Public Annex B5: Electronic copy of academic authority

Appellant's submissions of the list of authorities for the oral hearing, pursuant to the Appeals Chamber's order ICC-01/05-01/08-3579

Mettraux, G., *The Law of Command Responsibility*, 1st ed. OUP 2009, pp. 82-89

It should also be pointed out that it is not necessary for a superior to be held responsible that the perpetrator himself be charged or convicted for the crime that forms the basis of superior responsibility charges. It is sufficient to establish that the perpetrator was a subordinate of the accused at the time, that he was under his effective control, that the accused had adequate notice of his crime and that he culpably failed to prevent or to punish it.

4.5.4 Requirement of causation

4.5.4.1 The issue

The requirement that the conduct of an individual charged with a criminal offence must be causally linked to the crime itself is a general and fundamental requirement of criminal law.[193] However, international case law is contradictory on the point of deciding whether that requirement also applies to the doctrine of superior responsibility and, if it does, what it means in practice. Whilst some decisions suggest that this basic requirement applies to the doctrine of superior responsibility, more recent case law has taken the opposite stance.

It is the position of this author that international law demands proof of a causal relationship between the failure of the accused and the commission of crimes by subordinates (in regard to his duty to prevent crimes) and between his failure and the resulting impunity of the perpetrators (in regard to his duty to punish crimes).

4.5.4.2 Existing case law and precedents

In the *Čelebići* case, a Trial Chamber of the ICTY held that 'a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior's failure to take the measures within his powers to prevent them'.[194] In the same judgment, the Chamber stated, however, that it had found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility and, therefore, concluded that 'causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates'.[195] The Trial Chamber went on to add, without offering any support for its proposition, that customary international law did not require proof of a causal relationship between the conduct of the accused and the crimes of his subordinates.[196]

[193] See, generally, A. Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 1999, 3rd ed.), at 124.

[194] *Čelebići* Trial Judgment, par 399.

[195] *Čelebići* Trial Judgment, par 398. See also, *ibid.*, pars 399–400 and *Kordić* Trial Judgment, par 447.

[196] The Appeals Chamber in *Blaškić* noted that the *Čelebići* Trial Chamber's finding on that point 'does not cite any authority for that statement on the existence of the nexus [between the acts of the accused and the crimes of his subordinates]' (*Blaškić* Appeal Judgment, par 76).

A stream of subsequent judgments from the *ad hoc* Tribunals have adopted the view that 'causality' does not constitute an element to be established to prove superior responsibility, many of them limiting their considerations to a reference to the *Čelebići* holding or those judgments that have echoed its finding.[197] This position appears to fall short of the requirements of customary international law.

Contrary to the Trial Chamber's ultimate finding in *Čelebići*, insofar as precedents and state practice exist in this matter, they point to the conclusion that a causal relationship between the failure of the superior to fulfil his duties and the crimes of his subordinates is required under international law. In the *Hostage* case, for instance, the Military Tribunal said that liability as a commander required—

> [P]roof of a *causative*, overt act or omission from which a guilty intent can be inferred.[198]

The Tribunal went on to say in relation to the charges against the accused Foertsch, a staff officer, that—

> [T]he evidence fails to show the commission of an unlawful act *which was the result of* any action, affirmative or passive, on the part of this defendant. His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law. He must be one who orders, abets or takes a consenting part in the crime.[199]

[197] See *Blaškić* Appeal Judgment, par 77; *Hadžihasanović* Appeal Judgment, pars 38–9; *Hadžihasanović* Article 7(3) AC Decision, Partially Dissenting Opinion of Judge Shahabuddeen, par 16; *Kordić* Appeal Judgment, pars 830–2. It is not entirely certain whether the Appeals Chamber in this case rejected this ground of appeal on its merit—i.e., whether such a requirement exists or not under international law—or on the narrower basis that it had not been satisfied that the Appellant had met its burden of persuasion on appeal. See also *Halilović* Trial Judgment, par 78; *Orić* Trial Judgment, par 338; *Brdjanin* Trial Judgment, par 280. The *Ford v Garcia* case (*Ford ex rel. Estate of Ford v Garcia*, 289 F.3d 1283) offers an interesting, though inconclusive, domestic illustration of the existing confusion in this issue. In its instructions, the district court had instructed the jury to the effect that the plaintiff could only recover those damages arising from those omissions that could be attributed to the defendant. 'In other words,' the court said, 'there must be a sufficient causal connection between an omission of the defendant and any damage sustained by a plaintiff' (*ibid.*, 1287). In addition to the three elements that form the basis of superior responsibility, the district court said, the jury had to be satisfied that the injuries that form the basis of the charges:

> [W]ere a direct or a reasonably foreseeable consequence of one or both defendants' failure to fulfil their obligations under the doctrine of command responsibility (*ibid.*, 1287).

On appeal, the plaintiff sought to argue that the 'proximate cause' instruction of the district court had been in error, submitting that proximate cause is irrelevant under the doctrine of command responsibility (*ibid.*, 1293). The court of appeal—for the Eleventh Circuit—dismissed this ground of appeal on the basis that the plaintiff's failure at trial to object to the jury's instructions on that point was to be regarded as a waiver of the right to raise on appeal. In a concurring opinion, and relying *inter alia* on the *Čelebići* Trial Judgment mentioned above, Judge Birkett expressed a view about the matter, recording the fact that he considered that 'proximate cause' was irrelevant to assigning liability pursuant to the doctrine of command responsibility: 'The doctrine [of command responsibility] does not require a direct causal link between a plaintiff victim's injuries and the acts or omissions of a commander' (*ibid.*, 1298). See also *Hilao v Estate of Marcos*, 103 F.3d 767, 774, 776–9 (9th Cir. 1996).

[198] *Hostage* case, p 1261, emphasis added.

[199] *Hostage* case, quoted in LRWTC, XV, pp 76–7 (emphasis added).

In the same case, this time in relation to the accused Von Geitner, another staff officer, the court acquitted the accused as, the court said, the prosecution had failed to show that he took any consenting part in the commission of the crimes 'coupled with the nature and responsibility of his position and the want of authority on his part to prevent the execution of the unlawful acts charged'.[200]

Judge Bernard, of France, likewise underlined the importance of that requirement to the doctrine of superior responsibility in his Opinion in the *Tokyo* Judgment. Judge Bernard first made the point that 'no-one can be held responsible for other than the necessary consequences of his own acts or omissions'. He went on to add that—

> Responsibility for omission supposes, of course, an ultimate commission following the omission, and emanating either from the individual to whom the omission is imputed, or from one or several others. The responsibility for the results of this commission is only imputable to the author of the omission if the commission is the certain result of the latter. The relation of cause and effect may be easily ascertainable when the author of the omission and that of the commission are the same individual; it is no longer the case when they are different. The only possible manner of establishing this causal connection would consist in proving that the author of the omission could by an action of some kind prevent the commission and its direct harmful consequences.[201]

The requirement of causality continued to be applied in later war crimes trials. In the *Schonfeld et al.* case, for instance, the Judge Advocate indicated that superior liability could only be envisaged where the crimes are 'the natural result of the negligence of the accused; in other words, that a direction from [the accused Harders], given at the correct time, would have prevented any unjustifiable killing taking place'.[202] The same view was taken by the Judge Advocate in the *Baba Masao* case:

> In order to succeed [in proving command responsibility] the prosecution must prove [...] that war crimes were committed *as a result of* the accused's failure to discharge his duties as a commander, either by deliberately failing in his duties or by culpably or wilfully disregarding them, not caring whether this resulted in the commission of a war crime or not.[203]

In the *Medina* case, a case arising from the Vietnam War, the court was instructed that where murder charges have been brought pursuant to the doctrine of superior responsibility, those crimes must be shown to have—

[200] LRTWC, XV, p 77.

[201] Reprinted in B. Röling and C. Rüter (eds.), *The Tokyo Judgment* (Amsterdam: University Press Amsterdam, 1977), Dissenting Judgment of the Member from France, p 482, 492.

[202] LRTWC, XI, pp 70–1.

[203] Summing-up of the Judge-Advocate General (emphasis added) (*Baba Masao* case, Military Court at Rabaul, Judgment, 2 June 1947, reprinted in part in *Annual Digest* 1947, 205 *et seq.*, at 207).

resulted from the omission of the accused in failing to exercise control over subordinates subject to his command after having gained knowledge that his subordinates were killing non-combatants.[204]

The same requirement was subsequently enshrined in Article 86(1) of Additional Protocol I which provides that—

> The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol *which result from* a failure to act when under duty to do so.[205]

A similar approach was later adopted by the International Law Commission in Article 6 (Responsibility of the superior) of its 1996 ILC *Draft Code of Crimes against the Peace and Security of Mankind*, which provides that a military commander may be held criminally responsible for the unlawful conduct of his subordinates 'if he contributes directly or indirectly to their commission of a crime'.[206]

It is also instructive to note that Article 28 of the ICC Statute provides for the responsibility of a superior in relation to crimes of subordinates where, all other conditions being met, crimes have been committed 'as a result of' his or her failure.[207] The same standard has been adopted in several ICC implementing legislations in countries such as Canada and Great Britain, which provide expressly that to be held responsible, the crimes must have been committed 'as a result' of the commander's failure.[208] Likewise, in the Statute of the Special Tribunal for Lebanon, it is made clear that the doctrine of superior responsibility would only apply in that context to crimes of subordinates which were committed 'as a result of [the superior's] failure to exercise control properly over such subordinates'.[209]

[204] See generally K. Howard, 'Command Responsibility for War Crimes', 21 *Journal of Public Law* 7 (1972), pp 10–12 (emphasis added).

[205] Emphasis added. It must be noted, however, that this provision is binding *per se* upon states only (i.e., 'The High Contracting Parties and the Parties to the conflict'), not upon commanders.

[206] The 1991 ILC Draft Code is silent on that point and, therefore, provides no support for either proposition.

[207] Article 28(a) and (b). See also K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', 5 *JICJ* 159 (2007).

[208] No known implementation legislation excludes that requirement of causality, although several of them do not explicitly provide for it, therefore providing support for neither position. Also, some implementing legislations are of little relevance to the present matter as they conceive of command responsibility in a totally different light than under customary international law (for instance, as a crime in itself or as a separate offence, or as a form of complicity, rather than as a *sui generis* form of criminal participation). German law also seems to support the requirement of a causal link between the alleged failure of the commander and the alleged grave consequences which form the basis of the charges. See Article 41 WStG and § 130 WiG. See also Article 357(1) alt. 3 *StGb*. See also Scholz and Lingens, *Wehrstrafgesetz* (3rd ed 1988), Par 41, mn 2, 17, 13.

[209] See introductory paragraph of Article 3(2) of the Statute.

Finally, the literature on the subject provides further support for the position that such requirement of a causal link exists under international law.[210] Basic principles of personal liability, which demand that criminal responsibility only be assigned where the accused has himself taken part or has otherwise contributed to the commission of the crime, militate in the same sense.[211]

4.5.4.3 Policy reasons

There are also sound policy reasons that support the requirement of causality in relation to the doctrine of command responsibility. Proof of a causal relationship between the failure of the accused and the commission of the crimes ('failure to prevent') or the resulting impunity of the perpetrators ('failure to punish') would guard those charged with superior responsibility against the latent risk of a finding that they failed to adopt 'necessary and reasonable' measures while they could in fact do no more than what they did in the circumstances.[212] The requirement of proof of a causal relationship between the superior's failure and the crimes in relation to which a superior is convicted would provide unassailable evidence that his action would have been necessary and reasonable in the circumstances.

Furthermore, if no causal relation between the actions of a superior and the crimes of subordinates were required, this could in fact create a disincentive for commanders to comply with their duties: knowing that they could be held responsible regardless of any relationship between their actions and the crimes of their subordinates, they might prefer to stay clear of any involvement with those crimes if a failed attempt to prevent or punish crimes may later serve to establish their responsibility.[213]

Finally, without such a causal link between the failure of the accused and the crimes that form the basis of the charge, one may question whether such failure could ever be regarded as grave enough to meet the requirement of 'seriousness' which underlies the doctrine of superior responsibility and which is also found in the statute or charter of international criminal courts and tribunals under

[210] See, in particular, O. Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?', 15 *Leiden Journal of International Law* 179–205 (2002); O. Triffterer, 'Command Responsibility', in C. Prittwitz et al, *Festschrift für Klaus Lüdersen—Zum 70. Geburstag, am 2 Mai 2002*, pp 437–462; V. Nehrlich, 'Superior Responsibility under Article 28 ICCSt: For What Exactly is the Superior Held Responsible?', 5 *JICJ* 665 (2007). This author has supported a similar approach (Mettraux, *International Crimes*, pp 309–310).

[211] See *Tadić* Appeal Judgment, par 186.

[212] It is interesting to note that the Appeals Chamber of the ICTY has stated that the issue of the causal relationship between the conduct of the accused and the underlying offences could have some relevance to the court's determination of whether a particular course of action was, in the circumstances, 'necessary and reasonable' (*Hadžihasanović* Appeal Judgment, par 41).

[213] See 'Note. Command Responsibility for War Crimes', 82 *Yale Law Journal* 1274, 1291 (1973). For instance, in a situation where a superior learns of crimes committed by subordinates, he might be tempted to cover them up even if he had no part in them rather than to punish the perpetrators because his responsibility for failing to prevent the crimes would not be dependent on his having played any part therein.

different labels.[214] A superior who is not shown in any way to have contributed to the crimes of his subordinates could hardly be accused of 'affecting the peace of the world', as Justice Jackson put it.

4.5.4.4 A requirement of causality for command responsibility

In light of the above, and in view of the absence of any reasoned practice to the contrary, it may be concluded that, under customary international law, there is a causality requirement of variable degree for all modes of participation in an international crime under international law, including in relation to command responsibility.[215] One trial chamber of the ICTY, whilst acknowledging the position of the ICTY Appeals Chamber, came as close to reintroducing the requirement of causality as the binding jurisprudence of the Appeals Chamber would allow.[216]

4.5.4.4.1 Causality and failure to prevent

Where superior responsibility charges have been brought for an alleged failure to prevent crimes of subordinates, the prosecution would have to establish that the failure of the commander to act was a significant—though not necessarily the sole—contributing factor in the commission of the crime by subordinates. Put in another way, a relationship of causality must be established in such cases between the commander's failure to act and the crime or crimes committed by his subordinates which form the basis of the charges.

This failure of the superior does not have to be the only cause of the crime. Nor does it have to be its most significant contributing factor. It is sufficient to show that, had the superior adopted necessary and reasonable measures upon learning that a crime was about to be committed by subordinates, he would have been able to prevent that crime from occurring. The contribution that his failure made to the crime lies, not within the actual process of commission of that offence, but earlier in the criminal process. His failure to act effectively created the possibility

[214] See, e.g., Article 1 of the ICTY Statute; Article 1 of the ICTR Statute; Article 1(1) of the SCSL Statute; Article 1 of the ICC Statute. See, above, 4.4.4 Gravity of breach of duty; 11.3 Seriousness of the breach of duty relevant to superior responsibility.

[215] As acknowledged by the *Čelebići* Trial Chamber itself, causation has a 'central place' in criminal law (*Čelebići* Trial Judgment, par 398).

[216] In *Hadžihasanović*, the Trial Chamber appears to have gone as far as it could to state its view that a causal (or quasi-causal) requirement was necessary to liability as commander whilst keeping its finding within the bounds of the Appeals Chamber's binding jurisprudence in the *Blaškić* appeal. Whilst taking stock of that jurisprudence and its apparent rejection of a causality requirement, the Trial Chamber held, nevertheless, that liability as a superior required proof of 'a pertinent and significant link' ('un lien pertinent et significatif', in the French original) between the underlying offence and the omission attributed to the superior (*Hadžihasanović* Trial Judgment, par 192). The Trial Chamber further noted that a superior is responsible under that doctrine, all other conditions being met, because his omission has created or increased a real and reasonably foreseeable risk that crimes would be committed, that he has accepted that risk and that a crime was indeed committed (*ibid.*, par 193). In that sense, the Chamber concluded, the superior may be said to have substantially contributed to the commission of these crimes (*ibid.*).

for his subordinates to commit this crime. In the words of Judge Bernard, cited above, proof must be made that the superior 'could by an action of some kind prevent the commission and its direct harmful consequences'.[217]

In that sense, the contribution which a superior must make to the underlying offence has much in common with the requirement that the contribution of an aider and abetter must be shown to have had 'a substantial effect' on the commission of the crime by the principal offender.[218] And there are cases where the line between the two categories of liability may be hard to draw as, for instance, when a superior is found responsible for aiding and abetting a crime because he was present at the scene of a crime and did nothing to prevent or stop the commission of that crime.[219] The Appeals Chamber of the ICTY has pointed out, for instance, that a superior's past failure to punish crimes of subordinates was likely to increase the risk that further such crimes be committed in the future.[220] However, although the borders of those forms of liability may be co-terminus in some cases, their respective conditions remain distinct. First, whereas liability for aiding and abetting is incurred for an act of practical assistance, encouragement or moral support to the principal offender,[221] the basis of liability for command responsibility lies in a failure to act when under a legal duty to do so.[222] Secondly, in such a scenario, the perpetrators must be shown to have known of their superior's presence and have taken this as an encouragement. In the case of superior responsibility, by contrast, there is no requirement that subordinates knew of their superior's approval of or acquiescence with their crimes. Finally, whilst in the above example proof would have to be made that the aider and abettor knew that his presence would encourage or give moral support to the principal,[223] no such requirement applies under

[217] See in B. Röling and C. Rüter (eds.), *The Tokyo Judgment* (Amsterdam: University Press Amsterdam, 1977), Dissenting Judgment of the Member from France, pp. 482, 492.

[218] See, e.g., *Kayishema* Appeal Judgment, par 186; *Čelebići* Appeal Judgment, par 352; *Tadić* Appeal Judgment, par 229; *Blaškić* Appeal Judgment, par 46; *Furundžija* Trial Judgment, pars 235 and 249; *Vasiljević* Trial Judgment, par 70; *Kunarac* Trial Judgment, par 391.

[219] See, e.g., *Aleksovski* Trial Judgment, pars 64–5; *Vasiljević* Trial Judgment, par 70; *Furundžija* Trial Judgment, par 232; *Tadić* Trial Judgment, par 689; *Kunarac* Trial Judgment, par 393; *Krnojelac* Trial Judgment, par 88; *Kajelijeli* Trial Judgment, par 769; *Bagilishema* Trial Judgment, pars 34 and 386; *Kayishema* Trial Judgment, par 201; *Kamuhanda* Trial Judgment, par 600. See also Judge Schomburg's observation in his Separate and Partially Dissenting Opinion in the *Orić* appeal at par 16 ('subordinates could perceive a superior's failure to take the necessary and reasonable measures to effectively punish violations as an approval of their actions.').

[220] *Hadžihasanović* Appeal Judgment, pars 267 and 278.

[221] See, e.g., *Aleksovski* Appeal Judgment, par 62; *Kayishema* Appeal Judgment, par 186; *Čelebići* Appeal Judgment, par 352; *Tadić* Appeal Judgment, par 229; *Blaškić* Appeal Judgment, pars 46–8; *Kunarac* Trial Judgment, par 392. An act of 'aiding and abetting' could in principle take the form of an act or an omission (see *Orić* Trial Judgment, par 283; *Krnojelac* Trial Judgment, par 88; *Kunarac* Trial Judgment, par 391; *Vasiljević* Trial Judgment, par 70; *Brdjanin* Trial Judgment, par 271; *Blagojević* Trial Judgment, par 726; *Kayishema* Trial Judgment, pars 206–7; *Kajelijeli* Trial Judgment, par 766; *Kamuhanda* Trial Judgment, par 597).

[222] See, above, 4.1.2 Command responsibility and complicity.

[223] See, e.g., *Kayishema* Trial Judgment, par 201; *Kamuhanda* Trial Judgment, par 600.

the doctrine of superior responsibility. It is sufficient to establish that the superior, with knowledge of his subordinates' crimes, decided not to act upon his duties and thus demonstrated a degree of disregard for his obligations that was akin to acquiescence with or approval of those crimes. Under the doctrine of superior responsibility, his approval or acquiescence with those crimes does not have to be known to the perpetrators.

As will be seen below, there are situations in which the conduct of the accused might fulfil the requirements of two or more forms of liability, including superior responsibility, and where the issue of cumulative convictions in regard to two or more bases of liability will arise.[224]

4.5.4.4.2 Causality and failure to punish

The requirement of causality also applies to charges that a superior is responsible for a 'failure to punish' crimes of subordinates. In such a case, the relationship of causality that must be established is not one between the failure of the superior and the crimes of his subordinates. Indeed, in such a scenario, the failure of the superior will necessarily occur after the actual commission of crimes by his subordinates and subsequent also to the superior having learnt of those crimes.

The causal relationship that must be established in such a case is one between the conduct of the superior, on the one hand, and the impunity of the perpetrators, on the other. According to this author, international law requires proof of the fact that the failure of the superior to act upon knowledge of the commission of crimes by his subordinates was a significant contributing factor in the failure of the competent authorities to investigate the crimes, to identify and to punish the perpetrators. In other words, it must be established that the impunity of the perpetrators resulted, at least in part, from the inaction of the superior who knew, had reason to know or, in the case of the ICC, should have known of those crimes.

As will be discussed next, the causal link which must exist between the conduct of the superior and the crimes of his subordinates will not only be relevant to deciding the guilt or innocence of the accused.[225] It will also be of relevance to determining an adequate sentence where a conviction has been entered pursuant to the doctrine of superior liability.

4.6 Extent of liability and sentencing

The nature of 'command responsibility' as a form of criminal liability is pertinent, not only to establishing the conditions under which a person in a position

[224] See below, 4.7 Overlap of types of liabilities.
[225] See 4.6 Extent of liability and sentencing.