Roberta Arnold / Miles Jackson

Article 28 Responsibility of commanders and other superiors

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

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

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

(ii) That military commander or person failed to take the 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.

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A. Introduction

I. General

1

In October 1945, at the residence of the United States' High Commissioner in Manila, a Military Commission established under the authority General MacArthur, Commander of the U.S. Armed

Forces in the Pacific Theatre, was convened to try General Tomoyuki Yamashita.[1] General Yamashita had commanded Japanese forces in the Philippines prior to his surrender in September 1945. The core of the charge against Yamashita lay in the claim that he failed to discharge his duty as commander to control the activities of members of his command, activities which included the commission of atrocities.[2] Yamashita was convicted by the Military Commission, denied his petition for *habeas corpus* and prohibition by the U.S. Supreme Court early the following year,[3] and executed in February 1946.[4]

2

This is the modern origin of the doctrine of command responsibility or, more aptly given its evolution, the doctrine of superior responsibility.[5] The previous edition of this commentary provides a rich overview of its historical development.[6] Often described as an original creation of international law,[7] superior responsibility establishes the criminal responsibility of superiors on the basis of their material ability to control their subordinates. National military law has long provided a system of responsibility of commanders, including the delineation of specific duties of control.[8] On the international plane, as early as the Geneva Convention of 1864, we see the articulation of a specific duty of implementation: 'The implementing of the present Convention shall be arranged by the Commanders-in-Chief of the belligerent armies following the instructions of their respective Governments and in accordance with the general principles set forth in this Convention.'[9] As Triffterer explains, slow and uneven normative development followed, which eventually led to the articulation of a more comprehensive set of principles and duties in Articles 86 and 87 of Add. Prot. I.[10]

3

The overarching military notion of responsible command, pursuant to which commanders must discharge their command and control duties,[11] is key to understanding the genesis and application of the criminal law doctrine of command responsibility and, more specifically, Article 28.[12] The

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1 U.S. Military Commission, Manila, *Trial of General Tomoyuki Yamashita*, Case No. 21, 4 February 1946, LRTWC, Volume IV (London: UN War Crimes Commission, 1948).

2 *Ibid.,* 3-6.

3 U.S. Supreme Court, *In re Yamashita*, 327 US 1 (1946).

4 For an overview and evaluation, see Parks (1973) 62 *MilLRev* 22-38.

5 Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 851. For criticism in respect of its application to General Yamashita himself, see *U.S. Supreme Court*, In re Yamashita, 327 US 1 (1946) (Diss.Op. of Justice Murphy). See further Parks (1973) 62 *MilLRev* 35-38.

6 Triffterer, in: Triffterer/Ambos, *Commentary* (2016) mn. 1-84.

7 Werle and Jessberger, *Principles ICL* (2014) 221. See generally Karsten, *Verantwortlichkeit* (2010).

8 Triffterer/Arnold, in: Triffterer/Ambos, *Commentary* (2016) mn. 5. See relatedly ICTY, *Prosecutor v. Delalić et al. (Čelebici)*, AC, Judgement, IT-96-21-A, 20 Feb. 2001, para. 226: 'It is however noted that although a commander's failure to remain apprised of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability.'

9 Article 8 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864. See Triffterer/Arnold, in: Triffterer/Ambos, *Commentary* (2016) mn. 10.

10 Triffterer/Arnold, in Triffterer/Ambos, *Commentary* (2016) mn. 10-24.

11 See Sivakumaran (2012) 10 *JICJ* 1130-1137 on the duty of commanders.

12 On the historical development of the doctrine of superior responsibility, see Parks (1973) 62 *MilLRev* 1; Triffterer/Arnold, in: Triffterer/Ambos, *Commentary* (2016) mn. 1-84.

principle of 'responsible command' is incorporated in Article 1 Hague Reg.,[13] and in the provision in Article 43(1) Add. Prot. I that the 'armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates ...'[14] The principle of responsible command applies also in times of NIAC: Article 1(1) Add. Prot. II refers to armed forces, dissident forces or other organized groups under a 'responsible command'.[15] In *Hadžihasanović*, the ICTY AC explicitly drew the link between responsible command and command responsibility as a criminal law doctrine. First, in general terms, the Chamber referred to command responsibility as the *corollary* of responsible command – as the 'the most effective method by which international criminal law can enforce responsible command.'[16] Second, and more specifically, the Chamber found that the requirement of military organization applicable too in NIAC implied responsible command and thus the applicability of the criminal law doctrine of command responsibility.[17]

4

Article 28, then, entails the detailed specification of superior responsibility in its *criminal* form on the international plane. On one hand, this detailed specification is helpful, marking a clearer delineation of the doctrine than in the Statutes of the ICTY and ICTR.[18] On the other hand, certain drafting choices add a new dimension to points of discussion in older case law, while also introducing new doctrinal questions. More widely, at first glance, the justification for the criminal law doctrine of superior responsibility in general, and for its inclusion in the Rome Statute in particular, is straightforward: it centres responsibility on those who have a particular capacity to ensure compliance with international law.[19] At the same time, in its creation of a form of *omissions* liability, as well as in respect of particular elements of the doctrine, superior responsibility has long encountered principled critique – in terms of the principles of legality and culpability, as well as wider considerations of fairness.[20] Central here is the contested issue of causation, as well as the fact that liability can arise in situations where the superior possessed neither intent or knowledge.[21] In addition, the story of superior responsibility as a criminal law doctrine is, in part at least, a story

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13 Article 1 Regulations, Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 Oct. 1907.

14 Article 43(1) Add. Prot. I.

15 Article 1(1) Add. Prot. II.

16 ICTY, *Prosecutor v. Hadžihasanović et al*, AC, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, IT-01-47-AR72, 16 July 2003, paras. 14, 16.

17 *Hadžihasanović*, IT-01-47-AR72, para. 17. See though Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (OUP 2018) 85-89 on whether responsible command is a pre-requisite to party status under Common Article 3. In this respect, see *Prosecutor v. Mrksić et al.*, TC II, Judgement, IT-95-13/1-T, 27 Sep. 2007, para. 407: 'While some degree of organisation by the parties will suffice to establish the existence of an armed conflict, this degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation, as no determination of individual criminal responsibility is intended under this provision of the Statute.'

18 See similarly Article 6(3) SCSL Statute and Article 29 ECCC Law.

19 Ambos, *Treatise ICL I* (2013) 197.

20 See e.g. Damaška (2001) 49 *AmJCompL* 455; Mettraux, *Responsibility* (2009) 8-11; Robinson (2012) 13 *MelbJIL* 1.

21 Cf. Article 30 Rome Statute. On this issue, see Damaška (2001) 49 *AmJCompL* 455; Martinez (2007) 5 *JICJ* 638; Robinson (2017) 28 *CLF* 633.

of expansion,[22] bound up with growth in substantive international criminal law. We see in the Rome Statute the textual affirmation of this expansion: from application in international armed conflict to non-international armed conflict, from war crimes in a broad sense to other international crimes set out in the Statute, from military commanders to civilian relationships, even in times of peace.[23]

5

The elements of superior responsibility in customary international law have been developed and scrutinized in international case law and scholarship. Much of that material is relevant for the interpretation of Article 28, though account must be taken of certain textual choices in the Statute. In addition, Article 28(a) received detailed judicial attention at each stage of the proceedings in *Bemba*, where the charges related to crimes committed by forces found to be under the defendant's command on the territory of the CAR between late-October of 2002 and mid-March of 2003.[24] These proceedings encompass the PTC's confirmation of the charges in 2009,[25] conviction at trial in 2016,[26] where Judges Steiner and Ozaki each issued a Separate Opinion addressing certain legal questions arising under Article 28,[27] and acquittal by the AC in 2018 by a majority of three votes to two.[28] The majority comprised the President, Judge Eboe-Osuji, who issued a Concurring Separate Opinion,[29] and Judges Van den Wyngaert and Morrison, who issued a short Separate Opinion.[30] In dissent, Judges Monageng and Hofmański issued a detailed opinion addressing each aspect of the defendant's appeal.[31] Together, these decisions, judgements, and opinions indicate agreement on certain questions of superior responsibility under Article 28, but also deep disagreement on others.

II. The legal character of superior responsibility and Article 28

6

An initial question concerns the legal character of the doctrine of superior responsibility. Of course, there is agreement that the relevant criminal conduct at issue is omission. To reiterate, we are dealing with the different ways in which a commander might fail to exercise 'responsible command' – that is, to fail to discharge his duties. In general terms as to omissions liability, as Ambos puts it:

'Crimes of omission can appear in two different forms: as an offence of the special part of criminal law (a special, statutory offence) that makes certain omissions punishable; or as a commission by

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22 See though, as discussed in detail below, ICC, *Prosecutor v. Bemba*, AC, Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", ICC 01/05-01/08-3636-Red, 8 June 2018.

23 Cf. Mettraux, *Responsibility* (2009) 96-99 and Ronen (2012) 43 *VandJTransnatL* 313.

24 See McDermott (2016) 110 *AJIL* 526; Powderly (2018) 57 *ILM* 1031.

25 ICC, *Prosecutor v. Bemba*, PTC 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 01/05-01/08-424, 15 June 2009.

26 ICC, *Prosecutor v. Bemba*, TC, Judgment pursuant to Article 74 of the Statute, ICC 01/05-01/08-3343, 21 March 2016, para. 752. The defendant was convicted of two counts of CaH and three counts of war crimes on the basis of his responsibility under Article 28(a) of the Statute

27 *Bemba*, TC, ICC 01/05-01/08-3343-AnxI, Sep.Op. of Judge Steiner; *Bemba*, TC, ICC-01/05-01/08-3343-AnxII, Sep.Op. of Judge Ozaki.

28 *Bemba*, AC, ICC 01/05-01/08-3636-Red.

29 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Conc.Op. of Judge Eboe-Osuji.

30 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Sep.Op. of Judges Van den Wyngaert and Morrison.

31 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Joint Diss.Op. of Judges Monageng and Hofmański.

omission based on a rule in the general part. In the former case a proper (genuine, authentic or separate) offence of a pure omission (*délit de pure omission*; *echtes Unterlassungsdelikt*) is created; […] In the case of a commission by omission a general (part) provision defines the requirements under which crimes of active conduct can be committed by an omission causing a result – that is, by omitting to prevent a result ('improper' or 'inauthentic offence of omission', *délit de commission par omission*, *unechtes Unterlassungsdelikt*.') [32]

7

Moving from this general frame to the specific issue of the legal character of the doctrine of superior responsibility in international custom, this is a matter of long-standing controversy in the case law and literature.[33] Three major lines of thought may still be identified.[34] The exact terms used by different authors vary somewhat, but broadly they describe:

(i) Superior responsibility as a separate offence of omission;

(ii) Superior responsibility as a distinctive mode of liability whereby the commander is responsible as a party to the crimes committed by their subordinates; and

(iii) Superior responsibility as a *sui generis* form of liability that entails a mix of doctrinal structures ordinarily found in municipal law.[35]

8

The first line of thought thus corresponds to what is called above an *offence of pure omission*. There are, relatively at least, fewer complexities here: the responsibility of the defendant is defined by their own omission itself.[36] The second line of thought broadly corresponds to what is called above *commission by omission*. Commission by omission requires a specific legal duty to act, expressed as a 'guarantor duty' (*Garantenpflicht*) in some non-English speaking jurisdictions.[37] This is generally attached to persons with the legal obligation to protect either: (i) a specific object or person under their supervision from external dangers, or (ii) third parties from the negative effects

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32 Ambos, in: Ambos *et al.*, *Core Concepts I* (2020) 20.

33 Meloni (2007) 5 (3) *JICJ* 620.

34 Nybondas, *Command Responsibility* (2010) 158. See also Jia (2004) 3 *ChineseJIL* 31: 'One must wonder whether the existing literature has made the confusion in this regard worse or otherwise. There is, surprisingly, no trend in the writings of jurists.'

35 For discussion, see Triffterer, '"Command Responsibility" – Crimen Sui Generis or Participation as "Otherwise Provided"?', in Lagodny *et. al.* (eds.), Festschrift für Albin Eser (C.H. Beck 2005) 901; Weigend (2004) 116 *ZStW* 999; Meloni, (2007) 5 (3) *JICJ* 619; Maugeri, *Responsibilità da comando nello statuto della corta penale internazionale* (Giuffrè Editore 2007) 177; Bonafe (2007) 5 *JICJ* 599; Mettraux, *Responsibility* (2009) 37-52; Nybondas, *Command Responsibility* (2010) 158 ff; Arnold (2013) 11 *JICJ* 943; Arnold and Wehrenberg (2013) (52) 2 *MLLWR* 241; Laucci, in: Fernandez *et al., Commentaire I* (2019) 1095, 1096-1097. See also see also Fiolka, in Niggli and Wiprächtiger, *Basler Kommentar II* (Helbing Lichtenhahn 2019) 4833, mn 1.

36 Judge Eboe-Osuji's explanation in the AC in *Bemba* is helpful – 'But, the emphasis, then, is on the criminal responsibility *for the commander*—as a matter of *his own* failing only—in the sense of his own failing being only dereliction on his part and nothing more. It is not really about his or her own individual criminal liability "*for* the crimes of subordinates"' (*Bemba,* AC, ICC 01/05-01/08-3636-Red, Conc.Sep.Op. of Judge Eboe-Osuji, para. 191). There is still a distinctive feature on this approach, which is that the superior's responsibility is nonetheless conditional on the occurrence of their subordinate's crime.

37 Ambos, in: Ambos *et al.*, *Core Concepts I* (2020) 17. See generally Berster (2010) 10 *ICLRev* 619.

of a potential source of danger they originated.[38] Here, in superior responsibility, the omission leads to the responsibility of the superior as a party to the subordinate's crime. Under the third line of thought – superior responsibility as a *sui generis* form of liability – we are dealing with, as the name suggests, a mixed or hybrid form of liability. Of course, a degree of doctrinal complexity is hidden in that label. The idea, here, is that superior responsibility combines, as van Sliedregt puts it, 'aspects of a mode of liability and a separate offence liability.'[39]

9

As a number of authors have noted, deep disagreement on this issue is evident in the case law of the ICTY, most notably in the Interlocutory Appeal on Jurisdiction in *Hadžihasanović*.[40] In *Hadžihasanović*, in answering the question of the liability of successor commanders the majority and minority's views were informed by diverging understandings about the doctrine's legal nature. In this respect, it is helpful to set out part of Judge Shahabuddeen's Partial Dissenting Opinion:

'The position of the appellants seems to be influenced by their belief that article 7(3) of the Statute has the effect, as they say, of making the commander "guilty of an offence committed by others even though he neither possessed the applicable *mens rea* nor had any involvement whatsoever in the *actus reus*." No doubt, arguments can be made in support of that reading of the provision, but 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.'[41]

10

This part of Judge Shahabuddeen's opinion helps to illustrate why the debate on the legal character of superior responsibility matters so much. For one, the legal characterisation of the doctrine may have diverging implications for the resolution of specific questions of responsibility in practice – as it did in *Hadžihasanović*. It is directly relevant to the issue of causation, as well as to the interpretation and justifiability of superior responsibility's reduced fault element, which demands less than knowledge.[42] Moreover, as Meloni points out, characterisation may matter for sentencing[43] – for ensuring the imposition of a proportionate penalty – as well as the criminal law's labelling function. Finally, it makes a difference on the level of critique – for assessing whether the doctrine comports with fundamental principles of criminal law.

11

Looking to the cases at the ICTY determining the character of superior responsibility in custom, the prevailing interpretation describes the doctrine as a '*sui generis* form of liability' for failing to act.[44]

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38 Ambos, in: Ambos *et al.*, *Core Concepts I* (2020) 28.

39 van Sliedregt, *Responsibility* (2012) 196.

40 *Hadžihasanović*, IT-01-47-AR72.

41 *Hadžihasanović*, IT-01-47-AR72, Partially Diss.Op. of Judge Shahabuddeen, para. 32.

42 Cf. mn. 48-50 on the idea that it is the *elements* that are relevant to the question of characterisation, rather than the other way around.

43 Meloni (2007) 5 (3) *JICJ* 620.

44 Meloni (2007) 5 (3) *JICJ* 631; Mettraux, *Responsibility* (2009) 38; van Sliedregt, *Responsibility* (2012) 196. See ICTY, *Prosecutor v. Halilović*, TC, Judgement, IT-01-48-T, 16 Nov. 2005, para. 78: 'The Trial Chamber further notes that the nature of command responsibility itself, as a *sui generis* form of liability, which is distinct from the modes of individual responsibility set out in Article 7(1), does not

This designation is not altogether satisfying, in its generality and in the possibility that the label obscures aspects of the functioning of the doctrine that ought to be subject to criticism.[45] What it seems to mean, at least, is two things. On one hand, the superior is not inculpated as a party to their subordinate's crime.[46] On the other hand, as to sentencing, tribunal case law makes it clear that both the gravity of the superior's dereliction of duty *and* the gravity of the subordinate's crime inform the determination of penalty.[47]

12

Turning to Article 28, a basic point is that inevitably the text is a result of compromises during drafting.[48] On the issue of legal characterisation, the varying views set out above recur in scholarly accounts. One view is that Article 28 is best characterized as a separate offence of omission[49] – it 'makes the superior liable only for a failure of proper supervision and control of his or her subordinates but not, at least not 'directly', for crimes they commit.'[50] It is sometimes noted that a conception of this kind underpins the implementing legislation of certain States.[51] A more widely held position, expressed in slightly different language by different scholars, is that Article 28 establishes a form of participation in the crimes listed in the Statute,[52] albeit in a distinctive way. Views of this kind tend to emphasise, in the first place, the language of Article 28.[53] To reiterate, Article 28 provides: '*In addition to other grounds of criminal responsibility* under this Statute for crimes within the jurisdiction of the Court…' (emphasis added). Moreover, paragraphs (a) and (b) specify that the commander or superior 'shall be criminally responsible for crimes within the jurisdiction of the Court committed by' their subordinates. In addition, considering the context of the terms to be interpreted, Article 28 appears in Part 3 of the Statute, entitled 'General Principles of Criminal Law'.

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require a causal link'; and ICTY, *Prosecutor vs Hadžihasanović and Kubura*, AC, Judgement, IT-01-47-A, 22 April 2008, paras. 39, 312-318. See critically Robinson (2012) 13 *MelbJIL* 37: 'Claims about the 'sui generis' nature of command responsibility have been fuelled by increasingly tortuous and convoluted statements in Tribunal jurisprudence.'

45 Robinson (2012) 13 *MelbJIL* 39.

46 Meloni (2007) 5 (3) *JICJ* 632.

47 *Hadžihasanović and Kubura*, IT-01-47-A, paras. 312-318; *Delalić,* IT-96-21-A, paras. 732, 741.

48 See Mettraux, *Responsibility* (2009) 23 describing Article 28 as 'a perfect illustration of the compromises and adjustments that were necessary during the negotiation of the Statute to achieve a definition of that doctrine that was acceptable enough for all parties'; Karsten (2009) 7 *JICJ* 989.

49 Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 850; more recently Ambos, *Treatise ICL I* (2013) 206.

50 Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 851. This view is informed by a longstanding worry that in some circumstances the doctrine, if understood as a mode of participation, would give rise to responsibility in a manner inconsistent with the principle of culpability. For discussion, see Damaška (2001) 49 *AmJCompL.* 455; Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 832-835; Robinson (2012) 13 *MelbJIL* 1.

51 Cryer, in: *id. et al.*, *ICL* (2019), 377 in respect of the implementing legislation of Canada and Germany and, further, van Sliedregt, *Responsibility* (2012) 203 on the Dutch implementing legislation.

52 Triffterer (2002) 15 *LeidenJIL* 186. See further Werle and Jessberger, *Principles ICL* (2014) 224 arguing that under Article 28 the 'superior is liable for the crime committed by his or her subordinates, but to a lesser degree than those committing the crime as direct or indirect perpetrators', and Cryer, in: *id. et al.*, *ICL* (2019) 378 proposing that 'command responsibility is treated as a form of liability for the underlying offences', which 'clearly imputes the crimes of the subordinates to the superior'. For further comment along these lines, see Jia (2004) 3 *ChineseJIL* 14-15; *Nerlich* (2007) 5 *JICJ* 665; van Sliedregt, *Responsibility* (2012) 200.

53 Jackson, *Complicity* (2015) 114-115.

13

The question of the legal character of superior responsibility was addressed at various stages of proceedings at the ICC in *Bemba*. To start with the Confirmation Decision, the PTC noted:

> '[A]rticle 28 of the Statute reflects a different form of criminal responsibility than that found under article 25(3) (a) of the Statute in the sense that a superior may be held responsible for the prohibited conduct of his subordinates for failing to fulfil his duty to prevent or repress their unlawful conduct or submit the matter to the competent authorities. This sort of responsibility can be better understood "when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act"'.[54]

14

Thereafter, in its 2016 Judgement, the TC explicitly noted that the nature of superior responsibility had been a matter of considerable debate. Approving the passage quoted above of the PTC, the TC put the issue in even clearer terms: '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.'[55] It explicitly distinguished the scheme in Article 28 from what it called 'a distinct crime of pure omission'.[56] Its reasoning here emphasized the textual and contextual aspects of the provision mentioned above. Finally, the TC nonetheless emphasized Article 28's distinctiveness as a mode of liability – that is, its distinctiveness from Article 25. This prompted the conclusion as to Article 28's establishment of a 'form of *sui generis* liability.'[57]

15

The AC Judgement, in acquitting Mr Bemba, does not explicitly address the question of legal characterisation.[58] It is fair to read the Separate Opinion of Judges Van den Wyngaert and Morrison and the Joint Dissenting Opinion of Judges Hofmański and Monageng as premised on the idea that superior responsibility is a form of participation in the crimes of the subordinate.[59] More directly, Judge Eboe-Osuji's Concurring Separate Opinion includes an extensive discussion of the question – emphasizing that Article 28 contemplates 'much more than dereliction of duty'.[60] This is based on a close reading of the Rome Statute. For Judge Eboe-Osuji, this conclusion held even for the limb of superior responsibility that responds to failure to submit the matter to the competent authorities.[61]

16

In sum, the position taken in *Bemba* is that superior responsibility under Article 28 is to be understood as a form of participation in the underlying crimes of the superior's subordinates. As set out below, there is a better way to think about the provision's legal character – that it is better

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54 *Bemba*, PTC, ICC 01/05-01/08-424, para. 405.

55 *Bemba*, TC, ICC 01/05-01/08-3343, para. 171.

56 *Bemba*, TC, ICC 01/05-01/08-3343, fn. 384.

57 *Bemba*, TC, ICC 01/05-01/08-3343, para. 174. The *Bemba* TC at fn. 388 also noted that Judge Steiner would have adopted the term 'additional' liability instead of *sui generis* liability. See further McDermott (2016) 110 *AJIL* 530-531; Laucci in: *Commentaire I* (2019) 1096-1097.

58 *Bemba*, AC, ICC 01/05-01/08-3636-Red.

59 See e.g. *Bemba*, AC, ICC 01/05-01/08-3636-Red, Sep.Op. of Judges Van den Wyngaert and Morrison, para. 33; *Bemba*, AC, ICC 01/05-01/08-3636-Anx1-Red, Joint Diss.Op. of Judges Monageng and Hofmański, paras. 333-334.

60 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Concurring Sep.Op. of Judge Eboe-Osuji, para. 198.

61 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Concurring Sep.Op. of Judge Eboe-Osuji, para. 208.

understood as a separate offence of omission.[62] Key to this view is the idea that the legal character of Article 28 ought to be informed by the interpretation of its elements, rather than the other way around. Nonetheless, at this point the prevailing view is that under Article 28 the superior is held responsible as a party – although in a distinctive way.

B. Analysis of the elements of Article 28

I. General remarks

17

Immediately apparent is a set of distinctions drawn in the text of Article 28. Three are of particular significance.[63] *First*, Article 28 refers to three categories of superiors. The first two, both dealt with under para. (a), refer to a 'military commander' and a 'person effectively acting as a military commander'. The third, dealt with under para. (b), denotes 'superior and subordinate relationships not described' in para. (a). *Second,* Article 28 sets out three standards in the mental element. Criminal responsibility arises under para. (a) where the person either 'knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit' the underlying crimes. Criminal responsibility arises under para. (b) where the person either 'knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.' Thus, knowledge applies to both paragraphs, while each sets a lower, alternative, standard in different terms. *Third*, in articulating the duty on the commander, Article 28 refers to duties to 'prevent' or 'repress' the commission of the underlying crimes or 'submit the matter to the competent authorities for investigation and prosecution.'

18

Beyond these basic distinctions, much discussion of superior responsibility in scholarship takes as its basis the classic tripartite test articulated by the ICTY.[64] This test requires the following elements: (i) the existence of a superior-subordinate relationship; (ii) that the superior 'knew' or 'had reason to know' that the criminal act was about to be or had been committed; and (iii) that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[65] This straightforward articulation of the elements of superior responsibility captures its essence, elements which have been drawn on by the ICC in interpreting Article 28. Nonetheless, it makes sense to start with the assessment of Article 28(a) in *Bemba,* where the TC set out a six-part test:

(i) crimes within the jurisdiction of the Court must have been committed by forces;

(ii) the accused must have been either a military commander or a person effectively acting as a military commander;

(iii) the accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes;

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62 See mn. 48-50.

63 On a fourth possible distinction – 'effective command and control' compared to 'effective authority and control', at least as to Article 28(a) see *Bemba*, ICC 01/05-01/08, para. 180-181 and mn. 27 below.

64 On the importance of the ICTY and ICTR for the clarification and development of the law of superior responsibility, see Mettraux, *Responsibility* (2009) 13-20. For an account of the evolution of the ICTY's case-law, see van Sliedregt, *Responsibility* (2012) 184-197.

65 ICTY, *Prosecutor v. Delalić et al.* (*Čelebići*), TC, Judgement, IT-96-21-T, 16 Nov. 1998, para. 346; ICTY, *Prosecutor v. Halilović*, AC, Judgement, IT-01-48-A, 16 Oct. 2007, para. 59.

(iv) the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes;

(v) the accused must have failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; and

(vi) the crimes committed by the forces must have been *a result of* the failure of the accused to exercise control properly over them.[66]

19

The first requirement, though perhaps of a different kind from the others, is helpful in its reiteration of the necessity of the commission of certain underlying crimes. This flows from the characterisation of superior responsibility as a form of participation in the crimes of the subordinate, albeit a distinctive one.[67] The sixth requirement, also discussed below, addresses the connected and contested question of causation.

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The middle four requirements may be seen, broadly, as a particular articulation in the context of Article 28(a) of the classic tripartite test at the ICTY.[68] In one particular respect, however, the TC's splitting up of the commander's status – (ii) above – from effective command and control – (iii) above – has the potential to emphasize an important aspect of the doctrine of superior responsibility. This is the requirement, as the ICTY AC put it in *Halilović*, that control arises in the context of a 'pre-existing relationship of subordination, hierarchy or chain of command', whether formal or informal.[69] Karsten explains this point clearly:

'The superior responsibility doctrine does not aim at all persons who have effective control over the direct perpetrators in the sense that they have the material ability to prevent or punish their criminal behaviour. It only applies if the effective control is structurally rooted in an entity to which both superior and subordinate belong.'[70]

21

In practice, it may be that the distinction Karsten emphasises here is difficult to maintain in cases concerning *de facto* commanders – those 'effectively acting as a military commander' or indeed *de facto* non-military superiors.[71] In *Bemba*, the TC held as follows: 'The Chamber is of the view, and the parties appear to be in agreement, that the factors to be taken into consideration when determining a person's "effective authority and control" and those establishing that a person

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66 *Bemba*, TC, ICC 01/05-01/08-3343, para. 170. See mn. 73-87 below for discussion in the elements in respect of Article 28(b).

67 The commission of underlying crimes would still be a requirement if Article 28 were interpreted to establish a separate offence of omission – for discussion see mn. 48-50 below.

68 See Olasolo and Cantor (2019) 30 *CLF* 71 on their 'high degree of correspondence.'

69 *Halilović*, IT-01-48-A, para. 210. See further the AC's reference (fn. 591) to preceding case law developing this point, including *Delalić et al.,* IT-96-21-A, para. 303 and *Prosecutor v. Blaškić*, AC, Judgement, IT-95-14-A, 29 Jul. 2004, paras. 375-381. In this respect, the AC's emphasis in *Delalić et al.,* IT-96-21-A, para. 303 is illustrative: 'The Appeals Chamber does not consider the doctrine of command responsibility – which developed with an emphasis on persons who, by virtue of the position which they occupy, have authority over others – as having been intended to impose criminal liability on persons for the acts of other persons of completely equal status.'

70 Karsten (2009) 7 *JICJ* 993. See also Van der Wilt, in: Jalloh, *Sierra Leone* (2013) 148.

71 See similarly Ronen (2012) 43 *VandJTransnatL* 339.

"effectively acted as a military commander" are intrinsically linked.'[72] There is not necessarily a difficulty in principle here, as long as this statement is not taken to collapse the cumulative requirements of a particular relationship of subordination and effective control.[73]

II. Paragraph (a)

1. A '[m]ilitary commander or person effectively acting as a military commander'

22

Para. (a) establishes two categories: military commanders and persons effectively acting as a military commander. This itself, before even considering non-military superiors in terms of para. (b), distinguishes the Rome Statute from the relevant provisions of the ICTY and ICTR.[74] In *Bemba,* the TC provided the following definition of a military commander:

'The term "military commander" refers to a person who is formally or legally appointed to carry out a military command function. Commonly, military commanders and their forces will be part of the regular armed forces of a state; such commanders will be appointed and operate according to a state's domestic laws, procedures, or practices (*de jure* commanders). In addition, the term "military commander" in Article 28(a) also extends to individuals appointed as military commanders in non-governmental irregular forces, in accordance with their internal practices or regulations, whether written or unwritten.'[75]

23

Underpinning the first part of this definition is an assumption about the hierarchical nature of the military, with a strict chain and different levels of command. 'Responsible command' is attached to whomever holds a position of command, irrespective of rank or level, from commanders at the highest level to leaders with only a few members of the armed forces subordinated to them.[76] In setting out the second part of this definition, the TC explicitly drew a link to Article 1(1) of APII, which refers to 'dissident armed forces or other organized armed groups …under responsible command.'[77]

24

Turning to the second category in para. (a), the *Bemba* TC defined a person 'effectively acting as a military commander' in relatively sparse terms:

'These individuals are not formally or legally appointed as military commanders, but they will effectively act as commanders over the forces that committed the crimes. In addition, the phrase

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72 *Bemba*, TC, ICC 01/05-01/08-3343, para. 178.

73 See similarly *Delalić et al.,* IT-96-21-A, para. 303. See also Karsten (2009) 7 *JICJ* 995.

74 Article 7(3) ICTY Statute; Article 6(3) ICTR Statute.

75 Neither definition was contradicted on appeal, *Bemba*, AC, ICC 01/05-01/08-3636-Red. For an analysis after the decision of the TC in *Bemba*, see Murphy (2017) 15 *NZYbIL* 94.

76 *Bemba*, TC, ICC-01/05-01/08-3343, para. 179 citing, *inter alia*, *Delalić et al.*, IT-96-21-A, para. 252, 303.

77 *Bemba*, TC, ICC 01/05-01/08-3343, n. 391. See mn. 31-33 for a discussion of how this plays out in practice.

"military commander or person effectively acting as a military commander" includes individuals who do not perform exclusively military functions.'[78]

25

As noted above, the *Bemba* TC pointed to an intrinsic link between the factors establishing that a person was 'effectively acting as a military commander' and the factors establishing their effective authority and control.[79] This relationship is evident too in the case law of the ICTY.[80] In any event, there are still likely to be difficult boundary cases on the meaning of military in this context.[81] Moreover, unlike at the ICTY and ICTR, at the ICC this will be a boundary case that makes a difference as a matter of *law*.[82] As a starting point, consistent with other aspects of the doctrine of superior responsibility, it makes sense to look beyond the formal classification of the entity in domestic law[83] and, relatedly, beyond whether the defendant holds a military rank in and of itself.[84] Thus in *Naletilić and Martinović,* the defence argued that Martinović ought not to be treated as a military commander in the traditional sense of the law of command responsibility on the basis that 'he had not been subjected to rigorous military training or risen through the ranks of a military hierarchy'.[85] This the TC rejected on the basis that Martinović held a command position in what was, in reality, a *de facto* army.[86] Rather than formal classification, a more convincing approach is to focus on the rationale of the institution in which the superior-subordinate relationship arises. More specifically, Karsten argues that we should ask whether the institution's 'underlying purpose

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78 *Bemba*, TC, ICC 01/05-01/08-3343, para. 177. On the first proposition, the Trial Chamber cites ICTR, *Prosecutor v, Kajelijeli,* AC, Judgement, ICTR-98-44A-A, 23 May 2005, para. 85; ICTR, *Prosecutor v. Gacumbitsi*, AC, Judgement, ICTR-2001-64-A, 7 Jul. 2006, para. 143; and ICTY, *Prosecutor v. Aleksovski*, TC, Judgement, IT-95-14/1-T, 25 Jun. 1999, para. 76.

79 *Bemba*, TC, ICC 01/05-01/08-3343, para. 178. For how this played out the defendant's classification as a person effectively acting as a military commander, a determination not contradicted on appeal, see *Bemba*, TC, ICC 01/05-01/08-3343, para. 697 and, further Karsten (2009) 7 *JICJ* 991.

80 See, in particular, *Delalić et al.*, IT-96-21-A, para. 193: 'The power or authority to prevent or to punish does not solely arise from de jure authority conferred through official appointment. In many contemporary conflicts, there may be only de facto, self-proclaimed governments and therefore de facto armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against de facto superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander.'

81 Mettraux, *Responsibility* (2009) 27-30; Kiss, in: Stahn, *Practice* (2015) 615 referring to 'camp wardens and civilian police officers.'

82 It is not the case, as the AC put it in *Aleksovksi,* 'that it does not matter whether he was a civilian or military superior' (ICTY, *Prosecutor v. Aleksovski*, AC, Judgement, IT-95-14/1-A, 24 Mar. 2000, para. 76).

83 See, relatedly, the ICTR TC in *Kayishema* on a need to shed 'legalistic formalism and to focus upon the situation which prevails in the given fact situation', *Prosecutor v. Kayishema and Ruzindana*, TC II, Judgement, ICTR 95-1-T, 21 May 1999, para. 230.

84 Karsten (2009) 7 *JICJ* 993; Kiss, in: Stahn, *Practice* (2015) 615.

85 ICTY, *Prosecutor v. Naletilić and Martinović*, TC, Judgement, TC, IT-98-34-T, para. 99.

86 *Naletilić,* IT-98-34-T, para. 101-102. See Karsten (2009) 7 *JICJ* 992-993. As noted previously, the ICTY drew no distinction in any case in law between military and non-military superiors.

is to act or be deployed as a party to an armed conflict.'[87] This would then encompass the *Bemba* PTC's reference to 'armed police forces',[88] but only in so far as the force is configured or re-configured to be deployed in conflict.[89] It would also capture paramilitary units, armed wings of political groups,[90] and private military companies.[91]

2. Forces under effective command/authority and control

26

In the first place, the underlying crimes must be committed by *forces* under the effective command/authority and control of the commander. This is the second part of the relational element required for superior responsibility – the existence of a superior-subordinate relationship. In the ordinary case, forces here are to be understood in the sense of their meaning in IHL.[92] Thus Article 43 of Add. Prot. I refers to all organized armed forces, groups and units which are under a command responsible to that State Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.[93] As to non-state forces, the *Bemba* PTC referred to 'irregular forces (non-governmental forces) such as rebel groups, paramilitary units including, inter alia, armed resistance movements and militias that follow a structure of military hierarchy or a chain of command.'[94]

27

A second preliminary question concerns the different language used within para. (a) to describe the superior-subordinate relationship. To reiterate, para. (a) refers to relationships of 'effective command and control, or effective authority and control as the case may be.' The potential implications of this distinction did provoke discussion in the literature.[95] In *Bemba*, the PTC understood the drafters' textual choice as entailing 'close, but distinct' meanings.[96] Important, here, is the PTC's view that while the 'degree of control' is the same, the term effective authority may refer specifically to 'the modality, manner or nature, according to which, a military or military-like commander exercise[s] "control" over his forces or subordinates.'[97] This, then, shifts the assessment to the issue of control – to a determination of whether the military commander or person effectively acting as a military commander enjoyed the requisite level of effective control over their

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87 Karsten (2009) 7 *JICJ* 1002.

88 See *Bemba*, PTC, ICC 01/05-01/08-424, para. 410, though not mentioned in *Bemba*, TC, ICC 01/05-01/08-3343 paras. 176-177.

89 Karsten (2009) 7 *JICJ* 1002.

90 Kiss, in: Stahn, *Practice* (2015) 614.

91 Frulli (2010) 15 *JCSL* 453.

92 Fenrick, in: Triffterer, *Commentary* (1999) 518.

93 See also Article 4A GC III.

94 *Bemba*, PTC, ICC 01/05-01/08-424, para. 410.

95 Fenrick, in: Triffterer, *Commentary* (1999) 518; Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 837-841; Kortfält, in: Klamberg, *Commentary* (2017) 285-286.

96 *Bemba*, PTC, ICC 01/05-01/08-424, para. 413: 'However, the usage of the disjunctive "or" between the expressions "effective command" and "effective authority" calls the Chamber to interpret them as having close, but distinct meanings in order to remedy the appearance of redundancy in the text.'

97 *Bemba*, PTC, ICC 01/05-01/08-424, para. 413; *Bemba*, TC, ICC 01/05-01/08-3343, para. 181. This finding was not contradicted on appeal.

subordinates. The centrality of a determination of effective control has long been evident in case law. As is often said, effective control is the 'touchstone' of superior responsibility.[98]

28

If this is so, what is there to say about the application of 'effective control' in practice? As a basic definition, effective control refers to a superior's 'material ability to prevent or repress the commission of the crimes or to submit the matter to the competent authorities.'[99] This is a long-standing articulation of the concept, evident in the case law of the ICTY and ICTR.[100] Beyond this basic definition, certain more specific points can be developed. First, it is obviously the case that any determination is contextual – it occurs on a case-by-case basis.[101] Moreover, varying modalities of control may establish the requisite relationship.[102] Second, as to the lower boundary, case law distinguishes effective control from 'substantial influence' – the latter being insufficient for a finding of the former.[103] Third, the emphasis on *material* ability demands attention to the situation in reality.[104] On one hand, this point is connected to the very recognition of a category of *de facto* or military-like commanders.[105] On the other hand, it means that *de jure* status of command is not itself sufficient for responsibility.[106] A *de jure* commander who does not possess effective control of their subordinates is not liable under the doctrine of superior responsibility.[107] In this regard, the ICTY has held that a court may presume that effective control results *prima facie* from the *de jure* powers.[108] Care, here, is needed – the case law is also clear that the use of the term 'presume'

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98 *Kayishema and Ruzindana*, ICTR-95-1-T, para. 229.

99 *Bemba*, TC, ICC 01/05-01/08-3343, para. 183.

100 *Delalić et al.*, IT-96-21-A, para. 256; ICTR, *Prosecutor v. Bagilishema*, AC, ICTR-95-1A-A, Judgement, para. 51. See further *Delalić et al.*, IT-96-21-A, (n 374): 'It has been elsewhere accepted in the jurisprudence of the Tribunal that, where there is no effective control, there is no superior responsibility: *Aleksovski* Trial Judgement, para 108 (HVO soldiers with arms forced their way into the prison without the guards being able to stop them) and para 111 (no finding was made on any existence of control by Aleksovski over the HVO soldiers).' See *Aleksovski*, IT-95-14/1-T, paras. 108, 111.

101 ICTY, *Prosecutor v. Kordić and Čerkez*, TC, Judgement, IT-95-14/2-T, 26 Feb. 2001, para. 422; *Bemba*, TC, ICC 01/05-01/08-3343, para. 188. See also Blaškić, IT-95-14-A, para. 69; ICTY, *Prosecutor v. Strugar*, AC, Judgement, IT-01-42-A, 17 July 2008, para. 254; ICTY, *Prosecutor v. Milosević*, AC, Judgement, IT-98-29/1-A, 12 November 2009, para. 280; and for an analysis of effective control based on the specifics of the case: Halilović, IT-01-48-A, paras. 191-192; *Hadžihasanović and Kubura,* IT-01-47-A, paras. 190-232. For an assessment of *Kordić*, see Nybondas (2003) 59 *NethILRev* 1.

102 *Bemba*, TC, ICC 01/05-01/08-3343, para. 181.

103 *Delalić et al.*, IT-96-21-A, para. 266; *Bemba*, TC, ICC 01/05-01/08-3343, para. 183. See also SCSL, *Prosecutor v. Taylor*, TC II, Judgement, SCSL-03-01-T, 18 May 2012, para. 6979: 'The Accused had substantial influence over the leadership of the RUF, and to a lesser extent that of the AFRC. However, the Trial Chamber notes that substantial influence over the conduct of others falls short of effective control.'

104 See relatedly Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 838 referring 'to the situation as it really is (the real world).'

105 See though Van der Wilt, in: Jalloh, *Sierra Leone* (2013) 147-148 on the persisting importance of the (formal) chain of command.

106 For analysis, see Bantekas (1999) 93 *AJIL*. 578-584.

107 See relatedly ICTY, *Prosecutor v. Ante Gotovina et al.,* TC, Judgement, IT-06-90-T, 15 Apr. 2011, para. 166 in respect of Čermak acquittal by the ICTY in relation to conduct during Operation Storm in Croatia: 'Consequently, the formal powers of a garrison commander may be indicative, but are not dispositive, of the powers, responsibilities and functions actually wielded by Čermak.'

108 *Delalić et al.*, IT-96-21-A, para. 197.

should not be read to entail a shift in the burden of proof onto the defendant.[109] Fourth, it follows that relationships of control can arise across borders[110] or between different armed groups.[111] Fifth, the presence of intermediate subordinates between the commander and the forces committing the underlying crimes does not preclude a finding of effective control.[112] Sixth, more than one commander may exercise effective control over subordinates at the same time.[113] Seventh, there is no requirement that the principal perpetrators are identified by name, even if that may assist in the determination of a superior-subordinate relationship. It 'is sufficient to identify the perpetrators by group or unit in relation to a particular crime site.'[114] And eighth, as to temporality, the relationship of effective control must exist at the time of the commission of the crimes.[115] That point is self-evident for the preventive duty, but almost certainly true too for duties to repress and submit for investigation and prosecution.[116]

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If the foregoing entails a general definition and certain specific points developed from it, there remains the difficulty of contextual determination. In *Bemba*, drawing widely on case law of the ICTY, ICTR, and SCSL, the TC set out the following factors that may indicate the existence of the effective control:

(i) the official position of the commander within the military structure and the actual tasks that he carried out;

(ii) his power to issue orders, including his capacity to order forces or units under his command, whether under his immediate command or at lower levels, to engage in hostilities;

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109 ICTY, *Prosecutor v. Orić*, AC, Judgement, IT-03-68-A, 3 July 2008, para. 91-92. For a recent formulation, see ICTY, *Prosecutor v. Karadžić,* TC, IT-95-5/18-T, 24 Mar. 2016, para. 581: 'The superior's *de jure* authority "constitutes prima facie a reasonable basis for assuming that he has effective control over his subordinates" but still requires the Prosecution to prove that he exercised effective control.'

110 For instance, in *Bemba* itself the conduct of his subordinates that constituted the underlying crimes took place on the territory of the CAR. See mn. 71 below for the issue of remoteness.

111 Cf. Arnold (2002) 7 *JCSL* 191.

112 *Bemba*, TC, ICC 01/05-01/08-3343, para. 184; *Orić*, IT-03-68-A, para. 20. See though the discussion in the Sep.Op. of Judges Van den Wygaert and Morrison concerning an assessment of necessary and reasonable measures (*Bemba*, AC, ICC 01/05-01/08-3636-Red, Sep.Op. of Judges Van den Wyngaert and Morrison, para. 33).

113 ICTY, *Prosecutor v. Nizeyimana,* AC, Judgement, ICTR-00-55C-A, 29 Sep. 2014, para. 201; *Bemba*, TC, ICC 01/05-01/08-3343, para. 185. See also SCSL, *Prosecutor v. Brima et al*, TC, Judgement, SCSL-04-16-T, 20 June 2007, para. 786: 'Further, superior responsibility is not excluded by the concurrent responsibility of other superiors in a chain of command.' For rough analogy, see the potential for the dual attribution of conduct on the basis of effective control in the law of state responsibility.

114 *Bemba*, TC, ICC 01/05-01/08-3343, para. 186; *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 194. Care should be taken here: there remains the overarching procedural requirement of fair notice to the accused; see ICTR, *Prosecutor v. Renzaho,* AC, Judgement, ICTR-97-31-A, para. 64; see also ICTY, *Prosecutor v. Blaškić*, AC, Judgement, IT-95-14-A, 29 Jul. 2004, para. 217.

115 *Bemba*, PTC, ICC 01/05-01/08-424, para. 418-419. See van Sliedregt, *Responsibility* (2012) 198.

116 See *Hadžihasanović*, IT-01-47-AR72, paras. 37-56 for an extensive discussion around the issue of successor superior responsibility. This issue is connected to the legal characterisation of superior responsibility as well as the issue of causation below, see Sander (2010) 23 *LeidenJIL* 105; van Sliedregt, *Responsibility* (2012) 187-189.

(iii) his capacity to ensure compliance with orders including consideration of whether the orders were actually followed;

(iv) his capacity to re-subordinate units or make changes to command structure;

(v) his power to promote, replace, remove, or discipline any member of the forces, and to initiate investigations;

(vi) his authority to send forces to locations where hostilities take place and withdraw them at any given moment;

(vii) his independent access to, and control over, the means to wage war, such as communication equipment and weapons;

(viii) his control over finances;

(ix) the capacity to represent the forces in negotiations or interact with external bodies or individuals on behalf of the group; and

(x) whether he represents the ideology of the movement to which the subordinates adhere and has a certain level of profile, manifested through public appearances and statements.[117]

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Conversely, the TC set out certain factors that may indicate the absence of effective control in a particular case. These include (i) the existence of a different exclusive authority over the forces in question; (ii) disregard or non-compliance with orders or instructions of the accused; or (iii) a weak or malfunctioning chain of command.[118]

31

On both sides of the coin, these seem like plausible indicators of effective control. Nonetheless, as with any multi-factor test of this kind, the devil will be in the detail of its specific application to the situation under assessment. Of interest here is that, in *Bemba*, the Defence developed an argument on appeal that the TC assumed the existence of effective control on the basis of 'an incomplete checklist normally applied to hierarchical state forces, rather than nonlinear actors operating across international boundaries, in a composite contingent composed of state forces and militia.'[119] This idea drew on a finding of the SCSL TC in the *AFRC* trial that 'in 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.'[120] Instead, in *AFRC,* the TC had proposed that:

'[I]ndicia which may be useful to assess the ability of superiors in such irregular armies to exercise effective control over their subordinates, include that the superior had first entitlement to the profits of war, such as looted property and natural resources; exercised control over the fate of vulnerable persons such as women and children; the superior had independent access to and/or control of the means to wage war, including arms and ammunition and communications equipment; the superior

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117 *Bemba*, TC, ICC 01/05-01/08-3343, para. 188. For a summary in respect of the position of the defendant the case itself, see SàCouto and Viseur Sellers (2019) 27 (3) *WMBORJ* 607-609.

118 *Bemba*, TC, ICC 01/05-01/08-3343, para. 190; *Hadžihasanović and Kubura*, IT-01-47-A, paras. 192, 225, 230; *Prosecutor v. Orić,* TC II, Judgement, IT-03-68-T, 30 Jun. 2006, para. 707.

119 *Bemba*, ICC 01/05-01/08-3434-Red, 'Public Redacted Version of Appellant's document in support of the appeal', para. 130. See also paras. 132-144 on the need to distinguish three levels of military command – strategic, operational, and tactical – and the emphasis in para. 185 on 'the realities of command in multinational contingents.' See further *Delalić et al.*, IT-96-21-T, paras. 372, 648 and 649 and IT-96-21-A, para. 258; *Strugar*, IT-01-42-A, paras. 255-259; *U.S. v. List et al.,* XI TWC 1230, 1260. For details cf. Jia (2004) 3 *ChineseJIL* 1.

120 *Brima,* SCSL-04-16-T, para. 787.

rewarded himself or herself with positions of power and influence; the superior had the capacity to intimidate subordinates into compliance and was willing to do so; the superior was protected by personal security guards, loyal to him or her, akin to a modern praetorian guard; the superior fuels or represents the ideology of the movement to which the subordinates adhere; and the superior interacts with external bodies or individuals on behalf of the group.[121]

32

As Van der Wilt points out, the impact of this finding was immediately qualified in the judgement by a statement that 'the key traditional indicia of effective control remain central, although they may be more loosely defined.'[122] In the *Bemba* Appeal, the Joint Dissenting Opinion discusses the issue – with a conclusion that the TC made no error in its articulation and application of the test for effective control based primarily on traditional indicia.[123] Unfortunately, the majority in the AC chose not to focus on the issue, but rather centred its analysis on the TC's finding in respect of the defendant's putative failure to take all necessary and reasonable measures, an element discussed below. In passing, it noted that it had 'concerns regarding the Trial Chamber's findings relevant to Mr Bemba's effective control [and his actual knowledge of crimes] committed by MLC troops in the CAR.'[124]

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This, of course, leaves the position unclear. If there is to be a distinction, the ICC ought to be wary of a firm distinction based on a State / non-State line. The chains of command in certain armed groups may in fact be more like those in a State than in other, decentralised armed groups, even if the latter still meet the organizational requirements for IHL.[125] More widely, as the relationship moves further away from the archetypal State forces chain of command, the foundations of the doctrine – and putative justification for its somewhat relaxed rules of responsibility – becomes more tenuous.[126] Finally, one other point emerges implicitly from the AC majority's approach in *Bemba*. This is the close connection between the issue of effective control and the specification of what measures were 'necessary and reasonable'. Indeed, as discussed in more detail below (mn. 65-72), it has long been held that the latter inquiry is necessarily contextual and, as the ICTY AC put it in *Blaškić*, is informed by the 'degree of effective control he wielded over his subordinates.'[127] In this sense, certain factors that might in a particular case push against a finding of effective control

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121 *Brima,* SCSL-04-16-T, para. 788.

122 *Brima,* SCSL-04-16-T, para. 789. See Van der Wilt, in: Jalloh, *Sierra Leone* (2013) 149-150. This finding is emphasized by the Joint Diss.Op. in *Bemba* arguing that the TC made no error (*Bemba*, AC, ICC 01/05-01/08-3636-Anx1-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 126).

123 *Bemba*, AC, ICC 01/05-01/08-3636-Anx1-Red, Joint Diss.Op. of Judges Monageng and Hofmański, paras. 125-128.

124 *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 32.

125 See generally Van der Wilt, in: Jalloh, *Sierra Leone* (2013) 144 on different groups in cases before the SCSL.

126 Van der Wilt in Jalloh, *Sierra Leone* (2013) 144, 156-158. See also Mettraux, *Responsibility* (2009) 113-114 on 'specific evidential challenges'; Weigend, in Burchard *et al, Review Conference* (2010) 67; Ambos, *Treatise ICL I* (2013) 231.

127 *Blaškić*, IT-95-14-A, para. 72; *Popovic et al.*, AC, Judgement, IT-05-88-A, 30 Jan. 2015, para. 1929.

may also be relevant to the determination of whether, in the light of those factors, the accused discharged their duties.[128]

3. 'Crimes within the jurisdiction of the court committed by forces…'

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As noted above, the very first element of the six-part test set out by the *Bemba* TC was that 'crimes within the jurisdiction of the Court have actually been committed by the relevant forces.'[129] In many analyses, both judicial and scholarly, this requirement is taken implicitly. This makes sense, for there is little doubt that we are considering the superior's responsibility in relation to a specific set of crimes of the subordinate. Nonetheless, there are certain issues worthy of reflection.[130]

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An initial question is whether superior responsibility attaches to all modes of liability set out in Article 25 of the Statute. Recall the language of Article 28: the commander 'shall be criminally responsible for crimes within the jurisdiction of the Court *committed* by forces…'. One view, then, would be that superior responsibility applies only in circumstances of *commission* by the subordinates – that is, under Article 25(3)(a). This view emphasises the link between the textual choice of 'committed' within Article 28 and 'commits such a crime' in Article 25(3)(a), as well as the principle of legality.[131] The wider view, which is probably the better one, is that superior responsibility applies across the modes of liability set out in Article 25.[132] For one, it is hard to see why the purpose underlying the doctrine of superior responsibility does not apply to the range of ways in which a subordinate might participate in international crimes. Moreover, it is clear that at various points the ICC Statute uses 'commits' in a wider sense to encompass responsibility in general, including in Article 25 itself.[133] Likewise, in custom, this position was taken by the *Blagojević* AC in respect of Article 7 of the ICTY Statute, where, notably, Article 7(1) similarly uses the term 'commit' in respect of one particular mode of liability.[134] In *Bemba*, by way of aside the TC noted the position of the ICTY – the wider view – but made no finding either way.[135]

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128 See further *Bemba*, AC, ICC 01/05-01/08-3636-Red, Separate Opinion of Judges Van den Wyngaert and Morrison, para. 33 on the fact that superior responsibility is 'not a one size fits all offence'. On how this played out before the SCSL, see Sivakumaran, in: Jalloh, *Sierra Leone* (2013) 128.

129 *Bemba*, TC, ICC 01/05-01/08-3343, para. 175; *Orić*, IT-03-68-A, para. 35.

130 For the view of the Swiss legislator, see Arnold and Wehrenberg (2013) 52 (2) *MLLWRev* 241, 250; Vest and Sager (2009) 4 *AJP* 443.

131 Ambos, *Treatise ICL I* (2013) 214.

132 Nerlich (2007) 5 *JICJ* 669; Kiss, in: Stahn, *Practice* (2015) 633. See though Kiss' analysis of how – as a matter of application – in certain circumstances where the subordinate is not a principal the superior will likely lack the material ability to prevent the crime.

133 See e.g. Article 25(2) ICC Statute: 'A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.'

134 ICTY, *Prosecutor v. Blagojević and Jokić*, TC I A, Judgement, IT-02-60-T, 17 Jan. 2005, para. 280: 'As a threshold matter, the Appeals Chamber confirms that superior responsibility under Article 7(3) of the Statute encompasses all forms of criminal conduct by subordinates, not only the "committing" of crimes in the restricted sense of the term, but all other modes of participation under Article 7(1). The Appeals Chamber notes that the term "commit" is used throughout the Statute in a broad sense, encompassing all modes of responsibility covered by Article 7(1)…'. See also *Orić*, IT-03-68-A, para. 21; ICTR, *Prosecutor v. Nahimana et al.*, AC, Judgement, ICTR-99-52-A, 28 Nov. 2007, paras. 485-486.

135 *Bemba*, TC, ICC 01/05-01/08-3343, fn. 389.

If the wider view prevails, a second question is whether it encompasses inchoate liability under Article 25(3)(e) and (f). Those provisions entail responsibility for the direct and public incitement of the crime of genocide and attempts more generally. As to the former, in *Nahimana* the ICTR AC held that 'it is not necessary for the Appellant's subordinates to have killed Tutsi civilians: the only requirement is for the Appellant's subordinates to have committed a criminal act provided for in the Statute, such as direct and public incitement to commit genocide.'[136] A similar conclusion seems defensible under the Rome Statute. Indeed, for direct and public incitement of genocide – a crime established under international law – there is little difficulty in saying that the underlying crime was *committed* even in the sense of the narrow view.[137] For attempts liability in general, the issue is trickier, though it is not implausible to hold that the wider view encompasses situations where the liability of the subordinate arises solely under Article 25(3)(f).[138] This view was taken by the *Ntaganda* PTC,[139] though the issue did not arise in the Trial Judgment. This position, though, might give cause for pause as a matter of principle. As discussed below, at its most capacious, superior responsibility gives rise to criminal responsibility on the basis of omissions with a relatively undemanding *mens rea*. To add to that already capacious position the possibility of responsibility without actual harm seems excessive.[140] In any event, it is possible that other legal and procedural rules will diminish the possibility of a trial on the basis of a superior's responsibility in relation to their subordinate's attempts.[141]

37

One final question, now relevant, is the issue of superior responsibility for the crime of aggression as defined in Article 8*bis*. To reiterate a basic point, aggression is now a crime within the jurisdiction of the Court. The question thus arises how the crime of aggression relates to superior responsibility – an issue discussed at Kampala.[142] One possibility is that the nature of aggression as a leadership crime renders superior responsibility inapplicable.[143] There is an intuitive appeal to this idea, though on reflection it is not correct. There is no difficulty in imagining a scenario where, *within* the leadership group, a superior refused to act on information that their subordinate[144] was about to commit the crime of aggression. Take, for example, a situation in which the Minister of Defence failed to act on information that the professional head of the military was about to commit an act of aggression. As long as the other elements of superior responsibility are met – particularly effective

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136 *Nahimana et al.*, ICTR-99-52-A, para. 865.

137 Mettraux, *Responsibility* (2009) 132. This follows from the nature of the crime itself as a conduct crime.

138 Nerlich (2007) 5 *JICJ* 669.

139 ICC, *Prosecutor v. Ntaganda*, PTC II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014, para. 103.

140 The opposing view might emphasize that the lack of actual harm can be taken into account at sentencing.

141 See, in particular, gravity as it relates to admissibility – Article 17(1)(d), Article 53(1)(c), Article 53(2)(c) ICC Statute. It should be noted that gravity relates to the *case* rather than to a particular charge.

142 Annex II: Report of the SWGCA, ICC ASP/6/20/Add.1, para. 21; Barriga, in: Barriga and Kreß, *Travaux Aggression* (2012) 19-20.

143 For discussion, see Clark (2010) 20 *EJIL* 1109; on the leadership clause see Ambos above Art. 25 mn. 55.

144 To reiterate, the superior and subordinate would both need to be individuals 'in a position effectively to exercise control over or to direct the political or military action of a State…' in terms of Article 8*bis*.

control of the subordinate – there is no reason in principle that superior responsibility would not apply.[145]

4. 'as a result of his or her failure to exercise control' – causation

38

The text of para. (a) includes the phrase 'as a result of his or her failure to exercise control properly over such forces…' This terminology brings to the fore the issue of causation in superior responsibility. Indeed, it is here in the issue of causation that certain foundational tensions and structural problems in the doctrine play out.[146]

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As with the question of effective control, the issue of causation in custom received extensive attention in the case law of the ICTY and ICTR prior to and after the drafting of the Rome Statute. In sum, that case law sets out two important propositions.[147] First, in *Blaškić*, the AC held that it was 'not persuaded … that the existence of causality between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes, is an element of command responsibility that requires proof by the Prosecution in all circumstances of a case.'[148] Second, the AC in *Blaškić* explicitly rejected the appellant's claim that failure to *punish* is simply a sub-category of the failure to prevent – that is, a way in which a superior might fail to prevent *future* crimes. It accepted that the 'responsibility of a commander for his failure to punish was recognised in customary international law.'[149] This recognition, though strictly about the duties of superiors, is relevant to causation in that it recognizes the existence of responsibility for an omission taking place *after* the commission of the crime (see further mn. 46).

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Turning to Article 28, it is fair to say that the meaning of 'as a result of' – a textual change from the comparative provisions in the Statutes of the ICTY and ICTR – has provoked extensive disagreement in the literature.[150] Unfortunately, the proceedings in *Bemba* provide no clarity, a fact noted apologetically by Judges Van den Wyngaert and Morrison in their Separate Opinion.[151]

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145 Sayapin, *The Crime of Aggression in International Criminal Law* (Asser 2014) 291-292; Jackson, in: de Hemptinne *et al.*, *Modes* (2019) 417.

146 See Yokohama (2018) 18 *ICLRev* 285-290.

147 For discussion and criticism in respect of the holding on causation, see Mettraux, *Responsibility* (2009) 82-89. There is also a question of the role of general principles of (criminal) law in respect of causation.

148 *Blaškić*, IT-95-14-A, para. 77. See too *Delalić et al.*, IT-96-21-T, para. 398: 'Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject.' Despite this statement, the Trial Chamber in *Delalić et al*, in the next paragraph, suggested that for the duty to prevent specifically, 'recognition of a necessary causal nexus may be considered to be inherent…' – *Delalić et al.*, IT-96-21-T, para. 399. This idea of a necessary causal nexus was explicitly rejected by the Appeals Chamber in *Blaškić*, IT-95-14-A, paras. 75-77.

149 *Blaškić*, IT-95-14-A, para. 85. See also *Hadžihasanović and Kubura*, IT-01-47-A, paras. 38-40; and further the wider discussion in Mettraux, *Responsibility* (2009) 82-89 and specifically 87.

150 See e.g. Triffterer (2002) 15 *LeidenJIL* 179; Nerlich (2007) 5 *JICJ* 665; Meloni (2007) 5 (3) *JICJ* 633-637.

151 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Sep.Op. of Judges Van den Wyngaert and Morrison, para. 51: 'The question of whether superior responsibility requires causation has been a live issue in

Indeed, a number of possible interpretations of the phrase receive some support across the decisions, judgements, and opinions in the case. Four can be sketched.[152] *First*, there is the idea that the phrase 'as a result of' does not refer to the subordinate's crimes at all – i.e., that is not the *subordinate's crimes* that must arise 'as a result of' the omission. In *Bemba*, Amnesty International, as *amicus curiae*, put forward the argument that it is instead the superior's *responsibility* that arises 'as a result of' their failure to exercise control over their subordinates – rather than demanding a relationship with the subordinate crimes.[153] Emphasising in particular the (equally authentic) French and Chinese texts, the upshot of this argument is that the text requires no causal relationship between the omissions and the underlying crimes.[154] In *Bemba*, neither the PTC nor TC adopted this approach, Judges Steiner and Ozaki, writing separately in the TC, explicitly rejected it,[155] as did Judges Monageng and Hofmański in the AC.[156] By contrast, Judges Van den Wyngaert and Morrison, in the AC, do point to the diverging meanings of the authentic texts. Moreover, pointing to the impossibility of an omission taking place 'after a fact has occurred … caus[ing] this fact',[157] they conclude that 'article 28 does not – and should not – require that the commander's failure caused his or her subordinates to commit crimes.'[158] This is to say that there were two votes in the AC for the idea that Article 28 requires no causal relation at all.

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A *second* possibility is that Article 28 does require a causal relation between the superior's omissions and the subordinate's crimes, but only for the duty to prevent.[159] In the *Bemba* Confirmation Decision, the PTC first held that that Article 28 demanded an 'element of causality between the superior's dereliction of duty and the underlying crimes,'[160] and then qualified this by reference to the specific duties in para. (a)(ii). In this respect, the PTC considered it 'illogical' to conclude that a superior's failures in respect of their duties to repress (once the crime is completed) or submit the matter to the competent authorities could 'retroactively cause' the commission of the

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legal writings for many years, and the present Judgment will unfortunately not give the long-awaited judicial answer, as the judges are divided and could only express themselves in opinions.'

152 There is also the view that for the failure to punish there must be a causal relationship between the commander's failure to punish and the subordinate's *impunity*, see e.g. Mettraux, *Responsibility* (2009) 89. As Mettraux himself notes, on this account there remains no causal relation to the subordinate's crime itself. This view is rejected explicitly by Judges Judges Monageng and Hofmański in *Bemba* (*Bemba*, AC, ICC 01/05-01/08-3636-Red, Joint Diss.Op. of Judges Monageng and Hofmański, fn. 764).

153 Amnesty International, *Prosecutor v. Bemba,* Amicus Curiae Observations on Superior Responsibility Submitted Pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/05-01/08-406.

154 *Ibid.*, para. 41. On the importance of looking to different versions of the text, see Hamuli Kabumba (2017) 3 *RSC* 445; see also Laucci, in Fernandez *et al., Commentaire I* (2019) 1112-1113.

155 *Bemba*, TC, ICC 01/05-01/08-3343, Sep.Op. of Judge Steiner, para. 8; *Bemba*, TC, ICC-01/05-01/08-3343-AnxII, Sep.Op. of Judge Ozaki, para. 9. Judge Ozaki did explicitly hold that 'linguistically, in the English version of the Statute, either interpretation is possible.'

156 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 336. Judges Monageng and Hofmański do, however, note that the provision 'is indeed open to two readings' – see para. 330.

157 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Sep.Op. of Judges Van den Wyngaert and Morrison, para. 52.

158 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Sep.Op. of Judges Van den Wyngaert and Morrison, para. 56.

159 Or to the duty to repress *in so far* as it relates to ongoing crimes.

160 *Bemba*, PTC, ICC 01/05-01/08-424, para. 423.

underlying crimes.[161] For this reason, it held that the 'element of causality only relates to the commander's duty to prevent the commission of future crimes.'[162] As to the duties to repress and submit, the PTC did suggest that such failures are 'likely to increase the risk that further crimes will be committed in the future.'[163] But, crucially, it is not right to read the PTC's decision as holding that superior responsibility can *only* arise if further crimes are committed.[164]

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The first two approaches, then, do not require causality or require causality only for the duty to prevent;[165] the third and fourth interpretations require causality for all cases under Article 28 – that is, for the duties to repress and submit too. They do so in quite different ways, each of which finds support in specific opinions in *Bemba*. The *third* interpretation might be called a 'consequent crimes' approach. On this account, a superior's failures to repress or submit in relation to an initial crime or series of crimes must be causally related to the commission of further crimes.[166] To be clear, no responsibility arises on this interpretation where there are no further crimes: the failure to repress a previous crime or to submit the matter to the competent authorities is understood as a way to causally contribute to the future crimes. In *Bemba,* this was the position taken in the Joint Dissenting Opinion by Judges Monageng and Hofmański.[167] By contrast, the consequent crimes approach was explicitly rejected by Judges Van den Wyngaert and Morrison.[168]

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The *fourth* interpretation of the phrase 'as a result of', which also imposes a causality requirement in all cases under Article 28, is a little more complicated. This may be termed the two-fold duties approach[169] and is developed in Judge Steiner and Judge Ozaki's Separate Opinions in the TC in *Bemba*.[170] On this account, the chapeau of Article 28(a) establishes a *general* duty to exercise

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161 *Ibid*., para. 424.

162 *Ibid*.

163 *Ibid*.

164 In the AC, this appears to be how Judges Monageng and Hofmański interpret the decision of the PTC, see *Bemba*, AC, ICC 01/05-01/08-3636-Anx1-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 333: 'To overcome this problem, the Pre-Trial Chamber considered that, as far as the duties to repress and to punish are concerned, causation needs to be demonstrated in respect of subsequent crimes that were committed because of the failure to punish earlier crimes. This is indeed a convincing approach.'

165 See *Bemba*, TC, ICC 01/05-01/08-3343, para. 205.

166 See Robinson (2012) 13 *MelbJIL* 1.

167 *Bemba*, AC, ICC 01/05-01/08-3636-Anx1-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 333. See further *Bemba*, AC, ICC 01/05-01/08-3636-Red, Concurring Sep.Op. of Judge Eboe-Osuji, para. 211-212. It is not clear whether Judge Eboe-Osuji rejected the possibility of responsibility in relation to duty to punish cases where there are no further crimes, see *ibid*., para. 212.

168 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Sep.Op. of Judges Van den Wyngaert and Morrison, para. 53.

169 See similarly Yokohama (2018) 18 *ICLRev* 275 and foundationally Triffterer (2002) 15 *LeidenJIL* 179. Triffterer's approach is cited by the PTC in *Bemba* but then in the following paragraphs the PTC actually considers the issue of causation in relation to the specific duties, *Bemba*, PTC, ICC 01/05-01/08-424, para. 423-425. On Triffterer's account, the specific duties are best thought of as a 'second chance' for the superior – having failed to 'exercise control properly' in the general sense, they then avoid liability on the basis of their steps to prevent and/or punish the specific crimes, see Triffterer (2002) 15 *LeidenJIL* 203-205.

170 There is also affinity in Judge Eboe-Osuji's endangerment rationale for superior responsibility, see *Bemba*, AC, ICC 01/05-01/08-3636-Red, Concurring Sep.Op. of Judge Eboe-Osuji, paras. 238-251

control properly in addition to the specific duties of prevention, repression, and submission in sub-para. (ii).[171] For both Judges Steiner and Ozaki, this general duty is broader temporally and substantively than the specific duties.[172] They accept, of course, that a superior's failure to repress or submit cannot retroactively cause the subordinate crimes.[173] But in cases relating to the duty to repress and submit, there would need to be a causal relationship between the breach of the *general* duty and the commission of the underlying crime and then, as usual, a failure to take the necessary and reasonable measures of repression or submission.[174] This two-fold duties approach is explicitly rejected in by Judges Monageng and Hofmański in their Dissenting Opinion in the AC.[175]

44

Before evaluating these interpretations, there is also the question of what exactly the requirement of causation demands, assuming there is such a requirement. In *Bemba*, the PTC considered, but rejected, a 'but for' test – that if not for the superior's omissions the crimes would not have been committed.[176] Instead, it considered it only necessary to prove that the commander's omission 'increased the risk of the commission of the crimes charged.'[177] The TC's judgement adds little to this finding,[178] though the question is developed in the Separate Opinions at this stage in the proceedings. Judge Steiner, after discussing the conceptual difficulty of thinking about omissions in naturalistic causal terms,[179] reiterated the need for a normative model of causation. In respect of a normative model based on risk, Judge Steiner rejected what she called a 'wholly flexible approach, whereby a probability – of whatever degree, however slight – that a commander's discharge of his general duty of control may have impeded the commission of the crimes, could be sufficient to affirm causality.'[180] This grounded her conclusion that causation would only be met where, at least, 'there is a high probability that, had the commander discharged his duties, the crime would have been prevented or it would have not been committed by the forces in the manner it was committed.'[181] For Judge Ozaki, the requirement of causality demands that 'the liability of an accused should be confined to results that are reasonably foreseeable.'[182] In the AC, Judges

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and, in particularly, para. 249. In the endangerment account, liability rests on the fact that the superior 'created or fostered the danger of the subordinates' criminality (by training them, arming them and/or deploying them, so as to be able to commit those crimes)', *ibid.*, para. 251.

171 See McDermott (2016) 110 *AJIL* 528.

172 *Bemba*, TC, ICC 01/05-01/08-3343, Sep.Op. of Judge Steiner, para. 11; *Bemba*, TC, ICC-01/05-01/08-3343-AnxII, Sep.Op. of Judge Ozaki, para. 15.

173 *Bemba*, TC, ICC 01/05-01/08-3343, Sep.Op. of Judge Steiner, para. 14; *Bemba*, TC, ICC-01/05-01/08-3343-AnxII, Sep.Op. of Judge Ozaki, para. 17.

174 *Bemba*, TC, ICC 01/05-01/08-3343, Sep.Op. of Judge Steiner, para. 14.

175 *Bemba*, AC, ICC 01/05-01/08-3636-Anx1-Red, Joint Diss.Op. of Judges Monageng and Hofmański, fn. 765.

176 *Bemba*, PTC, ICC 01/05-01/08-424, para. 425.

177 *Ibid*. See *Ntaganda*, ICC-01/04-02/06-309, 170-174. See further Ambos, *Treatise ICL I* (2013) 215-217 and, critical of the absence of detail in the test of risk, Hamuli Kabumba (2017) 3 *RSC* 457.

178 *Bemba*, TC, ICC 01/05-01/08-3343, para. 213.

179 In Judge Steiner's explanation, this is the idea that 'nothing can result from the absence of action', *Bemba*, TC, ICC 01/05-01/08-3343-AnxI, Sep.Op. of Judge Steiner, para. 18.

180 *Ibid.*, para. 24.

181 *Ibid.*, para. 24.

182 *Bemba*, TC, ICC-01/05-01/08-3343-AnxII, Sep.Op. of Judge Ozaki, para. 23.

Monageng and Hofmański adopted Judge Steiner's 'high probability' test.[183] Judge Eboe-Osuji, by contrast, would simply have required a 'significant' contribution, defined as something 'more than negligible.'[184]

45

This is a long way of saying that the meaning of 'as a result of' and issue of causality under Article 28 remain unanswered. To step back, it is clear that the ICC is caught in a dilemma driven by foundational tensions in the doctrine of superior responsibility.[185] Moreover, it is easier to point to objections to each interpretation than to suggest a solution. Thus, though an interpretation of Article 28 that requires no causality entails a tempting simplicity, it sits uneasily with the principled objection to the imposition of responsibility on an individual as a party to another's crime or for certain results absent causation.[186] This point of principle explicitly informed the reasoning of a number of judges in *Bemba*.[187] The second interpretation – causality where the omission arose prior to the crime but not for the duties of repression and submission after the crime – is consistent with the long-standing acceptance that responsibility can arise for the breach of purely backward-facing duties without a need to show that those failures contributed to further crimes. But the objection of principle remains in ex post facto cases, in addition to the textual difficulty that the phrase 'as a result of' is included in the chapeau of Article 28, thus suggesting it applies to each of the specific duties.[188]

46

The third and fourth interpretations – that require causality in all cases – respond to the objection of principle, at least if the causal requirement were to be strictly applied.[189] But both create new problems. As to the consequent crimes approach, it would read out of Article 28 a situation long-understood to be captured by the doctrine of superior responsibility,[190] and, more significantly, would collapse the duties to repress and punish into the duty to prevent (the further crimes).[191] This seems inconsistent with a widely accepted principle of treaty interpretation.[192] As to the two-fold

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183 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 339. To reiterate, Judges Monageng and Hofmański's do not accept Judge Steiner's analysis of the duties.

184 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Concurring Sep.Op. of Judge Eboe-Osuji, para. 166.

185 Robinson (2012) 13 *MelbJIL* 1.

186 See further Ambos and Aboueldahab, in: FS Kremnitzer 2020, 16-18. See though mn. 48-50.

187 See *Bemba*, PTC, ICC 01/05-01/08-424, para. 423; *Bemba*, TC, ICC 01/05-01/08-3343, para. 213; *Bemba*, TC, ICC-01/05-01/08-3343-AnxII, Sep.Op. of Judge Ozaki, para. 9; *Bemba*, TC, ICC 01/05-01/08-3343-AnxI, Sep.Op. of Judge Steiner, para. 16; *Bemba*, AC, ICC 01/05-01/08-3636-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 333; *Bemba*, AC, ICC 01/05-01/08-3636-Red, Concurring Sep.Op. of Judge Eboe-Osuji, para. 212.

188 Yokohama (2018) 18 *ICLRev* 296.

189 This itself is a risk – that is, focusing on whether there is a requirement of causation rather than ensuring that the putative causal test does sufficient limiting work.

190 Cf. Robinson's argument that other disciplinary measures in domestic law remain possible – see Robinson (2012) 13 *MelbJIL* 19.

191 See *Bemba*, AC, ICC 01/05-01/08-3636-Red, Sep.Op. of Judges Van den Wyngaert and Morrison, para. 53-54.

192 See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, paras. 133–34. See also Appellate Body Report, *Korea—Definitive Safeguard Measure on Import of Certain Dairy Products*, WTO Doc. WT/DS98/AB/R, 14 Dec. 1999, para. 81: 'In light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to "read all applicable provisions of a

duties approach, though not necessarily a fatal objection, it would entail a significant change to the structure of superior responsibility in customary international law as applied by the ICTY and ICTR.[193] As Yokohama argues, this approach is also under-inclusive in certain cases of repression and submission, and, in cases based on the duty to prevent, is likely to involve a collapse of the general duty – the duty to exercise control properly – into the specific duty to prevent.[194]

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To reiterate, each of these approaches is plausible. Is one to be preferred? On its own terms, the better view is probably the first interpretation set out above – that no causal link is required by the text of Article 28. To take a step back, as per Article 128 of the Statute, the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic. As Amnesty International noted in its brief in *Bemba*, the French and Chinese texts do not require a causal link.[195] Thus, in the relevant phrase, the French text simply provides 'when he or she did not exercise control',[196] and the Chinese, 'if he or she failed to exercise control properly over such forces.'[197] As to the other four texts, both causal and non-causal readings of the relevant phrase are plausible, something explicitly noted by some of the judges in *Bemba*.[198] As a starting point, as set out in the VCLT the 'terms of the treaty are presumed to have the same meaning in each authentic text.'[199] The question, then, is whether there is a meaning 'which best reconciles the texts, having regard to the object and purpose of the treaty', as required by Article 33(4) VCLT? [200] In this respect, it makes sense to adopt a non-causal reading of 'as a result of' – that is, an interpretation by which 'as a result of' refers to the responsibility of the commander.[201] Such an interpretation reconciles the texts – each text is given the same meaning.[202]

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treaty in a way that gives meaning to *all* of them, harmoniously."' (emphasis in original). See similarly *Bemba*, PTC, ICC 01/05-01/08-424, para. 413.

193 Yokohama (2018) 18 *ICLRev* 284.

194 Yokohama (2018) 18 *ICLRev* 284-285. See relatedly *Bemba*, AC, ICC 01/05-01/08-3636-Red, Joint Diss.Op. of Judges Monageng and Hofmański, (n 765). There is also the issue of what mental element applies to the *general* duty in the chapeau, see Yokohama (2018) 18 *ICLRev* 290-292.

195 *Bemba*, ICC-01/05-01/08-406, para. 44.

196 '…lorsqu'il ou elle n'a pas exercé le contrôle…'

197 '…如果未对 ... 适当行使控制…'

198 *Bemba*, TC, ICC-01/05-01/08-3343-AnxII, Sep.Op. of Judge Ozaki, para. 9 (in respect of the English text); *Bemba*, AC, ICC 01/05-01/08-3636-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 330 (in respect of the English text); *Bemba*, AC, ICC 01/05-01/08-3636-Red, Sep.Op. of Judges Van den Wyngaert and Morrison, para. 51 (in respect of all four texts). Cf. *Bemba*, TC, ICC 01/05-01/08-3343-AnxI, Sep.Op. of Judge Steiner, para. 8. See further, Yokohama (2018) 18 *ICLRev* 300.

199 Article 33(3) VCLT. There is also the question of how the Statute itself modifies the ordinary application of the VCLT – see Akande, in: Cassese, *Companion* (2011) 41, 44-45.

200 Article 33(4) VCLT: 'Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.' On the customary status of Article 33, see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 15, para. 25.

201 Cf. the view of Judge Steiner in *Bemba,* which rejects reliance on Article 33(4) VCLT on the basis that 'there remains no ambiguity in the interpretation of Article 28', *Bemba*, TC, ICC 01/05-01/08-3343-AnxI, Sep.Op. of Judge Steiner, para. 8. This seems to put the cart before the horse.

202 In addition, this reading solves the difficulty of how 'as a result of' could apply to *ex post facto* omissions – failures to repress or submit.

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Of course, this approach immediately runs into the objection of principle – the responsibility of the superior as a party absent a causal connection to the crime. However, this objection only holds if such a characterisation of superior responsibility – responsibility as a *party* – is preferred (see mn 12-16). As Yokohama notes, the chain of reasoning in *Bemba* on the issue of causation seems to run something like (i) superior responsibility is a mode of liability; (ii) modes of liability require a causal contribution; and thus (iii) Article 28 requires causation.[203] But the reasoning could just as easily be taken the other way around – that is, that the answer to the question of causation ought to inform the question of legal characterisation. It is true, of course, that certain textual and contextual[204] factors point towards a characterisation of Article 28 as a mode of liability – in particular that the superior 'shall be criminally responsible *for* crimes within the jurisdiction of the Court…'[205] But this approach puts too much emphasis on the term *for* specifically,[206] rather than a holistic assessment of the legal character of Article 28.[207]

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When thinking about a holistic assessment, the fact that a proper interpretation of Article 28 does not require causation points towards an understanding of Article 28's legal character as establishing a separate offence of omission. The same inference can be drawn from the fact that Article 28(1)(a) encompasses a standard of negligence – and thus, on the mode of liability model, leads to the responsibility of a superior as a party to intentional crimes on the basis of their negligence.[208] In both cases, even if not a breach of 'internationally recognized human rights' as per Article 21(3) of the Statute,[209] we should be cautious about finding that the drafters' common intention was to establish the criminal responsibility of superiors in a way inconsistent with general principles of criminal law.[210] This would be incompatible with the treaty's object and purpose, which can only be understood as an ambition to end impunity for international crimes in accordance with the Statute

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203 Yokohama (2018) 18 *ICLRev* 286. Yokohama refers to Judge Ozaki's reasoning, but it is true more widely, see e.g. *Bemba*, AC, ICC 01/05-01/08-3636-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 334.

204 On objections to the contextual argument, see Yokohama (2018) 18 *ICLRev* fn. 48 and Robinson's discussion ((2012) 13 *MelbJIL* 32-33 of Article 28's place within the section of the Statute designated General Principles of Law. Relatedly, it is clearly the case that the Statute establishes crimes other than those listed in Article 5. Article 25(3)(e) sets out the crime of direct and public incitement to genocide and Article 70 sets out a number of crimes against the administration of justice.

205 See mn. 12-16. See also Robinson (2012) 13 *MelbJIL* 32.

206 Relatedly, the chapeau of Article 25(3) provides: 'a person shall be criminally responsible and liable for punishment *for* a crime within the jurisdiction of the Court if that person…' Sub-para. (f) then provides: 'Attempts to commit such a crime…' It is not thought that together this means that those who *attempt* to commit CaH are responsible *for* them.

207 Cf. Robinson (2012) 13 *MelbJIL* 32-35 arguing that an interpretation of this kind, which he sees as judicial recognition of a *new* crime, would conflict with the principle of legality. See, though, Robinson's discussion (at 30-31) of the plausibility of what he calls a strained textual reading.

208 Schabas (1998) 6 *EJCCLCJ* 417; Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 834. See mn. 60-64.

209 See Article 21(3): 'The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights…'

210 See Damaška (2001) 49 *AmJCompL* 455; Ambos, *Treatise ICL I* (2013) 87: ICL 'must respect and ensure … the fundamental principles of criminal law grounded in the rule of law.' See similarly, in respect of the Article 7(3) of the Statute of the ICTY, *Hadžihasanović*, IT-01-47-AR72, Partially Diss.Op. of Judge Shahabuddeen, para. 32: 'Reading the provision reasonably, it could not have been designed to make the commander a party to the particular crime committed by his subordinate.'

and general principles which protect the accused.[211] At stake here, in particular, is the principle of culpability in its demand for both a personal nexus to the crime and fault.[212]

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On this model, the superior's responsibility is defined by her own dereliction – she is not responsible or punished for the subordinate's crimes. In respect of the duty to prevent, the offence can be understood as a form of endangerment liability.[213] Here, responsibility arises on the basis that the superior's failure to take the necessary measures endangered the legal interests protected by underlying prohibitions.[214] Although it is required that those interests are *actually* infringed – that is, that crimes within the jurisdiction of the Court are committed – the superior is not blamed for that result.[215] In this sense, the superior's responsibility may be thought of as an endangerment offence 'in the inchoate mode',[216] even though it is nonetheless required that the risk eventuates for international responsibility to arise. In respect of the duties to repress and submit – those arising after commission of the crimes – the basis of responsibility does not lie in endangerment *per se*,[217] but rather in the superior's failure to perform the remedial duties generated by the underlying infringement. International law has marked the underlying infringements as being of the kind that ought not go unaddressed – for which there ought to be no impunity. For this reason, Article 28 places a specific duty on superiors to repress or to submit the matter to the competent authorities.

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Two final points are worth emphasizing. First, the model of superior responsibility proposed here clearly entails a less serious form of responsibility than any arising under Article 25. This should be reflected in a lower sentence, which ought also to vary according to the exact form of dereliction and the superior's mental state. Second, if the Court does not wish to change its prevailing view of the character of superior responsibility as a mode of liability (mn. 12-16), it ought to then require causation. The basis of such a requirement would not be the term 'as a result of' – the interpretation set out above (mn. 47) remains the better one. Rather, causation ought to be read into Article 28

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211 Article 31(1) VCLT. On the potential relevance of the object and purpose of the treaty in this context, though taking a different approach overall, see Robinson (2012) 13 *MelbJIL* fn. 135, 55. To give an example, it would be startling if the drafters in Rome agreed to establish a scheme which imposed responsibility on a superior, *as a party to international crimes*, where they, absent any prior knowledge or ability to prevent those crimes, failed to, for instance, set up a commission of inquiry after the fact in a situation where they ought to have known the crimes were committed.

212 For judicial recognition, see ICTY, *Prosecutor v. Tadić*, AC, Judgement, IT-94-1-A, 15 Jul. 1999, para. 186; *Bemba*, TC, ICC 01/05-01/08-3343, para. 211. In respect of fault, see in particular Damaška (2001) 49 *AmJCompL* 463-464 regarding the responsibility of negligent superiors: 'What has taken place here? *Sub silentio*, as it were, a negligent omission has been transformed into intentional criminality of the most serious nature.'

213 See Duff (2005) 65 *LouisianaLRev* 942; Duff and Hörnle, in: Ambos *et al.*, *Core Concepts II* (forthcoming). Cf *Bemba*, AC, ICC 01/05-01/08-3636-Red, Concurring Sep.Op. of Judge Eboe-Osuji, paras. 238-251.

214 Duff and Hörnle, in: Ambos *et al.*, *Core Concepts II* (forthcoming).

215 See Olasolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart 2009) 107. For some, this approach underweights the responsibility of superiors whose omissions were, in fact, causal and who had knowledge that the crimes were about to be committed. This prompts what is called the 'splitting solution' – see Triffterer (2002) 15 *LeidenJIL* 189-190; *Nerlich* (2007) 5 *JICJ* 665; van Sliedregt, *Responsibility* (2012) 198-199. In any event, it seems likely that some causal superiors would be captured by other modes of liability under Article 25(3).

216 Duff (2005) 65 *LouisianaLRev* 954.

217 Although, as is often noted, the failure to investigate and discipline past violations is likely to create a culture in which further violations occur.

as an unwritten principle of criminal law required for the imputation of the subordinate's crimes to the superior.[218]

5. 'knew or, owing to the circumstances at the time, should have known…'

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Responsibility arises under Article 28(a)(i) where the military commander or person effectively acting as a military commander 'either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.' This is the Statute's approach to the mental element for superior responsibility – a specific departure from the general mental element in Article 30 and a matter of long-standing discussion in the literature.[219] Indeed, concern over the lower boundary of the mental element has persisted since the execution of General Yamashita after his conviction, in December 1945, by the United States Military Commission on the basis of atrocities committed by the Imperial Japanese Army in the Philippines during the war.[220] It is easy to see why. If superior responsibility is properly characterised as a form of participation in the crimes of the subordinate, the doctrine entails a 'dramatic escalation' in the superior's responsibility relative to their own culpability.[221]

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The Statutes of the ICTY and ICTR formulated the mental element of superior responsibility as requiring that the superior 'knew or had reason to know that the subordinate was about to commit such acts or had done so.'[222] In *Delalić et al*, the ICTY TC, drawing on Article 86(2) of Add. Prot. I, held that the 'had reason to know' standard reflected custom at the time of offences in the indictment.[223] This finding was upheld by the AC.[224] In this light, immediately evident is the choice in Article 28(1)(a) of the seemingly lower standard of 'should have known'[225], as well as the choice for non-military commanders in Article 28(1)(b) of a slightly different standard of conscious disregard of information clearly indicating that crimes were being committed.[226]

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218 See Ambos and Aboueldahab, in: FS Kremnitzer 2020, 18-19.

219 See Damaška (2001) 49 *AmJCompL.* 455; Danner and Martinez (2005) 93 *CalLRev* 75. If the two-fold duties approach is taken – see mn. 43 – there is then the issue of whether Article 30 applies to the general duty.

220 U.S. Military Commission, Manila, *Trial of General Tomoyuki Yamashita*, Case No. 21, 4 February 1946, LRTWC, Volume IV (London: UN War Crimes Commission, 1948). On whether a standard of strict liability was applied in *Yamashita*, see Parks (1973) 62 *MilLRev* 22-38. See further *U.S. v. von Leeb et al.* (*German High Command Trial*), XII (1949) *LRTWC* 76; *U.S. v. List et al. (Hostages Trial)*, VIII (1949) LRTWC 71.

221 Damaška (2001) 49 *AmJCompL.* 464.

222 Article 7 ICTY; Article 6 ICTR Statute.

223 The TC did not examine the potential impact of the negotiation and adoption of the Rome Statute on custom, see *Delalić et al.*, IT-96-21-T, para. 393; see further *Kayishema and Ruzindana*, ICTR-95-1-T, paras. 225–228. See also Cryer, *Prosecuting* (2005) 325.

224 *Delalić et al.*, IT-96-21-A, para. 239. The AC, summing up, held that the 'had reason to know' standard requires at least that 'information was available to [the commander] which would have put him on notice of offences committed by subordinates' - *Delalić et al.*, IT-96-21-T, para. 241. See also *Bagilishema*, ICTR-95-1A-A, paras. 26-38; *Blaškić*, IT-95-14-A, paras. 58-64.

225 See *Bagilishema*, ICTR-95-1A-A, paras 32-34; *Blaškić*, IT-95-14-A, para. 62.

226 See mn. 82-83.

In *Bemba*, the mental element in Article 28(1)(a) received attention at each stage of the proceedings – Confirmation of Charges, Trial, and Appeal.[227] To start with the idea that the commander 'knew' – or had 'actual knowledge' – direct evidence is obviously a possibility.[228] Beyond that, in the Confirmation Decision the PTC drew on preceding case law[229] to set out factors said to be instructive in determining whether a superior had actual knowledge that their forces were about to engage or were engaging or had engaged in the underlying crimes:

> 'These factors include the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communication, the *modus operandi* of similar acts, the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts. Actual knowledge may be also proven if, "*a priori*, [a military commander] is part of an organised structure with established reporting and monitoring systems."'[230]

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One point of caution is needed here. The final sentence should not be read to suggest that where the commander is part of an organised structure with established reporting and monitoring systems actual knowledge can be presumed or assumed, in the sense of an *a priori* assumption. The relevant quotation is drawn from the *Hadžihasanović et al.* TC, where in full it reads: 'Additionally, it may be easier to prove the actual knowledge of a military commander if, *a priori*, he is part of an organised structure with established reporting and monitoring systems.'

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To this list of factors, the TC added, in particular, 'the notoriety of illegal acts, such as whether they were reported in media coverage of which the accused was aware.'[231] In addition, the TC set out three points of particular interest – also drawn from case law of other tribunals. First, in cases of circumstantial evidence, the 'inference must be the only reasonable conclusion available based on the evidence.'[232] Second, it is not necessary for the commander to know the identities of the

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227 The TC found Mr Bemba to have had actual knowledge, *Bemba*, TC, ICC 01/05-01/08-3343, para. 717.

228 *Bemba*, PTC, ICC 01/05-01/08-424, para. 430; *Bemba*, TC, ICC 01/05-01/08-3343, para. 191. See also *Kordić and Čerkez*, IT-95-14/2-T, para. 427; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, TC, Judgement, IT-01-47-T, 15 March 2006, para. 94; ICTY, *Prosecutor v. Galić*, AC, Judgement, IT-98-29-A, 30 November 2006, para. 171.

229 For an analysis of the (earlier) ICTY jurisprudence on the indicia suggesting knowledge, see Maugeri, *Responsabilità* (2007) 395 ff.

230 *Bemba*, PTC, ICC 01/05-01/08-424, para. 431; Final Report of the Commission of Experts Established Pursuant of SC Res. 780 (1992), UN Doc. S/1994/674, p. 7; *Delalić et al*, IT-96-21-T, para. 386; *Blaškić*, IT-95-14-T, para. 307; ICTY, *Prosecutor v. Strugar*, TC, Judgement, IT-01-42-T, 31 Jan. 2005, para. 368; *Orić*, IT-03-68-T, para. 319; ICTR, *Prosecutor v. Bagosora et al.*, TC, Judgement and Sentence, ICTR-98-41-T, 18 Dec. 2008, para. 2014; SCSL, *Prosecutor v. Sesay et al*, TC, Judgement, SCSL-04-15-T, 2 Mar. 2009, para. 309; *Hadžihasanović and Kubura*, IT-01-47-T, para. 94.

231 *Bemba*, TC, ICC 01/05-01/08-3343, para. 193: 'Such awareness may be established by evidence suggesting that, as a result of these reports, the commander took some kind of action.' See also *Bemba*, AC, ICC 01/05-01/08-3636-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 263.

232 *Bemba*, TC, ICC 01/05-01/08-3343, para. 192.

subordinate perpetrators.[233] And third, it was not required that the commander had 'mastered every detail of each crime.'[234]

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On appeal, other than signalling its concerns about the TC's finding that the defendant had 'actual knowledge', the Majority Judgement does not address the issue. President Eboe-Osuji's Separate Concurring Opinion does not address the mental element in detail, which leaves the two two-judge opinions. As to Judges Hofmański and Monageng, the Joint Dissenting Opinion rejects the argument that there was a legal error in the TC's reasoning. Moreover, it adds that 'liability under article 28 (a) of the Statute is triggered irrespective of which of the two standards is satisfied' – and notes the difficulty of distinguishing them.[235] Finally, while approving explicitly of the TC's view that the commander need neither know the identities of the specific individuals nor have 'mastered every detail', they held that it was necessary that he knew or should have known that '"offences such as those charged" were being committed or about to be committed by his or her subordinates.'[236]

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The second opinion – that of Judges Van den Wyngaert and Morrison – clearly aims to tighten up the standard of actual knowledge. On their view, the knowledge standard may not be met if a commander has 'genuine reasons to doubt the accuracy of a given source of information, even if the information later turns out to have been accurate.'[237] Where troops are 'about to commit' the crimes, the 'information must be sufficiently specific' – awareness of a 'generic risk' is insufficient.[238] Moreover, a 'certain imminence and specificity going well beyond general concerns about the level of discipline of particular troops/units' is required. In this respect, the Separate Opinion envisages that the commander 'must be aware of the identity of the soldier(s) or units and the nature of the criminal conduct', with the exception of situations where there is a pattern of criminality.[239] Where the crimes have already been committed, the commander must be 'virtually certain' of the guilt of his subordinates.[240] And finally, on a procedural level, the Prosecutor must spell out which of the two alternatives – 'knew' or 'should have known' – is alleged in respect of particular crimes.[241]

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What, then, is there to make of the mental element of knowledge after *Bemba*? It is not easy to say. As a starting point, the principles and factors set out above remain relevant. For the most part,

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233 *Ibid.*, para. 194 citing *Orić*, IT-03-68-A, para. 35.

234 *Ibid.*, para. 194 citing *Galić*, IT-98-29-A, para. 377.

235 *Bemba*, AC, ICC 01/05-01/08-3636-Anx1-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 266.

236 *Bemba*, AC, ICC 01/05-01/08-3636-Anx1-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 309.

237 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Sep.Op. of Judges Van den Wyngaert and Morrison, para. 43. Importantly, for future cases, the Sep.Op. notes that '[i]n any event, the fact that a commander may have doubts about the accuracy of certain information does not mean that he or she should not have investigated further, in accordance with what is required under the "should have known" standard.'

238 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Sep.Op. of Judges Van den Wyngaert and Morrison, para. 44.

239 *Ibid.*, para. 45. To emphasize, the text refers to the identity of soldier(s) *or* units.

240 *Ibid.*, para. 46.

241 *Ibid.*, para. 39. Cf. Mettraux, *Responsibility* (2009) 199 on the practice of the ICTR and ICTY: 'Although the 'had reason to know' standard offers the prosecution a useful alternative path to establishing the superior's *mens rea*, it is an evidential course that the prosecution has rarely pursued as a sole basis for liability.'

these are drawn from custom as articulated by the ICTR and ICTY. Beyond that, it is evident that there is a desire on the part of some judges to impose a more demanding application of the test for a finding of actual knowledge. On the level of principle, this makes sense: knowing failures and negligent failures entail critically different forms of blameworthiness, even if the structure of Article 28 does not recognize this.[242] In practice, in cases where the commander did *nothing* in response to the underlying crimes, it is hard to see what a more demanding application of the knowledge standard will change as to liability, if not sentence. These cases can straightforwardly be pleaded on the basis that the commander 'should have known' about their subordinate's crimes. However, in cases where the commander took certain measures to prevent and punish at different points in time – as in *Bemba* – the exact contours of the knowledge standard are likely to matter.[243]

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In any event, a key question then becomes what exactly is meant by the lower standard applicable to military commanders – that they, 'owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.' Textually, at least, the standard looks a little more relaxed than the 'had reason to know' standard in the statutes and case law of the ICTY and ICTR.[244] In *Bemba*, in its Confirmation Decision, the PTC held that the criteria developed in that case law 'may be useful' in interpreting Article 28(1)(a). It summarized these criteria in the following way:

> 'In this respect, the suspect may be considered to have known, if inter alia, and depending on the circumstances of each case: (i) he had general information to put him on notice of crimes committed by subordinates or of the possibility of occurrence of the unlawful acts; and (ii) such available information was sufficient to justify further inquiry or investigation. The Chamber also believes that failure to punish past crimes committed by the same group of subordinates may be an indication of future risk.'[245]

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Two key points of emphasis emerge from this passage.[246] First, the information may be *general*.[247] One important gloss emerges in this respect from the case law of the ICTY. In *Krjonelac*, the ICTY AC emphasized that the information, even if general, must relate to the specific crime of the

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242 On whether variation in sentence can mitigate a problem of this kind, compare in respect of a much wider debate Stewart (2012) 25 *LeidenJIL* 165 and Jackson (2016) 29 *LeidenJIL* 879.

243 Cf. *Bemba*, AC, ICC 01/05-01/08-3636-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 265. On potential differences between actors who meet a requirement of knowledge, see Jackson (2019) 68 ICLQ 817.

244 Cf. Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 846-851.

245 *Bemba*, PTC, ICC 01/05-01/08-424, para. 434. It is unlikely that the PTC meant to say, in the introductory sentence, that 'the suspect may be considered to have known…'. It is clear the Decision is setting out factors that inform whether a commander 'should have known.' The Chamber cites *Sesay et al*, SCSL-04-15-T, para. 311.

246 In respect of the final sentence, see *Hadžihasanović and Kubura*, IT-01-47-A, para. 30: 'While a superior's knowledge of and failure to punish his subordinates' past offences is insufficient, in itself, to conclude that the superior knew that similar future offences would be committed by the same group of subordinates, this *may, depending on the circumstances of the case*, nevertheless constitute sufficiently alarming information to justify further inquiry.' (emphasis added). See also ICTY, *Prosecutor v. Krnojelac,* AC, Judgement, IT-97-25-A, 17 Sep. 2003, para. 169.

247 See Moloto (2009) 3 *BerkeleyJILP* 18: 'Tribunals have interpreted quite broadly the legal standard of when a superior "had reason to know" of his subordinates' crimes.'

subordinate at issue.[248] Thus, for torture, which in that context requires a prohibited purpose, it was insufficient that the information alerted the commander to beatings undertaken by his subordinates.[249] Second, the PTC refers to the 'possibility' of occurrence of unlawful acts. This is consistent with statement of the ICTY AC in *Strugar*, where standards of a 'clear and strong risk' and a 'substantial likelihood' were rejected.[250] The AC reiterated the standard as demanding 'sufficiently alarming information putting a superior on notice of the risk that crimes might subsequently be carried out by his subordinates and justifying further inquiry.'[251]

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The 'should have known' standard received no substantive attention in the *Bemba* TJ.[252] On Appeal, as noted above neither the Majority Judgement nor the President's Separate Concurring Opinion addresses the issue in any detail. That again leaves the two two-judge opinions. Other than the point mentioned above that in their view it is not necessary for a TC to make a clear distinction between the standards of 'knew' and 'should have known', the Joint Dissenting Opinion of Judges Hofmański and Monageng does not take a view on the latter standard. By contrast, Judges Morrison and Van den Wyngaert propose that:

> 'If the Prosecutor alleges that the accused 'should have known', the questions that arise are (a) what information did the commander have at which point in time and (b) what did the commander do with this information, if anything? It should be noted, in this regard, that a commander may take all reasonable steps to follow up on the information and still not acquire actual knowledge of criminal activity.'[253]

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This does not provide a great deal of guidance, but it does implicitly raise a central issue still to be determined: does Article 28 depart from the customary standard of 'had reason to know' and if so, in what way?[254] In the case law of the ICTR and ICTY the standard of 'had reason to know' requires that the relevant information was provided or available to the commander. Although this requirement is softened slightly by the idea that the commander need not have acquainted himself

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248 *Krnojelac,* AC, IT-97-25-A, para. 155.

249 *Ibid.* Cf. the definition of torture in Article 7(2)(e) of the Statute. See more broadly Rodley (2002) 55 *CLP* 467.

250 *Strugar*, IT-01-42-A, para. 304.

251 *Strugar*, IT-01-42-A, para. 304.

252 *Bemba*, TC, ICC 01/05-01/08-3343, para. 196. The TC had issued a Regulation 55 notification that it may change the legal characterisation of the facts so as to consider the 'should have known standard.' (thereto Ambos, *Treatise ICL III* (2016) 420 ff.). In the light of its factual findings on knowledge itself, it did not consider the alternative standard. See ICC, *Prosecutor v. Bemba*, TC, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 21 Sep. 2012, ICC-01/05-01/08-2324. On this finding, see *Bemba*, AC, ICC 01/05-01/08-3636-Red, Sep.Op. of Judges Van den Wyngaert and Morrison, para. 41 and *Bemba*, AC, ICC 01/05-01/08-3636-Anx1-Red, Joint Diss.Op. of Judges Monageng and Hofmański, paras. 266-267.

253 *Bemba*, AC, ICC 01/05-01/08-3636-Red, Sep.Op. of Judges Van den Wyngaert and Morrison, para. 39.

254 See Meloni, *Command Responsibility* (2010) 184-185; Kiss, in: Stahn, *Practice* (2015) 643-647. See though Robinson (2012) 13 *MelbJIL* 1.

with the information,[255] there is then the possibility that the standard in Article 28 – that owing to the circumstances at the time the commander should have known – extends to situations in which no information is provided or available to the commander. This is exactly the view taken by the *Bemba* PTC: 'that the "should have known" standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime.'[256] By contrast, Judge Morrison and Van den Wyngaert's Joint Separate Opinion explicitly refers to information that the commander had.

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On reflection, it is strange to categorically require that a standard of 'should have known' applies only where a commander has information in her possession. That would exclude a duty of inquiry which may be entirely justifiable *owing to the circumstances at the time* in a particular situation.[257] Doing so would ignore the specific drafting choice not to use the standard set out in the statutes of the ICTR and ICTY, but also render difficult to understand the use of the standard 'consciously disregard information…' in para. (b) of Article 28 (on this standard, see below mn. 82-83).[258] That being said, there remains the principled concern of imposing criminal responsibility on a superior as a party to intentional crimes on the basis of what is in essence a standard of negligence.[259] For this reason, the ICC ought to confine an extension beyond the customary standard to encompass only grave failures to undertake inquiries on the part of the commander.[260]

6. 'measures … to prevent or repress their commission or to submit the matter to competent authorities for investigation and prosecution…'

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Article 28(a)(ii) requires that the commander 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.' This is the Statute's formulation of the classic understanding of superior responsibility as entailing distinct duties to prevent and punish their subordinate's crime.[261] In broad terms, the preventive duty arises prior to the commission of the underlying crime, the duty to repress encompasses a requirement to put down or restrain ongoing crimes, search for the perpetrators and, if appropriate, punish them, and the duty to submit arises where the superior has no power of sanction or if referral is nonetheless required on the

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255 *Delalić et al.*, IT-96-21-A, para. 239.

256 *Bemba*, PTC, ICC 01/05-01/08-424, para. 433 citing *Kayishema and Ruzindana*, ICTR 95-1-T, para. 227.

257 Robinson (2017) 28 *CLF* 662.

258 Kiss, in: Stahn, *Practice* (2015) 6646; Olasolo and Cantor (2019) 30 *CLF* 75. See also *Blaškić*, IT-95-14-A, paras. 58-64.

259 See van Sliedregt (2016) 21 *JCSL* 512.

260 For a defence of the 'should have known' standard, see Robinson (2017) 28 *CLF* 633.

261 Bantekas (1999) 93 *AJIL* 577, 591; Mettraux, *Responsibility* (2009) 230. See also *Halilović*, IT-01-48-T, para. 72; *Blaškić*, IT-95-14-A, para. 83.

facts of the case.[262] Even if there is overlap, these are distinct duties in the sense that a breach of any one can ground liability.[263]

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In *Orić*, the ICTY AC stressed 'that "necessary" measures are the measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish) and "reasonable" measures are those reasonably falling within the material powers of the superior.'[264] This latter point is emphasized in the text of Article 28 itself – 'measures within his or her power'. Taking these qualifications together, it is relatively straightforward to envisage the kinds of measures that a commander ought to take under Article 28(a)(ii). A list, set out at different points in the proceedings in *Bemba* and drawn from the case law of other tribunals, is illustrative: (i) ensuring that superior's forces are adequately trained in IHL; (ii) securing reports that military actions were carried out in accordance with international law; (iii) issuing orders aiming at bringing the relevant practices into accord with the rules of war; (iv) taking disciplinary measures to prevent the commission of atrocities by the troops under the superior's command; (v) issuing orders specifically meant to prevent the crimes, as opposed to merely issuing routine orders; (vi) protesting against or criticising criminal conduct; (vii) insisting before a superior authority that immediate action be taken; (viii) postponing military operations; (ix) suspending, excluding, or redeploying violent subordinates; and (x) conducting military operations in such a way as to lower the risk of specific crimes or to remove opportunities for their commission; (xi) investigating the underlying crimes in a manner capable of leading to criminal prosecution; (xii) imposing disciplinary measures; and (xiii) submission to an appropriate authority for further investigation and prosecution.[265]

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The problem, then, is that other than in situations in which the commander does nothing at all, a list of this kind tells us both a lot and very little at the same time.[266] In part, this simply flows from the articulation of a duty founded on reasonableness.[267] It has long been emphasised in the case law that an assessment of the situation is context-specific. In the terms of the ICTY TC in *Delalić et al*: 'any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard *in abstracto* would not be meaningful.'[268] Moreover, additional complexity arises from the relationship between this duty and the other elements of superior responsibility. There is a close connection between the necessity and reasonableness of the measures and what the

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262 *Bemba*, PTC, ICC 01/05-01/08-424, para. 435-443; *Bemba*, TC, ICC 01/05-01/08-3343, paras. 205-209. See generally van Sliedregt, *Responsibility* (2012) 198-199. On the idea that the chapeau of Article 28 entails an additional *general* duty, see mn. 43 and Yokohama (2018) 18 *ICLRev* 275.

263 *Bemba*, PTC, ICC 01/05-01/08-424, para. 436 citing ICTY, *Prosecutor v. Delić*, TC, Judgement, IT-04-83-T, 15 Sep. 2008, para. 69; ICTY, *Blaškić*, IT-95-14-T, para. 336; Strugar, IT-01-42-T, para. 373; *Hadžihasanović and Kubura*, IT-01-47-T, para. 126.

264 *Orić*, AC, Judgement, IT-03-68-A, 3 July 2008, para. 177. See also *Halilović*, IT-01-48-A, para. 63.

265 *Bemba*, PTC, ICC 01/05-01/08-424, para. 438; *Bemba*, TC, ICC 01/05-01/08-3343, paras. 203-204.

266 For a detailed analysis, see Bradley and de Beer (2020) 20 *ICLRev* 167 ff.

267 Ambos, *Treatise ICL I* (2013) 213; Mettraux, *Responsibility* (2009) 246.

268 *Delalić et al.*, IT-96-21-T, para. 394. See also e.g. *Blaškić*, IT-95-14-A, para. 72; Mettraux, *Responsibility* (2009) 245.

commander knew or ought to have known,[269] as well as with the degree and nature of the commander's control over their subordinates.[270]

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Nonetheless, it is possible to draw out some more specific considerations. First, at the outset, it bears reiterating that a commander must have had the power to take a specific measure.[271] Power here should be understood in a material sense, rather than simply as a matter of formal status.[272] Formal competence may, however, inform a determination that a particular measure was necessary.[273] Second, what is required is informed by the imminence, scale, and gravity of the potential crimes.[274] Relatedly, the measures must respond to the range of different crimes about to be committed or already committed.[275] Third, as noted by the *Bemba* TC, tribunal case law establishes that a commander must take steps to 'secure an adequate investigation capable of leading to the criminal prosecution of the perpetrators.'[276] This has been described as a minimum standard, applying across all cases.[277] Fourth, case law has emphasised that what is required is informed by the commander's own position in the relevant hierarchy.[278] Applying this in the context of the duty to repress or submit, in certain circumstances,[279] and subject to the point about taking a step in the investigative process, a commander may discharge their duty by reporting the matter to authorities competent to deal with it.[280] One qualification here is that such a report will not discharge the duty if the commander is aware that the competent authority is not functioning or would undertake a sham investigation,[281] so long as there exists another authority to which the

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269 *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 186.

270 *Blaškić*, IT-95-14-A, para. 72; *Popović et al*, IT-05-88-A, para. 1929; *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 167. See also *Delalić et al.*, IT-96-21-T, paras. 394-395; ICTY, *Aleksovski*, IT-95-14/1-T, para. 78; *Blaškić*, IT-95-14-T, para. 302; *Halilović*, IT-01-48-T, para. 73; *Karadžić,* IT-95-5/18-T, para. 587.

271 *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 167.

272 See *Delalić et al.*, IT-96-21-T, para. 395; *Orić,* IT-03-68-T, para. 331; ICTY, *Kordić and Čerkez*, IT-95-14/2-T, para. 443; ICTY, *Prosecutor v. Stakić*, TC, Judgement, IT-97-24-T, 31 Jul. 2003, para. 461; *Strugar*, IT-01-42-T, para. 372. Cf. Mettraux, *Responsibility* (2009) 237-239.

273 Mettraux, *Responsibility* (2009) 238.

274 *Orić,* IT-03-68-T, para. 329.

275 On how the nature of the crimes – sexual violence – was not properly taken into account by the *Bemba* AC in evaluating the adequacy of the defendant's measures, see SàCouto and Viseur Sellers (2019) 27 *WMBORJ* 612-618. See more generally Bradley and de Beer (2020) 20 *ICLRev* 163; Cote Barco (2019) 92 *Nuevo Foro Penal* 153.

276 *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 207. See *Popović et al*, IT-05-88-A, para. 1932; ICTY, *Prosecutor v. Limaj et al,* TC, Judgement, IT-03-66-T, 30 Nov. 2005, para. 529.

277 *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 207.

278 *Hadžihasanović and Kubura*, IT-01-47-A, para. 154.

279 See *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 207: 'If he does not hold disciplinary power, measures which may, depending upon the circumstances, satisfy the commander's duties include proposing a sanction to a superior who has disciplinary power or remitting the case to the judicial authority with such factual evidence as it was possible to find.'

280 *Blaškić*, IT-95-14-T, para. 335; *Hadžihasanović and Kubura*, IT-01-47-A, para. 154; *Blaškić*, IT-95-14-T, para. 335; *Blaškić*, IT-95-14-A, para. 72. For a discussion in the Sudanese context, see Lubaale (2018) 26 *AfricanJICompL* 391.

281 ICTY, *Prosecutor v. Boškoski and Tarčulovski*, AC, Judgement, IT-04-82-A, 19 May 2010, para. 234; *Bemba*, TC, ICC 01/05-01/08-3343, para. 208. See further *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 180: 'When a commander establishes an independent commission, inquiry or judicial process

commander could have submitted the report.[282] A second qualification is that the commander may be required, even where referral is appropriate, to additionally take disciplinary measures.[283]

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It is here that a certain new emphasis emerges from the decision of the *Bemba* AC. To reiterate, the TC's finding that the defendant failed to take necessary and reasonable measures was one of the two errors determinative of the appeal and thus the acquittal by the AC.[284] This new emphasis is evident in a number of passages in the Majority Judgement.[285] First, the Majority held that 'it is not the case that a commander must take each and every possible measure at his or her disposal.'[286] Considerations of proportionality and feasibility inform the analysis, and the commander may undertake a cost/benefit analysis as long as they bear in mind their overall responsibilities of prevention and repression.[287] Second, the Majority points to the 'operational realities on the ground' faced by commanders at the time, and the risks of an evaluation based on hindsight.[288] Third, and perhaps most importantly, it is necessary to 'identify what a commander should have done *in concreto*.'[289] It is not enough to simply 'juxtapose' the fact that crimes were committed with hypothetical list of measures that might have been taken.[290]

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In general, rather than the articulation of new standards, it makes sense to see the AC Judgement as an attempt to tighten up the application of existing factors and principles informing an evaluation of the necessary and reasonable measures element of superior responsibility.[291] This ambition is even more evident in the Separate Opinion of Judges Morrison and Van den Wyngaert.[292] Here,

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– of which he or she is not part – it must be left to freely fulfill its mandate. Whilst limitations in the results of an inquiry might be attributable to the manner of its establishment (for example, through deliberate exclusion or limitation of mandate), this is not necessarily so. It is important to establish, in this regard: (i) that the shortcomings of the inquiry were sufficiently serious; (ii) that the commander was aware of the shortcomings; (iii) that it was materially possible to correct the shortcomings; and (iv) that the shortcomings fell within his or her authority to remedy.'

282 ICTR, *Prosecutor v. Ntagerura*, AC, Judgement, ICTR-99-46-A, 7 July 2006, para. 345.

283 See *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 207; *Hadžihasanović and Kubura*, IT-01-47-A, para. 152 referring to the need for 'immediate and visible' disciplinary measures.

284 For a careful though critical view, see Bradley and de Beer (2020) 20 *ICLRev* 205-211.

285 Cf. also the approach of the majority – *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 183 – and the dissent – *Bemba*, AC, ICC 01/05-01/08-3636-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 94. For analysis, see SàCouto and Viseur Sellers (2019) 27 *WMBORJ* 612.

286 *Bemba*, AC, ICC 01/05-01/08-3636-Red, paras. 169.

287 *Ibid.*, paras. 169-170. For criticism, SàCouto and Viseur Sellers (2019) 27 *WMBORJ* 613-614.

288 See further Williamson (2008) *IRevRC* 310.

289 *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 170.

290 *Ibid.*, para. 170. Cf. *Nahimana et al.*, ICTR-99-52-A, para. 792: 'Having found that Appellant had the power to prevent or punish the broadcasting of criminal discourse by RTLM, the Trial Chamber did not need to specify the necessary and reasonable measures that he could have taken. It needed only to find that the Appellant had taken none.'

291 See further *Bemba*, AC, ICC 01/05-01/08-3636-Red, Joint Diss.Op. of Judges Monageng and Hofmański, paras. 50-51.

292 See *Bemba*, AC, ICC 01/05-01/08-3636-Red, Sep.Op. of Judges Van den Wyngaert and Morrison, para. 35: 'It is important not to get into a mind-set that gives priority to the desire to hold responsible those in high leadership positions and to always ascribe to them the highest levels of moral and legal culpability' and para. 36: 'The Court should therefore resist the reflex of always holding the

we see an emphasis on the fact that superior responsibility 'is not a one-size-fits-all offence' – an emphasis which sets up their analysis that what is required of commanders is informed by where in the chain of command they rest. More widely, on this account, differentiated responsibility across the chain of command, informed by the permissibility of delegation, is the proper way to understand the duties imposed by Article 28.

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Two other points emerge from *Bemba* in respect of Article 28: a commander's remoteness and motivations. First, it is true that the Majority Judgement on appeal places great emphasis on the defendant's status as a *remote* commander.[293] This should not be read as introducing a legal distinction, but rather a factor that was relevant in the information of the necessity and reasonableness of measures *in the specific circumstances of the case*.[294] If that is not evident in the Majority Judgement itself, it is made explicit in the Joint Dissenting Opinion of Judges Monageng and Hofmański and the President's Separate Concurring Opinion.[295] Indeed, while some measures may be made more difficult owing to the commander's remote position, certain measures may be more easily taken by a commander owing to his remoteness from the site of the crimes.[296] Second, a central point of contention arises from the AC's finding that the TC unduly focused on the defendant's *motivations* in assessing the adequacy of the measures.[297] Leaving *Bemba* itself aside, it is unlikely that there is real disagreement on this point. In brief, on one hand, adequate measures are adequate even if taken for neutral or even blameworthy reasons.[298] On the other hand, a commander's motivations may be relevant, as a matter of evidence, to whether the measures taken were in fact a good faith attempt to discharge their duty.[299]

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most senior commander criminally responsible, regardless of how proximate the superior-subordinate relationship actually was.'

293 See emblematically *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 171.

294 Cf. the issue of specific direction in responsibility for aiding and abetting, see ICTY, *Prosecutor v. Perisić*, AC, Judgement, IT-04-81-A, 28 Feb. 2013; SCSL, *Prosecutor v. Taylor*, AC, Judgement, SCSL-03-01-A, 26 Sep. 2013; ICTY, *Prosecutor v. Sainović et al.*, AC, Judgement, IT-05-87-A, 23 Jan. 2014. For analysis, see Coco and Gal (2014) 12 *JICJ* 345; Ventura, in: Hemptinne *et al.*, *Modes* (2019) 191; Ambos above Art. 25 mn. 30 with further references.

295 *Bemba*, AC, ICC 01/05-01/08-3636-Anex1-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 127; *Bemba*, AC, ICC 01/05-01/08-3636-Red, Concurring Sep.Op. of Judge Eboe-Osuji, para. 258. That is to say, at least three judges.

296 Consider here a decision to set up a commission of inquiry in the face of political pressure not to do so. This may involve political negotiation rendered more difficult by a superior's absence from, for instance, the capital city.

297 See in particular *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 191: 'In particular, it is apparent that the Trial Chamber's error in considering Mr Bemba's motivation had a material impact on the entirety of its findings on necessary and reasonable measures because it permeated the Trial Chamber's assessment of the measures that Mr Bemba had taken.'

298 For instance, protecting the reputation of the organization or focusing on a specific subordinate out of personal *animus*.

299 *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 176; *Bemba*, AC, ICC 01/05-01/08-3636-Anx1-Red, Joint Diss.Op. of Judges Monageng and Hofmański, para. 70; *Bemba*, AC, ICC 01/05-01/08-3636-Red, Concurring Sep.Op. of Judge Eboe-Osuji, para. 16. See also *Halilović*, IT-01-48-A, para. 63; *Orić*, IT-03-68-A, para. 177; *Strugar*, IT-01-42-T, paras. 232, 236-238; *Strugar*, IT-01-42-T, Sep.Op. of Judge Shahabuddeen, para. 7 and Joint Diss.Op. of Judge Meron and Judge Kwon, para. 11; *Sesay et al.*, SCSL-04-15-T para. 313; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, AC, Judgement, IT-04-82-A, 19 May 2010, Sep.Op. of Judge Liu Daqun, para. 2; ECCC, *Prosecutor v. Kaing Guek Eav*, TC, Judgement, 001/18-07-2007, 26 July 2010, para. 545; ICTY, *Prosecutor v. Đorđević*, TC, Judgement,

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Finally, it is worth noting certain complexities that arise in the application of duties to prevent, repress and submit in the context of irregular groups,[300] even before accounting for the variance within that category. Of course, what is implicit in the preceding analysis is the possibility of contextual variation in determining what should have been done. This is more straightforward in respect of the obligation to prevent or to repress ongoing crimes,[301] as well as the duty to undertake an investigation. More complicated is the commander in an irregular group's duty to punish. In certain circumstances, albeit rarely,[302] disciplinary measures will be sufficient.[303] But more likely, given the seriousness of the underlying crimes, a more formal process will be required.[304] Unlike in respect of state forces where there is the possibility of referral to the ordinary civil or military justice system, reading the 'competent authorities' to mean the (opposing) state will rarely make sense in a non-international armed conflict.[305] The implication, underpinned by a pragmatic justification, is that the subordinate ought to be tried by the group itself.[306] If, however, the protective scope of Common Article 3 encompasses this situation,[307] it would be a war crime for a sentence to be passed by a non-regularly constituted court, which failed to afford 'all judicial guarantees which are generally recognized as indispensable.'[308] As Spadaro points out, in certain situations this would be impossible, thus creating a potential conflict for the commander: punish and commit a war crime or fail to punish and be liable on the basis of failing to punish.[309] Here, any evaluation by a court of the necessity and reasonableness of the measures ought to pay close attention to the factual specifics of the situation, as well as constraints stemming from other parts of international law.[310]

IT-05-87/1-T, 23 February 2011, para. 1887; ECCC, *Prosecutor v. Nuon Chea and Khieu Samphan*, TC, Judgement, 002/19-09-2007, 16 November 2018, para. 3726.

300 Sivakumaran (2012) 10 *JICJ* 1129.

301 For analysis, see *ibid.*, 1139-1143.

302 *Ibid.*, 1145.

303 *Hadžihasanović and Kubura*, IT-01-47-A, para. 33. See Spadaro (2020) 18 *JICJ* 13-18. There is also the difficulty here of drawing a line between disciplinary and penal measures.

304 Sivakumaran (2012) 10 *JICJ* 1145; and Clapham (2017) 93 *ILS* 1; Klamberg (2018) 16 *JICJ* 235. See further *Bemba*, AC, ICC 01/05-01/08-3636-Red, para. 180.

305 Sivakumaran (2012) 10 *JICJ* 1146; Spadaro (2020) 18 *JICJ* 19. In the proceedings in *Bemba*, Amnesty International argued that 'competent authorities' ought not to be read to include a body established by the non-state group. Instead, they ought to be required to submit the matter to the authorities within the state, a foreign state, or an international tribunal, see Amicus Curiae Observations on Superior Responsibility, ICC-01/05-01/08-406, paras. 21-26. This was implicitly rejected by the PTC and TC, see specifically *Bemba*, PTC, ICC 01/05-01/08-424, para. 501 on 'the availability of a functional military judicial system within the MLC' and *Bemba*, TC, ICC 01/05-01/08-3343, para. 733.

306 See *Prosecutor v. Haisam Sakhanh*, Stockholm Tingsrätt, Judgement, B 3787-16, 16 Feb. 2017, translated as 'On the Establishment of Courts in Non-International Armed Conflict by Non-State Actors: Stockholm District Court Judgment of 16 February 2017' (2018) 16 *JICJ* 403; Klamberg (2018) 16 *JICJ* 235.

307 See relatedly and recently ICC, *Prosecutor v. Ntaganda*, AC, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', Judgement, ICC-01/04-02/06-1962-OA5, 15 Jun. 2017; ICC, *Prosecutor v. Ntaganda*, TC, Judgement, ICC-01-04-02/06-2359, 8 Jul. 2019, paras. 964-986.

308 See Article 8(c)(iv) ICC Statute

309 Spadaro (2020) 18 *JICJ* 26. See also Jöbstl (2020) 18 *JICJ* 567.

310 Spadaro (2020) 18 *JICJ* 30. For initial thoughts in this direction, see ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud,* PTC I, Version publique expurgée de la 'Version

III. Paragraph (b) – analysis

1. 'superior and subordinate relationships not described in paragraph (a)'

73

In contrast to the Statutes of the ICTY and ICTR, which do not distinguish between military and civilian superiors, para. (b) of Article 28 explicitly refers to other 'superior and subordinate relationships'. This is to say, para. (b) explicitly contemplates the responsibility of civilian superiors,[311] as it is defined by exception: superior-subordinate relations *not described in* para. (a).[312] The extension to non-military superiors is not doctrinally innovative in relation to custom in and of itself.[313] But the drawing of this distinction as a matter of substantive law, and the consequential variation in the applicable elements of the doctrine, is significant.

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The case law of the ICTR indicates an initial hesitation about the application of superior responsibility to civilian superiors.[314] Subsequent case law, at both the ICTR and ICTY, explicitly holds that under customary international law the doctrine encompassed civilian superiors.[315] Beyond this starting point, it is relatively straightforward to capture the elements of this extension. First, as always, the relationship ought to be assessed on a case-by-case basis.[316] Second, in order to be responsible, a civilian superior must exercise effective control over their subordinates, which means 'a degree of control over them which is similar to the degree of control of military commanders.'[317] Third, even if the *degree* of control is equivalent, its nature might be different. As the AC put it in *Bagilishema*: 'It is not suggested that "effective control" will necessarily be exercised by a civilian superior and by a military commander in the same way, or that it may necessarily be established in the same way in relation to both a civilian superior and a military commander.'[318]

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But to set out the elements in this way is to mask certain complexities. First, the Statutes of the ICTR and ICTY simply refer to superiors generally – it is not a matter, as to law, of distinguishing military commanders and civilians for the purposes of the application of different tests.[319] Second, as to the ease of relying directly on tribunal case law, at least some of the discussion in these cases

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amendée et corrigée du Document contenant les charges contre M. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud', ICC-01/12-01/18-335-Conf-Corr, 11 May 2019, para. 486 and n 1190; *Hassan,* PTC I, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Corr-Red, 13 Nov. 2019, paras. 363, 376-377.

311 Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 818; Schabas, *ICC Commentary* (2016) 612.

312 Schabas, *ICC Commentary* (2016) 612.

313 See generally Nybondas*, Command Responsibility* (2010); cf Ronen (2012) 43 *VandJTransnatL* 313.

314 ICTR, *Prosecutor v. Akayesu*, TC, Judgement, ICTR-96-4-T, 2 Sep. 1998, para. 491. See also Zahar (2001) 14 *LeidenJIL* 591.

315 ICTR, *Prosecutor v. Musema*, TC I, Judgement and Sentence, ICTR-96-13-T, 27 Jan. 2000, para. 148, *Delalić et al.*, IT-96-21-T, para. 363, *Delalić et al.*, IT-96-21-A, para. 195; *Bagilishema*, ICTR-95-1A-A, para. 51.

316 *Akayesu*, ICTR-96-4-T, para. 491.

317 *Bagilishema*, ICTR-95-1A-A, para. 52.

318 *Ibid.*, para. 52.

319 Kortfält, in: Klamberg, *Commentary* (2017) 298; Karsten (2009) 7 *JICJ* 984.

concerns a related, though distinct, line between *de jure* and *de facto* authority – with a push to capture the latter.[320] Third, as noted above, a focus only on 'effective control' risks overlooking that superior responsibility is not simply about material ability to prevent and punish, but material ability in the context of a specific relationship of subordination.[321]

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Turning to Article 28(b), then, there are, as Kortfält explains, questions of an upper boundary and a lower boundary.[322] The upper boundary issue concerns when an individual who may otherwise appear to be a civilian is brought within Article 28(a) as someone 'effectively acting as a military commander' (see mn. 25). The lower boundary issue concerns which non-military relations of subordination render someone a superior for the purposes of Article 28(b). In this respect, relationships within a civilian police force are a possibility. Beyond the police, Fenrick's starting point is that civilian superiors may include political leaders, business leaders and senior civil servants.[323] This is true, though care here is needed. The key to Article 28(b) – and to its proper limitation – does not lie in the identity of the superior but in the nature of the institutional relationship.[324] There is no limitation in principle flowing from the identity of the civilian – or non-military or non-military-like – superior. Rather, the key lies in a relation of institutional subordination marked by a hierarchical relationship akin to the military case.[325]

2. 'subordinates under effective authority and control'

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Two initial points are evident in the text. First, para. (b) refers to 'crimes within the jurisdiction of the Court committed by *subordinates*…'. This stands in contrast to the term 'forces' in para. (a). This distinction is simply a reflection of the choice to split Article 28 into two parts – and thus to capture relationships other than military relationships or military-like relationships in the second paragraph. Second, para. (b) uses the language of 'under his or her effective authority and control.' This matches the second formulation in para. (a). As noted above, the *Bemba* PTC felt the need to give 'close, but distinct meanings' to 'effective command' and 'effective authority'.[326] Nonetheless, the decision simply shifts the issue to a determination of the existence of effective control, with the qualification that the 'modality, manner or nature' of that control may vary.[327]

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That, then, leads to the question that will likely be a key issue: the requirement of effective control. Here, the two points drawn from the case law of the ICTR and ICTY in the preceding sub-section provide a starting point. First, it is required that the *degree* of control must match that required of a military commander.[328] Second, that control may be exercised and established in a different way.

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320 See the discussion in *Bagilishema*, ICTR-95-1A-A, paras. 47-62 and *Delalić et al.*, IT-96-21-A, para. 186-199.

321 Karsten (2009) 7 *JICJ* 993.

322 Kortfält, in: Klamberg, *Commentary* (2017) 298.

323 Fenrick, in: Triffterer, *Commentary* (1999) mn. 16. See also Ronen (2012) 43 *VandJTransnatL* 349.

324 Karsten (2009) 7 *JICJ* 993; Ronen (2012) 43 *VandJTransnatL* 341-342.

325 Van der Wilt, in: Jalloh, *Sierra Leone* (2013) 157-158.

326 *Bemba*, PTC, ICC 01/05-01/08-424, para. 413; *Bemba*, TC, ICC 01/05-01/08-3343, para. 181.

327 *Bemba*, PTC, ICC 01/05-01/08-424, para. 413; *Bemba*, TC, ICC 01/05-01/08-3343, para. 181. To be clear, the judgement was interpreting the phrase 'effective authority and control' in 28(a) rather than 28(b).

328 Cf. *Nahimana et al.* ICTR-99-52-A, para. 785.

In respect of the first point, much of the analysis in relation to para. (a) will be relevant. To reiterate, the superior's 'material ability to prevent or repress the commission of the crimes or to submit the matter to the competent authorities' is required, and it is critical to distinguish control from influence, even substantial influence.[329] As to the latter, the indicia of effective control already allow variation in the extension to irregular groups. In civilian settings, even further variation is likely needed.[330]

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As with a finding of a relationship of subordination, here it is nonetheless worth holding in mind both the origins of superior responsibility in military settings and the way that the doctrine operates to impose responsibility in situations where ordinary principles of culpability are already stretched.[331] In this respect, a case such as *Musema* might give us pause in respect of its finding on superior responsibility specifically.[332] In this case, the defendant was the director of a tea factory, where he had legal and financial control over his employees, including powers of removal.[333] This grounded his conviction on the basis of superior responsibility for the crimes committed by his employees.[334] Absent special circumstance, the hierarchies established in business or contractual relationships seem quite different from the paradigm situation of responsible command.[335] As the ICTR AC put it in *Bagilishema*, the *degree* of control must be similar to that in military command.[336]

3. 'crimes within the jurisdiction of the Court committed by subordinates…'

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This clause is identical to that under Article 28(a). For discussion, see mn. 34-37.

4. 'as a result of his or her failure to exercise control' – causation

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This clause is identical to that under Article 28(a). For discussion, see mn. 38-51.

5. 'knew or, consciously disregarded information which clearly indicated…'

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329 *Delalić et al.*, IT-96-21-A, para. 266; *Bemba*, TC, ICC 01/05-01/08-3343, para. 183. See also *Taylor*, SCSL-03-01-T, para. 6979; *Nahimana et al.*, ICTR-99-52-A, para. 788: [W]hile the Appeals Chamber concedes that mere membership of a collegiate board of directors does not suffice, *per se*, to establish the existence of effective control, it considers, nonetheless, that such membership may, taken together with other evidence, prove control.'

330 See *Nahimana et al.*, ICTR-99-52-A, paras. 793-834.

331 Van der Wilt, in: Jalloh, *Sierra Leone* (2013) 156-157. See also Zahar (2001) 14 *LeidenJIL* 610. Of course, whether ordinary principles of culpability are stretched does depend on the question of legal characterisation.

332 *Musema*, ICTR-96-13-T. See Zahar (2001) 14 *LeidenJIL* 602-603; Mettraux, *Responsibility* (2009) 166; Van der Wilt, in: Jalloh, *Sierra Leone* (2013) 156. It is worth noting that Musema was convicted under other modes of liability too.

333 *Musema*, ICTR-96-13-T, para. 880. See also *Nahimana et al.*, ICTR-99-52-A, paras. 803, 806, 808, 817.

334 *Musema*, ICTR-96-13-T, para. 895. See though Karsten (2009) 7 *JICJ* 996 on Musema's status as well as Sherman (2018) 38 *NorthernIllULRev* 320.

335 Zahar (2001) 14 *LeidenJIL* 602-603. See also Ambos (2018) 29 *CLF* 548-549.

336 *Bagilishema*, ICTR-95-1A-A, para. 52.

As noted previously, the mental element in Article 28 distinguishes military commanders and persons effectively acting as a military commander from other superior-subordinate relationships. Of course, knowledge is sufficient under both para. (a) and para. (b) – and the analysis set out above applies here too. Crucially, however, under para. (b) the lower threshold is more stringent.[337] Instead of arising on the basis that the defendant 'should have known' about the underlying crimes, it is required that the superior 'consciously disregarded information which clearly indicated … that the subordinates were committing or about to commit such crimes.' Evident, here, is a desire to tighten up, at least to a small extent, the boundaries of superior responsibility for civilian superiors.[338]

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In thinking about its demands, it is helpful to place the standard – 'consciously disregarded information which clearly indicated…' in relation to the other two relevant standards: 'should have known' under para. (a) for military commanders and 'had reason to know' under custom for all superiors. To labour the obvious point, the para. (b) standard is more demanding than that under para. (a), even allowing for the fact that the Court ought to interpret 'should have known' restrictively (see mn. 64). Beyond that, there is a view that the standard in para. (b) reflects or broadly reflects the standard in custom. Schabas suggests that 'it amounts to a formulation of the norm under customary international law, by which the accused person must have "reason to know"' and Mettraux that it 'does not diverge, in any significant manner, from the standard of *mens rea* applicable to all superiors under customary international law.'[339] 'Broadly reflects' is probably an apt description, though there is one reason for caution. As explained above, in *Strugar* the ICTY AC found that the TC had erred in articulating the 'had reason to know' test as one of awareness of a 'substantial likelihood' or 'clear and strong risk'. Instead, it found that 'sufficiently alarming information putting a superior on notice of the risk that crimes *might* subsequently be carried out by his subordinates and justifying further inquiry is sufficient to hold a superior liable' under the doctrine of superior responsibility.[340] Viewed in this light the standard in para. (b) – 'information which clearly indicated' – is more demanding.[341]

6. 'crimes concerned activities … within the effective responsibility and control'

84

To go with the more demanding mental element in situations falling short of actual knowledge, para. (b)(ii) also contains an additional element: it is required that 'the crimes concerned activities that were within the effective responsibility and control of the superior.' Again, here, we see the wish of the drafters to constrain the application of the doctrine in respect of non-military relationships.[342]

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337 See van Sliedregt, *Responsibility* (2012) 201 proposing that '[T]he two concepts of command responsibility differ fundamentally on the cognitive aspect.'

338 See relatedly the comment of a member of the US delegation during the drafting of the Statute, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC, Summary Records of the Plenary Meetings and the Meetings of the Committee as the Whole', Rome, 15 Jun. 1998 – 17 Jul. 1998, Official Records, Volume II, A/Conf.183/13 (Vol. II), p. 136: 'The negligence standard was not appropriate in a civilian context and was basically contrary to the usual principles of criminal law responsibility.'

339 Mettraux, *Responsibility* (2009) 195; Schabas, *ICC Commentary* (2016) 617.

340 *Strugar*, IT-01-42-A, para. 304.

341 See Olasolo and Cantor (2019) 30 *CLF* 76. An analogy to the common law concept of wilful blindness may be useful – see Ambos, *Treatise ICL I* (2013) 227.

342 See though Mettraux, *Responsibility* (2009) 32-33.

Underpinning this constraint is the idea that outside of the military context there are important issues of the scope of the relationship of control between the civilian superior and subordinate.[343] Ideally, these differences will be properly captured in a determination of effective control,[344] though this additional element is intended to operate as further safeguard. Beyond this starting point, the application of this requirement will, of course, depend on the nature of the activity. To take business relationships specifically, and assuming the other elements are met, Vest gives the example of a superior who fails to prevent a subordinate from selling weapons to a party known to be committing systematic war crimes.[345] *Nahimana* at the ICTR provides a similar example: the defendant, who had *de facto* authority within a radio station, was held responsible for failing to prevent broadcasts that constituted direct and public incitement to genocide.[346] By contrast, a case like *Musema* would likely be excluded – even leaving aside issues of effective control,[347] the subordinate crimes were unconnected to the defendant's effective responsibility and control.[348]

7. 'necessary and reasonable measures … to prevent or repress … or to submit the matter to the competent authorities for investigation and prosecution'

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As noted above, the list of possible measures set out at different stages of proceedings in *Bemba* was drawn from the case law of, in particular, the ICTR and ICTY. Neither the ICTY nor the ICTR Statute drew a distinction between different kinds of superior, and the case law is explicit that it 'does not matter whether [the defendant] was a civilian or military superior.'[349] Moreover, effective control in the civilian context must be of a degree similar to the archetypal military relationship. In broad terms, then, the possible measures set out above under para. (a) are relevant to the same terminology under para. (b).

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'In broad terms', though, needs further elaboration. Indeed, it is here too that the application of a doctrine of responsibility grounded in the command relationships of the military comes under strain.[350] In part, this strain is mitigated by the variable nature of the qualifier that what is required are 'necessary and reasonable' measures. As to the duty to prevent, it is possible to think of situations where its application is relatively straightforward, assuming all other elements of the doctrine are fulfilled.[351] The example in the previous paragraph is again illustrative – it would ordinarily be straightforward for a superior in a business context to take measures stopping their subordinate from facilitating war crimes through arms sales.[352] The same goes for repression, at least in respect of ongoing crimes. But to think about measures concerning the imposition of disciplinary measures or even punishment is to see the difficulty. Some disciplinary measures, likely

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343 Wu and Kang (1997) 38 *HarvILJ* 295.

344 Ambos, *Treatise ICL I* (2013) 212.

345 Vest (2010) 8 *JICJ* 871-872.

346 *Nahimana et al.*, ICTR-99-52-T, paras. 972, 1033; *Nahimana et al.*, ICTR-99-52-A, paras. 822, 834.

347 Ronen (2012) 43 *VandJTransnatL* 341.

348 For a wider view, see Kiss, in: Stahn, *Practice* (2015) 621. For scenarios, see Levine (2007) 193 *MilLRev* 86 ff.

349 *Aleksovski*, IT-95-14/1-A, para. 76.

350 See Ambos (2018) 29 *CLF* 548-549.

351 See generally *Nahimana et al.*, ICTR-99-52-A, paras. 842-856.

352 Vest (2010) 8 *JICJ* 872.

contractual, may be possible, though more widely it is difficult to think of civilian-subordinate relationships marked by a capacity to take disciplinary measures that respond to the gravity of the underlying crimes. The same goes, more strongly, for measures properly designated as punishment. Even aside from the question of whether the superior has the competence to take a measure, there may well be constraints stemming from domestic law as to what exactly can be done to the subordinate. That prompts a focus on investigative measures, appropriately adapted to the context, as well as the duty to submit the matter to the competent authorities for investigation and prosecution.

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Finally, it makes sense here to consider the certain points of emphasis in the AC decision in *Bemba*. To reiterate, the AC decision, as well as the Separate Opinion of Judges Van den Wyngaert and Morrison, emphasised the need to carefully assess the position of the superior in determining whether necessary and reasonable measures were taken. This included, in that case, a consideration of operational realities, of the risks of hindsight, and of the need to identify concretely the measures the commander ought to have taken. Although, of course, *Bemba* concerned a defendant categorized as falling within para. (a) of Article 28, these points of emphasis apply with as much force to other superiors under para. (b).

C. Special remarks - Article 28 and customary international law

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It is generally accepted that the doctrine of superior responsibility exists in customary international law. As to judicial assessment, the decision of the PTC of the ECCC in *Sary et al* provides a close analysis of the position in the period 1975-1979.[353] More recently, the need for the ICTR and ICTY to ensure compliance with the principle of legality in the application of criminal law to the defendants – and thus to apply custom as it existed at the time – has resulted in detailed judicial consideration of the doctrine's customary basis. This is not to say that various expansions – whether from international armed conflict to non-international armed conflict, from war crimes to other international crimes, or from the military structures to civilian institutions – was not controversial at certain points in time.[354] But it is fair to say, in principle, that superior responsibility is recognised in customary international law as applying to the crimes mentioned in Article 5 of the Rome Statute.[355]

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To recognise this in general terms is not, however, to assume that all of the specific elements of the doctrine prescribed in the Statute reflect rules of customary international law.[356] An initial question, here, is why this matters at all? After all, Article 21(1) provides that the Court shall apply: 'In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence.' However, this issue matters because in a small but significant set of situations the principle of legality, as an 'internationally recognized human right' in the sense of Article 21(3) of the Statute, precludes the application of the substantive provisions of the Statute to the defendant.[357] The most

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353 ECCC, *Prosecutor v. Ieng Sary*, PTC 75, Decision on Ieng Sary's Appeal Against the Closing Order, 002/19-09-2007-ECCC/OCIJ, 11 Apr. 2011, paras. 399-460. For discussion, see Abeyratne (2012) 44 *GeoWashILRev* 39; see also Heller, *Nuremberg* (2011) 262-271.

354 See generally Ronen (2012) 43 *VandJTransnatL* 313.

355 In this respect, the position in relation to the crime of aggression is more complicated.

356 Mettraux, *Responsibility* (2009) 21.

357 For analysis see Milanović (2018) 9 *JICJ* 25; Bartels, in: Hayashi and Bailliet, *Legitimacy* (2017) 141; de Souza Dias (2018) 16 *JICJ* 65.

important of this set are instances where the Security Council refers a situation to the Court that involves non-State parties to the Statute and where a State lodges an *ad hoc* declaration under Article 12(3) accepting the Court's jurisdiction.[358] In both cases, the Court's temporal jurisdiction may extend back to the date of entry into force of the Statute – that is 1 July 2002.[359] In these two situations, there is a good chance that the potential accused persons would not have been bound by the provisions of the Statute at the time of the offences, if we assume that the Statute binds individuals on the basis of the consent of the territorial State and/or the State of nationality of the (alleged) perpetrator.[360]

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In these situations, then, in order to comply with the principle of legality the Court can only convict an individual in so far as their conduct was criminalized under a body of law binding them at the time of the offence. Here, the body of law will almost certainly be custom, which is by definition generally applicable.[361] And thus to return to Article 28, the question in this set of situations will be whether the specific elements of Article 28, and most notably the lower mental element for military commanders,[362] are accepted in custom. More precisely, the question is not whether the impugned elements reflected custom at the time of drafting of the Statute, but whether the defendant's conduct was criminalized in custom at the time of the offence. Reflection here cannot be assumed, though, of course, it is possible that the process of drafting the Statute affected the customary position. In any event, this will be a matter for the Court, most likely in response to a challenge by the defence.

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358 Milanović (2018) 9 *JICJ* 27; de Souza Dias (2018) 16 *JICJ* 66-67.

359 See Article 11(2) and 12(2) read together with Article 13(b) ICC Statute.

360 Article 12(2). For a longer explanation, Milanović (2018) 9 *JICJ* 47-51.

361 See de Souza Dias (2018) 16 *JICJ* 65 for an overview and evaluation of the different solutions raised in the literature.

362 In addition, there is the question of the legal characterisation of the doctrine in custom at the time of the offence – see generally mn. 16.