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THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY

VOLUME I

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21

SUPERIOR RESPONSIBILITY

Kai Ambos

I. Introduction	824	B. Critical Analysis and Interpretation	850
II. The Status of Superior Responsibility		1. <i>General Considerations</i>	850
in Customary Law	824	2. Actus Reus	855
A. International and National		(a) The Status of the Superior	855
Jurisprudence	825	(b) Effective 'command and control' or 'authority and control'	857
1. <i>The Yamashita Case: The Difficult Debut of the Superior Responsibility Doctrine</i>	825	(c) Crimes as a 'result' of the Superior's Failure to Exercise Control Properly	860
2. <i>Other Post-World War II Jurisprudence</i>	828	(d) 'Necessary and reasonable' Countermeasures 'within his or her power'	861
(a) Nuremberg	828	(e) 'Prevent', 'repress', or 'submit to the competent authorities'	862
(b) IMTFE-Tokyo	830	3. Mens rea	863
(c) UNWCC	831	(a) Military and Non-Military Superior: Positive Knowledge	863
(d) Other National Trials for War Crimes	832	(b) Military Superior: 'should have known'	864
3. <i>The Jurisprudence of the Existing ad hoc Tribunals</i>	833	(c) Non-Military Superior: 'consciously disregarded information which clearly indicated ...'	870
B. Efforts of Codification	837	C. Conclusion	871
1. <i>Protocol Additional I to the Geneva Conventions</i>	837	Select Bibliography	871
2. <i>Other</i>	839		
C. Comparative Aspects	841		
1. <i>Military Law</i>	841		
2. <i>Related Aspects of Economic Criminal Law</i>	844		
D. Preliminary Conclusions	846		
III. Article 28 Rome Statute	848		
A. Description of the Provision and Comparison with Earlier Codifications	848		

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Control Properly

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This does not mean, however, that the traditional criticism of the *conditio* formula does not apply here. One can imagine, for example, a scenario in occupied territory in which crimes have been committed, either by improperly supervised subordinates or, in their absence, by hostile insurgent forces operating in that same territory. In such a case of *alternative* causation (alternative causes for the same result) the responsible superior could claim that the crimes would have been committed anyway, even if the subordinates had been properly supervised. This defence, however, would only apply if the two groups acted simultaneously in the commission of the crimes since only then could one speak of a true alternative causation.²⁴⁹ In any other situation, i.e. the group that reached the place of commission first committed the crimes, criminal responsibility would be attributed, accordingly, to that group. A hypothetical alternative causation would be of no importance. The example shows, however, that there are cases where the pure (inverted) *conditio* formula could lead to unsatisfying results. In such cases, normative theories of (objective) attribution²⁵⁰ or the proximate cause doctrine²⁵¹ could be helpful.

(d) 'Necessary and reasonable' Countermeasures 'within his or her power'

The superior must take countermeasures that are 'feasible' (Article 86(2) PA I; Article 12 Draft Code 1991), 'necessary' (Article 87(3) PA I; Article 6 Draft Code 1996, Article 7(3) ICTY Statute and Article 6(3) ICTR Statute) or 'reasonable' (ICTY and ICTR Statutes). There is no substantive difference between these qualifiers. This has been confirmed by the ILC with regard to 'feasible' or 'necessary' measures.²⁵² In any case, the superior must have both the 'legal competence' and the 'material possibility' to prevent or repress the crimes.²⁵³ It is obvious that these two requirements enable the superior to raise an important defence.²⁵⁴

According to Fenrick²⁵⁵ the commander must do in particular the following:

- ensure that the forces are adequately trained in international humanitarian law

²⁴⁹ See the example given by Fletcher, *supra* note 149, at 63.

²⁵⁰ These theories try to limit attribution by normative criteria (cf. Roxin, *Strafrecht, Allgemeiner Teil I* (3rd edn., 1997), sec. 11 mn. 39–136; see also Fletcher, *Rethinking Criminal Law* (1978) at 495–496). For our context in particular, see Rogall and Schünemann, as quoted *supra* note 150 and accompanying text. See also Ambos, *supra* note 31, at 518 *et seq.*

²⁵¹ Fletcher, *supra* note 149, 64–67.

²⁵² See *supra*, II.A.2, note 113 and accompanying text.

²⁵³ Report ILC 1996, *supra* note 111, at 38–39, para. 6 = *YILC* (1996) Vol. II, Part 2, at 26, para. 6 (emphasis added); similar Partsch, *supra* note 108, 525; and Jia, *supra* note 17, 347. See also the ICTY position, *supra* note 71.

²⁵⁴ Cf. L. C. Green, 'Article 12: Responsibility of the Superior', in M. C. Bassiouni (ed.), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind* (1993) at 195–196 (1996); see also Hessler, *supra* note 16, 1285 *et seq.*: lack of physical control or legal authority as an excuse.

²⁵⁵ Fenrick, *supra* note 76, mn. 9.

- ensure that due regard is paid to international humanitarian law in operational decision-making
- ensure that an effective reporting system is established so that he or she is informed of incidents when violations of international humanitarian law might have occurred
- monitor the reporting system to ensure it is effective and
- take corrective action when he or she becomes aware that violations are about to occur or have occurred.

In any case, only those measures can be expected that are within the superior's power (Article 86(2) PA I) and covered by the superior's command and control (Article 87(1), (3) PA I) as defined above. Thus, the concrete measures depend on the superior's position in the chain of command.²⁵⁶ If the superior is him- or herself responsible for the situation that left him or her powerless to prevent a crime, he or she must be held responsible 'for allowing such a situation to develop'.²⁵⁷ The superior must display good faith in meeting his or her responsibilities.²⁵⁸

The time of commission of the offences is also important as will be seen in the next section.

(e) 'Prevent', 'repress', or 'submit to the competent authorities'

Besides 'prevent' and 'repress' (Articles 86(2) PA I and 87(3) PA I), the terms 'suppress' and 'report' have been used in earlier codifications (Article 87(1) PA I). In contrast, the formulation 'submit to the competent authorities' is new; however, it corresponds in substance to the earlier 'report' requirement. It fills a gap in that it formulates a specific duty for those superiors who have themselves no disciplinary powers to 'repress' a crime. Since this is not limited to non-military superiors, the formulation has been included in both paragraphs (a) (ii) and (b) (iii) of Article 28.²⁵⁹

Whether the superior has to 'prevent' or to 'repress' depends on the concrete circumstances of each case. In general, the following distinction can be made:²⁶⁰ if a crime has not yet been committed (is 'about' to be committed), the superior is obliged to intervene, e.g. by issuing the appropriate orders; if the crime has already been committed, the superior can only react with repressive measures, i.e. order an investigation and punish the perpetrators or submit the matter to the competent authorities. If the subordinates are 'committing' crimes, as formulated in

²⁵⁶ Fenrick, *supra* note 76, mn. 12.

²⁵⁷ See Wu and Kang, *supra* note 107, at 296.

²⁵⁸ Fenrick, *supra* note 76, mn. 14, 25.

²⁵⁹ This seems to overlook Fenrick who comments on this formulation—at least explicitly—only in relation to non-military superiors, *supra* note 76, mn. 25.

²⁶⁰ See also Fenrick, *supra* note 76, mn. 12–14; Bantekas, *supra* note 41, 591–2. On the temporal factor, see already *supra*, II.A.2.