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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

Triffterer, O., "Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?", (2002) 15 *Leiden Journal of International Law*, pp. 179-205

Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?*

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Abstract. The jurisprudence of the ICTY and the ICTR has denied this question, but accepts causality as a basic principle of criminal responsibility. Since the relevant articles in the Statute of the ICTY (Article 7(3)) and the ICTR (Article 6(3)), differ from Article 28 of the Rome Statute, which demands "a result of his or her failure to exercise control properly," a comparative study is desirable. It has to include the question, whether this failure overlaps with the omission "to take all necessary or reasonable measures within his or her power," and whether the last alternative "failed […] to submit," requires at all a causal nexus.

1. Historical Survey, Practical Importance and Applicable Laws

Command responsibility as a legal institution to hold superiors responsible for crimes committed by their subordinates, plays an important though disputed role, on the national as well as the international level, since the middle of the 19th century. Its practical importance appeared in particular after the World War II in several cases. The lack of agreement about its scope and elements at that time and up until now is mirrored in several decisions of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'). Their Chambers have dealt quite often and in detail with questions of cause and effect in the notion of command responsibility; one Trial Chamber has

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* The character of a separate element was denied with respect to Art. 7(3) of the ICTY Statute in Prosecutor *v.* Delalić, Mucić, Delić and Landžo ('Čelebići'), Judgment, Case No. IT-96-21-T, T.Ch. II, 16 November 1998, *see* para. 400.

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This article is a homage to Prof. Dr Stefan Trechsel, former judge at the European Court of Human Rights, on occasion of his 70th birthday and as acknowledgment for his admirable engagement to protect and develop human rights.

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devoted in this context a separate section to the "Construction of criminal statutes."[1] Both issues will be the main concern of this article.[2]

1.1. Starting positions and development

The original concept of international law as the legal order exclusively between sovereign states, did not provide that state organs could be held personally (criminally) responsible by other states for acts of state. However, this doctrine was questioned when the Carnegie Endowment for International Peace investigated the causes and conduct of the Balkan Wars 1912/1913. It came to the conclusion that only one word of those in power would have been needed to stop all belligerent struggles and all atrocities committed during these events. It further was found that superiors at all levels of a chain of command were the decisive factors, for strict obedience to the laws and customs of war as well as for not preventing unlawful acts, such as war crimes, committed by their subordinates.[3]

The relevant findings of this Investigation Commission were backed on the national level, for instance, by the 1863 American Lieber Code, which provided in Article 71 the death penalty for a person "who orders or encourages" soldiers to commit certain war crimes. This responsibility included commanders which, as officers, were generally liable for a higher penalty if participating in the commission of such crimes.[4] Article 1 of the 1907 Hague Convention IV, established a general responsibility of a commander "for his subordinates,"[5] but left the scope open. A precise definition of command responsibility was not needed at that time, because the enforcement of these international regulations was in the competence

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1. *See* Čelebići, *supra* note *, at para. 396 *et seq.*; for the quotation *see* para. 401 and the section on construction of criminal statutes, paras. 402–418. For a survey on relevant jurisprudence *see* note 34, *infra*.
2. For a more comprehensive analysis *see* O. Triffterer, *"Command Responsibility", Grundstrukturen und Anwendungsbereiche von Artikel 28 des Rom Statutes – Eignung, auch zur Bekämpfung des internationalen Terrorismus?*, *in* C. Prittwitz, *et al.* (Eds.), Festschrift für Claus Lüderssen 437 *et seq* (2002).
3. *See* The Carnegie Endowment (Ed.), Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars (1914), reprinted in 1993 with an introduction by G.F. Kennan. He pointed out, with regard to command responsibility in his introduction:

   > If the behaviour in question was not ordered by the regular commanders, they [the 1913 commissioners] pointed out, it was certainly tolerated and winked at, sometimes actually encouraged, by them. Again, the comparison with what is going on today [meaning on the territory of former Yugoslavia since 1991] is obvious

   (brackets added). Similar facts were established and conclusions made by the Commission on the Responsibilities of Authors of War and Enforcement of Penalties with regard to World War I, *infra* note 8.
4. General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, 1863.
5. Hague Convention respecting the Laws and Customs of War on Land, 18 October 1907.

of the domestic legal systems which, therefore, had to take care of the principle of certainty as far as it was acknowledged in their legal order.

As a first reaction to the Report of the Carnegie Endowment Article 227 of the 1919 Versailles Treaty arraigned former German Emperor William II "for a supreme offence against international morality and the sanctity of treaties." This was the first time that an international treaty provided for the highest state organ and military commander to "be put on trial."[6] There was no special regulation in the meaning of superior responsibility as defined in Article 28.[7] But, such a responsibility also was not excluded for cases, in which subordinates "committed acts in violation of the laws and customs of war," as provided in Article 228 of this Peace Treaty. However, due to the refusal of The Netherlands to extradite the ex-Emperor to the Allies, he never had to face trial.[8]

After this failure neither the draft 1937 Convention on Terrorism nor the Nuremberg[9] and Tokyo[10] Statutes or Control Council Law No. 10[11] provided expressly for command responsibility. The last three, however, mentioning "major war criminals" and regulating that "[t]he official position of defendants, whether as heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment,"[12] made it clear that persons on the top of the chain of command would not be excluded from criminal responsibility as principals and accomplices. Accordingly, the jurisprudence after World War II acknowledged the doctrine of criminal responsibility of superiors broadly on the national and the international level in a more pragmatic than theoretical approach; it gave due account to the

6. Treaty of Peace between Germany and the Allied and Associate Powers, signed at Versailles, 28 June 1919. *See*, also with references for notes 4 and 5, M.C. Bassiouni, Crimes Against Humanity in International Law 373 *et seq.* (1992).
7. All further articles without indication are those of the Rome Statute.
8. *See*, for instance, H.-H. Jescheck, Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht 62 (1952). *See also* for *supra* notes 4 and 5, Carnegie Endowment for International Peace (Ed.), Report of the Commission on the Responsibilities of the Authors of War and Enforcement of Penalties (1919), reprinted *in* 14 AJIL 95 (1920).
9. Agreement for the Prosecution of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 279, 59 Stat. 1544 ('Nuremberg Charter').
10. Charter of the International Military Tribunal for the Far East ('IMTFE') at Tokyo, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 January 1946 (amended 26 April 1946), TIAS No. 1589.
11. Control Council Law No. 10, 1945, *in* L. Friedman (Ed.), 1 The Law of War: A Documentary History 908, at 909 (1972).
12. *See* Art. 6, 1946 Charter of the IMTFE, *supra* note 10; Art. 7, 1945 Nuremberg Charter, *supra* note 9; and Art. II(4) *sub* (a) of Control Council Law No. 10 of 20 December 1945.

special duty of superiors to exercise their authority in order to guarantee lawful behaviour and to prevent unlawful acts of their subordinates.[13]

All cases emphasised the possibilities of superiors to order obedience and to enforce measures to prevent illegal behaviour because of the hierarchical structures they had available. This influence and power appeared partly unlimited; it, therefore, led to an indirect responsibility for whatever behaviour of their subordinates; their unlawful acts, including crimes, appeared to depend on how effectively superiors had fulfilled their duty to guarantee proper behaviour.[14]

These cases, however, clearly demonstrate also the difficulties to hold commanders responsible for omissions, in particular when their behaviour was not more than silently expressing more or less toleration. It was a responsibility for crimes of others, which was established in addition to the regular possibilities to participate in the commission of such crimes.[15] The key role superiors played with regard to the behaviour of their subordinates already at that time resulted in punishing them for their inactivity, where there was a duty to intervene and a possibility that necessary and reasonable measures within their power would have prevented crimes.[16]

The nevertheless lacking agreement on the notion and formulation of command responsibility hindered its inclusion into the 1948 Genocide Convention[17] and the 1949 Geneva Conventions,[18] even though in Article 39 Convention III, for instance, the responsibility of commissioned officers

13. *See*, for instance, 1st Report of Special Rapporteur Spiropoulos regarding a draft Code of Offences against the Peace and Security of Mankind and the Nuremberg principles, 2 April 1950, Report of the ILC on the Work of its Second Session, UN Doc. A/1316 (5 June–29 July 1950), para. 86 *et seq.*, reprinted *in* B. Ferencz, An International Criminal Court, Vol. II, 196 *et seq.* (1980); L.C. Green, War Crimes, Crimes against Humanity, and Command Responsibility, 50 Naval War College Review 26 *et seq.* (1997), available also at http://www.nwc.navy.mil/press/Review/1997/spring/art2sp97.htm. *See also* Prosecutor *v.* Musema, Judgment, Case No. ICTR-96-13, 27 January 2000, para. 127 *et seq.*; Prosecutor *v.* Blaškić, Judgment, Case No. IT-95-14, 3 March 2000, para. 319 *et seq.*; Čelebići, *supra* note *, at para. 333 *et seq*.
14. *See*, in particular, the German High Command Trial, US *v.* Von Leeb and Others, 1948 and the case of General Tomoyuki Yamashita, In Re Yamashita, 327 U.S. 1 (1946).
15. For this differentiation *see*, for instance, Blaškić, *supra* note 13, at para. 322; Čelebići, *supra* note *, at para. 333; and Art. 2 of the 1968 Convention on the Non-Applicability of Statutory Limitations, *infra* note 20.
16. In the Čelebići case, *supra* note *, para. 394, the Trial Chamber confirms such an influence, even with regard to the submission of the matter to the competent authorities and also with regard to further crimes.
17. Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1951).
18. 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (1950) ('Geneva Convention I'); 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 75 UNTS 85 (1950) ('Geneva Convention II'); 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135 (1950) ('Geneva Convention III'); and 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950) ('Geneva Convention IV').

for the application of the Convention is expressly mentioned. Even the Draft Codes of Offences against the Peace and Security of Mankind and the Draft Statutes for an International Criminal Court, elaborated at the UN between 1950 and 1954, did not provide relevant provisions. The Special Rapporteur of the International Law Commission ('ILC') had proposed with reference to an extensive study of the national laws and jurisprudence, to include, in principle, command responsibility. But the still disputed notion hindered a positive decision on this question.[19] Clauses establishing criminal responsibility independent of any official positions appeared to be sufficient.

On the other hand, the belligerent events after World War II demonstrated clearly that hierarchical structures of command played an increasing role in modern warfare. Commanders were no longer permanently present at the battle fields and the possibility to communicate by electronic technical means was more and more perfected. This raised their possibilities to influence their forces but at the same time made it more difficult to locate the exact chain of command, especially since paper trails, as the Nazis left behind them, were less frequently used.

Lacking an international agreement for the prosecution of command responsibility as such, directly under international law, it was attempted to influence prosecution on the national level, for instance, by the 1968 Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes Against Humanity: After describing the relevant crimes in Article 1, Article 2 of this Convention enumerates the forms of criminal responsibility in respect to which there should be no statutory limitations:

> […] to representatives of the State authority and private individuals who, as principals or accomplices, participate […], irrespective of the degree of completion [, but also] to representatives of the State authority who tolerate their commission.[20]

Command responsibility as expressed at the end of this quotation was applicable to all "representatives of the State authority," because, at that time, a broad consensus existed only with regard to superiors within such a power structure; only they had through hierarchical structures of command, ways and possibilities at their disposal to strongly influence or even force subordinates in one or the other direction.

The word "tolerate" left sufficient room for a broad interpretation, including mere omissions and perhaps even negligence. This vagueness was in the context of this Convention without serious danger to the rule

19. *See* 1st Report of Special Rapporteur Spiropoulos, *supra* note 13, at para. 100; and for the 1954 Draft Code, Report of the ILC on the Work of its Sixth Session, UN Doc. A/2693 (3 June–28 July 1954), also available at http://www.un.org/law/ilc/texts/offences.htm. *See also* Report of the ILC on the Work of its Fortieth Session, UN Doc. A/43/10 (9 May–29 July 1988), para. 66 *et seq*., *infra* note 25.
20. Adopted by General Assembly Res. 2391 (XXIII), UN Doc. A/RES/2391 (26 November 1968), entered into force 11 November 1970.

of law; because it was left to the national level to establish detailed regulations and, in which ever way, to fulfil the demands of *nullum crimen sine lege*. But since to tolerate can be interpreted as meaning almost everything not resulting in one of the typical, generally accepted ways of criminal responsibility as principals or accomplices, the need for an internationally accepted more precise definition of command responsibility increased.

Nevertheless, the Draft Code and the Draft Statute were not on the schedule of the UN for almost thirty years anymore after 1956. However, the cases of Lieutenant Calley[21] and Captain Medina[22] in the USA had demonstrated the need to smoothen the differences between the national legal systems dealing with command responsibility in order to guarantee an equality before the law. The Red Cross, therefore, took the initiative to achieve an agreement in 1977 when adopting Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts. Its Article 86(1) acknowledges the individual criminal responsibility for omissions, in cases where there is a *legal* duty to act. Paragraph 2 of the same Article contains the following first extensive definition of command responsibility:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[23]

This regulation is amended by Article 87 of the same Protocol, which refers to the duties of superiors to inform and supervise their subordinates because of the possibilities available to them in the typical hierarchical structures of an army, to influence even by binding orders every subordinate.

Article 86(2) of this Protocol clearly excludes any strict liability but, in addition to demanding awareness of the criminal situation or the possibility to conclude its existence, it establishes a causal connection between the omission of the superior and the crime committed by his or her subordinate. Because, it implies that if a superior had used his power, he would have or at least could have prevented the attempted or completed crime. "Repress" may have a double meaning: to suppress the further commission, if necessary by force, or to submit the case to competent authorities and thus repress the completed crime, which could not be prevented

21. United States *v.* Calley, 46 CMR 1131 (1971), *affirmed* 48 CMR 19, 24 (1973).
22. *See* K.A. Howard, *Command Responsibility for War Crimes*, 21 J. Pub. L. 7 (1972).
23. *See*, for the interpretation of this article, J. de Preux, *Article 86 – Failure to Act*, *in* Y. Sandoz, C. Swinarski & B. Zimmermann (Eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, para. 3524 *et seq.* (1987).

anymore at that time, but should be prosecuted and punished in order to prevent future crimes.[24]

At the end of the so-called 'Cold War,' the question of an International Criminal Code and a permanent International Criminal Court was again dealt with at the UN. Against the background described above it appeared almost self-evident that the 1988 Report of the ILC included an Article 10, describing responsibility of superiors almost in the same way as Article 86(2) of Additional Protocol I;[25] it only exchanged "breach of the Conventions or of this Protocol" by "crimes against the peace and security of mankind" and, consequently, limited itself to the criminal responsibility of superiors. A corresponding Article 12 was included into the 1991 Draft Code and from there transferred with minor changes as Article 6 into the 1996 Draft Code.[26]

In the meantime the events on the Balkan and in Rwanda demanded the establishment of *ad hoc* International Criminal Tribunals in 1993 and 1994 respectively. Their Statutes[27] contain almost verbally corresponding regulations on command responsibility reading as follows:

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

The differences between Article 86(2) Additional Protocol I and the above quoted formulation in the Statute of the ICTY, relevant in the context of our considerations, are the substitution of "to repress" by "to punish" and the elimination of the words "in his power." The first change clarifies that a causal connection between the omission of the superior and the commission of the crime by the subordinate needs to be established only for the first alternative, "to prevent"; nobody can be held responsible for omitting to prevent, what anyhow has already been completed, unless the completion is not final because a repetition of the completed crime or the

24. *See*, for instance, Blaškić, *supra* note 13, at para. 337 *et seq.*; and Čelebići, *supra* note *, at para. 400.
25. Report of the ILC on the Work of its Fortieth Session, *supra* note 19.
26. For the 1991 Draft Code *see* Report of the ILC on its Forty-third Session, UN Doc. A/46/10 (29 April–19 July 1991); *see also* L.C. Green, *Article 12: Responsibility of Superiors*, *in* M.C. Bassiouni (Ed.), Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind 195 *et seq.* (1993); and for the 1996 Draft Code and its Commentary *see* Report of the ILC on its Forty-eighth Session, UN Doc. A/51/10 (6 May–26 July 1996).
27. Statute for the International Tribunal for the Former Yugoslavia, *in* the Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, UN Doc. S/25704 (3 May 1993), reproduced *in* 32 ILM 1159 (1993), Art. 9(2) and Statute for the International Tribunal for Rwanda, Annex to Security Council Res. 955, UN Doc. S/RES/955 (8 November 1994), Annex, Art. 8(2).

continuance of the harm is threatening.[28] The elimination of the words "in his power" does not contain any changes in substance; because no legal order can impose obligations on any person "*ultra vires*" anyhow.

It was this development and the practical importance of command responsibility, appearing in the first cases before the ICTY and the ICTR, which had to enforce the law as it was, when those crimes were committed, which inspired the drafters of the Rome Statute to adopt with Article 28 the most detailed and precise formulation of this legal institution in international law.[29]

1.2. Article 28, extending "criminal responsibility for crimes within the jurisdiction of the Court"

Though more voluminous than all other comparable regulations, Article 28 does not broaden the scope of what is generally accepted as command responsibility in international law. The description of various alternatives and conditions rather aims merely to fulfil the needs of *nullum crimen sine lege* and to avoid future disputes on the notion of command responsibility before the International Criminal Court ('ICC'). Against the above summarized background, Article 28 does not open a new dimension of command responsibility, but merely clarifies that criminal responsibility for crimes within the jurisdiction of the Court does exist equally for military commanders and all other superiors acting in relationship with subordinates.

The common *chapeau* for all alternatives contained in Article 28, explicitly mentions that superior responsibility for acts of their subordinates should be "[i]n addition to other grounds of criminal responsibility under this Statute." It, therefore, does not substitute, but supplements all forms of participation as listed in Article 25(3) *sub* a–f. Article 28 thus extends the scope of individual criminal responsibility for perpetrators in the position of superiors. This mirrors the idea already accepted since World War II, to establish besides the responsibility as principals or accomplices an international responsibility in order to put an end to impunity for those who do not fulfil their legal obligation to prevent unlawful acts and thus, at least by silent toleration, abuse their power over subordinates, which they have because of their higher position in a very strict hierarchical system. Correspondingly Article 7(1) and (3) of the ICTY Statute are constructed.

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28. For more detailed considerations *see*, for instance, Triffterer, *supra* note 2, at 454; and O. Triffterer, Österreichisches Strafrecht, Allgemeiner Teil, 2nd Ed., Chapter 8, marginal note 74 (1994).
29. *See* for this development and the debates in Rome, W.J. Fenrick, *Article 28*, *in* O. Triffterer (Ed.), Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 515 *et seq.* (1999); and P. Saland, *International Criminal Law Principles*, *in* R.S. Lee (Ed.), The International Criminal Court, The Making of the Rome Statute 202 *et seq.* (1999).

The wording of Article 28, not the notion of command responsibility, was disputed until the end of the Rome Conference. The achieved compromise, therefore, describes expressly those limitations, deemed indispensable to protect suspects against an uncertain and ambiguous regulation.[30]

Nevertheless, some questions concerning the scope of Article 28 compared to ordinary participation are left open: Since omissions are not regulated in the Rome Statute and negligent behaviour is, according to Article 30, not punishable "unless otherwise provided," all forms of responsibility listed in Article 25 can only be committed by intentional acts. But, does Article 28 extend this general responsibility, applicable to everybody, including superiors, in a way that it encompasses negligence and omissions of superiors in cases where they support directly specific crimes of their subordinates in the way provided for in Article 25? Or does Article 28 extend the responsibility of superiors only with regard to those cases, where they indirectly support their subordinates under the conditions expressly mentioned in its wording? For a confirmation of the latter aspect can be argued, that the wording is the limit of any and even more of an interpretation extending criminal responsibility. But for an interpretation, which, in addition, broadens the applicability of Article 25 to omissions and negligence, can be pointed out that, when negligent omissions of superiors lead to criminal responsibility even in cases where they do not *directly* participate in the commission of the crime, they should even more be held responsible when their negligent omissions do amount to directly aiding or abetting the subordinate in the commission of the crime. However, this question cannot be dealt with here further, due to lack of space.

In cases where participation according to Article 25 concurs with the fulfilment of the prerequisites for the application of Article 28, the situation is the same as with respect to Article 7(1) and (3) of the ICTY Statute. The ICTY has concluded that, in principle, there can be a concurrent application of both paragraphs, except when active participation in the crime of the subordinate is concurring with the failure to prevent this crime. It would not only be illogical to oblige a principal or accomplice just to do the opposite, namely to prevent what he or she is doing or supporting,[31] but it would amount to a double jeopardy to punish the superior for both crimes. The situation is different in cases where the superior does not only not prevent, but takes part in the continuance of the crime, like in cases of torture or deprivation of liberty. He then by his failure to prevent does not only "create" the danger that a (new) crime will be committed by his subordinate, which he also does not prevent, but he further himself is directly committing harm by taking part in this commission, though by omitting its prevention; because Article 28 presupposes that he knew or

30. For the history of this development *see*, for instance, Bassiouni, *supra* note 6; and Green, *supra* note 13.
31. For details *see* Blaškić, *supra* note 13, at para. 337 *et seq.*

should have known not only that certain criminal acts were committed, but also, what would be the consequence of his omission.[32]

In cases where both provisions, Articles 25 and 28, are applicable, the active participation should always prevail. However, in all these cases and independent of the fact, whether one crime displaces the other or not, acting or omitting in the capacity as superior is an aggravating circumstance, even though Article 28 may not be applicable. In cases where an ordering or participating superior does not submit the case, however, the situation is a little more complicated. No one is obliged to submit himself to the competent authorities; and if the superior has participated or cooperated, by submitting his subordinate to the competent authorities, he necessarily reveals the basis for proving his participation or at least takes the serious risk that his participation will be revealed in the course of the investigation and thus, he himself may be prosecuted too.[33]

1.3. Different notions of superior responsibility depending on the applicable law?

Criminal responsibility of superiors for crimes committed by their subordinates is, as such, equally acknowledged in national and international regulations. This has been repeatedly confirmed by the jurisdiction of the ICTY and the ICTR, referring to these laws and to previous decisions on the national and the international level, as well as to the relevant literature.[34] The scope may, however, vary according to the formulation this legal institution has been given by the national or the international legislator. Since the Security Council is not a legislative body for international criminal law, it cannot create law. The *ad hoc* Tribunals, therefore, have to find the law applicable at the time and do so by referring to previous jurisprudence, national and international regulations as well as drafts and broadly adopted provisions, like Article 28, expected to come into force

32. The question, how far the knowledge or the negligent lack of information have to encompass his own power to prevent and thereby, the consequences of his omission, has to be answered in the affirmative according to the general principle of criminal law; *see*, for instance, Triffterer, *supra* note 28, Chapter 14, marginal note 23 *et seq.*; and Čelebići, *supra* note *, para. 334.
33. *See* below Section 3.
34. Prosecutor *v.* Krstić, Judgment, Case No. IT-98-33, 2 August 2001, para. 478 *et seq.*; Prosecutor *v.* Bagilishema, Judgment, Case No. ICTR-95-1A-T, 7 June 2001, para. 37 *et seq.*; Prosecutor *v.* Kordić and Čerkez, Judgment, Case No. IT-95-14/2, 26 February 2001, para. 401 *et seq.*; Prosecutor *v.* Delalić, Mucić, Delić and Landžo ('Čelebići'), Judgment, Case No. IT-96-21-T, 20 February 2001, para. 182 *et seq.*; Prosecutor *v.* Aleksovski, Judgment, Case No. IT-95-14/1, 24 March 2000, para. 66 *et seq.*; Blaškić, *supra* note 13, para. 289 *et seq.*; Musema, *supra* note 13, para. 127 *et seq.*; Prosecutor *v.* Aleksovski, Judgment, Case No. IT-95-14/1, 25 June 1999, para. 66 et seq.; Prosecutor v. Kayishema and Ruzindana, Judgment, Cases Nos. ICTR-95-1, ICTR-96-10, 21 May 1999, para. 208 *et seq.*; Čelebići, *supra* note *, at para. 330 *et seq.*; Prosecutor *v.* Akayesu, Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 486 *et seq.*

soon.[35] Nevertheless, the wording expressed in Article 7(3) ICTY Statute is binding with regard to the scope chosen specifically for command responsibility being prosecuted by this Tribunal.

According to this wording, Article 7(3) ICTY Statute is different from Article 28. Both acknowledge command responsibility as an additional responsibility of superiors for crimes committed by others, namely by their subordinates. But the conditions under which the superiors shall be punishable, are not phrased in the same way. Article 7(3) ICTY Statute has as starting point that "the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrator thereof," while Article 28 starts with the element that, "as a result of his or her failure to exercise control properly," subordinates committed or were "about to commit" such crimes. Does it really make a difference, whether Article 7(3) ICTY Statute or Article 28 has to be applied? Is the latter more favourable for an accused or does the first assume, though by an unwritten but required element in favour of an accused superior, that he did not control properly and that this failure resulted in the crime, which he then has to prevent or to submit to the competent authorities in order to be free from criminal responsibility?

It seems to me that not only in this regard the different national and international regulations have to be applied strictly. They establish different elements and conditions, not touching the basic scope of the existence of a command responsibility, but the proof in specific cases to put a superior on trial for criminal acts committed by others. Thus, only the procedural threshold may be different, not the basic structure with its constituent elements.

Relevant in this respect is the *chapeau*, common for *sub* a and *sub* b. It merely clarifies, as already mentioned above under Section 1.2, that Article 28 describes the necessary elements for superior responsibility only with respect to "crimes within the jurisdiction of the Court." It is, therefore, not excluded, that deviant concepts, conditions and elements are regulated in other laws to be applied, for instance, when domestic courts are dealing not with the most serious, but "only" with serious "crimes of concern to the community as a whole." But for the crimes within the jurisdiction of the Court, Article 28 summarizes the actual law and, thus, describes exclusively the elements of superior responsibility to be proven when a person is prosecuted and liable for punishment before the ICC.

National laws may have different versions or even split Article 28 for its implementation into the national legal systems into different crimes. The German draft, for instance, provides three different regulations; the first, Section 5, shall punish superiors *as principals* in cases where they omitted to hinder *specific* criminal acts committed by their subordinates and falling within the jurisdiction of the Court. The second, Section 14,

35. *See* Secretary-General's Report on Aspects of Establishing an International Tribunal, *supra* note 27, at paras. 29 *et seq.*

proposes to punish superiors, who intentionally or negligently do not control their subordinates properly in cases, where they could have prevented the crime; however, according to this provision the superior is not punishable *as principal* of the committed crime, but for *violating his duty to supervise*. The third provision, Section 15, intends to punish superiors, who do not submit the case of a completed crime immediately to the competent organs. In Section 5 the punishment proposed is the same as for the crime the subordinate has committed; Section 14 differentiates between up to five years for intentionally neglecting the duty to control and up to three years for a negligent dereliction of duty; Section 15 also provides a penalty up to three years.[36]

Such a "splitting solution" makes it possible to describe more clearly the different elements necessary to be proven for the different alternatives holding a superior responsible. But it has, compared with an all comprehensive regulation, the disadvantage that it seems to be less suitable to create the necessary awareness with respect to the gravity of an offence of command responsibility and, thus, diminishes the opportunity to contribute already by its existence to the prevention of criminal omissions of superiors. Article 28, therefore, has chosen the different way by including all possibilities for command responsibility in one comprehensive provision.[37]

Since my considerations here are dealing exclusively with Article 28, we merely have to keep in mind, that the elements to be proven for or to be accepted as defence against command responsibility may differ. The more elements are required by law, the more difficult it is to interpret the regulation in the sense of an extensive responsibility. Such a narrow notion, as provided for in Article 28, therefore, needs to be precisely analysed in order not to oversee an element established to protect the suspect by the principle *nullum crimen sine lege*. I limit myself to find out at least one of such elements: Causality between the behaviour of the superior and the crimes of the subordinate to be prevented.

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36. Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, 22 June 2001, available at http://www.bmj.bund.de/images/10185.pdf. The draft has passed the cabinet in the middle of January 2002, *see*, for instance, G. Werle, *Konturen eines deutschen Völkerstrafrechts*, 56 JZ 884-895 (2001); G. Werle, *Völkerstrafrecht und geltendes deutsches Strafrecht*, 55 JZ 755-760 (2000).
37. In regard to effects of criminal law and its application *see* O. Triffterer, *The Preventive and Repressive Function of the Permanent International Criminal Court*, *in* G. Nesi & M. Politi (Eds.), The Rome Statute of the International Criminal Court: A Challenge to Impunity 137 *et seq.* (2001).

2. "Responsibility of Commanders and Other Superiors", Violating Their Duty "to Exercise Control Properly" and Failing to Use Their Second Chance to Prevent Crimes

Already the heading indicates the major questions, this contribution is concentrating on: Are superiors, in principle, criminally responsible already for their failure to exercise control properly, where it results in a crime committed by their subordinates? Does such dereliction of duty, however, lead to a liability for punishment only when, in addition, after knowing or negligently not knowing about these criminal events, superiors do not intervene in concrete plans or actions of their subordinates, in order to prevent crimes?

How are the two answers connected with each other, do they completely or partly overlap? Do such omissions have to be causal for the commission of the crime and, if so, what concept of causality shapes this nexus?

It is not easy to separate these two basic aspects and to differentiate between a nexus according to the laws of causality established by natural sciences, and, because the reaction depends on a decision of a human being, a nexus dominated and proven only by *ex post* observations, considerations and experience. But for guaranteeing the rule of law, answers are absolutely essential to see how far strict liability has been excluded by demanding that even command responsibility presupposes an objective personal accountability and a subjective guilt, intent or negligence, to be proven beyond reasonable doubt.

2.1. Survey on the structure of superior responsibility and on its different alternatives to avoid liability for punishment

In order to answer these questions, no complete picture of all elements of Article 28 is needed. It rather is sufficient to analyse its main structures and those elements, relevant for answering the question, whether "a requirement of causality as a separate element of the doctrine of superior responsibility"[38] shapes all appearances of command responsibility, or only the notion underlying Article 28.

Aspects, such as the differentiation between commanders effectively acting and other superiors, between "forces" and "subordinates" as well as "should have known" and "consciously disregarded," are in this context irrelevant. They, therefore, will be neglected in the same way as the interpretation of "all necessary and reasonable measures." Partly, these aspects have been dealt with already in another publication of the author.[39]

38. *See* Čelebići, *supra* note *, at para. 400.
39. *See* Triffterer, *supra* note 2, at 144 *et seq*.

(a) For all superiors alike, Article 28 requires as the starting position that they have failed "to exercise control properly" over "forces" under their "effective command and control, or effective authority and control," or, with regard to *sub* b, "over such subordinates" to which they have a "superior or subordinate relationship not described in paragraph (a)." Such a dereliction of duty, however, is relevant exclusively, only if it results in an attempted or completed crime committed by "such forces" or subordinates. The rather broad terms, "forces" or "subordinates," demonstrate that the duty to inform and control is very comprehensive and encompasses all persons which are within the hierarchical structure subordinated to the superior and, therefore, under his or her "effective command and control."

According to this wording, the superior is practically blamed for not taking sufficiently good care of all his subordinates by informing, educating, advising and/or controlling them, to the benefit of the correct application of law and justice. This reproach includes that he has not used all his power and means, for instance, orders, to influence the subordinates to act lawfully and to abstain completely from unlawful acts, especially from crimes. That he acted thus derelict in duty has to be established beyond reasonable doubt. If assumed, that such an influence is at all possible, the failure to control can be proven by the mere fact that not all "forces" or "subordinates" were reached by the endeavours, even though it has been possible to address and influence them too. These are the aspects of the first common element, which need to be interpreted to answer the questions concerning causality: The omission to sufficiently control all subordinates and influence them, resulting in an attempted or completed crime committed by a subordinate.

This rather broad and even partly vague first starting position for command responsibility, could, if viewed separately, easily raise the impression, Article 28 would establish strict liability for superiors. Therefore, Article 28 contains for both groups of superiors, separately for *sub* a under (i) and (ii) and, for *sub* b, under (i) and (iii), conditions, which limit this liability for punishment.

(b) These further conditions are nearly the same, though separately listed, for all superiors. For both alternatives it is demanded as the second element to be dealt with here, that the superior either knew or, because of negligence, did not know that forces or the subordinates were about to commit or had already started or even completed to commit such crimes.[40] This

40. The differentiation between "should have known" and "consciously disregarded information which clearly indicated," marks a different threshold for military and other superiors: The first should be held responsible for negligence in any way, the second group, however, only for conscious negligence. *See* for this differentiation Triffterer, *supra* note 2, at 444; and C. Garraway, Command Responsibility, Transcript of a presentation held at the Conference Preparing for the International Criminal Court in the Hague, December 2001. With respect to the standard applied to "other superiors" *see* G.R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 Yale J. Int'l L. 89 *et seq.* (2000).

element concerns specific situations, not, as the first common element in the *chapeau* for both alternatives, a latent existing possibility that forces or subordinates may commit crimes. On the second stage of development, the danger has become concrete and the superior knew or should have known that it meanwhile turned from a rather abstract to a concrete threat for protected legal values.

(c) The next requirement, the third element dealt with here, is also almost verbally identical for both alternatives: The superior must have "failed to take all necessary and reasonable measures […]." This is more than "failure to exercise control properly": It is a dereliction of duty concerning those specific crimes, which is the necessary element to trigger the responsibility of superiors under Article 28.

The clear separation of the first and the third element, dealt with in this survey, and their connection with the word "where," means, both have to be established, whatever their notions may be with regard to causality.[41]

(d) The fact that with regard to "other superiors," an additional element is mentioned for *sub* b under (ii), is for the present considerations of minor relevance; but helpful for the investigation in respect to a causal nexus can be, that this additional element indicates the following: In military structures a chain of command does, normally, function "properly." So every superior can rely on it and, therefore, can be held responsible, if the information, education and supervision of the "forces" were not sufficient to prevent crimes. Such a strict hierarchy may not exist or may not equally be reliable in other "superior and subordinate relationships," unless they amount to paramilitary organizations, perhaps to be found in terrorist organizations. Otherwise, to compensate for this lack of power to command, *sub* b under (ii) provides that not (only) the perpetrator, but the activities he commits in form of crimes are "within the effective responsibility and control of the superior."

The different emphasis of subordinates and activities characterizes one basic element for causality: Forces are "under orders" which they have to obey, and refusing to execute the order may even result in punishment for disobedience. Such a strict hierarchy is quite unusual outside the military. Not so much the person, but what he or she is doing is under the supervision of the superior. What information or other measure may be effective to prevent crimes, may be for non-military superiors, therefore, more difficult to calculate.

41. *See infra* Sections 2.3 and 2.4.

2.2. Doctrinal differentiation between consequences resulting from acts and those resulting from omissions?

In the *Čelebići* case

> 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 formulation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject;

it refers in footnote 428 to "the one authority cited to M. Cherif Bassiouni, The Law of the International Criminal Tribunal for the Former Yugoslavia (1996) p. 350 and *idem*, Crimes Against Humanity in International Criminal Law (1992), p. 372."[42]

Bassiouni, when dealing with this question, may not have the same notion of causality in mind as the Trial Chamber. But there are good arguments to back his opinion. Since the notion of causality is not defined in one of the Statutes dealt with here, but, as the Trial Chamber emphasises, a well acknowledged principle of criminal law, it should be analysed in order to find out, where it appears at all and whether there is a common notion of causality as an indispensable element of command responsibility. Perhaps such an element has different concepts and serves in some provisions only to achieve more certainty and thus to avoid ambiguity.

Appearances of a connection between criminal behaviour and its consequences may not all have the same structure. In particular, when persons shall be held responsible for omitting to prevent a specific result, it has to be differentiated: Was the result already on the way because human behaviour or natural events set a condition, which according to the laws of causality leads anyhow to the consequence (*see* below Section 2.2.1), or does such a consequence depend on a free decision of a person, who may be influenced or not by active or passive behaviour of another person (*see* below Section 2.2.2). A legal duty to interfere may exist in both cases; and the failure to intervene may in both cause the consequence.

2.2.1. Omitting to interfere in the ordinary course of events

The first difference is based on the fact that active human behaviour may cause consequences that "will occur in the ordinary course of events" (Article 30(2) *sub* b) and those, which appear merely accidentally connected with such behaviour, though caused by it. If such an act is a condition for the consequence in the sense of the laws of causality, meaning that it has never been observed that when A occurs, the consequence will not be B, all of such conditions are in principle equal. But as the formulation "in the ordinary course of events" already indicates, there

42. *See* Čelebići, *supra* note *, at para. 398.

may be situations, in which a consequence, though caused by a certain act, is not legally attributable to the act which it may have caused and, therefore, the actor is not liable for punishment. *Ex post*, therefore, always has to be proven, that by the laws of causality the omission is the condition for or the cause of the consequence, and that this consequence appeared as a "normal" result of the omission: "*Kausalität und objektive Zurechnung*."[43]

When a condition "in the ordinary course of events" is on the way to lead to the consequence, meaning that it has been started by human action or by a natural phenomenon, the law may put certain persons under a special duty to interfere and, thus, to prevent the threatening violation of legally protected values. It may be argued that in those cases, when a person remains inactive and, thus, does not hinder the achievement of a consequence, there is no causality, because something cannot result from nothing. However, it may equally be argued, that the laws of causality apply also to omissions leading to consequences because of the non-interference of the person obliged to do something. Causality then can be proven in a similar way as in connections between acts and consequences. It can be established, when it never has been observed that, if the necessary and reasonable action was taken, the consequences occurred.[44]

Independently of whether causality in both cases is equally accepted or in the latter case the nexus between non-interference and its result is nominated differently, there is a connection in the sense that the consequences would not have appeared if the person obliged to intervene had taken the necessary and reasonable measures to prevent this consequence. Because, what is necessary and reasonable for the prevention depends on what can hinder the otherwise to be expected consequence and therefore, if taken, will necessarily be effective.

2.2.2. Omitting to influence, initiate, inspire, support or to prevent, human behaviour

The causality dealt with under Section 2.2.1, shaping the connection between failure to intervene in order to stop, what "will otherwise occur in the ordinary course of events," depends exclusively on the omission of the perpetrator: He could have pulled the drowning person out of the lake, extinguished the fire or brought the wounded person to the hospital, to save his or her life. Of course, in the last case, the effectiveness of this intervention depends on the availability and the capability of the medical personal. But the necessary and reasonable measure for a person under duty to react in such cases is, to bring the victim to the hospital.

However, there are situations, in which a legal duty demands to initiate

43. Triffterer, *supra* note 28, Chapter 8, marginal note 52 *et seq.*, in general and Chapter 14, marginal note 82 *et seq.* with special regard to omissions.
44. For details *see* Triffterer, *id.*, Chapter 14, marginal note 86 with further references.

or inspire human behaviour, actions or omissions, such as to obey the law and abstain from crimes. The effectiveness of such endeavours and their result are less predictable, as, for instance, those of shooting; because it depends on an autonomous decision of an independent human being, whether I achieve or do not achieve a certain "result." To order, solicit or induce a crime may in one case need only one word, in others a quite convincing speech and in a third even a promise of advantages or the announcement of disadvantages in case of refusal. The difficulty is to predict, which action will be successful to bring another person to react in a certain way: "Professional killers" are available at different prices!

These difficulties also exist when trying to bring another person to omit something, for instance, not to commit crimes. There is no law of causality which can help to establish in such cases a causal nexus in the sense of natural science. A causal relationship can only be proven *ex post*, either when the person addressed openly admits that he was motivated by the inspiring words or, when not addressed, that he would have abstained when asked.

All these aspects and differentiations have to be kept in mind, when we are analysing, whether and, if applicable, what nexus is required in cases of command responsibility as acknowledged in Article 28, and whether the elements established there are applicable also to all cases of command responsibility, even if regulated by different laws.

2.3. "Failure to exercise control properly" resulting in "crimes within the jurisdiction of the Court" – a causal connection?

This element, common for all alternatives, describes expressly a certain nexus between a failure to control properly and its result, that crimes by subordinates were committed. It does not define what measures are needed for a proper control nor how tight or loose the connection between the failure and its result has to be. These questions, however, are decisive for the structure of command responsibility characterized by this element.[45]

2.3.1. Notion of the connection between an omission of the superior and the criminal behaviour of his subordinates

The corresponding *chapeaux* under *sub* a and b presuppose that all superiors in their respective field of influence are able to exercise control properly over their subordinates and that such a control is suitable to influence relevant further actions and omissions of their subordinates. However, since the subject matter of our considerations is human behaviour, no

45. For individual responsibility in the sense of a causal nexus without a normative evaluation *see* K. Ambos, Der "Allgemeine Teil des Völkerstrafrechts", Ansätze einer Dogmatisierung 87 *et seq.*, for command responsibility 97 *et seq.* and 147 *et seq.*, and, in particular, 666 *et seq.* (2002).

precise law of natural science exists to predict, in what cases and by which means human beings can definitely be influenced in one way or the other. What is needed, when it comes to influence human behaviour, is a rather flexible system of measures to be adapted to the needs and desires of individual persons and/or the units of forces or the groups of subordinates, to be addressed and either motivated to act in a certain way or to abstain from certain actions like the commission of crimes.

This first element in Article 28 presupposes further that adequate measures are at the disposal and will be successful: generations of subordinates, especially in the military, have followed the words of those in power and obeyed to orders. This experience is confirmed indirectly by Article 33. Because, if this would not be taken for granted, the provision there that acting "pursuant to an order […] shall not relieve […] of criminal responsibility unless […]," would not be needed.

If this is conceded, it also is convincing that omitting to put into action such measures as appear necessary, may result in unlawful behaviour or even crimes. These assumptions are based on experience over the years, generations and even centuries, as shaping besides the military hierarchy even other "superior and subordinate relationships." This experience makes it easier to prove such a connection. It does not need a confession of a subordinate that he would have abstained from unlawful acts or even crimes, if his or her superiors had fulfilled their duty to inform, influence and control properly. Circumstantial evidence would be sufficient for proving what has been omitted, and which degree of obedience to the law could have been expected without such a failure, for instance, by comparing this group with properly controlled forces or subordinates. From such evidence it is only a permissible inference to conclude that the result in the case on trial could have been prevented through proper control.

2.3.2. "[A] requirement of causality as a separate element of the doctrine of superior responsibility"?[46]

The connection analyzed above between "failure to exercise control properly" and a commission of relevant crimes "as a result" of this failure, clearly characterises the command responsibility described in Article 28. It is, insofar, a constituent element; but it does not exist as a nexus in the sense of strict causality according to the laws of natural sciences. However, it is a connection which can be characterised as being parallel or comparable to the laws of natural science: Since it has to be proven that, according to the confession of the subordinate or to all our experiences in comparable cases, because there has been no proper control, "as a result" of this failure, crimes were committed. This unwritten element appears to be indisputable in respect to Article 28.

46. Čelebići, *supra* note *, at para. 400.

But is this element "a requirement as a separate element of superior responsibility"?[47] Does Article 28 merely express what is the underlying structure of all legal institutions called "command responsibility"? The answer is a clear no; because, as the German Draft, mentioned above, clearly expresses in Section 15, the mere failure to submit the case to the competent authorities is seen there likewise as a case of command responsibility. But the answer should be an equally clear yes, if command responsibility is structured according to the rule of law. Because a superior who properly tried by all means, including regular control, to prevent unlawful behaviour and crimes of his subordinates, should not be punishable, if one of his subordinates, completely unexpectedly and, therefore, unpredictable, turns mad and commits a crime. He should also not be liable for punishment, if by an intentional intervention of a third and counterproductive person, more effective than him, forces are misled. With regard to Article 28, the common first element is then not fulfilled. But the question arises, whether he is out of any obligation, when he in general has not failed to properly inform and control; or does an additional new obligation arise, when he knows or should have known that even though he properly controlled his forces, crimes were about to be committed or attempted by his subordinates?

This question may appear theoretical, because the mere existence of such crimes could be evidence of not controlling properly his subcommanders or subordinates directly. But this approach does not solve the problem in the above-mentioned cases. There ought to be a defence that a superior, properly controlling all his forces, should not be liable for punishment, because then such crimes do not "occur in the ordinary course of events" of his or her failure to control. But this result may be or put under the condition that at a later stage of development he does not fail to react properly.

This question, however, can be answered only after looking at the second element of command responsibility as defined in Article 28 and listed in the survey above under Section 2.1.2.

2.4. Lifting the threshold of responsibility by granting derelict in duty superiors a second chance to prevent crimes, about to be committed, attempted or completed by their "forces" or "subordinates"

The notion and the structure of the first element, common to all cases of command responsibility mentioned in Article 28, appears rather convincing and even relatively simple if viewed separately. This is valid even if seen in its complexity as "failure to control," resulting in an attempted or completed crime, falling within the jurisdiction of the Court. These conditions have to be fulfilled in order to trigger such responsibility. But

47. *Id.*, at para. 396 *et seq.*

whatever structure this formulation may hide, all presuppose some connection between the failure and its result, in order to avoid strict liability, as has been explained on another occasion.[48]

However, this element appears more complicated in its notion and structure when viewed together with the additional conditions equally linked to the corresponding *chapeaux* for *sub* a and b by the words "where." Because this indicates that command responsibility is punishable only when the following conditions are fulfilled: knowledge or negligence about the situation in which crimes are about to be committed or committed, and failure "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."

These two conditions clearly express that even if a superior has failed to control properly and his dereliction of duty resulted in the commission of a crime, he cannot be punished unless they are established. They do not concern the potential danger inherent in the failure to control, but presuppose a continuation of inactivity, even though now the situation increased in the sense of endangering *in concreto* legally protected values.

What then is the relationship between the failure to exercise control properly and these two elements? Are they overlapping and, if, in which way? Would such an overlapping change the notion of the first common element expressed in the corresponding *chapeaux*? Is the connection between the omission of the superior to control and its result, the same as the connection between not taking adequate measures and its consequence that the crimes were not prevented, repressed or submitted to the competent authorities?

2.4.1. Exclusion of strict liability and the element of personal guilt

The common element, contained in the corresponding *chapeaux* for *sub* a and *sub* b, establishes strict liability when, as the result of this omission, a crime has been attempted or completed; that it was about to be committed, is not sufficient for the fulfilment of this element.

Since personal guilt is one of the basic principles in criminal law, and since international criminal law is criminal law by its subject matter, it has to be applied for command responsibility as well; the vicarious responsibility of superiors is nevertheless criminal responsibility; it, therefore, has to fulfil the basic demands of criminal law, if it wants to be acknowledged as law, leading to justice and not as absolute arbitrariness.

This subjective element, contained for both, *sub* a and b under (i), does not only refer to an event "that the forces were committing […] such crimes." Mentioned in the same sentence are also situations in which a crime has not yet been attempted, but "the forces were about to commit such crimes." The inclusion of this earlier stage as triggering the duty to

48. Triffterer, *supra* note 2, at 445 *et seq.*

react is due to the fact that a superior with the duty to prevent crimes should not wait until the crime "commences its execution by means of a substantial step," as it is required for an attempt in the sense of Article 25(3) *sub* f. In order to be successful and to avoid the condition which triggers his punishability, namely an attempt, the superior has to start getting active as soon as possible. It could be argued that, because his failure to control was the cause and resulted in a situation, where the forces were "about to commit such crimes," he had to catch up with fulfilling his duties properly and avoid, even though late, what is only a preparatory step for a specific crime and, as such, not punishable for the subordinates.

But, nevertheless, there is no overlapping between the general duty to control and the more specific duty to interfere, when crimes are not only potentially possible but already on the way to be committed. The actual situation that crimes were about to be committed, attempted or completed, the superior should either know or should have known; because the precise awareness of the stage of the crime shapes the measures necessary and reasonable to prevent the crime or further harm. This knowledge or negligent lack of awareness is the second triggering mechanism for command responsibility.

2.4.2. Failure "to take all necessary and reasonable measures within his or her power"

The third and last condition, relevant in the context of investigating the connection between the omissions of the superior and the crimes of his subordinates, is the failure to take counteractions. Such a failure presupposes first, that it is within the power of the superior to take "necessary and reasonable measures." A commander who just receives knowledge about what is going on, knows his failure to control and is on the way to take counteractions, but before he can set them into practice, is suspended from his office because of his failure to control, has no more power to take himself the necessary and reasonable measures to directly prevent, repress or to submit the matter to the competent authorities. He has to give his information to the commander substituting him or to his superior. As for the rest, the measures necessary and reasonable depend on the situation about which the superior was aware or negligently not informed.

2.4.3. Non-interference as an attributable contribution to the crime committed

The case is simple, when the subordinate is "about to commit such crimes." The necessary measure is, to prevent with all means, available to the superior, that the activities continue and the crimes reach the stage of an attempt. Has the superior not used all means and, therefore, not been successful in preventing an attempt, the basic conditions for command respon-

sibility are fulfilled and he is liable for punishment. The reason for this punishability is that he, by failing again to take proper actions in time, sets a condition which enables the subordinate to commit an attempted crime. The omission of the superior therefore contributes as an indispensable condition to this crime and thus, is causal for the attempt.

Does the superior in such a situation take the necessary action too late for interfering with the preparation, but early enough to prevent that the attempt is turning over to a completed crime, though he could have prevented already the attempt, he is nevertheless punishable. This is convincing, not only from a theoretical point of view, but also from the point of view of criminal policy. He, by his failure to take action in due time, is responsible for the harm an attempt may include, like an attempted murder including heavy bodily harm. Whenever the superior fails to prevent the next step of the three mentioned in the heading of Section 2.4, he has caused this next step. The causality is a necessary requirement to prove in each of the cases that there exists liability for punishment for command responsibility.

The difference between prevent and repress is of no relevance for the question dealt with here. Either repress could be defined as preventing the continuance of the crime by force, or as preventing future crimes, by punishment. In the first case the consideration with regard to prevent an attempt or the completed crime are applicable, in the latter the following considerations under Section 2.4.4.[49]

2.4.4. Omissions as a contribution to "the commission of … future crimes"[50]

A superior, becoming aware or negligently not taking due knowledge of the fact that his subordinates have committed a completed crime, cannot contribute to this atrocity any more.[51] Participation in any form as principal or accomplice, mentioned in Article 25(3) *sub* a–e, is no longer possible. However, the underlying structure of command responsibility establishing responsibility for crimes of others, is not encompassed in Article 25. Article 28 rather punishes, when a superior failed to control his subordinates properly and this dereliction of duty results in a crime. But, Article 28 limits this broad notion by an additional condition, namely that the superior, after knowing or negligently not taking notice of what has happened, at least "submits the matter to the competent authorities for investigation and prosecution." He already by this submission takes the risk that his failure to control properly will be discovered and he himself will have to face the consequences, disciplinary or criminal, as the

49. *See also supra* Section 1.
50. *See* Čelebići, *supra* note *, at para. 400.
51. For the exceptions in cases of torture, deprivation of liberty and other "permanent crimes" *see supra* Section 1.2.

law may be in his country. But on the international level, his responsibility depends on the condition, that he does not submit the case. Article 28 thus is more favourable to a suspect and, through this additional element, achieves that not all cases of a failure to control properly resulting in a crime fall within the competence of the Court.

An additional argument, why the failure "to submit the case to the competent authorities" is a sufficient reason to bring the case in the competence of the ICC, is that omitting to investigate and prosecute most probably will have a dangerous effect on the prevention of future crimes. The same subordinates or others may be confirmed in their opinion, that their superiors, even though they have not openly expressed their sympathy with what their subordinates have done, have at least tolerated such crimes and will do so in the future. This impression has to be avoided by all means, for preventive reasons.[52]

Investigation, prosecution and punishment have a limited preventive effect for the time a person is sent to prison. However, it is disputed, whether criminal procedures and punishment have such an effect also after his release, in general and on other persons. Nevertheless, criminal law needs to be applied and thus confirmed, in order to create awareness and thus, at least contribute to the prevention of future crimes. This has been confirmed by the jurisprudence of the ICTY.[53] In particular in hierarchical structures the exemplary effect of such a submission cannot be underestimated. This is the reason, why a superior submitting the matter to the competent authorities, contributes to the prevention of future crimes even at the risk that he himself may be disciplined or punished on the national level for failure to control and thus contribute to the crime, before it has been completed.

In cases of failure to submit, there is no direct causal connection between the omission to take necessary measures and the completed crime. But there always remains the causal connection between the failure to control properly and the commission of the completed crime; because the applicability of Article 28 depends on this first element, which is only narrowed by the second and the third conditions considered here. Therefore, causality in the sense of failure resulting in crimes is a requirement for all alternatives in Article 28! It has to be established even twice in each case, except when the superior failed to submit the case. In this last alternative even though taken for granted, an influence on the commission of future crimes does not have to be proven.

52. *See* Čelebići, *supra* note *, at para. 400.
53. *Id.*; *see also* Triffterer, *supra* note 37, at 143 *et seq.*

3. Conclusion: Causal Connection, a Common Element for all Alternatives and the Differentiation When a Superior "Failed to Take all Necessary and Reasonable Measures"

In conclusion, the following is presented as a contribution to the discussion about the notion of superior responsibility as expressed in Article 28: "A requirement of causality as a separate element of the doctrine of superior responsibility" has to be proven in all cases where liability for punishment shall be established according to Article 28. It is, therefore, a common element of all alternatives.

This element is independent of the fact, whether other international or domestic regulations refrain from expressly mentioning such an element in their wording. Legislators may, however, construct a certain form of superior responsibility by punishing the mere dereliction of duty, without the requirement that such an omission has caused any results.

The element of causality in Article 28 is not for all alternatives independent of future actions of the superior. By their definitions, the second and third element, knowledge or negligent disregard of information and omitting to take relevant action within their power, grant superiors a chance to interfere in a course of causality, which they, by their own failure to control properly, have started. Being aware or at least having the possibility to notice this contribution caused by their failure, they practically receive a second chance to prevent a result, which otherwise falls within their responsibility. If they miss this chance, they support the already moving chain of causality, they have started by their failure to control and, thus, confirm and strengthen the causal connection, which they, by their first omission, have permitted to occur and to develop.

This strengthening effect is a second causal connection to be established, to prove that the superiors did not take all necessary measures within their power, to prevent crimes when they were about to be committed or already attempted. This double causal connection, of which the second may be called a check, may be one of the reasons, why it is asserted that causality is not a separate element of the doctrine of superior responsibility. Another reason definitely is that in cases where the crime is already completed, the first causal nexus has come to its end. It has been exhausted and, therefore, cannot be interrupted or supported any more in the sense of being strengthened. What has to be done and can be expected of the superior, is a sort of compensation for his failure to control by submitting the matter to justice. For his subordinate this means responsibility for crimes within the jurisdiction of the Court. The superior then is not responsible according to Article 28. He may, however, have to face disciplinary or penal responsibility according to national law.

Omitting to submit the case to the competent authorities may start another causal nexus with regard to future crimes.[54] But such a connec-

54. Čelebići, *supra* note *, at para. 400; *see also* Triffterer, *supra* note 37, at 155 *et seq*.

tion is not contained as a constituent element in Article 28; it was rather one of the motives of the legislator to punish the omission to submit the matter. In such cases, the causal connection between the failure to control properly and the completed crime is the only one, required to be established. Becoming aware of the case or negligently not considering relevant information, appears at a time when the crime already was completed. Therefore, it has to be assumed that the superior in the meantime, due to lack of knowledge or negligence, has had no chance to prevent the crime by taking adequate measures within his power.[55] The fact, that nothing happened "in between," confirms only the failure to control and thus may be evaluated as an objective confirmation of the causal nexus. But it is the question, how far this failure has to be proven, when the omission to submit the case to the competent authorities is the decisive element for establishing command responsibility.

It may be difficult to separate one or two elements of causality in practice. But these elements, all contained in Article 28, serve to guarantee the rule of law and, therefore, should at least receive due attention and consideration, independent of the crime committed by a subordinate and the position of his or her superior. Article 28 can thus serve as a good example, how to apply the rule of law to suspects, responsible directly under international law for "the most serious crimes of concern to the international community as a whole."

The actual importance of Article 28 is demonstrated by several decisions of the ICTY and the ICTR, as well as by pending cases like *Prosecutor* v. *Milošević*. It is underlined by the fact that quite often terrorist organisations or groups call themselves and are called by others "militant branches" or even "military arms" of political parties, both fighting for the same aim, though by different means. The legally established organisations are, therefore, often blamed for not preventing the crimes committed by members of these affiliated illegal branches.

It sometimes is asserted that high-ranking political leaders have or could exercise control over such groups and, therefore, carry command responsibility not only for their militant activities but also for their crimes. If terrorist attacks, committed after the entry into force of the Rome Statute, fulfil the requirements of crimes falling within the jurisdiction of the Court, in particular as crimes against humanity, Article 28 will be applicable. Proof may be difficult to achieve, but if terrorist attacks are indicted as crimes under the Rome Statute, Article 28 has to be taken into consideration.

In this context it should be remembered that Article 28 has incorporated more than one element to avoid strict liability and to guarantee the rule of law. Since terrorist attacks in general and especially those in a comparable dimension to the crimes committed on 11 September 2001, always

55. For the consequences in cases where he has had such a chance, *see* Triffterer, *supra* note 2, at 453 *et seq*.

have a strong political background and impetus, the temptation to support or to oppose these political aims when dealing with such crimes, perhaps even with the help of the competent national judiciary, may be great. It nevertheless has to be resisted. This concerns above all the establishment of special courts and, in particular, military commissions, created for the exclusive purpose of dealing with such crimes. Such organs, claimed to be part of the judiciary, appear to be suspicious, in particular, when the ordinary domestic legal system is well equipped to handle this task. Special procedural rules and treatment for alleged terrorists have to be avoided. They cannot only split the Alliance against Terror, but may, in addition, cause damage to the reputation and credibility of the judiciary and the political system of the respective states and even to their Allies.

Fortunately, states that give in to such a temptation and not "genuinely […] carry out the investigation and prosecution" against alleged terrorists, for instance with respect to command responsibility, as established in Article 28, or even abuse their judicial power in this respect, may trigger the competence of the ICC according to Articles 17 and 20(3). As despicable as such dreadful and insidious terrorist attacks are, there will be no peace without a proper justice, unrestricted for terrorists and without exceptions diminishing the right of a fair trial.[56]

56. *See* in this context O. Triffterer, *New Dimensions of International Terrorism, Concurring with Core Crimes?*, LJIL (2002) (forthcoming).