale for including civilian superiors under CR – in not only the 1919 Commission but also the Nuremberg and the Tokyo Tribunal – is argued here to have been the voluntary assumption of the position of command.¹⁸⁵ This is consistent with, Article 1 Annex to the Hague Convention stated that: “The laws, rights, and duties of war apply not only to armies, but also to militia and *voluntary*” groups.¹⁸⁶

¹⁸² *Hostage* 1261.

¹⁸³ See (nn 98-99); see also Chapter 1 (n 143).

¹⁸⁴ *Ibid.*

¹⁸⁵ See Mitchell (n 124).

¹⁸⁶ The Hague Convention (IV) 1907.

i) Paramilitary Commanders:-

The voluntary assumption of the role of a military commander, whence the obligations are derived, means that the responsibility is derived accordingly. The Nuremberg Tribunal, regarding the paramilitary groups - because of this derivative nature - faced no difficulty in applying CR. In this, the Tribunal deduced individuals' duties and responsibilities from the military system, as both frameworks were identical.¹⁸⁷ Accordingly, the S.S. (a paramilitary organization under the Nazi regime) consisted of a number of departments, one of which was the 'W.V.H.A.'¹⁸⁸ This department was led by Oswald Pohl and functioned as the "main office of the Inspector of Concentration Camps".¹⁸⁹

Pohl was directly under the orders of Heinrich Himmler; therefore, he denied responsibility for the crimes committed by his subordinates, claiming that he lacked the actual power of command as the orders were issued by Himmler.¹⁹⁰ The Tribunal rejected his argument and stated that "[T]he fact remains...that Pohl as head of the WVHA was the superior...in a position to exercise and did exercise substantial supervision and control...".¹⁹¹ The Tribunal derived the *duty to control* from the military system and concluded that it is applicable to the paramilitary structure. Hence, the Tribunal concluded that Pohl "had full disciplinary power over all guards who served in the concentration camps".¹⁹²

Likewise, the Tribunal charged Karl Mummerthey under CR for his subordinates' crimes *as a result of his failure to exercise control*. He presented himself as a "private business man" but the Tribunal found that he "was a definite, integral and important figure in the concentration camp... [and] wielded military power of command."¹⁹³ The Tribunal, although it recognised Mummerthey's position as non-military, deduced his duties and responsibilities from the military system: accordingly his position was comparable. Therefore, it stated that "[i]f

¹⁸⁷ Heller (n 170) 265-6.

¹⁸⁸ Law Reports, Vol. VIII, 57. (W.V.H.A. stands for "Wirtschafts-Verwaltungshauptamt" or "Main Economic and Administration Office" (of the S.S.)).

¹⁸⁹ *Ibid.*

¹⁹⁰ Heller (n 170) 265-6.

¹⁹¹ *Pohl case* 981-2.

¹⁹² *Pohl case*, 981-2. This, coupled with the operational manner of issuing orders and reporting issues to Himmler, rendered the case easy to proceed with at the Nuremberg Trials.

¹⁹³ *Ibid* 1052.

excesses occurred in the industries under his control he was in a position not only to know about them, but to do something.”¹⁹⁴

Accordingly, it could be argued that the Tribunal convicted Pohl and Mummerthey on the basis of CR, for international crimes committed by subordinates, as a result of their *voluntary assumption* of the position of operational military commanders. Since the assumption of such a position was voluntarily, the duty and responsibility attached to the position are binding and a failure *to exercise command and control* renders the accused responsible for subordinates’ crimes resulting from his omission.

ii) Civilian superiors:-

Although the test of voluntary assumption of military command is easier to establish in a paramilitary structure, in relation to a civilian superior the IMTs adopted a similar criterion. In this, the IMT asserted that “the mere fact of being a civilian affords no protection whatever to a charge based upon international criminal law”.¹⁹⁵ Subsequently, the Tokyo Tribunal unprecedentedly charged the Japanese Government as “collectively” responsible for its failure to control subordinates.¹⁹⁶ Most importantly, one of those members – Koki Hirota, whose case is discussed below - was prosecuted in accordance with CR.¹⁹⁷ The Tokyo Tribunal was thus the first to recognise explicitly civilian officials’ liability under CR.

The duty *to exercise command and control* that attaches to the relevant position is the core factor when a civilian is charged pursuant to the CR doctrine. The Trials at Nuremberg illustrated the importance of identifying such a duty through their judgments in several cases. In the *Medical* case¹⁹⁸, Karl Brandt (a Professor Doctor¹⁹⁹) was found responsible for the crimes - medical experiments - committed by his subordinates.²⁰⁰ The Tribunal asserted that, because of his

¹⁹⁴ *Ibid.*

¹⁹⁵ Law reports, Vol. XV, 59.

¹⁹⁶ E. van Sliedregt, *The criminal responsibility of individuals for violations of international humanitarian law* (T.M.C. Asser Press 2003) 128.

¹⁹⁷ See (n 214).

¹⁹⁸ *Medical* was against twenty-three German “doctors and scientists”. Law Report, Vol. VIII, 55.

¹⁹⁹ *The Medical case*, Volume II, 190.

²⁰⁰ *Medical case*, 193.

position, he had had the duty to act and he was held responsible for his failure to fulfil that duty.²⁰¹

In the *Justice* case²⁰², Joel – the Nazis’ General Public Prosecutor²⁰³- was held responsible pursuant to CR. The Tribunal stated that “[i]t was his task to supervise the work of all prosecutors assigned to his office”²⁰⁴. In other words, it was Joel’s *duty to control* his staff, which he failed to do: he was thus found responsible for the resultant crimes. The superior’s duty to act was weighed against his ability to act; and this was further illustrated through the *Ministries* case’s judgment. Gottlob Berger, as the Chief of the Main Office for State Security (SSHA – *Staatssicherheitshauptamt*)²⁰⁵ was charged with crimes committed by examiners (subordinates) in their “racial examinations”.²⁰⁶ Those examiners were assigned to carry out those examinations by RuSHA (*SS Rasse- und Siedlungshauptamt/SS Race and Settlement Main Office.*). Thus, they were under the control of the RuSHA and not the SSHA. Accordingly, the Tribunal acquitted Berger, as he lacked the material ability to control those subordinates.²⁰⁷

Indeed, commanders’ positions are essential factors in determining their duties and responsibilities under CR. International law generally stated that the commander is obliged to command and to be responsible for his subordinates.²⁰⁸ However, the Nuremberg and Tokyo Tribunals, for the purpose of articulating CR, interpreted the extent of such duties and responsibilities by resorting to the military system and values. The tribunals accordingly derived and illustrated the sub-duties required for the commander to excise command.

E) Boundaries of developing the nature of CR:-

According to the interpretation of the IMTFE CR as a form of responsibility could occur as a result of a failure to create the required system (the failure to take

²⁰¹ *Ibid* 193-4.

²⁰² The *Justice* Trial was against sixteen German “judges and prosecutors” for crimes committed through “legislative or judicial acts”. Law Report, Vol. VIII, 56.

²⁰³ *Justice* case, Volume III, 1135.

²⁰⁴ *Ibid* 1137.

²⁰⁵ The *Ministries* Case, Volume XIV, 528.

²⁰⁶ *Ibid* 546.

²⁰⁷ *Ibid* 546-7.

²⁰⁸ The Hague Convention (II) of 1899 in its Annex, Article 1.

measures to prevent crimes)²⁰⁹, or of a fault regarding the sufficiency of that system, that ultimately resulted from an omission of the duty to command. Thus, the Tribunal found General H. Kimura, Commander-in-Chief of the Burma Area Army, responsible in accordance with CR.²¹⁰

Even though he had issued and passed an order to his subordinates to maintain the care of prisoners, the Tribunal held him responsible (as a result of his failure to control) for the offences committed by his troops because of his failure to maintain an effective system.²¹¹ This interpretation of CR by the IMTFE expanded the application of this doctrine; however, this was controversial for the lack of an established test for examining the commander's ability to control.²¹²

Interpretation was an essential tool for articulating the nature and requirements of CR. The three elements, (values, custom and criminal responsibility) of the nature of CR, just started to crystallise through these judicial developments. Nevertheless, the implementation of CR was more problematic for the Japanese superiors. Two trials against Japanese superiors were, however, important for both their interpretation and their implementation of CR.²¹³

i) Hirota:-

Koki Hirota served as Japanese Foreign Minister between 1933 and 1936 before he was appointed Prime Minister until 1937, when the Government collapsed. After that, the Konoye government took over and again Hirota was appointed Foreign Minister until May 1938. The Tribunal charged him under Count 55,²¹⁴ in respect of the offences committed in Nanking, or Nanjing, between

²⁰⁹ Lippman (Chapter 1 n 7) 18.

²¹⁰ Boister and Cryer (n 140) 610.

²¹¹ Weston D. Burnett, 'Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra' (1985) 107 Mil. L. Rev. 71, 116.

²¹² This could be used to support *Sengheiser's* argument about the controversial nature of CR. Cf. (n 141). Nevertheless, the Tribunal, in order to justify its interpretation of this standard of culpability, stated that: "... such persons are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be committed unless:-

(1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or

(2) They are at fault in having failed to acquire such knowledge." Boister and Cryer (n 140) 83.

²¹³ See *Celebici*, para 357; also Akayesu, paras. 490 & 633. See also Yaël Ronen, 'Superior Responsibility of Civilian for International Crimes Committed in Civilian Settings' (2010) 43 Vand. J. Transnat'l L. 313, 321.

²¹⁴ See (n 141).

December 1937 and February 1938 (also known as the Nanking, or Nanjing, Massacre).²¹⁵

Although Hirota admitted knowledge of those crimes, he argued that the Minister of War had been responsible for those issues and that he, Hirota, had acted effectively in requesting the Minister of War to prevent these atrocities.²¹⁶ The Tribunal concluded that he should have urged the Cabinet to prevent these offences and that; ultimately, he did not take the necessary measures to prevent them.²¹⁷ Accordingly, the majority opinion of the Tribunal convicted Hirota and sentenced him to death by hanging for those crimes.²¹⁸

However, Judge Röling, in his dissenting opinion, argued that Hirota more precisely had fulfilled his duties properly and that the evidence showed that he had taken the necessary measures which were open to him to prevent the crimes.²¹⁹ Judge Röling also argued that the effect of the Tribunal's majority ruling would be to hold a Foreign Minister responsible for crimes which had been out of his duty and ability to control.²²⁰ He argued that the defendant, based on his authority, had reacted immediately and urged the Minister of War to prevent atrocities and control the Japanese troops; therefore the Minister of War instead should be charged on those factual grounds.²²¹ In other words, the material ability to control should have been the boundary (or the test) for the liability under CR. Therefore, Hirota's liability under CR was problematic, particularly because he did act in accordance with his material ability.²²² Thus, Judge Röling adequately argued that this charge "was too broad, and led to unjust convictions".²²³

²¹⁵ Meloni (2010) 60.

²¹⁶ Lippman (Chapter 1 n 7) 22.

²¹⁷ *Ibid* 23.

²¹⁸ Meloni (2010) 60.

²¹⁹ Boister and Cryer (n 140) 788.

²²⁰ Röling and Rüter (n 144) 1126.

²²¹ *Ibid*.

²²² Accordingly there are three elements from the outcome of the Hirota case according to Röling that the accused: (1) knew or should have known; (2) should possess the authority to prevent; (3) should be obliged to act. Boister and Cryer (140) 706-7.

²²³ Robert Cryer, 'Röling in Tokyo: a Dignified Dissenter' (2010) 8 J. Int'l Crim. Just. 1109, 1120. Justice Röling's conclusion seems to be more adequate than other arguments about for example the *ex post facto*. Cf. Erik Andersen (Chapter 1 n 131) 19.

ii) The Trial of Toyoda:-²²⁴

This case was against Admiral Soemu Toyoda, the Commander of the Japanese Combined Fleet in 1945. The defendant was tried before a Military Commission created under the authority of General MacArthur similar to that which had tried Yamashita, but Toyoda was acquitted.²²⁵ This Commission's presiding judge was an Australian military officer and the Tribunal included a law practitioner. Toyoda was charged with "wilful and unlawful disregard and failure to discharge his duties by ordering and permitting the unlawful internment, mistreatment, abuse, starvation, torture and killing of prisoners of war".²²⁶

The Commission required that, in the event of large-scale atrocities during war time, such a commander must know, at least constructively, about his troops' activities on the battlefield.²²⁷ The Commission concluded that:-

"In the simplest language it may be said that this Tribunal believes the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt ... and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished."²²⁸

It then suggested, however, CR to be comparable with a dereliction of duty and ruled that:-

"In determining the guilt or innocence of an accused, charged with dereliction of his duty as a commander, consideration must be given to many factors. The theory is simple, its application is not".²²⁹

It seems, therefore, that the Tribunal in *Toyoda* applied this form of liability too narrow in comparison with *Hirota* too broad implementation. More precisely,

²²⁴ Cf. *Čelebići* TC, para 339.

²²⁵ The Tribunal consisted of a high-ranking military Australian as the President, six American military members and a lawyer. Parks (n 142) 70.

²²⁶ *Ibid.*

²²⁷ Burnett (n 211) 118.

²²⁸ Parks (n 142) 72.

²²⁹ *Ibid* 73.

Toyoda confused CR, being a form of liability for underlying crimes, with the mere dereliction of duty that is *per se* a requirement, among others, for CR.²³⁰ Thus these two cases may be used to generally define the boundaries of developing CR. In that sense, CR should not be interpreted too vague, too narrow or too broad. Note that this conclusion in *Toyoda* did not require the commander directly to punish a perpetrator of criminal acts; instead it obliged the commander to *take action* to ensure that the perpetrator should be punished.²³¹

3. Conclusion:-

This chapter examined the creation of CR as an applicable form of international criminal liability. It illustrated the establishment of CR as a distinct form of responsibility, resulting from judges' interpretations rather than from states' codifications under ICL. CR was implemented in *Yamashita*, then developed by the IMTs' judgments, which resulted in the gradual crystallisation of its customary nature and requirements. The requirements were perceived eventually, in terms of identity, to be integrated as follows: (1) the commission of crime(s), (2) subordination, (3) knowledge, (4) failure to act, and (5) causation.

Yamashita was problematic because of the failure to clarify the nature of CR, as the judgment relied on the 'military values' and 'customary rules' elements to hold the accused responsible for subordinates' crimes. Due to the domination of military values over CR, nationally and internationally at that time, it was perceived that, under CR, commanders should be held responsible, as accomplices, for crimes committed by subordinates. Clarifying the nature and requirements of CR at the Nuremberg and Tokyo Tribunals was, therefore, the main reason for the use of interpretation by judges. The three elements (military values, customary rules and criminal responsibility) of the nature of CR were accordingly interpreted, simultaneously, to articulate and implement this doctrine as a form of criminal liability.

²³⁰ This finding was the core argument for re-characterising CR. See Chapter 4 (n 143). *Halilović* TC, paras 82 & 91.

²³¹ *Cf.* Burnett (n 211) 119. Note that the *ad hoc* tribunals argued that the *Toyoda* required the commander to punish. *Cf.* Chapter 5 (nn 97 *et seq.* and 167).

The judges found that, under international law and the rules of customary law, commanders were generally responsible for their subordinates. To interpret this general customary rule, however, they resorted to military laws and values – being the source of this customary rule - to specify the meaning of such a rule and the associated responsibility. This was mainly through the commander’s three values of duty, responsibility and leadership. The nature of the crimes committed (being contrary to international law) required a different method to interpret the associated forms of responsibility. Judges illustrated, therefore, that criminal liability, to be upheld internationally, required both moral and legal elements of violation, when structuring the applicable law. This was also the result of resorting to the common military laws and values.

It was therefore concluded that a commander’s failure to control subordinates can establish the commander’s criminal responsibility for the crimes resulting from this failure to act. The tribunals then articulated the requirements of such a responsibility and derived them from those duties and sub-duties attached to the position of command. They resorted, therefore, to the military systems’ values to interpret the extent of implementing these duties. The *sui generis* nature of CR is thus attributed to the development of the three elements by judges, rather than solely to the establishment of CR under ICL. These three elements were interpreted and implemented as an integral part of the nature of CR; this doctrine was applied also to non-military superiors, but only to those who voluntarily assume command.

The rudimentary nature of ICL, with its lack of clear precedents and codified principles, were, however, behind the indefinite boundaries of developing CR, which, consequently, were controversial. Nevertheless, the Nuremberg and Tokyo Tribunals were generally consistent about the nature of the liability under CR. In the interpretation process, the three elements of the nature of CR were the reason for its successful application as a consistent and operative form of international criminal responsibility. The following chapter examines whether the recent codifications and implementation reflect the threefold nature of CR as developed by the post-WWII trials.

III. Chapter Three

Codifying CR and its impact on the *sui generis* nature of the doctrine

As illustrated above, the doctrine of CR was established and subsequently developed through case-law. Essentially, its threefold *sui generis* nature consists of values, custom and criminal elements.¹ These three elements developed gradually through case-law after the Second World War, forming the nature and requirements of CR as a mode of liability. The commander's duties during armed conflict – for the purpose of CR - were also developed through case-law, out of military values.² In fact, precedents for CR – post-WWII - recognised the importance of these duties – as part of the *sui generis* nature of CR³ - from which the nature and requirements of CR were deduced. Even so, CR was not considered under any international treaty until the Additional Protocol I to the Geneva Conventions of 1977 (API).

This chapter aims to examine the extent of the codification and its impact on the threefold nature of CR. The first part of this chapter, therefore, examines the extent of the codifications of CR under international law and international tribunals' statutes. It evaluates the consistency of codifying the nature and requirements of CR, with the three components of its nature. This is essential for the second part, which analyses the implementation of the nature of CR by various international criminal courts and tribunals. In doing this, the chapter scrutinises (a) the compatibility of these codifications with the threefold nature of responsibility under CR; and (b) the consistency of the nature of CR throughout the various recent implementations under ICL.

¹ See Chapter 1 (n 12) *et seq.* See also the discussions in chapter 1.

² The Law Report stated that “... all persons are usually equally bound by the general provisions of the applicable criminal law. With the international criminal law as it has been developed in recent years the position is different. In many instances rules have developed in relation to particular categories such as commanding generals and staff officers”. The United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Volume XV, Digest of Laws and Cases, 1949, 59.

³ See Chapter 2 (nn 24, 72, 114 and 160 *et seq.*).

1. Codifying the doctrine: Additional Protocol I of 1977:-

The First and Second World Wars together were one of the most horrific events for centuries; nevertheless, the Second was positively a turning point for developing the concept of International Community. For instance, the United Nations and the International Committee of the Red Cross (ICRC) recognised the need to adopt some binding legislation.⁴ Several international instruments were therefore adopted to uphold (1) peace and security; (2) humanitarian standards; (3) international criminal law; and (4) human rights. Nevertheless, CR was not integrated as a mode of liability until 1977⁵, when the doctrine was codified by Additional Protocol I of 1977 to the Geneva Convention (API).⁶

Generally, treaties are directed to states, to implement and ensure the compliance of individuals with their provisions.⁷ The significance of the API evolves from its being another cornerstone of CR since the WWII aftermath. In this, the API emphasised commanders' obligations⁸ and responsibility for failure to exercise duties⁹, unprecedentedly articulating and regulating them under an international treaty.¹⁰ Article 86 (2) of the API states that:-

“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.”¹¹

⁴ *Waldemar A. Solj and Edward R. Cummings*, A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949, (1977) 9 *Case W. Res. J. Int'l L.* 205, 218-9.

⁵ Following WWII the UN adopted, for example, the Genocide Convention of 1948 as well as the Geneva Convention of 1949, but neither of them considered Command Responsibility as a punishable form of liability.

⁶ The adoption of the Additional Protocols was a result of the 'Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict' operated between 1974 and 1977 by the ICRC. See Igor P. Blishchenko, *Adoption of the 1977 Additional Protocols*, (1997) *International Review of the Red Cross* 320.

⁷ The Geneva Convention of 1949, Art. 1, provides that 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'. Therefore, the obligation is upon the states' parties and it was not directed to individuals, as international criminal law had not yet been crystallized.

⁸ API, Art. 87, 'Duty of commanders'.

⁹ API, Art. 86, 'Failure to act'.

¹⁰ Igor P. Blishchenko (n 6); see also Beatrice Onica Jarka, '30 Years from the Adoption of Additional Protocols I and II to the Geneva Conventions' (2008) 15 *Lex ET Scientia Int'l J.* 23, 23-4.

¹¹ 'Failure to act', Additional Protocol I, Art. 86.

This provision is considered a novel development particularly for International Humanitarian Law: for instance, the term ‘superior’ explicitly encompasses a wider scope of responsibility, including that of non-military commanders.¹²

Nevertheless, the provision has been criticised for its lack of clarity in defining the nature of the liability.¹³ Bassiouni, for instance, argued for the inclusion of “from responsibility” instead “from penal or disciplinary responsibility” at the time of drafting the API.¹⁴ However, even with such amendment, the question will still be, for what will commanders actually be held responsible? In fact, this question of the nature of responsibility was the most problematic issue, (one that was eventually resolved only through resorting to the Yamashita Trial, IMTs’ trials and military codes and values during this drafting)¹⁵.

The ICRC published a non-binding commentary document to clarify the meaning of the API provisions. First, it emphasised that Art. 86 should be considered as a whole, together with Art. 87 in the stage of implementation.¹⁶ Therefore, Art. 86 (1) addressed the role of states in implementing the principle of failure to act,¹⁷ and Art. 86 (2) defined this principle. Accordingly, Art. 87 explained commanders’ duties thus: (1) commanders are obliged to “prevent, suppress and report” any violations under existing legislation;¹⁸ (2) to ensure that troops are fully conscious of their obligations;¹⁹ (3) the commander should initiate

¹² Timothy Wu and Young-Sung Kang, 'Criminal Liability for the Actions of Subordinates: The Doctrine of Command Responsibility and its Analogue in United States Law' (1997) 38 Harv. Int'l. L. J. 272, 291-2.

¹³ The lack of clarifying the nature of CR impacted on states', such as the Former Yugoslavia, incorporation of this article into their national law. Cf. Dragan Jovašević, 'The Command Responsibility in Criminal Law – International Criminal Law and Criminal Law of Republic of Serbia' (2010) 3 Int'l L. Y.B. 39, 42. The provision stated that that “does not absolve his superiors from penal or disciplinary responsibility”: this did not specify for what commanders will be held responsible. Is it for the crime committed or for his failure to prevent such a crime? However, at the time of the codification it seems that this issue was not considered a problem, perhaps because of the clear judicial practice and interpretation of the post-WWII trials, as has been observed. See Chapter 4 (nn 80 and 115 *et seq*).

¹⁴ M. Cherif Bassiouni, 'Repression of Breaches of the Geneva Conventions under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949' (1976-1977) 8 Rutgers-Cam L.J. 185, 203-4.

¹⁵ See Chapter 4 (n 108 *et seq*).

¹⁶ Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, para 3541

¹⁷ API, Art. 86 (1). provided that: ‘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.’

¹⁸ API, Art. 87 (1). reads as following: “The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.”

¹⁹ API, Art. 87 (2). provided that “In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of

any steps necessary to prevent offences from being committed by his subordinates²⁰.

Therefore, commanders are to be held responsible if they know that crimes have been committed or are about to be committed which constitute, or which may constitute, a violation of the Conventions or of this Protocol. Accordingly, that a crime has been committed is not a pre-requisite for CR; but the existence of a crime or the potential commission of a crime is essential for a jurisdictional assumption.²¹

Most importantly, Art. 87 concerning the commander's duties did not – oblige commanders to acquire knowledge. Nevertheless, the ICRC Commentary provided that, for the commander to be held liable for offences committed or about to be committed by subordinates, three conditions have to be satisfied to raise the possibility of CR for 'omission':-

- a) the superior concerned must be the superior of that subordinate ("his superiors");
- b) he knew, or had information which should have enabled him to conclude, that a breach was being committed or was going to be committed;
- c) he did not take the measures within his power to prevent it."²²

Thus, it could be argued that these three requirements are accordingly the foundation of the contemporary doctrine of CR, as seen later in the *ad hoc* tribunals.²³ However, this is not the case with regard to the ICC,²⁴ as it corresponded to the post-WWII²⁵ trials in respect of the requirements of causation and the commission of a crime. It could be argued, however, that the causation and

responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol".

²⁰ API, Art. 87 (3). stated that "The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof".

²¹ The API commentary did not discuss this issue; nevertheless, this issue is potentially problematic. See Chapter 5 (nn 11 and 241-245).

²² Commentary on API, para 3543.

²³ However, they are under ICL currently not limited to these requirements: Art. 28, the ICC.

²⁴ The ICC, being a treaty, is an evidence of the current status of customary law. See Chapter 4 (nn 129-130).

²⁵ Chapter 2 (n 145).

the commission of a crime or crimes are requirements inherently deduced as general requirements of criminal liability.²⁶

These provisions successfully - although not fully - codified the requirements of CR, especially the problematic '*mens rea*', the requirement of knowledge.²⁷ A duty to acquire information could be regarded as a subsidiary obligation under the duty to initiate necessary steps to prevent offences, discussed later, below.²⁸ Note that the commander is not obliged to punish perpetrators, but rather his duty is limited to "initiate disciplinary or penal actions".²⁹ Most importantly, the articles were vaguely formulated regarding both the nature and requirements of the liability, which impacted on the subsequent codifications discussed below.

A) The codification in contemporary jurisprudence: *Ad Hoc* Tribunals:-

The unprecedented event of codifying the modern CR by the API of 1977 was a notable development of International Law, particularly its criminal and humanitarian law. Nevertheless, the codified principles were not tested until the creation of the *ad hoc* Tribunals for (the Former) Yugoslavia (ICTY) and Rwanda (ICTR).

The violations of International Humanitarian Law committed in the former Yugoslavia caused the Security Council to establish a special Commission in order to investigate the crimes alleged to have been committed in there.³⁰ The Security Council requested the Secretary General to establish a tribunal in accordance with the Commission's Report.³¹ The United Nations Charter permits the Security Council to take necessary action to preserve peace; that can include establishing Tribunals pursuant to Chapter Seven.³²

²⁶ *Čelebići* para 346.

²⁷ Weston D. Burnett (*Op. cit* chapter 2 n 211) 147-8.

²⁸ Chapter 5 (n 52 *et seq*).

²⁹ Article 87 (3). The formulation is still vague as to whether these actions are a means of punishment or only of arresting and transferring to judicial jurisdiction.

³⁰ SC Resolution 780 (1992), under which M. Cherif Bassiouni was the Commission Chairman.

³¹ The Security Council request was submitted to the Secretary General in Resolution 808 (1993).

³² UN Chapter VII, Art. 39 provided that 'The Security Council shall ... decide what measures shall be taken ... to maintain or restore international peace and security'.

The Secretary General, in his Report submitted to the Security Council, included a draft Statute.³³ The Security Council then established the ICTY by Resolution 827 in 1993 for “the prosecution of persons *responsible for* serious violations of international humanitarian law”.³⁴ It may be noted that the Security Council, in this Resolution, recognised the concept of Victims’ Rights, which was a notable development in the implementation of International Human Rights Law.³⁵ It did not, however, consider the rights of the defence,³⁶ which could be ascribed to the predominant international tendency at that time to favour the enhancement of victims’ rights.

The International Criminal Tribunal of Rwanda (ICTR) was also created, by a Resolution in 1994 almost identical to that which had led to the creation of the ICTY.³⁷ The *ad hoc* tribunals’ statutes – including the SCSL – stated that these courts were created to prosecute and punish individuals *for crimes* committed under international law, and stated that the purpose of creating such tribunals is “to prosecute persons responsible for serious violations of international humanitarian law committed in” these territories.³⁸

With regard to CR, both Tribunals’ Statutes identically formulated the standard of CR as a separate mode of individual responsibility that derived from the API of 1977. Accordingly, Article 7 (3) of the ICTY and 6 (3) of the ICTR (concerning the criminal responsibility of individuals) stated that:-

“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.”³⁹

³³ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc. S/25704.

³⁴ SC Resolution 827, 25 May 1993, 1.

³⁵ SC Resolution 827(1993), para 7; stated that ‘the work of the International Tribunal shall be carried out without prejudice to the right of victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law.’

³⁶ See discussions in Chapter 6.

³⁷ SC Resolution 955, 8 November 1994.

³⁸ See ICTY Art.1, ICTR Art. 1 and SCSL Art. 1.

³⁹ Art. 7 (3) ICTY and Art. 6(3) ICTR Statutes.

It seemed, accordingly, that the API had not been fully adopted in drafting these Articles.⁴⁰ These provisions not only differ in formulations but also lack the inclusion of the nature of the criminal responsibility of CR.⁴¹ However, the Report of the UN Secretary General emphasised that a superior “should also be held *responsible for failure to prevent* a crime or to deter the unlawful behaviour of his subordinates”.⁴²

Note that the purpose of creating the *ad hoc* tribunals - abovementioned - was to prosecute individual responsible for the serious violation (the underlying crimes); nonetheless, the report of the UN Secretary General suggested the prosecution for a dereliction of a duty to prevent, which is contrary to the customary nature of CR⁴³ and to the purpose of creating the *ad hoc* tribunals.

Nevertheless, the Report explicitly defined CR as liability for omission, stating that it is a “responsibility for failure to prevent”.⁴⁴ Additionally, the UN Secretary General’s Report provided the conditions for this doctrine to be established. These requirements are in accordance with those specified in the API.⁴⁵ The UN International Law Commission (ILC), in the Draft Code of Crimes against the Peace and Security of Mankind of 1991, and then in 1996, regarding *Responsibility of the superior*, said that:-

“The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if

⁴⁰ The formulations were not identical, although in the API Article 86 (2) used the similar meaning that, if a violation is committed by a subordinate, this ‘does not absolve’ his superior; and the *ad hoc* tribunals’ provisions provided that a breach committed by a subordinate ‘does not relieve’ his superior.

⁴¹ Cf. Robert Cryer, *Prosecuting International Crimes* (CUP 2005) 319.

⁴² Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc. S/25704, para 56.

⁴³ *Ibid* para. 35. Note that this report required the tribunal to only apply rules of customary law. See Chapter 4 (n 96).

⁴⁴ *Ibid*.

⁴⁵ *Ibid*. Paragraph 56 provided that the responsibility standard is to be invoked ‘... if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them’.

they did not take all necessary measures within their power to prevent or repress the crime.”⁴⁶

The ILC – in its Commentary - after citing the Hague Conventions, referred to the Nuremberg and Tokyo judgments to illustrate this form of liability and emphasised duties of significance to the nature and requirements of CR.⁴⁷ For instance, this Commentary on the ILC referred, *inter alia*, to the *Hostage Trial* conclusion that “a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his order and for acts which the corps commander knew or ought to have known about”.⁴⁸ The ILC Commentary also stated that the commander “incurs criminal responsibility for the failure to act only when there is a legal obligation to act”.⁴⁹

On the one hand, this could be considered as a restriction of the liability solely to individuals who have official duties known as the *de jure* command rather than individuals who possess material ability to act.⁵⁰ On the other, it could be argued that requiring legal obligation to act, does not exclude superiors who voluntarily assume the position of command from responsibility attached to such position.⁵¹ It rather asserts the importance of duties to the nature and requirements of CR and the relationship between the doctrine and the concept of responsible command.⁵²

This corresponded also to the Final Report of the ICTY Commission, that “the Commission is satisfied with the principles provided in Article 7, ICTY”.⁵³ However, the Experts’ Final Report suggested that CR is principally relevant to military commanders rather than to civilian superiors. Nevertheless, the Experts’ Report recommended that, if this standard of liability is to be applied against civilian superiors, some conditions should be considered differently.⁵⁴ Therefore, it provided that CR “is directed primarily at military commanders because such

⁴⁶ Draft Code of Crimes against the Peace and Security of Mankind, 1996, Article 6; see also Draft Code of Crimes against the Peace and Security of Mankind, 1991, Article 12.

⁴⁷ Draft Code 1996, 25-6.

⁴⁸ *Ibid* 25.

⁴⁹ *Ibid*.

⁵⁰ Mettraux arguing that the *ad hoc* tribunals contradicted the ILC by establishing the *de facto* command standard. Mettraux (2009) 143.

⁵¹ See Chapter 2 (nn 121 and 186 *et seq*).

⁵² See (n 162).

⁵³ Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, para 56.

⁵⁴ *Ibid* para 57. The Commission did not explicitly state the conditions to be applied, but it suggested that ‘certain circumstances’ might exist in which non-military superiors could be held liable pursuant to the Command Responsibility doctrine.

persons have a *personal obligation* to ensure the maintenance of discipline among troops”.⁵⁵ Such personal obligation, attached primarily to military commanders, is to be deduced from military laws and values.

The above-mentioned codifications were not able fully to acknowledge the multiple nature of CR.⁵⁶ Thus, it appeared inconsistent regarding the nature of the doctrine; this could be ascribed to the missing balance between elements of this threefold nature: values, customs and criminality. These codifications focused to illustrate mainly the criminality element in conjunction with only the customary element through explaining the conditions or requirements of CR. As a result, its nature was missing, as they failed to specify whether commanders’ responsibility was for their own failure or for the crimes of subordinates. This had an impact on the implementation of CR, as will be illustrated below.⁵⁷ Other international criminal tribunals’ provisions were affected accordingly.

B) Other International Tribunals:-

The *ad hoc* tribunals of Yugoslavia and Rwanda were adopted as the model in drafting other tribunals’ statutes.⁵⁸ Accordingly, the majority of the subsequent tribunals followed the ICTY/ICTR codification of CR. The Special Court for Sierra Leone (SCSL) Statute,⁵⁹ The Extraordinary Chambers in the Courts of Cambodia (ECCC)⁶⁰ and The East Timor Special Panels included provisions concerning CR.⁶¹ These provisions are largely similar to the *ad hoc*

⁵⁵ *Ibid*; see also Chapter 1 (nn 58-68).

⁵⁶ As mentioned above in the Additional Protocol discussion, these problems were mainly about the vagueness of the nature of culpability and the requirement of causation.

⁵⁷ See (n 159 *et seq*).

⁵⁸ This is with the exception of the STL (n 63).

⁵⁹ The SCSL Statute, Article 6 (3). “The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

⁶⁰ ECCC, Article 29: “The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior 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.”

⁶¹ The ETSP, Section 16, UNTAET/REG/2000/15, 6 June 2000: “... the fact that any of the acts referred to in the said Sections 4 to 7 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.”

tribunals' formulation, which corresponds to the international influence of the *ad hoc* tribunals' jurisprudence, especially that of the ICTY. However, the Special Tribunal for Lebanon (STL)⁶² has adopted different language in presenting the principle of CR that corresponded to the ICC formulation.⁶³

C) The International Criminal Court (ICC):-

The *ad hoc* Tribunals indeed paved the way for the creation of other tribunals or special courts: that alone is commendable. Nevertheless, there was a great need to establish an international criminal court, with the scale of atrocities growing globally. The UN therefore established a Preparatory Committee on the Establishment of the International Criminal Court, from 1996.⁶⁴ The UN General Assembly (UNGA) created a Diplomatic Conference for the purpose of establishing an international criminal court.⁶⁵ This Conference concluded in 1998 with the Final Report in favour of the establishment of the present ICC.⁶⁶ Accordingly, the Rome Statute of the ICC was adopted as a Treaty and came into force on 1 July 2002.⁶⁷

CR was initially proposed to be drafted under Article 25 (Article 28 currently) of the Rome Statute as the “Responsibility of [commanders] [superiors] for acts of [forces under their command] [subordinates]”.⁶⁸ The Report of the Preparatory Committee on the Establishment of an International Criminal Court noted that “[m]ost delegations were in favour of extending the principle of

⁶² The STL was established under Security Council Resolution 1664, 29 March 2006.

⁶³ The STL Statute, Article 3 (2).

⁶⁴ See <<http://www.iccnw.org/?mod=preprecommittee>> accessed 1 May 2013; see also the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22.

⁶⁵ The UNGA Resolution 51/207 of 17 December 1996.

⁶⁶ Final Act of The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, done at Rome on 17 July 1998, U.N. Doc. A/CONF.183/10. [Final Act of The Diplomatic Conference of the ICC] hereinafter.

⁶⁷ See <http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx> accessed 1 May 2013.

⁶⁸ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Reports and other documents, Volume III, A/CONF. 183/13 (Vol. III), 15 June - 17 July 1998, 32. [The UN Diplomatic Conference of the ICC, (Vol. III)] hereinafter.

command responsibility to any superior”.⁶⁹ CR was drafted originally under Art. 25 (Art. 28 now) as follows:-

“[In addition to other forms of responsibility for crimes under this Statute, a [commander] [superior] is criminally responsible]. [A [commander] [superior] is not relieved of responsibility] for crimes under this Statute committed by [forces] [subordinates] under his or her command [or authority] and effective control as a result of the [commander’s] [superior’s] failure to exercise properly this control where:-

- (a) The [commander] [superior] either knew, or [owing to the widespread commission of the offences] [owing to the circumstances at the time] should have known, that the [forces] [subordinates] were committing or intended to commit such crimes; and
- (b) The [commander] [superior] failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission [or punish the perpetrators thereof]”.⁷⁰

CR under this initial Article was drafted consistently with the customary nature of CR. This can be observed through its emphasis that: (a) CR is a form of responsibility; (b) this responsibility is criminal; (c) both military personnel and civilians alike can be held to account under this form of responsibility for their subordinates’ crimes; and (d) this responsibility is established as a result of failure to exercise duties attached to the position of command.⁷¹ The requirements of CR under this Article appear to be generally consistent with those under the customary form of CR.

The requirements of CR were also drafted consistently for both military and civilians alike.⁷² This supports this thesis’ argument that the determinate factor is not whether the accused was military or civilian, rather it is whether an accused assumed voluntarily the position of command.⁷³ The *mens rea* requirement

⁶⁹ The UN Diplomatic Conference of the ICC, Vol. III (32 at footnote 78).

⁷⁰ The UN Diplomatic Conference of the ICC, (Vol. III), 32.

⁷¹ This customary nature originated from the precedents following WWII. See the discussions in Chapter 2. For the nature of CR under the ICC, see Robert Cryer, ‘General Principles of Liability in International Criminal Law’, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing 2004) 257-261.

⁷² The voluntary assumption of the position of command is the reason for holding a civilian superior criminally responsible similarly to a military commander, pursuant to CR doctrine. See Chapter 2 (nn 185-195).

⁷³ *Ibid.* It emphasises instead that the determinate factor is whether the alleged accused commander had voluntarily assumed the position of command. Cf. Yaël Ronen, ‘Superior

specified, for instance, that the accused superior may be responsible if, “owing to the widespread commission of the offences [or] owing to the circumstances at the time”, he/she knew or should have known about the crime(s) committed.⁷⁴ The ‘should have known’ standard and the widespread element of the subordinates’ crimes were recognised as essential features of the *mens rea* requirement under the customary nature of CR.⁷⁵

However, CR, as drafted initially under Article 25, was re-drafted later on, in accordance with an amendment proposed by the delegation of the United States.⁷⁶ This suggested a separation between the responsibility of military commanders and that of civilian superiors under the principle of CR. The delegation’s reason for this separation was “because of the very different rules governing criminal punishment in civilian and military organization”.⁷⁷ Note that the customary status of CR was not discussed during the process of codifying CR under the ICC. This lack of examination seems to be the reason that other delegations supported the US proposal. Therefore, the original formulation of CR under Art. 25, which was consistent with customary law, was replaced by the current formulation under Art. 28.

Accordingly, the ‘responsibility of commanders and other superiors’ provided, under Art. 28 of the ICC Statute, that:-

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

Responsibility of Civilians for International Crimes Committed in Civilian Settings’ (2010) 43 Vand. J. Transnat’l L. 313, 347.

⁷⁴ See *supra* (n 70); see also Major James D. Levine II, ‘The Doctrine of Command Responsibility and its Application to Superior Civilian Leadership: Does the International Criminal Court Have the Correct Standard?’ (2007) 193 Mil. L. Rev. 52, 94-95.

⁷⁵ See Chapter 2 (nn 56, 64 and 72) regarding widespread commission and Chapter 2 (nn 151-176) regarding the ‘should have known’ standard.

⁷⁶ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Volume II, A/CONF. 183/13 (Vol. II), 15 June - 17 July 1998, Summary records of the meetings of the Committee of the Whole, A/CONF.183/C.1/SR.1, 136.

⁷⁷ *Ibid.* The US delegation added that the “main difference between civilian supervisors and military commanders lay in the nature and scope of their authority. The latter’s authority rested on the military discipline system, which had a penal dimension, whereas there was no comparable punishment system for civilians in most countries”. Note that this argument is partly incorrect, as a civilian superior would be held responsible under CR only if he or she was in a position of command and only when those under his/her command committed crimes against international law.

(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.”⁷⁸

This is indeed the most comprehensive provision concerning CR as a ground on the basis of which to hold superiors *criminally responsible for crimes* committed by subordinates.⁷⁹ Mettraux, for instance, argued that this is the only provision fully and explicitly to consider the requirements of CR one-by-one.⁸⁰ Karsten, in

⁷⁸ Rome Statute, Art. 28.

⁷⁹ See Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (3rd edn., CUP 2014) 395; see also William A. Schabas, *An Introduction to the International Criminal Court* (4th edn., CUP 2012) 233; Cf. Alejandro Kiss, ‘Command Responsibility under Article 28 of the Rome Statute’, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015) 609-610; cf. also Douglas Guilfoyle, *International Criminal Law* (OUP 2016) 332.

⁸⁰ Mettraux (2009) 24. This could be ascribed to the fact that the ICC is a treaty base and comprehensive provisions would encourage more states to ratify.

contrast, described Art. 28 as being “long and complicated”.⁸¹ The latter description is, however, inaccurate.

In fact, Art. 28 recognised, first, the doctrine of CR as a separate form of liability for omission (failure to act). It then provided an extensive definition, most probably to maintain clarity and to avoid ambiguity, and to confirm the nature of the responsibility under the doctrine of CR. Accordingly, commanders are responsible for the crimes of subordinates only if they fail to control their troops. Art. 28 then specifies the conditions required for such liability.⁸² Interestingly, Art. 28, when extending the liability to civilians, seems to have adopted the caution suggested by the Commission of Experts, although it is not binding on the ICC.⁸³ This Article was therefore divided into two parts: the first concerns military commanders and the second civilian superiors.

On the one hand, this separation between military and civilian superiors under Art. 28 does not entirely reflect customary law,⁸⁴ although Art. 28 (a) and Art. 28 (b) of the ICC specifically recognised the duty to exercise control as being the decisive element in CR of both military and civilian superiors.⁸⁵ On the other, it could be argued that Art. 28 sought to develop the customary nature of CR; thus, a sub-provision for civilian superiors was desirable because of the differences between the military position and the nature of civilian authority.⁸⁶ Nonetheless,

⁸¹ Cf. Nora Karsten, ‘Distinguishing Military and Non-military Superiors: Reflections on the Bemba Case at the ICC’ (2009) 7 J. Int’l Crim. Just. 983, 984.

⁸² See Roberta Arnold and Otto Triffterer, ‘Article 28: Responsibility of Commanders and other Superiors’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, C.H.Beck - Hart - Nomos 2008) 807-808.

⁸³ See (n 54); see also William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 460.

⁸⁴ See Roberta Arnold and Otto Triffterer, ‘Article 28: Responsibility of Commanders and other Superiors’ in Otto Triffterer and Kia Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H.Beck - Hart - Nomos 2016) 1105-1106; see also Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn., CUP 2010) 393-394; see also Mettraux (2009) 210; also Robert Cryer, *Prosecuting International Crimes* (CUP 2005), 325; see also *Prosecutor v. Bemba*, Pre-TC II, Amicus Curiae Observations on Superior Responsibility Submitted Pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/05-01/08, 20 April 2009, para 7. Note that the Amicus Curiae provided that the customary nature of CR is to be found in the *ad hoc* tribunals’ jurisprudence, which is contrary to this thesis’ argument.

⁸⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-TC II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 15 June 2009, para 406.

⁸⁶ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Volume II, A/CONF. 183/13 (Vol. II), 15 June - 17 July 1998, Summary records of the meetings of the Committee of the Whole, A/CONF.183/C.1/SR.1, 136. This is also in line with the personal obligation. See Chap. 1 (n 59). It can be argued that the separation was needed to avoid the problems of some precedents. Cf. *Hirota* (Chap. 2, n 214) *et seq.*

Art. 28 (a) and Art. 28 (b) were both consistent with the customary law of CR for charging the accused, being a superior, with crimes committed by subordinates.

Thus, some aspects of Art. 28 were inconsistent with the customary nature of CR, such as the separation between the requirements of military and civilian responsibility, whereas other aspects were consistent with customary law.⁸⁷ Nevertheless, the ICC approach, of codifying customary rules, appears to be generally controversial. Therefore, it is unclear whether the ICC approach constitutes a departure from customary law or the developing of customary rules. In the case of CR, Art. 28 allows an accused, whether military or civilian, to be charged with a crime committed by a subordinate under his/her command, which is consistent with the customary law. The separation between military commanders' and civilian superiors' criteria of responsibility under CR does not, however, reflect customary law.

This unclear approach of the ICC in codifying customary law continues to be controversial in other rules under the Rome Statute. This can be seen more precisely in the case of (Art. 33) the "superior orders" defence. Art. 33 states that:-

"1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:-

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."⁸⁸

The defence of superior orders under Art. 33 means that the principal perpetrator of war crimes can be excluded from criminal responsibility. Under customary law, however, the defence of superior order(s) is not permitted, although it can be invoked as a mitigating factor in relation to the punishment alone.

⁸⁷ Vetter, for example, because of this partial consistency, argued that CR for military commanders under the ICC "is essentially the current customary international law standard". Greg Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Courts (ICC)' (2000) 25 *Yale J. Int'l L.* 89, 95.

⁸⁸ Rome Statute, Art. 33.

The Nuremberg⁸⁹ and Tokyo⁹⁰ Tribunals' Charters, as well as the API⁹¹, expressly rejected the 'superior orders defence'. The *ad hoc* tribunals' statutes of the ICTY⁹², ICTR⁹³ and the SCSL⁹⁴ also rejected it. Furthermore, some non-governmental organisations, such as Amnesty International, have criticised Art. 33, as being a departure from customary law.⁹⁵ Nevertheless, these rejections were not absolute, as the "superior orders" defence can be invoked only as a ground for mitigating punishment. Thus, it can be argued that the ICC standard of the "superior orders" defence is partly consistent with the customary law;⁹⁶ hence, Art. 33 (2) rejected the defence in relation to genocide or to crimes against humanity.

Accordingly, the ICC approach, of codifying customary rules, appears to be, in part, consistent with some aspects of the original customary norms, although this approach is controversial, as it does not precisely reflect or express customary law. It seems, therefore, that the rationale of the ICC approach is to develop the customary law rather than to deviate from, or merely express, the original customary rule.

In short, the codification of CR was not consistent throughout its recent developments. The API was not consistent with the customary case-law.⁹⁷ The *ad hoc* tribunals were inconsistent with the API regarding CR as well as the ICC. Accordingly, neither the *ad hoc* tribunals nor the ICC precisely reflected or expressed the customary nature of CR. This made it inevitable that the implementation of CR would be inconsistent and highly controversial - unless the nature of the doctrine were interpreted adequately.

⁸⁹ The Nuremberg Charter, Art. 8 stated that "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

⁹⁰ The Tokyo Charter, Art. 6.

⁹¹ See Chapter 1 (nn 60-63).

⁹² ICTY Statute, Art. 7 (4) provided that "[t]he 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."

⁹³ ICTR Statute, Art. 6 (4).

⁹⁴ SCSL Statute, Art. 6 (4).

⁹⁵ Amnesty International, International Criminal Court: Making the right choices – Part V: recommendation to the Diplomatic Conference, IOR 40/010/1998, 47.

<<https://www.amnesty.org/en/documents/ior40/010/1998/en/>> accessed on 19 September 2016.

⁹⁶ Paola Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law' (1999) 10 EJIL 172, 190; see also Lydia Ansermet, 'Manifest Illegality and the ICC Superior Orders Defense: *Schuldtheorie* Mistake of Law Doctrine as an Article 33(1)(c) Panacea' (2014) 47 Vand. J. Transnat'l L. 1425, 1452.

⁹⁷ Chapter 4 (n 108 *et seq*).

2. The impact of codifications on the nature of command responsibility:-

Although codified internationally, CR became more problematic, as these codifications are inconsistent regarding the formulation of CR. It seemed inevitable, therefore, that the application of CR would be controversial. As a result, it became debatable whether a commander would be held responsible only for his failure to act (dereliction of duty); or for the crimes committed by his subordinates (a form of liability).⁹⁸

As argued here, however, the question should be whether various international criminal courts' formulation, interpretation and implementation were accurate; whether the ICC's and the *ad hoc* tribunals' interpretations were consistent with the true *sui generis* nature of CR; and whether the practices of the ICC and of the *ad hoc* tribunals - regarding CR - were consistent and in accordance with the legality principle.⁹⁹

A) CR at the ICC: (the *Bemba* case):-

The ICC is required to apply 'in the first place' the Rome Statute.¹⁰⁰ As discussed above, Art. 28 of the ICC's Statute is the most comprehensive provision of CR under International Law. Although the formulation of Art. 28 does not precisely reflect customary law, the ICC is bound to apply its Statute. Most importantly, as a result of the clear and comprehensive formulation of CR under

⁹⁸ Volker Nerlich, 'Superior Responsibility Under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?' (2007) 5 J. Int'l Crim. Just. 665; Elies van Sliedregt, 'Article 28 of the ICC Statute: Mode of Liability and /or Separate Offense' (2009) 12 New Crim. L. Rev. 420; Scott James Meyer, 'Responsibility for an Omission? Article 28 of the ICC Statute on Command Responsibility' (2011) 8 Miskolc J. Int'l L. 27; see also Christine Bishai, 'Superior Responsibility, Inferior Sentencing: Sentencing Practice at the International Criminal Tribunals' (2013) 11 Nw. U. J. Int'l Hum. Rts. 84.

⁹⁹ The majority of scholars assume that the *ad hoc* tribunals' implementation is in accordance with the customary law as well as customary precedents. Cf. Gregory Bart, 'Special Operations Forces and Responsibility for Surrogates' War Crimes' (2014) 5 Harv. Nat'l Sec. J. 513, 516; see also William A Schabas, *An Introduction to the International Criminal Court* (4th edn., CUP 2012) 233-235; see also *supra* (n 98).

¹⁰⁰ Rome Statute, Art. 21 (1) (a).

Art. 28, the principle of interpretation for the purpose of developing ambiguous rules is unlikely to be used for CR under the ICC.¹⁰¹

The first elaboration on CR at the ICC was in the Pre-Trial Chamber's decision on confirming the charges against Jean-Pierre Bemba Gombo [Bemba]. Bemba was the President of the rebel *Mouvement de Libération du Congo* (MLC) and Commander-in-Chief of its military wing the *Armée de Libération du Congo* (ALC).¹⁰² Bemba was charged under Art. 28 (a) alone for the crimes committed by MLC troops in the Central African Republic (CAR).¹⁰³ The court, in its interpretation of the nature of responsibility under Art. 28, confirmed that CR is a criminal liability for omission, by failing to fulfil the duty to act.¹⁰⁴ It then emphasised that, under CR, the accused is charged for crimes within the jurisdiction of the court (i.e. war crimes, crimes against humanity and genocide) committed by subordinates.¹⁰⁵

In March 2016, the Trial Chamber delivered its judgment in *Bemba*. It confirmed the Pre-Trial Chamber's interpretation of CR under Art. 28 (a) and ruled that for such responsibility the following requirements must be proved: (a) that crimes under the Rome Statutes have been committed by forces; (b) that the accused was the forces' commander; (c) that the accused had effective command over these forces; (d) that the accused either knew or should have known about the forces' crimes; (e) that the accused failed to take necessary measures to prevent, repress or report the commission of such crimes; and (f) that these crimes were committed as a result of the accused's failure properly to exercise control over the relevant forces.¹⁰⁶

¹⁰¹ Cf. Lou Ann Bohn, 'Proceeding with Caution under Article 28: An Argument to Exempt Non-Governmental Civilians from Prosecution on the basis of Command Responsibility' (2004) 1 *Eyes on the ICC* 1, 13.

¹⁰² *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-TC II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 15 June 2009, paras 453-458; see also Johan D. Van Der Vyver, 'Prosecutor v. Jean-Pierre Bemba' (2010) 104 *AM. J. Int'l L.* 241.

¹⁰³ *Bemba* Pre-TC 2009, para 501.

¹⁰⁴ *Bemba* Pre-TC 2009, para 405.

¹⁰⁵ *Ibid.* para 407; see also Chantal Meloni, 'Command Responsibility, Joint Commission and 'Control over the Crime' Approach in the First ICC Jurisprudence', in Triestino Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity* (Routledge 2015) 45-47.

¹⁰⁶ *Prosecutor v. Jean-Pierre Bemba Gombo*, TC III, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08, 21 March 2016, para 170. Cf. the discussions in Chapter 5 regarding the requirements of CR by the *ad hoc* tribunals.

The Trial Chamber then highlighted the debate in the literature;¹⁰⁷ and stated that “[w]hile there has been considerable debate regarding the precise nature of superior responsibility, the Chamber concurs with the Pre-Trial Chamber that Article 28 provides for a mode of liability, through which superiors may be held criminally responsible for crimes within the jurisdiction of the Court committed by his or her subordinates”.¹⁰⁸ Note that this is consistent with the customary nature of CR as formulated in the customary precedents. The UN Secretary-General, for instance, re-affirmed the nature of responsibility under CR and commented that the TC judgment “sends a strong signal that commanders will be held *responsible for international crimes* committed by those under their authority”.¹⁰⁹

The Chamber then noted - in response to the defence regarding the defendant’s lack of ‘unity of command’ - that “there is an overlap between factors relevant to assessing (i) the status of someone effectively acting as a military commander, and (ii) a person’s effective authority and control”.¹¹⁰ The Chamber therefore relied on the interpretation of the *Popović* case regarding the differences between the military principle of ‘unity of command’ and the assessment of effective control.¹¹¹ The Chamber therefore concluded that evidence showed that Bemba had maintained effective command over the MLC troops.¹¹²

It then stated that the evidence showed that Bemba knew about the crimes committed, *via* direct, as well as indirect, communications. The direct communications were through radios, satellite phones and mobile telephones, as well as through his having visited a number of the sites of those crimes.¹¹³ The indirect communications were through appointed commanders such as Colonel

¹⁰⁷ The Trial Chamber referred to: Gerhard Werle, *Principles of International Criminal Law* (2nd edn, 2009) 187 to 197; Kai Ambos, *Treatise on International Criminal Law* (OUP 2013), Vol. 1, 189 to 197; Chantal Meloni, *Command Responsibility in International Criminal Law* (2010) 191 to 207; Guénaél Mettraux, *The Law of Command Responsibility* (2009), 37 to 95; and Otto Triffterer, “Responsibility of Commanders and Other Superiors”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, C.H.Beck - Hart - Nomos 2008) 815 to 822.

¹⁰⁸ *Bemba* TC 2016, para 171.

¹⁰⁹ United Nations (UN), ‘Statement Attributable to the Spokesperson of the Secretary-General on Judgement of the International Criminal Court regarding Jean-Pierre Bemba’, 22 March 2016, <<https://www.un.org/sg/en/content/sg/statement/2016-03-22/statement-attributable-spokesperson-secretary-general-judgment>> accessed 30 September 2016.

¹¹⁰ *Bemba* TC 2016, para 696.

¹¹¹ *Bemba* TC 2016, para 698; see also *Popović* TC, paras 2023-2026.

¹¹² The Chamber accepted a range of evidence such as ‘maintaining direct contact with senior commanders in the field, receiving numerous detailed reports and providing logistical support or equipment to the MLC’ troops. *Bemba* 2016, paras 700-705.

¹¹³ *Bemba* TC 2016, para 707-710.

Mondonga and Colonel Moustapha, who had operated under the orders of Bemba.¹¹⁴

The Chamber then noted that Bemba had established the Mondonga Inquiry to investigate the commission of crimes by troops under his command.¹¹⁵ The Inquiry resulted in a formal prosecution on minor charges of pillaging small sum of money.¹¹⁶ The Chamber found that this Inquiry “did not address the responsibility of commanders, and the investigations did not question the suspects about the crimes of murder and did not pursue reports of rape”.¹¹⁷ The Chamber noted also that Bemba had established “the Zongo Commission in light of public allegations of murder, rape, and pillaging by MLC” troops.¹¹⁸

The Chamber found, however, that “there is no evidence that any action, including by Mr. Bemba, was taken to pursue leads uncovered during the Zongo Commission’s investigations”.¹¹⁹ The Chamber therefore decided that “the measures Mr. Bemba took were a grossly inadequate response to the consistent information of widespread crimes committed by MLC soldiers in the CAR of which Mr. Bemba had knowledge”.¹²⁰ The Chamber asserted therefore that Bemba’s “primary intention was not to genuinely take all necessary and reasonable measures within his material ability to prevent or repress the commission of crimes, as was his duty”.¹²¹

The Chamber established thus that “had Mr. Bemba taken [necessary or reasonable measures], the crimes would have been prevented or would not have been committed in the circumstances in which they were”.¹²² Accordingly, the Chamber held proved all of the requirements for CR and concluded that “Mr Bemba is criminally responsible under Article 28(a) for the crimes against humanity of murder and rape, and the war crimes of murder, rape, and pillaging committed by his forces”.¹²³

¹¹⁴ *Bemba* TC 2016, para 712 and 217.

¹¹⁵ *Bemba* TC 2016, para 711.

¹¹⁶ *Bemba* TC 2016, para 720.

¹¹⁷ *Bemba* TC 2016, para 589.

¹¹⁸ *Bemba* TC 2016, para 722.

¹¹⁹ *Bemba* TC 2016, para 722.

¹²⁰ *Bemba* TC 2016, para 727.

¹²¹ *Bemba* TC 2016, para 728; *Cf.* Chapter 5 (nn 158-168). The AC in *Hadžihasanović* controversially concluded that disciplinary measures are sufficient to fulfil the duty to act, which is contrary to the ICL purpose and the requirements of CR that only necessary and reasonable measures to prevent crimes may be counted.

¹²² *Bemba* TC 2016, para 741.

¹²³ *Bemba* TC 2016, para 742.

In 21 June 2016, the Trial Chamber reached its decision on sentence of Mr. Bemba. During this, the prosecution argued for no less than 25 years of imprisonment for the accused. The defence, however, argued that “a sentence outside the range of 12 to 14 years of imprisonment would infringe Mr. Bemba’s rights”.¹²⁴ The Chamber, after balancing the mitigating and aggravating factors, sentenced Mr. Bemba to 18 years of imprisonment pursuant to Article 28(a), for crimes committed by his subordinates.¹²⁵

This most recent case under ICL about CR is of great value and importance not only for the ICC but more precisely for the doctrine of CR in international criminal law.¹²⁶ It contains the answers for the controversial issues regarding the nature of CR as well as the requirements of such responsibility.¹²⁷ It responded also to the controversy over the precise nature of the responsibility under CR and the criticisms that Art. 28 is inconsistent with the *ad hoc* tribunals’ practice of CR.¹²⁸ The following discussions examine the consistency of the *ad hoc* tribunals’ judgments and their decisions on CR.

B) Re- characterising the nature of CR:-

Under the API and the *ad hoc* tribunals’ statutes, CR was briefly formulated. This impacted on the standard of clarity regarding the nature and requirements of CR in comparison with, for instance, Article 28 of the ICC. In this Mettraux, for example, addresses the *ad hoc* tribunals’ Statutes as the “skeletons”.¹²⁹ Accordingly, these skeletons need to be covered by the flesh, which means to be generally developed through interpretation. This corresponded to the IMT stating that:-

¹²⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, TC III, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08, 21 June 2016, para 90.

¹²⁵ *Bemba*, Decision on Sentence, para 95.

¹²⁶ See Janine Natalya Clark, ‘The First Rape Conviction at the ICC: An Analysis of the Bemba Judgement’ (2016) 14 JICJ 667, 687.

¹²⁷ *Cf. Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Decision on the confirmation of charges against Laurent Gbagbo, ICC-02/11-01/11, 12 June 2014, para 262-263; *Cf. also Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15, 23 March 2016, para 146. In these two cases the Chambers provided the controversial interpretation of Article 28 that the responsibility under CR is for violation of duties in relation to the underlying crime. Such interpretation was corrected by this recent judgment in *Bemba*.

¹²⁸ *Cf. Kia Ambos*, ‘Critical Issues in the Bemba Confirmation Decision’ (2009) 22 LJIL 715, 721.

¹²⁹ Guénaél Mettraux, *International Crimes and the ad hoc Tribunals* (OUP 2005) 5.

“This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing”.¹³⁰

Although in the process of codifying an already existing customary law, minor differences might occur, the substance of that law should always be maintained. Once the substance is changed, the law is regarded as *ex post facto* (retroactive), violating the principle of legality.¹³¹ Thus, the interpretation of rules of an applicable law is governed by the legality principle under (international) criminal law, so the purpose of interpretation is developing the law and never creating a new law.

In this context, the IMT stated that the Laws and Customs of War neither adequately articulated the nature of responsibility nor were there courts for interpreting those rules.¹³² Thus, the IMT Charters demanded such a mechanism for interpretation.¹³³ Although this reasoning for the IMTs was sufficient to develop the law and primarily to avoid *lacunae*, that cannot be deemed to have been so for the *ad hoc* tribunals – especially regarding CR. This is because CR has evolved and been interpreted through the customary precedents. Thus it forms what one could regard as the customary nature of CR, which recognised an already existing law. In order to develop this customary nature, the process should not jeopardise the legality principle to the extent of creating a new law.

i) Developing CR in accordance with its true *sui generis* nature:-

The IMTs, when they interpreted and developed CR, relied on recognised (or common) values for its interpretation: (a) morality as part of establishing (customary) international law, and (b) values of military society. Then it interpreted the criminal nature of CR in conjunction with the nature of atrocities being considered crimes under/against international law as the accused is

¹³⁰ Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Volume I, 12 November 1945 – 1 October 1946. 221.

¹³¹ See discussions in Chapters 4 & 5,

¹³² Law Reports Vol. X, 366.

¹³³ Chapter 2 (n 109 *et seq*).

punished for these crimes.¹³⁴ The IMTs' interpretation of CR was in line with Mr. Henry Stimson's emphasis that:-

“we must bring our law in balance with the universal moral judgment of mankind”.¹³⁵

Accordingly, the IMT to some extent combined “the moral duty” and “the legal duty” for interpreting forms of criminal responsibility.¹³⁶ The distinction between those two duties brings back the relation between morality and law philosophically. Fuller, particularly, argued for the “internal morality” of the law,¹³⁷ which corresponded to the IMTs' interpretation regarding criminal responsibility and CR. In fact, two important values had been essentially influential during the interpretation process at the IMT judgments. First, that international law is a law of nations deduced from the natural law, stating that the history of international wars “proves that such conflicts of necessity tend to precede the inner consolidation of states with almost the force of natural law”.¹³⁸

Second, its social nature is a fundamental element of natural law,¹³⁹ thus the IMTs to interpret CR resort to some of the military society's values – mainly duty, responsibility and “officership/leadership” - for articulating the nature of the doctrine. In this, and particularly for military society, “moral values make up what [commanders are] as persons...Failure here is drastic not just unfortunate” that is because “the purpose of military, its very existence, is based upon the giving and taking of life”.¹⁴⁰ It follows that the military values considered “officership” as the “executive branch” in every military society.¹⁴¹ According to the concept of officership, commanders are to be held responsible for their troops' acts under CR in connection with other ‘personal obligations’ as described by the UN Commission of Experts' Final Report.¹⁴²

Interpretation and implementation of CR, thereafter, should be carried out through considering not only the nature of international law and the committed

¹³⁴ See Chapter 2 (n 111 *et seq*).

¹³⁵ Law Reports Vol. X, 110.

¹³⁶ Law Reports Vol. X, 401.

¹³⁷ See Chapter 1 (n. 92 *et seq*).

¹³⁸ Law Reports Vol. X, 157. This also in accordance with Grotius' description of natural law “that has in it a quality of moral baseness or moral necessity”. H Lauterpacht, ‘The Grotian Tradition in International Law’ (1946) 23 Brit Y.B. Int'l L 1, 7.

¹³⁹ *Ibid* Lauterpacht 24.

¹⁴⁰ Sam C Sarkesian (chapter 1 n 86) 201.

¹⁴¹ *Ibid* 204.

¹⁴² See (n 55).

crimes, but also of the military values as being the basis of creating the customary rules for the nature of CR.

ii) Developing CR by the *ad hoc* tribunals:-

As illustrated above, IMTs judgements sought to develop vague aspects of CR. The IMTs' interpretation resorted to the three components of the *sui generis* nature of CR. The *ad hoc* tribunals' interpretation therefore should be consistent with the customary nature of CR to avoid vagueness and particularly the ICTY to comply with its applicable law.¹⁴³

It is important to reiterate that, in the process of codifying an already existing customary law, minor differences might occur; nevertheless, the substance of that law should always be maintained. Once the substance is changed, the law is regarded as *ex post facto* (retroactive), violating the principle of legality. As highlighted by Christopher Greenwood, "...the codification of a hitherto unwritten rule will almost invariably affect the content of the rule. In selecting words to codify a customary principle, those responsible for the draft are generally forced to try to resolve the ambiguities about the scope and content of that rule and their choices may have the effect of creating new ambiguities. Attention in the future will focus upon the text so that the scope of the customary rule will tend to become a matter of textual interpretation."¹⁴⁴ Interpretation is therefore an essential principle needed to clarify ambiguous rules.

Note that under customary law commanders are obliged to fulfil their duties, in the first place as a military value, in that the responsibility is associated with the fulfilment of these duties.¹⁴⁵ Accordingly, when the commander's failure has resulted in his subordinates committing *Crimes under International law*, the commander will be held criminally responsible for the resultant crimes pursuant to CR,¹⁴⁶ which is the customary nature of this doctrine as developed by the IMTs.

¹⁴³ The ICTY is obliged to only apply the law "which has beyond doubt become part of international customary law". See chapter 4 (n 96).

¹⁴⁴ Christopher Greenwood, 'Customary Law Status of the 1977 Geneva Protocols', in Delissen and Gerard Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven* (Martinus Nijhoff Publishers 1991) 97.

¹⁴⁵ Chapter 2 (n 135).

¹⁴⁶ Cf. Jamie Allan Williamson, Some Considerations on Command Responsibility and Criminal Liability, (2008) 90 *International Review of Red Cross* 303.

C) CR at the *ad hoc* tribunals:-

As illustrated above, the *ad hoc* tribunals' Statutes were "thin" regarding the nature of CR,¹⁴⁷ which was the reason for employing interpretation.¹⁴⁸ The *Čelebići* case, which was the first case to examine, interpret and implement CR at the *ad hoc* tribunals, stated that CR is a "type of individual responsibility for the illegal acts of subordinates".¹⁴⁹ It then stated that:-

"From the text of Article 7 (3) it is thus possible to identify the essential elements of command responsibility for failure to act as follows:-

- (i) The existence of a superior-subordinate relationship;
- (ii) The superior knew or had reasons to know that the criminal act was about to be or had been committed; and
- (iii) The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof."¹⁵⁰

This finding was practically employed as the core precedent to refer to the "essential" requirements of CR for the subsequent cases, not only at the ICTY but also - although not binding - by the ICTR and the SCSL.¹⁵¹ Note that these three requirements alone are not fully in accordance with the customary application of the precedent for CR.¹⁵² They are, in fact, in accordance with the Commentary on the API.¹⁵³ Moreover, the duty to punish appeared only once in the already existing

¹⁴⁷ Fenrick, for example, argued that "Article 7(3) is infelicitously worded". W Fenrick, 'Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia' (1996) 6 Duke J. Comp. & Int'l L. 103, 111.

¹⁴⁸ Note that the *ad hoc* tribunals – particularly the ICTY – are obliged to apply only customary law. See Chapter 4 (n 96); see also Beatrice Bonafé, 'Finding a Proper Role for Command Responsibility' (2007) 5 J. Int'l Crim. Just. 599, 603.

¹⁴⁹ *Čelebići* para 331.

¹⁵⁰ *Čelebići* para 346. These requirements seem to have been deduced from the Commentary's findings rather than the customary cases listed in *Čelebići*. Cf. *supra* (n 22). Cf. chapter 4 (n 105 *et seq*).

¹⁵¹ This can be seen through a number of judgments, *Aleksovski* TC, para 69; *Blaškić* TC, para 289; *Kordić* TC, para 401; *Halilović* TC, para 55; *Limaj et al.*, TC, para 520; also this Judgment has had an impact on the ICTR in many cases, see *Akayesu* TC, para 486; *Kayishema and Ruzindana* TC, paras 208-9; *Rutaganda* TC, para 31; also this Judgment has had an impact on the SCSL in *Alex Tamba Brima et al.*, TCII, paras 782-799; and *Issa Hassan Sesay* TCI, paras 282-317.

¹⁵² See Chapter 2 (nn 47, 48 & 145).

¹⁵³ See (n 22); Cf. also *Čelebići*, paras 354 and 371.

body of customary case law at *Toyoda*; interestingly, even this single trial did not explicitly require the commander to punish offenders.¹⁵⁴

The Tribunal then - citing the ILC and API Commentary - stated explicitly that CR is a form of *omission* “that criminal responsibility for omissions is incurred only where there exists a legal obligation to act”.¹⁵⁵ The Tribunal then – controversially – stated that “we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility. The Trial Chamber accordingly does not adopt the position taken by the ILC on this point, and finds that the lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior”.¹⁵⁶

In other words, there were two problems; first, after the tribunals interpreting CR as a *type of individual responsibility for the illegal acts of subordinates*, it ruled that the commander should be held responsible for failing to take such measures. Second, the Tribunal, after resorting to the ILC and API Commentary, which stated that only *de jure* command is culpable under CR as a customary norm, contradicts these instruments, creating inconsistency. Development of the law is required, but changing the law means violating the legality principle. It would have been more appropriate had the Tribunal stated that a legal obligation can exist whenever the position of command is voluntarily assumed.¹⁵⁷

D) The search for an applicable nature of CR:-

Note that the *Čelebići* case for the ICTY case-law is a precedent and that it is also perceived as a precedent – although not binding - for other *ad hoc* tribunals. More precisely, the characteristics of CR as a norm of customary law are controversially argued to be found in the *Čelebići* case.¹⁵⁸ Nevertheless, the

¹⁵⁴ See Chapter 2 (n 231).

¹⁵⁵ *Čelebići*, para 334. This was confusing also to the subsequent cases at the ICTY. See *Aleksovski*, TC, para 72 (at footnote 106).

¹⁵⁶ *Čelebići* para 395.

¹⁵⁷ See (n 51).

¹⁵⁸ See, for example, van der Wilt, addressing the *Čelebići* to be the origin of CR. Harmen van der Wilt, ‘Command Responsibility in the Jungle: Some Reflections on the Elements of Effective Command and Control’, in Charles Chernor Jalloh (ed), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (CUP 2014) 149; see also Chapter 4 (n 38).

Čelebići case did not recognise the essential elements originating in the *sui generis* nature of CR; nor did it regard the customary case-law to deduce and articulate the nature of CR.¹⁵⁹

This had an impact on the subsequent cases. For example, as a result of the *Čelebići* case's controversial findings mentioned above, the *Blaškić* case stated that "the commander need not have legal authority to prevent and punish acts of his subordinates. What counts is his material ability" to act.¹⁶⁰ This interpretation affected the subordination as a requirement, as it led to disregard the role of duty in relation to this requirement.¹⁶¹ In this, the *ad hoc* Tribunal departed farther from the *sui generis* nature of CR, by disregarding the importance of duties to the nature of this doctrine.

Thus not only the values element was undermined, but also the essence of the customs element - embodied in the concept of 'responsible command' - was disregarded.¹⁶² Nevertheless, the TC in *Blaškić*, acknowledging eventually the importance of the duty for the doctrine of CR, by implication as being part of the values element, concluded that:-

"when a commander fails in his duty to prevent the crime or to punish the perpetrator thereof he should receive a heavier sentence than the subordinates who committed the crime insofar as the failing conveys some tolerance or even approval on the part of the commander towards the commission of crimes by his subordinates and thus contributes to encouraging the commission of new crimes".¹⁶³

It then emphasised that:-

"Command position must therefore systematically increase the sentence..."¹⁶⁴

¹⁵⁹ *Čelebići* merely listed the customary cases, to prove that CR was a pre-existing rule; and these cases were never used to deduce the nature of CR. See the discussions in Chapter 4.

¹⁶⁰ *Blaškić* TC, para 302.

¹⁶¹ See Chapter 5 (nn 180 *et seq*).

¹⁶² See (n 167).

¹⁶³ *Blaškić* TC, para 789. *Cf.* Rogers (chapter 1 n 22); see also Williamson supporting the *Blaškić* TC that the commander should receive a heavier sentences, although his arguments was of considering the commanders position as an aggravating factor only rather than as one element of the threefold nature of CR. Jamie Allan Williamson, 'Some Considerations on Command Responsibility and Criminal Liability' (2008) 90 *International Review of the Red Cross* 303, 312-313.

¹⁶⁴ *Ibid.*

Although this was rejected by the AC,¹⁶⁵ the above illustrates that the importance of the threefold nature of CR. Balancing the three elements is essential for interpreting the nature of this responsibility being considered as a norm created under international law. The TC interpretation in *Blaškić* recognised the three parts which constitute the military values element: the duty and the responsibility and leadership. Note that the TC rationale of duty was not an integral part under the nature of CR: therefore, the TC finding was not overall persuasive. More precisely, the TC relied extensively on the military values element that jeopardised the implementation of other elements; thus, it was rejected by the AC. This conclusion resulted in more controversy, as the subsequent cases continued to search for a more justifiable interpretation of the nature of CR. These cases can be regarded as the first generation of CR under the *ad hoc* tribunals' jurisprudence.¹⁶⁶

The *sui generis* nature of CR was therefore not clear in the first generation. In fact, undermining the customary nature of CR has resulted in this failure to take into account the importance of the values element as part of the *sui generis* nature of CR. Most precisely, the ICTY initially stated “that the concept of responsible command looks to duties comprised in the idea of command whereas that of command responsibility looks at liability flowing from breach of those duties. ...the elements of command responsibility are derived from the elements of responsible command.”¹⁶⁷ The decision stated further that “military organization implies responsible command and that responsible command in turn implies command responsibility”.¹⁶⁸

Note that ‘responsible command’ was created on the basis of ‘military values’.¹⁶⁹ This decision appears, therefore, to be in agreement with some findings

¹⁶⁵ *Prosecutor v. Tihomir Blaškić*, AC Judgement, IT-95-14-A, 29 July 2004, para 89.

¹⁶⁶ Note that Sliedregt argued for three generations. Although the classifications proposed in this thesis may share similarities to those in the Sliedregt, the generations in this thesis are specifically established to examine only the nature of CR. Therefore, generations in this study differ from those in other works. Cf. Elies von Sliedregt, ‘Command Responsibility at the ICTY – Three Generations of Case-law and still Ambiguity’ in Bert Swart *et al.*, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 380.

¹⁶⁷ *Prosecutor v. Enver Hadžihasanović et al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, IT-01-47-AR72, 16 July 2003, para 22.

¹⁶⁸ *Ibid* para 17.

¹⁶⁹ Chapter 1 (n 102 *et seq*).

of this study, although subsequent implementations contradict the essence of this decision, as discussed below.¹⁷⁰

3. Command responsibility *per se* as a crime:-

Although the *Čelebići* case resulted in a controversial judgment, it ruled that CR is a form of criminal responsibility and not *per se* a crime.¹⁷¹ Accordingly, it concluded – during the sentencing - that the “Chamber has found [the accused] guilty, pursuant to Article 7(3) of the Statute, for: the wilful killing and murder ... by his failure to prevent or punish the violent acts of his subordinates...”.¹⁷² This is in accordance with the customary nature of CR, the commander was accordingly held responsible for core crimes under international law as a result of his failure to act.¹⁷³ This did not, however, resolve the problem caused by the failure to articulate the nature of CR explicitly at the beginning of the *Čelebići* judgment.

Hence, the ICTY, in *Krnjelac* (AC) stated that, “[i]t cannot be overemphasised that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control”.¹⁷⁴ The TC in *Halilović* argued, accordingly, that as a result of the lack of definition of the nature of CR in the *Čelebići* judgment, it found it important to examine this issue.¹⁷⁵ It ruled that, because CR is a form of liability for omission,¹⁷⁶ only “[t]his omission is culpable”.¹⁷⁷

The *Krnjelac* and *Halilović* interpretations, therefore, not only departed from the customary case-law and *Čelebići* as a precedent binding on the ICTY, but also violated the legality principle.¹⁷⁸ This could be ascribed to two reasons: (a) judges’ interpretation of CR as a liability for omission based on theories under national criminal law traditions rather than its creation under international law,

¹⁷⁰ The interpretation of CR during the ICTY judgments shows the lack of examination of this concept as well as the values element in relation to the true nature of CR. See *infra* Chapter 4.

¹⁷¹ *Čelebići*, para 331; see also *Aleksovski* TC, para 118.

¹⁷² *Čelebići* para 1237.

¹⁷³ This was followed by the *Blaškić* case stating that “a commander may incur criminal responsibility for crimes committed by ... subordinates”. *Blaškić* TC, para 301.

¹⁷⁴ *Prosecutor v. Krnjelac*, AC Judgment, IT-97-25-A, 17 September 2003, para 171.

¹⁷⁵ See Chapter 4 (n 132).

¹⁷⁶ The *Halilović* case confused the forms of liability for omission. See *infra* Chapter 7.

¹⁷⁷ *Prosecutor v. Sefer Halilović*, TC Judgment, (IT-01-48) 16 November 2005, para 54.

¹⁷⁸ The legality principle was jeopardised as this interpretation changed CR from being a form of liability to being a crime in itself. This amounted to creating a new law or an *ex post facto* law, which is against the principle of legality. See *infra* Chapter 6.

which was problematic already,¹⁷⁹ and, therefore, (b) disregarding the true *sui generis* nature of CR.

Subsequently, the Tribunal in the *Hadžihasanović* case supported the *Krnojelac* and *Halilović* cases' findings that CR is a "responsibility for an omission".¹⁸⁰ Note that, in *Hadžihasanović*, the accused was charged only on the basis of Article (7) 3 of CR; therefore it stated that "the question arises as to whether a commander who has failed in his obligation to ensure that his troops respect international humanitarian law is held criminally responsible for his own omissions or rather for the crimes resulting from them".¹⁸¹ This was important for this case as *Hadžihasanović* was charged solely under CR. The nature of CR was explicitly provided for through the *Halilović* judgment mentioned above; therefore *Hadžihasanović*, without examining the customary case-law or the API drafting, found the *Halilović* interpretation to be more appropriate.¹⁸²

It is suggested that, although the *Čelebići* case recognised CR as a responsibility for the crimes committed by subordinates, *Čelebići* is only an authority for characterising CR as a norm of customary law.¹⁸³ *Čelebići* is not, therefore, an authority for the criminal nature of CR, because this nature was solely examined by the *Halilović* case.¹⁸⁴ Note that the *sui generis* nature claimed by the *Halilović* case differs from the true *sui generis* nature of the doctrine suggested by this thesis. *Halilović* decided that the nature of:-

"...command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus "for the acts of his subordinates" as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed

¹⁷⁹ This was the core problem during the drafting of the API. See *infra* Chapter 4.

¹⁸⁰ *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, TC Judgment, IT-01-47-T, 15 March 2006, paras 73-4.

¹⁸¹ *Hadžihasanović* TC, para 68.

¹⁸² *Hadžihasanović* TC, para 71.

¹⁸³ *Hadžihasanović* TC, para 70.

¹⁸⁴ *Hadžihasanović* TC, para 71.

the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed. The Trial Chamber considers that this is still in keeping with the logic of the weight which international humanitarian law places on protection values”.¹⁸⁵

Accordingly, the *Hadžihasanović* TC concluded that CR is a “responsibility for an omission to prevent or punish crimes committed by his subordinates”.¹⁸⁶ This was followed by the *Orić* TC stating explicitly that “superior criminal responsibility is characterised by the mere omission... the superior bears responsibility for his own omission”.¹⁸⁷ In other words, the second generation cases – *Halilović*, *Hadžihasanović* and *Orić* - contradicted the first generation’s interpretation by re-characterising the nature of the doctrine - that the commander is responsible for his own act no matter what the resultant crimes. In this it re-characterised the nature (or changed the law) that was affirmed by the first generation case-law mainly of *Čelebići*. This also contradicted the reason of creating CR under ICL as well as the purpose of establishing the tribunals.¹⁸⁸

In other words, the *Halilović* judgment’s interpretation deviated from the applicable law of CR; thus, the ICTY jurisprudence seems to suggest two different natures of the doctrine, so far. This deviation had an impact on the *ad hoc* tribunals’ judgements not only at the ICTY but also the ICTR and SCSL. The ICTR, however, seems more in line with the *Čelebići* ruling,¹⁸⁹ and more precisely the verdict at the ICTR reflects the customary purpose of establishing CR.¹⁹⁰ The SCSL in *Fofana*, on the other hand, referred to the *Čelebići* case to emphasise the

¹⁸⁵ *Halilović* TC, para 54; *Hadžihasanović* TC, para 75; and *Prosecutor v. Naser Orić* TC Judgment, IT-03-68-T, 30 June 2006, para 293.

¹⁸⁶ *Hadžihasanović* TC, para 75.

¹⁸⁷ *Orić* TC, para 293.

¹⁸⁸ The purpose is to find individuals responsible for international crimes. *Cf. supra* (nn 38-39).

¹⁸⁹ *Prosecutor v. Alfred Musema*, TC Judgement and Sentence, ICTR-96-13-A, 27 January 2000, para 951; see also *Prosecutor v. Juvénal Kajelijeli*, TC Judgement, ICTR-98-44A-T, 1 December 2003, paras 843 and 906; see also *Prosecutor v. Tharcisse Muvunyi*, TC Judgment, ICTR-2000-55A-T, 12 September 2006, para 473 & 497; see also *Prosecutor v. Nahimana et al.*, AC Judgment, ICTR-99-52-A, 28 November 2007, para 359. Although the nature of the doctrine seems to be somehow consistent - holding the superior responsible for the crime committed - the ICTR created a problem in applying the requirements of CR inconsistently, due to the tribunal’s failure to articulate the nature of CR. See *infra* Chapter 5.

¹⁹⁰ The ICTR consistency here could be attributed to the gravity of the underlying crime being genocide which “was far more serious” therefore “the individual culpability of the defendants far more grave”. Jens David Ohlin, ‘Proportional Sentences at the ICTY’ in Bert Swart *et al.*, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 323. In *Kayishema* sentence, for example it was ruled that “Kayishema was a leader in the genocide in...and this abuse of power and betrayal of his high office constitutes the most significant aggravating circumstance”. *Prosecutor v. Kayishema and Ruzindana*, TCII Sentence, ICTR-95-1 T, 21 May 1999, para 15.

customary characteristics of CR as a form of liability,¹⁹¹ then *Halilović case's* classification of CR as a liability for omission.¹⁹² This was without noticing the extent of inconsistency between these two cases. Most importantly, this offers two possibilities: (a) a chamber might follow the ICTY first generation cases of CR, where the responsibility was for the underlying crime; or (b) the second generation cases' interpretation, where CR was *per se* a crime.

In the *Brima* case, the Tribunal, on the one hand, suggested that CR is a customary norm as affirmed by *Čelebići*,¹⁹³ then referred to *Halilović* and stated that CR is a liability for an omission that “a superior is not responsible for the principal crimes, but rather for what has been described as a ‘dereliction’ or ‘neglect of duty’ to prevent or punish the perpetrators of serious crimes”.¹⁹⁴ Nevertheless, the SCSL, contrary to this interpretation, concluded that it “finds ... Brima guilty of the following crimes pursuant to Article 6(3) ... Rape, a crime against Humanity”.¹⁹⁵

This inconsistent verdict in *Brima* has impacted on the subsequent case at the SCSL. The TC in *Seray*, stated at the beginning that “the Accused [is] responsible pursuant to Article 6 (3) of the Statute for the crimes” committed by his subordinates.¹⁹⁶ After that, it regarded CR as a responsibility for the failure to prevent crimes - and not for the underlying crime - referring to the *Halilović* interpretation.¹⁹⁷ Interestingly, it found the accused guilty “of murder pursuant to Article 6(3)”,¹⁹⁸ which contradicts its interpretation about CR at the beginning of the judgment.

This controversial issue became more notable at the “lenient” sentences, as in the *Čelebići* case the verdict was clear that the accused was responsible for the

¹⁹¹ *Prosecutor v. Moinina Fofana et al.*, TC Judgment, SCSL-04-14-T-785, 2 August 2007, (hereafter *Fofana*) para 233.

¹⁹² *Ibid* para 234.

¹⁹³ *Prosecutor v. Alex Tamba Brima et al.*, TC Judgment, SCSL-04-16-T, 20 June 2007, (hereafter *Brima*) para 782.

¹⁹⁴ *Ibid* para 783.

¹⁹⁵ *Ibid* para 2114.

¹⁹⁶ *Prosecutor v. Issa Hassan Sesay et al.*, TC Judgment, SCSL-04-15-T-1234, 2 March 2009, (hereafter *Sesay*) para 281.

¹⁹⁷ *Ibid* paras 282-3.

¹⁹⁸ *Ibid* 680.

crimes committed but the sentence was too lenient.¹⁹⁹ As a result of the single charge of CR in *Hadžihasanović* and *Orić* of the second generation cases,²⁰⁰ however, the accused was convicted of: “[f]ailure to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of murder”.²⁰¹ This means that the crimes committed went unpunished, which is contrary to the purpose of creating these international criminal courts and tribunals.²⁰² Most importantly, this jeopardised the principle of legality, as well as of the accused person’s right to know the nature of the accusation against him.²⁰³

This uncertainty about the nature of CR was from the beginning inevitable, because judges themselves were uncertain about this doctrine’s nature, therefore judgments concerning CR appear contradictory.²⁰⁴ Judge Shahabuddeen, for instance, disagreed with the majority ruling in the *Hadžihasanović* Interlocutory Decision²⁰⁵ and stated that:-

“I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so. Reading the provision reasonably, it could not have been designed to make the commander a party to the particular crime committed by his subordinate”.²⁰⁶

Judge Shahabuddeen, interestingly, declared in the *Orić* case that:

“...the language of several cases does suggest that the commander himself committed the crime of the subordinate. However, in my view, those cases are to be construed as resting on the basis that punishment for the actual

¹⁹⁹ Cf. *supra* (n 163); see also (n 190); see Christine Bishai (n 98) 87; see also Barbora Holá *et al.* ‘Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice’ (2009) 22 LJIL 79, 91; also Ohlin (n 190) 340; see also chapter 7 (n 57).

²⁰⁰ *Hadžihasanović* was sentenced to three and half years and Kubura to two years. *Hadžihasanović* AC, paras 356-358. *Orić* the TC sentenced him to two years before the AC acquittal. *Orić* AC, paras 6 and 188.

²⁰¹ *Orić* TC, para 782.

²⁰² See *supra* (n 38).

²⁰³ See *infra* Chapter 6.

²⁰⁴ Cf. A M M Orić, ‘Stare Decisis in the ICTY Appeal System? Successor Responsibility in the Case’ (2012) 10 J. Int’l Crim. Just. 635, 635-636.

²⁰⁵ See (nn 167-168).

²⁰⁶ Partially Dissenting Opinion of Judge Shahabuddeen, on *Hadžihasanović* Decision on Interlocutory Appeal, *supra* (n 112). Here, Judge Shahabuddeen did not consider the fact that this provision was created based on Art. 86 of the API. Art. 86 functions to codify the already existed customary nature of CR. Cf. Chapter 4 (n 57 *et seq.*).

crime committed by the subordinate is only the measure of punishment of the commander for his failure to control the subordinate. Considered in this way, those cases are correct. If they are not to be so construed and have as a result led to punishment of the commander for participating in the actual crimes committed by his subordinates, they have misrepresented the true meaning of the doctrine of command responsibility in international criminal law. Practitioners are familiar with the procedure of construing a case so as to reconcile it, if possible, with common sense. One should speak of a contradiction only where such a procedure fails to achieve harmony. I do not consider that there is a contradiction in this case, and so do not propose to express a view on the assumption that there is.”²⁰⁷

This oscillation was debated in the literature;²⁰⁸ Cryer, for example, challenged Judge Shahabuddeen’s view and accurately criticised these inconsistent interpretations of CR.²⁰⁹ However, as found above, the inconsistency about the nature of CR came about because of the *Halilović* interpretation of CR as being a liability for omission. Although CR was correctly regarded as a liability for omission, the interpretation was inadequate, as it was examined *per se* as a crime of omission rather than a commission by omission.²¹⁰ However, neither the values element was included as an integral part of CR nor was its true *sui generis* nature recognised in the literature.

Thus, it must be noted that Article 28 of the ICC accurately defines that nature when it states that:-

“[a] 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”.²¹¹

²⁰⁷ *Prosecutor v. Orić*, AC Judgment, IT-03-68-A, 3 July 2008, Declaration of Judge Shahabuddeen, para 25.

²⁰⁸ Elies van Sliedregt (2012) 195-6; see also Chantal Meloni (2010) 132-7. But as Stewart suggested that this practice was the reason for “the vast majority of academics agree that failures to punish must constitute a separate conduct-type offense”. J. G. Stewart, The end of “modes of liability” for international crimes (2012) 25 LJIL 165, 190-192.

²⁰⁹ Robert Cryer, ‘The Ad hoc Tribunals and the Law of Command Responsibility: A Quiet Earthquake’ in Shane Darcy and Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) 174-181.

²¹⁰ See the discussions in chapter 7.

²¹¹ Art. 28 (a), ICC.

This is, indeed, the simplest and clearest description of the nature of CR.²¹² Thus the ICC should resort to this Article alone for the nature of CR.²¹³ The ICC in *Bemba* somehow resorted to the problematic interpretations of the *ad hoc* tribunals.²¹⁴ Nevertheless, the ICC ruled – more recently – that “the language of Article 28 expressly links the responsibility of the commander to the crimes committed by subordinates” accordingly “the crimes for which the commander is held responsible are “committed” by forces, or subordinates, under his or her effective command and control, or effective authority and control, rather than by the commander directly”.²¹⁵

4. Ongoing inconsistency of the nature as a form of responsibility:-

As illustrated above, the first generation case-law of the *ad hoc* tribunals implemented CR as a form of responsibility and the accused commanders were found responsible for the underlying crimes. The second generation case-law, however, implemented CR as a crime *per se* and accordingly found the accused commanders responsible for a dereliction of duty. Although the second generation was controversial as it deviated from the interpretation of CR by the first generation case-law,²¹⁶ the second generation case-law interpretation received more support as being more in line with the precise nature of CR.²¹⁷ Nonetheless, in a recent ruling, *Popović* stated that, under CR, an accused is “*charged as a commander* for the acts of his subordinates, with the same crimes” committed by these subordinates.²¹⁸

²¹² Cf. N Karsten, ‘Distinguishing Military and Non-military Superiors: Reflections on the Bemba Case at the ICC’ (2009) 7 J. Int’l Crim. Just. 983, 984. Karsten described Art. 28 as being “long and complicated”. See also Watt responding to Vetter’s criticisms about CR in the Rome Statute. Daniel Watt, ‘Stepping Forward or Stumbling Back? Command Responsibility for Failure to Act, Civilian Superior and the International Criminal Court’ (2008) 17 Dalhousie J. Legal Stud. 141, 143 *et seq.*

²¹³ Although it is clear that the responsibility for the crime as a result of an omission and not vice versa, some scholars were confused as a result of the *ad hoc* tribunals’ implementation as they attributed the commander’s responsibility to the omission as a crime. Cf. Scott Meyer, ‘Responsibility for an Omission? Article 28 of the ICC Statute on Command Responsibility’ (2011) 8 Miskolc J. Int’l L. 27, 33.

²¹⁴ *Bemba*, paras 409, 424 & 495.

²¹⁵ *Prosecutor v. Bemba*, TC III, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08, 21 March 2016, para 173.

²¹⁶ Alexander Zahar and Göran Sluiter, *International Criminal Law* (OUP 2008) 271.

²¹⁷ See, for example, *Hadžihasanović and Orić*, *supra*; see also Judge Bakone Justice Moloto, ‘Command responsibility in International Criminal Tribunals’ (2009) 3 Publicist 12, 15.

²¹⁸ *Prosecutor v. Popović et al.*, TC Judgment, IT-05-88-T, 10 June 2010, paras 1432, 1838 and 2016.

Popović, therefore, found the commander “criminally responsible, pursuant to Article 7(3), for murder as a crime against humanity as well as for murder as a violation of the laws or customs of war”.²¹⁹ It then emphasised that the commander is “responsible pursuant to Article 7(3) for murder with respect to the murder of” victims.²²⁰ Most importantly, the *Popović* AC affirmed the TC’s ruling that under CR an accused commander is charged for the result of his omission; thus, the commander is responsible for the crimes committed by his subordinates.²²¹ Note that the *Popović* ruling is identical to the ICC recent interpretation of the nature of CR in *Bemba*.²²²

This recent change by *Popović* constituted the third generation case-law for the nature of CR at the *ad hoc* tribunals. It precisely defined the nature of CR being a mode of responsibility for omission and not a crime *per se*. This re-interpretation of the nature of CR by *Popović* resulted in re-consideration of the requirements of CR. Therefore *Popović* AC re-interpreted, for instance, the test of effective control in a way more appropriate to its precise nature.²²³ It thereafter adequately articulated the duty to acquire information in line with the ‘values’ component.²²⁴ These recent developments resulted from the court’s articulation of the precise nature of CR.

In other words, the *ad hoc* tribunals – particularly the ICTY – have recently recognised the precise nature of CR in *Popović*.²²⁵ It is noteworthy that this precise nature, as re-interpreted by *Popović*, is compatible with CR in the ICC implementation. On the one hand, the ICTY in *Popović* implemented the true *sui generis* nature of CR. On the other, the differences between the first, second and third generations of case-law might have jeopardised the accused’s right to be informed of the precise nature of the accusation(s) against him.²²⁶ Especially is this so in that the more recent case of *Karadžić* has provided an interpretation of CR that differs from these three generations’ implementation.

²¹⁹ *Popović* TC, para 1576.

²²⁰ *Ibid.*

²²¹ *Prosecutor v. Popović et al.*, AC Judgment, IT-05-88-A, 30 January 2015, para 2117.

²²² *Cf. Bemba* 2016, *supra* (nn 105-106).

²²³ *Popović* AC, para 1745. In this, the test examines whether the commander “had the ability to act, such that there were means available to him to fulfil his duty”. *Cf.* Chapter 5 (n 228).

²²⁴ The “duty of inquiry”. *Popović* AC, para 1754. See Chapter 5 (n 229).

²²⁵ *Popović* AC, para 2117; *Cf.* also Christine Bishai (n 98) 97.

²²⁶ See *infra*, Chapter 6.

The ICTY in *Karadžić* stated that an accused, under CR, is charged “with respect to a crime for which his subordinate is criminally responsible”.²²⁷ This interpretation created a different category – the fourth generation case-law - for the nature of responsibility under CR. While *Popović* held the accused responsible for the crimes committed by his subordinates, *Karadžić* found him responsible for *a dereliction of duty*.²²⁸ The court’s verdict in *Karadžić* was accordingly for his failure to fulfil his duty rather than the crimes committed by his subordinates.²²⁹

Note that CR under Article 7(3) of the ICTY has been interpreted in four different forms (or “generations”). This issue has also affected the practice of the other *ad hoc* tribunals. In the ICTR, Judges Pocar and Liu recently dissented that “[t]he Majority appears to concede that superior responsibility under Article 6 (3) of the Statute is no less culpable than individual criminal responsibility under Article 6 (1) of the Statute. However, notwithstanding this concession, the Majority fails to provide persuasive reasons to justify its decision to significantly reduce the sentence ... Such reduction may appear to suggest that ... it does not apply this principle in practice”.²³⁰ The excessively lenient sentencing of individuals charged under CR at the *ad hoc* tribunals illustrates that judges consider CR to be in a lower category than other forms of direct liability.²³¹

Such inconsistency in implementation has had an impact on the effectiveness of CR as an operative form of individual criminal responsibility in ICL.²³² In fact, the precise nature of CR seemed ambiguous because of the lack of consistency in interpretation and implementation of this doctrine in ICL. Judges at the *ad hoc* tribunals, as a result, considered CR to be a secondary form of responsibility compared to other modes of liability, because of the failure to declare the precise nature of CR. The process of interpretation is therefore discussed in the following Chapter.

²²⁷ *Prosecutor v. Karadžić*, TC Judgment, IT-95-5/18-T, 24 March 2016, para 579. The Chamber seems to have adopted Sliedregt’s justification of the second generation of *Orić*’s findings that “the superior is not ‘responsible for’ but ‘responsible in respect of’ or ‘with respect to’ the crimes of subordinates”. Elies van Sliedregt, *Individual criminal responsibility in international criminal law* (OUP 2012) 195-196.

²²⁸ *Karadžić*, para 5852.

²²⁹ *Karadžić*, para 6005.

²³⁰ *Bagosora AC*, Joint Dissenting Opinion of Judges Pocar and Liu, para 2.

²³¹ See, for instance, *Hadžihasanović and Orić* sentences: *supra* (n 200).

²³² *Stakić*, for instance, ruled that “it is in general not necessary in the interest of justice ... to make finding under Article 7 (3) if the Chamber is already satisfied beyond reasonable doubt of ... responsibility under 7 (1)”. Its justification being that: “it would be a waste of judicial resource to enter into a debate on Article 7 (3) knowing that Article 7 (1) responsibility subsumes Article 7 (3)”. *Prosecutor v. Milomir Stakić*, TC-II Judgement, IT-97-24-T, 31 July 2003, para 466.

5. Conclusion:-

This chapter analysed the codification of CR and then examined the consistency of implementing the nature of CR accordingly. It examined, therefore, the consistency of various statutory codifications of the threefold nature of CR. It then examined the extent of consistency in the implementation of this nature in various courts under ICL. It observed, first, that the nature of CR has been - and remains - the most challenging issue of its implementation as a mode of criminal responsibility. It found that the codifications – with the exception of the ICC – did not articulate the nature of CR. This is primarily because the structure of the responsibility under CR differs fundamentally from that under other forms of liability.

This chapter has found the implementation of CR under ICL to be inconsistent, because neither the codifications nor the implementation were consistent with each other or with the threefold nature of CR. The *ad hoc* tribunals correctly found CR to be a liability for omission (the criminal element). They also accurately identified the nexus between CR and responsible command (the custom element). They implicitly recognised the significance of duty, leadership and responsibility for the nature of CR (the values element). It found the problem to be, however, that these three elements had never been considered explicitly together as an integral part of the nature of CR. Although the three components were by implication considered in some cases, the balance of these three elements was implicitly articulated only in *Popović*.

The current problems of the inconsistent nature of CR resulted, therefore, from the imbalance between these three elements. Judgments appeared contradictory because the application process was inconsistent regarding the balance of implementing the nature's elements. This can be seen through this chapter's findings about the four different generations of CR at the ICTY, namely that: (1) an undefined nature; (2) responsibility for dereliction that excluded the underlying crime; (3) responsibility for the crime(s) but without explicit consideration of the three elements; and (4) responsibility with respect to the crime(s).

This inconsistency in implementing the nature of CR produced three results: (a) contradictory judgments, because the nature of CR was not clearly specified in the influential judgment in *Čelebići*; (b) the lack of any clear nature of CR, allowing judges controversially to change the nature, and subsequently to create, a new standard of CR as a crime *per se*; and (c) because of these inconsistency, a tendency to sentence convicted criminals too leniently and disproportionally for the international law crimes committed. This put CR in a category lower than other modes of liability, which is contrary to the *ad hoc* tribunals' statutes.

As a result, the *ad hoc* tribunals' implantations of CR were not consistent with the customary precedents or with the purposes of these courts' creation. The purpose of creating these international criminal tribunals was to prosecute individuals *responsible for core crimes committed* under ICL. This inconsistency was because of the inconsistent formulation of various codifications, from the API through the *ad hoc* tribunals to the ICC, with the customary precedents. The nature of CR would have not been affected had judges resorted to the customary precedents to deduce the law as the applicable law of CR.

Nonetheless, the criminal element has been correctly, and repeatedly, considered in relation to the nature of CR as a liability for omission; but this was not implemented in accordance with CR's threefold nature. The *ad hoc* tribunals changed/re-characterised CR, from being a form of criminal responsibility for the crime(s) resulting from a commander's omission to being regarded as a punishable crime *per se*. This re-characterisation resulted from the inconsistent interpretation of CR by the *ad hoc* tribunals. The following Chapter, therefore, discusses the process of interpretation and its legitimacy.

Part II

The Legitimacy and Impact of the *Ad Hoc* Tribunals' Interpretation of CR

The foregoing discussions under Part I examined the creation development and implementation of CR by judges especially during post-WWII, which constituted the customary precedents of CR. It found that CR was created under international law by judges rather than states. In this, judges interpreted then implemented CR in accordance with the three elements of its *sui generis* nature (military values, customary rules and criminal responsibility). The uniqueness is therefore attributed to the judges' success of implementing these three elements simultaneously, rather than the mere establishment of this doctrine by judges. However, neither the codifications of this doctrine nor judges' implementation of CR recently reflected these three elements.

Therefore, the nature was vaguely formulated under various legislations such as the *ad hoc* tribunals' statutes. As a result of this ambiguity, the *ad hoc* tribunals' implantations of CR were not inconsistent with the customary precedents nor was it with these courts purposes' of creation. In this, the purpose of creating these international criminal tribunals was to prosecutor individuals *responsible for core crimes committed* under international law.

However, the preceding discussions demonstrate the inconsistency in implementing the nature of CR, that can be summarised as following: existed in four forms: (a) early judgments appeared contradictory due to failure to articulate the nature of responsibility; (b) the second generation argued the lack of clear nature of CR, therefore, judges changed the nature and subsequently created a new standard of CR; and (c) the inconsistency resulted in the tendency to sentences the accused criminals too lenient and disproportion. This puts CR in a category lower than other modes of liability, which is contrary to statutes' of these courts.

These findings of Part I supported accordingly this thesis's argument that the implementation of CR in the *ad hoc* tribunals was inconsistent. Part II is designated to dissect the reasons for and the impact of the inconsistency. The purpose of this part is to examine whether these inconsistent implementations were resulted from inconsistent interpretation and to analyse the impact of these inconsistencies.

This Part therefore consists of three chapters:-

Chapter Four analyses the process of interpretation adopted by the *ad hoc* tribunals particularly the ICTY being the germane for the alleged developments of the nature of CR.

Chapter Five examines the impact of the process of interpretation on the requirements of CR. It discusses the impact of the inconsistency on the unique rationale and purposes of establishing these requirements.

Chapter Six dissects the impact of these inconsistencies on the process of conducting international criminal proceedings. In this it only examine the extent of jeopardy and potential violations of the accused person's rights as a result of these inconsistencies.

IV. Chapter Four

The legitimacy of the interpretation method of Command Responsibility

As illustrated above, judicial interpretation was used by judges at the International Military Tribunals of Nuremburg and Tokyo (IMTs) to develop and articulate the nature of Command Responsibility (CR). In fact, interpretation for the purpose of developing CR can be traced back to 1919.¹ Accordingly, different interpretations regarding the concept of CR were significantly discussed historically.² The successful application of CR in *Yamashita* resulted from judicial interpretation of its nature.³

The IMTs at the beginning of the trials relied on the principle of interpretation, allowing judges, therefore, to develop CR.⁴ The *ad hoc* tribunals' provisions regarding CR were "thin" about the nature of responsibility.⁵ Therefore, the ICTY in its seminal case - *Čelebići* - interpreted CR, attempting to articulate its true nature. This chapter argues that inconsistent implementation of CR resulted from that Tribunal's vaguely interpreted CR and it therefore examines this method of interpretation.

As demonstrated above, interpreting CR at the *ad hoc* tribunals could be the reason for its inconsistent implementation and their continued re-characterisation of this doctrine's nature.⁶ Thus, in order to assess the legitimacy of the interpreted rules and the judicial decision thereafter, two issues are important: the process of interpretation and the sustainability of the resultant rules.⁷ In that sense, the outcomes of the judicial decision need to be weighed against the process of interpretation.

¹ See Chapter 1 (n 143) *et seq.*

² See the American and Japanese representatives' impact on the Commission's final report. See Chapter 1 (n 153) *et seq.* Note that the nature of CR was consistent that commanders were responsible for the underlying crimes.

³ That "the gist" of [CR] is violating a duty "as an army commander to control" subordinates activates "permitting them to *Yamashita* commit" crimes under IL. See Chapter 2 (n 72). This issue of interpretation was undermined in the literature as a result of the problematic procedure at the *Yamashita* Trial. See Chapter 2 (n 92) *et seq.*

⁴ See Chapter 2 (n 109).

⁵ See Chapter 3 (nn 39 & 58).

⁶ Cf. Darryl Robinson, 'How Command Responsibility Got so Complicated: a Culpability Contradiction, its Obfuscation, and a Simple Solution' (2012) 13 *Melb. J. Int'l L.* 1.

⁷ Joseph Powderly, 'Distinguishing Creativity from Activism: International Criminal Law and the 'Legitimacy' of Judicial Development of the Law' in William A Schabas and others (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate 2013) 225.

This process of interpreting CR at the *ad hoc* tribunals is therefore the main purpose of this chapter, which examines and analyses the process of CR's interpretation adopted mainly by the ICTY. The chapter argues that customary precedents of CR should have a superior role during the interpretation of its nature, created through customary precedents. The following, therefore, dissects the process of interpreting CR at the *ad hoc* tribunals and the role of the doctrine's precedents in recent interpretations.

1. Interpretation and International Criminal Law:-

A poorly drafted or vague rule is common in any newly created law. Thus, judicial 'law-making' – through interpretation - emerged to resolve such vagueness, for the rule to be applicable as a law and to avoid *non liquet*.⁸ Hernandez suggested that "the interpretation of a principle or rule by a judicial body channels it into a concrete form".⁹ In addition, interpreting such a rule "bestows it with meaning and authoritative weight".¹⁰

International Criminal Law (ICL) is regarded as a "hybrid branch of law: it is [Public International Law] PIL impregnated with notions, principles, and legal constructs derived from national criminal law, IHL as well as HRL".¹¹ ICL is more importantly regarded as a "rudimentary branch of law", thus it requires constant development.¹² Interpretation, therefore, became an essential principle in ICL. Above all, interpretation is regarded as a legal method of revealing the true meaning of the law when the general understanding breaks down.¹³ In fact, interpretation is an essential principle that is necessary for articulating the true application of the law in practice.¹⁴ Patterson, accordingly, described interpretation as the repairer of 'the fabric of the law'.¹⁵

⁸ Sir David Baragwanath, 'The Interpretative Challenges of International Adjudication Across the Common Law/Civil Law Divide' (2014) 3 Cambridge J. Int'l & Comp. L. 450, 453-454.

⁹ Gleider I. Hernandez, *The International Court of Justice and the Judicial Function* (OUP 2014) 88.

¹⁰ Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 272.

¹¹ A Cassese, *International Criminal Law* (3rd edn, OUP 2013) 7.

¹² *Ibid* 4-5.

¹³ Dennis Patterson, 'Interpretation in Law' (2005) 42 San Diego L. Rev. 685, 696-7.

¹⁴ *Ibid* 708-9.

¹⁵ *Ibid* 697.

A) The procedure of interpretation:-

Interpretation for, especially, ICL is “subject to the “principles of legality” which derive from “general principles of law” as applied in ICL”.¹⁶ The legality principle “in this case serves to preserve legal certainty and avoid arbitrariness”.¹⁷ As a result of the ICL’s nature, the principle of interpretation was formulated mainly from national law systems.¹⁸ In general terms, western national law systems can be divided into two systems: Common Law and Civil Law.¹⁹ Civil Law is defined generally as the “legal tradition which has its origin in...the codified Roman law” that is “highly systematized and structured and relies on declarations of broad, general principles, often ignoring the details”.²⁰ The main feature of the Civil Law tradition is that it is written broadly in statutes. Common Law is defined as the “law established on the basis of decisions by courts, rather than by statute”.²¹ The essential feature is that common law generally depends on judicial precedents (*stare decisis*) to form the applicable law.²²

These two legal systems, when interpreting a disputed rule, rely on the principle of interpretation to deduce or explain the true meaning, by referring to the source of that law. They thus vary in their implementation.²³ In the Civil Law, the statute is the primary source: therefore, in interpreting a rule, the “intention of the legislator” is to be identified.²⁴ In the Common Law the precedent is the core factor: therefore interpreting a rule needs to be weighed against, or examined through, case-law. Thus, the function of the judges in Civil Law is the application of the law that was purposely created by the legislator; that of the judges in the

¹⁶ M Cherif Bassiouni, ‘The Discipline of International Criminal Law’ in M Cherif Bassiouni (ed.), *International Criminal Law: Sources, Subject, and Contents Volume I* (3rd edn., Martinus Nijhoff Publishers 2008) 5.

¹⁷ I Bantekas, ‘Reflection on Some Sources and Methods of International Criminal and Humanitarian Law’ (2006) 6 Int’l Crim. L. Rev. 121, 125.

¹⁸ *Čelebići* TC, paras 158-9.

¹⁹ Although there are other national laws, such as those based on the Islamic ‘*Sharia*’ law, the Common and Civil laws are the national laws that impacted on the ICL. *Čelebići* TC, para 159.

²⁰ William Tetley, ‘Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)’ (2000) 60 La. L. Rev. 677, 683.

²¹ Peter H. Collin, *Dictionary of Law* (4th edn., Bloomsbury Publishing 2004) 55.

²² Precedent is “[a] judgment or decision of a court...used as an authority for reaching the same decision in subsequent cases. In English law, judgments and decisions can represent authoritative precedent (which is generally binding and must be followed) or persuasive precedent (which need not be followed)”. Elizabeth A. Martin and Jonathan Law (eds.), *A Dictionary of Law* (6th edn., OUP 2006) 404.

²³ See William Tetley (n 20) 704-5.

²⁴ *Ibid.* Judges may therefore examine the relevant *travaux préparatoires* at the creation of this legislation to identify the legislators’ intention.

Common Law is to find rules through ‘judge-made’ law deduced from precedents.²⁵

Accordingly, purposes of interpretation are three-fold. First, to identify the “objective meaning” of the text: this is concerned only with the literal meaning of the words (the traditional approach). Secondly, to find the treaty-drafter’s true intention: this is concerned only with the history of a treaty and its historical ‘*travaux préparatoires*’ (the historical approach). Thirdly, and lastly, to consider the drafter’s objectives through application: this is concerned with the application of the provision(s) for what the drafters’ aims were to regulate, regardless of their intention at the time of the creation of the treaty (the teleological approach, also known as the ‘progressive’ or ‘extensive’ approach).²⁶

Accordingly, the essential purpose of interpretation is to deduce the applicable law - through explanation of the “true” meaning of the rules in question - by referring to the source of that relevant law. Note that CR was created and developed through case-law under international law. Therefore, these cases - particularly those of the IMTs – became more important as a source of law for the application of CR.

B) Interpretation process at international criminal law:-

The ICTY provided that “The Tribunal’s Statute and Rules consist of a fusion and synthesis of two dominant legal traditions...the common law system ...and the civil law system”.²⁷ The Tribunal, hence, stated that “the essence of interpretation is to discover the true purpose and intent of the statute in question, invariably, the search of the judge interpreting a provision under whichever system, is necessarily the same”.²⁸

Interpretation in national law systems will be based on the relevant source of law, mainly statutes or precedents. Similarly, in International Criminal Law,

²⁵ *Ibid* 701.

²⁶ Each approach has some drawbacks: the traditional approach is so strict as to the linguistic issues rather than the legal issues. The historical approach seems to be strict as to the historical implementation of the treaty, without recognising any development that might have occurred from the time of its creation to the time of interpretation. The teleological approach could be regarded as illegitimate if it is not recognised by all state -parties. See Jan Klabbers, *International law* (CUP 2013) 52-3.

²⁷ *Čelebići TC*, para 159.

²⁸ *Ibid*.

interpreting rules of law is deduced from one or more of the international law sources.²⁹ The ICTY stated, accordingly, in its judgment that: “[i]t is obvious that the subject matter jurisdiction of the Tribunal is constituted by provisions of international law. It follows, therefore, that recourse would be had to the various sources of international law as listed in Article 38 of the Statute of the ICJ...”.³⁰

It is therefore accepted that Article 38 (1) of the Statute of the International Court of Justice (ICJ)³¹ is the legal authority of the sources of International Criminal Law.³² Analogy to this Article the primary sources of ICL are “treaties, customs and general principles of law”; and the subsidiary sources are “judicial decisions and the most highly qualified publicists”.³³ It is important to highlight that judicial decisions function practically as a primary source for ICL and particularly for CR.³⁴

With regard to the development of CR, the IMT resorted to those sources to interpret the nature and requirements of CR. The IMT emphasised the importance of, first, interpretation and, secondly, of these sources of ICL.³⁵ Accordingly, interpretation is used in ICL to resolve ambiguity by identifying the applicable law. The rules of this applicable law are to be derived from one or more of the sources of ICL. For the IMTs, these sources were: treaties, customs, general principles of justice, jurists’ practice and judicial decisions of military courts.³⁶

Both the ICJ Statute and IMT statement provided identically for the primary sources of ICL. The ICJ Statute, which is the most authoritative body, articulated more precisely the two subsidiary sources: judicial decisions and distinguished writers’ opinions. Note that the interpretation process at the IMTs is considered generally to “stem from natural law and are therefore higher principles

²⁹ These sources are regarded as the means that are used to create “legally binding rules”. See A. Cassese, *International Law* (2nd edn., OUP 2005) 153. Brownlie also described these sources as “legal procedures and methods for the creation of rules of general application which are legally binding”. I. Brownlie, *Principles of Public International Law* (5th edn., OUP 1998) 1.

³⁰ *Čelebići* TC, para 414.

³¹ See <<http://www.icj-cij.org/pcij/?p1=9>> accessed 14 August 2014; see also A. Cassese (n 11) 9. He also suggested that the only variation between IL and ICL is with the general principles, as each branch of IL has some distinctive principles.

³² See Shaw (Chapter 1 n 117) 70.

³³ ICJ Statute, Article 38 (1).

³⁴ See *infra* (n 167) *et seq.*

³⁵ Chapter 2 (n 109).

³⁶ *Ibid.* The IMT recognised judicial decisions through its practice. See Chapter 2 (nn 113 and 161).

of morality, and for this reason... their application would not violate the principle of legality”.³⁷

2. The interpretation of command responsibility:-

It is noteworthy that, when CR is referred to as a norm of customary law, – whether in a judgment or a scholarly work– the source is mainly the *Čelebići* judgment.³⁸ The following discussions will therefore predominantly examine the ICTY jurisprudence and judgments as a result of their direct and influential participation in interpreting CR.

As illustrated above, the sources of ICL are largely similar to those of PIL.³⁹ The ICL is a relatively new branch of law; therefore it is generally regarded as under-developed law and judges therefore frequently resort to sources of ICL to interpret poorly drafted rules.⁴⁰ The IMT’s statement corresponded identically to a suggestion that the *ad hoc* Tribunals’ Statutes are established to provide a general framework, rather than a set of strict and specific rules.⁴¹ Accordingly, in *Čelebići*, ‘interpretation’, as a term, could be defined in two senses:-

“In its broad sense, it involves the creative activities of the judge in extending, restricting or modifying a rule of law contained in its statutory form. In its narrow sense, it could be taken to denote the role of a judge in explaining the meaning of words or phrases used in a statute”.⁴²

³⁷ Noora Arajärvi, *The Changing Nature of Customary International Law: Methods of interpreting the concept of custom in international criminal tribunals* (Routledge 2014) 39.

³⁸ This can be seen through a number of judgments, see: *Aleksovski* TC, para. 69; *Blaškić* TC, para 289; *Kordić and Cerkez*. TC, para 401; *Halilović*, TC, para 55; *Limaj et al.*, TC, para 520; also this Judgment has had an impact on the ICTR in many cases, see: *Akayesu*, TC, para 486; *Kayishema and Ruzindana*, TC, paras 208-9; *Rutaganda* TC, para 31; also this Judgment has had an impact on the SCSL in: *Alex Tamba Brima et al.*, TCII, paras 782-799; and *Issa Hassan Sesay*, TCI, paras 282-317. SeeHyder Gulam, ‘Command responsibility under the Law of Armed Conflict’ (2004) N.Z. Armed F. L. Rev. 8, 15; also Andrew Mitchell (chapter 2 n 124) 400. See also Chapter 3 (n 158).

³⁹ *Supra* (n 30).

⁴⁰ In fact, this is conceded as one of the main features of the international criminal law. Even though one could argue that it is more of a negative aspect, in general this was the justification of the need to develop the law. See A. Cassese, *International Criminal Law* (2nd edn., OUP 2008) 4-10.

⁴¹ For example, Mettraux addressed the *ad hoc* Tribunals’ Statutes as the “skeletons”. See Guénaël Mettraux, *International Crimes and the ad hoc Tribunals* (OUP 2005), p. 5. Accordingly, these skeletons need to be covered by the flesh, which means to be articulated through interpretation.

⁴² *Čelebići* TC, para 158.

It is noteworthy that the ICTY was in favour of interpretation in its broad sense. This could be seen through its judgment stating that:-

“The ‘teleological approach’, also called the ‘progressive’ or ‘extensive’ approach, of the civilian jurisprudence, is in contrast with the legislative historical approach. The teleological approach plays the same role as the ‘mischief rule’ of common law jurisprudence. This approach enables interpretation of the subject matter of legislation within the context of contemporary conditions. The idea of the approach is to adapt the law to changed conditions, be they special, economic or technological, and attribute such change to the intention of the legislation.”⁴³

Therefore the purpose for adopting this approach was to utilise the ‘creative activities through judicial law-making, ‘gap-filling’ or ‘judge-made law’ which the teleological approach⁴⁴ will allow through interpretation.⁴⁵ It was, therefore, concluded that the nature of an *ad hoc* international tribunal requires “a purposive interpretation” for articulating the applicable law.⁴⁶

According to the above, one could assume that precedent would play a significant role in the *ad hoc* tribunals’ interpretation of vague rules of law, particularly when such rules were created and developed through case-law.⁴⁷ This assumption is mainly for two reasons: (1) judicial decision is one of the sources of ICL; and (2) purposive interpretation is more relevant to the common law tradition, which is based on judicial decisions.⁴⁸ Precedent therefore functions to allow the development of a rule: by resorting to the purpose of its creation, and through using interpretation through a teleological approach.⁴⁹ Analogically, for developing (CR), precedents should be prioritised – to reveal their true meaning and purpose - because this doctrine is a case-law creation.

⁴³ *Ibid* para 163.

⁴⁴ The teleological approach’s impact will be examined further below. *Infra* (n 90) *et seq.*

⁴⁵ *Čelebići* TC, para 165.

⁴⁶ *Ibid* para 170.

⁴⁷ This is logical as the ‘literal, golden and mischief rules’ related generally to common law systems, which require a form of consistency between the case-law (precedent) and interpretation. *Supra* (nn 21 & 22).

⁴⁸ Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 85.

⁴⁹ *Ibid* 86-7.

The following section analyses the ICTY application of the teleological approach, raising the following question: was the *ad hoc* Tribunals' interpretation of CR accurately and legitimately conducted pursuant to the teleological approach? This is discussed below.

A) Treaty as a source of ICL:-⁵⁰

When applying sources of ICL, these sources should be resorted to in their written order, to provide a form of hierarchal application.⁵¹ In general, when interpreting a treaty, there is a number of rules to be followed. Generally, to implement provisions of international treaties, some form of interpretation is usually required for their accurate application.⁵² Therefore, the principles of treaty interpretation are governed strictly by Articles 31, 32 & 33 of the Vienna Convention on the Law of Treaties of 1969.⁵³

Article 31 provides the "General Rules of Interpretation".⁵⁴ Article 32 covers the "Supplementary Means of Interpretation".⁵⁵ Article 33 is concerned with the "Interpretation of Treaties Authenticated in two or more Languages".⁵⁶

⁵⁰ Treaty is less important as a source for ICL, compared to its role for other IL branches. See Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (3rd edn., OUP 2014) 57.

⁵¹ See A Cassese, *International Criminal Law* (2nd edn., OUP 2003) 26.

⁵² This is actually similar to the statutory law in many national legal systems, which requires a form of explanation or interpretation before or through its application. See Gerhard Werle, *Principles of International Criminal Law* (2nd edn., T.M.C. Asser Press 2009) 59.

⁵³ This is, or could be seen as, contradictory. As Klabbers, for instance, has commented, it is interesting that "the rules on interpretation of treaties are themselves laid down in a treaty". Jan Klabbers, 'International Legal History: the declining importance of *Travaux Préparatoires* in treaty interpretation?' (2003) 50 *Netherlands International Law Review* 267, 270.

⁵⁴ Article 31 stated that "1. A treaty shall be interpreted 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:-

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

⁵⁵ Article 32, provided that "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to

Most importantly, it could be argued that when treaties codify an already existing law (a situation similar to the CR codified by the Additional Protocol I of 1977 ‘API’), it means that such a treaty primarily emphasises the validity of that already existing law.⁵⁷ However, the Čelebići case, after considering CR as a norm of customary law, relied on the API. In this the ICTY, when confronted with the vaguely drafted provision of CR at the API, resorted to the Commentary on API rather than to the customary precedents. It thus contradicted the hierarchical application required for the teleological approach, as will be discussed below.

In ICL, “Treaty” means the court’s Statute, which is the primary source of its applicable law.⁵⁸ This was explicitly provided under Art. 21 of the ICC.⁵⁹

The ICC and other tribunals’ Statutes – such as the SCSL - are treaties by nature; however, the *ad hoc* tribunals’ Statutes, such as the ICTY/R, are considered as “proximate in nature to a treaty”.⁶⁰ Although the judgements of other *ad hoc* tribunals – such as ICTR and SCSL – for the purpose of interpretation prioritise treaties over customary law,⁶¹ the controversy of the ICTY’s problematic process of interpretation is extendable to all courts. This is because all *ad hoc* tribunals relied on the API of 1977 - for interpreting CR - either

confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 :-

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.”

⁵⁶ It provided for rather technical rules when writing in more than one language.

⁵⁷ Werle and Jessberger (n 50) 57; see also D J Harris, *Cases and Materials on International Law* (6th edn., Sweet & Maxwell 2004) 43.

⁵⁸ Dapo Akande, ‘Sources of International Criminal Law’ in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (OUP 2009) 44.

⁵⁹ Rome Statute, Art. 21: “The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any

adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”

⁶⁰ Joseph Powderly, ‘Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?’ in Shane Darcy and Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) 34; see also Akande (n 58) 44.

⁶¹ Noora Arajärvi (n 37) 58.

per se as a treaty law provision or as codifying a pre-existing customary rule under a treaty.

The *Tadić* stated that, when interpreting the ICTY Statute, it should be interpreted in accordance with “Article 31 of the Vienna Convention on the Law of Treaties”.⁶² Note that the reference to rules of treaties “are not applied qua treaty but rather as the context for a rule of customary law”, and this is mainly to avoid violating the legality principle.⁶³

B) Rules of customary law under treaties:-

In its practice of interpretation, the IMT was confronted by the defence argument that the application of the Hague Conventions – being treaties - is limited to the parties to them, pursuant to the Hague Convention of 1907, Article (2).⁶⁴ Therefore, the IMT provided that “by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war”.⁶⁵ Later, the ICRC supported this interpretation of the classification of the Hague Conventions and stated that these Conventions and partly the two protocols of the Geneva Convention “are considered as embodying rules of customary international law. As such they are also binding on States which are not formally parties to them”.⁶⁶

The Geneva Conventions are significant,⁶⁷ as sources, in developing ICL in general;⁶⁸ and the Additional Protocol I is important for, particularly, the codification of CR.⁶⁹ Certain treaties’ provisions function as customary law rather

⁶² *Prosecutor v. Tadić*, AC Judgment, IT-94-1-A, 15 July 1999, para 300. (Hereafter, *Tadić* AC).

⁶³ Akande (n 58) 48.

⁶⁴ Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Volume XXII, 14 November 1945 – 1 October 1946, p. 497; see also the Hague Convention IV of 1907: Article 2 stated that: “The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention”.

⁶⁵ See (n 64).

⁶⁶ See <<http://www.icrc.org/ihl/INTRO/195>> accessed 14 August 2014.

⁶⁷ The ICJ stated that The Hague and Geneva Conventions “... are considered to have gradually formed one single complex system, known today as international humanitarian law”. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *I. C. J. Reports 1996*, 226, para 75.

⁶⁸ For example, Article 2 of the Statutes of the ICTY reads as follows: “Grave breaches of the Geneva Conventions of 1949”. In this, the ICTY Statute directly referred to the acts that are prohibited by the Geneva Conventions not as treaties’ provisions but rather as customary rules. This alone illustrates the significance of customary law over treaties as sources of ICL.

⁶⁹ The API of 1977 constitutes the first codification of the contemporary CR. Chapter 3 (n 11).

than as provisions as such, which renders treaties - as a source of ICL - less important for the purpose of interpretation if they lack pre-existing rules.

The Krstić case laid down the process of interpreting a customary rule under a treaty to identify the nature of such a rule to declare the applicable law. The TC stated, therefore, that it is generally important to identify “the state of the customary international law at the time of the events”.⁷⁰ In this, it stated that for the applicable law to be identified the following should be examined: (a) “the codification work undertaken by international bodies”, mainly treaties as well as “the object and purpose of the Convention”; (b) it may, therefore, “consult the preparatory work and the circumstances which gave rise to the Convention”; and (c) it then should examine “the international case-law” most relevant to the instant matter of interpretation.⁷¹

Note that, “[j]udicial practice naturally has great significance for the formation of customary law in the area of international criminal law”.⁷² CR as a principle was created under international law, and then it was developed through case-law before being codified by the API. Most importantly, during the codification, judicial practices were significant factors during the drafting of the API. The following discusses whether the *ad hoc* tribunals’ process of interpreting CR was consistent and whether the purpose was to identify the applicable law.

C) Interpreting CR: a customary rule under a treaty:-

It is important to reiterate that a treaty (the API) for the purpose of CR functions in practice as an organised set of customary norms. In this, at the TC in *Blaškić* the defence argued that the API “did not constitute part of established customary international law”.⁷³ The TC concluded that it was not “necessary to rule the applicability of [API]”,⁷⁴ but it did not deem the API to be of a customary nature. Instead, it stated that the parties to the conflict ratified the API and that

⁷⁰ *Krstić* TC, para 541.

⁷¹ *Ibid.* The TC has also stated that other instruments could be resorted to, such as the “Report of the International Law Commission (ILC)...also...the work done in producing the Rome Statute”.

⁷² Werle (2009) 59.

⁷³ *Blaškić* TC, para 163.

⁷⁴ *Blaškić* TC, para 170.

they were therefore bound by its rules, regardless whether it was of a customary nature.⁷⁵

However, the *Čelebići* judgement, regarding the status of the API, stated that it is not necessary to examine the status if the provisions in question already “constitute customary international law”.⁷⁶ CR was one of those provisions under the API; nevertheless, this complexity generates controversy in practice. The ICTY and ICTR statutes are not treaties themselves; however, it was concluded that:-

“Although the Statute of the International Tribunal is a *sui generis* legal instrument and not a treaty, in interpreting its provisions and the drafters' conception of the applicability of the jurisprudence of other courts, the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant”.⁷⁷

However, based on the *ad hoc* tribunals' practice, CR was interpreted, problematically, as a norm of customary law.⁷⁸

In spite of the debate over the status of the API as to whether it should be regarded as customary international law,⁷⁹ CR is recognised *de facto* as a norm of customary law due to its creation through precedents under international law. The codification of the doctrine therefore merely placed an emphasis on the already existing law. In this, *Čelebići* explicitly stated regarding drafting CR under the API that:-

“A survey of the *travaux préparatoires* of these provisions reveals that, while their inclusion was not uncontested during the drafting of the Protocol, a number of delegations clearly expressed the view that principles expressed therein were in conformity with pre-existing law”.⁸⁰

⁷⁵ *Blaškić* TC, para 172.

⁷⁶ *Čelebići* TC, para 314.

⁷⁷ *Prosecutor v. Dusko Tadić*, A/K/A “DULE”, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, TC Decisions, IT-94-1, 10 August 1995, para. 18. This view was also adopted by the ICTR. See *Prosecutor v. Theoneste Bagosora and 28 others, Decision on the Admissibility of the Prosecutor’s Appeal from the Decision of a Confirming Judge dismissing an Indictment against Theoneste Bagosora and 28 others*, AC Decisions, ICTR-98-37-A, 8 June 1998, para 28.

⁷⁸ *Infra* (n 97) *et seq.*

⁷⁹ For this debatable issue, see Jean-Marie Henckaerts, ‘Study on Customary International Humanitarian Law: a contribution to the understanding of and respect for the rule of law in armed conflict’ (2005) Volume 87 Number 857, *International Review on the Red Cross*.

⁸⁰ *Čelebići* TC, para 340.

The TC then cited two delegations that referred to: (a) the case-law of post WWII; and (b) military codes.⁸¹ Although the TC acknowledged that the nature of CR was problematic during drafting, it did not examine those problems. Nevertheless, *Čelebići* acknowledged that the delegations, during the drafting of the API, intended the nature of CR to be applied as if it were the customary precedents.

The API, although being a treaty, functions generally as a supplementary instrument to the Geneva Convention.⁸² The Commentary on the API is an effort by a respectable number of experts to provide an explanation of the text of the API.⁸³ Neither the API nor its commentary is considered entirely to be customary law. Hence, they should each be used in accordance with their actual function. In other words, the *ad hoc* tribunals' judges' interpretation of CR was controversial, as the API's commentary was accorded priority over judicial decisions of the customary precedents.⁸⁴

The Commentary – as declared by its author - “is considered a scholarly work and aims to explain the provisions of the protocol”.⁸⁵ The Commentary explains only the provisions based on the legal text; the commentator, therefore, comments on the basis of a personal opinion and not through examining the sources of ICL. This – examined further below - is in line with Vladimir-Djuro Degan's suggestion that the notion of the judges (and some publicists) about customary law differs from its actual meaning; therefore, some judges and publicists tend to create their own *opinio juris* when interpreting a rule of customary law, without examining states' practice or relevant precedents.⁸⁶

This *opinio juris* means that the state believes that a rule is an accepted law; therefore, it is practised. The practice of a state is the source from which the nature

⁸¹ The Swedish & Yugoslav Delegations. See *Čelebići* TC, para 340.

⁸² Fausto Pocar, 'To What Extent Is Protocol I Customary International Law?' in Andru E. Wall (ed.), *Legal and Ethical Lessons of NATO's Kosovo Campaign, International Law Studies Vol. 78*, (Naval War College Newport, Rhode Island 2002) 338. The API is a treaty but it was established for two reasons: (a) to codify the already existing customary law; and (b) to develop the law of the Geneva Conventions. Thus, it aims to complement the Geneva Conventions' rules; it therefore functions as a supplementary document.

⁸³ See the Forward to the commentary, available at:-

<http://www.loc.gov/rr/frd/Military_Law/RC_commentary-1977.html> accessed on 16 September 2014.

⁸⁴ This could be seen through the determination of the requirements of CR. See *Čelebići*, paras 354 & 371.

⁸⁵ See the Forward to the commentary, *supra* (n 83).

⁸⁶ He correctly argued that judges', as well as legal experts', *opinio juris* cannot be the *opinio juris* of any state. See Vladimir-Djuro Degan, 'On the Sources of International Criminal Law' (2005) 4 CJIL 45, 64-6.

of the rule can be deduced. Thus, case-law is important for identifying the nature of such a rule. The ICTY judges, for instance, created the concept of *de facto* command even though this lacks customary characteristics,⁸⁷ which was contrary to the applicable law as set out by the UNSG's Report.⁸⁸ Accordingly, the *ad hoc* tribunals' judges based their interpretation on what they – the judges - had accepted as law through reliance on selective instruments, which eventually led them to disregard the actual elements of customary law.

Thus, CR characteristics are to be found through the application of customary law, and likewise its *sui generis* nature.⁸⁹ Thus, a court should examine precedents of that 'already existing law' for its characteristics, particularly because CR is a case-law creation.⁹⁰ The *ad hoc* tribunals – especially the ICTY - ignored this required examination of precedent as a source of law⁹¹ and focused more on the Commentary on the API, which is a writer's opinion.⁹²

3. CR under the API: the *ad hoc* tribunals' interpretation:-

As discussed above, the teleological approach was the method for interpreting CR at the *ad hoc* tribunals. However, CR as a provision under a treaty needs to be interpreted in accordance with two core factors: first, Article 31 of the Vienna Convention, which states that "A treaty shall be interpreted 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...".⁹³ Second, the teleological approach requires examination of sources of law when interpreting a problematic rule prior to considering *travaux préparatoires* (the preparatory work for the treaty).⁹⁴

Judges at the *ad hoc* tribunals, however, tended to use *travaux préparatoires selectively* to justify their decisions, which made these decisions

⁸⁷ Mettraux (2009) 143.

⁸⁸ *Infra* (n 96).

⁸⁹ See the discussions in Chapters 1 and 2.

⁹⁰ *Supra* (nn 79-80).

⁹¹ *Infra* (n 141) *et seq.*

⁹² *Supra* (nn 83 and 85). This is in line with Cryer's criticism of the ICRC customary law study that focused on the *ad hoc* tribunals' practice alone. See Robert Cryer, 'Of Custom, Treaties, Scholars and the Gavel: the Influence of the International Criminal Tribunals on the ICRC Customary Law Study' (2006) 11 *J. Conflict & Sec. L.* 239, 239-420.

⁹³ The Vienna Convention, Article 31 (1). *Supra* (n. 54).

⁹⁴ *Supra* (nn 43-49).

questionable as discussed above.⁹⁵ Another example of using *travaux préparatoires* is when the ICTY relied on the Report of the United Nations' Secretary-General (UNSG Report), being part the preparatory work for the Statute. The Report spells out the applicable law for the purpose of interpretation, which stated that:-

“The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflicts as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945”.⁹⁶

While the abovementioned Conventions undoubtedly reflect the rules of customary international law by which all states are bound, CR is slightly different. The doctrine was codified only under the API, which is not binding on all countries and was created primarily to emphasise the already existing (customary) law particularly for CR.⁹⁷

In other words, when interpreting CR (as a provision under API), a court has to examine its historical circumstances. According to the teleological approach, if the provision is ambiguous the court should resort to the preparatory work of this provision during the drafting process.⁹⁸ The judgment in *Čelebići*, however, after referring to the UNSG Report (above) mentioned chronologically – without adequate examination- the historical development of CR. In this it referred to precedents and conventions from the Hague Conventions to Article 28 of the ICC; nevertheless, this was without a thorough examination and more precisely without deducing rules of the applicable law.⁹⁹

⁹⁵ *Supra* (n 62) *et seq.*

⁹⁶ UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, para 35.

⁹⁷ *Supra* (n 76).

⁹⁸ *Supra* (nn 26 & 94).

⁹⁹ *Čelebići* TC, paras 335-342. Vetter argued, however, that CR for military commanders under the ICC “is essentially the current customary international law standard”. Greg Vetter, ‘Command Responsibility of Non-Military Superiors in the International Criminal Courts (ICC)’ (2000) 25 Yale J. Int’l L. 89, 95

The obvious purpose of listing these events was not to deduce the rules of CR, but only to conclude that CR did exist under customary law. It is important to reiterate that this is contrary to the teleological method, which calls for examining the historical framework for articulating and deducing the applicable law. This is partially the reason for the judgement appearing contradictory to the reader.¹⁰⁰ Nevertheless, *Čelebići* based its findings on the API, which is already vague about, particularly, the nature of CR.¹⁰¹ Interestingly, this judgment relied on the Commentary on the API,¹⁰² rather than considering the preparatory work for this Treaty as being the actual *travaux préparatoires*, and more in line with the discussed below findings about the delegations' opinions.¹⁰³

A) The core problem:-

The court first should, alternatively, have articulated the nature of CR and then its requirements. This should have been carried out through examining the preparatory work for the API in accordance with the nature and requirements of CR as intended by states' delegations. Had the judgement examined these discussions, the findings would have been more legitimate and in line with the teleological approach. Interestingly, during the drafting of the API the ICRC delegation pointed out that the core problem was the "differences between national penal systems, some of which did not provide for failure to act".¹⁰⁴ Note that the differences between states - regarding the liability for omission (failure to act) - are still behind the problem of interpreting CR, as will be discussed below.¹⁰⁵

This issue impacted also on the requirements of CR. The *Blaškić* TC stated that the "pertinent question is that: was customary international law altered with the adoption of Additional Protocol I, in the sense that a commander can be held accountable for failure to act in response to crimes by his subordinates only if specific information was in fact available to him which would provide notice of such offences?"¹⁰⁶ The TC concluded that "this is not so", but this was through

¹⁰⁰ Mettraux, (2009) 48.

¹⁰¹ Chapter 3 (n 155).

¹⁰² Throughout the allocated section for examining the nature of CR there was no reference to the preparatory work for Art. 86 of the API. *Čelebići*, paras 330-343.

¹⁰³ *Infra* (n 106) *et seq.*

¹⁰⁴ CDDH/I/SR.50, para 27.

¹⁰⁵ Chapter 7.

¹⁰⁶ *Blaškić* TC, para 324.

interpretation of CR as a treaty provision under the API, contrary to the *Čelebići* method, above.

The *Blaškić* TC interpreted CR through referring explicitly to the Vienna Convention articles that govern the interpretation of treaties.¹⁰⁷ Nevertheless, due to the nature of CR being created through customary case-law, the TC's judges prioritised adequately this case-law over the Commentary on the API, stating that: "Article 86(2) must be interpreted ... on the basis of post-World War II jurisprudence".¹⁰⁸ Note that the *Blaškić* TC was among those few cases that recognised – although not explicitly - aspects of the true nature of CR.¹⁰⁹ In this, it not only placed its interpretation in conjunction with the commander's duties, but also the sentence based on the 'officership' value.¹¹⁰

Most importantly, the nature of CR was a problem during the drafting of the API. In relation to this, there were three categories of states' delegations: (a) delegations from states which recognised failure to act as a potential basis of liability under their national law; (b) delegations from states in which failure to act was unrecognised under their national law as a possible basis of liability; and (c) delegations that recognised CR as including a failure to act, under international law based on the Yamashita and IMTs' Trials regardless of their national system.

The nature of CR was a problem particularly for delegations from states in which liability for failure to act did not exist under their national law. Because of these differences between states' systems, the ICRC representative changed the initially proposed form of CR and stated instead that:-

"[a]ccount had been taken, in accordance with the wishes of the experts consulted, of the appreciable differences between different national penal systems, some of which did not provide for failure to act. Despite those difficulties, the ICRC had bowed to the wishes of those for whom the failure of the officer-in-charge of a prisoner-of-war camp to provide food for his prisoners or a non-commissioned officer to stop a mob lynching prisoners of war constituted breaches which could not be left unpunished".¹¹¹

¹⁰⁷ *Ibid* paras 326-7.

¹⁰⁸ *Ibid* para 328.

¹⁰⁹ See *Blaškić* and *Popović*, Chapter 3 (nn 165-166, 221-222 and 224).

¹¹⁰ *Blaškić* TC, para 733.

¹¹¹ CDDH/I/SR.50, para 27.

Nevertheless, this resulted in more confusion in understanding the separation between the failure to act Art. 76 (Art. 86 currently) and the duty of commanders Art. 76 *bis* (Art. 87 currently).

For instance, Israel's delegation stated that "a distinction should be drawn between grave breaches involving a heavy responsibility and simple breaches where the responsibility was administrative or disciplinary".¹¹² The Japanese delegation also interpreted these provisions as two categories, one of penal and the other of disciplinary responsibility.¹¹³ The nature of CR was not provided for in the final results, because of the differences between states' national systems, as pointed out above by the ICRC delegation.¹¹⁴

Delegations in category (c) recognised CR as an already existing principle as implemented by the customary precedents, regardless of the status of this theory in their national systems. The Netherlands' delegation, for example, stated that "the responsibility of superiors was strongly emphasized in the existing law of war"¹¹⁵; therefore, "failure to act could be regarded as criminal negligence", pursuant to the Nuremberg trials.¹¹⁶ The Philippines' delegation asserted that *Yamashita* had endorsed the nature of CR as being a failure to act.¹¹⁷ More precisely, the Swedish delegation reaffirmed that *Yamashita* had been important for the nature of CR, but that the judgments of the Nuremberg and Tokyo Trials had been of more importance to the nature of CR and to ICL generally.¹¹⁸ Accordingly, CR is recognised as a form of criminal liability for the underlying crime(s) potentially incurred by reason of failure to act to prevent subordinates' crimes.¹¹⁹

It follows that the teleological approach requires a court to examine these preparatory discussions in order to identify the intention of the drafters. However, the judgement in *Čelebići*, considered CR as a norm of customary law that existed

¹¹² CDDH/I/SR.51, para 3.

¹¹³ CDDH/I/SR.50, para 59.

¹¹⁴ See also the delegation of Austria pointing out that this liability for failure to act "CR" might have an impact on "national legislation" due to the lack of specifying the nature of responsibility.

CDDH/I/SR.50, para 37.

¹¹⁵ CDDH/I/SR.50, para 33.

¹¹⁶ CDDH/I/SR.50, para 34.

¹¹⁷ CDDH/I/SR.52, para 30.

¹¹⁸ CDDH/I/SR.64, para 61; see also CDDH/I/SR.71, para 60.

¹¹⁹ See discussions in Chapter 2.

under the API, but did not practically examine the stance or intention of the drafters.¹²⁰ Thus this judgment assumed that the nature of CR was clear and it was therefore not examined throughout the Čelebići judgment for the nature of responsibility under CR.

The Tribunal stated also that “two highly influential domestic military manuals” had considered the doctrine of CR within their rules: the U.S¹²¹ and the British¹²² Manuals.¹²³ The Tribunal did not, however, examine or cite the actual text of these manuals within its judgment. In other words, it is a paradox to state that something is “highly influential” on a matter that a court is endeavouring to establish for the first time, when these “highly influential” instruments went unexamined by the judges. Nevertheless, this illustrates the importance of military codes and values concerning the nature of CR.

But had the Čelebići judgment examined the nature of CR they would have analysed the preparatory discussions, accordingly it would have been possible to acknowledge that, due to the differences between national law systems, the nature of CR was understood to exist in *Yamashita* and the IMTs’ judgments (the customary precedents). This is also more appropriate to its unique nature being established during these precedents. This “rashness” in determining customary rules (without further examination) could be attributed to the judges’ concentration having been on law-making rather than on applying or revealing the actual and true rules of CR.¹²⁴

¹²⁰ This logically seems to be correct as *Čelebići*, for example, interpreted CR based on the API but did not refer to the treaty rules of interpretation provided for by the Vienna Convention; it rather referred to the Protocol as customary law. See *Čelebići*, para 340.

¹²¹ The United States Department of the Army, the Law of Land Warfare, FM 27-10, July 1956, para 501. It provided that “...a military commander may be responsible for war crimes committed by subordinates ... if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish the violators thereof”.

¹²² CR provision under this manual did not ask for to punish the violators, which made the US manual the only manual recognised this duty to punish. The War Office, The Law of War on Land, Being Part III of the Manual of Military Law (The War Office, 1958) para 631. It stated that “The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime, and if he fails to use the means at his disposal to ensure compliance with the laws of war”. Cf. Chapter 5 (n 105).

¹²³ See *Čelebići*, para 341.

¹²⁴ Indeed, this is an example of judges creating their own *opinio juris*. For instance, Vladimir - Djuro Degan criticised generally this practice and stated that the *ad hoc* Tribunals’ judges “will better fulfil their mission by insisting on the respect of customary rules which form positive international law”. See Degan (n 86) 66.

This hypothesis is more in line with the Secretary-General's Report stating that the ICTY can apply only the law "which has beyond doubt become part of international customary law".¹²⁵ Indeed, such a statement would justify the ICTY assertion that CR is a principle of customary law rather than a treaty provision under API.¹²⁶ A treaty could be used as a justification, or rather as evidence, of customary international criminal law.¹²⁷ The *ad hoc* Tribunal needed, therefore, an authority to justify its view. It thus introduced the Secretary-General's Report as a source of the "legal character of command responsibility and its status under customary international law".¹²⁸ Although the Tribunal was aware that the API is also "thin" regarding CR and that Art. 28 of the ICC is more informative and also functions as an evidence of state practice and of *opinio juris*, they resorted predominantly to the Commentary on API instead.

CR was therefore interpreted by the judges of the *ad hoc* Tribunals as a customary norm, but through resorting to the API and its Commentary instead of the delegations' *opinio juris* that the nature of CR is to be found in the post-WWII trials.¹²⁹ This seems to have allowed the judges' *opinio juris* to replace states' *opinio juris* during the interpretation of CR. The current status of the nature of this customary norm was not investigated, thus Art. 28 of the ICC was avoided as evidence of the current status of the customary law of CR. Additionally, the ICC Statute could constitute state practice and *opinio juris* for the true customary nature of CR.¹³⁰ In this regard, Judge Liu suggested that the "best starting point for ascertaining the state of customary law in force at the time the crimes were committed is Additional Protocol I, Articles 86 and 87 respectively".¹³¹

The problem, however, is that the nature of CR was not specified throughout the early jurisprudence of the *ad hoc* tribunals, including the Čelebići case; also because the API Articles were rather vague regarding this nature. This

¹²⁵ *Supra* (n 96).

¹²⁶ *Cf.* (n 76).

¹²⁷ William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 98-100; see also Werle and Jessberger (n 50) 57.

¹²⁸ In fact, the Tribunal provided for the Report's definition immediately after stating that CR is a "norm of customary and conventional international law". *Čelebići*, para 333.

¹²⁹ The Tribunal, in referring to the API, stated that it "will interpret Article 86(2) in accordance with Article 31 of the Vienna Convention". *Blaškić* TC, para 327. *Cf.* Maria Nybondas, 'Civilian Superior Responsibility in the *Kordić*' (2003) NILR 59, 66.

¹³⁰ Klabbers, for example, suggested that the conclusion of a treaty may be used as evidence of state practice or *opinio juris*. See Jan Klabbers (n 26) 29.

¹³¹ *Orić* AC (2008), Partially Dissenting Opinion and Declaration of Judge Liu, para 14. Note that *Blaškić* TC referred to the ICC in interpreting CR, but these findings were rejected by the AC. See (chapter 7 n 194).

was stated more explicitly in *Halilović*' problematic finding that both the API¹³² and "the post-World War II case-law contained differing views as to the nature of command responsibility, that is as liability for crimes of subordinates, or as a *sui generis* responsibility for dereliction of duty".¹³³ According to this judgement sequence - judges seemed to assume that there is a *non liquet* possibility and that it should therefore provide an interpretation to avoid such possibility.

Note that the legality principle and the consistency of the applicable law are among those reasons to be considered together in determining the applicability of the law. Fuller's theory,¹³⁴ for instance, proposed eight rules to be avoided during interpretation, presenting them as "the eight failures":-

"(1) a failure to achieve rules... (2) a failure to publicize... (3) the abuse of retroactive legislation,(4) a failure to make rules understandable, (5) the enactment of contradictory rules, or (6) rules that require conduct beyond the power of an affected party, (7) introducing such frequent change in the rules...; and, finally (8) a failure of congruence between the rules as announced and their actual administration".¹³⁵

In a situation similar to the *Halilović case*, a court may find it more appropriate to apply the law as it should be (*lex ferenda*), rather than the law as it stands (*lex lata*).¹³⁶ Interpretation of the rules of ICL is, however, subject to the principle of legality.

Note that the CR problem is not one of the application of *lex ferenda* against the legality principles; rather it is of a *lex lata* interpretation. Nevertheless, the *lex ferenda* of CR means Article 28 of the ICC, which was not supported through the *ad hoc* tribunals' judgments. *Furundžija* stated that, subject to the legality principle, "the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them".¹³⁷

Note that the API was deemed to have the customary nature of CR over the more recent ICC, because the API implies "customary law in force at the time of

¹³² *Halilović* TC, para 53.

¹³³ *Ibid* para 42.

¹³⁴ Fuller *Op. cit* 42.

¹³⁵ *Ibid* 39.

¹³⁶ Noora Arajärvi, 'Between Lex Lata and Lex Ferenda? Customary International (Criminal) Law and the Principle of Legality' (2010-2011) 15 *Tilburg L. Rev.* 163, 166 & 168-9.

¹³⁷ *Prosecutor v. Furundžija*, TC Judgment, IT-95-17/1-T, 10 December 1998, para 227.

the crimes”.¹³⁸ However, the API was vague; thus the nature of CR needed to be interpreted to find the applicable nature. Interestingly, the judges did not place this interpretation according to the teleological approach requirements, such as investigating the preparatory work or the Commentary on the API. Instead, they directly ruled that CR is a form of omission and that this omission was culpable. Accordingly, they provided an interpretation that was rather vague, as the *Halilović* TC Judgment concluded that:-

“[c]ommand responsibility is responsibility for omission...This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates.”.¹³⁹

In fact, this interpretation was not only inconsistent with the wording of the API and with the intention of the delegations during the drafting, but it was also inconsistent with the ICTY precedents and with its applicable law.

The liability for an omission is well established in some domestic law systems and it is twofold: commission by omission; and omission *as a crime*. The commission by omission is a form of criminal responsibility for the resultant crimes, whereas the other type of omission is *per se* an offence, regardless of the result of the omission. However, the problem is that some states recognised only one of these two forms. The problem was thus exacerbated by this form of liability being already problematic due to the differences between states’ systems.¹⁴⁰

4. CR between customary law and judicial decisions:-

The *ad hoc* Tribunals have repeatedly cited the ICTY emphasis that the principle of CR is a norm of customary international law.¹⁴¹ Nevertheless, the interpretation process was not adequately in line with the essence of the

¹³⁸ *Orić* AC (2008), Partially Dissenting Opinion and Declaration of Judge Liu, para 14.

¹³⁹ *Halilović*, TC, para 54; see also Chapter 3 (n 185).

¹⁴⁰ Regarding the liability for an omission, see Chapter 7.

¹⁴¹ See for example, *Čelebići*, the most authoritative judgment regarding CR in the *ad hoc* Tribunals’ jurisprudence. *Čelebići* AC, para 195. See also *Hadžihasanović* TC, paras 65 and 70. See also the East Timor Special Panels at *Prosecutor v. Jose Cardoso*, Judgment, 04/2001, 05 April 2003, para 507; *Brima et al.*, TCII, SCSL-04-16-T, paras 782-799; also *Kayishema and Ruzindana*, TC, ICTR-95-1, para 209.

teleological approach, as discussed above. Thus, *Halilović*, after a rapid review of selective cases (although stating that “the consistent jurisprudence of the Tribunal has found that a commander is responsible for the crimes of his subordinates under Article 7(3)”) ruled, however, that:-

“[t]he post-World War II case-law was divergent as to the question of the exact nature of command responsibility, and Article 86(2) of Additional Protocol I and Article 7(3) are silent as to the nature of the responsibility of commanders, whether command responsibility is a mode of liability for the crimes of subordinates or responsibility of a commander for dereliction of duty has not been considered at length in the jurisprudence of the Tribunal”.¹⁴²

In reaching this conclusion, however, the Tribunal relied primarily on Judge Murphy’s opinion in *re Yamashita* and findings from *Toyoda*, to state that the post-WWII case-laws were not consistent about the nature of CR.¹⁴³ It relied also on Judge Shahabuddeen’s dissenting opinion in the *Hadžihasanović* AC decision.¹⁴⁴ *Halilović* concluded, therefore, that because CR is a “responsibility for an omission...This omission is culpable”.¹⁴⁵ Note that this is inconsistent with the teleological approach being already adopted as the method for interpretation.

The teleological approach calls for examining the preparatory work of, in the context of this study, Article 86 of the API. However, as a result of *Čelebići*’s failure adequately to determine the nature of CR at the API, this had an impact on the subsequent cases, although the *Čelebići* Judgment stated that CR “is best understood when seen against the principle that criminal responsibility [is] for omission”.¹⁴⁶ Interestingly, precedents of customary CR were referred to in the *Čelebići* and *Halilović* Judgments, but these precedents were not used as sources from which to deduce the applicable law. In this, the *Halilović* TC claimed that the *Čelebići* findings were limited to “whether command responsibility was part of customary international law” and did not relate to the nature of liability.¹⁴⁷

It is almost impossible, however, to understand where a court would find the nature of CR, if not in the early case-law where this principle was created. CR is

¹⁴² *Halilović* TC, para 53.

¹⁴³ *Ibid* para 44 and 47.

¹⁴⁴ *Halilović* TC, para 53; see also Judge Shahabuddeen’s dissenting opinion, (Chapter 3 nn 197 & 206).

¹⁴⁵ *Ibid* para 54.

¹⁴⁶ *Čelebići* TC, para 334.

¹⁴⁷ *Halilović* TC para 53, [at footnote 125].

a creation of precedents in international law rather than of national law systems. *Halilović* disregarded the differences between national systems - as already examined throughout the preparatory discussions mentioned above - and based its interpretation of the nature of CR merely on liability for an omission, which is already problematic in national systems. It is therefore, the inadequately implemented teleological approach which was behind such a problem.

Accordingly, there were two interpretations for the subsequent cases in front of the ICTY to choose from. *Hadžihasanović* was in a position to choose between the *Čelebići* and the *Halilović* interpretations. The *Hadžihasanović* TC stated that “the Chamber in *Čelebići* noted that “the type of individual criminal responsibility for the illegal acts of subordinates [...] is commonly referred to as ‘command responsibility’”.¹⁴⁸ *Hadžihasanović* supported the *Halilović* finding that “examination shows that post-World War II case law diverges on the [nature of CR]. Similarly, the Additional Protocols to the Geneva Conventions make no determination as to the nature of command responsibility”.¹⁴⁹ Thus, it concluded that it “subscribes to the findings of the *Halilović* Chamber”.¹⁵⁰ This resulted in CR *per se* being classified as a crime for omission, as illustrated previously.¹⁵¹

Nevertheless, this was not endorsed the most recent CR case. In *Popović*, commanders were held responsible for crimes committed by a subordinate, that is, akin to the *Čelebići* findings. It is noteworthy that *Popović* managed to avoid being in the *Hadžihasanović* position. It avoided examining CR’s nature altogether: neither the TC nor the AC discussed the status of nature of CR.¹⁵² In this case, the nature of CR was not explicitly articulated until reaching the sentence stage, where it stated that the commander is “criminally responsible, pursuant to Article 7(3) for murder as a crime against humanity as well as for murder as a violation of the laws or custom of war”.¹⁵³

In *Karadžić*, however, the tribunal interpreted the accused responsibility under CR to be “with respect to a crime for which his subordinate is criminally responsible”.¹⁵⁴ The tribunal ruled accordingly that “[t]he Accused failed in his duty as Supreme Commander to take necessary and reasonable measures to

¹⁴⁸ *Hadžihasanović* TC, para 70.

¹⁴⁹ *Hadžihasanović* TC, para 71.

¹⁵⁰ *Hadžihasanović* TC, para 75.

¹⁵¹ See Chapter 3 (n 171) *et seq.*

¹⁵² Chapter 3 (n 218) *et seq.*

¹⁵³ *Popović* AC, para 2073.

¹⁵⁴ *Prosecutor v. Karadžić*, TC Judgment, IT-95-5/18-T, 24 March 2016, para 579.

punish the commission of [crimes] as an underlying act of prosecution. He is therefore criminally responsible for such failure pursuant to Article 7 (3)".¹⁵⁵ This more recent interpretation endorsed the *Hadžihasanović* position, although the nature was differently formulated as responsibility *with respect to (a) crimes by subordinates*.

The inconsistent implementation of the nature of CR has resulted from the inadequate interpretation of the nature of responsibility under CR. This inconsistency was inevitable as the process of interpretation was inconsistent with the teleological method, primarily because judges' interpretation overlooked the role of precedents when interpreting the nature of CR. The ECCC approach was, however, more in line with the customary precedents while interpreting the nature of CR. In *Duch* the tribunal hold the non-military superior, by implication on the bases of the voluntary assumption of the position of command, responsible for the crimes committed by subordinates.¹⁵⁶

In *Ieng Sary* the defence argued about the customary status of CR between 1975 and 1979 and that CR did not exist as a customary norm before the adoption of the API in 1977.¹⁵⁷ The tribunal in response to this allegation examined the evolution of CR as a mode of liability under ICL. In doing this, it discussed the development of CR in the 1919 report of the Commission on Responsibility of Authors of the War; *Yamashita, re Yamashita*, IMT and IMTFE;¹⁵⁸ and then it concluded that CR "existed as a matter of customary international law" before and during the creation of the API¹⁵⁹. The ECCC elaborated on the customary precedents to declare the customary status and then deduce the nature of CR to interpret its applicable law accordingly. The literature was influenced, however, by the ICTY problematic interpretation. Therefore, the ECCC discussion was criticised, although it agreed with the ICTY's and other *ad hoc* tribunals that CR is a customary norm.¹⁶⁰

¹⁵⁵ *Ibid* para 5848.

¹⁵⁶ *Prosecutor v. Kaing Guek Eav "Duch"*, Judgment, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010, 548-549.

¹⁵⁷ *Prosecutor v. Ieng Sary*, Decision on Ieng Sary's Appeal Against the Closing Order, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), 11 April 2011, 399.

¹⁵⁸ *Ibid* 421-458. Note that the tribunal examined thoroughly the customary nature of CR more accurate than *Čelebići* or *Halilović* discussed above.

¹⁵⁹ *Ibid* 460.

¹⁶⁰ *Cf.* Rehan Abeyratne, 'Superior Responsibility and the Principle of Legality at the ECCC' (2012) 44 *Geo. Wash. Int'l L. Rev.* 39, 78.

A) The role of precedents for the purpose of interpreting CR:-

Although there are inconsistencies regarding the nature of CR, it seems to be settled that CR is an already existing law.¹⁶¹ Customary law is the only ICL source that is binding on all states.¹⁶² This theory of binding customs evolved from the general concept of states' practice perceived as an applicable and binding law, as Art. 38 of the ICJ Statute provides for "international custom, as evidence of a general practice accepted as law".¹⁶³ Subsequently, there are two essential elements to constitute customary law: (a) state practice as the general practice; and (b) such practice as has to be accepted as binding and, therefore, in effect a law (*opinio juris*).¹⁶⁴

Note that the meaning of CR being a creation of international law is that CR was established primarily through international judicial decisions. This is in line with the findings in *Kupreškić*, that:-

"Being international in nature and applying international law *principaliter*, the Tribunal *cannot but rely* upon the well-established sources of international law and, within this framework, *upon judicial decisions*."¹⁶⁵

It stated also that these judicial decisions are not binding by nature. Rather, they are "subsidiary means..., which must be regarded as declaratory of customary international law".¹⁶⁶ Nevertheless, it is unclear whether judicial decisions would declare the status of a rule or declare the nature of the rule. As discussed above, *Čelebići* was more declaratory of status, although it acknowledged that, for the nature of CR, post-WWII case-law was of more importance.

¹⁶¹ *Supra*, (nn 57, 76 and 97).

¹⁶² Indeed, treaties bind only the parties to them; customs on the other hand bind all states. This is what distinguishes customary law from others. See Malcolm D. Evans (ed.), *International Law*, (4th edn., OUP 2014) 91.

¹⁶³ The IMT statement provided that "customs and practices of states which gradually obtained universal recognition" are a source of IL. *Supra* (n 36).

¹⁶⁴ Jan Klabbbers (n 26) 26.

¹⁶⁵ *Prosecutor v. Zoran Kupreškić et. al.*, TC Judgement, IT-95-16-T, 14 January 2000, para 540.

¹⁶⁶ *Ibid.*

5. Judicial decisions:-

Kupreškić ruled that, even though judicial decisions are a subsidiary source, for ICL they are significant for finding the basis of this rudimentary law.¹⁶⁷ In fact, this could arguably be the most important source for the creation and development of CR and its requirements. Nonetheless, international criminal courts and tribunals are not bound by precedents of other courts.¹⁶⁸ Thus, the ICC stated that “decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute”.¹⁶⁹

Similarly, the *ad hoc* Tribunals are not bound by precedents from other courts and, therefore, the ICTY stated that “the International Tribunal is not bound by past doctrines but must apply customary law”.¹⁷⁰ In practice, however, this is problematic, as various international tribunals referred repeatedly to the judgment and decision of *Čelebići*.¹⁷¹ Here, the interpretation of CR was confused with the general role of judicial decisions. Thus inconsistent application was to be the result, and then CR was continually re-characterised.¹⁷²

A) The nature of CR and judicial decisions:-

The Tribunal added emphasis and asserted that it “is not bound by precedents established by other international courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts...”.¹⁷³ The Tribunal noted that binding precedent (“*stare decisis*”) is a doctrine to be found in

¹⁶⁷ *Supra* (n 165). This is also the opinion of some notable scholars. For instance, Cassese claimed that as a result of the absence of a universal mechanism of law-making, the judicial decisions became a more important source of interpretation. Cassese 2005 (n 29)194-5; see also Damgaard cited Oppenheim notes that “judicial decision has become a most important factor in the development of international law, and the authority and persuasive power of judicial decision may sometimes give them greater significance than they enjoy formally”. Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes* (Springer 2008), 35.

¹⁶⁸ *Infra* (n 173).

¹⁶⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para 603.

¹⁷⁰ *Prosecutor v. Tadić*, TC Judgment, IT-94-1-T, 7 May 1997, para 654. Also the ECCC decision, regarding the precedents of other courts, that “this Chamber emphasises that these cases are non-binding and not, in and of themselves, primary sources of international law”; *Kaing Guek Eav*, Appeal Judgment, 001/18-07-2007-ECCC/SC, 3 February 2012, para 97. See also the SCSL which stated that it “is not bound by decisions of the ICTY”, *Prosecutor v. Issa Hassan Sesay, et. al.*, Trial Chamber I Judgment, SCSL-04-15-T-1234, 2 March 2009, para 295.

¹⁷¹ *Supra* (n 38).

¹⁷² See the four categories of the nature of CR, (Chapter 3 n 216) *et seq.*

¹⁷³ *Kupreškić* TC, para 540.

common law systems which establishes a form of hierarchy for judicial decisions; but that the absence of such a hierarchy within the international framework renders it inapplicable in that context.¹⁷⁴

Nevertheless, the ICTY frequently referred to a number of judgments and decisions from the Nuremberg and Tokyo Tribunals. This is due to: (a) the nature of CR being developed through case-law; and (b) “the Additional Protocols to the Geneva Conventions make no determination as to the nature of command responsibility”.¹⁷⁵ The *ad hoc* tribunals resorted to judicial decisions whenever confronted with a problem about CR; but they predominantly resorted to such decisions to support their findings selectively rather than deducing (or declaring) the applicable law. The question then arises as to what role judicial decisions play with regard to customary rules of interpretation.

B) The role of judicial decisions for interpreting customary rules:-

Tadić, which is a seminal case for various international criminal courts and tribunals, stated that:-

“In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions”.¹⁷⁶

Accordingly, judicial decisions – with statements of states’ delegations and military manuals - are important for finding the nature of a customary norm. Therefore, the *Tadić* AC examined – although it was debatable⁻¹⁷⁷ the customary case-law to deduce the nature of the JCE rather than to declare its status. The AC cited a considerable number of case decisions in order to declare the applicable nature and requirements of the JCE rather than its customary status.¹⁷⁸

¹⁷⁴ *Ibid.*

¹⁷⁵ *Supra* (n 149).

¹⁷⁶ *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 99.

¹⁷⁷ The debate is about the customary status of (JCE 3). See Danner and Martinez (*Op. cit* Chapter 1) 110-112 and 117-120.; see also Pamela Stephens, ‘Collective Criminality and Individual Responsibility: the Constraints of Interpretation’ (2014) 37 *Fordham Int’l L. J.* 501, 529-533.

¹⁷⁸ *Tadić* AC, paras 195-229.

This method was not followed for interpreting CR, as *Čelebići*, under the Section designated for the ‘legal Character of Command Responsibility and its Status under Customary International Law’, cited the *High Command, Medical & Hostage Cases*, but this was not for declaring the nature of CR.¹⁷⁹ In this the *Čelebići* judgment declared the status of CR, but did not specify the nature or its characteristics. These references were to list evidence for the existence of CR as an already existing rule, using those cases as examples of state practice and not as (judicial decisions) a source of ICL.

In spite of the contradictory standard of responsibility adopted in the Yamashita case, the Tribunal, in order to prove the validity and applicability of CR, first referred to *Yamashita* as somewhat ‘state practice’. In this it – without examining the nature of CR or its requirements - referred to the conclusion of the US Supreme Court regarding the *re Yamashita* case.¹⁸⁰

The *ad hoc* tribunals undermined, however, the importance of judicial decisions – as a source – not only of CR but also of ICL. Cassese, for example, suggested that judicial decisions are more significant regarding ICL for two reasons. Generally, they are resorted to in order to support, or as evidence of, the already existing rules reflecting ‘customary law’. They are more precisely used as “means to establish the most appropriate interpretation to be placed on a treaty rule”.¹⁸¹ However, - subject to the legality principle - this interpretation must be in line with those judicial decisions.

Note that a judicial decision as evidence of customary law is not limited to declaring only the existence of the rule, but more precisely it is evidence for identifying the applicable law.¹⁸² This is in accordance with Art. 38 of the ICJ, stating that judicial decisions are “subsidiary means for the determination of rules of law”.¹⁸³ Judicial decisions’ function, to identify the applicable law, seems to be the settled part; nevertheless, its priority within the hierarchy of Art. 38 for,

¹⁷⁹ *Čelebići* TC, paras 338, 366 & 367.

¹⁸⁰ *Ibid* para 338 (at footnote 351).

¹⁸¹ Cassese *et al.* (2013) 18.

¹⁸² Arajärvi (n.37) 100.

¹⁸³ ICJ Statute, Article 38 (1) (d).

particularly, ICL is the debatable issue in practice.¹⁸⁴ Gallant articulated accurately that judicial decisions for ICL “are no longer “subsidiary” sources as that word in Article 38 of the Statute of the International Court of Justice”.¹⁸⁵

A distinction should always be drawn between identifying the applicable law as being deduced from judicial decisions, and whether these judicial decisions are of an instant binding nature. As discussed above, international criminal courts are not bound by other courts’ decisions. Nevertheless, judicial decisions are recognised, particularly for ICL, as a source from which the applicable law should be deduced for the purpose of implementation. This is in accordance with the ICTY practice in *Tadić*, which was a seminal case.¹⁸⁶

C) The impact on CR:-

The *Aleksovski* case stated that, in general, “the Appeal Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interest of justice”.¹⁸⁷ Generally, courts’ decisions are referred to as state practice and *opinio juris*. Some cases are, however, recognised as being of more importance because of their nature, as based on international law.¹⁸⁸ In this, some judicial decisions were important to identify and deduce that applicable law in *Tadić*, concerning JCE.¹⁸⁹

It is important to reiterate that *Čelebići* is widely cited when referring to the customary nature or status of CR.¹⁹⁰ The core issue here is that the *Čelebići* Judgment overlooked the nature of CR, and focused merely on declaring that CR was a pre-existent rule. Accordingly, *Halilović* found this a cogent reason to re-examine and then interpret such nature. Therefore, it was possible for *Halilović* to depart from *Čelebići* regarding the nature of CR. One can, thus, assume that, based on the teleological approach, the *Halilović* would re-visit the customary case-law to identify the true nature of CR.

¹⁸⁴ Mia Swart, ‘Judicial Lawmaking at the *ad hoc* Tribunals: The Creative Use of the Sources of International Law and “Adventurous Interpretation”’ (2010) 70 *Heidelberg J. Int’l L.* 459, 471.

¹⁸⁵ Kenneth Gallant, ‘International Criminal Courts and the Making of Public International Law: New Roles for International Organizations and Individuals’ (2010) 43 *J. Marshall L. Rev.* 603.

¹⁸⁶ *Supra* (n 176).

¹⁸⁷ *Aleksovski* AC, para 107.

¹⁸⁸ Werle and Jessberger (n 50) 65.

¹⁸⁹ Danner and Martinez (n 177).

¹⁹⁰ *Supra* (n 38).

This was not the case, however, as *Halilović* listed some customary cases and then rapidly concluded that the nature of CR was not consistent throughout its existing case-law from *Yamashita* to *Čelebići*.¹⁹¹ Therefore, *Halilović* also overlooked the fact that, in the drafting of the API, the issue had been the differences between national law systems, regarding liability for omission.¹⁹² *Halilović* overlooked this issue and concluded that CR is a form of omission and that “omission is culpable”.¹⁹³ This conclusion was confusing for the subsequent cases, because it shifted the liability of the commander from the crime(s) committed to the omission, rendering CR *per se* a crime, as applied in *Orić*, *Hadžihasanović* and more recently *Karadžić*.¹⁹⁴

The failure to acknowledge the problem at the preparatory discussion on the drafting of CR in the API was the reason behind this inconsistency of interpretation. Judges may also be affected by this issue of whether their original national system recognised the liability of omission.¹⁹⁵ Analogy to the delegations at the preparatory discussions,¹⁹⁶ judges can also be divided as follows: (a) judges who endorse failure to act because it exists as a form of liability under their national law, (b) judges who do not endorse failure to act because it is unrecognised under their national law; and (c) judges who recognise CR as a failure to act under international law based on *Yamashita* and the IMTs’ Trials, regardless of their national systems.

Accordingly, judges recognising that liability for omission exists in their national systems would be more able to understand its theoretical challenges. Most importantly, judges who recognise the nature of CR as being based on the customary precedents would find their task less complex in interpreting the nature as well as the requirements of CR. The extent of this issue of liability for omission in national law systems and its impact on CR will, therefore, be discussed in Chapter 7.

¹⁹¹ *Halilović* TC, paras 44-54.

¹⁹² *Supra* (nn 104 and 111).

¹⁹³ *Halilović* TC, para 54.

¹⁹⁴ See Chapter 3 (nn 177 *et seq.* and 216 *et seq.*).

¹⁹⁵ Cf. James Meernik *et al.*, ‘Judicial Decision Making at the ICTY: the Influence of Home Country Characteristics’ (2012) 95 *Judicature* 171, 176.

¹⁹⁶ *Supra* (n 106) *et seq.*

6. Conclusion:-

This chapter examined the consistency, and legitimacy, of the process of interpretation of this doctrine's nature at the *ad hoc* tribunals, which have resulted in the uncertain nature of CR. In assessing the legitimacy of an interpreted rule, that rule should be consistently implemented; and, when this rule needs to be developed, this process should be carried out through a consistent method of interpretation. As discussed previously, the implementation of CR was not consistent; therefore, assessing the legitimacy of the interpretation process of CR was the aim of this chapter. The method and process of interpreting the nature of CR was inconsistently carried out at, particularly, the ICTY being the germane authority for developing the law of CR in the *ad hoc* tribunals. This inconsistency can be summarised as follows:-

(a) the API was regarded in *Blaškić* as a treaty that need a specific method of interpretation; but later, during the judgment, this was changed, which impacted on whether CR was interpreted as a customary rule or as a treaty's provision;

(b) *Čelebići* examined customary precedents which were referred to during the drafting of the API as the sources of the nature of CR; but *Čelebići* used them as examples of state practice, to declare the status of CR as being an already existing norm, rather than deducing the applicable law; and

(c) *Halilović* exacerbated the inconsistency as, on the one hand, it defined the nature of CR as based on criminal theory in national law systems, whilst, on the other, acknowledging its creation as being based on international law and without any equivalent form in domestic criminal law.

This chapter has found this process inconsistent, because the ICTY deemed the teleological approach the method for interpreting its applicable law. The teleological approach required judges to consider the drafter's objectives; in the case of CR the drafter's of the API. With regard to CR, the drafters endorsed the nature of CR as that which was interpreted and implemented in the Nuremberg and Tokyo Trials (as customary precedents for the doctrine). It has found that the role and priority of judicial decisions (particularly customary precedents for CR) were overlooked in the ICTY, especially in *Čelebići* and *Halilović*.

It has shown that, although the majority of the *ad hoc* tribunals' cases of CR followed *Čelebići*, which did not explicitly articulate the nature of CR. Thus, it had an impact on the interpretation of CR: that caused inconsistency, not only between the ICTY and other international courts, but also within the ICTY's case-law. It is questionable, therefore, whether such interpretation could be deemed legitimate, as neither the process of interpretation was consistent nor were the resultant rules sustainable or consistently implemented. Chapter Six examines, accordingly, the impact of these inconsistencies on the rights of accused persons. Before that, however, the following chapter evaluates the legitimacy of the development of CR by the *ad hoc* tribunals, through examining the impact of this inconsistency on the requirements of CR.

V. Chapter Five

Re-characterising the requirements of command responsibility

As discussed above, the inconsistent and continued re-characterisation of the nature of CR resulted in inconsistent and vague implementation of CR. This essentially resulted from the failure to acknowledge the true, threefold, *sui generis* nature of CR. However, aspects of this nature were initially recognised by the ICTY, in that the “concept of responsible command looks to duties comprised in the idea of command whereas that of command responsibility looks at liability flowing from breach of those duties. ...the elements of command responsibility are derived from the elements of responsible command...”.¹

This decision supports by implication the argument in this thesis that CR is threefold, in the sense that CR flows from a breach of duties under IHL and those duties flow from military laws and values. The breach of duties accordingly infringes (a) ICL (because of the underlying crime), (b) IHL (because of the duty); and, lastly, (c) military values (because of the nature of operations and being the sources by which those duties can be interpreted). This is – or should always be – the rationale of the nature and requirements of the liability under CR.²

According to the *ad hoc* tribunals, duties are therefore part of the doctrine of CR, which are deduced from the concept of responsible command. CR was, however, separated from the essential elements constituting its nature due to the continual re-interpretation. The implementation of CR was thus inconsistent. As the ICTY stated, above, *duties* are sources forming the requirements of CR. The duty of commanders is also part of the values element, which is a component of the nature of CR.

This chapter therefore aims to examine the impact of re-characterising CR through the inconsistent interpretation of its nature. It scrutinises the impact of these re-characterisations the nature on the implementation of the doctrine’s requirements; and also evaluates the role of duties in relation to these requirements. The chapter consists of two parts. The first provides an overview of

¹ *Prosecutor v. Enver Hadžihasanović et al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, IT-01-47-AR72, 16 July 2003, para 22. It also stated that “military organization implies responsible command and that responsible command in turn implies command responsibility”; para 17.

² *Cf.* Mitchell (chapter 2 n 124).

these requirements, where some controversial aspects of interpreting these requirements will be discussed. The second scrutinises the extent of re-characterising CR, more precisely the practical impact of the continued inconsistency on the implementation of its requirements.

1. The requirements of CR:-

The requirements of CR, as generally where the commission of crime is at issue, are divided into two categories: the *actus reus* and *mens rea*. However, for the purpose of this thesis – while maintaining this traditional division - these requirements will be categorised as follows: (a) the requirements for responsibility that are derived from the ‘responsible command’ (customs element) and military society (values element); and (b) the requirements for criminality, which is deduced from the ‘criminal law’. This categorisation aims to simplify the complexity of the requirements of CR,³ which was behind the inconsistent interpretation at the *ad hoc* tribunals’ judgments.

This criminality requirement consists of two elements: crime and causation, which are essential for raising the issue of and determining criminal responsibility within any jurisdiction.⁴ Crimes perpetrated by units causally link their commander to responsibility for these crimes as a result of that commander’s failure to act that is also consistent with the military values of commanders.⁵ The responsibility requirement, however, is important for finding who in the relevant chain of command was supposed to act but failed to do so. Therefore, these crimes were recognised to be the result of his failure, thus raising the question of his responsibility.⁶ This requirement determines the identity of the commander who was under duties: (a) to control; (b) to know; and (c) to prevent, subordinates’ crimes.

³ Cf. Sonja Boelaert-Suominen, ‘Prosecuting Superiors for Crimes Committed by Subordinates: a Discussion of the First Significant Case Law Since the Second World War’ (2001) 41 Va. J. Int’l L. 747, 784-5.

⁴ Jonathan Herring, *Criminal Law Text, Cases, and Materials* (6th edn. OUP, 2014) 70.

⁵ These values for commanders are: duty, responsibility and leadership. See (chapter 1 n 59).

⁶ Cf. R A Duff, Who is Responsible, for What, to Whom? (2004-2005) 2 Ohio St. J. Crim. L. 441, 442.

A) The requirement for criminality:-

This is the first requirement to hold commanders criminally responsible for crimes committed by subordinates. Criminal law consists of two essential elements: the crime and the person who caused this crime. These requirements conveyed the answers of an accused person asking: for what I am became being held responsible?⁷

The *ad hoc* tribunals overlooked the importance of considering the first factor of the underlying crime when examining CR. They also rejected causation as a separate element for CR. The ICC, in contrast, required a causal link to be proved for the purpose of CR, and the crime committed to constitute a crime under international law.⁸

i) The crime committed:-

Under ICL, there are a number of crimes – also known as the “core crimes” - that are under the jurisdiction of international criminal courts and tribunals,⁹ entitling these courts to prosecute individuals who commit or contribute – directly or indirectly - to the commission of such crimes. These crimes share a distinctive key feature, which is the gravity of their characteristics. It is the gravity of the nature of those offences which make them international crimes.¹⁰

Čelebići, for instance, stated that the underlying crime “is a necessary prerequisite” for the application of CR; but it is not an essential requirement for this doctrine.¹¹ According to the *ad hoc* tribunals, the underlying crime is not a requirement for CR: this had an impact, however, on the implementation of CR, as discussed below.¹²

⁷ Cf. David Akerson and Natalie Knowlton, ‘President Obama and the International Criminal Law of Successor Liability’ (2009) 37 Denv. J. Int’l L. & Pol’y 615; also Cf. *infra* (nn 233-9).

⁸ See Houston Goodell, ‘The Greatest Measure of Deterrence: a Conviction for Jean-Pierre Bemba Gombo’ (2012) 18 U.C. Davis L. Int’l L. & Pol’y 191, 201-2.

⁹ Generally, there are four international crimes: war crimes, genocide, aggression and crimes against humanity. See Cryer *et. al.* (2010) 4-5. However, Bassiouni, has defined 27 crimes as international crimes. See M Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (Martinus Nijhoff 2012) 144-5.

¹⁰ Cf. (Chapter 2 n 119) *et seq.*

¹¹ *Čelebići*, para 346.

¹² *Čelebići* TC excluded the role of crime at the sentence; the AC therefore included the crime as an aggravating factor. *Čelebići* AC, para 732. But *Orić* inconsistently interpreted the crime as a requirement of CR. *Orić* TC, para 295. Cf. *Infar* (nn 241-245).

ii) Causation:-

In criminal law, causation “is necessary to show not only that the defendant performed an act, but that the act caused a particular consequence”.¹³ Accordingly, it is regarded principally as an essential element of the theory of criminal liability.¹⁴ However, the *ad hoc* tribunals, on the one hand, rejected the need for causation to be proved for CR, discussed below. On the other, the ICC required proof of a causal link between the commander’s failure and the crime committed.¹⁵

Above all, causation is a fundamental requirement of all modes of liability. In domestic criminal law, therefore, causation is perceived - implicitly or explicitly - as a requirement for all forms of responsibility.¹⁶ It follows that, with regard to CR, causation is a requirement for criminality. In *Yamashita*, causation was implicitly required as to link his omission with his criminal liability. General Yamashita was, therefore, responsible for those crimes where his failure *permitted* their commission.¹⁷

The IMTs, more explicitly, stated that, for the commander to be responsible under CR, “a causative, overt act or omission” is required to be proven.¹⁸ It also placed emphasis on the proof of causation for CR as a matter of being a requirement of criminal law. The Foertsch case stated that “[t]he evidence fails to show the commission of an unlawful act which was the result of any action, affirmative or passive...His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law”.¹⁹

The API, more precisely, provided that states “shall repress grave breaches and take measures necessary to suppress all other breaches...which *resulted from* a failure to act...”.²⁰ The ICC recognised the “*resulted from*” as a requirement of

¹³ Jonathan Herring, n. 4, p. 85. See also H Hart & T Honore, *Causation in the Law* (2nd edn., OUP 1985) 84.

¹⁴ A Ashworth & J Horder, *Principles of Criminal Law* (7th edn., OUP 2013) 102.

¹⁵ The crime is required to be of international characteristics to apply CR. Cf. Sarah Perkins, ‘The Filer to Protect: Expanding the scope of Command Responsibility to the United Nations at Srebrenica’ (2004) 62 U. Toronto Fac. L. Rev. 193, 202 and 211-2.

¹⁶ Markus D Dubber and Tatjana Hörnle, *Criminal Law: A Comparative Approach* (OUP 2014) 291 & 293.

¹⁷ See (Chapter 2 nn 36, 47 & 72).

¹⁸ *Hostage* 1261.

¹⁹ Law Report, XV, 76-7.

²⁰ API of 1977, Article 86 (1).

causation within Art. 28²¹ and stated that the commander is responsible “*as a result of his or her failure*”, and therefore that it was required for both military and civilian superiors.²² In sum, the *ad hoc* tribunals neither consistently followed the customary precedents nor the ICC regarding the criminality requirement.

B) The requirements for responsibility:-

This category encompasses the traditional *actus reus* and *mens rea* elements. In fact, it consists of the central three elements required by the *ad hoc* tribunals: (a) the superior-subordinate(s) relationship; (b) the failure to prevent or punish; and (c) the knowledge.²³

i) Subordination: the duty and the requirement:-

The concept of subordination is primarily derived from the military hierarchal structure. As a concept, it was the key element of the ancient theory of responsible command; and it is well recognised under customary law. Foremost as a requirement for the CR doctrine but pre-dating it, it was and is the duty of every commander to *exercise command and control*.²⁴

The customary precedents prosecuted predominantly the officially appointed commander. This is known as the *de jure* command,²⁵ where a commander, by virtue of such a position, is required to exercise the authority necessary to control subordinates²⁶. It is usually argued that the problem in *Yamashita* was his lack of knowledge about the crimes committed. Nevertheless,

²¹ Delegations found this sufficient as a requirement to prove causation and therefore “thought that a provision on causation was not necessary”. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, 33.

²² ICCS Art. 28 (a) & (b). See Kai Ambos, ‘Superior Responsibility’ in Antonio Cassese and others (eds.) *The Rome Statute of the International Criminal Court: a Commentary Volume III* (OUP 2002) 841-2. Ambos noted that the standard “as a result” was clearly required as causation. See also *Bemba*, TC III, (2016), paras 211 and 213.

²³ API Commentary, para 3543; see also *Čelebići*, para 346.

²⁴ See for example the ancient nature and historical development of CR in Chapters 1 & 2.

²⁵ Few, however, were found responsible because of the voluntary assumption of the command. See (Chapter 2 n 186) *et seq.*

²⁶ *Čelebići*, para 348.

this view is slightly inaccurate,²⁷ as the core problem was that his duty was confused with his ability *to exercise control*.²⁸

a) Obligation to exercise this duty: *de jure* and *de facto*:-

The Commentary on the API of 1977 recognised the importance of the duty to exercise command and control, from which the subordination requirement was established.²⁹ The *ad hoc* tribunals – particularly the ICTY - after supporting the importance of this duty,³⁰ stated that this concept “is problematic in situations ... where previously existing formal structures have been broken down ... thus individuals in positions of authority, whether civilian or within military structures, may incur criminal responsibility under the doctrine of command responsibility on the bases of their *de facto* as well as *de jure* positions as superiors”.³¹

In other words, the Tribunal, while recognising the importance of the duty to control, supported the prosecution’s proposition of its *de facto* application even though it lacks the customary characteristics required for the applicable law at the ICTY.³² Thus, the *de facto* command was perceived as “a creation of the *ad hoc* Tribunals”.³³ This could be seen as an example of crafting new law, which violates the legality principle.³⁴ Therefore the key element became the test of possessing “material ability to control”, which is more appropriate to this type of conflict.³⁵

The rationale of this *de facto* concept is that “persons effectively in command of such more informal structure” may be held responsible for crimes committed by their subordinates.³⁶ Nevertheless, this application jeopardised the legality principle. Thus, it would have been more appropriate had the Tribunal referred to the practice of the IMTs trials, which developed this issue by resorting to the concept of “the voluntary assumption of command”.³⁷

²⁷ *Infra* (n 46) *et seq.*

²⁸ Judge Murphy (Chapter 2 n 103).

²⁹ API Commentary, para 3544. See also *Čelebići*, para 354.

³⁰ *Čelebići*, para 354; see also *supra* (n 1).

³¹ *Ibid*, see also *Nahimana AC*, para 787.

³² *Ibid*, see also the UNSG’s Report (chapter 4 n 96).

³³ *Čelebići* judgment rejected the ILC Draft Code where the International Law Commission required, for CR, the existence of “formal legal competence”. *Čelebići*, para 395; see also Mettraux (2009) 143.

³⁴ Chapter 6.

³⁵ *Čelebići*, para 354.

³⁶ *Blaškić TC*, para 301-2.

³⁷ Chapter 2 (n 186) *et seq.*

b) Ability to exercise effective control:-

As a duty, effective control is essential, because it is the reason for exercising the subsequent duties.³⁸ In other words, exercising effective control requires the establishment of an effective monitoring system, to enable the commander to know about his troops' actions. Subsequently, this would enable him to prevent the commission, or to identify the potential perpetrators of those crimes.

The ICC, however, recognised the importance of this issue and, therefore, Art. 28 of the ICCS provided that: commanders will be responsible for *the crimes committed* by troops under their “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...*”.³⁹ The *ad hoc* tribunals, however, overlooked the importance of this duty, which was, therefore, left out of their Statutes.⁴⁰ The ICC highlighted two issues: (a) effective control as a duty; and (b) the ability to exercise effective control at the time⁴¹.

The separation of the military from the non-military at the ICC does not *per se* reflect customary law. With regard to the concept of control, however, Art. 28 of the ICC accurately included the duty to exercise control; and, by separating the military from civilian superiors, it recognised both *de jure* and *de facto* command, while maintaining the role of duty.⁴² In this it developed the customary law and required that, for civilian superiors, the underlying crimes must be “within the effective responsibility and control of the superior”.⁴³ This explains also the ICC

³⁸ API Commentary, para 3549.

³⁹ The ICC Statute, Art. 28 (a).

⁴⁰ The role of duty was sometimes examined during judgments but not as part of the nature of CR. See *Čelebići* TC, para 378. *Prosecutor v. Alfred Musema*, Trial Chamber I, Judgement and Sentence, ICTR-96-13-A, 27 January 2000, para 135. *Prosecutor v. Moinina Fofana et al.*, TC Judgment, SCSL-04-14-T, 2 August 2007, para 238.

⁴¹ *Prosecutor v. Bemba*, Pre-TC II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 15 June 2009, para 414.

⁴² *Ibid* para 406.

⁴³ ICCS Art, 28 (b) (ii).

rationale for a sub-provision for civilian superiors,⁴⁴ in that the concept of “duty” is more military than civilian by nature.⁴⁵

ii) The duty to take measures:-

As illustrated above, the actual problem - in *Yamashita* - was the inability (impossibility) to exercise control over his subordinates, as a test. Nevertheless, the Court in *re Yamashita* – articulated the extent of this duty: stating that he was obliged “to take such measures as were within his power ... to protect prisoners of war and the civilian population”.⁴⁶ These measures, therefore, are the steps that should enable the commander to fulfil the essential duty to control subordinates.⁴⁷ The knowledge is perceived accordingly as a prerequisite measure and therefore a sub-duty.⁴⁸

Judge Ozaki articulated in *Bemba* recently the rationale as well as the role of this duty to the nature of responsibility under CR and stated that: “[t]he duty of a commander to exercise control properly may extend both temporally and substantively beyond the specific Article 28(a)(ii) duties. ... Further examples of measures undertaken in exercise of proper control may include maintaining order, and setting out operational system of supervision”;⁴⁹ therefore, “[t]he specific duties are the core of the duty to exercise control properly”.⁵⁰ However, Judge Ozaki resorted to the Commentary on the API. Conversely, *Popović* resorted to the military values to articulate the commentary and not vice versa.⁵¹

Note that, neither the API nor its Commentary examined the status of the duty to acquire information. Therefore, it could be argued that the knowledge

⁴⁴ Cf. Nora Karsten, ‘Distinguishing Military and Non-military Superiors’ (2009) 7J. Int’l Crim. Just. 983, 989.

⁴⁵ UN Diplomatic Conference, *infra*. n. 80. This is also in line with the personal obligation. Chapter 1 (n 59). Cf. *Hirota* (chapter 2 n 214) *et seq.*

⁴⁶ *Re Yamashita* 16.

⁴⁷ Yearbook of the International Law Commission 1996, Report of the Commission to the General Assembly on the work of its forty-eight session, Volume II Part Two, A/CN.4/SER.A/1996/ASS.1 Part2 (Hereafter ILC Report, 1996) 25.

⁴⁸ Chapter 2 (nn 56 and 64).

⁴⁹ Separate Opinion of Judge Kuniko Ozaki, *Bemba* TCIII, (2016), para 15

⁵⁰ *Ibid* para 16.

⁵¹ *Popović* AC, para 1932.

requirement was derived as one of these measures, which can accordingly be regarded as a subsidiary duty.⁵²

iii) *Mens rea*:-

a) Is there a duty to know?

Pursuant to customary law (or CIHL), the commander was obliged only to command his subordinates.⁵³ The CIHL thereafter imposed on the commander a duty to “take all measures in his power to restore...public order and safety...”.⁵⁴ For the commander to take such measures, he needs to know about troops’ activities. This process of being informed could be regarded, therefore, as one of the measures required indirectly by the law. It could, accordingly, be regarded as a constructive duty to meet the obligation to take reasonable measures.

Nevertheless, under CIHL, commanders do not have any explicit obligation to know.⁵⁵ In fact, this duty to acquire information was developed – as part of military values - through customary precedents.⁵⁶ *Čelebići* stated, therefore, that the duty to know was recognised as a commander’s obligation through the WWII jurisprudence.⁵⁷ This is more consistent with it as a subsidiary duty, under the duty to take measures, than as an affirmative duty *per se*.

⁵² Cf. Victor Galson, ‘The Constructive Knowledge Standard of Command Responsibility’ (2009) 7 *Dartmouth L. J.* 223, 230; also Cf. David Nersessian, ‘Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes’ (2006) 30 *Fletcher F. World Aff.* 81, 90-1.

⁵³ The Hague Convention (II) 1899, Annex Article 1.

⁵⁴ The Hague Convention (IV) 1907, Article 43.

⁵⁵ Besides Article 43 of the Annex to the Hague Convention (IV), Article 19 of the Hague Convention (X) stated that: “[t]he commanders-in-chief of the belligerent fleets must see the above articles are properly carried out, they will have also to see to cases not covered thereby...”. In this it might be argued that “to see” is to know but this is still controversial as a duty for every commander.

⁵⁶ See (Chapter 2 nn 167-176).

⁵⁷ *Čelebići*, paras 388 & 389.

b) Developing the knowledge requirement:-

Generally, the *Yamashita* controversy was attributed - in the literature - mainly to the *mens rea* standard.⁵⁸ *Yamashita* concluded that “widespread atrocities”⁵⁹ were indicia of the commander’s knowledge.⁶⁰ The Prosecutor – after explaining the widespread occurrence of the crimes – submitted that:-

“[t]hey must have been known to the accused if he were making any effort whatever to meet the responsibilities of his command or his position: and that if he did not know of those acts, notorious, widespread, repeated, constant as they were, it was simply because he took affirmative action not to know. That is our case”.⁶¹

This is consistent with the UN Commission of Experts finding that military commanders are under personal obligations and responsibilities. This also solidifies the importance of the military commander’s values (being: duty, leadership and responsibility) to CR.⁶² However, as discussed above, it was impossible for *Yamashita* to exercise control.

The Tokyo Tribunal finding illustrated the duty to know. The *ad hoc* Tribunal in *Čelebići* supported – before it later re-characterised - the customary precedents’ finding that the commander is responsible if he “knew, or should have known” about the crimes; and supported the conclusion in *Mummenthey* that lack of knowledge cannot be pleaded as a defence.⁶³ However, this was reinterpreted and, without the consideration of the role of duty, it became controversial.⁶⁴

⁵⁸ See for these criticisms: Reel (chapter 2 n127); see also Courtney Whitney, *The case of General Yamashita: A Memorandum*, 1949, 1. Richard Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (Scholarly Resources Inc. 1982) 123-27. See also Antonio Cassese, *International Criminal Law* (2nd edn., OUP 2008) 322; see also William A. Schabas, ‘Victor's Justice: Selecting "SITUATIONS" at the International Criminal Court’ (2010) 43 J. Marshall L. Rev. 535, 536; see also Arthur Thomas O' Reilly, ‘Command Responsibility: A Call to Realign Doctrine with Principles’ (2004-2005) 20 Am. U. Int'l L. Rev. 71, 78.

⁵⁹ The Prosecutor stated that “atrocities were spread from the northern portion ... to the southern portion”. Law reports, Volume IV, 17.

⁶⁰ This is a presumption of knowledge rather than actual knowledge. Vagueness is inevitable here, because the actual issue was the inability to exercise effective control.

⁶¹ Law reports, Volume IV, 17.

⁶² *Supra* (n 5).

⁶³ *Čelebići*, para 389.

⁶⁴ *Infra* (n 131) *et seq.*

c) Structuring the requirement:-

Article 86 (2) of the API of 1977 provided that commanders may be held responsible “if they knew, or had information which should have enabled them” to know about crimes committed within their areas of jurisdiction and command.⁶⁵ In other words, the API partially followed the IMTs’ judgments that either the commander had actual knowledge or, based on the circumstances, he should be presumed to have known. Nevertheless, Article 87 – concerning the commander’s duty - did not explicitly impose a duty to know. This, on the one hand, could be seen in contrast to the post-WWII judgments already mentioned; but, on the other, it could be argued that, under IHL, there is no separate duty to know.⁶⁶

The Commentary on the API provided that Article 87 should be read in conjunction with Article 80, concerning “Measures for execution”, thus imposing on the states parties, *inter alia*, a duty to observe and supervise.⁶⁷ The Commentary also stipulated that “[e]very commander at every level has a duty to react by initiating “such steps as are necessary to prevent such violations⁶⁸... The object of these texts is to ensure that military commanders at every level exercise the power vested in them...”.⁶⁹ Thus, the commanders’ “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”.⁷⁰ Accordingly, the necessary measures encompass the knowledge as a sub-duty and a requirement for CR.

C) The role of the values element:-

As there is no explicit duty to know, the *mens rea* requirement was and is one of the issues that generate controversy. The Law Reports commented that “the most interesting issue in [CR] is the question to what extent the accused’s

⁶⁵ The API of 1977, Article 86 (2). Cf. (n 206).

⁶⁶ The API of 1977, Article 87.

⁶⁷ API Commentary, para 3550. Article 80, which was directed to the state parties and not to commanders, obliged those states (1) to “take all necessary measures for the execution of their obligations”; and (2) said “and [they] shall supervise their execution”.

⁶⁸ API Commentary, para 3561.

⁶⁹ API Commentary, para 3562.

⁷⁰ The Commentary stated that it is because of the position occupied by the commander that he comes under a duty to be informed. API Commentary, para 3560.

knowledge of offences ... must be proved”.⁷¹ Accordingly, the Law Reports argued that:-

“... here it is probable that the widespread nature of the offences proved was an important factor in so far as it may have convinced his judges either that the accused must have known or must be deemed to have known of their perpetration, or that he failed to fulfil a duty to discover the standard of conduct of his troops”.⁷²

The UN Commission of Experts’ reported that the “mental element” for CR is divided into actual and constructive knowledge.⁷³ This constructive knowledge required that the commander “must have known about the offences”; thus, the Commission proposed a number of indicia, including:-

“ (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; (f) the logistics involved, if any; (g) the geographic location of the acts; (h) the widespread occurrence of the acts... (l) the location of the commander at the time”.⁷⁴

In other words, these indicia suggest that, pursuant to the personal obligations, commanders cannot ignore or deny knowledge which they, based on primarily the military values (duty, leadership and responsibility), must have known.

Before turning to the *ad hoc* tribunals’ interpretation of this issue, it would be more appropriate to shed light on the ICC perspective of this requirement. According to the ICC, there are two standards of this requirement, one concerning the military commander and the other a civilian superior, which was a matter of debate and criticism in the literature.⁷⁵

First, the ICC stated that commanders may be found responsible if the “military commander or person either knew or owing to the circumstances at the time, should have known”.⁷⁶ That is, that the commander has actual knowledge or,

⁷¹ Law Reports, Vol. VIII, 89.

⁷² *Ibid.*

⁷³ UN Doc. S/1994/674, para 58.

⁷⁴ UN Doc. S/1994/674, para 58; see also *Čelebići*, para 386.

⁷⁵ ICCS, Art. 28.

⁷⁶ ICCS, Art. 28 (a) (i).

based on the circumstance of the crimes committed, he should have known constructively.⁷⁷

Secondly, the ICC, with regard to civilian superiors, stated that: “[t]he superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes”.⁷⁸ The ICC attributed the separation between military and civilian superiors to the different nature of responsibility and authority between them.⁷⁹ However, the *ad hoc* tribunal standard of constructive knowledge is similar to that of civilian superiors in the ICC.

Note that the U.S. representative who actually proposed the current formulation of Art.28 of the ICC at ‘the conference of establishment’ attributed this generally to the affirmative duty and responsibility attached to the military commander, there being no equivalent rule regarding the civilian superior.⁸⁰ This is, however, debatable, as the duty to know is a sub-duty to the obligation to take reasonable measures, which is required whenever the position of command is voluntarily assumed.⁸¹

iv) Failure to prevent or punish:-

The Commentary on the API provided generally that a commander is obliged to control his subordinates.⁸² The Commentary, therefore, emphasised that the commander “shall take all measures in his power to achieve this...even with regard to troops which are not directly subordinate to him...he is obliged to do everything in his power to deal with this, particularly by informing the responsible commander”.⁸³ This was consistent with the personal obligations derived from the values as an element of the nature of CR.

⁷⁷ Cf. *Yamashita* standard of knowledge. See (Chapter 2 n 48).

⁷⁸ ICCS, Art. 28 (b) (i).

⁷⁹ *Bemba*, para 433.

⁸⁰ The American delegate stated that the “authority rested on the military discipline system, which had a penal dimension” that is lacking in the civilian system. He concluded, accordingly, that “a military commander was expected to take responsibility if he knew or should have known”. UN Diplomatic Conference of the ICC, A/CONF.183C.1/SR.1, para 67,

⁸¹ Cf. *Infra* (nn 127-130).

⁸² API Commentary, para 3552.

⁸³ API Commentary, para 3555.

a) The controversy:-

In the literature,⁸⁴ there are two misleading assumptions that result from incorrect interpretation. First, it is widely claimed that, based on Customary Law, CR depends on the failure to prevent or punish crime;⁸⁵ but this reflected only the *ad hoc* tribunals' interpretation,⁸⁶ and, as discussed below, this affected the implementation of CR.⁸⁷ The second error is in limiting the duty to take necessary and reasonable measures to institute preventive and punitive steps,⁸⁸ which is also incorrect, as initiating an effective system to acquire information is also a sub-measure.⁸⁹ These issues resulted from undermining not only commanders' duties, but also the role of the values element regarding CR.

The ICC, however, adopted a different method regarding the duty to take necessary and reasonable measures. It required three phases, instead of the two of the *ad hoc* tribunals. In this, it illustrated that there are three duties in dealing with the "commission of the crimes: before, during and after".⁹⁰ It emphasised that there are "three duties listed under Article 28 (a) (ii) of the Statute: the duty to prevent crimes, the duty to repress crimes or the duty to submit the matter to the competent authorities for investigation and prosecution".⁹¹ These three duties not only correspond to legal duties but, more precisely, they are more commensurate with the *sui generis* nature of CR and its values elements.

The acquiring of information is regarded— for the purpose of this study - as the first step of the required 'necessary measures'. Nevertheless, these measures, according to the *ad hoc* tribunals, are either preventive (required before the occurrence of the crime), or punitive (required after the crime being committed).

⁸⁴ See Cassese (2008) 238-9; see also Meloni (2010) 46-48.

⁸⁵ Cassese (2013) 182.

⁸⁶ Customary law, practice and the ICC all agreed that such responsibility resulted from the failure to exercise effective control. See discussion in previous chapter. *Cf. infra* (n 97) *et seq.*

⁸⁷ *Cf. Infra* (n 158) *et seq.*

⁸⁸ Cassese (2013) 189-90.

⁸⁹ This is contrary to the customary precedents, at the IMTs, and contrary to the API.

⁹⁰ *Bemba*, para 436.

⁹¹ *Bemba*, para 435. Note that the competent authority is responsible to investigate and not the commander. This was followed recently in *Popović AC. Infra* (n 229).

v) Duty to take preventive measures:-

Under Art. 87 of the API, commanders are obliged to prevent their subordinates from committing crimes and to suppress such crimes if they are being committed and to report these crimes to the authority. However, there is no explicit duty to suppress under the *ad hoc* tribunals' provisions of CR, although it is understood primarily as part of the commander's duty to act – or, as the Commentary on the API suggested, duty to react - as “[t]here is no member of the armed forces exercising command who is not obliged to ensure the proper application” of the rules of international law.⁹²

A commander is under a duty to prevent crimes only if the first step of knowledge is met: to prevent a crime, he needs to know about its likelihood of occurrence. Nevertheless, this duty to take measures is generated essentially from the duty to act, which was developed through “customary” precedents concerning CR.⁹³ Thus, the ICTY - in *Čelebići* - relied on “failure to act” as a standard that encompasses the duty to take measures,⁹⁴ prior to the re-characterisation in the *Halilović*.⁹⁵

vi) Duty to take punitive measures:-

Art. 87 of the API imposes a duty “to initiate disciplinary or penal action against” subordinates who commit crimes under international law.⁹⁶ On the one hand, it can be read so that initiating *disciplinary or penal* actions does not require the commander himself to punish; on the other, it might be interpreted as the commander being obliged to punish the perpetrator because this Article is directed to commanders. It is, therefore, important to scrutinise the source of this duty.

⁹² API Commentary, para 3553.

⁹³ *Čelebići*, para 338.

⁹⁴ *Čelebići* examined the necessary measures as part of the duty to act. See *Čelebići*, paras 223, 230 & 277.

⁹⁵ Chapter 4 (n 141) *et seq.*

⁹⁶ API, Art. 87 (3). *Cf. infra* (n 158) *et seq.*

a) Is there a legitimate duty to punish?:-

The clause “and, where appropriate, to initiate disciplinary or penal action against violators thereof” of Art. 87⁹⁷ was controversial during its drafting and was therefore voted on in a separate session.⁹⁸ The French delegation led the opposition to the retention of this clause, arguing that it would work “to transfer certain responsibilities – mainly in the field of disciplinary or penal action - from the level of governments to that of commanders in zones of military operation”.⁹⁹ The delegation argued also that it might have an impact on the principle of the independence of the investigation and the prosecution,¹⁰⁰ as well as on that of the judicial system.¹⁰¹ This argument is also against the *ad hoc* tribunals’ suggestion that the “duty to punish” was actually limited to investigation only.¹⁰²

Nevertheless, in justifying the inclusion of this clause it was argued, on the other hand, that this duty was “already in the military codes of all countries”.¹⁰³ This is not, however, adequate. Advocates of this duty to punish, such as Sivakumaran, argue that it is a duty deduced from the national military discipline of all states,¹⁰⁴ but this is mostly concerned with crimes differing from crimes under international law.

More precisely, in this argument, it was stated that “[a]rticle 76 *bis* consisted of provisions which were already in the military codes of all

⁹⁷ *Ibid.*

⁹⁸ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977), Volume IX, CDDH/I/SR. 71, 393 & 399.

⁹⁹ See CDDH/I/SR. 71, para 17. This is consistent with the ICC. *Supra* (n 91).

¹⁰⁰ *Cf.* (n 92). Note that the investigation of a crime differs from that about the general conduct of troops.

¹⁰¹ *Ibid.*

¹⁰² This duty to investigate appeared first under the API Commentary where it stated that “[i]n this way, for example, a commander... would act like an investigating magistrate”. API Commentary para 3562. In *Limaj*, the TC concluded that the “superior’s duty to punish the perpetrators...encompasses the obligation to conduct an effective investigation...to ensure that the perpetrator will be punished”. *Prosecutor v. Limaj et al.*, TCII Judgment, IT-03-66-T, 30 November 2005, para 529. See *infra* (nn 238-239). But this might be seen as obliging the commander to do the impossible. *Cf.* Yasmin Naqvi, ‘Enforcement of Violations of IHL: The ICTY Statute – Crimes and Forms of liability’ (2014) 33 U. Tas. L. Rev. 1, 25-6.

¹⁰³ See CDDH/I/SR. 71, para 2.

¹⁰⁴ Sivakumaran cited: Henckaerts & Doswald-Beck, *Customary International Humanitarian Law, Vol. II: Practice* (Cambridge U.P., ICRC, 2005) 3738-51. See Sandesh Sivakumaran, ‘Command Responsibility in the Sierra Leonean Conflict: The Duty to Take Measures to Prevent Crimes and Punish the Perpetrations’, in Charles Chernor Jalloh (ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (CUP 2014) 131.

countries”.¹⁰⁵ Therefore, Sivakumaran,¹⁰⁶ as a result of this misleading argument, suggests that this duty pre-exists in military codes and referred to Henckaerts & Doswald-Beck, Customary International Humanitarian Law, 2005. According to this work, however, the only explicit inclusion of this duty to punish, *prior to the drafting of the API of 1977*, was in the US Field Manual (1956) alone.¹⁰⁷

Sivakumaran incorrectly, does not distinguish between the two duties and cites a number of references that discuss only the duty to prevent.¹⁰⁸ Even if the duty to punish was referred to within some cases or reports, this should have been declared through the recorded discussions for the drafting of the API; however, there was no evidence of such a duty to punish other than in the above US Field Manual (1956).¹⁰⁹

D) The requirements of CR: the rationale:-

Affirmatively, “[t]he first duty of a military commander, whatever his rank, is to exercise command”.¹¹⁰ The commander could thus be responsible for failure to command (failure to act). The duty to command requires the individual occupying such a position (*de jure* or *de facto*) to take measures that should enable him to exercise command effectively. As discussed above, these measures encompass sub-duties, such as to acquire knowledge and prevent crimes, which are deduced from the military values¹¹¹ and then required to comply with the laws of armed conflict. Thus, the customary case-law found commanders responsible for failure to act as a result of their failure to take reasonable measures and this failure to act permitted these crimes or increased the risk of their being committed.¹¹²

To assess the culpability for failure to act, a test of effective control was required, which *Čelebići* defined as “the material ability to prevent and punish”

¹⁰⁵ See CDDH/I/SR. 71, para. 2. Note that Art. 87 of the API of 1977 was, during the drafting, Art.76 *bis*.

¹⁰⁶ *Supra* (n 104).

¹⁰⁷ Henckaerts & Doswald-Beck *Op. cit* 3738-3751.

¹⁰⁸ For example, Sivakumaran cited *Yamashita*, where the only duty was the duty to prevent. See Sandesh Sivakumaran 131.

¹⁰⁹ See Henckaerts & Doswald-Beck, *supra*, n. 104; also see Official records of the Diplomatic conference, (n 98). See UN Doc. S/1994/674, para 60; *Cf.* (chapter 4 nn. 121-122).

¹¹⁰ API Commentary, para. 3549.

¹¹¹ Chapter 2 (nn 171 and 176).

¹¹² See (n 17).

crimes.¹¹³ It is acknowledged that, on the one hand and unlike the *Yamashita* situation, “international law cannot oblige a superior to perform the impossible”.¹¹⁴ On the other, international law recognised the significance of the position and role of commanders to ensure compliance with IHL.¹¹⁵ Therefore, Art. 28 of the ICCS attributed - the commander’s culpability for the underlying crime - to his or her “failure to exercise control properly”,¹¹⁶ which seems to be consistent with the customary case-law findings about the nature and requirements.

2. Re-characterising the requirements:-

The *ad hoc* tribunals’ interpretation of the nature of CR was inconsistent and that impacted on the rationale of the requirements of CR. This resulted primarily from undermining the role and rationale of duty, as argued above. The following considerations, therefore, aim to examine the extent of the re-characterising of these requirements. It examines the *ad hoc* tribunals’ inconsistent interpretation and implementation in four phases that are correspondent to the four generations of the nature of CR.¹¹⁷ Each phase analyses the impact of this inconsistency on the implementation of these requirements at the *ad hoc* tribunals.

A) Restricting the application:-

The commander’s ability to control at the time of the commission of the alleged crime is a required test to find the person responsible for failure to act under the CR doctrine, whether military or civilian. The initial purpose of this test was to identify the commander who bears the responsibility. The API commentary stated therefore that: “the text does not limit the obligation of commanders to

¹¹³ *Čelebići*, para 378; also *Bemba*, para 415; see also *Prosecutor v. Juvénal Kajelijeli* AC, ICTR-98-44A-A, 23 May 2005, para 86.

¹¹⁴ *Čelebići*, para 395.

¹¹⁵ Michael A. Newton and Casey Kuhlman, “Why Criminal Culpability Should Follow the Critical Path: Reframing the Theory of ‘Effective Control’” (2009) 40 *Netherlands Year of International Law* 3, 9.

¹¹⁶ ICCS, Art. 28 (a) & (b).

¹¹⁷ Chapter 3 (n 216) *et seq.*

apply only with respect to members of the armed forces under their command; it is further extended to apply with respect to "other persons under their control".¹¹⁸

The practice of the *ad hoc* tribunals, however, was controversial.¹¹⁹ The UN Commission of Experts listed factors when testing commanders' connection to crimes committed by subordinates; these include "the number ... the type ... [and] the scope of illegal acts; ... the number and type of troops involved; the logistics involved... the widespread occurrence of the acts...".¹²⁰ Accordingly, providing logistics is evidence (or, at least, an indicium) to establish the ability to control under CR.

As an illustration, Alfred Musema was an influential individual who was assigned, by a Presidential Decree, to be the Director of a public enterprise, the Gisovu Tea Factory in Rwanda.¹²¹ The Tribunal held him responsible – as a *de jure* superior - for the genocide committed by his employees.¹²² He was held responsible only for the crime committed by his direct employees,¹²³ even though, from the evidence, Musema had authority over the "soldiers, guards" and other units that perpetrated crimes.¹²⁴

The Tribunal overlooked the fact that effective control means, in the first place, the ability and authority to control.¹²⁵ Musema's ability to control can be deduced from his ability, *inter alia*, to provide logistical support tantamount to those available to responsible commanders. Musema knew of, and at the time had been able to prevent, those logistics which would have prevented those crimes. Nevertheless, because the duty was not weighed against the test, Musema's responsibility was restricted only to his direct subordinates, even though the Tribunal acknowledged that although:-

"[t]he Chamber is satisfied that such individuals perceived Musema as a figure of authority and as someone who wielded considerable power in the

¹¹⁸ API Commentary, para 3555.

¹¹⁹ It could be argued that the judgment in *Čelebići* was devoted to justifying the applicability of CR to civilian superiors and that the judgment therefore avoided considering the duty, as it might have been more difficult to find support through customary law. *Cf.* Mettraux (2009) 143.

¹²⁰ UN Doc. S/1994/674, para. 58. See also *Čelebići*, para 386.

¹²¹ *Musema* TC, para 12.

¹²² *Ibid*, paras 880 & 894.

¹²³ Cecile Aptel & Jamie A Williamson, 'A Commentary on the Musema Judgment Rendered by the United Nations International Criminal Tribunal for Rwanda,' (2000) 1 *Melb. J. Int'l L.* 131, 140.

¹²⁴ *Musema* TC, para 491.

¹²⁵ *Cf.* Art. 28 ICCS.

region, it is not satisfied ... that Musema did, in fact, exercise *de jure* and *de facto* control over these individuals”.¹²⁶

Whenever, therefore, a commander, superior or any person assumes command, this should be considered a voluntary assumption of duty and of responsibility attached to such a position of command or leadership.¹²⁷ Consequently, such an individual should be held responsible for crimes committed by subordinates under his presumed command as a result of his *failure to act*. This is in line with the *Bagilishema* AC finding that “[i]t is sufficient that, for one reason or another, the accused exercises the required “degree” of control over his subordinates, namely, that of effective control”.¹²⁸

In *Nahimana*, the AC did not endorse the *Musema* findings. The *Nahimana* AC emphasised that effective control means “material capacity” to prevent or punish: it “does not have to be established that the civilian superior was vested with “excessive power” similar to that of a public authority”.¹²⁹ Therefore, it concluded that “the authority vested in” the accused is the criterion by which to assess the capacity to exercise effective control.¹³⁰

i) Restricting the necessary measures:-

The *Čelebići* Judgment stated that “[w]here a superior has knowledge of violations of the laws of war by his subordinates, he is under a duty to take necessary and reasonable measures to prevent such acts”.¹³¹ Note that these requirements of CR should not be confused with the requirements of the principal perpetrator of the crime. In this, “it is not necessary to establish that a superior knew of the specific intent of his subordinates”,¹³² as what rendered him causally linked to the crime is his omission (failure to act) and not any form of direct participation.

¹²⁶ *Musema* TC, para 881.

¹²⁷ *Cf. Pohl and Mumenthey*: (Chapter 2 n 187) *et seq.*

¹²⁸ *Prosecutor v. Bagilishema*, AC Judgment, ICTR-95-1 A-A, 3 July 2002, para 55.

¹²⁹ *Prosecutor v. Nahimana et al.*, AC Judgment, ICTR-99-52-A, 28 November 2007, para 785.

¹³⁰ *Nahimana* AC, para 795; see also *Prosecutor v. Nahimana et al.*, TC Judgment, ICTR-99-52-T, 03 December 2003, para 972.

¹³¹ See also *Čelebići*, para 771.

¹³² *Prosecutor v. Ntabakuze*, AC Judgment, ICTR-98-41 A-A, 8 May 2012, Joint Declaration of Judges Pocar and Liu, para 1.

The Tribunal stated that these measures will be specified on a case-by-case basis, as the implementation of the duty generally depends on the circumstances of each case.¹³³ Thus, the *Blaškić* AC stated that “what constitutes such measures is not a matter of substantive law but of evidence”.¹³⁴ Nevertheless, the ICC provided a number of general steps as indicia of what is expected from commanders if they are to fulfil this duty, such as to secure a reporting system.¹³⁵ Hence, the ICC recognised the duty to acquire information as part of the duty to take measures necessary for exercising effective command. The knowledge of the commander therefore differs from the intent of the perpetrator.¹³⁶

The ICTR in *Akayesu*, initially by resorting to the API Commentary, required that the knowledge element amount to a level to “ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence”.¹³⁷ This is inconsistent with the knowledge standard under CR as a customary norm, as the knowledge requirement is derived from the sub-duty to know. This was, however, resolved as the ICTR endorsed the *Čelebići* finding of the information,¹³⁸ which required that:-

“a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he “had reason to know”... This information does not need to provide specific information about unlawful acts committed or about to be committed. 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”.¹³⁹

In other words, if general information were open to the commander, he would be presumed to have the knowledge of the crime.¹⁴⁰ Nevertheless, this was

¹³³ These measures will ultimately depend on “the degree of effective control he wielded over his subordinates”. *Blaškić* AC, para 72.

¹³⁴ See *Blaškić* AC, para. 72; see also *Čelebići* AC, para 198.

¹³⁵ *Bemba*, para 438.

¹³⁶ *Ibid.*

¹³⁷ *Akayesu* TC, para. 489; also *Bagilishema* TC, para 1007; see also the API Commentary, para 3541.

¹³⁸ *Bagilishema* AC, para 42.

¹³⁹ *Čelebići* AC, para 238.

¹⁴⁰ Cf. James Levine II, “The doctrine of Command Responsibility and its Application to Superior Civilian Leadership: Does the International Criminal Court Have the Correct Standard?” (2007) 193 *Mil. L. Rev.* 52, 74.

not always consistent as the focus gradually shifted away from the *duty* to know. The *Krnjelac* AC for example, ruled that “the court must ascertain whether [the accused] had sufficiently alarming information to alert him to the risk of acts”.¹⁴¹ This is contrary to the standard of knowledge as interpreted by *Čelebići*. It is as a result of disregarding the duty to know that the Tribunal focused only on the type of information (from general to alarming) rather than on the obligation to know or to establish a reporting system. The *Krnjelac* AC, accordingly, overlooked the fact that general information was available to the commander, which is the actual requirement.

B) Deflating from essence:-

The essence of these requirements is primarily to assess whether the accused controlled his troops when he was able to exercise control. Naser Orić,¹⁴² for instance, was appointed Commander of the Srebrenica Armed Forces Staff before he became the Commander of the Joint Forces of the Sub-Region for Srebrenica.¹⁴³ The Srebrenica Armed Forces consisted of a number of irregular fighting groups¹⁴⁴ under Orić’s command from which the Srebrenica Military Police was established.¹⁴⁵ The TC found the Srebrenica Military Police detained, at the Srebrenica Police Station and elsewhere,¹⁴⁶ a number of Bosnian Serbs who were subjected to cruel treatment and murder, which was the first ground of charges against Orić under CR.¹⁴⁷

The TC then affirmed that the superior-subordinates relationship existed between Orić and the Military Police.¹⁴⁸ It concluded, accordingly, that Orić was responsible for his failure “to prevent the occurrence” of the crimes but that he “cannot be held criminally responsible for having failed ... to punish”.¹⁴⁹ Note that the ICTY changed the responsibility from “responsible for crimes” to a dereliction

¹⁴¹ *Krnjelac* AC, para 155.

¹⁴² He was a police officer who served mostly in Srebrenica. *Orić* TC, para 1.

¹⁴³ *Ibid* para 2.

¹⁴⁴ *Ibid* para 140-1.

¹⁴⁵ *Ibid* para 181.

¹⁴⁶ *Ibid* para 355. The Tribunal noted that the Military Police were commanded by Mirzet Halilović and Atif Krdzić, who were responsible for the omissions and acts committed against the detainees. *Orić* TC, paras 490-6.

¹⁴⁷ *Ibid* para 289.

¹⁴⁸ *Orić* TC, para 532.

¹⁴⁹ *Ibid* para 578.

of duty that impacted subsequently on the requirement.¹⁵⁰ The focus was thus on which duty the commanders had failed to fulfil rather than on the resultant international crime.

The prosecution argued that Orić, as a *de jure* commander, possessed the effective control and had thus failed in this duty.¹⁵¹ The AC, however, suggested that, due to the chaotic conditions and loose chain of command, he was unable to exercise control.¹⁵² Note that particularly the *de jure* commander is obliged to command: that means that his duty is to resolve the chaotic situation or - at least - initiate the necessary measures to do so. But, due to this re-characterised requirement, the Tribunal could not recognise the essence of the prosecution's arguments about the role of duty, when it was examining the requirement.

This finding is also contrary to *Čelebići*, which affirmed that, in such chaotic circumstances, the hierarchical structure is tested differently.¹⁵³ *Čelebići* stated, accordingly, that the nature of any such chain of command will be loose;¹⁵⁴ nevertheless, commanders remain obliged to know their rights and duties.¹⁵⁵ Thus, the *Orić* TC should have considered: (a) his background and role in creating the Military Police unit;¹⁵⁶ and (b) his duty to exercise effective control over the Military Police as an operational - if not an executive - command.¹⁵⁷

i) The impact on the duty to take necessary measures:-

In *Hadžihasanović*, the TC considered the use of disciplinary action sufficient to fulfil the duty to punish under Art. 7 (3) of the ICTYS.¹⁵⁸ In his Appeal, the Prosecutor argued that this was an error, as disciplinary action is an insufficient punishment for international crimes.¹⁵⁹ The AC, however, confirmed

¹⁵⁰ *Cf.* (Chapter 3 n 187).

¹⁵¹ The Prosecutor indicated that it was Orić's duty to exercise effective control. *Orić* AC, para 145.

¹⁵² *Orić* AC, para 149.

¹⁵³ *Supra* (nn 30-31).

¹⁵⁴ *Orić* TC, para 142.

¹⁵⁵ The Prosecutor's argument was that a "*de jure* power always results in a presumption of effective control." *Orić* AC, para 91. It would have been more accurate had he argued that a commander, whether *de jure* or *de facto*, is under an affirmative duty to exercise control that would have been consistent with the API. *Cf. supra* (nn 110 and 127).

¹⁵⁶ The Tribunal, in its judgment, stated that Orić was the "overall commander" of the Srebrenica Forces, including his establishing of the military police. See *Orić* TC, paras 143 and 174. In addition, Orić's high profile was significant, especially in terms of prisoner exchanges. *Orić* AC, para 139.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Hadžihasanović* TC, paras 2056-58.

¹⁵⁹ *Prosecutor v. Hadžihasanović and Kubura*, AC Judgement, IT-01-47-A, 22 April 2008, para 32.

the TC conclusion, asserting that these measures are “not a matter of substantive law but of evidence”.¹⁶⁰ It then ruled that these measures might be “disciplinary or penal”, depending on the circumstances of each case, as “the use of disciplinary measures will be sufficient to discharge a superior of his duty to punish crimes under Article 7 (3)”.¹⁶¹ It should be noted that the AC, in reaching this conclusion, referred to the API Art. 87, which, as discussed above, was misleading.¹⁶²

Accordingly, the AC’s finding shows that, when troops commit acts recognised as crimes under international law, some disciplinary actions are sufficient to provide justice.¹⁶³ This problem can be attributed to two causes: first, the misleading clause: (“and, where appropriate, to initiate disciplinary or penal action against violators thereof”).¹⁶⁴ Note that it is contrary to the ICL purpose: in *Alic Sefik* case, for example, the Trial ruled that the violation of a disciplinary duty – which requires disciplinary action – “is not the subject of criminal proceedings”.¹⁶⁵

The second cause is the undermining of the role of duty: there is no examination of the existence of this duty anywhere in the judgments of the *ad hoc* tribunals.¹⁶⁶ Had there been an examination of the customary law by these tribunals, they would have found that this “requirement to punish” appeared only once; nevertheless, it did not suggest a duty.¹⁶⁷ The *Nahimana* AC stated, however, that the Tribunal needed to find that the accused had had the power to prevent; thus, it “did not need to specify the necessary and reasonable measures that he could have taken. It needed only to find that the [accused] had taken none” of those reasonable measures.¹⁶⁸

The ICC drafters were notably more cautious and aware of the inevitability of such a problem, as punishing perpetrators of crimes under international law is a

¹⁶⁰ *Ibid* para 33.

¹⁶¹ *Ibid*. The *ad hoc* tribunals tried to resolve such a difficult problem but, again, it was not sufficient to justify this duty because it is judicial by nature. *Cf. Orić* TC, para 336; also *Prosecutor v. Strugar* TC II Judgement, IT-01-42-T, 31 January 2005, para 376. See also *Brima* TC, para 799.

¹⁶² *Supra* (n 97) *et seq.*

¹⁶³ This is against the purpose of creating the *ad hoc* tribunals. *Cf.* (Chapter 3 n 38).

¹⁶⁴ *Supra* (n 103).

¹⁶⁵ *Prosecutor v. Alic Sefik*, Verdict, X-KR-06/294, 11 April 2008, 51.

¹⁶⁶ *Cf. supra* (n 107). Note that duty as part of CR was considered in few judgments but this was not consistently implemented. See *supra* (n 1); see also *Blaškić* TC, (chapter 3 n 163).

¹⁶⁷ *Toyoda*, *Cf.* (Chapter 2 nn 228 and 321).

¹⁶⁸ *Nahimana* AC, para 792.

judicial duty. It therefore adopted different duties that truly did already exist “in the military codes of all countries”.¹⁶⁹

C) Replacing the requirement by forming a separate requirement:-

The rationale of taking measures is to enable the commander to control subordinates and subsequently prevent crimes. Therefore, the *Kayishema* TC emphasised that CR “cannot demand the impossible. Thus, any imposition of responsibility must be based upon a material ability of the accused to prevent or punish the crimes in question”.¹⁷⁰ The AC endorsed this finding and asserted that “it is the effective capacity of the Accused to take measures which is relevant”.¹⁷¹ The ICTY and ICTR interpretations were inconsistent regarding the meaning and implementation of material ability as a standard.

Enver Hadžihasanović¹⁷², for instance, was the commander of the 3rd. Corps, and later Chief of Staff, of the Army of the Republic of Bosnia and Herzegovina (the ABiH).¹⁷³ He was held responsible for crimes committed, *inter alia*, by El Mujahedin¹⁷⁴ for failure to prevent crimes, before his acquittal on this count.¹⁷⁵ Initially, Hadžihasanović reported to the authority his concern about the activities of the El Mujahedin who fought side-by-side with his troops: the prosecution considered this as evidence for *de facto* command.¹⁷⁶ More precisely, Hadžihasanović, in his report, requested the creation of an El Mujahedin detachment (EMD),¹⁷⁷ to be an organised unit under his control and command.¹⁷⁸ Despite the evidence, the Tribunal rejected the prosecution’s argument regarding the accused’s *de jure* or *de facto* command over El Mujahedin before the creation of EMD.¹⁷⁹

¹⁶⁹ *Cf. supra* (nn 90-91).

¹⁷⁰ *Prosecutor v. Kayishema and Ruzindana*, TC Judgment, ICTR-95-1 T, 21 May 1999, para 511.

¹⁷¹ *Prosecutor v. Kayishema and Ruzindana*, AC Judgment, ICTR-95-1-A, 1 June 2001, para 302; see also *Prosecutor v. Mpambara*, TC Judgment, ICTR-01-65-T, 11 September 2006, para 32.

¹⁷² *Hadžihasanović* TC, para 403.

¹⁷³ *Ibid* para 330.

¹⁷⁴ *Ibid* para 407 & 413. El Mujahedin eventually became a force unit that consisted of (a) foreign fighters (b) local forces (c) regular units of the ABiH and (d) Bosnian volunteers. *Hadžihasanović* TC, para 463.

¹⁷⁵ He was sentenced to three years and six months, but on other counts. *Hadžihasanović* AC, para 357.

¹⁷⁶ *Hadžihasanović* TC, para 464.

¹⁷⁷ *Ibid* paras 809, 812 & 843.

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid* para 479 & 580.

Nevertheless, the Tribunal concluded that the accused exercised effective control over the EMD only, its reasons being: “the power to give orders and have them executed; the conduct of combat operations involving the forces in question; the absence of any other authority over the forces in question”.¹⁸⁰ In this, the court recognised only the duty for *de jure* command, being the source of the test of effective control. The TC, therefore, found Hadžihasanović responsible, *inter alia*, for the failure to prevent crimes committed by the EMD and sentenced him to 5 years’ imprisonment.¹⁸¹

The Appeal Chamber, however, rejected the TC finding and concluded that Hadžihasanović lacked the *material ability* to exercise effective control over the EMD.¹⁸² In so doing, the Appeal Chamber overlooked the fact that the EMD was created, controlled and commanded by the accused; whence he became obliged to fulfil his *duty to exercise command and control* over such a unit. Although the AC stated that: “[s]uch material ability is a minimum requirement for the recognition of a superior-subordinate relationship”,¹⁸³ the so-called “minimum” requirement (a test), practically, replaced the “subordination” requirement.

The AC here stated that, according to the *Čelebići* AC, “the possession of *de jure* authority constitutes *prima facie* a reasonable basis for assuming that an accused has effective control”.¹⁸⁴ It suggested, however, that the prosecution has to prove that the commander – regardless of his/her *de jure* authority and duty - did actually exercise effective control.¹⁸⁵ This is contrary to the purpose of the test of effective control, as the rationale of this test is to assess whether, at the time of the crime’s being committed, the commander was able to act, regardless of whether he/she did.

The undermining of the role of duty affected the interpretation and implementation of these requirements of CR. The *Halilović* AC, therefore, to establish the effective control, stated that the “material ability to prevent and punish crimes” needs to be evidentially demonstrated.¹⁸⁶ Nevertheless, it rejected the evidence by the Prosecutor that, *inter alia*, the accused issued orders.¹⁸⁷ It

¹⁸⁰ *Ibid* para 851 & 853.

¹⁸¹ *Ibid* para 2085.

¹⁸² *Hadžihasanović* AC, para 231-2.

¹⁸³ *Ibid* para 321.

¹⁸⁴ *Ibid* para 21.

¹⁸⁵ *Cf. supra* (n 1).

¹⁸⁶ *Halilović* AC, para 208.

¹⁸⁷ *Ibid* para 205.

ruled that it is more important that the accused's "orders are actually followed".¹⁸⁸ Although this is partly correct to assess the extent of authority, the AC overlooked the role of duties vested in the position of command.

i) Replacing the requirement of knowledge:-

The ICC – in *Bemba* – mentioned a number of those factors relevant when determining knowledge, including, *inter alia*, "the number of illegal acts, their scope, whether their occurrence is widespread, the time..." also the commander's position *etc.*¹⁸⁹ These factors can be considered when determining the "should have known" standard,¹⁹⁰ as well as other factors, such as the existence of general information about crimes.¹⁹¹ The Chamber stated that "had reasons to know" by the *ad hoc* Tribunal "sets a standard different from the "should have known" standard ... "However...the criteria or *indicia* developed by the *ad hoc* tribunals...may be useful when applying the "should have known" requirement".¹⁹²

The *ad hoc* tribunals' - following *Čelebići* - considered the UN Commission of Experts' report of *indicia* such as "the time during which the illegal acts occurred... the widespread occurrence of the acts...".¹⁹³ The ICTY, however, after presenting and supporting the customary practice regarding the "existence of a duty of commanders to remain informed"¹⁹⁴ and that "command responsibility applies to the commander who "*knew, or should have known, by use of reasonable diligence*" of the commission of atrocities"¹⁹⁵, mistakenly interpreted Art. 86 of the API of 1977.

In doing so, it referred to the debate during the drafting of this Article, where it – incorrectly - considered some discussions to have been a rejection of the "should have known" standard.¹⁹⁶ It then, erroneously, concluded that the Customary Law regarding the "should have known" requirement was changed

¹⁸⁸ *Halilović* AC, para 207.

¹⁸⁹ *Bemba*, para 431.

¹⁹⁰ *Ibid* para 434.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ UN Doc. S/1994/674, para. 58. See also *Čelebići*, para 386.

¹⁹⁴ *Čelebići*, para 388.

¹⁹⁵ *Ibid* para 389.

¹⁹⁶ *Čelebići*, para 391. See Ilias Bantekas, *Principles of direct and superior responsibility in international humanitarian law* (MUP 2002) 112; see also Monica Fera Tinta, 'Commanders on Trial: The Blaškić. Case and the Doctrine of Command Responsibility under International Law' (2000) NILR 293, 319.

accordingly.¹⁹⁷ Reviewing these debates, however, it is clear that the parties' actual concern was the clarity of the formulation, rather than the substance, of this provision. For example, the Swedish representative supported the "should have known" requirement, as it is:-

"[o]ften ... extremely difficult ... to prove that a commander actually knew what was going on, which would deprive the provision of some of its deterrent effects. It would have been desirable that a commander should be held responsible for acts which he, as a commander, should know were taking place".¹⁹⁸

The Swedish representative thus was in favour of "a wording more in line with the original United States amendments".¹⁹⁹ He also considered that "there would be an inducement for the commander to ensure that he was at all times kept fully informed and thereby enabled to prevent breaches".²⁰⁰ This corresponds to this study's argument, about the relevance of the values element and that knowledge is a sub-duty under the necessary measures.

The Netherlands' representative stated that "[h]is delegation supported the United States' amendment" and "was willing to assist, if necessary, in the improvement of the text".²⁰¹ The Syrian delegation also commented that the 'words "or should have known"... seemed unclear'.²⁰² Similarly, the Argentinian representative stated that 'the words "or should have known" introduced a lack of clarity'.²⁰³ He also expressed his support for this standard and asserted that a "superior, indeed, should always have knowledge of any breach committed by his subordinates".²⁰⁴

It is, therefore, *Čelebići* that erroneously re-characterised the mental standard, and also contradicted the customary law, through its interpretation which violated the legality principle. It accordingly replaced the "should have known" with a now standard form of "had reason to know". This incorrect interpretation by the ICTY affected the other *ad hoc* tribunals, as they followed the

¹⁹⁷ *Čelebići*, para 391.

¹⁹⁸ CDDH/I/SR. 64, para 62.

¹⁹⁹ CDDH/I/SR. 64, para 63. The US amended text was "or should reasonably have known". See also CDDH/I/SR.50, para 30, where the US representative stated that the amendment of wording was "designed to make the article clearer".

²⁰⁰ CDDH/I/SR. 64, para 62.

²⁰¹ CDDH/I/SR.50, para 36.

²⁰² CDDH/I/SR.50, para 51.

²⁰³ CDDH/I/SR.50, para 55.

²⁰⁴ CDDH/I/SR.50, para 56.

“had reason to know” standard as being part of customary law.²⁰⁵ Note that the Commentary on API referred to the draft Article where the standard was of “should have known”.²⁰⁶

However, as a result of the re-characterisation of the duty to know, the “had reason to know” standard became similar to the civilian standard of the knowledge requirement under the ICCS.²⁰⁷ This could be considered a justification of the separation - due to the lack of personal obligations and the different nature of duties - between military and civilians regarding the knowledge requirement at the ICC.²⁰⁸ It serves also to alert the ICC to the need, when referring to the *ad hoc* tribunals’ knowledge standard, to be as limited as possible only to those ICC cases involving civilian superiors.

D) Reconsidering the rationale of the requirements:-

The abovementioned inconsistent interpretations affected the application of CR as a form of responsibility. Nevertheless, a change has recently emerged through the *ad hoc* tribunals’ judgments. Although this, negatively, constitutes another inconsistent re-characterisation, the commander’s duty was re-considered for the true rationale of the requirements of CR.

The SCSL, in *Brima* known also as AFRC, stated that, “[t]he doctrine of effective control was traditionally applied to commanders in regular armies, which tend to be highly structured and disciplined forces. The AFRC was less trained, resourced, organised and staffed than a regular army. However, it mimicked one”.²⁰⁹ It then emphasised the significance of the commander’s role in such a situation, stating that “[r]ules and systems facilitating the exercise of control existed ... [and] were legitimated not by law but by the authority of the individual commanders”.²¹⁰

²⁰⁵ Indeed the *Čelebići* finding was adopted by the ICTR and SCSL. See *Musema*, *supra* (nn 125-6); see also *Brima* TC, para 794.

²⁰⁶ API Commentary, para 3526 footnote 2. But this was overlooked by the judges in the *ad hoc* tribunals.

²⁰⁷ *Cf.* Cassese (2013) 190.

²⁰⁸ *Supra* (nn 78-80).

²⁰⁹ *Brima* TC, para 539.

²¹⁰ *Ibid.*

The SCSL then asserted that the less organised nature of these entities *cannot* be used to exclude liability,²¹¹ as the ability to control subordinates is “derived at least in part by virtue of their positions within this organisation”.²¹² The TC recognised, accordingly, duties vested in the position of command in determining the culpable commander within the chain of command, even when it is loosely structured.²¹³ This is in line – although not explicitly – with the voluntary assumption of command.²¹⁴

The *Kordić* Judgment, for example, failed to establish subordination, because effective control was erroneously considered a separate requirement, even though the Tribunal found that Dario Kordić “wore a military uniform, held the title of ‘Colonel’, issued orders for military equipment and supplies, managed personnel, represented the Croatian forces in UN negotiations, exercised control over roads, roadblocks, and prisoners, participated in planning, was physically present during military operations, and provided “political authorization” for ethnic cleansing campaigns”.²¹⁵ This illustrates the impact of undermining the duty when examining the exercise of effective control as a test.

The SCSL, however, was torn between two views: (a) examining the accused’s ability “to actually exercise effective control”;²¹⁶ and (b) examining whether the accused did in practice exercise effective control. This illustrates the importance of the duty to exercise control in determining the effective control correctly as a *test* and not as a separate requirement.²¹⁷ The SCSL seems, therefore, partly to have departed from the implemented test of effective control as a separate requirement, by not following the above findings of the ICTY/R.

The Knowledge requirement was also reinterpreted recently in reconsidering the role of “duty”. Previously, however, *mens rea* for CR was confused with the *mens rea* of the principal perpetrator, especially in the case of

²¹¹ Cf. the ICTY and ICTR conclusions: *supra* (nn 123-4 and n 182).

²¹² *Brima* TC, para 540.

²¹³ Newton & Kuhlman suggested that the Court seemed to recognise the linkage between the concept of ‘responsible command’ and the doctrine of ‘command responsibility’. See Newton and Kuhlman, *supra* (n 115) 48-51. Cf. also (nn 69-70).

²¹⁴ Cf. *supra* (nn 37, 81 and 127).

²¹⁵ *Prosecutor v. Kordić & Čerkez*, TC, IT-95-14/2-T, 26 February 2001, paras 838-841; see also *Brima* TC, para 1660. Note that this can be ascribed to the reliance on the Commentary on the API rather than the customary precedents. Cf. Maria Nybondas, ‘Civilian Superior Responsibility in the *Kordić*’ (2003) NILR 59, 66.

²¹⁶ *Brima* TC, para 1723.

²¹⁷ *Brima* TC, paras 788-9.

responsibility for genocide, which requires a specific intent.²¹⁸ For example, Judges Pocar and Liu emphasised that, “it is sufficient for a superior to know or have reasons to know that his subordinates are about to commit a crime but it is not necessary that he be aware of their specific *mens rea*”.²¹⁹

The concept of personal obligations required of military commanders was also applied by the *ad hoc* tribunals’ more recent case-law. The ICTR found that commanders’ actual knowledge is evident when crimes are committed by “organised military operations”, because such operations require “authorisation, planning and orders from the highest levels...when the vigilance of military authorities would have been at its height”.²²⁰ This was endorsed also at the AC.²²¹

Nevertheless, this issue was in debate as Judges Meron and Robinson disagreed, arguing that there was no reasonable evidence to show the actual knowledge of the accused.²²² In this, however, the Judges considered neither the values element of the duty nor the personal obligations vested, more explicitly, in the military commander. Although there was no discussion of *personal obligations*, the context of the majority judgments was in line with this interpretation.

i) Reinterpreting the requirements:-

The duty as a concept is important, not only as being the source of these requirements but, more precisely, as being part of the nature of CR. Although this was never explicitly acknowledged by the *ad hoc* tribunals’ case-law, the *Nahimana* AC stated recently that the “superior who enjoyed power of effective control... (he) was under an *obligation* to exercise that power, even if it was shared with others”.²²³ It emphasised that, even when power is shared, such a superior remains under a duty to control, and that informing the authority cannot, alone, be a reasonable measure.²²⁴

²¹⁸ Cf. Alexander Zahar, ‘Command Responsibility of Civilian Superiors for Genocide’ (2001) 14 LJIL 591; see also William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn., CUP 2009) 364.

²¹⁹ *Ntabakuze* AC, Joint Declaration of Judges Pocar and Liu, para. 1, *supra* (n 162).

²²⁰ *Prosecutor v. Bagosora et al.*, TC Judgment, ICTR-98-41-T, 18 December 2008, para 2082.

²²¹ *Prosecutor v. Bagosora et al.*, AC Judgment, ICTR-98-41-A, 14 December 2011, para 298.

²²² *Bagosora* AC, Joint Dissenting Opinion of Judges Meron and Robinson, paras 1 - 7.

²²³ *Nahimana* AC, para 848.

²²⁴ *Ibid* para 854.

The *Brima* TC commented on the applicability of the misinterpreted test of effective control, especially to irregular forces, and stated that:-

“[i]n a conflict characterised by the participation of irregular armies or rebel groups, the traditional *indicia* of effective control provided in the jurisprudence may not be appropriate or useful. As the Trial Chamber has observed, the formality of an organisation’s structure is relevant to, but not determinative of, the question of the effective control of its leaders. The less developed the structure, the more important it becomes to focus on the nature of the superior’s authority rather than on his or her formal designation”.²²⁵

The duty in the informal situation is not, however, as definitive as that of formal forces; this test thus became more important by assessing the extent of authority and exercising duty. The SCSL in *Fofana* asserted that the degree of control might be lower in relation to civilian superiors, but that this should not affect the test of ability to control.²²⁶

The SCSL was, therefore, criticised for departing from the “original concept of superior responsibility”.²²⁷ One can wonder, however, what is the original concept? Is it based on *Čelebići* or *Halilović*, which partly diverged from customary law? Is it based on *Yamashita* and the IMTs, where the nature of CR was considered differently? Or is it based on the ICC view that, although evidence of actual state practice and *opinio juris*, it does not explicitly imply customary law? The core problem is the inconsistent implementation of CR, which resulted from the rationale being overlooked in the inconsistent interpretation of its requirements.

The *ad hoc* tribunals’ judgements confused the test with the actual requirement, as a result of undermining the role of duty; it was thus inconsistently applied. The ICTY recognised this issue recently, however, stating that:-

“[t]he test of effective control relates to the relationship between the individuals and is not limited to a consideration of whether actual control is being exercised at any given moment. Otherwise the responsibility would

²²⁵ *Brima* TC, para 787.

²²⁶ *Prosecutor v. Moinina Fofana et al.*, AC Judgment, SCSL-04-14-A, 28 May 2008, paras 174 & 187. Nevertheless, the AC seems to have confused actual exercise of control and the capacity to exercise control. See also *Fofana* AC, Partially Dissenting Opinion of Honourable Justice George Gelagaking, para 64-5.

²²⁷ See Harmen van der Wilt (chapter 3 n 158) 149.

be significantly narrowed – restricted to those who were in control and not reaching those who could have taken that control to prevent these crimes or punish them. Thus, in assessing effective control for these purposes, the issue is not whether the superior was in command or exercising control at any given moment but rather whether he or she had the material ability to prevent or punish the perpetrators of the crimes. It is this ability that evidences a superior-subordinate relationship”.²²⁸

In this, it implicitly recognised the rationale of the requirement, in conjunction with the role of the duty as the source of these requirements.

More precisely, the duty was implicitly recognised as part of the “values element”. The *Popović* AC resorted to military practice –rather than the controversial Commentary on API- to assess the function and process of reporting, and concluded that “in military practice such reports may sometimes be made either directly to the competent authority or through a superior officer”.²²⁹ However, “in order to constitute a necessary and reasonable measure to punish, the commander’s report must be sufficient to trigger the action of the competent authority”.²³⁰ The Tribunal also rejected *Hadžihasanović*,²³¹ and concluded that if “initiating the disciplinary offence procedure was an option [the accused] could have taken, such action on its own would not have satisfied the obligation to take necessary and reasonable measures to punish his subordinates”.²³²

This, on the one hand, illustrates that the prior re-characterisation or inconsistent interpretation of the requirement was an error of law.²³³ On the other, this jeopardised the legality principles and the accused person’s rights because the substance of these requirements was, and is still, inconsistently interpreted and then inaccurately implemented.

²²⁸ *Prosecutor v. Popović et al.*, AC Judgment, IT-05-88-A, 30 January 2015, para 1858; see also *Popović* TC, para 2023.

²²⁹ *Popović* AC, para 1932.

²³⁰ *Ibid.*

²³¹ *Cf. supra* (nn 158-169).

²³² *Popović* AC, para 1942.

²³³ *Cf.* Judge Niang, who disagreed with the majority opinion because he supported the effective control test being actually exercised. *Popović* AC, Separate and Dissenting Opinions of Judge Mandiaye Niang, para 61.

3. The role of duty and the boundaries of CR:-

The duty – as part of the values element – is important in defining the boundaries of the nature of CR. The Tribunal - in *Popović* - asserted “the importance of a superior’s duty to enforce the rule of international humanitarian law”; therefore, “a failure to fulfil a legal duty is a serious form of responsibility, particularly when it contributes” to international crimes, as the commander’s “omission thus cannot be trivialized”.²³⁴ Accordingly, the ICTR recently reiterated that the “superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes”.²³⁵ The issue of concern is whether duties were effectively fulfilled at the time of armed conflict.

The duty is an important factor in justifying the extent of applying CR as a component of its nature, rather than as a source of requirements only. In this, the concept of successor command was denied recognition as part of the nature of CR. It was rejected during the early decisions of the ICTY, but Judge Liu recently argued that it should be recognised as part of CR, claiming that “the *Hadžihasanović et al.* Appeal Decision erred in finding that customary international law excludes such a mode of successor command”.²³⁶ He emphasised that “superior responsibility is meant to ensure that commanders comply with the laws and customs of war and international humanitarian law generally”.²³⁷

Judge Liu argued, also, that this successor command is within the meaning of the duty to punish and should thus be recognised as part of CR; but Judge Liu’s suggestion contradicts the rationale of CR. Note that the duty to punish is *per se* problematic; nevertheless, even under the duty to investigate crimes, the commander prior to his assumption of command is obliged only to report these crimes.²³⁸ The failure to investigate or report is not, alone, sufficient to raise CR, because causation is required, among others (whether explicitly or implicitly) for CR, between the omission and the crime.²³⁹ This omission is recognised only if the commander was able to control subordinates at the time of commission. Successor

²³⁴ *Popović* AC, para 1997.

²³⁵ *Prosecutor v. Ndindilyimana et al.*, AC Judgement, ICTR-00-56-A, 11 February 2014, para 251.

²³⁶ *Prosecutor v. Bizimungu*, AC Judgment, ICTR-00-56B-A, 30 June 2014, Separate Declaration of Judge Liu, para. 4; *Cf. Hadžihasanović* Appeal Decision, *supra* (n 1).

²³⁷ *Ibid.*

²³⁸ *Supra* (n 97) *et seq.*

²³⁹ Explicitly in the ICC’s Art. 28; and implicitly in *Čelebići* TC, para 399; see also *infra* (n 254).

command cannot, accordingly, be recognised as part of CR.²⁴⁰ This suggestion resulted from overlooking the criminality requirement of CR.

4. Re-characterising the criminality requirements:-

A) The underlying crime:-

The *ad hoc* tribunals do not recognise the underlying crimes as a requirement for CR. This finding, however, impacted on the sentence, as the focus was on the accused's failure to prevent and not on the connection between his omission and such crime. Initially, it was argued that the gravity of the offences should have been considered in the sentence,²⁴¹ as a result of the too lenient sentence for CR. The *Čelebići* AC therefore ruled that there were two implicit elements under Art. 7 (3) relating to the underlying crime:-

“(1) the gravity of the underlying crime committed by the convicted person's subordinate; and

(2) the gravity of the convicted person's own conduct in failing to prevent or punish the underlying crimes”.²⁴²

This was the settled practice of the ICTY until *Orić* found that the underlying crime is a fourth requirement to be proven for CR.²⁴³ Although this was used only to clarify that the commission of crime is an obvious condition for the court's jurisdiction, it was, however, introduced as a fourth requirement inconsistent with the ICTY case-law.²⁴⁴ But the abovementioned two elements of gravity did not resolved the lenient verdicts of CR.²⁴⁵

²⁴⁰ Cf. Barrie Sander, 'Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence' (2010) LJIL 105, 134-135. Cf. Carol Fox, 'Closing A loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Knowing Past Offenses' (2005) 55 Cases W. Res. L. Rev. 443, 458.

²⁴¹ *Čelebići* AC, p. 258.

²⁴² *Ibid* para 732.

²⁴³ *Orić* TC, para 295.

²⁴⁴ *Ibid*; see also *Prosecutor v. Sylvestre Gacumbitsi*, AC Judgment, ICTR-2001-64-A, 7 July 2006, para 143; also *Prosecutor v. Ntagerura et al.*, AC Judgment, ICTR-99-46-A, 7 July 2006, para 152.

²⁴⁵ Chapter 3 (n 199).

B) Causation:-

Čelebići stated that “a necessary causal nexus may be considered to be inherent in the requirements of crimes committed by subordinates and the superior’s failure to take measures within his powers to prevent them”.²⁴⁶ This was contradicted, however, by its conclusion that “causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates”.²⁴⁷

The ICTY, by assuming that customary law does not indispensably require proof of a causal link, has clearly undermined first the requirements of CR post-WWII, but more precisely has overlooked some of the explicit findings of the customary cases of causation.²⁴⁸ It could be argued, therefore, that it partially departed from the already existing customary law, as if a principle not precisely examined does not mean it was not important. In its justification in *Čelebići*, it argued however, that “no such causal link can possibly exist between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence”.²⁴⁹ Causation was, therefore, a problem, as the trigger of culpability – at the *ad hoc* Tribunal - was the failure to prevent and punish.²⁵⁰

Hadžihasanović – although not explicitly – provided, however, an example of the extent of, and potential to resolve, this issue when it slightly shifted the culpability based on the duty to act. The *Hadžihasanović* TC stated that “[s]uch a nexus is implicitly part of the usual conditions which must be met to establish command responsibility”.²⁵¹ It then declared that “the Chamber considers that the existence of a link between *the failure to act* to prevent a crime and the commission of the crime is implicit and therefore presumed”.²⁵²

²⁴⁶ *Čelebići*, para 399.

²⁴⁷ *Čelebići*, para.398.

²⁴⁸ *Supra* (nn 17-20). It seems that the tribunal here overlooked the fact that the prosecutors’ task was easier in proving the linkage because of the evidence types. See Chapter 2 (nn 145-147 and 182).

²⁴⁹ *Čelebići*, para 400.

²⁵⁰ It is not only important, therefore, to find a link but also that this should be linked with culpability, attributed to the failure to control. See Mettraux (2009) 82.

²⁵¹ *Hadžihasanović* TC, para 192.

²⁵² *Ibid* para 1465.

Hadžihasanović corresponded to the finding in *Bemba* that for causation “it is only necessary to prove that the commander’s omission *increased the risk* of the commission of the crimes”.²⁵³ The *Hadžihasanović* TC explained accordingly that:-

“Firstly, a superior who exercises effective control over his subordinates and has reason to know that they are about to commit crimes, but fails to take the necessary and reasonable measures to prevent those crimes, incurs responsibility, both because *his omission created or heightened a real and reasonably foreseeable risk* that those crimes would be committed, a risk he accepted willingly, and because that risk materialised in the commission of those crimes. In that sense, the superior had substantially played a part in the commission of those crimes. Secondly, it is presumed that there is such a nexus between the superior’s omission and those crimes. The Prosecution therefore has no duty to establish evidence of that nexus. Instead, the Accused must disprove it”.²⁵⁴

Hadžihasanović AC rejected, however, this finding and concluded that the TC had erred in law; subsequently, the AC supported *Blaškić*²⁵⁵ and *Halilović*,²⁵⁶ which were based on *Čelebići*’s findings.²⁵⁷ In sum, the inconsistent interpretation of the nature impacted on the rationale of implementing the requirements of CR. Zahar and Sluiter articulated that the *ad hoc* Tribunals’ “have lived the life of hunter-gatherers in a legal wilderness. They have had to track down and synthesise for themselves the law to apply to the facts”.²⁵⁸

These controversial uses of inconsistent interpretation have impacted on the implementation of CR as a form of responsibility. Consequently, the accused’s right “to be informed promptly...of the nature and cause of the charges against him”, was affected.²⁵⁹ In fact, *Čelebići* stated that the defence had “misunderstood” and “misconceived” the purport of some of the arguments about CR.²⁶⁰ It did,

²⁵³ *Bemba* TC, para 425.

²⁵⁴ *Hadžihasanović* TC, para 193. It is, therefore, Bassiouni, for example, argued that the “essential element in the cases of command responsibility, particularly with regard to those in the higher echelons in the chain of command, is causation”. M Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (CUP 2011) 529.

²⁵⁵ *Blaškić* AC, para 77.

²⁵⁶ *Halilović* TC, para 78.

²⁵⁷ *Hadžihasanović* AC, para 40.

²⁵⁸ Alexander Zahar & Goran Sluiter, *International Criminal Law* (OUP 2008) 80.

²⁵⁹ ICTY Statute, Article (21) (4) (a).

²⁶⁰ *Čelebići* TC, para 742.

however, disregard its own role in creating and exacerbating such confusion, through problematic interpretation and inconsistent implementation.

5. Conclusion:-

This chapter has examined the impact of the inconsistent process of interpreting the nature of CR on the doctrine's requirements, in the *ad hoc* tribunals. It has observed, first, the rationale of creating these requirements, as acknowledged by the tribunals' early decisions that these requirements were deduced from commanders' essential duties. The responsibility under CR flows, therefore, from *breach of these duties*.

The requirements of CR were, however, inconsistently interpreted, without considering the role of duty. This primarily resulted from overlooking the true meaning of the threefold nature of CR. The values element was disregarded as part of CR, although, when judges were confronted with difficulties concerning CR's nature or the requirements application, they predominantly by implication resorted to commanders' duties. The extent of implementing some requirements was highly controversial, such as the requirement to punish and the constructive knowledge of crimes. This chapter has found that these controversies resulted from overlooking the rationale of commanders' duties.

These inconsistent interpretations have resulted in inadequate implementation of these essential requirements of CR. This was found through examining the re-characterisation of requirements in four phases that corresponded to the four generations found (in Chapter 3) of the nature of CR. It also found that overlooking the role of duty with regard to these requirements rendered them contradictory within the *ad hoc* tribunals' case-law and also inharmonious with those in the ICC and the customary precedents.

These findings reinforce the argument of previous chapters that the process of interpretation was the reason for the inconsistent implementation of the nature and requirements of CR. Such inconsistency has, it is argued, had an impact on the accused's rights: it (a) jeopardised the legality principle; and (b) violated his right to be informed. If this argument were proven, the right to a fair trial would have been affected. The following chapter, accordingly, examines these two potentially violated principles of the rights of the accused.

VI. Chapter Six

The impact of re-characterising Command Responsibility on the Rights of the Accused

As discussed above, inadequate interpretation of the rules for Command Responsibility (CR) was the reason for the inconsistent implementation (re-characterisation) of its nature and requirements. The extent of such re-characterisations affected the essence of the information provided to an accused charged under CR. This chapter argues that these re-characterisations resulted in the jeopardising of the accused's rights and aims to evaluate the impact of these re-characterisations on those rights. It is therefore divided into two parts.

The first part discusses the violation of the requirement of specificity as an essential element of the principles of legality. The second examines the violation, as a result of these re-characterisations and the inconsistent interpretation of CR, of the right of the accused to be fully informed about the nature of the accusation.

1. The principle of legality and the requirement of specificity:-

The principle of legality is recognised worldwide in national law and part of customary international law accordingly;¹ but, most precisely, it was codified internationally in the Universal Declaration of Human Rights (UDHR)², the European Convention on Human Rights (ECHR)³ and the International Covenant on Civil and Political Rights (ICCPR).⁴ This principle generally comprises *nullum crimen, nulla poena sine lege*.⁵ The *ad hoc* tribunals' Statutes were deficient with

¹ Susan Lamb, 'Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law', in Antonio Cassese and others (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (OUP 2002) 734.

² The UDHR, Art. 11 (2).

³ The ECHR, Art. 7.

⁴ The ICCPR, Article 15.

⁵ See Cryer *et al.* (2010) 17. In fact, the *nullum crimen* consists of a number of elements required for a fair trial, as follows: (a) *nullum crimen sine lege scripta*, which prevents the creation of new rules, by judges, retrospectively applicable before the commission of the criminal act; (b) *nullum crimen sine lege certa* (the requirement of specificity and the prohibition of ambiguity), which precludes the use of analogy by judges; and (c) *nullum crimen sine lege previa*, which prevents the use of retrospective rules unless they are in favour of the defendant. These are in conjunction with *nulla poena sine lege*, with regard to providing for the rules of penalties specifically. Accordingly, the

regard to the principle of legality. Nonetheless, it was applied, through their judgments, as a result of its worldwide recognition; therefore the ICTY stated that:-

“The principles *nullum crimen sine lege* and *nulla poena sine lege* are well recognised in the world’s major criminal justice systems as being fundamental principles of criminality. Another such fundamental principle is the prohibition against *ex post facto* criminal laws with its derivative rule of non-retroactive application of criminal laws and criminal sanctions.”⁶

Most importantly, regarding the requirement of specificity, the Tribunal asserted that:-

“Associated with these principles are the requirement of specificity and the prohibition of ambiguity in criminal legislation. These considerations are the solid pillars on which the principle of legality stands. Without the satisfaction of these principles no criminalisation process can be accomplished and recognised.”⁷

Accordingly, one can assume that *ad hoc* tribunals would apply the principle of legality without any limitation or reservation. However, the *Čelebići* Judgment stated that, regarding the implementation of these principles:-

“It is not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems. This is essentially because of the different methods of criminalisation of conduct in national and international criminal justice systems.”⁸

In applying the principles of legality to national systems, there are two different approaches. First, the strict approach, which means that, in accordance with the principle of legality, no person shall be punished for crimes without there being a relevant law.⁹ This approach is concerned primarily with the status of the act being a defined crime under the law at the time when the act was committed. Second, the

principle of legality is generally called *nullum crimen nulla poena sine lege*. See Vladimir-Djuro Degan (chapter 4 n 86) 51; also Cassese (2013) 22.

⁶ *Čelebići*, para 402.

⁷ *Ibid.*

⁸ *Čelebići*, para 403.

⁹ Cassese (2013) 22.

substantive approach, which aims to prevent any criminal conduct, regardless of its status under the law.¹⁰ This approach is concerned primarily with the nature of the act being a crime, even if it is not yet criminalised by the law at the time of commission.

Most importantly, the nature of ICL in general, and the *ad hoc* tribunals' Statutes specifically, being rudimentary and the latter poorly drafted, might be a justification for avoiding the strict application of the principle of legality by the *ad hoc* tribunals' judges.¹¹ In contrast, Art. 21 of the ICC stated that "interpretation of law pursuant to this article must be consistent with internationally recognized human rights";¹² it therefore provided for the principle of legality extensively in the Rome Statute under Articles 22, 23 & 24.¹³ This might indicate that the ICC will not follow the *ad hoc* tribunals' interpretation process regarding the implementation of the legality principle, as it is obliged to apply, above all, its Statute.¹⁴

As a result of the difference between the *ad hoc* tribunals and the ICC with regard to the applicable law as well as to the inclusion of the principle of legality, it could be argued that the ICC should adopt a cautious approach – amongst the strict and the substantive approach(es) - more appropriate to its treaty nature, applicable law, interpretation, and to its high standard regarding implementing human rights' principles.

¹⁰ *Ibid* 22-3. Cassese provided for an example of the substantive approach against the Nazi criminals, but it should be noted that there were extraordinary temporary circumstances for such application.

¹¹ For instance, Degan argued that this principle obliged the judges to limit the use of what is known as 'judge-made law'. But, as a result of the poor drafting of the *ad hoc* tribunals' Statutes, the judges seemed to compromise extensively on the application of this principle. Vladimir-Djuro Degan, *Op. cit.*, 51-2.

¹² Rome Statute, Art. 21.

¹³ Rome Statute, Articles 22, 23 and 24 laid down that: "Article 22 *Nullum crimen sine lege*
1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23 *Nulla poena sine lege*

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24 Non-retroactivity *ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute. 2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply."

¹⁴ According to Art. 21(1) (a) of the Rome Statute, the ICC is required to apply "[i]n the first place, this Statute".

A) Significance in practice:-

As illustrated above, customary international law (CIL) is the most important source of ICL for the interpretation of CR.¹⁵ The legality principle is equally important for both CR and the international criminal courts' proceedings. While the importance of the principle of legality regarding the ICC is clear throughout its Statutes' provisions, the reason for the reliance of both the ICTY/R on the rules of CIL was to avoid any potential accusation of violating the principle of legality. This is consistent with the Tribunal's decision in *Tadić* that:-

“It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege*”.¹⁶

With regard to the application of the principle of legality for the purpose of CR, the Appeal Chamber in *Hadžihasanović* stated that:-

“The Appeals Chamber holds the view that this Tribunal can impose criminal responsibility only if the crime charged was clearly established under customary law at the time the events in issue occurred. In case of doubt, criminal responsibility cannot be found to exist, thereby preserving full respect for the principle of legality.”¹⁷

Although the principle of legality was not included under the *ad hoc* tribunals' Statutes, it was recognised and implemented as a norm of customary law.¹⁸ Most importantly, the *ad hoc* tribunals – especially the ICTY – were required to apply only customary norms, to avoid violating that principle. Among its components, there is one standard of greater importance regarding the development of CR: that is, the standard of specificity, meaning clarity and exactitude.

¹⁵ See (Chapter 4 n 76) *et seq.*

¹⁶ *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 143; see also *Prosecutor v. Dario Kordić & Mario Čerkez*, AC Judgement, IT-95-14/2-A, 17 December 2004, para 46.

¹⁷ *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, AC, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, IT-01-47-AR72, 16 July 2003, para 51. See also *Prosecutor v. Tihomir Blaškić*, AC Judgement, IT-95-14-A, 29 July 2004, para 141.

¹⁸ *Supra* (nn 1 and 6); see also Stefan Glaser, 'Nullum Crimen Sine Lege.' (1942) 24 J. Comp. Legis. & Int'l L. 3d. ser. 29.

B) The requirement of specificity:-

Generally, to conform with the principle of legality, its requirements or components have to be fulfilled if a fair trial is to be achieved.¹⁹ The requirement of specificity is thus closely related to the standard of clarity, as both are aimed at avoiding vagueness and ambiguity in the interpreted law.²⁰ The ICTY, in *Kupreškić*, concluded therefore that the principle of legality is violated if a rule “lacks precision and is too general to provide a safe yardstick of the work of the Tribunal and hence, that it is contrary to the principle of the “specificity” of criminal law”.²¹ Note that CR was interpreted too generally: that resulted in two different implementations of it: (a) as a mode of liability; and (b) *per se* as a crime.²²

International Human Rights Law (IHRL) considers the principle of legality and the requirement of specificity essential for a fair trial.²³ The principle of legality is therefore a fundamental factor for the protection of the right of the accused to a fair trial.²⁴ This principle is an essential part of both criminal and human rights’ law. The requirement of specificity, according to Cassese, means that “*criminal rules* must be as detailed as possible, so as to clearly indicate to their addressees the conduct prohibited, both the objective elements of the crime and the requisite *mens rea*”.²⁵

Analogically, this standard aims to define the nature of rules to avoid any ambiguity for accused commanders in knowing ‘for what are they held responsible?’.²⁶ The criminal law role is thus important in adequately interpreting vague rules to clarify the nature of the applicable law. The human rights’ law plays an equally important role in maintaining the accused’s right to a fair trial and, for the purpose of CR, the right to be informed of the nature of the accusation(s).²⁷ The Rome Statute, contrary to the *ad hoc* tribunals’ Statutes, stated therefore that

¹⁹ Cian C. Murphy, ‘The Principle of Legality in Criminal Law under the ECHR’ (2009) 2 European Human Rights Law Review 192.

²⁰ Michael J. Glennon, ‘The Blank-Prose Crime of Aggression’ (2010) 35 Yale J. Int’l L. 71, 85.

²¹ *Prosecutor v. Kupreškić et al.*, TC Judgment, IT-95-16-T, 14 January 2000, paras 563 & 609.

²² See (Chapter 3 n 171) *et seq.*

²³ See Mark Klamberg, ‘International Criminal in Swedish Courts: the Principle of Legality in the *Arklöv* Case’ (2009) 9 Int’l Crim. L. Rev. 395, 402; also Rhona K. M. Smith, *Textbook on International Human Rights* (4th edn., OUP, 2010) 260-1.

²⁴ For the right to a fair trial: *infra* (n 54).

²⁵ Cassese (2008) 41.

²⁶ See (Chapter 3 n 98).

²⁷ *Infra* (n 77) *et seq.*

“[t]he definition of a crime shall be strictly construed and shall not be extended by analogy.”²⁸

Note that this prohibition of analogy is to prevent judges from creating rules which do not already exist; this differs from analogy for the purpose of articulating an interpretation, which is legitimate.²⁹

C) The applicability of the principle of specificity in ICL:-

The application of the requirement of specificity varies: on the one hand, it could be claimed that this standard is limited only to defining elements of crimes.³⁰ On the other, it can be argued that it is extended to any principle that has direct relation with or influence on crimes under ICL.³¹ It seems that Cassese’s definition of the requirement was in favour of extending its applicability to *criminal rules*, which includes CR as a mode of liability directly relevant to crimes under ICL.³² In determining which approach would be the more applicable to contemporary ICL, it is essential to consider the problematic re-characterisation of CR and to weigh it against the need for specificity, as a requirement under the principle of legality.

As illustrated previously, the re-characterisation problem appeared when the *ad hoc* tribunals inconsistently interpreted the rules of CR. They changed the responsibility from that for the crime committed to CR being *per se* a crime.³³ This re-characterisation, more importantly, has had an impact on CR’s requirements and has resulted in first, inconsistency regarding these requirements³⁴ and, secondly, the problem of the inconsistent nature of responsibility under CR.

This problem of re-characterising CR was created as a result of misusing the principle of interpretation.³⁵ The requirement of specificity (RS) was established

²⁸ Art. 22, the ICCS.

²⁹ Bruce Broomhall, ‘Article 22: Nullum crimen sine lege’ in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (C.H.Beck . Hart . Nomos, 2008) 725; see also Susan Lamb (n 1) 752-3.

³⁰ Broomhall, *Op. cit.*, 723-4.

³¹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 410.

³² See Cassese (n 25).

³³ See (Chapter 3 n 98) *et seq.*

³⁴ See the discussions in the previous Chapter.

³⁵ See the discussions in Chapter 4.

essentially to ensure that interpretation serves to clarify any vagueness.³⁶ However, the *ad hoc* tribunals' interpretation resulted in the nature of CR being ambiguous. Accordingly, the specificity requirement was eroded by the *ad hoc* tribunals, in that not only did that interpretation create new law³⁷ but such an interpretation also increased the vagueness of CR.³⁸

D) Eroding the RS through re-characterising CR:-

Extending the applicability of the requirement of specificity, generally to encompass *criminal rules*, was more appropriate for the purpose of RS as a requirement.³⁹ Since modes of responsibility are most relevant to crimes under ICL, the *ad hoc* tribunals should – for the purpose of clarifying the nature of CR – have applied the broader approach of the specificity requirement. Indeed, the application is to be extended to modes of liability for the fulfilment of the legality principle and of its essential components, *inter alia* the specificity requirement. The European Court of Human Rights (ECtHR) therefore stated that:-

“From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where individuals can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him criminally liable”.⁴⁰

The ICTY recognised the importance of the requirement of specificity under the principle of legality in criminal proceedings:-

“From the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time”.⁴¹

³⁶ The ICC, Art. 22 (2).

³⁷ CR was implemented *per se* as a crime. See (Chapter 3 n 174) *et seq.*

³⁸ As the question remains 'for what are commanders held responsible?'. *Supra* (n 26).

³⁹ *Infra* (n 41).

⁴⁰ *Veeber v. Estonia (No. 2)*, Judgment, Application no. 45771/99, 21 January 2003, para 31.

⁴¹ *Prosecutor v. Mitar Vasiljević*, TC II Judgment, IT-98-32-T, 29 November 2002, para 193.

In respect of the extended applicability of the requirement of specificity over modes of liability, the Tribunal supported the ECtHR – above - and emphasised that:-

“A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility”.⁴²

Analogically, the specificity required clarity regarding the nature of CR for the purpose of the legality principle, which was impossible as a result of the *ad hoc* tribunals’ re-characterisation. However, as stated by the ICC, in case of vagueness a court should interpret the rule in favour of the accused.⁴³ This is largely intended - from the human rights perspective - to protect the rule of law;⁴⁴ and – from a criminal law viewpoint – to ensure a fair trial.⁴⁵

This failure to recognise the essence of the problem of re-characterising CR was affected by examining the requirement of specificity in relation to crimes only,⁴⁶ although in principle this requirement is extended to the clarity of modes of liability.⁴⁷ The *ad hoc* tribunals’ interpretation and implementation of specificity as a requirement under the legality principle is, accordingly, very narrow. The ICTY thus stated that “the emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary importance”.⁴⁸

It seems that the judges at the *ad hoc* tribunals acknowledged the importance of the requirement of specificity, but then applied the narrow approach, which affected the accused’s comprehension of what he could be held responsible for. Judge Meron, for instance, examined the principle of legality in its

⁴² *Ibid.*

⁴³ Rome Statute, Art. 22 (2).

⁴⁴ The ECtHR stated that the legality principle “is an essential element of the rule of law ... It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment”. *Puhk v. Estonia*, Judgment, Application no. 55103/00, 10 February 2004, paras 24.

⁴⁵ The ECHR stated that under the legality principles there are a number of principles and “[f]rom these principles it follows that an offence must be clearly defined in the law”. *Puhk v. Estonia*, para 25.

⁴⁶ See for example, Jennifer Lincoln, ‘*Nullum Crimen Sine Lege* in International Criminal Tribunal Jurisprudence: the problem of the residual category of crime’ (2010-2011) 7 *Eyes on the ICC* 137.

⁴⁷ *Supra* (n 39); also Cassese *supra* (n 25) 41-3.

⁴⁸ *Prosecutor v. Enver Hadzihasanovic et al.*, TC II, Decision on Joint Challenge to Jurisdiction, IT-01-47-PT, 12 November 2002, para 62 (at footnote 18).

narrowest form, while agreeing that it has a more applicable broader form.⁴⁹ Judge Shahabuddeen also, in his argument about whether the requirement of specificity prevents the development of law, limited that requirement to its applicability to only crimes under ICL.⁵⁰ Interestingly, in his conclusion, Judge Shahabuddeen supported the decision of the ECtHR that the principle of legality does not prevent the law from development “provided that the resultant development is consistent with the essence of the offence”.⁵¹

However, the *ad hoc* tribunals’ development of CR, examined previously, was not consistent with the essence of the underlying crimes under ICL. Thus, two issues resulted from such inconsistent interpretation. First, the nature of CR was not clear as to whether the responsibility is based on the underlying crime or on dereliction of duty.⁵² Second, the requirements of CR at the *ad hoc* tribunals were unclear to the accused, as a result of this inconsistency: this inevitably had an impact on the right to a fair trial.⁵³

2. The right to a fair trial:-

IHRL considers the principle of legality and its components essential for a fair trial; more precisely, it is primarily a general principle at national criminal law systems and also a norm of customary law.⁵⁴ The accused’s rights are recognised as principles under IHRL, but more importantly they are required to guarantee justice in criminal proceedings. Thus, proceedings at ICL are interdependent on not only respecting but implementing such principles.⁵⁵ The ICTY, in *Furundzija*, emphasised the interaction between ICL and IHRL.⁵⁶ Fair trial is thus an essential principle that links those two different branches of laws together.

⁴⁹ Cf. Theodor Meron, *The Making of International Criminal Justice: a view from the bench* (OUP 2012) 110.

⁵⁰ Cf. Mohammed Shahabuddeen, ‘Does the Principle of Legality Stand in the Way of Progressive Development of Law?’ (2004) 2 J. Int’l Crim. Just. 1007.

⁵¹ *Ibid* 1017; see also *C.R. v. the United Kingdom*, Judgment, A.335-C, 22 November 1995, para 34.

⁵² See for example, the four generations at the ICTY. (Chapter 3 n 216) *et seq.*

⁵³ Compare for example the *Orić* and *Hadžihasanović* findings with the *Popović* ruling about effective control. See (Chapter 5 nn 151, 185 & 228).

⁵⁴ Cf. (n 6).

⁵⁵ Javaid Rehman, *International Human Rights Law* (2nd edn., Pearson Education Limited, 2010) 715.

⁵⁶ *Prosecutor v. Anto Furundzija*, TC Judgment, IT-95-17/1-T, 10 December 1998, paras 143-6.

The right to a fair trial is as ancient as the concept of CR.⁵⁷ The contemporary fair trial is recognised, however, as a norm of IHRL that contains a number of the accused's rights, one of which is the right to be informed.⁵⁸ It was, accordingly, included in a number of international criminal courts' and tribunals' statutes and charters, discussed below.

The right to a fair trial has been recently, however, mis-interpreted by the *ad hoc* tribunals, jeopardising the accused's rights. McDermott, for example, suggested, in a related context, that the interpretation of "fair trial" being extended to include the prosecutor resulted in violating the accused's right to a fair trial without undue delay.⁵⁹ The following discussion, for the purpose of this study, argues that mis-interpreting "fair trial" resulted in infringing the accused's right to be informed of the nature and cause of CR.

A) The right to be informed:-

The right to be informed is generally recognised as a component of the right to a fair trial. The principle of legality and the right to a fair trial were both considered under the early instruments of ICL to promote justice. Note that, the right to be informed (or the right to information) is a specific right in criminal procedures: it should not be confused with generic concepts, such as the right of an accused to be informed of his rights generally.⁶⁰ The following discussion will therefore be limited to two rights: first - primarily - the right to be informed of the nature and cause of the charges; and second - where relevant - the right to know the reasons for arrest; those two rights sometimes might overlap.⁶¹

⁵⁷ See Judge Patrick Robinson, 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY' (2009) 3 Berkeley J.L Int'l L. Publicist 1, 1-3.

⁵⁸ Lawyers' Committee for Human Rights, "What Is A Fair Trial? a basic guide to legal standards and practice" (March 2000) 1.

⁵⁹ Yvonne McDermott, 'Rights in Reverse: A Critical Analysis of Fair Trial Rights under International Criminal Law' in William A. Schabas and others, *The Ashgate Research Companion to International Criminal Law: critical perspectives* (Ashgate, 2013) 165.

⁶⁰ According to, for example, Art. 14 (3) (d) of the ICCPR, everyone is entitled "[t]o be informed, if he does not have legal assistance", which is a general right at any trial, whether civil or criminal.

⁶¹ For example, the Open Society Justice Initiative did not distinguish between those two rights. Cf. Open Society Justice Initiative, *Arrest Rights Brief No. 2: the right to information*, June 2012. As discussed below, the first right differs from the second, as one is part of the right to a fair trial while the other is part of the right to liberty and security. See *infra* (n 69) *et seq.*

B) The right to be informed as between international criminal and Human Rights jurisprudence:-

The right to be informed was recognised by a number of international instruments under the accused's right to a fair trial. The Nuremberg⁶² and Tokyo⁶³ Charters provided a number of 'procedural' elements of fair trial. They both stated that the accused, through his defence counsel, has to be supplied with adequate information to prepare for the trial. Note that this information is for a procedural purpose. In other words, according to these Charters, this right can be fulfilled once the information is passed to the defendant and is in a language that he understands, regardless of its substance.⁶⁴

As a result of this narrow scope of implementing the right of an accused to be informed, it was essential to develop this right from being merely procedural to be applied as a fundamental right. Accordingly, the UDHR laid down the general principles of human rights, including the right to a fair trial.⁶⁵ However, the essential development was acknowledged through the adoption of the (binding, on the parties to it) International Covenant on Civil and Political Rights of 1966 (ICCPR), and, regionally, through the European Convention on Human Rights, 1950 (ECHR).⁶⁶

It is, therefore, the UDHR which specified the general principles of HR, while the ICCPR explained these principles in more details. Accordingly, Art. 14 (3) (a) of the ICCPR stated that "everyone shall be ... informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".⁶⁷ This right is unique and significant to the accused; thus, the ICCPR distinguished it from, for instance, the right to know the reasons for arrest.⁶⁸

⁶² The Nuremberg Charter, Sec. IV, Art. 16.

⁶³ The Tokyo Charter, Sec. III, Art. 9.

⁶⁴ This was an implicit problem at *Yamashita*, as the defence team was unable to understand the nature of the charge or the Bill of Particulars. See (Chapter 2 n 35).

⁶⁵ The UDHR, Art. 10.

⁶⁶ Karolina Kremens, 'The Protection of the Accused in International Criminal Law According to the Human Rights Law Standard' (2011) 1 *Wroclaw Review of Law* 26, 29; See also Haji NA Noor Muhammad, 'Due Process of Law for Persons Accused of Crime' in Louis Henkin (ed.), *The International Bill of Rights. The Covenant on Civil and Political Rights* (Columbia University Press, 1981) 139.

⁶⁷ ICCPR, Art. 14 (3) (a).

⁶⁸ Pursuant to Art. 9 (3) of the ICCPR: "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him".

The ECHR also distinguished between those two rights. Thus, it first stated, in Art. 5, on the right to liberty and security, that “[e]veryone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and any charge against him”.⁶⁹ After that, Art. 6, concerning the right to a fair trial, stated that the accused shall be “informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”.⁷⁰

Note that, whilst the right to know the reasons for arrest is considered part of the right to liberty and security,⁷¹ the right to be informed about the nature and cause of the charge(s) is – within these HR instruments – recognised as a component of the right to a fair trial in criminal proceedings.⁷² It is, therefore, the right to know the reasons for arrest which primarily guarantees the right to be “adequately informed of the reasons why he has been deprived of his liberty”.⁷³ The purpose of the right to know the reasons for arrest, according to the ECtHR, is thus “an integral part of the scheme of protection afforded” by the right to liberty and security.⁷⁴

This right, therefore, even though it might be relevant to a criminal case, is not recognised as part of the accused’s right to a fair trial. Accordingly, it is “by virtue of [the right to know the reasons for arrest] any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness”.⁷⁵

In other words, the right to know the reasons for arrest is focused on the rights of a suspected person at the moment of arrest and detention, whereas the right to be informed about the nature and causes of the charge is required after the

⁶⁹ ECHR, Art. 5 (2).

⁷⁰ ECHR, Art. 6 (3) (a).

⁷¹ *Supra* (n 61).

⁷² *Infar* (n 115).

⁷³ See the European Court of Human Rights, *Van der Leer v. The Netherlands*, Judgment, 11509/85, 21 February 1990, para 28; See also *Shamayev and others v. Georgia and Russia*, Judgment, 36378/02, 12 April 2005, para 413; See also *X v. The United Kingdom*, Judgment, 7215/75, 5 November 1981, para 66.

⁷⁴ See the European Court of Human Rights, *Fox, Campbell and Hartley v. The United Kingdom*, Judgment, 12244/86, 30 August 1990, para 40.

⁷⁵ *Ibid* para 40.

issue of the charges at the trial stage.⁷⁶ Additionally, the information provided at the moment of arrest should be in a language the suspected person understands, simple about the reasons for his being deprived of his liberty. However, the right to be informed of the nature and cause of the charges – discussed below – is considered a requirement under the right to a fair trial.

3. The right to be informed of the nature of the charge:-

There are two approaches regarding the application of the right to be informed of the nature of the charge(s). First, the “Functional approach”, which considers this right to be subsidiary to the right to prepare the defence.⁷⁷ According to this narrow approach, in examining a potential violation of this right, the violation must be weighed against the right of preparing the defence. Second, the “Absolutist approach”, which recognises this right as a separate right.⁷⁸ According to this broader approach, this right may be violated “even in the absence of evidence that better information would have increased the defence’s possibilities of success”.⁷⁹ Therefore, the broader approach weighs this right against the right to a fair trial.

As illustrated above, the right to be informed of the nature and cause of the charge(s) is distinguishable from other rights to be informed. In fact, this is the only right to information that is required directly for satisfying the right to a fair trial.⁸⁰ Differing implementations of this right are therefore discussed below.

A) Application of the IHRL jurisprudence:-

Art. 14 of the ICCPR obliges the judicial authority, first, to inform “promptly” and, secondly, to inform “in detail” the accused about the “nature” and

⁷⁶ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd edn., OUP, 2014) 480. It is the duty of the *police* to communicate the reasons for arrest, while it is the duty of the *judicial authority* to guarantee the right to be informed about the nature of the charge.

⁷⁷ Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP, 2006) 193.

⁷⁸ *Ibid.*

⁷⁹ *Ibid* 193-4. Trechsel strongly supported the broader approach, due to the importance of this right to the fair trial.

⁸⁰ For other rights to be informed; see, *supra*, n. 60; also, under the ICC, a number of other general rights to information. See Art. 55 (2), Art. 60 (1), and Art. 61 (3) (b).

“cause” of the charge(s).⁸¹ It follows that those two obligations together require the accused to *comprehend* through the supplied information the *nature* of the accusation; otherwise, according to the -more favourable in this thesis- “Absolutist approach”, this right is violated. Similarly, the ECHR distinguished between the right to know the reasons for arrest⁸² and the right to be informed of the nature of the charge(s).⁸³ The American Convention on Human Rights, 1969 (ACHR) also included – but not as comprehensively as the ICCPR and ECHR - the right to be informed. Pursuant to Art. 8 – regarding the Right to a fair trial - the ACHR stated that every person is entitled to “prior notification in detail to the accused of the charges against him”.⁸⁴

The right to be informed of the nature of the accusation under ICL – discussed below – corresponds therefore to the ICCPR and ECHR formulations. Accordingly, the following discussions examine the judicial application of this right through various Courts; more attention will be given to the European Court of Human Rights (ECtHR) than to the others. This is primarily because the ECtHR has more influence on the judges of not only the international criminal courts and tribunals,⁸⁵ but also those of other International Human Rights Courts, such as the IACtHR.⁸⁶

B) The extent of application by the IHRL judicial systems:-

As illustrated above, there are two approaches for applying the right to be informed of the nature of the accusation: (a) as a subsidiary right to the right to prepare the defence;⁸⁷ and (b) as a separate right under the right of the accused to a fair trial.⁸⁸ Note that the latter is the favoured approach for the purpose of re-characterising CR by judges during judgments. The discussion below examines the extent of the application of these two approaches at the major human rights courts.

⁸¹ ICCPR, Art. 14 (3) (a). See *supra* (n 67).

⁸² ECHR, Art. 5 (2).

⁸³ *Supra* (n 70).

⁸⁴ ACHR, Art. 8 (2) (b).

⁸⁵ *Supra* (nn 41-42); see also *infra* (n 110); also, Olivier de Frouville, ‘The Influence of the European Court of Human Rights’ Case Law on International Criminal Law of Torture and Inhuman or Degrading Treatment’ (2011), 9 JICJ 633.

⁸⁶ Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case law and Commentary* (OUP, 2011), paras 25-26.

⁸⁷ This is the narrow or “Functional approach”, *supra* (n 77).

⁸⁸ This is the broad or “Absolutist approach”, *supra* (n 78).

i) The IACtHR:-

The ACHR formulated this right differently in a way that would inevitably narrow its application.⁸⁹ Moreover, from a linguistic perspective, although the words “notify” and “inform” *can* be used synonymously, each one has a slightly different connotation. The word ‘notify’ means “to make a person aware of something”, but the word ‘inform’ means “to make a person knowledgeable about something”.⁹⁰

In this regard, de Torres, for example, argued that, based on the American Convention, the right to be informed of the nature of the charge(s) is in a lower category.⁹¹ He claimed that, pursuant to the ACHR, the rights of an accused person are divided into two categories: (a) essential rights, such as the right to be presumed innocent; and (b) non-essential rights dependent on the circumstances of each case, to assist the application of rights such as that to be notified about the nature and cause of the charges.⁹² Although this division might be logical for classification purposes,⁹³ the aim is (or should) always be to guarantee the accused a fair trial.

It is, therefore, this right to be informed of the nature of the charge(s) which became limited in application, mainly to the pre-trial stage.⁹⁴ In *Castillo Petruzzi*, the defence argued that everyone “has the right to know the charges against him and to have adequate time and means to prepare his defense” (Art. 8 (2) (b) and Art. 8 (2) (c), respectively); and that right was violated by the relevant authority.⁹⁵ The court concluded that:-

⁸⁹ *Cf. supra* (nn 67 and 70).

⁹⁰ A S Hornby, *Oxford Advanced Learner's Dictionary of Current English* (7th edn., OUP, 2005) 797 and 1039.

⁹¹ Laurence Burgogue-Larsen and Amaya Úbeda de Torres, *supra* (n 86) paras.25-34.

⁹² *Ibid* 664-5.

⁹³ As, for example, the ICCS provided for a similar division under Art. 66 (“presumption of innocence”) and Art. 67 (“rights of the accused”). This should not, however, jeopardise the applicability of the right to be informed. *Cf. re-characterising CR: (Chapter 3 n 171) et seq.*

⁹⁴ Roza Pati, *Due Process and International Terrorism: An International Legal Analysis* (Martinus Nijhoff Publishers, 2010) 101.

⁹⁵ *Castillo Petruzzi et al. v. Peru*, Judgment, Inter-Am Ct. H. R. No. 52, 30 May 1999, para 136.

“[T]he accused did not have sufficient advance notification, in detail, of the charges against them; the conditions under which the defense attorneys had to operate were wholly inadequate for a proper defense”.⁹⁶

The court therefore found that the rights of the accused, specified in Art. 8 (2) (b) and Art. 8 (2) (c), had been violated.⁹⁷ In a more recent case, *Vélez Loor*, the court concluded that this right had been violated as the notification was not provided to the defendant directly; as a result the time was insufficient for the defendant to be prepared.⁹⁸ These are examples of adopting the narrow or functional approach, where the essence of this right is shifted toward the time to be prepared.

Nevertheless, the court provided – in *Barreto Leiva* - a slightly different interpretation of this right and stated that:-

“To comply with Article 8(2)(b) of the Convention, the State must notify the accused not only of the charges against him, that is, the crimes or offenses he is charged with, but also of the reasons for them, and the evidence for such charges and the legal definition of the facts. The defendant has the right to know, through a clear, detailed and precise description, all the information of the facts in order to fully exercise his right to defense and prove to the judge his version of the facts.”⁹⁹

The court also emphasised that such right:-

“[M]ust be necessarily exercised as from the moment a person is accused of being the perpetrator or participant of an illegal act and ends when the jurisdiction thereby ceases, including, where applicable, the enforcement phase. The opposite would imply to subordinate the conventional guarantees that protect the right to defense, including Article 8(2)(b)”.¹⁰⁰

In both *Castillo Petruzzi* and *Vélez Loor*, the court applied the narrow scope, which limited the application of this right to the indictment or the pre-trial stage. In *Barreto Leiva*, however, the court applied a different interpretation, akin to the

⁹⁶ *Castillo Petruzzi*, para 141.

⁹⁷ *Castillo Petruzzi*, para 142.

⁹⁸ *Vélez Loor v. Panama*, Judgment, Inter-Am Ct. H. R. No. 218, 23 November 2010, paras 149 – 150.

⁹⁹ *Barreto Leiva v. Venezuela*, Judgment, Inter-Am Ct. H. R. No. 206, 17 November 2009, para 28.

¹⁰⁰ *Barreto Leiva*, para 29.

broad approach. Nevertheless, this right in the IACtHR was, overall, not recognised as a separate requirement for the right to a fair trial.

ii) The ICCPR:-

According to Art. 14 (3) (a) ICCPR, concerning the right to be informed of the nature and cause, “the duty to inform the accused ... is more precise than that for arrest under article 9, paragraph 2”.¹⁰¹ This is because “the details of the nature and cause of the charge need not necessarily be provided to an accused person immediately upon arrest”.¹⁰² Accordingly, it is sufficient, to satisfy Art. 9 (2), “for an arrested person to be aware” of the reasons for arrest, but this cannot be said regarding Art. 14 (3) (a).¹⁰³ Therefore, in *Kurbanov v. Tajikistan* it was concluded that:-

“the delay in presenting the charges to the detained author and in securing him legal assistance affected the possibilities of Mr. Kurbanov to defend himself, in a manner that constitutes a violation of article 14, paragraph 3 (a)”.¹⁰⁴

This could be seen as a way of applying the narrow scope of application. It seems, however, that the Committee recognised that this right could be violated even if a delay in supplying the required information had had an impact on the accused’s right to know the nature of the relevant charges in due time.

It is plain, therefore, that the ICCPR’s clear formulation resulted in a better interpretation, even though such interpretation was not always consistent.¹⁰⁵ Art. 14 (3) (a) required the information to provide the accused with sufficient understanding about the nature of the charge(s).¹⁰⁶ As a result, Art. 14 (3) (a) is

¹⁰¹ *Clifford McLawrence v. Jamaica*, CCPR/C/60/D/702/1996, 26 April 1996, par. 5.9.

¹⁰² *Ibid.*

¹⁰³ Joseph and Castan, *supra* (n 76) para 14-114. See also *Vicente et al. v. Colombia*, CCPR/C/60/D/612/1995, para 8.7.

¹⁰⁴ *Abduali Ismatovich Kurbanov v. Tajikistan*, CCPR/C/79/D/1096/2002, 2003, para 7.3.

¹⁰⁵ See for the inconsistency, Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd rev. edn., N.P. Engel, Publisher, 2005) 331 – 332; see also, Lawyers Committee for Human Rights, *supra* (n 58) 15.

¹⁰⁶ *Ibid* Nowak 331 – 332.

guaranteed applicable at all stages of a trial until the *termination of the proceedings*.¹⁰⁷

iii) The ECtHR:-

As illustrated above, among international courts of human rights the ECtHR is one of the most influential, on both international criminal and human rights' courts.¹⁰⁸ In the seminal case of *Tadić*, for instance, the Appeal Chamber deliberated on the principle of fair trial and resorted to the ECtHR,¹⁰⁹ ruling that “guidance may be taken from Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights”.¹¹⁰

The right to be informed of the nature and cause of the charge(s), under Art. 6 (3) (a) of the ECHR, obliges the authority to provide *detailed information* to the accused about the charge.¹¹¹ The ECtHR, therefore, emphasised that such information should enable that accused “to understand fully the extent of the charges against him with a view to preparing an adequate defence”.¹¹² The court also observed that the information needs to be sufficient and adequate; therefore, “the information must be assessed in relation to ... the right to have adequate time and facilities for the preparation of their defence, and in the light of a more general right to a fair hearing”.¹¹³

Accordingly, this provision obliges the authority to ensure that the accused, through the information provided, will have “sufficient knowledge” of the accusation.¹¹⁴ The Court, therefore, asserted that “[i]n criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the

¹⁰⁷ *Ibid* 318 – 319.

¹⁰⁸ Frouville, *supra* (n 85) 644. Olivier de Frouville also argued that this influence of IHRL has declined in recent cases of ICL, as the international criminal tribunals tended to refer to their own precedents instead.

¹⁰⁹ *Prosecutor v. Duško Tadić*, AC Judgment, IT-94-1-A, 15 July 1999, paras 30-43.

¹¹⁰ *Tadić* AC, para 321.

¹¹¹ ECHR, Art. 6 (3) (a). *Supra* (n 70).

¹¹² *Mattochia v. Italy*, Judgment, Application No. 23969/94, 25 July 2000, para 60.

¹¹³ *Ibid*. The violation of this right is therefore an infringement of the right to fair trial. See *Varela Geis v. Spain*, Judgment, Application No. 61005/09, 5 March 2013. 53-55; see also *Abramyan v. Russia*, Judgment, Application No. 10709/02, 9 October 2008, 38-40.

¹¹⁴ *Brozicek v. Italy*, Judgment, Application No. 10964/84, 19 December 1989, para 41.

matter, is an essential prerequisite for ensuring that the proceedings are fair”.¹¹⁵ Art. 6 (3) (a), therefore, required that such information must be in a language the accused understands.¹¹⁶

The Court also observed that there is “special attention to be paid to the notification of the “accusation” to the defendant”.¹¹⁷ The Court, therefore, reiterated that the accused is guaranteed the right to “be informed in detail not only of acts he is alleged to have committed, that is, of the facts underlying the charges, but also of the legal characterisation given to them”.¹¹⁸ In other words, an accused is entitled to *understand fully* not only the underlying crime alleged against him, but also the form of his responsibility.¹¹⁹

Most relevant to the re-characterisation of CR, the Court examined the “change in the characterisation of the offences during the trial” or the “re-characterisation” of the elements of the offence in relation to the accused’s right to be informed of the nature of the charge(s).¹²⁰ In this, the Court concluded that such re-characterisation can directly violate the accused’s right to be informed of the nature of that/those charge(s) and therefore adversely affect his right to a fair trial.¹²¹ The right to be informed of the nature of the accusation(s) could, therefore, be violated by changing (or re-characterising) the nature of the charge through judges’ (re)interpretation.¹²²

The court more explicitly observed that violation of this right could be brought about through re-characterising the nature of not only the offence but also the relevant mode of liability.¹²³ The ECtHR, in *Pélissier and Sassi v. France*, found that the nature of “aiding and abetting” was re-characterised by the authority rendering the accused unable to comprehend the re-characterised form, concluding that his right to be informed of the nature of the charge was violated.¹²⁴ Accordingly, this right could be violated through re-characterising the nature of

¹¹⁵ *Sejdovic v. Italy*, Judgment, Application No. 56581/00, 1 March 2006, para 90.

¹¹⁶ Alastair Mowbray, *Case, Materials, and Commentary on the European Convention on Human Rights* (3rd edn., OUP, 2012) 457. See also *Brozicek v. Italy*, *supra* (n 114).

¹¹⁷ *Kamasinski v. Austria*, Judgment, Application No. 9783/82, 19 December 1989, para 79.

¹¹⁸ *Penev v. Bulgaria*, Judgment, Application No. 20494/04, 7 January 2010, para 42.

¹¹⁹ *Dallos v. Hungary*, Judgment, Application No. 29082/95, 1 March 2001, para 47.

¹²⁰ *Sadak et al. v. Turkey*, Judgment, Application Nos. 29900/96–29903/96, 17 July 2001, para 43.

¹²¹ *Ibid* para 59.

¹²² *Cf. Halilović TC*, para 54; see also (Chapter 3 n 172) *et seq.*

¹²³ *Pélissier and Sassi v. France*, Judgment, Application No. 25444/94, 25 March 1999, paras 20 – 29.

¹²⁴ *Ibid* paras 48, 49, 56 & 63.

modes of liability. Re-characterising the nature of CR – at the *ad hoc* tribunals – analogically with the ECtHR jurisprudence is therefore in violation of the right of the accused to know the nature of the accusation.

C) Application in ICL:-

The Nuremberg and Tokyo (IMTs) Charters provided a provision about the right to a fair trial for the accused person.¹²⁵ The right to be informed of the nature of the accusation, however, was not as explicitly covered as in the HRL instruments mentioned above. Unlike the HRL, which guarantee the accused the right to be informed throughout the proceedings,¹²⁶ the IMTs limited this right of the defence only to the indictment. HRL obliges the authority to ensure that the accused *fully comprehends*, in detail, the *nature* of the charges against him; whereas the IMTs obliged the authority only to ensure that the indictment presented the charges in detail.

Thus, while HRL views this right as being in the interest of the rights of the accused, the IMT applied it as the fulfilment of a procedural requirement (formalities). In fact, HRL became more influential, particularly on ICL. The degree of this influence varies, however, regarding the implementation of human rights' principles between the *ad hoc* tribunals and the ICC. Bassiouni criticised, for instance, the structure of the *ad hoc* tribunals for their failure to allocate a separate defence division where such a deficiency would most probably affect the defendant's right(s) at some points.¹²⁷

i) The right to be informed under the *ad hoc* tribunals:-

Generally, international criminal courts and tribunals are established primarily for purposes, *inter alia*, of protecting human rights.¹²⁸ Those individuals who violate international human rights and humanitarian laws are therefore prosecuted under ICL jurisdiction. The ICTR stated therefore that the main reason

¹²⁵ *Supra* (nn 62-63).

¹²⁶ The IACtHR (n 89) *et seq.*; also the ICCPR (n 101) *et seq.*; see also for the ECtHR (n 108) *et seq.*

¹²⁷ M Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers Inc., 1996) 798.

¹²⁸ Rome Statute's Preamble.

for its creation is “to prosecute persons responsible for serious violation of international human law”.¹²⁹ The ICTY also emphasised that:-

“The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law”.¹³⁰

Accordingly the ICTY declared that ‘international criminal tribunals should resort to HRL’ and stated that:-

“Because of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law”.¹³¹

Accordingly, the *ad hoc* tribunals’ clearly acknowledged the importance of HRL jurisprudence to its judgements.

ii) Formulating this right at the *ad hoc* tribunals:-

As a result of this influence of HRL, the right to a fair trial was drafted in the *ad hoc* tribunals’ statutes akin to that of the HRL formulation. Hence, the ICTY, for instance, first obliges all Trial Chambers to “ensure that a trial is fair and expeditious and that proceedings are conducted ... with full respect for the rights of the accused...”.¹³² The *ad hoc* tribunals’ statutes laid down the “rights of the accused”, one of which is the right to be informed of the nature and causes of the

¹²⁹ *Prosecutor v. Jean-Paul Akayesu*, TC Judgment, ICTR-96-4-T, 2 September 1998, para 4.

¹³⁰ *Prosecutor v. Anto Furundžija*, TC Judgment, IT-95-17/1-T, 10 December 1998, para 183.

¹³¹ *Prosecutor v. Dragoljub Kunarac*, TC Judgment, IT-96-23/1-T, 22 February 2001, para 467.

¹³² ICTYS, Art. 20 (1); ICTRS, Art. 19 (1).

charge. The *ad hoc* tribunals' statutes – regarding this right to be informed – stated that the accused person is entitled:-

“To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her”.¹³³

The formulation of this provision corresponds exactly with those of HRL regarding this right to be informed, such as Article 14 (3) (a) of the ICCPR¹³⁴ and Article 6 (3) (a) of the ECHR¹³⁵. It can therefore be expected that the application of this right would correspond to that of HRL courts, mainly the ECtHR because of its influence.

4. The *ad hoc* tribunals' implementation:-

The HR courts lay obligations mainly on the prosecutor,¹³⁶ whereas the *ad hoc* tribunals (ICTY and ICTR) oblige all Trial Chambers to ensure fair trial.¹³⁷ This wider duty calls for the application of the “broad approach” to the right to be informed to be followed;¹³⁸ and it is clear, therefore, that this right should not be limited to the indictment.¹³⁹ Based on the *ad hoc* tribunals' statutes, this right should be considered a separate right, being formulated as one of the fair trial requirements.

A) The overlapping and inconsistent implementation:-

As illustrated above, this right should not be confused with other rights to information, such as the right to know the reasons for arrest.¹⁴⁰ Nevertheless, due to similarities between some of those rights, they may overlap. For example,

¹³³ ICTYS, Art. 21 (4) (a), ICTRS, Art. 20 (4) (a) and SCSSLS, Art. 17 (4) (a).

¹³⁴ *Supra* (n 67).

¹³⁵ *Supra* (n 70).

¹³⁶ See for example, the ECtHR stating, regarding this right, that “the duty rests entirely on the prosecution authority's shoulders and cannot be complied with passively by making information available without bringing it to the attention of the defence”. *Mattochia v. Italy* (n 112) para 65.

¹³⁷ *Supra* (n 132).

¹³⁸ *Supra* (nn 78 and 88).

¹³⁹ Otherwise the *ad hoc* tribunals' implementation, after acknowledging and adopting the IHRL approach, would correspond to that of the IMTs. *Supra* (nn 126-127).

¹⁴⁰ *Cf.* (nn 61 and 80).

Wolfgang Schomburg,¹⁴¹ although initially distinguishing between those two rights, provided a number of case-law instances related to the right to know the reasons for arrest as being examples of the right to be informed of the nature and cause of the charge(s).¹⁴² This most probably occurred as a result of the overlapping grounds of appeal in these cases referred to by Schomburg. In those cases, the grounds of appeal were, *inter alia*, (a) the right to be informed of the nature of the charges; and (b) the right to know the reasons for arrest.

In *Barayagwiza*, the defendant challenged the lawfulness of his detention.¹⁴³ He argued that his rights, *inter alia* the right to know the reasons for his arrest and the right to be informed about the nature and cause of the accusation, had been violated. The court, however, centralised its discussion on the violation of the right to know the reasons for arrest. It therefore examined only Rule 40 *bis* – concerning the “transfer and provisional detention of suspects”¹⁴⁴ of the Rules of Procedure and Evidence.¹⁴⁵

The AC concluded that the right of the accused to know the reasons for his arrest had been violated and stated that “[i]nternational standards require that a *suspect* who is *arrested* be informed promptly of the reasons for his *arrest* and the charges against him”.¹⁴⁶ Accordingly, “any person *arrested* should know why he is deprived of his liberty”.¹⁴⁷ Thus, it seems that Schomburg confused the right to be informed of the nature of the charge(s) – which is a component of the accused’s right to a fair trial – with the right to know the reasons for arrest, which is in essence a component of the right to liberty.¹⁴⁸

This was the case in a number of trials where the accused appealed on the ground that a number of his rights had been violated, among which was the right to be informed of the nature of the accusation. For example, in the *Laurent Semanza* appeal, the defendant alleged that his rights had been violated during the

¹⁴¹ Wolfgang Schomburg is a former Judge of the ICTY and ICTR.

¹⁴² Wolfgang Schomburg, ‘The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights’ (2009) 8 Nw. U. J. Int’l Hum. Rts. 1, 11-12.

¹⁴³ *Prosecutor v. Jean-Bosco Barayagwiza*, AC Decision, ICTY-97-19-AR72, 3 November 1999, para 11.

¹⁴⁴ Rule 40 *bis*, *Rules of Procedure and Evidence*, ICTR, as amended on 26 June 2000.

¹⁴⁵ The court rarely mentioned the accused’s right to be informed of the nature of the charge(s). Rather, it concentrated on the right to know the reasons for arrest.

¹⁴⁶ *Barayagwiza*, AC Decision, para 80.

¹⁴⁷ *Barayagwiza*, AC Decision, para 81.

¹⁴⁸ *Supra* (nn 73-76).

period of his detention.¹⁴⁹ Similarly with *Barayagwiza*, the *Semanza* AC concluded that the defendant's rights, *inter alia* that to be informed of the nature of the charge(s), had been violated.¹⁵⁰ Interestingly, the AC discussion was directed to the extent of applying Rule 40 *bis*.¹⁵¹

5. Specificity, the right to be informed and CR:-

Although those three principles vary with regard to their legal origins and characteristics, they are directly related to the legal status of an accused during criminal proceedings. An important nexus which exists between those three principles is the process by which the information has become available to the accused. The standard of specificity requires the information to be clearly – without vagueness or ambiguity – provided to the defendant, based on the legality principle.¹⁵² The right to be informed about the nature of the accusations - together with the standard of specificity – exists to ensure that the accused (defence) comprehends the accusation.¹⁵³ Thus, that an accused comprehends the nature of accusation against him – in this study the nature of CR – means his acknowledging for what it is he is being held responsible.¹⁵⁴

A) Re-characterising CR and violating the accused's rights:-

The information supplied to the accused at the *ad hoc* tribunals about the nature of CR was always problematic.¹⁵⁵ Its nature and requirements were repeatedly re-characterised through judges' inconsistent interpretations in their judgments in various trials and not by the prosecutor at the indictments. Note that HRL obliges primarily the prosecution – through the indictment – to ensure that the defendant comprehended the charges sufficiently for him to be regarded as having been *fully informed in detail*.¹⁵⁶ This duty on the prosecution was created to guarantee the right to a fair trial.

¹⁴⁹ *Laurent Semanza v. The Prosecutor*, AC Decision, ICTR-97-20-A, 31 May 2000, para 1-2.

¹⁵⁰ *Semanza*, AC Decision, para 127.

¹⁵¹ *Supra* (n 144).

¹⁵² *Supra* (nn 19, 26, 36 and 41).

¹⁵³ *Supra* (nn 81 and 124).

¹⁵⁴ *Cf.* the discussions about four generations in Chapter 3; also the four phases of the requirements in chapter 5.

¹⁵⁵ As the definition of its nature remains vague about what the responsibility is for and, most importantly, what triggers the culpability.

¹⁵⁶ See *supra* (nn 112 and 119).

With regard to ICL, at the *ad hoc* tribunals (particularly the ICTY/R) this obligation was/is more on the judges to guarantee fair trial.¹⁵⁷ The principle of interpretation was supposed to enable the judges to ensure that a fair trial takes place, by *clarifying* and *specifying* the ambiguous nature and requirements of CR. This therefore justifies the duty – in ICL – being on the judges to guarantee fair trial, as this principle of interpretation is available only to them.¹⁵⁸

B) Shifting the priorities:-

According to the *ad hoc* tribunals' statutes, judges are obliged to ensure fair trial with, most probably, a higher degree of obligations and requirements attributable to HRL.¹⁵⁹ This is mainly as a result of the rudimentary nature of ICL, which requires more clarity and specificity through judges' interpretations. Where there is vagueness, the issue should be interpreted in favour of the defendant.¹⁶⁰ This is in accordance with the *ad hoc* tribunals' conclusion – in the seminal case of *Tadić* - that “the inconsistency is viewed most favourably to the accused”.¹⁶¹

Nevertheless, the *ad hoc* tribunals, by adopting the narrow approach of the right to be informed of the nature of the charge(s), limited this right to the indictment. The *ad hoc* tribunals, to justify their approach, stated that:-

“The massive scale of the crimes with which the International Tribunal has to deal makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes – at any rate, the degree of specificity may not be as high as that called for in domestic jurisdictions”.¹⁶²

¹⁵⁷ See *supra* (n 132).

¹⁵⁸ For IHRL courts' nature and framework see; Rhona K M Smith, *Textbook on International Human Rights* (6th edn., OUP, 2014) 106.

¹⁵⁹ See (n 132).

¹⁶⁰ Art. 22 (2) of the ICCS stated, of judges' interpretation, that in the “case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted”.

¹⁶¹ *Prosecutor v. Duško Tadić*, TC judgment, IT-94-1-T, 7 May 1997, para 301. See also *Čelebići*, where this was considered as a general principle of criminal law. *Čelebići* TC, para 450.

¹⁶² *Prosecutor v. Miroslav Kvočka et al.*, TC decision on defence preliminary motions on the form of the indictment, IT-98-30/1, 12 April 1999, para 17.

In other words, duties to specify and ensure fair trial shifted from the judges to the prosecutor at the indictment. Thus, the principle of interpretation was used frequently for law-making rather than for clarifying the already existing law.¹⁶³

Interestingly, in *Krnojelac*, the prosecution, as a result of the above justification, claimed that “it can provide no better particulars”.¹⁶⁴ The Prosecutor argued that adequacy of information is limited only to “whether or not the accused can prepare his defence”.¹⁶⁵ This approach, as Jordash and Coughlan contended, is more of a ‘slippery slope’ approach,¹⁶⁶ as not only does it limit the fair trial requirement to this single element of preparing the defence, but also it limits this right to the presentation of information in the indictment alone. It ignores the fact that implementing this right to be informed at ICL is (a) a duty placed on the judges¹⁶⁷; and (b) required throughout the proceedings.¹⁶⁸

This approach limited the *ad hoc* tribunals’ implementation of this right to the indictment alone, although the tribunals recognised that the nature and cause of charges required a wider scope of information to be supplied to the defendant.¹⁶⁹ This was once again justified by the judges, in that the only parameter was the accused’s ability to prepare his defence, but not his right to a fair trial.

In fact, the *ad hoc* tribunals re-characterised the right to be informed of the nature of the charge(s), limiting it to the indictment. As a result, the subsequent alleged development of this right¹⁷⁰ was actually improving only the standard of information at the indictment and not improving the implementation of this right to be informed of the nature of the charge(s). In *Kupreškić*, for instance, the defendant appealed against convictions based on an ambiguous amended

¹⁶³ This is the core problem about the vagueness of CR. See *in far* (n 166).

¹⁶⁴ *Prosecutor v. Milorad Krnojelac*, TC decision on preliminary motion on form of amended indictment, IT-97-25-PT, 11 February 2000, para 37.

¹⁶⁵ *Prosecutor v. Tihomir Blaškić*, TC decision on the defence motion to dismiss the indictment, based upon defects in the form thereof (Vagueness/Lack of adequate notice of charges), IT-95-14, 4 April 1997, para 32.

¹⁶⁶ Wayne Jordash and John Coughlan, ‘The Right to be Informed of the Nature and Cause of the Charges: A Potentially Formidable Jurisprudential Legacy’ in Shane Darcy and Joseph Powderly, *Judicial Creativity at the International Criminal Tribunals* (OUP, 2010) 289. Although they argued that the recent case-law indicates a different approach to improve this right, it obviously was limited to the indictment only and failed to recognise this right as a separate element of the right to a fair trial.

¹⁶⁷ *Supra* (n 132).

¹⁶⁸ *Supra* (nn 133-137).

¹⁶⁹ *Blaškić* TC decision (n 165) para 11.

¹⁷⁰ Jordash and Coughlan (n 166).

indictment and the AC therefore stated the indictment should be consistent with the accused rights' to be informed of the nature of the charge and this:-

“...translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence”.¹⁷¹

This conclusion was, however, limited to the standard of specificity of the *indictment*. Although it considered the right to be informed as a requirement for a fair trial, this was limited only to the Prosecutor at the indictment. Most importantly, the AC shifted the duty from all Chambers – as imposed by the Statute – to only the prosecution.¹⁷² Thus, although the *ad hoc* tribunals declared their consideration of HRL through judgment,¹⁷³ with regard to the right to be informed of the nature of the charge(s) the *ad hoc* tribunals rather followed the IMT's approach, which was merely procedural and formal.¹⁷⁴

C) The application between international criminal courts:-

The ICC – discussed below - is clearly the superior judicial body with the highest standard of fairness requirements, followed by the ICTY/R and then, lastly, the SCSL, as being the lowest regarding the requirement, obligation and standard of fairness.¹⁷⁵ The ICTY/R, regarding the right to be informed, limited it to the indictment, therefore: it stated that the “question is not whether particular words have been used, but whether an accused has been meaningfully “informed of the nature of the charges” so as to be able to prepare an effective defence”.¹⁷⁶ However, this right practically, at the ICTY/R is limited to the prosecution at the indictment, for the reason of preparing the defence.

¹⁷¹ *Kupreškić* AC, para 88.

¹⁷² *Ibid.*

¹⁷³ *Supra* (n 130) *et seq.*

¹⁷⁴ *Supra* (nn 126-127).

¹⁷⁵ With regard to the SCSL practice see, for example, Cecily Rose, ‘Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes’, (2009) 7 JICJ 353. In this, Rose argued that the accused's rights had been violated, as the information in the indictments was neither specific nor in accordance with the rights of the accused.

¹⁷⁶ *Prosecutor v. Sylvestre Gacumbitsi*, AC Judgment, ICTR-2001-64-A, 7 July 2006, para 165.

It clearly disregarded the actual purpose of this right as a separate component of the right to a fair trial, rendering it a right subsidiary to that to prepare a defence: that is contrary to the *ad hoc* tribunals' statutes.¹⁷⁷ The SCSL, as a result of the low standard of fairness provided by its Statute, was criticised for that standard, specifically with regard to its interpretation of the right to be informed of the nature of the charge(s).¹⁷⁸ Although the *ad hoc* tribunals limited this right to the indictment, the SCSL went beyond this, by allowing the Prosecutor to present indictments with a lower standard of specificity than had other tribunals.

For example, the SCSL examined briefly the *Sesay* Motion about: "(A) lack of specificity regarding different forms of individual criminal responsibility" and "(B) lack of specificity regarding various counts".¹⁷⁹ Despite the fact that the indictment was presented with a lower degree of adequacy than was the case in other tribunals,¹⁸⁰ the SCSL rejected the defence motion, permitting the prosecution to provide a lower degree of information and concluded that this was "in substantial compliance with [the right to be informed of the nature and cause]".¹⁸¹ While the ICTY/R regarded the purpose of this right as being subsidiary to that of the right to prepare a defence, the SCSL – by rejecting the defence motion - rendered the right to a fair trial inaccessible for the accused.

The ICC implementation of the right to be informed required a higher level of fairness. This can be seen throughout the ICC informative Statute, which provided for a wider scope of protection regarding fair trial. The Statute first obliged all Chambers to ensure fair trial.¹⁸² It also emphasised that judges' directions at a trial should be carried out so as to ensure fairness.¹⁸³ Most importantly, under Art. 67, an accused is entitled to a fair trial; therefore, the

¹⁷⁷ According to the statutes, the right to be informed is a separate component. *Supra* (n 133).

¹⁷⁸ See for instance, Wayne Jordash and Scott Martin, 'Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court of Sierra Leone', (2010) 23 LJIL 585.

¹⁷⁹ *Prosecutor v. Issa Hassan Sesay*, TC Decision and order on defence preliminary motion for defects in the form of the indictment, SCSL-2003-05-PT, 13 October 2003, para 2.

¹⁸⁰ *Prosecutor v. Sesay, Kallon and Gbao*, Corrected Amended Consolidated Indictment, SCSL-2004-15-PT, 2 August 2006. See also Wayne Jordash and Scott Martin, 'How the Approach to JCE in Taylor and the RUF Case Undermined the Demand of Justice at the Special Court of Sierra Leone' in Charles Chernor Jalloh (ed.), *The Sierra Leone Special Court and its Legacy: The Impact of Africa and International Criminal Law* (CUP, 2014) 101-103.

¹⁸¹ *Sesay* TC Decision, para 34.

¹⁸² ICCS, Art. 64 (2) and (3) (a).

¹⁸³ ICCS, Art. 64 (8) (b).

accused is to “be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks”.¹⁸⁴

The formulation of this right to information in the ICCS differs from that at the other international criminal tribunals. It seems that the drafters desired more clarity of what it is to which the accused is actually entitled. For instance, some of the international instruments’ formulations indicated that the language is more important than the substance of the information provided.¹⁸⁵ According to the ICC, the nature, cause and content of the charge(s) are to be clearly supplied in detail to the defendant. This information about the nature, cause and content should be in a language the defendant understands (and speaks). It is, therefore, clear that the right is to know the nature and cause of the charge against the defendant; it thus added the content, to indicate higher specificity as a requirement.

Nevertheless, the language of the information, rather than the actual substance of information, still attracts the commentators’ attention.¹⁸⁶ This most probably occurred as a result of limiting the scope of this in the *ad hoc* tribunals’ practice.¹⁸⁷ The ICC’s practice, however, seems more to consider the actual right as being information about the nature, cause and content of the charge. In spite of some ICC cases where the language was the important issue,¹⁸⁸ the nature and cause of the charge was a major factor in others.

In *Lubanga*, the TC – relying on Regulation 55 –¹⁸⁹allowed¹⁹⁰ the re-characterisation of the charges against the accused following the prosecution’s allegation, permitting the victims’ legal representative to participate.¹⁹¹ Nevertheless, Judge Fulford dissented and “questioned whether any modification

¹⁸⁴ ICCS, Art. 67 (1) (a).

¹⁸⁵ *Supra* (nn 70 and 133).

¹⁸⁶ Schabas (n 31) 802-804. See also William A. Schabas, ‘Article 67: Right of the accused’ in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (C.H,Beck . Hart. Nomos 2008) 1256-7.

¹⁸⁷ *Ibid*; see for example, Meester, Pitcher, Rastan and Sluiter after suggested that this right was inconsistently implemented in ICL, they limited their argued to the right to have an interpreter. K Meester *et al.*, ‘Investigation, Coercive Measures, Arrest, and Surrender’ in Hakan Friman *et al.*, *International Criminal Procedure: Rules and Principles* (OUP 2013) 252.

¹⁸⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Pre-TC-I, Decision on the Request of the Defence of 3 and 4 July 2006, 5-6.

¹⁸⁹ ICC, Regulations of the Court, ICC-BD/01-01-04, 26 May 2004, Regulation 55 concerning the “authority of the chamber to modify the legal characterisation of facts”.

¹⁹⁰ *Prosecutor v. Thomas Lubanga Dyilo*, AC Judgment, ICC-01/04-01/06 OA 15 OA16, 8 December 2009, para 42 .

¹⁹¹ *Ibid* para 2 *et seq.*

of the legal characterisation would not automatically lead to an “amendment” of the charges”.¹⁹²

The AC concluded that, although the right to be informed of the nature and cause of the accusation “does not preclude the possibility that there may be a change in the legal characterisation of facts in the course of the trial”, this “must not render the trial unfair”.¹⁹³ Even though this was partly - but not only - related to the indictment, the ICC implemented this right as a separate component of fair trial. This alone illustrates the difference between the ICC’s and the *ad hoc* tribunals’ implementation.¹⁹⁴ Analogically, it can be concluded that the re-characterisation of CR through the *ad hoc* tribunals’ judgments violated the rights of the accused.

D) The inconsistency of CR as excuse for the violations:-

As discussed above, judges at the *ad hoc* tribunals shifted their obligation to ensure fair trial, to being the prosecution’s duty only and limited to the information provided at the indictment. It should be noted that the SCSL lacked the imposition of any duty upon judges to ensure fairness in all Chambers;¹⁹⁵ its standard of fairness therefore appeared lower than of that at the ICTY and ICTR.¹⁹⁶ The ICTR, in *Semanza*, stated therefore that this right is guaranteed to every accused, but limited it to the indictment,¹⁹⁷ stating that:-

“The fundamental question in determining whether an indictment was pleaded with sufficient particularity is whether an accused had enough detail *to prepare his defence*”.¹⁹⁸

The *ad hoc* tribunals thus undermined the right to be informed as a separate component of the right to a fair trial.

¹⁹² *Ibid* para 46.

¹⁹³ *Ibid* paras 84-85.

¹⁹⁴ *Supra* (n 175) *et seq.*

¹⁹⁵ No equivalent provision is in the SCSL Statute.

¹⁹⁶ See *Jordash and Coughlan* (n 166) 310.

¹⁹⁷ *Prosecutor v. Laurent Semanza*, TC Judgment, ICTR-97-20-T, 15 May 2003, para 42.

¹⁹⁸ *Semanza* TC, para 44.

This had an impact on the right of the accused to know the nature of the accusation with regard to an allegation based on CR. This led the *Blaškić* AC to suggest that the *ad hoc* tribunals' jurisprudence distinguished the "level of specificity required when pleading" to: (a) direct and (b) indirect participation in crimes under Art. 7 (1); and (c) CR under Art. 7 (3).¹⁹⁹ Excluding CR, the AC stated that, for the modes of responsibility under Art. 7 (1), a certain level of specificity "may be required to avoid ambiguity with respect to the exact nature and cause of the charges against the accused, and to enable the accused to effectively and efficiently prepare his defence".²⁰⁰

6. Conclusion:-

This chapter has discussed the potential impact of the inconsistent nature and requirements of CR on the accused person's rights in criminal proceedings. It examined the two principles that would be most likely to be affected by such inconsistency: (a) the standard of specificity of the information available to the accused and (b) the right to be informed about the nature of the accusation(s). It observed that IHRL, particularly through the ECtHR, has influenced ICL, through promoting the standard of fair trial. International criminal courts and tribunals endorsed this influence and subscribed initially to that standard in their application. This chapter found, however, that the *ad hoc* tribunals' implementation was inconsistent with that initial endorsement.

It has argued that a nexus exists between CR, the specificity requirements and the right to be informed about the nature of accusation(s). In that sense, those three principles are intersected by the information which becomes available to the accused. The vagueness, or ambiguity, of, more precisely, the essence of information impacted on the fairness standard of those trials. In fact, the inconsistent interpretations of these rights, together with the inconsistently implemented CR, eroded such entitlements and eventually precluded the accused from securing his right to a fair trial.

¹⁹⁹ *Blaškić* AC, para 211.

²⁰⁰ *Blaškić* AC, para 212.

It has found that not only is the right to be informed of the nature of the charge(s) limited to the initial indictment, but also the specificity level of information was lower, especially for the CR doctrine, at the *ad hoc* tribunals. Note that CR was re-characterised through judges' interpretations during their judgments. Thus it should have been the CR, re-formed inconsistently through judgments, that required a higher level of specificity instead. As a result, however, of (a) the lower degree of specificity regarding CR; (b) limiting the right to be informed to the indictment only; and (c) shifting the duty of ensuring fairness from judges to the Prosecutor alone, the nature of CR remains ambiguous.

The inconsistent interpretation and implementation of the principle of specificity and the right to be informed of the nature of accusations, resulted in precluding the defendant from securing his rights. The re-characterisation of CR by the *ad hoc* tribunals would have been recognised as a violation of the rights of the accused, had the interpretation of these two rights been consistent with their actual purpose and the initial subscription to the practice of the ECtHR.

The legitimacy of the CR interpretations by the *ad hoc* tribunals is therefore questionable. This inconsistency resulted from judges interpreting the nature of CR on the basis of the theory of liability for omission, most probably based on national law systems rather than its creation under ICL. The following chapter examines the extent of differences between national systems regarding this theory, which attracts the attention of judges and has thus affected the nature of CR.

Part III

The Future of CR as a Sustainable Form of Criminal Responsibility in ICL

In assessing the adequacy and legitimacy of an interpretation process, the resultant rule should be weight generally against two factors: (a) the ability for such a result to be consistently implemented as a sustainable and constant rule; and (b) the consistency of the method adopted for reaching or finding such a result. Neither (a) nor (b) was satisfied during the interpretation process of the nature of CR or its requirements in the *ad hoc* tribunals. The ICTY was given pride of place as a result of being practically the superior authority for developing the law of CR for other *ad hoc* tribunals. The preceding discussions found that the rationale and purposes of establishing these requirements were inconsistently interpreted, as a result these requirements implementation was problematic.

Providing these inconsistencies in the nature, requirements and the process of interpretation, paved the way for examining the likelihood for violating the accused rights to a fair trial as a result. In this it examined the standard of specificity required in the applicable law as well as the consistency of the information provided to the accused person about the nature of accusation against him. It found accordingly that the right of the accused person to a fair trial was jeopardised as a result of these inconsistencies in interpreting and implementing CR.

Part III dissects the essence of the problem in order to prospect CR as a sustainable form of criminal responsibility under ICL. In this it sheds light on philosophical difficulties regarding the liability for omission as a theory under relevant national criminal law systems. In this case, it examines the extent of these difficulties in conjunction with the nature of CR. Therefore, this Part could be regarded as the conclusion of this thesis as it sums up the key problem for the ongoing debates about the nature of criminal liability under CR. It then advocates CR as identified throughout this study of being threefold. It finally ends with the conclusion remarks as a summary of this thesis's findings.

VII. Chapter Seven

The future of CR as an operative form of liability

As seen above, the complexity of the problems of command responsibility (CR) resulted from a number of issues. First, there is the divergence between the customary nature of CR and the ambiguous codifications of the 1977 Additional Protocol I (API).¹ This resulted, secondly, in the inconsistent interpretation and continual re-characterising of CR by judges of international criminal courts and tribunals.² In the third place, there is the problem of – indirectly - violating human rights principles in respect of the accused.³

The core issue, however, that causes the current ambiguity of CR is isolating, or disregarding, its true nature. This true nature is complex because it is not rooted in the concept of ‘responsible command’ alone. It originated more precisely from essentially the *duty, responsibility and leadership* values (the personal obligations), forming the “values element” that derived from military society. These two elements, together with the crystallisation of criminal responsibility as a third element, constituted the contemporary CR in ICL.⁴

These three (values, custom and criminal) elements are the reason for regarding CR as having a *sui generis* nature.⁵ However, neither the *ad hoc* tribunals nor the ICC recognised explicitly its true nature, most probably because it was not codified – although it was by implication discussed - in the API.⁶

This chapter, therefore, will verify this theory of the “threefold nature” application, aiming prospectively to resolve the inconsistent application of CR. It discusses the criminal theory of liability for omission as the origin of CR since its creation. It aims to show why the *Halilović* interpretation of the nature of CR, although based on liability for omission, was problematic and changed the nature

¹ See Chapter 3. The ambiguity partially resulted from the fact that IHL lacks an authoritative body for interpreting its rules, which affected CR and its customary nature in ICL. *Infra* (n 164) *et seq.*

² See the discussions in Chapter 4.

³ The irony is that the reason for the *ad hoc* tribunals’ re-characterisation of CR seems, in part, to be motivated by the desire to avoid repeating the violation of the human rights of the accused in *Yamashita* and the IMTs’ trials, which had led to the *ad hoc* tribunals violating human rights. *Supra*, Chapters 2 & 6.

⁴ Lippman M, ‘Humanitarian Law: the Uncertain Contours of Command Responsibility’ (2002) 9 *Tulsa J. Comp. & Int’l L.* 1, 93.

⁵ CR is referred to as a *sui generis* doctrine but for different reasons. See Meloni (2010) 136.

⁶ The API codified the duties and some aspects of the concept of CR, but laid down nothing regarding the nature of the responsibility. See the discussions in chapter 3.

of CR. Liability for omission was discussed during the drafting of CR by the API but, because of the differences between national criminal law traditions, this theory of omission was controversial.⁷ The *ad hoc* tribunals' judges tended to justify the nature of CR by – implicitly or explicitly – resorting to domestic law.

However, judges overlooked the fact that CR was an ICL creation and is thus distinguishable from other traditional modes of liability.⁸ The first part of this chapter therefore discusses – for the purpose of CR - aspects of liability for omission as a criminal theory, where some of CR's characteristics are rooted.⁹ In the light of this, the second part identifies and suggests a solution, through incorporating the values elements for adequate interpretation and consistent implementation of the nature of CR as a *sui generis* mode of liability.

1. Omission and Command Responsibility:-

Some national law traditions recognised failure to act as a possible basis of liability, while other systems did not. These differences were behind the debate and difficulty in codifying CR, which was settled eventually through referring to military values (or military basic principles), *Yamashita* and the IMT's trials as the customary precedents.¹⁰ Nevertheless, domestic law theories of liability for omission attract judges' attention when interpreting the nature of CR; and so liability for omission is discussed below.

Omission as a criminal law theory is generally the result of failing to carry out an existing *duty to act*, which is the core of the liability for an omission.¹¹ The nature of this criminal responsibility, therefore, results from a *failure to act*. This nature is of undisputed importance for both national and international criminal law. Whilst CR is the only statutory form of omission under ICL, omission in

⁷ See the discussions in chapter 4.

⁸ CR is at least the only explicit form of liability for omission in ICL. E Sliedregt, *Individual criminal responsibility in international criminal law* (OUP 2012) 54.

⁹ Mainly in the common and civil law traditions, as they are the major – if not the only - interactive legal systems at ICL. *Čelebići* TC, para 159.

¹⁰ The differences between criminal laws at the API drafting. See (Chapter 4 n 111).

¹¹ See Larry Alexander, 'Criminal Liability for Omission: An Inventory of Issues' in Stephen Shute and A P Simester (eds.), *Criminal Law Theory* (OUP 2002) 121-2; see also Catherine Elliott, *French Criminal Law* (Willan Publishing, 2001) 60. This is also the interpretation of international criminal courts and tribunals. *Bemba*, para 405 *Čelebići* TC, para 334.

national criminal law can occur in one of two forms: (a) the omission is *per se* an offence;¹² (b) the omission is a form of responsibility for the resultant crime.

In both common and civil law systems¹³ the first is known as the offence of omission; while the liability for the resultant crime by omission is widely known as “commission by omission”.¹⁴ Although the latter is the focus of this study - because CR is a mode of liability for the crime resulting from the omission - the ‘offence of omission’ will be discussed when relevant to illustrate differences between systems which might have influenced judges’ interpretation and caused the inconsistent implementation of CR.¹⁵

A) The philosophy and the failure to act:-

In the traditional philosophy of criminal responsibility, morality is deemed to be the determining element for criminality. According to Grotius, “[t]he law of nature is a right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of *moral baseness* or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature...”.¹⁶ This is not limited to only *an act* as it is common - when establishing a general law – to focus on the “active [an act] rather than the passive [an omission] conduct”¹⁷; hence, Grotius in his philosophy focused on the active conduct, which does not necessarily exclude omission as a fundamental mode of criminal liability.

Most importantly, Grotius emphasised that what renders the conduct right or wrong is dependent on answering how moral or immoral it can be regarded as being.¹⁸ But, one may argue that morality varies, as in reality there are different levels of moral conduct, even though it is understandable that only harmful

¹² The law usually specifies the omission as a crime and individuals are punished for the omission, which is not applicable in ICL. See Michael Duttwiler, ‘Liability for Omission in International Criminal Law’ (2006) 6 Int’l Crim. L. Rev. 1, 4-5 and 7-8.

¹³ *Čelebići* TC, para 159; see also (Chapter 4 n 19) *et seq.*

¹⁴ Commission by omission is also known as improper omission. See Kai Ambos, *Treaties on International Criminal Law, Volume I: Foundations and General Part* (OUP 2013) 181.

¹⁵ *Infra* (n 34) *et seq.*

¹⁶ Stephen C Neff, *Hugo Grotius on The Law of War and Peace* (CUP 2012) 28-9.

¹⁷ Robert Sullivan, ‘Conduct and Complicity: Liability based on Omission and Risk’ (2008) 39 *Cambrian L. Rev.* 60.

¹⁸ There is unity that morally wrong behaviour is reprehensible, yet it is debatable whether to concede immorality as a principle of criminality over that of harm caused. See Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn., OUP 2013) 35-8.

morality is relevant here.¹⁹ Nevertheless, these moral values are distinctive and commonly determined by societies rather than individuals.²⁰ Laws may thus vary from one society - or one national criminal law - to another as a result of the variation of these societies' values.²¹

Lord Devlin generally viewed those moral values as the most significant – if not the only – element for the enforcement of law.²² Hart, although he argued for a different application of moral values, emphasised that the development of the law was “influenced by morals”.²³ In contemporary philosophies of criminal law moral values are, also, essential for distinguishing between right and wrong when criminalising conduct. In this, Duff stated that:-

“Some moral considerations are action-guiding. They generate direct reasons for action; they concern what, as moral agents, we may, must, should, or ought to do (or not to do); they can figure in the practical reasoning of a moral agent who asks herself ‘What am I to do?’... Such moral considerations identify actions as right, or wrong, or permissible...”.²⁴

Moore also emphasised that in criminal responsibility, morality “plays the crucial justificatory role”;²⁵ accordingly, he summarised his philosophy of criminal responsibility by stating that:-

“Punishing those who deserve it is good and is the distinctive good that gives the essence, and defines the borders, of criminal law as an area of law. Such function demands that those subject to punishment: (1) have done something *morally wrong*, and (2) did so in a culpable way”.²⁶

¹⁹ Jonathan Bennett, *The Act Itself* (OUP 1995) 22. For example, homosexual conducts were criminal offences under the German Criminal Law before 1969. One of the reasons for decriminalising homosexual conducts was because there was no harm caused by this conduct to others (i.e. no harmful immorality). See Carl Constantin Lauterwein, *The Limit of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing* (Routledge 2016) 11.

²⁰ Catherine Elliott, ‘Liability for Manslaughter by Omission: Don’t Let the Baby Drown!’ (2010) 74 J. Crim. L. 163.

²¹ Moral values are the foundation not only of criminal but also of *social* justice. See Christopher R Williams and Bruce A Arrigo, *Ethics, Crime, and Criminal Justice* (Pearson Prentice Hall 2008) 16-7. See also Elies Sliedregt, ‘Criminal Responsibility in International Law: Liability Shaped by Policy Goals and Moral Outrage’ (2006) 14 Eur. J. Crim. L. & Crim. Just. 81, 113.

²² Lord Devlin argued for the enforcement of law based on the immorality of conduct to a society. However, he eventually linked his argument with religious principles as a source of morality and law. Patrick Devlin, *The Enforcement of Morals* (OUP 1965) 24-5.

²³ H Hart, *Law, Liberty and Morality* (OUP 1963) 1.

²⁴ R A Duff, ‘Rule-Violations and Wrongdoings’ in Stephen Shute and A P Simester (eds.), *Criminal Law Theory* (OUP 2002) 47.

²⁵ Michael S Moore, *Placing Blame: A Theory of the Criminal Law* (OUP 1997) 105.

²⁶ *Ibid* 79.

Tadros, likewise, stated that - in criminal responsibility - “[c]entral to the idea of criminal conviction is that the agent is *morally criticised* in a public forum for performing the act in question”.²⁷

Note that Moore argued – in his most controversial argument²⁸ – that omission cannot cause harm.²⁹ Tadros argued that, on the contrary, such an assumption is insufficient, as it confuses the *failure to act* (the core issue in liability for omission) with *non-action*, concluding that “[w]here one has a duty to act, where there is no other morally legitimate thing that one could have done, failing to act is sufficiently culpable to warrant the imposition of criminal responsibility”.³⁰

These differences in the philosophical sphere are not isolated from the ongoing problem of CR. The following scenario may illustrate one aspect of such a problem for CR that: (a) the true nature of CR holds the commander responsible for crimes resulting from his *failure to act*, which encompasses his *failure* to control and the subsidiary duty to prevent a crime;³¹ (b) CR at the *ad hoc* tribunals holds the commander responsible only for failing to prevent (that is, only a subsidiary duty), restricting the implementation of CR.³² This is akin to the “commission by omission” in civil law, where the focus will be on what type of duty was legally established, rather than the underlying crime as the result of the failure to act, discussed below.³³

B) Omission and differences of rationale:-

The differences between societies regarding their values (also known as basic principles) resulted in different application and interpretation of the liability

²⁷ Victor Tadros, *Criminal Responsibility* (OUP 2005) 71.

²⁸ F M Kamm, ‘Action, Omission, and The Stringency of Duties’ (1994) 142 U. Pa. L. Rev. 1493.

²⁹ Michael S Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (OUP 1993) 54-9. Moore defended his argument, responding to the major criticisms: Moore, *Placing Blame* (n 25) 333-399.

³⁰ Tadros (n 27) 207. *Cf.* Ambos (n 14) 181. Ambos defines omission as “non-action, absence of action, failure to act”; and he does not differentiate between them. Note that non-action does not imply a form of accountability.

³¹ See Separate Opinion of Judge Kuniko Ozaki, *Bemba* TCIII, 21 March 2016, paras 15-7.

³² See for example, in *Karadžić* the tribunal first distinguished between the duty to prevent and the duty to punish in order to find his responsibility as for failure to prevent of failure to punish. *Karadžić*, TC, 24 March 2016, paras 589 and 5833.

³³ *Cf.* Michael Bohlander, *Principles of German Criminal Law* (Hart Publishing 2009) 40-41.

for omission as a criminal theory. This can be illustrated through the classic example of ‘a stranger walking past a drowning baby’ and especially how the common law system views the death of the baby (no responsibility because of individuals’ liberty to act when there is no relationship) in comparison with a civil law system (criminal responsibility for failure to rescue as a general duty).³⁴

The practice of common law regarding the liability for the drowning baby is debatable, as some common law lawyers argued that criminal liability for an omission should be applied in “line with society’s moral values”.³⁵ Others argued that this would be against the basic principle of individual liberty,³⁶ which is a higher value recognised by society. Note that such a debate is within a single society – the common law system. While both societies – common and civil law traditions - are in favour of promoting their society’s values, their conclusions differ regarding the above example of a drowning baby. This could be attributed to their differences in prioritising those values and the associated duties and responsibilities accordingly.

Note that, on the one hand, at the preparatory discussion on the drafting of CR in the API was influenced by whether participant delegations’ original national system recognised the liability of omission, which was resolved eventually by resorting to the customary precedents.³⁷ On the other, CR was interpreted by the judges at the *ad hoc* tribunals and those judges shared either the view of common law or that of civil law when interpreting CR. In common law, for example, there are only two types of omission: (a) commission by omission; and (b) offences of omission. In civil law, however, a third category exists, for failure to act in some special situations.³⁸ That may be a reason for the recent suggestions by some scholars that CR should be sub-divided into at least three categories.³⁹

³⁴ Elliott (n 20). Traditionally, common law in such a situation will find no reason for liability, as the stranger was under no duty to act, whereas under civil law there is a general duty to act or rescue: as a result the stranger can be held liable for the baby’s death. This general *duty to rescue* resulted from a *moral value (or requirement to act)*.

³⁵ Elliott (n 20) 179.

³⁶ *Ibid* 163-4; see also Bohlander (n 33) 40; Not that individuals’ autonomy as an element of the concept of liberty was originally considered a moral value of society, which then the supporters of Hart – opponent of Lord Devlin – claimed to be of more importance than other moral values. See John Stuart Mill, *On Liberty* (first published 1851, CUP 2011) 7-8; see also Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn., OUP 2013) 35.

³⁷ See (Chapter 4 nn 111) *et seq.*

³⁸ Jacobo Dopico Gómez-Aller, ‘Criminal Omission: a European Perspective’ (2008) 11 *New Crim. L. Rev.* 419, 420-421. This is in line with the Spanish Penal Code, which consider a third form of liability for omission of medium gravity. Gómez-Aller, 448.

³⁹ *Cf. infra* (nn 82-92).

C) Responsibilities under the liability for omission:-

Omission is a *failure* to act, rather than a *non-action*.⁴⁰ Theoretically, an accused is punished for action, but in some cases the accused “person bears moral responsibility for creating” the criminal risk passively.⁴¹ Accordingly, common law tradition requires (for commission by omission) a specific form of *relationship* between the party failing in his duty and the party harmed thereby. Based on this relationship, the former needs to be under a specific duty to act; and the punishment is for the resultant, but no punishment without a specific duty in both forms: commission by omission and proper omission.⁴²

Whereas, in the civil law tradition, such a duty can be imposed as a *general* duty to act, even when there is no relationship between those parties, but the punishment is for the failure to act and not for the resultant crime (offences of omission).⁴³ Nevertheless, Smith, for example, suggested that, in common law societies, in the ‘drowning baby’ instance, “the bystander ...may well be morally rebuked”, but not criminally responsible for the omission, as there is no general duty to act or rescue in common law.⁴⁴

A general duty to act (also known as the duty to aid or rescue)⁴⁵ is imposed on individuals in the civil law tradition, even when there is no relationship between

⁴⁰ Tadros (n 27); see also Nersessian, (Chapter 5 n 52) 88-9.

⁴¹ Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (OUP 2011) 129.

⁴² A specific duty to act is required for both forms of the liability for omission; but commission by omission in common law tradition means that the offender as a result of his omission will be held responsible for the resultant crime. The accused is, therefore, punished for the occurrence of the harm and not for his omission. Thus, when comparing this approach to the French, which imposes penalties only for the omission *per se*, the “French law is [therefore] less severe”. See John Bell, ‘Criminal Law’ in Johan Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law* (OUP 2008) 251-261.

⁴³ Jonathan Herring, *Criminal Law Text, Cases, and Materials* (6th. edn. OUP 2014) 71 *et seq.*; see also, regarding relationships and duties in civil law, Bohlander (n 33) 42.

⁴⁴ Alexander McCall Smith, ‘The Duty to Rescue and the Common Law’ in Michael A Menlowe and Alexander McCall Smith (eds.), *The Duty to Rescue: The Jurisprudence of Aid* (Dartmouth Publishing 1993) 55-6.

⁴⁵ The German Criminal Code, s.323c (Failure to Render Assistance): “Who does not render assistance in the case of a misadventure, common danger or disaster, although it is required and can be expected of him under the circumstances, especially, if assistance is possible without substantial danger to himself and without violation of other important duties, will be punished with imprisonment of not more than one year or a fine”.

The French Penal Code, Art. 223-6, “Anyone who, being able to prevent by immediate action a felony or misdemeanor against the bodily integrity of a person, without risk to himself or to third parties, wilfully abstains from doing so, is punished by five years’ imprisonment and a fine of € 75,000. The same penalties apply to anyone who wilfully fails to offer assistance, to a person in danger, which he could himself provide without risk to himself or to third parties, or by initiating rescue operations”.

The French Penal Code, Art. 223-7, “Anyone who voluntarily abstains from taking or initiating measures, which involve no risk to himself or third parties, to combat a natural disaster likely to endanger the safety of others is punished by two years’ imprisonment and a fine of € 30,000”.; see

the parties.⁴⁶ This ‘general duty to act’ is derived fundamentally from society’s values and construed as a duty to act positively, even though it is recognised to be deduced from the religious principle of “Good Samaritan” law.⁴⁷

Generally, liability for omission as *per se* an offence depends fundamentally on society’s values.⁴⁸ Although common law rejects the general duty to act which informs offences of omission, the liability for “commission by omission” seems to be more consistent in the common law than in the civil law tradition. In civil law, countries tend to adopt either the German or the French approach regarding commission by omission.⁴⁹

In French criminal law, only the omission *per se* is criminalised: the Criminal Code makes the conduct (the omission itself) punishable, no matter what the result of the failure to act.⁵⁰ Therefore, commission by omission is not applicable as, under the Criminal Code, there is no provision for such a mode of liability.⁵¹ The main reason for this interpretation is that *omission* cannot be analogous to *commission*: therefore, the French Criminal Code does not endorse this liability.⁵²

In Germany, however, the Criminal Code provides for liability for “commission by omission” and states that:-

“Whosoever fails to avert a result which is an element of a criminal provision shall only be liable under this law if he is responsible under law to ensure that the result does not occur, and if the omission is equivalent to

also Markus D Dubber and Tatjana Hörnle, *Criminal Law: A Comparative Approach* (OUP 2014) 218-9.

⁴⁶ *Ibid* 207.

⁴⁷ It is more accurate – in my opinion - to regard it as a moral value, even though it could be argued that it evolved from or was enhanced through religious principles such as the Good Samaritan. See Kathleen M Ridolfi, ‘Law, Ethics, and Good Samaritan: Should there be a Duty to Rescue?’ (2000) 40 Santa Clara L. Rev. 957; see also Ernest J Weinrib, ‘Good Samaritan Law’ in Gerald Dworkin (ed.), *Morality, Harm, and the Law* (Westview Press 1994) 134-144; see also Joel Feinberg, *The Moral Limits of the Criminal Law: Volume 1, Harm to Others* (OUP 1984) 126 *et seq.*

⁴⁸ R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007) 108-9.

⁴⁹ Sarah Mitchell and Emilia Powell, *Domestic Law Goes Global: Legal Traditions and International Courts* (CUP 2011) 22-23.

⁵⁰ Elliott (n 11) 60-1; see also Catherine Elliott, ‘France’ in Kevin Heller and Markus Dubber (eds), *The Hand Book of Comparative Criminal Law* (SUP 2011) 215-6.

⁵¹ George A Bermann and Etienne Picard, *Introduction to French Law* (Wolters Kluwer 2008) 112-3.

⁵² *Ibid.*

the realisation of the statutory elements of the offence through a positive act”.⁵³

Despite the complex formulation of this provision, the German law in practice is focused on identifying a special duty known as the *guarantor duty*.⁵⁴ This provision does not explain in what circumstances the accused will be responsible by omission (as requirements), just as if he had actively committed the crime which occurred as a consequence of his omission.⁵⁵ It is argued, therefore, that this might enable judges to decide when this omission is equal to action, but this could be seen as “a transfer of legislative functions to [judges]”.⁵⁶

Accordingly, judges might incline towards creating offences that are not, *per se*, within the criminal code, although the element of the crime is already defined under the legislation. Through the application of this provision, therefore, an accused might be responsible for the result but generally would be punished only for his omission, judges thus tending to impose (too) lenient punishment.⁵⁷ In other words, “commission by omission” – as in common law, which punishes the result and not the omission – is not identically recognised in civil law practice.⁵⁸

This practice suggests that this form is “less reprehensible than actively” perpetrating crimes,⁵⁹ but this does not fully reflect the purpose of commission by omission. This explains the lenient sentencing of CR by the *ad hoc* tribunals.⁶⁰ In this Judges Pocar and Liu contended that CR “is no less culpable than [other]

⁵³ The German Criminal Code, Section 13 (1). This liability is also known as “the improper omission or the derivative omission offences”. See Bohlander (n 33) 40-1; see also Dubber and Hörnle (n 45) 213; also for official translation see < https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html > accessed 14/2/2016.

⁵⁴ However, this is problematic in theory. For example, “the father whose child drowns is guilty of murder if he fails to [act]” but a non-guarantor will be guilty of “Failure to Render Assistance” pursuant to s.323c. See Bermann and Picard (n 51).

⁵⁵ This could potentially cause a dispute if it is compared with the German Criminal Code, s.323c (Failure to Render Assistance); see also Dubber and Hörnle (n 45) 219.

⁵⁶ Gómez-Aller (n 38) 447.

⁵⁷ See Jacobo Dopico Gómez-Aller (n 38) 447-9. International criminal courts –especially the *ad hoc* tribunals – are criticised for their leniency regarding sentencing. This divergence between common/civil laws can be a reason for this leniency. Cf. Carsten Stahn, *The Law and Practice of the International Criminal Court* (OUP 2015) 1263-4; Cf. also Silvia D’Ascoli, ‘Reconciliation and Sentencing in the Practice of the *ad hoc* Tribunals’ in William A Schabas and others (eds.), *The Ashgate Research Companion to International Criminal Law* (Ashgate 2013) 307 *et seq.*

⁵⁸ Jesús-María Silva Sánchez, ‘Criminal Omissions: Some Relevant Distinctions’ (2008) 11 *New Crim. L. Rev.* 452, 456-7; see also Gómez-Aller (n 38) 448-450.

⁵⁹ Thomas Weigend, ‘Germany’ in Kevin Heller and Markus Dubber (eds), *The Hand Book of Comparative Criminal Law* (SUP 2011) 261.

⁶⁰ Cf. Arthur O’Reilly, ‘Command Responsibility: A Call to Realign Doctrine with Principles’ (2005) 20 *Am. U. Int’l L. Rev.* 71, 95; Cf. Darryl Robinson, ‘How Command Responsibility Got so Complicated: a Culpability Contradiction, its Obfuscation, and a Simple Solution’ (2012) 13 *Melb. J. Int’l L.* 1, 11-12.

individual criminal responsibility”.⁶¹ They argued that, based on current practice of CR, “foot soldiers would face the most stringent sentences while those at the top of the chain of command would be deemed less blameworthy, which we believe would be unjust”.⁶²

Note that one of the German criminal system’s justifications of liability for commission by omission is that “moral obligations” are recognised as an element of legal obligations.⁶³ Therefore, the general duty to act, which is an imposed duty in civil law tradition, was created, based on the virtue of moral obligation.⁶⁴ Nevertheless, as discussed above, implementing liability for failure to act seems to be controversial in both common law and civil law traditions mainly because of the differences between their basic social principles (common law is controversial in proper omission whereas civil law is inconsistent about commission by omission).

Hence, values - for the purpose of omission – are better regarded as an essential component of the criminal nature of failure to act rather than as *per se* a cause of liability.⁶⁵ Its complex application in both traditions might, however, have impacted on judges’ interpretation of CR. Judges would build their interpretation of a vague rule, such as CR, through comparing the implementation of their national law tradition. Subsequently, a controversial national theory such as commission by omission would influence their interpretation about a form of liability that was (a) created through international cases; and (b) regarded – because of developing its three elements – as a *sui generis* liability.⁶⁶ Consequently, scholars eventually discussed the nature of CR as if it were akin to those national criminal theories only, thereby re-characterising its true nature.⁶⁷

⁶¹ *Bagosora* AC, 14 December 2011, Joint Dissenting Opinion of Judges Pocar and Liu, para 2.

⁶² *Ibid* para 2 (in footnote 4).

⁶³ Note that this became a complex issue as the German Federal Court of Justice, controversially, rejected morality as a notion of criminality; see Dubber and Hörnle (n 45) 220.

⁶⁴ *Supra* (nn 43-47).

⁶⁵ There are two views about the enforcement of morality: (a) the moderate (utilitarian), which generally distinguishes between harmfulness and immorality for legal enforcement purposes; and (b) the extreme, which generally does not distinguish between harm and morals for the purpose of legal enforcement. Hart (n 23) 53-5.

⁶⁶ Judge Steiner prefers the word “additional instead of *sui generis* liability”. This could be as a result of the inconsistent practice of CR that the term *sui generis* liability resulted in the inconsistent interpretation. See *Bemba* TC III, 21 March 2016, para 174 (footnote 388).

⁶⁷ See, for example, Olasolo, questioning whether commanders’ duty constitutes a guarantor duty rather than an affirmative duty under international law. See Hector Olasolo, ‘International Criminal Court and International Tribunals: Substantive and Procedural Aspects’ in Carlos Jimenez Piernas (ed.), *The Legal Practice in International Law and European Community Law: A Spanish Perspective* (Martinus Nijhoff Publishers 2007) 188.

2. The values element and Command Responsibility:-

As discussed above, morality, although being theoretically controversial, remains the essence of liability for omission. The controversy, however, evolved from the nature of society's (moral) values – and being unregulated generally. These values to CR, on the other hand, are largely regulated and governed by military ethics and training, as well as by the laws and customs of war, for both military commanders and civilian superiors.⁶⁸

Generally, morality and ethics might be used interchangeably;⁶⁹ theoretically, however, they are distinct in their usage.⁷⁰ Ethics is generally defined as “the study of the concept involved in practical reasoning: good, right, duty, obligation, virtue, freedom, rationality, choice”.⁷¹ The controversial aspect of ethics is largely philosophical, as, for example, in Aristotle's argument that the notion behind ethics is individuals' aim, whereas Kant argued that that notion is individuals' duty.⁷² Most importantly, these schools – and presumably all philosophical schools – agreed that ethics are derived from society's values.⁷³

In other word, ethics, as a subject, is the codification of some major values of a society that can be regarded as 'moral obligatory actions'.⁷⁴ Accordingly, individuals ought to act in accordance with those values even if they are not ethically codified⁷⁵, because ethics practically are “private regulatory efforts”

⁶⁸ During armed conflicts military ethics are applicable to civilian superiors, since “[a]uthorizing a machine to make lethal combat decisions is contingent upon political and military leaders resolving legal and ethical questions”. United States Air Force, ‘United States Air Force Unmanned Aircraft System Flight Plan 2009-2047’, 18 May 2009, 41.

⁶⁹ Alfred P. Rubin, *Ethics and Authority in International Law* (CUP 1997) 8.

⁷⁰ See, for example, Blackburn summarising the differences and complexity, stating that “[a]lthough the morality of people and their ethics amount to the same thing, there is a usage that restricts morality to systems such as that of Kant, based on notions such as duty, obligation, and principles of conduct, reserving ethics for the more Aristotelian approach to practical reasoning, based on the notion of a virtue, and generally avoiding the separation of ‘moral’ considerations from other practical considerations. The scholarly issues are complex, with some writers seeing Kant as more Aristotelian, and Aristotle as more involved with a separate sphere of responsibility and duty, than the simple contrast suggests”. Simon Blackburn, *The Oxford Dictionary of Philosophy* (OUP 2005) 241.

⁷¹ *Ibid* 121; see also Williams and Arrigo (n 21) 4-5.

⁷² Roger J Sullivan, ‘The Kantian Critique of Aristotle's Moral Philosophy: An Appraisal’ (1974) 28 *The Review of Metaphysics* 24, 24-8.

⁷³ Jonathan Barnes and Anthony Kenny, *Aristotle's Ethics: Writing from the Complete Works* (Princeton UP 2014) 13; also Julia Driver, *Ethics: The Fundamentals* (Blackwell Publishing 2007) 9-10.

⁷⁴ *Ibid*.

⁷⁵ Julia Driver, *Op. cit.*, 14. Such codification could be seen as a reason for the confusion between ethics and morality; see also Paul Robinson, Nigel de Lee and Don Carrick (eds.), *Ethics Education in the Military* (Ashgate 2008) 1.

designed for a specific institution or society.⁷⁶ Thus, training in military ethics – as a unique society - varies between countries’ armies and depends on how much values are being regulated.⁷⁷ Nevertheless, the training process itself would normally be carried out in accordance with these values, although uncodified.⁷⁸

A) The impact of values on CR:-

As discussed above, the liability for an omission is theoretically controversial among national criminal traditions. Hence, judges and scholars focusing only on theoretical aspects will be immersed in the theoretical question of the nature of CR, whether of common or civil law, and of the extent of implementing “commission by omission” in domestic law. This affected the interpretation of CR, as the focus was on justifying the criminal theory rather than on implementing the actual nature of CR being threefold. The values of a society are the core reason not only for criminalising conduct but also for justifying its status as criminal.⁷⁹

However, those who criticised the nature of CR disregarded this essential component of the nature of this form of liability. Consider the differences between Common and Civil law traditions regarding the situation of a drowning baby: one society accepted the failure to act - of the stranger who stands by doing nothing to help the drowning baby - to be morally acceptable or less important than individual autonomy; thus common law viewed this as legitimate conduct.⁸⁰ The other society viewed such conduct to be against their society’s moral values: thus, civil law considered it fair and legitimate to criminalise and punish such conduct.⁸¹

The question is not whether this should be morally or legally accepted in that society; more precisely the question should be what the determinant factor is? The difference is that, although both traditions consider the conduct to be *immoral*, only one considers it to be *criminal*. The determinant factor is the

⁷⁶ Larry Catá Backer, ‘From Moral Obligations to International Law: Disclosure Systems, Markets and The Regulation of Multinational Corporations’ (2008) 39 Geo. J. Int’l L. 591, 595.

⁷⁷ Jessica Wolfendale, ‘What is the Point of Teaching Ethics in the Military?’ in Paul Robinson and others, *Ethics, Education in the Military* (Ashgate 2008) 161.

⁷⁸ See the discussions in Chapter 1.

⁷⁹ Kirsten J Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (Routledge 2012) 94-5.

⁸⁰ *Supra* (n 34) *et seq.*

⁸¹ *Ibid.*

society's values role, influence and priority. This is not only in relation to offences of omission, because values also play an important role in interpreting liability for commission by omission. The implementation of this liability therefore varies between different national criminal systems because of the influence of values in each society, as illustrated above.

Thus, overlooking the values of the military - as a society – seems to be the reason behind a number of scholars' arguments for re-characterising CR and advocating the (inconsistent) practice of the *ad hoc* tribunals.⁸² Meloni, for example, supported the position of the German Criminal Code (VStGB) against International law,⁸³ which divided CR (Art. 28 of the ICC) into three forms: (a) under s.4 VStGB as accomplice liability; (b) under s.13 VStGB as a dereliction of duty of supervision; and (c) under s.14 VStGB as a dereliction of duty to report a crime.⁸⁴

The reason for this division of CR under the German Code is that, for CR to be applied domestically, this would have to be in accordance with the civil law tradition's theory of liability for omission pursuant to the German Criminal Code, discussed above.⁸⁵ Sliedregt, similarly, argued that such a division would solve and enhance the nature of CR, following the practice of civil law traditions about omission.⁸⁶ Note that, unlike the civil law, common law, because of the different application of 'commission by omission' - regarding CR, Art. 28 of the ICC - did not divide the actual *nature* of the doctrine of responsibility that punishes for the crime committed.⁸⁷ The UK, for instance, adopted the wording of Art. 28 - under The International Criminal Court Act, 2001, s.65 - but it was regarded as a form of "aiding, abetting, counselling or procuring", which might be problematic in its

⁸² See, for example, Volker Nerlich, 'Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?' (2007) 5 J. Int'l. Crim. Just. 665, 667 *et seq.* Nerlich argued that CR could be divided into 'four' forms.

⁸³ The Code was the basis, in 1 July 2002, for the implementation of the Rome Statute.

⁸⁴ Chantal Meloni, *Command Responsibility in International Criminal Law* (T.M.C Asser Press 2010) 205-7; see also Kia Ambos, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 J. Int'l Crim. Just. 159, 176 (in footnote 117); also E. van Sliedregt, *The criminal responsibility of individuals for violations of international humanitarian law* (T.M.C. Asser Press 2003) 212-213.

⁸⁵ This is an example of isolating the moral value and focusing merely on the theoretical aspect. *Supra* (n 48) *et seq.*

⁸⁶ Elies van Sliedregt, 'Article 28 of the ICC Statute: Mode of Liability and /or Separate Offense?' (2009) 12 New Crim. L. Rev. 420, 431-2.

⁸⁷ The UK, International Criminal Court Act, 2001, Chapter 17, s. 65. Note that the Canadian approach differs, than that of the other common law countries such as the UK, because of the Canadian Constitutional Jurisdiction. See Sliedregt (n 8) 203.

implementation.⁸⁸ This shows also the extent of the overlooking of the true nature of CR and the true meaning of this doctrine's being under ICL.⁸⁹

Indeed, overlooking the values element as part of the nature of CR confused not only the academic scholars but also some of their military counterparts. Root, for example, argued that CR is an unfair mode of liability under ICL.⁹⁰ In his justification, he claimed that "the punishment does not fit the crime" and that "[t]here is no moral link between punishment and guilt".⁹¹ Root, however, confused the nature of CR with the nature of complicity as, under CR, commanders have not been punished as the main perpetrators.⁹²

B) The values as obligations under CR:-

Military, before WWII, was "a closed society" or perhaps an isolated society, that consisted exclusively of military personnel.⁹³ Gradually, however, military societies around the world became more open, especially regarding "civilian-military interface and civilian *value*", which elevated the military moral standard even more⁹⁴, but this does not change the fact that military society is a distinctive society by nature. Thus, more precisely, military ethics and basic principles are both "manifested in the concepts of personal integrity, duty, honor, country and officership".⁹⁵ These values are recognised also to encompass: "loyalty, duty, respect, selfless service, honor, integrity and personal courage".⁹⁶ Most importantly, the distinctive values for commanders are essentially: duty, responsibility and leadership.⁹⁷ In the sense that, as a result of the commander's

⁸⁸ Note that, although the UK's ICC Act of 2001 adopted the wording of Art. 28, it stated in Section 65 (4) that "[a] person responsible under this section for an offence is regarded as aiding, abetting, counselling or procuring the commission of the offence". This is as a result of excluding the values element. Cf. Constantine Mortopoulos, 'Kobayashi Maru: Arduous Effort and Sean Incorporation of the Yamashita Standard to the Hellenic Law' (2011) 19 Eur. J. Crime Crim. L. & Crim. Just. 199, 234.

⁸⁹ See the discussions in Chapters 1 and 2.

⁹⁰ Joshua L. Root, 'Some Other Men's Rea? The Nature of Command Responsibility in the Rome Statute' (2014) 23 J. Transnat'l L. & Pol'y 119, 151.

⁹¹ *Ibid.*

⁹² *Ibid.* Root claimed that CR will "[t]urn a commander into a murderer"; Root confused the main perpetrator with the commander and, more precisely, overlooked the values element.

⁹³ Sam C Sarkesian, *Beyond the Battlefield: the New Military Professionalism* (New York Pergamon Press Inc. 1981) 205.

⁹⁴ *Ibid.*

⁹⁵ *Ibid* 202.

⁹⁶ Diane H Mazur, *Military Values in Law* (2007) 14 Duke J. Gender L. & Pol'y 977, 994.

⁹⁷ Cf. Paul Robinson, 'Introduction: Ethics Education in the Military' in Paul Robinson and others (eds.), *Ethics Education in the Military* (Ashgate 2008) 7.

duty and position of command, he will be responsible for the (criminal) conduct of his subordinates.

Duty and ‘officership’ - morally more than ethically - are characteristic of military society. Therefore, duty – militarily - is defined as “a commitment to carry out the dictates of his position and office”, and officers are the executive group in the military “based on the idea of “special trust and confidence” as spelt out in the oath of office”.⁹⁸ Therefore, Triffterer commented on the practical importance of CR in ICL during armed conflicts because of the “unlimited power and influence of superiors over forces”; thus “superior(s) by an indifferent attitude may cause crimes by simply letting them appear through the hands of others”.⁹⁹

Therefore, commanders are to be held responsible for the crimes their subordinates commit, because these crimes result from those commanders’ failure to exercise control over those subordinates. Such responsibility is imposed because of the *omission*, the failure to fulfil a *duty* under international law that is against the values obligations, which constitute the nature of CR. Accordingly, if these three elements were acknowledged, Greenwood’s description of CR would be logically understood, that:-

“[i]n a command responsibility case, the commander is punished for his failure to control those under his command – not for participation in the crimes which they commit. Yet the commander is punished not for a separate offence of failure to control, but for the actual offences committed by his subordinates”.¹⁰⁰

But the lenient sentencing indicates that commanders are being punished for a separate offence of *failure to prevent*.¹⁰¹ The reason for such leniency is the overlooking of the values element.¹⁰² The nature of liability under CR is thus a threefold responsibility: (a) the criminal responsibility for crimes committed by subordinates; (b) the *legal* accountability of holding a commander responsible for

⁹⁸ Sarkesian, *Op. cit.*, 203- 204.

⁹⁹ Roberta Arnold and Otto Triffterer, ‘Article 28: Responsibility of Commanders and other Superiors’ in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (C.H.Beck - Hart - Nomos 2008) 809.

¹⁰⁰ Christopher Greenwood, ‘Command Responsibility and the *Hadzihasanovic* Decision’ (2004) 2 J. Int’l Crim. Just. 598, 599.

¹⁰¹ *Cf. supra* (n 57); also *Cf.* (Chapter 3 n 199) *et seq.* See also the four generations that indicate the uncertainty about the nature of CR and interpreting this nature akin to the domestic theories of liability for omission.

¹⁰² *Cf.* Robert Cryer, ‘The *Ad Hoc* Tribunals and the Law of Command Responsibility: A Quiet Earthquake’, in Shane Darcy and Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) 173-4.

his failure to act (violation of the element of ‘customary rules’); and (c) the personal culpability for violating the *values* obligations as dictated by military society.

Therefore, when the defence argued that General Yamashita neither committed, nor ordered the commission of, crimes, the U.S. Supreme Court responded that this:-

“...overlooks the fact that *the gist* of the charge is an unlawful *breach of duty* by petitioner as an army commander”.¹⁰³

The Court emphasised that, with CR, the “gist” is violating: (a) the *duty* (b) *officership* as values that allowed the commission of crimes by subordinates, which he is (c) responsible for their conduct based on commanders personal *responsibility*. The *Yamashita* problem, however, is the reliance only on the values element and unbalancing the three elements of the nature of CR. The three elements form, accordingly, the *sui generis* nature of CR;¹⁰⁴ and this was completely disregarded when CR was codified and interpreted.

The importance of values was highlighted in the IMTs’ case-law. For example, the *High Command* Judgment stated that “[t]he duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general” generally;¹⁰⁵ but, if a commander “merely stands by while his subordinates execute a criminal ... [act, he] violates a *moral obligation* under International Law”¹⁰⁶. This issue of values regarding CR should have been acknowledged at the codification stage of CR. But neither the API of 1977 nor its Commentary referred to such an essential component of the nature of the doctrine; hence, the nature of CR was highly controversial.¹⁰⁷

¹⁰³ Chapter 2 (n 72).

¹⁰⁴ Note that the nature of CR should not be confused with the fairness of the Yamashita Trial. The nature of CR was dominated, however, by the values element at that time. See (chapter 2 nn 1 and 60).

¹⁰⁵ The *High Command* Case, Trials of War Criminals before the Nuremberg Military Tribunals, Vol. XI, 631-2.

¹⁰⁶ *High Command* 521.

¹⁰⁷ Greenwood argued that “...the codification of a hitherto unwritten rule will almost invariably affect the content of the rule”. Christopher Greenwood, ‘Customary Law Status of the 1977 Geneva Protocols’, in Delissen and Gerard Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven* (Martinus Nijhoff Publishers 1991) 97.

This “forgotten” part of CR thus needs to be revived, not only as an inner element of the criminal theory¹⁰⁸ but, more precisely, as a separate element of the nature of CR. Accordingly, CR needs to be re-interpreted, based on its true nature; and that “the criminal law as a morally-loaded regulatory tool” need to be acknowledged.¹⁰⁹ CR needs to be re-identified pursuant to the values of military society’ and their interpretation and implementations, particularly to re-consider those values of commanders: duty, responsibility and leadership.¹¹⁰ Consider also the fact that the accused commander essentially “bears moral responsibility for creating” the risk of perpetrating crimes.¹¹¹

3. The Interpretation of Military Values:-

Judges are the direct means in ICL for providing, through interpretation, the required clarity and specificity of legal rules.¹¹² As discussed above, CR was inaccurately interpreted, through isolating its essential part of the values element, rendering its nature vague and its implementation inconsistent.¹¹³ The interpretation in the *ad hoc* tribunals was based on the API of 1977 codification, where the nature of CR was controversial and undefined.¹¹⁴

The process of interpreting CR was also problematic - and inconsistent. In this its essential component - the values element – was overlooked throughout the interpretation processes at the *ad hoc* tribunals. CR should therefore be re-interpreted, taking into account the values element as part of constituting the true nature of the doctrine.

¹⁰⁸ Fuller (chapter 1 n 92).

¹⁰⁹ A P Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing 2011) 11.

¹¹⁰ The scholarly debate focused only on two aspects of CR: the criminal theory and the IHL rules. Excluding the military aspect from the nature of liability under CR was the reason for the inconsistent implementation of CR as well as the ongoing debate about this doctrine’s nature in the literature. Cf. Lars C Berster, “Duty to Act’ and ‘Commission by Omission’ in International Criminal Law’ (2010) 10 Int’l Crim. L. Rev. 619, 624-626

¹¹¹ Tadros (n 41).

¹¹² Alexander Knoops, ‘Superior responsibility under International Criminal Law: Concurrence with Military Ethics’ (2010) 7 Int’l Study. J. 1, 16. Knoops suggested an international military code as a guideline to be considered by judges during judgment in ICL. Although it could be argued that a treaty regarding CR might radically solve this issue, this is unlikely to happen, as states are generally reluctant to ratify treaties that potentially go against their interests or restrict their military capacity. This thesis suggests, however, a new direction for interpreting CR under ICL through acknowledging its nature’s components.

¹¹³ *Supra* (n 79) *et seq.*

¹¹⁴ See the previous discussions in chapters 3, 4 and 5.

Even if a court were *de novo* interpret CR, it is unlikely that judges who have no military background would be able to identify, comprehend and then implement the values of a military society.¹¹⁵ What is needed is, therefore, knowledge both of the armed services' justice system in general and of military values for the nature of CR. In fact, a Judge-advocate could resolve problems¹¹⁶ (*inter alia*, for the purpose of CR) as a permanent judge at international criminal courts and tribunals. Nonetheless this alone would not ensure the needed balance of interpretation and implementation of the threefold nature of CR.

The ICC focuses on diversity, especially in terms of judges representing different legal traditions, regions and gender, which is in harmony with a number of international norms.¹¹⁷ It also required State Parties to nominate judges with special expertise in specific issues such as – *but not limited to* - violence against children or women under Article 36 (8).¹¹⁸ Note that this provision emphasised that it is extendable to any specific issues, as for instance “[j]udges with expertise on certain issues, such as military operations and laws of war, might become crucial in some cases”.¹¹⁹

Some recent proposed suggestions for reforming the judges' selection process were for: “(1) transparency; (2) independence and non-politicization; (3) competence and merit; and (4) diversity and representation”.¹²⁰ The nomination of a judge with military expertise was not suggested as a reason for reform. This could be a result of the literature's focus being mainly on the theoretical aspect of criminal law and isolating the practical need based on the nature of the cases.¹²¹ In

¹¹⁵ From *Čelebići* to *Popović*, this was problematic. See the previous discussions in Chapters 3 & 5.

¹¹⁶ Georg Nolte (ed.), *European Military Law Systems* (De Gruyter Recht. Berlin 2003) 161.

¹¹⁷ Thordis Ingadottir, ‘The International Criminal Court Nomination and Election of Judges: A Discussion Paper’ (June 2002) PiCT, ICC Discussion Paper 4, 12-20; see also Zhu Wen-qi/Sureta Chana, ‘Article 36 Qualifications, nomination and election of judges’ in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn., C.H.Beck; Hart . Nomos 2008) 944-7.

¹¹⁸ The ICC, Art. 36 (8); *Ibid* Zhu Wen-qi/Sureta Chana.

¹¹⁹ Thordis Ingadottir (117) 22. Cf. William Driscoll, Joseph Zompetti and Suzette W. Zompetti (eds.), *The International Criminal Court: Global Politics and the Quest for Justice* (International Debate Education Association 2004) 87-8.

¹²⁰ Ruth Mackenzie and others, *Selecting International Judges: Principle, Process, and Politics* (OUP 2010) 137.

¹²¹ A number of scholars argued for more diversity of judges at international criminal courts, but their arguments were limited to diversity on a set of issues, none of which took into account the real need in practice. Cf. Mackenzie (n 120); see also Leigh Swigart and Daniel Terris, ‘Who are International Judges?’ in Cesare P R Romano and others, *The Oxford Handbook of International Adjudication* (OUP 2014) 632-4; see also Ruth Mackenzie (n 120) 746-8.

fact, the majority of cases before international criminal courts require judges with military expertise, especially for the purpose of interpreting the doctrine of CR.

In practice, judges, when confronted with military-related issues, would seek the opinion of militarily-knowledgeable expert witnesses, whether military or civilian.¹²² Nevertheless, an expert opinion is limited to the direct question; and this expert is not permitted to express an opinion if the question relates to a legal issue.¹²³ For example, the ICTY stated in its decision on the admissibility of experts participation that:-

“The Trial Chamber is satisfied that Professor Schabas is an expert in his field. However, the Chamber is of the view that the subject on which his expertise is offered in this case is a matter which falls directly within the competence of the Trial Chamber. Accordingly, neither the Report nor Professor Schabas’ proposed testimony would enlighten the Trial Chamber on specific issues of a technical nature that are outside of its experience and knowledge”.¹²⁴ Thus, “the Trial Chamber hereby holds that the joint Defence will not be permitted to call Professor Schabas as an expert witness, nor tender the Report as an expert report”.¹²⁵

Ironically, the Defence was arguing that misinterpretation of “genocide” resulted in “conflicts and uncertainty” in application by various international courts.¹²⁶ Analogically, an expert military witness’s legal opinion would have been rejected on a similar basis, had any of the parties requested the military expert’s specialist opinion of the significance of military values in trials concerning CR.¹²⁷

Nonetheless, even Judge-advocates or any military expertise might overlook military values particularly regarding the implementation of CR. These values should be acknowledged as being part of the nature of responsibility of CR.

¹²² The ICTY, Rules of Procedure and Evidence, Rules 89 and 94 *bis*.

¹²³ *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, TC II, Decision on Report of Prosecutor Expert Klaus Reinhardt, IT-01-47-T, 11 February 2004; see also Vladimir Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (Martinus Nijhoff Publishers 2008) 470.

¹²⁴ *Prosecutor v. Popović et al.*, TC II, Decision on the Admissibility of the Expert Report and Proposed Expert Testimony of Professor Schabas, IT-05-88-T, 1 July 2008, para 8.

¹²⁵ *Ibid* para 9.

¹²⁶ *Ibid* para 3.

¹²⁷ One of the notable downsides of the expert witnesses is that experts during the investigation “may be considered as being too closely involved with the Prosecution team, affecting their independence and objectivity”. Reynaud Theunens, ‘The Role of Military Expertise in the Prosecution of and Trials for International Crimes’ (2009) 48 *Mil. L. & L. War Rev.* 119, 133.

Because the problem is that these three elements were overlooked by judges during the interpretation process of CR. Note that when these elements were considered in interpreting CR, such interpretation was criticised and rejected.¹²⁸ This not only overlooked the fact that CR is a military concept but more precisely disregarded the rationale of creating CR as a mode of liability under ICL. Bassiouni clarified that “[b]ecause military law is based on a hierarchical structure of command and control, those in the chain of command have the duty to develop measures designed to prevent the commission of violative acts, to investigate information about violative acts, to punish the perpetrators, and to institute measures to prevent and correct situations leading to potential violations”¹²⁹

The rationale of command responsibility from a military law aspect is more direct than it under ICL. In line with this, Dahl explained, as a Judge-Advocate, the rationale of creating CR as a mode of liability under ICL and stated that “[i]f a commander is to be held responsible for losing battles by not controlling his men, it is obvious that he should also be held responsible for spoiling the good reputation of his army or even his country, by his omission to control his man”;¹³⁰ therefore, “a commander must generally be prepared to be held responsible for acts or omission by his subordinates, if he could corrected matters by his own activity”.¹³¹ Greenwood’s and Triffterer’s justifications of the nature of CR in ICL are, therefore, consistent, by implication, with the values element as being part of the nature of CR.¹³² The following examples illustrate the importance of values in judgments. Although these cases were not for CR, they were for crimes committed against the international law and military values of commanders were determinant factors.

A) Sergeant Blackman:-

Sergeant Blackman was the commander of a small unit during a patrol in Helmand, in Afghanistan. He was held responsible for murdering an unknown

¹²⁸ Cf. Rehan Abeyratne, (chapter 4 n 160). See *Blaškić* TC, (chapter 3 n 163). Cf. also (n 200) *et seq.*

¹²⁹ M Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (CUP 2011) 529.

¹³⁰ Dahl is a distinguished Norwegian Judge-Advocate General. See Arne Willy Dahl, ‘Command Responsibility’ (2002) 41 *Mil. L. & L. War Rev.* 215, 218.

¹³¹ *Ibid* 217.

¹³² See (nn 99-100).

Afghan insurgent who was wounded after a lawful attack by a helicopter.¹³³ Sergeant Blackman treated the insurgent brutally and then unlawfully shot him in the chest, killing him.¹³⁴ Sergeant Blackman then asked his unit-members not to disclose the incident, admitting that he had committed a crime under international law, saying: “I just broke the Geneva Convention”.¹³⁵

The court-martial, accordingly, convicted him of murder and sentenced him to imprisonment for life, with a minimum term of 10 years in prison (subsequently reduced, on appeal, to 8 years),¹³⁶ to be stripped of his rank and to be dismissed from the service with disgrace.¹³⁷ The case was debated in the media and in society at large, but for reasons irrelevant to this study.¹³⁸ Most importantly, His Honour Judge Jeff Blackett, the then Judge Advocate General, in his remarks on the case, highlighted the significance of military values.¹³⁹

Judge Blackett articulated a number of factors which conflicted with the values of military society, as reasons for imposing the criminal responsibility. For example, the Judge stated of Sergeant Blackman that, by committing the crime, “you have *betrayed* your Corps and all British Service personnel who have served in Afghanistan, and you have *tarnished* their reputation”.¹⁴⁰ This illustrates the importance of the notion of *responsibility* being the DNA of commanders’ values. Judge Blackett illustrated the significant role of a court-martial in such circumstances and stated that: “you have been judged here by a Board made up of Service personnel who understand operational service because they too have experienced it. That is one of the strengths of the Court Martial system”.¹⁴¹

¹³³ *Regina v. Alexander Wayne Blackman and Secretary of State for Defence*, Appeal Judgment, The Courts Martials Appeal Court, Royal Courts of Justice, Case No. 2014/00049/B5, 22/05/2014, para. 2-3; at < <https://www.judiciary.gov.uk/judgments/r-v-sergeant-alexander-wayne-blackman-and-secretary-of-state-for-defence/> > accessed 17/09/15.

¹³⁴ *Regina v. Sergeant Alexander Wayne Blackman* (“Marine A”), Sentencing Remarks by His Honour Judge Jeff Blackett, Judge Advocate General, Case Ref. 2012CM00442, 6 December 2013, 1; at < <https://www.judiciary.gov.uk/judgments/r-v-sergeant-blackman/> >.

¹³⁵ See also *Regina v. Sergeant Alexander Wayne Blackman* (“Marine A”) at <<http://www.internationalcrimesdatabase.org/Case/1236>> accessed 17/09/15.

¹³⁶ Blackman was initially sentenced to life imprisonment with a minimum term of 10 years before being reviewed for parole. See *Blackman*, Sentencing Remarks, 5. On appeal, the sentence was reduced to life imprisonment with a minimum term of 8 years. See *Blackman*, Appeal Judgment, para 77.

¹³⁷ *Blackman*, Sentencing Remarks, 5.

¹³⁸ *Ibid* 2.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid* 2.

¹⁴¹ *Blackman*, Sentencing Remarks, 2.

Judge Blackett also emphasised that, by committing such a crime, Sergeant Blackman not only had “increased the risk of revenge attacks against [his] fellow service personnel” but he also “[has] failed to demonstrate the self-discipline and restraint that is required of service personnel on operations”.¹⁴² This is consistent with *duty* as a value rather than as a legal obligation. Judge Blackett, lastly, considered the accused leadership role in the light of military values and stated that “[l]ong before you shot the insurgent you should as a Senior NCO have showed better leadership to young and less experienced men”.¹⁴³ The judge also considered and applied a number of mitigating circumstances about the military operation.¹⁴⁴ These values are crucial for liability in such a society as, for example, when the Royal Navy’s review of Blackman’s case classified his conduct above all as “moral disengagement”.¹⁴⁵

The judgment in *Blackman* might have reached a different conclusion had the Judge Advocate General overlooked those military values mentioned above. The following example illustrates the impact of excluding military values in a case with similar circumstances but more relevant to CR.

B) Medina - The My Lai Massacre:-

During the Vietnam War three platoons of U.S. troops (Platoons 1, 2 & 3) landed near the village of My Lai. The three platoons were under the command of Captain Medina, who was informed by his superior that the civilians were either Viet Cong (the rebels) or allied to them.¹⁴⁶ He then conveyed this to his troops and “ordered his men to destroy all crops, to kill all livestock, to burn all houses, and to pollute the water of the village”.¹⁴⁷

Captain Medina then ordered the 1st. Platoon to enter the village first, followed by the 2nd. Platoon; lastly, Captain Medina and the 3rd. Platoon would

¹⁴² *Ibid.*

¹⁴³ *Ibid* 4.

¹⁴⁴ *Ibid.*

¹⁴⁵ Royal Navy review, Op Telemeter internal review: Executive summary and recommendations <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/461067/20150916_Op_Telemeter_Exec_Summary_Recommendations_for_release.pdf> p. B2, accessed 19/09/15;

¹⁴⁶ Major Michael L Smidt, ‘Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations’ (2000) 164 Mil. L. Rev. 155, 188.

¹⁴⁷ William George Eckhardt, ‘My Lai: An American Tragedy’ (2000) 68 UMKC L. Rev. 671, 675 & 678.

follow once the area was secured.¹⁴⁸ The 3rd. Platoon and Captain Medina at that time were – not far from the operation - located at his headquarters, only 150 metres from the village.¹⁴⁹ The troops moved towards the hamlet and the 1st. Platoon, although not facing any fire, started to shoot at several unarmed fleeing Vietnamese.¹⁵⁰ They thereafter grouped the civilians in a “ditch”, and then hundreds of civilians were killed.¹⁵¹ The 2nd. Platoon then joined the 1st. Platoon and, while they were moving through the village, more fleeing civilians were killed.¹⁵²

Eventually, they stopped shooting, and Captain Medina moved to the village. Even though hundreds of civilians had been killed, Captain Medina denied seeing the ditch.¹⁵³ In this incident alone, over 500 hundred civilians were killed.¹⁵⁴ As a way of covering up the truth, Captain Medina reported that his troops had killed about 90 Viet Cong.¹⁵⁵ After an official investigation, a court-martial tried those who were believed to be responsible for those crimes.

The prosecution charged Captain Medina – under CR – for crimes committed by his troops.¹⁵⁶ The Prosecutor argued that Medina knew about these crimes and would have been able to prevent them through a radio order, especially given that he had been located only about 150 metres from the massacre. The judge ruled that, for CR, the “evidence beyond a reasonable doubt” had to show that the commander had only had *actual knowledge* of the crimes committed.¹⁵⁷ Accordingly, the evidence cast doubt upon Captain Medina’s knowledge or having been actually aware of the killings as, throughout the operation, he was at his headquarters away from the battle field.¹⁵⁸ As a result, he was acquitted, but this was controversial, because it contradicted the nature of CR as a norm of customary

¹⁴⁸ Douglas O Linder, ‘An Introduction to the My Lai Courts-Martial, at My Lai: An Account’ (1999) Famous Trials, University of Missouri-Kansas City.

<http://law2.umkc.edu/faculty/projects/ftrials/mylai/Myl_intro.html> accessed 19/09/15.

¹⁴⁹ Smidt (n 146) 190.

¹⁵⁰ *Ibid* 189.

¹⁵¹ *Ibid* 189-190.

¹⁵² *Ibid* 190.

¹⁵³ *Ibid*.

¹⁵⁴ Jeannine Davanzo, ‘An Absence of Accountability for the My Lai Massacre’ (1999) 3 Hofstra L. & Pol’y Symp 287, 288.

¹⁵⁵ Smidt (n 146) 191.

¹⁵⁶ Matthew Lippman, ‘War Crimes: the My Lai Massacre and The Vietnam War’ (1993) 1 San Diego Just. J. 295, 362.

¹⁵⁷ Eckhardt (n 147) 687-8.

¹⁵⁸ Eckhardt (n 147) 675; also *Cf.* Lippman (n 156) 299-306.

law. The controversy escalated primarily because the US had been the first to apply this doctrine, in *Yamashita*.¹⁵⁹

But, most importantly, the (American) Judge Advocate did not consider the military values, in contrast with the (British) Judge Advocate General at Sergeant Blackman's court-martial.¹⁶⁰ Basically, the judge in *Medina* overlooked the fact that the "military is a unique society where the commander has tremendous authority over subordinates not normally extended to superiors in the civilian sector".¹⁶¹ Therefore:-

"Commanders have both a moral and legal role in preventing atrocities that could potentially be committed by subordinates against non-combatants, including wounded and sick, civilians and prisoners of war, as well as the destruction of civilian property lacking in military value".¹⁶²

The My Lai trial was generally criticised for being unfair.¹⁶³ Nevertheless, for the purpose of this study, the case of *Medina* factually illustrates the significance of considering (and overlooking) military values specifically in relation to CR.

4. CR: balancing military values between ICL and IHL:-

The concept of 'responsible command' under IHL was designed to internationally direct the military activities during armed conflict.¹⁶⁴ Corn, therefore, accurately stated that "responsible command is an essential requirement ... and ... central to the doctrine of command responsibility".¹⁶⁵ It is noteworthy that rules under IHL "are ... reminiscent of the values or ethics" of the military society.¹⁶⁶ The nature of breaching the IHL, being serious by nature of its resultant,

¹⁵⁹ Lippman (n 156) 360.

¹⁶⁰ *Cf.* (n 140) *et seq.*

¹⁶¹ Smidt (n 146) 166.

¹⁶² *Ibid.* This is in accordance with the conclusion in *re Yamashita* by the US Supreme Court.

¹⁶³ Wm. C. Peters, 'Article 37 of the UCMJ and Command Responsibility for War Crimes – Unlawful Command Influence as (Rogue) Elephant in the Room' (2013) 5 *Elon L. Rev.* 329, 344.

¹⁶⁴ Richard Goldstone, 'Ownership of International Humanitarian Law' in Morten Bergsmo and SONG Tianying (eds), *Military Self-Interest in Accountability for Core International Crimes* (Torkel Opsahl Academic EPublisher 2015) 37.

¹⁶⁵ Geoffrey S Corn, 'Contemplating the True Nature of the Notion of "Responsibility" in Responsible Command' (2014) 96 *International Review of the Red Cross* 901, 901-902.

¹⁶⁶ SONG Tianying, 'The International Humanitarian Law Implementation Paradigm and the Idea of Military Self-Interest in Accountability' in Morten Bergsmo and SONG Tianying (eds), *Military Self-Interest in Accountability for Core International Crimes* (Torkel Opsahl Academic EPublisher 2015) 52.

is the reason for the ICL jurisdiction.¹⁶⁷ The post-WWII trials recognised this issue about the gross nature of crimes committed during the armed conflict. These trials, therefore, interpreted the nature of responsibility under CR in accordance with the nature of those underlying crimes; thus, they interpreted the IHL's rules through resorting to associated values. Knoops argued, therefore, that for CR these military values are “meaningless when cannot be criminally enforced in order to deter military commanders from not honouring these ethical principles”.¹⁶⁸

The values element thus plays a role of significance for interpreting the nature of CR by judges because the IHL' rules are created to guide and not to find criminal accountability. In *re Yamashita* and the IMTs' judgments, these values were relied on for articulating the nature of responsibility under CR.¹⁶⁹ Some of the Judge-Advocates' - during the Military Tribunals and Commissions after WWII - interpretations of CR were problematic, but this was as a result of the rudimentary nature of CR and ICL. For example, the Judge-Advocate in the British Military Court at Wuppertal July 1946 stated that the accused:-

“[w]as holding a military *position* which *required* him to do things which he failed to do and which amount to a war crime”.¹⁷⁰

The Judge-Advocate clearly resorted to the three and most significant military values: leadership, duty and responsibility. CR as a mode of liability, however, was evolved through the IMTs' judgments, which took place after this trial;¹⁷¹ thus the Judge-Advocate in the British Military Court considered CR *per se* as a war crime.¹⁷² Note that during that time – before the *High Command* and *Hostage* – the military values dominated the concept of CR.¹⁷³ This case should not be confused therefore with the consistent implementation of CR as a mode of liability in the IMTs' trials where CR was crystallised.

¹⁶⁷ Surveying the national statutory inclusion of CR is irrelevant to that in ICL unless the underlying crime was international crime. Cf. Hitromi Sato, 'Modes of International Criminal Justice and General Principles of Criminal Responsibility' (2012) 4 *Goettingen J. Int'l L.* 765, 787-789.

¹⁶⁸ Alexander Knoops (n 112) 8.

¹⁶⁹ *Supra* (nn 103-106); see also the discussions in Chapter 2.

¹⁷⁰ *Law Reports* Vol. IV, 88-9.

¹⁷¹ The Nuremberg Tribunals were between October 1946 and April 1949.

¹⁷² Cf. Mettraux (2009) 37-8.

¹⁷³ See (chapter 2 n 1); see also (chapter 2 n 60) *et seq.*

It is therefore, the essence and purpose of creating international criminal courts and tribunals was recently overlooked when examining the nature of CR.¹⁷⁴ Although it has repeatedly been emphasised that CR is an ICL creation,¹⁷⁵ the meaning of this creation seems to have been overlooked. The recent practice at international criminal courts and tribunals shows, however, that the three elements of CR were unbalanced during the interpretation of CR: (a) the values were overlooked; (b) the essence of violating IHL was undermined; and (c) the nature of this form of responsibility - being international - was also disregarded.

The four different generations of CR in the ICTY illustrate the extent of inconsistency and uncertainty about the nature of liability.¹⁷⁶ These inconsistent generations of CR overlooked the fact that prosecuting individuals for the underlying crime is the only purpose of which these international criminal courts and tribunals were established. Overlooking this purpose resulted eventually in illegitimately lowering CR as a form of responsibility compared to the other forms of liability under ICL in terms of:¹⁷⁷ (a) sentencing and (b) consistency of interpretation and specificity of information about the nature of CR.

This subsequently impacted on the essence of violating IHL. In that sense, the duty to punish under IHL was incorrectly considered a sufficient step to discharge the duty to take reasonable measures during armed conflict.¹⁷⁸ It was therefore endorsed at *Hadžihasanović* AC that disciplinary measures are sufficient to discharge the duty to punish international crimes.¹⁷⁹ Note that disciplinary measures are applicable in case of minor disorder during armed conflict particularly because this was interpreted - under IHL - to be for the purpose of maintaining discipline during military operations rather than a judicial means.¹⁸⁰

¹⁷⁴ Article 1 of the ICTY, ICTR and SCSL Statutes.

¹⁷⁵ This fact is endorsed by also the IHL's scholars. See for examples, Yasmin Naqvi, 'Enforcement of Violations of IHL: the ICTY Statute – Crimes and Forms of Liability' (2014) 33 U. Tas. L. Rev. 1, 22.

¹⁷⁶ See (Chapter 3 n 216) *et seq.*

¹⁷⁷ Judges Pocar and Liu (n 61); see also *Stakić* ruling that examining CR is "a waste of judicial resource" when the accused can be found liable under direct forms of responsibility. *Stakić* TC, para 466. It is, therefore, Schabas stated that in the *ad hoc* tribunals' case-law CR "has proven to be a big disappointment". William A Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006), 324.

¹⁷⁸ This is in accordance with Art. 87 (3), which stated that "where appropriate, to initiate disciplinary or penal action against violations". See the API Commentary, para. 3562. Nonetheless, this is controversial to be sufficient in relation to international crimes under ICL. See (Chapter 5 n 164).

¹⁷⁹ See (Chapter 5 nn 165 and 232).

¹⁸⁰ See the API Commentary, para 3560. Some IHL scholars, Renault for example, claimed that the acceptance of disciplinary measures by the *ad hoc* tribunals has enhanced the effectiveness of ICL,

However, under ICL (and criminal responsibility theories) the duty to punish is only a judicial duty that can only be fulfilled through a judicial prosecution.¹⁸¹

With regard to military values, they were discussed during the drafting of the API in relation to formulating the duties and responsibilities of superiors. These values were generally referred to as the military basic principle.¹⁸² They were also referred to as being essential parts of the “military laws and regulations”,¹⁸³ “conditions set forth in military handbooks”¹⁸⁴ or “the basis of all military discipline”.¹⁸⁵ In fact, they were more frequently perceived to be an “integral part of military rules” and therefore are required elements for discharging commanders’ duties generally.¹⁸⁶

Although a Judge-Advocate would be expected to employ these values in court-martial judgments, the importance of these values could easily be overlooked in international criminal proceedings. This is primarily because of the *ad hoc* tribunals’ case-law – particularly the ICTY- influence recently on developing CR. However, as discussed above these case-law findings were inconsistent and therefore their developments of CR are controversial. The *ad hoc* tribunals’ practice employed military values first in *Blaškić*, but because of the unbalanced implementation of these values and the failure to articulate their relevance to the nature of CR, this finding was rejected and these values were abandoned in subsequent cases. It is therefore importance to first acknowledge these values as part of the nature of CR. Then it is - more significant - to simultaneously implement these three elements in balance.

Judges in the international criminal courts and tribunals frequently refer to the IHL rules to examine military operations and therefore based their opinions pursuant to only these rules’ guideline. Róisín Burke, for instance, articulated this issue, and stated that “[IHL] and the laws of war already legally regulate soldiers’

but this is not true as discussed in this thesis. Cf. Céline Renaut, ‘The Impact of Military Disciplinary Sanctions on Compliance with International Humanitarian Law’ (2008) 90 *International Review of the Red Cross* 319, 326.

¹⁸¹ Cf. Naqvi (n 175) 25-6. Note that this was over-studied to suggest to forms of failure to punish: the failure per se an offence and (b) the failure to punish as a mode of liability. Cf. Amy Sepinwall, ‘Failure to Punish: Command Responsibility in Domestic and International Law’ (2009) 30 *Mich. J. Int’l L.* 251, 298-9.

¹⁸² CDDH/I/SR.44, para 18.

¹⁸³ CDDH/I/SR.45, para 9.

¹⁸⁴ CDDH/I/SR.48, para 11.

¹⁸⁵ CDDH/I/SR.52, para 14.

¹⁸⁶ CDDH/I/SR.51, paras 41 & 49.

behaviour during armed conflict...However, these laws may not fully reflect codes of conduct or ethics by which a soldier is or may feel bound by”.¹⁸⁷ This is consistent with the words of Judge Blackett abovementioned that military values are significant in cases of military operations.¹⁸⁸ This is also consistent with the reasoning of the Semrau case, where the Canadian Judge-Advocate convicted the accused commander with an act of violation of the IHL; therefore, the Judge considered the military values of military commanders in determining the appropriate sentence.¹⁸⁹

Judges at various international criminal courts and tribunals limit their focus to the laws of armed conflict particularly for the nature of CR. Judge Steiner recently to clarify the duty to prevent observed that such a duty “usually reflects a degree of situational specificity”.¹⁹⁰ Judge Steiner, however, overlooked the importance of military values in examining such a duty limiting the examination to only the IHL’s guideline (i.e. the API Commentary).¹⁹¹ This was also the practice in the *ad hoc* tribunals in the interpretation process of CR, which allowed judges to use their own *opinio juris* when interpreting CR (instead of that of the participants’ states during the drafting of the API).¹⁹² Few judgments only referred to the customary precedent or included the military values for justifying the nature of CR.

Blaškić TC judgment, for example, found the accused responsible for international crimes because “as a commander, he failed to take the necessary and reasonable measures which would have allowed these crimes to be prevented or the perpetrators to be punished”.¹⁹³ In doing so, the TC cited Art. 28 of the ICC to justify the nature of responsibility under CR,¹⁹⁴ and to articulate the requirements’ rationale and the duties’ role in interpreting and implementing CR.¹⁹⁵ It also referred to the customary precedents that endorse the military values even for non-military superiors to interpret the rationale of duties and requirements of CR.

¹⁸⁷ See Róisín Burke, Troop Discipline, the Rules of Law and Mission Operational Effectiveness in Conflict-Affected States’ in Morten Bergsmo and SONG Tianying (eds), *Military Self-Interest in Accountability for Core International Crimes* (Torkel Opsahl Academic EPublisher 2015) 386.

¹⁸⁸ *Supra* (n 139) *et seq.*

¹⁸⁹ *R v. Semrau*, [2010] CM 4010, paras 9 and 10.

¹⁹⁰ Separate Opinion of Judge Sylvia Steiner, Bemba TC III, 21 March 2016, paras 12-13.

¹⁹¹ *Ibid.*

¹⁹² The issue became more notable between requirements and duties rationale. See (Chapter 5 n 110) *et seq.* See *Halilović*, paras 38 (in footnotes 87-88) and paras 41, 61, 68, 83 and 85. Although *Halilović* TC referred to the customary precedents it based its interpretation of the requirements on CR pursuant to the API Commentary only. See also (Chapter 4 nn 86, 102 and 129).

¹⁹³ *Blaškić* TC, Disposition, 269.

¹⁹⁴ *Ibid* para. 301 (in footnote 530).

¹⁹⁵ *Ibid* para. 312.

It endorsed, therefore, *Roehling* findings that the duty to know was a prerequisite under CR and failure to know is not a defence.¹⁹⁶

Although *Popović* findings corresponded to those of the *Blaškić* TC, it did not examine the customary precedents.¹⁹⁷ *Blaškić* TC examined, however, the customary precedent and, by implication, the three elements of the nature of CR. It accordingly found that “it is inconsistent with military principles for the commander of an operational area not to have authority over all the troops” therefore such conduct “was contrary to the principle of unity of command” and the notion of responsibility.¹⁹⁸ These factors were taken into consideration at its conclusion that: (1) the duty is a component of CR stating that “when a commander fails in his duty ... he should receive a heavier sentence than the subordinates who committed the crime”; (2) this coupled with leadership as another component stating that “[c]ommand position must systematically increase the sentence”; and (3) “thereby incurred responsibility for crimes committed” by his subordinates.¹⁹⁹ The TC therefore sentenced General *Blaškić*, *inter alia* of CR, for 45 years imprisonment before it was reversed in the AC - particularly the counts relevant to CR - that then was reduced to 9 years, which caused controversy among Judges.²⁰⁰

The *Blaškić* AC controversial rejection of the TC findings could be ascribed to three reasons: (a) the TC did not explicitly articulate the rationale of these values and their relevance to CR (duty, leadership and responsibility); (b) overlooking the threefold nature of responsibility under CR of values, custom and criminal elements; and (c) the TC over-reliance (or without balance) on the military values that impacted on other elements. In the *ad hoc* tribunals’ case-law as well as the literature these values were rather perceived as only aggravating factors²⁰¹ or imposed as objective of deterrence²⁰². In *Kayishema*, for example, the

¹⁹⁶ *Ibid* para. 318 (in footnote 552), see also The Nuremberg, *Ministries*, Vol. XIV, 1088.

¹⁹⁷ *Popović* referred to the ICTY case-law, however, reached a different conclusion. See *Popović* TC, paras 1033-1046; see also (Chapter 5 n 228) *et seq.*

¹⁹⁸ *Blaškić* para 451. Although some military values were argued occasionally by judges, these were not for the purpose of incorporating them as part of interpreting the nature or requirements of CR. Cf. *Popović* TC, Dissenting and Separate Opinions of Judge Kwon, paras 49-50.

¹⁹⁹ *Ibid* para 789.

²⁰⁰ *Blaškić* AC, para 726 *et seq.* Judge Roca argued that the AC “has failed to provide ‘cogent reasons in the interest of justice’ for departing from this [the TC] well-established precedent”.

Blaškić AC, Partial Dissenting Opinion of Judge Weinberg De Roca, para 7.

²⁰¹ Cf. Barbora Holá, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of the Sentencing Case Law’ (2012) 4 Amsterdam L.F. 3, 16-7. See *Čelebići* AC, para 732; also chapter 5 (n 12).

TC ruled that “Kayishema was a leader in the genocide ... and this abuse of power and betrayal of his high office constitutes the most significant aggravating circumstance”.²⁰³

Nevertheless, the *ad hoc* tribunals tended predominantly to interpret CR in accordance to the API and its Commentary. Recently *Popović* interpreted, however, the API and its Commentary in accordance with the customary precedents’ findings regarding the extent of applying “reasonable measures” in armed conflict. In doing so, it cited the conclusion in *Von Leeb*, that “[u]nder basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal [act] ... By doing nothing he cannot wash his hands of international responsibility”.²⁰⁴ These cases exemplify both the problem of and, solution for, the inconsistently interpreted and implemented CR under ICL, particularly in the *ad hoc* tribunals’ case-law.

The ICC recently - in *Bemba* – referred to the *Popović* findings of the precise nature of CR.²⁰⁵ The *Blaškić* TC, when examining this precise nature, correctly referred to Art. 28 of the ICC as containing the precise nature of CR.²⁰⁶ Now that the judgment in *Bemba* has accurately elaborated on and articulated the precise nature of CR, subsequent interpretation and implementation of CR should be consistent with this remarkable precedent in ICL. The interpretations of different States Parties to the Rome Statute of Art. 28 have to be in accordance with the interpretation in *Bemba*.²⁰⁷

In short, the interpretation of CR should be carried out with its three components, rather than the mere expansion and the over-studying of the ‘criminal theory’ of liability for omission as in domestic law systems.²⁰⁸ The actual problem that needs to be resolved is balancing the three components of the precise nature of this doctrine simultaneously when interpreting and implementing CR.

²⁰² Cf. Shahram Dana, ‘Revisiting the Blaškić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY’ (2004) 4 Int’l Crim. L. Rev. 321, 344.

²⁰³ *Prosecutor v. Kayishema and Ruzindana*, TCII Sentence, ICTR-95-1 T, 21 May 1999, para 15.

²⁰⁴ *Popović* AC, (para 1932 at footnote 5479).

²⁰⁵ *Bemba* 2016, para 698; see also Chapter 3 (n 111).

²⁰⁶ See *Blaškić* TC, *supra* (n 194).

²⁰⁷ Such as the interpretation of Article 28 of the ICC under the German Criminal Code (VStGB), as against that of International Law and that of the UK International Criminal Court ACT. Cf. *supra* (nn. 82-89); see also the discussions in chapter 3 regarding *Bemba* (Chapter 3 nn 104-109).

²⁰⁸ Elies van Sliedregt, ‘International Criminal Law: Over-studied and Underachieving?’ (2016) 29 LJIL 1, 11.

5. Conclusion:-

This chapter has examined the liability for omission as a criminal theory in conjunction with the nature of responsibility under CR. It has shown that “failure to act” was discussed interchangeably as “non-action”. However, “non-action” indicates a degree of innocence rather than accountability; whereas “failure to act” implies a form of liability. This has had an impact on the direction of the debates within the literature as well as on judges’ opinions, and thus explains the reason for arguments in favour of the too lenient sentences for those convicted under CR.

This chapter has shown that “commission by omission” is the theory from which the nature of CR is recognised as a form of individual liability. During the drafting of the API, this theory was taken to be “the failure to act”. It has argued that the key problem is that during the drafting it was a problem, especially for those delegations whose countries lacked this form of liability. It has found that it was resolved by referring to the post-WWII judgments, where CR was developed, being threefold. *Halilović* re-considered the nature of CR, as “liability for omission”; but it was interpreted as akin to omission being an offence *per se*.

This occurred as a result of excluding the values element throughout the processes of interpreting CR by the *ad hoc* tribunals. The need for incorporating the values elements as part of the nature of CR therefore became more acute at the international criminal courts and tribunals. Such a need is urgent in cases of interpreting the nature of CR. This chapter has suggested implementing the values element, being a separate component of the threefold nature of CR rather than an inner (moral) element of criminal theories or aggravating factor in sentencing alone. For CR to be an operative form of liability in ICL, particularly the values element has to be integrated as an essential component of the nature and requirements of CR. This can be consistently implemented and fairly justified only through acknowledging the threefold nature of CR as created and developed under ICL.

❖ Conclusion

This thesis was concerned with examining the consistency of interpreting and implementing the nature and requirements of CR in ICL. It has discussed the extent and impact of this inconsistency, before suggesting a reason for these incompatible interpretations and implementations, which have adversely affected CR as an effective mode of liability under ICL.

This thesis was divided, therefore, into three parts. Part I identifies the elements that compose the nature of CR. It then examines the development of these elements, to determine the extent of their inclusion under the current codifications of CR. Part II discusses the process of interpreting CR in conjunction with these codifications. It then examines the impact of this interpretation on the requirements of CR and on the accused person's rights. Part III concludes this research by examining the core reason, and a possible solution, for the inconsistent interpretation and implementation of CR in ICL, followed by the thesis's concluding remarks.

At the beginning of this study it was observed that the attribution of uniqueness to CR can be justified only by implementing the three elements constituting its nature: values, custom and criminality. Military values established the concept of CR that was thereafter implied under the laws and customs of war; and then CR was developed as a form of criminal responsibility under ICL. Military values are those attached primarily to commanders: duty, responsibility and leadership. Through examining the origins of CR, this study has found the military values predominant in these principles, from its ancient creation to the post-WWII trials. It has therefore argued that, as a result of the domination of the values element, CR was perceived as a form of "accomplice liability" under various national legal systems.

These three elements were gradually developed throughout the history of CR. This study has argued that these elements were unprecedentedly implemented during the few post-WWII trials simultaneously, as an integral part of the nature of CR. The discussions find that each element contributed to shaping the nature of CR during the interpretation process by judges. It examines *Yamashita* as the core precedent for this doctrine's development. Although *Yamashita* was problematic as a fair trial, this thesis has found that the real problem was the imbalance of its

implementation of the three elements. This was because the values elements dominated the judges' interpretation, being more influential under their national law. *Re Yamashita*, however, acknowledged implicitly these three elements, in that the values element was argued to be the reason for 'responsible command' being a principle under customary law. This was, however, without examining the criminal element, although it was implicitly perceived to be based on liability for omission.

This study has therefore argued that, when interpreting the nature of CR, each of these three elements should be acknowledged and balanced as part of CR's nature. It examines relevant trials at the Nuremberg and Tokyo Tribunals and argues that the interpretation process during these trials was legitimate and consistent with the legality principle. It has found that the success of these cases is that, unlike that in *Yamashita*, the interpretation successfully balanced the three elements of the nature of CR. These discussions showed that the nature of liability under CR was articulated and applied effectively during the Nuremberg and Tokyo Trials, as a result of balancing these three elements.

This study has, further, argued that these three elements are the reason for the successful interpretation and implementation of CR's nature and requirements. These judgments therefore contain the customary nature and characteristics of CR. These three elements would, it can be assumed, have been considered during the codifications of CR, if they had been acknowledged. The first codification of CR was the Additional Protocol of 1977 to the Geneva Convention (API). The nature of liability under CR was not specified under the API's provisions; therefore CR was ambiguous.

This thesis has reviewed the preparatory work (*travaux préparatoires*) of the API. It found that, during the codification of CR, the nature of the liability was controversial, because the liability for failure to act (omission) was not endorsed in the domestic law systems of a number of participant states. It has shown, however, that the post-WWII trials were cited as precedent for the nature of CR during the drafting history of the API. Nonetheless, the final draft did not specify the nature of CR. This was for two reasons: (a) this nature was not recognised by the national systems of a number of states; and (b) a number of states, also, endorsed the post-WWII trials as the precedents where the nature of CR should be found. This finding supported this thesis' argument that the post-WWII trials should be recognised as the customary precedents of CR.

The API's significance for this study derives from the fact that it represents the customary status of CR as an already existing norm prior to its being stipulated in the Rome Statute, which embodies the current state of CR. Ambiguous formulation by the API influenced the drafting of CR under various statutes, especially those of the ICTY, ICTR and SCSL. Eventually, during judgments at the *ad hoc* tribunals, judges were confronted with this vague formulation of CR, under both these Statutes and the API.

It has argued that, based on the contemporary codifications of this doctrine, there are two potential readings:-

(1) CR is a mode of liability under ICL, to find a commander responsible for *failure to prevent* the commission of crimes by subordinates.

(2) CR is a mode of liability under ICL, to find a commander responsible for *the commission of crimes* by subordinates as a result of that commander's failure to prevent their commission.

Thus, to clarify the nature of CR, judges resorted to the post-WWII trials to deduce the rules of CR through interpretation. This study has argued that, for the implementation to be successful, the interpretation should be consistently carried out with its customary precedents, through resorting to the three elements of the nature of CR. It has also argued that, if such a method of interpretation had been followed by the *ad hoc* tribunals' judges, the second reading would have been found to endorse customary CR. The three components/elements of the nature of CR function, therefore, as a determinant of the nature of liability between these two readings: either (a) for omission or (b) for the underlying crime(s) committed.

Part I was therefore designed to examine and articulate those elements that constitute the nature of liability under CR. The subsequent implementation of CR in the *ad hoc* tribunals, however, resulted in CR being implemented in the following four forms:-

- I. the responsibility is for the underlying crime by subordinates, but the verdict is based on the failure to act;
- II. the responsibility is for the failure to act and the underlying crime is not relevant to the commander's own culpability;
- III. the responsibility is for the underlying crime and the verdict is for this crime; and

- IV. the responsibility is with respect to the underlying crime and the verdict is for the failure to act.

These four forms – or “generations” – appeared mainly in the ICTY, but they impacted on the SCSL interpretation of the nature of CR; and subsequently on the judgments of these tribunals, including the ICTR. These generations, above all, are inconsistent with one another and some of them contradict the reason for establishing international criminal courts and tribunals under ICL. More precisely, the second and fourth of these generations have changed CR from being a form of liability to being a punishable offence *per se*. This is contrary to the creation of CR under these tribunals’ applicable law and statutes, being codified as a mode of criminal responsibility. The reason for creating the *ad hoc* tribunals – according to Art. 1 of their statutes – is to prosecute persons *responsible for serious crimes* committed in those territories affected.

This study has also found that, as a result of the ICTY being more influential and therefore the model for the other *ad hoc* tribunals, judgments of the SCSL appeared contradictory, because it resorted extensively to the ICTY’s inconsistent interpretations. It has, consequently, found that the requirements of CR were controversial at these tribunals, including the ICTR. It has attributed these inconsistencies to imbalanced interpretation and implementation of the three elements of the customary nature of CR, which would have not been affected had these courts resorted to the customary precedents to deduce the applicable law.

Part I has found the implementation of CR inconsistent, as the nature of liability was controversial. Part II has therefore examined the legitimacy and consistency of the process of interpretation followed by the *ad hoc* tribunals. In these parts, the ICTY was given pride of place as a result of being the core mechanism and the influential authority for developing the law of CR for other *ad hoc* tribunals’ jurisprudence.

The authoritative interpretation of CR by the *ad hoc* tribunals is *Čelebići*, but it did not articulate precisely the nature of this doctrine. The judges in *Halilović* therefore found its nature to be unspecified. They interpreted CR as a liability for omission; but then suggested that CR is *per se* a crime of omission rather than a form of liability for omission. This thesis has found that this was primarily due to interpreting CR analogously to the liability for omission in some domestic law traditions, without considering the effect of CR being created under

international law; its three elements were therefore not recognised. Thus subsequent judgments were more controversial. In *Orić* for instance, although it suggested the underlying crime to be a fourth requirement of CR, it excluded the underlying crime from the commander's responsibility and found the accused to be responsible only for his dereliction of duty.

In this the actual underlying crime went unpunished, as it was replaced by the CR (being *per se* a crime, for dereliction of duty). This changed the nature of CR from being a separate form of liability to being *per se* a crime, which is contrary to its purpose in ICL. This interpretation was thereafter changed, as *Popović* found the commander explicitly responsible for the crimes of his subordinates; accordingly the accused was prosecuted and punished for the underlying crime, which fulfilled the purpose of CR and the reason for creating these *ad hoc* tribunals, as well as being consistent with the customary precedents. Nevertheless, *Karadžić* - more recently - found the accused responsible *with respect to a crime for which his subordinate was criminally responsible*. This is also controversially inconsistent, as it not only held the commander responsible *with respect to* – and not *for* – the underlying crime, but also changed the nature of CR and created a new form of it.

It has found, accordingly, that the first case-law “generation” prosecuted individuals under an unspecified nature of liability. This was followed by the second generation, which changed CR from being a form of liability to being an offence *per se*. The third generation was also controversial, as it did not examine the nature of CR at all, although it was correctly interpreted, as a form of responsibility for the underlying crime, implicitly acknowledging the three elements of its nature; whereas, lastly, in *Karadžić*, the liability was *with respect to* - but not *for* - the underlying crimes: that constituted a new form.

This study has found that the process of interpretation by judges at the *ad hoc* tribunals was inaccurate; and that this was the main reason for overlooking the true nature of CR. The discussions found that the *ad hoc* tribunals' interpretation process followed the teleological approach to interpretation. This study has argued that the teleological approach was not consistently implemented and that the tribunals' findings could, consequently, be illegitimate.

In assessing the legitimacy of an interpreted rule the determinant criteria are that: (a) any such rule should be consistently implemented and (b)

implemented through a consistently applied method of interpretation. These two requirements were affected by the interpretation process of CR. This thesis has found that, during this process of interpreting CR, the *ad hoc* tribunals – particularly the ICTY – suggested a number of misleading findings that exacerbated the problem of this ongoing inconsistency. In this sense, the *ad hoc* tribunals resorted to the API and its Commentary as the core authorities for clarifying the nature of CR.

Due to the vagueness of CR under the API provision, however, *Čelebići* reviewed – briefly and inconsistently with the teleological approach - the preparatory work of the drafting of the API. It suggested some findings as factual conclusions from few delegations' discussions about CR, it concluded that: (a) the participants' delegations rejected some standard such as that of 'should have known'; and (b) that the duty to punish was supported as an affirmative duty. However, by reviewing the preparatory work, this study has found that the *ad hoc* tribunals' findings were inaccurate.

The interpretation process of CR was, therefore, *per se* controversial, as were the resulting findings. Although the *ad hoc* tribunals referred to the post-WWII trials as precedents, this was not to deduce the law; more precisely, these precedents were listed as examples to support the status of CR as an already existing principle under customary law. Accordingly, the *ad hoc* tribunals' judges were continuously re-characterising the nature of CR, thereby jeopardising their interpretation's legitimacy.

Having shown that the *ad hoc* tribunals inconsistently implemented CR and that their method of interpretation was also inconsistent, this thesis has examined the potential impact on the requirements of CR. It has argued that these inconsistencies have impacted on these requirements' rationale. It has observed that the *ad hoc* tribunals - initially – recognised the importance of the 'military values' element, by acknowledging that the requirements of CR are deduced from a commander's duties. This should be through identifying the duties imposed on commanders by international law; and then articulating the sub-duties of which the requirements are being examined and against which they are being weighed.

This study has argued that the rationale of these requirements was overlooked. The interpretation of these requirements, therefore, appeared contradictory throughout the *ad hoc* tribunals' judgments. As a result of the

inadequate interpretation of CR, these requirements were divorced from their actual rationale. This study has found that some elements eventually replaced the essential requirements of CR. Particularly the “effective control” test predominantly replaced the requirements of subordination throughout the *ad hoc* tribunals, until recently.

It has argued that the suggestion of successor command was a result of overlooking not only the rationale and the boundaries of these duties, but also the role of duty with regard to the nature of CR. This thesis has found, also, that the inconsistency of interpreting the constructive knowledge requirement resulted from misinterpreting the nature and scope of the sub-duty to know. It has found that the sub-duty to know was a step under the essential duty to take necessary measures to prevent, rather than a separate duty. It has also found that the misleading clause which suggested that the duty to punish existed in all military codes, had an impact on the rationale of such a duty. It has accordingly argued that this duty, which is available exclusively to the judicial authority, was transferred to the commander illegitimately. This was found through examining the relevant ‘*travaux préparatoires*’ of the API, as well as its Commentary.

Consequently, the implementation of these requirements was found to be inconsistent. This primarily resulted from overlooking the nature of CR as having been created under international law; more precisely, the three elements of this nature were ignored. It became evident that the problem of the nature of the doctrine being continually re-characterised has resulted from the failure to acknowledge these elements of the nature of CR. Accordingly, this study has found the inconsistency of interpreting and implementing CR to have impacted subsequently not only on the doctrine’s requirements but also on other principles required generally in criminal proceedings.

This thesis has therefore examined the potential impact of these inconsistencies on the rights of an accused person. Hence, it has argued that the inconsistent interpretation and continuous re-characterisation of CR jeopardise the Human Right standard that is guaranteed to every accused person under: (a) the principle of legality; and (b) the right to a fair trial. It then jeopardises the accused’s rights during these proceedings. It has argued this in the light of the previously discussed, and then demonstrated, inconsistencies.

This thesis has examined the impact of such inconsistency on two principles only. First, on the principle of specificity, which is a separate requirement under the principle of legality. Secondly, on the right of an accused person to be fully informed about the nature of the accusation against him, which is a requirement under the right to a fair trial. The extent of implementing these two principles was discussed, in conjunction with the problem of inconsistently interpreting and implementing CR in the *ad hoc* tribunals.

In the light of the preceding findings, this thesis has found that the nature of CR was not clear and that it therefore lacked the specificity required by the legality principle. It has observed that the information that is available to the accused lacked specificity; and that that subsequently precludes the accused from the proper entitlements under the legality principle. It has found that, particularly in instances of charges pursuant to CR, such information, whether available or not, would not satisfy the legality principles. Because of the problem of inconsistency, such an accused would not comprehend the accusation until the verdict stage and by then the rights of the accused would have been eroded.

This study has found an associated issue connected to information available to the accused concerning the nature of CR. One of the requirements of fair trial is the right of an accused person to be informed of the nature of the charge and the case against him. This thesis has found that such a right was put in a lower category, to be the right of the defence in preparing, rather than part of a fair trial. It has also found that the *ad hoc* tribunals argued that, for CR, the specificity of the information is lower than that for direct liability. This study has argued, accordingly, that the problem of inconsistency would have been considered a violation of the accused person's rights had this problem of inconsistency been acknowledged by judges at the *ad hoc* tribunals and the accused not precluded from his rights.

Part I found CR to have been implemented inconsistently; and Part II then found such inconsistency to have (a) resulted from the process of interpretation, and (b) impacted on CR's requirements and affected consequently the accused's rights. Part III examined the core reason for the exacerbation of the inconsistency of CR under ICL.

In the light of the above findings, Chapter 7 discussed the reason for the inadequate application of this doctrine under ICL. From this study's findings, it

seems that the essence of the inconsistency in interpretation and implementation is the result of interpreting CR on the basis of domestic criminal theories rather than on that of its nature and its creation under ICL. This issue impacted on not only judges' interpretations of CR, but also attracted scholars' attention more frequently.

This thesis, accordingly, has examined, lastly, the essence of the problem for the future of CR, to resolve this problem of inconsistency. It has argued that this problem concerning the nature of culpability under CR was also a controversial issue between states' delegates in the API drafting history (i.e. regarding "the failure to act"). This thesis has discussed, therefore, the theory of the liability for omission under relevant domestic criminal law systems that were relevant to CR in the *ad hoc* tribunals' interpretations.

It has observed that some national criminal systems recognise "the failure to act" under liability for omission. Such liability exists in two forms: (a) "commission by omission", where the responsibility is for the underlying crime; and (b) where the omission is a crime *per se*. It has found, also, that, although commission by omission is liability for the underlying crime, the implementation of this concept is controversial in some traditions. This supports the argument of this thesis that the methodology *per se* – which was adopted by judges during their process of interpretation – was inaccurate. CR was inadequately interpreted in accordance with only the theory of liability for omission in domestic law systems, without distinguishing between commission by omission and omission as a crime in itself. It has found that, partly because of such lack of a distinction, CR was interpreted inconsistently by the *ad hoc* tribunals.

It has concluded, more precisely, that although the doctrine of CR borrows aspects of its nature from the theory of liability for omission, this should not overrule other aspects of the nature of this doctrine. The values element plays a fundamental role, particularly in cases of violating the law of armed conflict, implicitly under ICL and explicitly by military justice systems. The *ad hoc* tribunals' interpretation of CR, therefore, neither reflected the military values nor adequately applied the purpose of ICL: to prosecute those responsible for violations of the laws of armed conflict.

This thesis, lastly, has observed that only a few judgments in ICL implemented CR in conjunction with norms dictated by these three elements. Two

issues are therefore of more importance in future practices: the balance of these elements and the priority of their use in the implementation. In that sense, two cases were discussed to justify this stance: *Popović* and *Blaškić* TC. Although these cases implicitly interpreted CR pursuant to these three elements, it was unsuccessfully implemented in *Blaškić* due to the imbalanced application of these elements.

First, *Blaškić* TC stretched the nature of CR beyond its scope, as a result of unbalancing the elements of CR; thus its finding was rejected. Secondly, *Popović* interpreted rules of IHL regarding CR by accurately resorting to the military values rather than the API Commentary. In these cases – unlike the majority of the *ad hoc* tribunals' cases - military values were given priority during the implementation of CR, but it was admissible in *Popović* due to successful balancing the three elements of CR (values, custom and criminality). It is therefore, the balance and priority of implementing the three elements that are the two solutions for the inconsistency of CR under ICL, as summarised in the conclusion below.

As outlined above, in order to implement CR as an operative and consistent form of liability under ICL, its interpretation should be re-considered in conjunction with its threefold nature. This thesis has found that the values element, especially, was overlooked throughout the process of interpreting and implementing the nature of CR by the *ad hoc* tribunals. It has also found that, to resolve such a problem, these three elements need to be balanced during the interpretation and implementation processes. Hence, this study has emphasised the importance of acknowledging the three components as being part of the nature of CR, which can be consistently implemented and fairly justified only through balancing these three components under ICL.

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