Article 22

Nullum crimen sine lege

General Remarks
Together with nulla poena sine lege, contained in Article 23 of the Rome Statute, the principle of nullum crimen sine lege forms the principle of legality which is of fundamental importance to international criminal law. The principles of nullum crimen and nulla poena are well-established in customary international law, a fact that was reflected by the effortlessly drafting of Articles 22 and 23 of the Rome Statute [Lamb in Cassese, 2002, p. 734-735]. The need for a provision acknowledging the principle of nullum crimen was agreed upon already by the 1996 Preparatory Commission which stated that "the crimes within the jurisdiction of the Court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality (nullum crimen sine lege)" [Broomhall in Triffterer, 2008, p. 715]. It may be noted that the statutes of the ICTY and ICTR does not contain provisions equivalent to Article 22 of the Rome Statute.

The principle of nullum crimen contributes to a foreseeable legal system as it stipulates that only actions which are prohibited by law can be deemed as criminal. This is an important part of the legitimacy of a legal system, and in the case of the ICC it works both in relation to the individuals under investigation and in relation to states [Broomhall in Triffterer, 2008, p. 716]. The principle of nullum crimen also acknowledges that the individual virtually always is the weaker part in the criminal process and that the individual therefore has a need to be protected from a misuse of powers by the judiciary.

Nullum crimen is harder to apply and fulfil in international criminal law than in national criminal law since international criminal law often is more vague than national law. This is a problem which was at the centre of the proceedings in Nuremberg. At the end of World War II the international crimes had not been exhaustively defined, which led the judges of the Nuremberg Tribunal to define many of the elements of the crimes themselves. The proceedings of Nuremberg have thus received criticism of creating new law. With regard to nullum crimen, the judges of Nuremberg concluded that it is a moral principle and that it is allowed to punish actions that were not prohibited at the time of the conduct in cases where it would be "unjust" not to punish the actions [Lamb in Cassese, 2002, p. 735-736].

After World War II and Nuremberg the principle of nullum crimen sine lege has been codified in a number of international treaties on human rights. The first sentence of Article 11(2) of the 1948 Universal Declaration of Human Rights states that “[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed”. The essentially identical first sentence of Article 15 of the International Covenant on Civil and Political Rights states that “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed”.

When creating the ICTY the United Nations Secretary-General stated in a report that “the application of the principle nullum crimen sine lege requires that the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law” [Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 34]. The principle of nullum crimen has also been addressed by the ICTY, for example in Prosecutor v. Tadić where the Trial Chamber found that common Article 3 of the Geneva Conventions “is beyond doubt part of customary international law, therefore the principle of nullum crimen sine lege is not violated by incorporating the prohibitory norms of common Article 3 in Article 3 of the Statute of the International Tribunal” [Prosecutor v. Tadić, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 72]
and that "[i]mposing criminal responsibility upon individuals for these violations does not violate the principle of *nullum crimen sine lege*" [para. 65].

The ICC Elements of Crimes has an important role in the fulfilling of the objectives of Article 22 since it defines the crimes within the jurisdiction of the Court. The need for the Element of Crimes was observed by the United States in the Preparatory Committee. The United States that argued that the Elements of Crime were consistent with "the need to define crimes with the clarity, precision and specificity many jurisdictions require for criminal law" [Schabas, 2010, p. 407, citing the Proposal submitted by the United States of America, Elements of offences of the International Criminal Court, UN Doc, A/AC.249/1998/DP.11]. The need for the Elements of Crime was also stressed by Japan during the Rome Conference [Schabas 2010, p. 407].

_Cross-reference_

Article 23

**Author:** Camilla Lind

**Updated:** 30 June 2016

**Article 22(1)**

[257] 1. *A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.*

Not only was the need for a provision on the _nullum crimen_ principle noticed early in the preparation of the Rome Statute but the need for a provision on non-retroactivity, which as well was considered fundamental to a criminal legal system, was also specifically addressed by the 1996 Preparatory Committee [Lamb in Cassese, 2002, p. 751]. According to Article 22(1), which states the principle of non-retroactivity, a certain conduct can only be deemed as illegal if that specific conduct was prohibited at the time when the conduct took place. In cases when the specific conduct was not criminalised at the time of the conduct Article 22(1) prescribes that the person shall not be convicted. The individual responsibility of the perpetrator of the crime does however arise directly under international law, meaning that the criminal conduct does not have to be criminalised in national law in order to fulfil the principle of _nullum crimen_[Broomhall in Triffterer, 2008, p. 718].

The term "conduct" refers both to acts and omissions. In cases where a continuous conduct is under examination Article 22(1) prescribes that all elements of the crime must be fulfilled during the time that the conduct was criminalised [Broomhall in Triffterer, 2008, pp. 722-723].

Article 22(1) refers to the jurisdiction of the Court. To determine whether a person can be held criminally responsible under the Rome statute it is therefore necessary to establish the jurisdiction of the Court. The jurisdiction _ratione materiae_ of the ICC is found in Article 5 of the Rome statute, which states that the crimes within the jurisdiction of the Court are the crimes of genocide, crimes against humanity, war crimes and the crime of aggression. However, to establish jurisdiction Article 11, stating the jurisdiction _ratione temporis_ and Article 12, stating preconditions to the exercise of jurisdiction, must be taken into consideration. According to Article 11(1), the Court may only exercise jurisdiction with respect to crimes committed after the entry into force of the Rome statute. The Rome statute entered into force on 1 July 2002. For those states that has become parties to the Rome statute after 1 July 2002 Article 11(2) states that the ICC may only exercise jurisdiction with respect to crimes committed after the entry into force of the Rome statute for that individual state. Article 126(2) states further conditions on the entry into force of the Rome statute for a state as it prescribes that the statute enters into force on the first day of the month after the 60th day following the deposit of the state’s instrument of ratification, acceptance, approval or
Article 22(1) is not only a reminder of the principle of legality but also serves as a principle of interpretation according to which rules can be interpreted in such a way that the principle of legality is respected [Schabas 2010, p. 409]. Article 22(1) has been used as a tool of interpretation in Prosecutor v. Katanga, when the Pre-Trial Chamber defined “other inhumane acts” in Article 7(1)(k) as “serious violations of international customary law and the basic rights pertaining to human beings, being drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in Article 7(1) of the Statute” (Prosecutor v. Katanga et al., ICC PT. Ch. I, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008).

i. Non-state parties and international customary law

When addressing Article 22(1) the Court will typically examine whether a certain conduct was prohibited by the Rome statute at the time of that certain conduct. It is however possible that the Court may have to take international customary law in consideration in addressing Article 22(1) when a situation is referred to the Court by the United Nations Security Council or when a state makes a declaration of the acceptance of jurisdiction in accordance with Article 12(3). According to one view, advocated by Bruce Broomhall, the Court can only establish criminal responsibility in international customary law in such cases since the state of which the person investigated is a national of was not a party to the Rome statute when the conduct took place. Consequently the Rome Statute cannot provide a prohibition of that certain conduct in those cases [See Broomhall in Triffterer, 2008, p. 720]. This issue was however not discussed by the Pre-Trial Chamber neither when deciding to issue a warrant of arrest for president Omar Al Bashir of Sudan, a state that is not a party to the ICC [see Prosecutor v. Al Bashir, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009] nor when deciding to issue warrants of arrest in relation to any of the other persons that allegedly are responsible of having committed international crimes in Sudan.

International crimes are also investigated in Côte d’Ivoire, a state that has accepted the jurisdiction of the ICC pursuant to Article 12(3) of the Rome Statute. The government of Côte d’Ivoire lodged an Article 12(3)-declaration on 18 April 2003, declaring that it accepted the jurisdiction of the court for crimes committed on its territory since the events of 19 September 2002. This declaration was reconfirmed by the President of the Côte d’Ivoire on 14 December 2010. Two cases are open in the situation of Côte d’Ivoire, the case of the Prosecutor v. Simone Gbagbo and of the Prosecutor v. Laurent Gbagbo and Charles Blé Goudé. Both cases concern alleged crimes against humanity committed in Côte d’Ivoire during the period of 16 December 2010 to 12 April 2011. Since that period occurred after the Article 12(3)-declaration on the acceptance of the jurisdiction of the ICC the Court should not, according to the view advocated by Broomhall, have to assess whether the conduct of the suspected persons was prohibited by international customary law at the time of the conduct. This issue was not addressed by the Pre-Trial Chamber II when it issued the arrest warrants of the persons allegedly responsible for crimes in Côte d’Ivoire.

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Updated: 30 June 2016

Article 22(2)

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

The rule of strict interpretation that is enshrined in Article 22(2) protects both the state parties of the Rome
Statute as it ensures that the judges will interpret the Statute narrowly, and the individual that is under investigation by guaranteeing that the criminal responsibility of that individual will be judged according to the legislation and nothing else. According to this rule of interpretation and the prohibition of analogy the judges of the ICC cannot create new crimes as the creation of new crimes is exclusively within the power of the Assembly of States Parties. Article 22(2) is aimed at prohibiting the use of analogy for law-making, but it allows the judges of the Court to use analogies as a last resort to interpret and fill gaps in the Rome Statute [Broomhall in Triffterer, 2008, p. 725]. In other words, the use of analogy as a tool of law-making is prohibited by Article 22(2) but analogy as a tool of interpretation is not prohibited [Lamb in Cassese, 2002, pp. 752-753]. As Article 22(2) states that cases of ambiguity shall be interpreted in favour of the person being investigated, prosecuted or convicted it also contains the principle of in dubio pro reo.

Since Article 22(2) refers to the interpretation of crimes it is only applicable to Article 6-8 bis of the Rome Statute, which are Articles that contain the definitions of the crimes enlisted in Article 5 [Broomhall in Triffterer, 2008, pp. 723-724]. It is however argued that Article 22(2) could also be applicable to Articles and principles that have a direct impact on the application of Articles 6-8 bis [Schabas, 2010, p. 410]. Pre-Trial Chamber II has in Prosecutor v. Bemba referred to the principles of nullum crimen and strict interpretation in Article 22(2) when interpreting whether the chapeau of Article 28(a) includes an element of causality between a superior's dereliction of duty and the underlying crimes [Prosecutor v. Bemba, ICC PT. Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009].

i. Al Bashir
According to Pre-Trial Chamber I of the ICC, Article 22(2) "fully embraces the general principle of interpretation in dubio pro reo", which means that in cases of uncertainty the interpretation that is more favourable to the investigated person shall be used [Prosecutor v. Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 156]. In the same decision, the majority of the Pre-Trial Chamber argued that the Elements of Crimes must be applied in order to respect Article 22 [para. 131]. Judge Ušacka did however in her separate opinion state that the Elements of Crime shall be consistent with the Rome Statute according to Article 9(3) and that the definitions of crime therefore only can be found in the Rome Statute itself [Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 18].

ii. Lubanga
On 14 March 2012 Trial Chamber I delivered the first judgment of the ICC in which Thomas Lubanga Dyilo was found guilty of war crimes consisting of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. Article 22(2) was addressed during this process. The Defence argued in its closing submission that various interpretations made by the Pre-Trial Chamber in its Decision on the confirmation of charges was in breach with Article 22(2) [Prosecutor v. Thomas Lubanga Dyilo, Closing submissions of the Defence, 15 July 2011, see for example paras. 23, 39 and 65]. In the judgment the judges used Article 22(2) as a test of whether the interpretation of Article 8(2)(e)(vii) was acceptable: "[t]herefore, consistently with Article 22 of the Statute, a child can be 'used' for the purposes of the Statute without evidence being provided as regards his or her earlier 'conscription' or 'enlistment' into the relevant armed force or group" [Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 620].

iii. Katanga
Article 22(2) and its impact on the interpretation was also discussed by Trial Chamber II in its judgment in Prosecutor v. Katanga. The Trial Chamber noted that Article 22(2)) must be taken into consideration when
interpreting the rules of the Rome Statute as it prescribes that "any meaning from a broad interpretation that is to the detriment of the accused" shall be discarded (Prosecutor v. Katanga, ICC T. Ch. II, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 50) and that the principle of legality poses "clear and explicit restrictions on all interpretative activity" (para 51). Because of this, the judges of the Court may not create new law, but only apply already existing law (para 53). The Chamber however also noted that the principle of in dubio pro reo that is enshrined in Article 22(2) only is applicable in cases of ambiguity and that it does not take precedence over the conventional method of interpretation according to the Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). Lastly, the Chamber concluded that the rules of interpretation in the VCLT is in accordance with Article 22(2). The Chamber hence used the general rule of interpretation in the VCLT when interpreting the rules of the Rome statute.

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Updated: 30 June 2016

Article 22(3)

[259] 3. This Article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 22(3) acknowledges that the nullum crimen principle in Article 22 does not affect customary international law and that it applies only to the definitions of crimes in the Rome Statute [Broomhall in Triffterer, 2008, p. 719]. This third subparagraph does only limit the impact of Article 22 and not the whole Rome Statute [Lamb in Cassese, 2002, p. 754].

Cross-references: Article 23 and 24

Doctrine:


Author: Camilla Lind

Updated: 30 June 2016

Article 23

[260] Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

General Remarks
Article 23 contains the principle of *nulla poena sine lege*, which is part of the principle of legality and prohibits retroactive penalties. It is closely related to *nullum crimen sine lege*, a principle that prohibits retroactive application of law (see Article 22). As *nullum crimen, nulla poena* is part of a number of human rights treaties and declarations, e.g., the *International Covenant on Civil and Political Rights* (Article 15(1)) and the *1948 Universal Declaration on Human Rights* (Article 11(2)). The principle of *nulla poena* is uncontroversial and was widely accepted and supported at the Rome conference [Lamb in Cassese, 2002, p. 756].

**Analysis**

Article 23 shall, since *nulla poena* is a principle regarding penalties, be read together with Part 7 of the Rome Statute. Article 77(1) of the Rome Statute states the penalties available to the Court. These are imprisonment, either for a maximum of 30 years or for life, a fine or a forfeiture of proceeds, property and assets derived either directly or indirectly from the crime at hand. Factors that shall be taken into consideration when determining the sentence are stated in Article 78.

It may be noted that the drafters of the Rome statute did not choose to regulate the penalties available to the court in the same manner as is the case in the ICTY statute. According to Article 24 of that statute, the ICTY shall, when determining sentences, consider the general practice regarding prison sentences in the former Yugoslavia. The ICTY has however, despite the fact that the national penal code of Yugoslavia did only allow sentences of a maximum of 20 years of imprisonment, concluded that it may sentence convicted persons to life imprisonment (see, for example, *Prosecutor v. Radislav Krstic*, (Case No. IT-98-33-A), ICTY A. Ch., Judgment, 19 April 2004 and Lamb in Cassese, 2002, p. 759. The Rome statute contains no reference to the penal codes of its state parties.

**Lubanga**

In its sentencing decision the Trial Chamber in *Prosecutor v. Thomas Lubanga Dyilo* acknowledged Article 23 as one of the Articles that according to Article 21(1), which states applicable law, shall be applied when passing sentence. The Trial Chamber did however not discuss it further [*Prosecutor v. Lubanga, Decision on Sentence pursuant to Article 76 of the Statute*, 10 July 2012, paras. 17-18]. After acknowledging Article 23 and the principle of *nulla poena* the Trial Chamber went on with discussing and applying Articles related to sentencing. The conclusion may be drawn that the Trial Chamber was not of the opinion that Article 23 and its implications needed further discussion and that the Articles of the Rome Statute was in accordance with Article 23.

**Cross-references:**

Articles 22 and 77

**Doctrine**


**Author:** Camilla Lind

**Updated:** 30 June 2016

**Article 24**
Non-retroactivity ratione personae

General remarks
Article 24 completes Articles 22 and 23, which states the principle of legality. It is also closely related to Article 11, which determines the jurisdiction ratione temporis of the ICC. Article 24 does however not have any predecessor in international human rights documents, as is the case for Articles 22 and 23. The need for an Article with the substance of Article 24 was noted early in the drafting process, and the drafting of Article 24 was undramatic [Schabas, 2010, p. 418].

Author: Camilla Lind

Updated: 30 June 2016

Article 24(1)

No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

Article 24(1) provides that no person shall be held criminally responsible for conduct prior to the entry into force of the Statute. The statement is a reflection of Article 11(1) concerning jurisdiction ratione temporis, which provides that "[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute". The Rome Statute entered into force on 1 July 2002. When determining the jurisdiction ratione temporis in relation to states that has ratified the Rome Statute after its entry into force, Article 126(2) must be taken into consideration. The Article states that the entry into force for such states occurs on the first day of the month after the 60th day following the deposit by that state. This day is important to the application of Article 24(1) as it prohibits criminal responsibility for conduct prior to that date.

Article 24(1) refers to "conduct", which covers both active actions and omissions. It may however prove difficult to determine when an omission takes place, and it may therefore be difficult to determine whether an omission falls within the scope of the Rome Statute [Pangalangan in Triffterer, 2008, p. 740]. A difficulty with Article 24(1) and the temporal limitation of application of the Rome Statute is that the Statute does not provide a solution to the problem of continuing crimes [see Schabas, 2010, p. 419]. It is possible that situations may arise when a criminal conduct begun before the entry into force of the Statute and where the criminal conduct is of a continuing nature and continues after the entry into force of the Statute. The Pre-Trial Chamber I stated in Lubanga that the crime of enlisting and conscripting children under the age of fifteen is of a continuing nature and that it continues to be committed during the time children remain in armed groups or forces [Prosecutor v. Lubanga, Decision of the Confirmation of Charges, 9 January 2007, para. 248]. The status of continuing crimes is however uncertain and the solution is yet to be determined by the Court.

Author: Camilla Lind

Updated: 30 June 2016

Article 24(2)

In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 24(2) states that the law most favourable to the person being investigated, prosecuted or convicted
shall be applied if the law changes before the judgment. It completes the statements concerning retroactive application in Articles 22 and 23. The wording of Article 24(2) makes it broad, and it may be invoked at any stage of the proceedings before the ICC, meaning that it may also be invoked when a case reaches the Appeals Chamber [Schabas, 2010, p. 420].

Article 24(2) uses the word “law”. Applicable law is determined by Article 21, which states that the Court first and foremost shall apply the Statute, the Elements of Crimes and the Rules of Procedure and Evidence. The Court may however in second place also apply treaties and customary international law according to Article 21(1)(b). Treaties and customary international law may therefore be part of the applicable law and the Court may hence have to determine whether a change in customary international law has taken place to fully respect Article 24(2) [see Schabas, 2010, p. 420].

Cross-references:
Article 11, 22, Article 23.

Doctrine:


Author: Camilla Lind
Updated: 30 June 2016

Article 25

Individual criminal responsibility

General remarks

Article 25 provides the various modes of individual liability within the jurisdiction of the ICC. This is the core of a case, providing the legal theory which connects the accused to the crimes charged. The Rome Statute provides a general framework for determining individual criminal responsibility. However, the approach taken to individual criminal responsibility differed greatly from that of previous international tribunals. As well the elements of each mode of liability have evolved through case law with various ICC Pre-Trial and Trial Chambers interpreting the diverse elements differently. The Appeals Chamber in the Lubanga case has issued the only decision thus far that deals with Article 25 at the appeals level, essentially confirming the approach taken at the Pre-Trial and Trial level of the case. Continued jurisprudence from the Appeals Chamber will assist in providing certainty moving forward and ending superfluous litigation over diverse opinions at the Pre-Trial and Trial level.

Compared with the previous laws on individual criminal responsibility, the provisions contained within the Rome Statute mark a turning point in regulating modes of participation under international criminal law. The ad hoc tribunals were in their early years during the drafting and adopting of the Rome Statute in 1998, and the modes of liability were a key focus of the development of the ad hoc jurisprudence during this time. In particular, and in contrast to the ICC, the ad hoc tribunals developed their modes of liability in the absence of guidance from their Statutes. Central to this was the concept of joint criminal enterprise (JCE), and the extent to which this concept falls within the Rome Statute is debatable.

The Rome Statute is much more precise than the ICTY/ICTR Statutes in that it adopts a scheme that clearly
differentiates between a four-tiered system of participation. In contrast to both the ILC Draft Codes of Crimes against the Peace and Security of Mankind and the Statutes of the ad hoc tribunals, paragraph 3 distinguishes between perpetration and other forms of participation. In particular, perpetration corresponds to the most serious qualification of individual criminal responsibility and it is expressly provided for under letter (a) in three different forms: i) as an individual; ii) jointly with another person (co-perpetration) and iii) through another person (indirect perpetration). Based on the new drafting of the Rome Statute a new format of perpetration has emerged at the ICC based on the notion of 'indirect perpetration'. Pursuant to this new interpretation, commission of crimes encompasses the concept of 'control over the crime', including control over an organized apparatus of power, whereby indirect perpetration interacts with co-perpetration in such a way that the two forms of participation complement each other. This new doctrine on perpetration serves to make clearer the distinction between principal and accessorial liabilities within the context of the collective and multi-level commission of crimes. The Pre-Trial Chamber of the ICC has taken this all one step further in a decision in the Katanga and Ngudjolo case, where the judges decided that the 'control over the crime' amounted to 'control over the organization' (Prosecutor v. Katanga and Ngudjolo, ICC PT Ch I, Confirmation of Charges Decision, ICC-01-04-01-07-717, 30 September 2008, paragraph 500). Now, the requirements of indirect perpetration include the existence of an organized apparatus of power, within which the direct and indirect perpetrators operate, and which enables the indirect perpetrator to secure the commission of the crimes (Prosecutor v. Katanga and Ngudjolo, ICC PT Ch I, ICC-01-04-01-07-717, 30 September 2008, paragraph 515-518).

Author: Kirsten Bowman

Updated: 30 June 2016

Article 25(1)

[265] I. The Court shall have jurisdiction over natural persons pursuant to this Statute

Preparatory works

Article 25(1) of the Rome Statute reads: "The Court shall have jurisdiction over natural persons pursuant to this statute". The decision regarding whether to include 'legal' or 'juridical' persons within the jurisdiction of the court was controversial. During the conference in Rome there was a working paper circulated by the French delegation which articulated a proposal for ICC jurisdiction over 'juridical persons'. There was considerable debate on this point with many delegations concerned that the legal systems of their countries did not provide for such a concept or that the concept would be difficult to apply in the context of an international criminal court. The French delegation noted these concerns, but felt that the Statute should go at least as far as the Nuremberg Charter, which had provided for the criminal responsibility of criminal organizations. The debate was mainly based upon Romano-Germanic versus common law system countries. Romano-Germanic countries generally do not have mechanisms under their national systems to prosecute legal entities, effectively conferring automatic jurisdiction on the ICC in such circumstances. In the end, the concerns regarding the French proposal were too great to overcome and the Rome Statute would not accept jurisdiction over legal persons. (Report of the Preparatory Committee on the Establishment of an International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, Italy 15 June - 17 July 1998, A/CONF.183/2/).

Article 25(1) of the Rome Statute establishes the principle of 'personal jurisdiction', giving the ICC jurisdiction over natural persons accused of crimes within its jurisdiction. This provision and in particular paragraphs 1 and 2 of the Article confirm the universal acceptance of the principle of individual criminal responsibility. Subparagraphs (a) through (c) of paragraph 3 establish the basic concepts of individual criminal attribution. Subparagraph (a) refers to three forms of perpetration: on one's own, as a co-
perpetrator or through another person. Subparagraph (b) contains different forms of participation; ordering, soliciting or inducing commission. Subparagraph (c) establishes criminal responsibility for aiding and abetting and subparagraphs (d), (e) and (f) provide for expansions of attribution contributing to the commission or attempted commission of a crime by a group, incitement to genocide and attempt.

Author: Kirsten Bowman
Updated: 30 June 2016

Article 25(2)

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

Article 25(2) articulates the principle of individual criminal responsibility. "A crime within the jurisdiction of the Court" refers to genocide, crimes against humanity and war crimes according to Articles 5(1)(a)-(c) and 6-8. The possible punishment follows from Article 77.

Author: Kirsten Bowman
Updated: 30 June 2016

Article 25(3)(a) - co-perpetration

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
   (a) Commits such a crime, whether as an individual, jointly with another or ...

Subparagraph (a) distinguishes between three forms of perpetration: direct, co-perpetration and perpetration by means.

With respect to co-perpetration, it is no longer included in the complicity concept but recognized as an autonomous form of perpetration. Co-perpetration is characterized by a functional division of the criminal tasks between the different co-perpetrators, who are interrelated by a common plan or agreement. Every co-perpetrator fulfils a certain task which contributes to the commission of the crime and without which the commission would not be possible. The common plan or agreement forms the basis of a reciprocal or mutual attribution of the different contributions holding every co-perpetrator responsible for the whole crime.

Perpetration by means presupposes that the person who commits the crime can be used as an instrument by the indirect perpetrator as the master-mind or individual in the background. He or she is normally an innocent agent, not responsible for the criminal act.

The jurisprudence for this issue began with the Pre-Trial Chamber's Confirmation of Charges decision in Lubanga. Rather than rely on any precedent established by the ICTY, the Lubanga Pre-Trial Chamber chose to forge a new path relying on its own theoretical analysis. The Pre-Trial Chamber noted that the ICC Statute contains a much more differentiated regime of forms of individual and joint responsibility than the ICTY Statute. It referred in particular to Article 25(3)(d) of the ICC Statute, which establishes responsibility for contributing to the activities of 'a group of persons acting with a common purpose', as probably covering some forms of JCE. However, the Chamber voiced substantial reservations against accepting JCE as a form of primary liability under the ICC Statute, associating JCE with a 'subjective' approach toward distinguishing between principals and accessories, an approach that moves the focus from the objective level of contribution to the 'state of mind in which the contribution to the crime was made'.
Rather, the Pre-Trial Chamber in *Lubanga* identified five factors of individual criminal liability in order to find co-perpetration under Article 25(3)(a). These five elements were confirmed and used in the trial chamber decision of *Lubanga*, as well as by the appeals chamber decision of *Lubanga*, in order to find the accused guilty as a co-perpetrator under Article 25(3)(a). The five elements include two objective and three subjective elements.

**The Objective Requirements**

In the confirmation of charges, the Pre-Trial Chamber set forth two objective elements: 1) the existence of a common plan between two or more persons; and 2) the coordinated essential contribution made by each co-perpetrator that results in the realization of the objective elements of the crime. The Lubanga Trial Chamber then, following the reasoning set forth by the Pre-Trial Chamber, agreed that under the co-perpetration theory two or more individuals must act jointly within the common plan, which must include 'an element of criminality' (*Prosecutor v. Lubanga*, ICC PT. Ch. I, Decision on the confirmation of charges, ICC-01/04-01/06-803, 29 January 2007, paragraph 343). As well, the Pre-Trial Chamber found that the plan did not need to be specifically directed at the commission of a crime.

However, the *Lubanga* Trial Chamber did find that it is necessary to prove that if events followed the ordinary course of events, a crime will be committed (*Prosecutor v. Lubanga*, ICC T. Ch. I, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, paragraph 2984). Noting that the crime in question need not be the overarching goal of the co-perpetrators, nor explicit in nature, the Chamber did stress that the existence of a common plan can be inferred from circumstantial evidence (*Prosecutor v. Lubanga*, Judgment, paragraph 988).

With regard to the requirement of an 'essential contribution' the Trial Chamber majority stated that the Statute’s wording required that the offence "be the result of the combined and coordinated contributions of those involved, [...]. None of the participants’ exercises, individually, control over the crime as a whole but, instead, the control of the crime is collective" (*Prosecutor v. Lubanga*, ICC T. Ch. I, Judgment, ICC-01/04-01/06-2842, 14 March 2012, paragraph 994). Here, the Chamber notes that the Prosecution does not have the burden to demonstrate that the contribution of the accused, if taken alone, would have caused the crime. Rather, the Prosecutor must prove mutual attribution, based on joint agreement or common plan. The Majority states that what is decisive is 'whether the co-perpetrator performs an essential role in accordance with the common plan, and it is in this sense that his contribution, as it relates to the exercise of the role and functions assigned to him, must be essential' (*Prosecutor v. Lubanga*, ICC T. Ch. I, Judgment, ICC-01/04-01/06-2842, 14 March 2012, paragraph 1000).

**The Subjective Requirements**

The Lubanga Pre-Trial and Trial Chamber named the three subjective requirements, including that i) the accused was aware that by implementing the common plan, the criminal consequences would 'occur in the ordinary course of events'; ii) the accused was aware that he provided an essential contribution to the implementation of the common plan and iii) the accused was aware of the factual circumstances that established the existence of an armed conflict, and of the link between these facts and his conduct (*Prosecutor v. Lubanga*, ICC T. Ch. I, Judgment, ICC-01/04-01/06-2842, 14 March 2012, paragraph 1008).

**The Elements of Crimes and the Mental Element**

It is important to note that the Chambers have chosen to examine the subjective requirements based on Article 30 – the mental element requirements, noting that "the general mental element contained in Article 30(1) (intent and knowledge) applies to all crimes under the jurisdiction of the Court "unless otherwise provided". (*Prosecutor v. Lubanga*, ICC PT. Ch. I, ICC-01/04-01/06-803, 29 January 2007, paragraph 351; *Prosecutor v. Lubanga*, ICC T. Ch. I, ICC-01/04-01/06-2842, 14 March 2012, paragraph 1007-1014).
At the Lubanga Pre-Trial stage, the chamber implicitly confirmed the status of the Elements of Crimes as law to be applied by the Court, suggesting that is equal to the Statute itself. In the drafting process of the Elements, some participants thought that the Elements could not provide for 'downward' departures from offence requirements listed in the Statute unless there was a clear mandate in the Statute itself (See R. Clark, The Mental Element in International Criminal Law, 12 Criminal Law Forum (2001) 291 at 320-321). This was exactly the situation that was presented to the Pre-Trial Chamber. The question presented to the PTC was: With respect to the age of the soldiers enlisted, does the general requirement of intention and knowledge (Article 30 of the ICC Statute) apply, or has the subjective threshold been lowered by the Elements, which require only that 'the perpetrator knew or should have known that such person or persons were under the age of 15 years' (Article 8(2)(b)(xxvi) of the ICC Statute)? The Pre-Trial Chamber stated that the crime definition in Article 8(3)(b)(xxvii) of the ICC Statute does not contain a special subjective element and Article 30 is therefore applicable. The Chamber then further specified that they "note that the third element listed in the Elements of Crimes for these specific crimes requires that in relation to the age of the victims [the perpetrator knew or should have known that such person or persons were under the age of 15 years] (Prosecutor v. Lubanga, ICC PT. Ch. I, ICC-01/04-01/06-803, 29 January 2007, paragraph 358). The Chamber then went on to explain that 'should have known' requires more negligence. Thus, the Pre-Trial Chamber concludes that the 'should have known' requirement is an exception to the 'intent and knowledge' requirement embodied in Article 30 of the Statute (Prosecutor v. Lubanga, ICC PT. Ch. I, ICC-01/04-01/06-803, 29 January 2007, paragraph 359).

The Dissent of Judge Fulford

Judge Fulford, dissented in the Trial Chamber Judgment in the Lubanga case, favoring a plain text reading of Article 25(3)(a), which would result in a lower standard of proof for the Prosecution, requiring a finding that at least two persons acted to implement a common plan. Additionally, his standard would require only a 'contribution to the crime', direct or indirect. In Judge Fulford's reasoning, a plain text reading of Article 25(3)(a) would establish the following elements for co-perpetration: a. The involvement of at least two individuals. b. Coordination between those who commit the offence, which may take the form of an agreement, common plan or joint understanding, express or implied, to commit a crime or to undertake action that, in the ordinary course of events will lead to the commission of the crime. c. A contribution to the crime which may be direct or indirect, provided either way there is a causal link between the individual's contribution and the crime. d. Intent and knowledge, as defined in Article 30 of the Statute, or as 'otherwise provided' elsewhere in the Court's legal framework.

Essentially, Judge Fulford was concerned about hypothetical and counterfactual reasoning that would be required by the control theory as applied by the Chamber's approach. Because this control theory requires the 'essential contribution' finding, it is necessary to decide if the crime would have still occurred in the absence of the defendant's contribution (Prosecutor v. Lubanga, ICC T. Ch. I, Judgment, Separate Opinion of Judge Adrian Fulford, ICC-01/04-01/06-2842, 14 March 2012, paragraph 17). As well Judge Fulford discusses that the Majority's approach creates a distinction between principals and accomplices, which Judge Fulford deems unnecessary since there are no international statutory sentencing guidelines (Prosecutor v. Lubanga, ICC T. Ch. I, Judgment, http://www.legal-tools.org/doc/677866/Separate Opinion of Judge Adrian Fulford, ICC-01/04-01/06-2842, 14 March 2012, paragraph 9). In this discussion, he refers to the question of whether the new language of individual criminal liability found in Article 25 has created a hierarchy of seriousness in crimes (with 25(3)(a) representing the most serious of crimes and 25(3)(d) representing the least. He rejects this notion, stating that "there is no proper basis for concluding that ordering, soliciting, or inducing a crime (Article 25(3)(b)) is a less serious form of commission than committing it 'through another person' (Article 25(3)(a) [...] Similarly, I am unable to accept that the criminality of accessories (Article 25(3)(c)) is greater than those who participate within a group (Article
25(3)(d)), particularly since many of history's most serious crimes occurred as the result of the coordinated actions of groups of individuals, who jointly pursued a common goal" (Prosecutor v. Lubanga, ICC T. Ch. I, Judgment, Separate Opinion of Judge Adrian Fulford, ICC-01/04-01/06-2842, 14 March 2012, paragraph 8). Lastly, as an interesting note Judge Fulford states that within the Lubanga case, he agrees that the test laid out by the Pre-Trial Chamber should be applied as the "case has been conducted on the basis of the legal framework established by the Pre-Trial Chamber". His opinion stems from fear of prejudicing the accused's right to be informed of the charges against him. He states that, in his view, "this requirement [...] means that the accused should not only be aware of the basic outline of the legal framework against which those facts will be determined. This ensures that the accused knows, at all stages of the proceedings, what he is expected to meet" (Prosecutor v. Lubanga, ICC T. Ch. I, Judgment, Separate Opinion of Judge Adrian Fulford, ICC-01/04-01/06-2842, 14 March 2012, paragraph 20).

In the case of Katanga and Ngudolo Chui, Pre-Trial Chamber I in its confirmation of charges reiterated its position on Article 25(3)(a), continuing to use the formulation developed in Lubanga and adding to its analysis to incorporate the issue of perpetration through another person, found in the language of Article 25(3)(a). Here, the Pre-Trial Chamber interpreted the concept of indirect perpetration in order to charge the co-accused as co-perpetrators based on the theory that they exercised 'joint control' over the crimes committed (Prosecutor v. Katanga, ICC PT. Ch. I, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, paragraph 473). The prosecutor charged the defendants, in the alternative, as accessories under Article 25(3)(b) for 'ordering' the crimes committed by the militia members. The Chamber decided that accessorial liability was 'rendered moot' by a finding of liability as principals under Article 25(3)(a) and hence did not further pursue the alternative of accessorial liability; Ibid, §§ 470–471. The Chamber thus sidestepped the question whether it is permissible for the prosecutor to present alternative charges although Reg. 52(c) of the ICC Regulations requires '[a] legal characterization of the facts to accord both with the crimes under Articles 6, 7 or 8 and the precise form of participation under Articles 25 and 28'. Following its lead in Lubanga, the Pre-Trial Chamber of Katanga defined 'control' as the criteria for distinguishing principal and accessory liability. However, here, the Chamber expanded upon their statement, interpreting the 'control or mastermind' formula to include the situation where a person 'has control over the will of those who carry out the objective elements of the offence' (Prosecutor v. Katanga, ICC PT. Ch. I, ICC-01/04-01/07-717, 30 September 2008, paragraph 488). As well, the Chamber concludes that 'control' over an immediate actor can be exerted by means of an organization. Since the Article explicitly declares it irrelevant whether the person through whom the crime is committed acts culpably or not, the Chamber here concludes that the 'control' over the immediate actor can be exerted through an organization. The Chamber notes that, "[...] the cases most relevant to international criminal law are those in which the perpetrator behind the perpetrator commits the crime through another by means of 'control over an organization'" (Prosecutor v. Katanga, ICC PT. Ch I, ICC-01/04-01/07-717, 30 September 2008, paragraph 498). Importantly, the Pre-Trial Chamber then goes on to define the necessary elements of an 'organization' for these purposes:

The Chamber finds that the organization must be based on hierarchical relations between superiors and subordinates. The organization must also be composed of sufficient subordinates to guarantee that superiors' orders will be carried out, if not by one subordinate, then by another. These criteria ensure that orders given by the recognized leadership will generally be complied with by their subordinates (Prosecutor v. Katanga, ICC PT. Ch I, ICC-01/04-01/07-717, 30 September 2008, paragraph 512).

The Chamber goes on to explain that perpetration by means of an organization can also be committed jointly by several leaders acting in concert, provided that each leader supplied a contribution necessary

In the Al Bashir arrest warrant, the Prosecution broke new ground, exclusively basing the charges on the concept of indirect perpetration. According to the Prosecutor's application, this mode of liability under Article 25(3)(a) included the following three elements:

a) the Prosecution must establish the existence of a relationship such that the indirect perpetrator may impose his dominant will over the direct perpetrator to ensure that the crime is committed. Where, as in this Application, the indirect perpetrator is alleged to have committed the crime through an organization or group, that institution must be "hierarchically organized". b) Second, the indirect perpetrator must have sufficient authority within the organization such that he has 'the final say about the adoption and implementation' of the policies and practices at issue. c) Third, the indirect perpetrator must be 'aware of his unique role within the [organization] and actively use it' in furthance of the crimes charged (Prosecutor v. Bashir, PT. Ch. I, Public Redacted Version of the Prosecution's Application under Article 58, ICC-02/05-157-AnxA, 12 September 2008, paragraph 248).

The Prosecutor based his approach on the findings of Pre-Trial Chamber I in the Lubanga case (Prosecutor v. Bashir, PT. Ch. I, ICC-02/05-157-AnxA, 12 September 2008, paragraph 309). The Chamber then provided further reasoning on indirect co-perpetration based on the notion of control over an organization within the Al Bashir Warrant of Arrest with respect to the Darfur situation. The judges contemplated three different forms of perpetration (indirect, co, and indirect co-perpetration) to qualify the participation of the accused in the alleged crimes that were directly carried out by members of the Sudanese Armed Forces, the allied militia, the Janjaweed and other individuals (Prosecutor v. Bashir, PT. Ch. I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09-3), 4 March 2009, paragraphs 209-223). The Chamber found that Al Bashir played an essential role in coordinating the design and the implementation of the common plan, which consisted in the unlawful attack on a part of the civilian population of Darfur, belonging to specific ethnic groups. Thus, the Chamber reiterated that, "the notion of indirect co-perpetration is applicable when some or all of the co-perpetrators carry out their respective essential contributions to the common plan through another person. As the Chamber has underscored, in these types of situations co-perpetration or joint commission through another person is not possible if the suspects behaved without the concrete intent to bring about the objective elements of the crime and if there is a low and unaccepted probability that such would be a result of their activities" (Prosecutor v. Bashir, PT. Ch. I, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09-3), 4 March 2009, paragraph 213).

It is important to note here though that the judges had differing views over the need to resort to indirect co-perpetration (Prosecutor v. Bashir, PT. Ch. I, ICC-02/05-01/09-3, 4 March 2009, paragraphs 211-213, See also Separate and Partly Dissenting Opinion of Judge Usacka, paragraphs 103-104). Judge Usacka, offering a dissenting view, noted that because she was not able to find that Al Bashir had full control, or whether it was shared by others so that each person had the power to frustrate the completion of the crime, she would not subscribe to the Majorities assessment of indirect co-perpetration and would rather have found as the sole mode of liability indirect perpetration (Prosecutor v. Bashir, Separate and Partly Dissenting Opinion of Judge Usacka, PT. Ch. I, ICC-02/05-01/09-3, 4 March 2009, paragraph 104).

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Updated: 30 June 2016

Article 25(3)(a) - indirect perpetration
through another person, regardless of whether that other person is criminally responsible;

**Indirect Perpetration**

A scenario often envisioned under the concept of indirect perpetration is the case of the so-called 'perpetrator behind the perpetrator', where the direct perpetrator is manipulated or exploited by the indirect perpetrator to commit the crime, but who nevertheless remains a fully responsible agent. This has been formulated by the Lubanga Appeals Chamber as "being based on the notion that a person can commit a crime 'through another person'. The underlying assumption is that the accused makes use of another person, who actually carries out the incriminated conduct, by virtue of the accused's control over that person, and the latter's conduct is therefore imputed on the former". ([Prosecutor v. Lubanga](https://www.icc-cpi.int偶像/Pages/Document.aspx?DocumentID=147&FileID=147&LangID=1), A. Ch., Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, 1 December 2014, paragraph 465). This formulation was also used in the Pre-Trial Chamber decision in the [Blé Goudé](https://www.icc-cpi.int偶像/Pages/Document.aspx?DocumentID=147&FileID=147&LangID=1) decision on the Confirmation of Charges. ([Prosecutor v. Blé Goudé](https://www.icc-cpi.int偶像/Pages/Document.aspx?DocumentID=147&FileID=147&LangID=1), PT. Ch. I, ICC-02/11-02/11), 31 December 2014, paragraph 134.

When looking at the Chamber's reasoning in applying the law in this manner, rather than a plain text reading as suggested by Judge Fulford or a JCE approach as has been customary international law and established law at the ad hoc tribunals, the Chamber gave three reasons: 1) The notion of control over crime has been incorporated into the framework of the Statute, 2) it has been increasingly used in national jurisdictions and 3) it has been addressed in the jurisprudence of the international tribunals ([Prosecutor v. Katanga](https://www.icc-cpi.int偶像/Pages/Document.aspx?DocumentID=147&FileID=147&LangID=1), ICC PT. Ch. I, Decision on the Confirmation of Charges, 30 September 2008, paragraphs 500-510). As regards the second reasoning given, the Chamber noted 'the control over the crime approach has been applied in a number of legal systems and is widely recognized in legal doctrine ([Prosecutor v. Katanga](https://www.icc-cpi.int偶像/Pages/Document.aspx?DocumentID=147&FileID=147&LangID=1), ICC PT. Ch. I, Decision on the Confirmation of Charges, 30 September 2008, paragraph 485).

**Indirect and Co-Perpetration**

The concept of indirect co-perpetration is complex. Within the Katanga decision, the Pre-Trial Chamber adopted a sophisticated and complicated line of reasoning, combining the concepts of joint commission and commission through another ([Prosecutor v. Katanga](https://www.icc-cpi.int偶像/Pages/Document.aspx?DocumentID=147&FileID=147&LangID=1), ICC PT. Ch. I, Decision on the Confirmation of Charges, 30 September 2008, paragraph 492).

The Chamber found this necessary to overcome difficulties regarding the categorization of the responsibility of two accused as principals for the crimes carried out by members of their two military organizations under their control. In fact, the Chamber stated that though Katanga and Ngudjolo acted with a common plan, some of the members within the two organizations only accepted orders from the leader of their own ethnic group. Therefore, not all the direct perpetrators of the crime were considered to fall directly under the control of the two leaders. In order to solve this problem, the judges combined the two forms of group criminality found in Article 25(3)(a) – indirect co-perpetration.

The Chamber affirmed that:

[... an individual who has no control over the person through whom the crimes would be committed cannot be said to commit the crime by means of that other person. However, if he acts jointly with another individual – one who controls the person used as an instrument – these crimes can be attributed to him on the basis of mutual attribution ([Prosecutor v. Katanga](https://www.icc-cpi.int偶像/Pages/Document.aspx?DocumentID=147&FileID=147&LangID=1), ICC PT. Ch. I, Decision on the Confirmation of Charges, 30 September 2008, paragraph 493).]

Due to the very high threshold that the Chamber has set for both the objective elements and subjective elements and the narrow terms in which the law is being construed, a fact pattern such as that found in the Katanga case with multiple organizations and perpetrators and a complex network of criminal activity presents a complicated problem. The Court needed a way to loosen this mode of liability and by combining
the second and third forms of perpetration under Article 25(3)(a) of the ICC Statute, the Chamber has endeavored to bring certain forms of conduct under the same notion of perpetration that would otherwise remain outside of it.

The Appeals Chamber neither confirmed nor appeared to deny the validity of this form of perpetration in the Lubanga Appeals Chamber decision noting that Article 25(3)(a) of the Statute expressly provides for three forms of commission liability - individual, jointly with another person, or through another person. (Prosecutor v. Lubanga, ICC A. Ch., Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, 1 December 2014, paragraph 464). The Appeals Chamber also noted that the Court's jurisprudence contained differing views on the existence of a fourth form of commission liability where a perpetrator may commit a crime jointly with another as well as through another person: indirect co-perpetration. The Appeals Chamber expresses no particular view on whether they find this form of commission liability valid, leaving the issue open to further litigation on the matter. (Prosecutor v. Lubanga, ICC A. Ch., Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3132-Red, 1 December 2014, footnote 863).

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Updated: 30 June 2016

Article 25(3)(b)

Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted.

The forms of participation listed under Article 25(3)(b) are specific and distinct from those provided for in the other sub paragraphs. Here a person ordering a crime is not merely an accomplice, but a perpetrator by means. In fact, Article 2(3)(b) of the 1996 Draft Code was intended to provide for the criminal responsibility of mid-level officials who order their subordinates to commit crimes.

This form of individual criminal liability has not been litigated judicially within the framework of the ICC and thus, there is no jurisprudence from which to analyze. In the Katanga warrant of arrest, individual criminal responsibility was pled under 25(3)(a) or 25(3)(b) (Prosecutor v. Katanga, PT. Ch. I, ICC-01/04-01/07-649-AnxIa, 26 June 2008, paragraph 94). However, the Pre-Trial Chamber confirmed the charges based on liability under 25(3)(a), leaving no discussion or jurisprudence on subparagraph (b) (Prosecutor v. Katanga, PT. Ch. I, ICC-01/04-01/07-649-AnxIa, 26 June 2008, paragraph 94).

It is important to note the close relationship that sub paragraph (b) has with Article 28 which governs command responsibility. The first alternative in subparagraph (b), “orders”, complements the command responsibility provision in Article 28. In the Article 28 provision the superior is liable for an omission while in the case of an order to commit a crime (Article 25(3)(b)) the superior is liable for commission for having ‘ordered’. According to Ambos in the Triffterer commentary, “the first alternative in subparagraph (b) actually belongs to the forms of perpetration provided for in subparagraph (a), being a form of commission ‘through another person’”. Other commentators have pondered whether ordering a crime is not more appropriately dealt with within Article 28, rather than naming ordering a crime as a case of instigation, which could be seen as inappropriately degrading a form of perpetration to mere complicity.

Commenting on the latter two provisions within subparagraph (b), Ambos notes that “soliciting a crime means, inter alia, to command, encourage, request or incite another person to engage in specific conduct to commit it, while to "induce" means to influence another person to commit a crime. Inducing is an umbrella term which covers soliciting. Inducing is a broad enough term to cover any conduct which leads another person to commit a crime, including solicitation. It is important to note that neither solicitation nor
inducement require a superior-subordinate relationship.

A last useful note on subparagraph (b) is to keep in mind that according to commentary, excesses of the perpetrator cannot be attributed to an instigator. This is key as the instigator’s scope of intent limits his responsibility and is important in cases where a principal may commit a further crime than he was instigated to do. In other respects the drafting of this sub paragraph is consistent with previous international laws concerning instigation crimes and there is not expected to be much confusion in how to apply this law, once cases come before the Court.

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Updated: 30 June 2016

Article 25(3)(c)

[270] For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

Subparagraph (c) is set to cover the field of complicity by assistance which falls short of instigation (subparagraph (b)) but goes beyond 'other contributions' such as contributing to group activities within subparagraph (d). This form of liability under Article 25(3)(c) has not yet been adjudicated at the ICC. However, the Mbarushimana Pre-Trial Chamber commented, with reference to this sub-provision, in its Confirmation of Charges decision that "the application of analogous modes of liability at the ad hoc tribunals suggests that a substantial contribution to the crime may be contemplated" (Prosecutor v. Mbarushimana, PT. Ch. I, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, 16 December 2011, paragraph 279).

One difference that has been pointed out with regard to sub paragraph (c) of the Rome Statute as compared to the jurisprudence of the ad hoc tribunals is that the latter does not require the aider and abettor to share the intent of the perpetrator to commit the crime. With the drafting of subparagraph (c) "the aider and abettor must act with the purpose of facilitating the commission of that crime".

As well, there has been debate as to whether the actus reus required should likewise differ from the ad hoc tribunals' 'substantial contribution' requirement (Prosecutor v. Mbarushimana, PT. Ch. I, ICC-01/04-01/10-465-Red, 16 December 2011, paragraph 281). However, the Lubanga Trial Chamber did address the contribution threshold requirement of subparagraph (c) in relation to defining the contribution threshold for Article 25(3)(a) as a principal actor versus an accessorial actor suggesting that if accessories must have had 'a substantial effect on the commission of the crime' to be held liable, then co-perpetrators must have had [...] more than a substantial effect (Prosecutor v. Lubanga, ICC T. Ch. I, Judgment, ICC-01/04-01/06-2842, 14 March 2012, paragraph 997). Thus, they seem to implicitly assume or endorse the substantial effect standard for contribution as an aider and abettor.

Scholarly commentary on the subparagraph has noted that the language used in the ad hoc tribunals' 'aiding and abetting' formulation, is slightly different in the Rome Statute. The Rome Statute speaks of a person who 'aids, abets or otherwise assists' in the attempt or accomplishment of a crime, including 'providing the means for its commission'. This wording may suggest that 1) aiding and abetting are not one unit but rather each term has its own meaning, 2) aiding and abetting are only two forms of possible assistance, with 'otherwise assists' being an umbrella term to encompass other forms of possible assistance and 3) 'providing the means' for the commission of a crime is merely an example of assistance.

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Article 25(3)(d)

[271] In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

Article 25(3)(d) of the ICC Statute regulates a new form of criminal participation: contributing to the commission of a crime or an attempted crime by a group. Some have argued that the jurisprudence of the ad hoc Tribunal's JCE theory and Article 25(3)(d) of the ICC Statute might be considered 'little cousins'. In contrast, others have argued that Article 25(3)(d) 'certainly cracks open the door, but it is far from clear how much of the ICTY's complex JCE doctrine will be able to slip through it'.

In the Prosecution's submission in the Mbarushimana case requesting a Warrant for Arrest, they sought the arrest warrant based on the Accused's individual responsibility as a co-perpetrator under Article 25(3)(a) and in the alternative as an accessory under Article 25(3)(d) of the Statute (Prosecutor v. Mbarushimana, PT. Ch. I, Prosecution's Application under Article 58, ICC-01/04-573-US-Exp, 20 August 2010, page 68).

In its analysis on accessorial liability based on Article 25(3)(d), the Pre-Trial Chamber stated the objective and subjective elements required in order to find individual responsibility. The three objective elements were stated as: i) a crime within the jurisdiction of the Court is attempted or committed; ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose; and iii) the individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (d) of the Statute. The subjective elements were elaborated as: i) the contribution shall be intentional; and ii) shall either a) be made with the aim of furthering the criminal activity or criminal purpose of the group; or b) in the knowledge of the intention of the group to commit the crime (Prosecutor v. Mbarushimana, PT. Ch. I, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, ICC-01/04-01/10-1. 11 October 2010, paragraph 39).

In its Decision on the Confirmation of Charges, the Pre-Trial Chamber rejected the idea that Article 25(3)(d) only applied to 'outside contributors' who are essentially assisting in a collective crime from the outside, but who are not themselves a member of the criminal group (Prosecutor v. Mbarushimana, PT. Ch. I, ICC-01/04-01/10-465-Red, 16 December 2011, paragraph 273). The Chamber reasoned that "[t]o adopt an essential contribution test for liability under Article 25(3)(a) of the Statute, as this Chamber has done, and accept the Defence argument that 25(3)(d) liability is limited only to non-group members would restrict criminal responsibility for group members making non-essential contributions in ways not intended [...]" (Prosecutor v. Mbarushimana, PT. Ch. I, ICC-01/04-01/10-465-Red, 16 December 2011, paragraph 273).

While not imposing the high 'essential contribution' language, the Chamber did require a threshold of 'significant contribution' for the accused to have made toward crimes committed or attempted. (Prosecutor v. Mbarushimana, PT. Ch. I, ICC-01/04-01/10-465-Red, 16 December 2011, paragraph 283).

Doctrine:


Author: Kirsten Bowman
Updated: 30 June 2016

Article 25(3)(e)

[272] In respect of the crime of genocide, directly and publicly incites others to commit genocide;

Article 25(3)(e) of the ICC Statute criminalizes direct and public incitement of others to commit genocide. It is in substance identical to Article III(c) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the ICTY and ICTR Statutes. Genocide is the only international crime to which public incitement has been criminalized. The reason for this provision is to prevent the early stages of genocide even prior to the preparation or attempt thereof.

To incite 'publicly' means that the call for criminal action is communicated to a number of individuals in a public place or to members of the general public at large particularly by technological means of mass communication, such as by radio or television. To incite 'directly' means that a person is specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion. This incitement comes very close to, if not even substantially covered by, instigation according to Article 25(3)(b), thus losing much of its own significance. The difference between ordinary form instigation, e.g. instigation on the one hand and incitement to genocide on the other, lies in the fact that the former is specifically directed towards a certain person or group of persons in private while the latter is directed to the public in general. There is one important difference between incitement to genocide and the forms of complicity under subparagraphs (b), (c) and (d): incitement with regard to genocide does not require the commission or even attempted commission of the actual crime, i.e. genocide. As such, incitement to commit genocide is an inchoate crime.

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Updated: 30 June 2016

Article 25(3)(f)

[273] Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely
and voluntarily gave up the criminal purpose.

Article 25(3)(f) provides for the criminal responsibility of an individual who attempts to commit a crime within the jurisdiction of the Court if a person commits an act to carry out his or her intention and fails to successfully complete the crime only because of some independent factor which prevents him or her from doing so. The phrase ‘does not occur’ recognizes that the notion of attempt by definition only applies to situations in which an individual endeavours to commit a crime and fails in this endeavour. Thus, an individual incurs criminal responsibility for unsuccessfully attempting to commit a crime only when the following elements are present: (a) intent to commit a particular crime; (b) an act designed to commit it; and (c) non-completion of the crime for reasons independent of the perpetrator's will.

On the other hand, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime is not criminally responsible. The provision does not clarify at what stage of the commission abandonment is still admissible or under which circumstances the abandonment is voluntary. This problem is left for the Court. However, some guidance may be sought in the phrase "by taking action commencing the execution of a crime" which is used to indicate that the individual has performed an act which constitutes a significant step towards the completion of the crime.

In Prosecutor v. Katanga and Ngudjolo Chui, ICC PT, Ch. I, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, para. 460, PTC I endorsed the "doctrine that establishes that the attempt to commit a crime is a crime in which the objective elements are incomplete, while the subjective elements are complete. Therefore, the dolus that embodies the attempt is the same than the one that embodies the consummated act. As a consequence, in order for an attempt to commit a crime to be punished, it is necessary to infer the intent to further an action that would cause the result intended by the perpetrator, and the commencement of the execution of the act".

Doctrine:


Author: Mark Klamberg

Updated: 30 June 2016

Article 25(3) bis

[274] In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

Article 25(3) bis echoes the requirement in Article 8 bis(1) that a ‘perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression’. The purpose of this paragraph is to clarify that the leadership requirement, discussed under Article 8 bis(1), applies also when making assessments under Article 25(3). It has been suggested that as acts of aggression are generally collective in nature, joint criminal enterprise will be the most applicable entry through which to assess individual responsibility [Cassese, 2007, p. 848].

While the various forms of participation are explained under Article 25(3)(a-f), it should be noted
here that it is uncertain whether it is possible to attempt to commit a crime of aggression in accordance with Article 25(3)(f), since the elements of the crimes clearly states that an act of aggression will have had to be committed in order for there to be a crime of aggression under the Rome Statute (Element 3). The Special Working Group on the Crime of Aggression held this to be a largely theoretical question, and decided not to actively exclude Article 25(3)(f) due to its unlikely application on the crime of aggression [Barriga, 2012, pp. 23-24].

Cross-references:
Article 8 bis

Doctrine:


Author: Marie Aronsson-Storrier

Updated: 30 June 2016

Article 25(4)

[275] No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

The ICC has no direct power to ascertain State responsibility. Nevertheless, the paragraph affirms the parallel validity of the rules of state responsibility.

Doctrine:


Author: Mark Klamberg

Updated: 30 June 2016

Article 26

[276] Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

The time limit of 18 is an absolute border completely independent of maturity of immaturity. The Statutes of the International Military Tribunal, the UN ad hoc tribunals provide no age of criminal responsibility. Article
7 of the Statute of the Special Court for Sierra Leone had the limit of fifteen but no teenagers were ever prosecuted. Article 40(3)(a) of the Convention on the Rights of the Child provides that States shall seek to establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law", without a specification of an age limit.

Turning to immaturity for person above the age of 18, responsibility of such persons may be excluded by a defence listed in Article 31(1)(a), when their immaturity results from a mental disease. It can also be a mitigating factor under Article 78(1). This article only applies to the jurisdiction of the ICC which means that youngsters may be tried by national courts.

**Doctrine:**


**Author:** Mark Klamberg

**Updated:** 30 June 2016

**Article 27**

[277]**Article 27 Irrelevance of official capacity**

**General Remarks**

The principles of state sovereignty and the equality of all states are fundamental to international relations and international law. As an extension of these principles certain state officials who represents their states are granted immunity from prosecution by international law. International law distinguishes between two types of immunity; immunity *ratione materiae*, which shields certain acts, and immunity *ratione personae*, which shields specific state officials.

Immunity *ratione materiae*, (often also referred to as functional immunity,) is attached to such acts that can be regarded as being acts of a state, i.e. non-private, sovereign acts. Anyone carrying out such state acts are protected by immunity *ratione materiae*. Immunity *ratione personae* (personal immunity) on the other hand relates to a specific office held by certain state officials. It is only a small group of senior state officials who enjoy immunity *ratione personae*. The ICJ stated in the *Arrest Warrant Case* that such is a firmly established principle in international law that immunity *ratione personae* attaches to heads of states and heads of government [para. 51]. Furthermore the ICJ stated that also ministers of foreign affairs enjoys immunity *ratione personae*.

Since immunity *ratione personae* attaches to the office itself and not a certain category of acts it shields the state official from prosecution for both official, non-private and private acts. However, while immunity *ratione materiae* never ceases to protect the protected acts immunity *ratione personae* ceases to exist when the state official in question leaves his or her office. All official acts carried out during the time of office are though protected by immunity *ratione materiae* also for these persons.

The scope of immunity *ratione materiae* and immunity *ratione personae* is mainly determined by customary international law, in which an exception from immunity *ratione materiae* has developed since the Nuremberg trials. The exception provides that a state official cannot rely on immunity *ratione materiae*
when committing international crimes [Kreß and Prost in Triffterer, 2008, p. 1608]. The ICTY has confirmed this exception in *Prosecutor v. Milošević* when the Trial Chamber argued that Article 7(2) of the ICTY Statute, which provides that the official capacity of a person shall not relieve him or her from criminal responsibility, reflects customary international law [*Prosecutor v. Milošević*, ICTY, T. Ch., 8 November 2001, para 28]. The Trial Chamber found that the fact that Slobodan Milošević was the former president of the Federal Republic of Yugoslavia did not stop the ICTY from having jurisdiction over him. The ICTY addressed Milošević’s immunity *ratione materiae* since he no longer was the incumbent president and therefore did not enjoy immunity *ratione personae.* Two years later, the ICTY confirmed its earlier findings in *Prosecutor v. Kristić* (who was found guilty of inter alia aiding and abetting genocide):

"It may be the case (it is unnecessary to decide here) that, between States, such a functional immunity exists against prosecution for those acts, but it would be incorrect to suggest that such an immunity exists in international criminal courts". [*Prosecutor v. Kristić*, ICTY A. Ch., 1 July 2003, para 26]

Whether customary law provides for an exception from immunity *ratione personae* with regard to criminal proceedings before international courts is at this point not certain. The issue is though widely discussed. However the status of immunity *ratione personae* in customary law is of no importance in the relationship between the ICC and its member states. When becoming a member state to the ICC, and consenting to Article 27 of the Rome Statute, every member state waives the immunity *ratione personae* that would otherwise be accorded to its state officials (see below). Article 27 is therefore one of the more important Articles in the Rome Statute when it comes to reaching the aim set out in the preamble of putting an end to the impunity of perpetrators of international crimes since the Article grants the ICC jurisdiction over the highest state officials of the member states [Triffterer, 2008, p. 786].

**Cross-reference:**

Article 98(1)

**Author:** Camilla Lind

**Updated:** 30 June 2016

**Article 27(1)**

1. *This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*

According to Article 27(1) state officials, for example - but not exclusively - those mentioned in the Article, that would otherwise be protected by immunity *ratione materiae* or immunity *ratione personae* can be held responsible for committing international crimes [Triffterer, 2008, pp. 787-788]. The aim of Article 27(1) is to remove any immunity that may be attached to any official capacity, not only the immunities applying to the official capacities mentioned in the Article. Article 27(1) therefore focuses of the functional immunity of state officials [Gaeta in Cassese, 2002, p. 990].

**Cross-reference:**

Article 98(1)

**Author:** Camilla Lind
Article 27(2)

[279] 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 27(2) aims at providing the ICC with jurisdiction over crimes committed by state officials enjoying immunity ratione materiae or immunity ratione personae [Triffterer, 2008, p. 791]. Also immunity accorded to state officials by customary international law is irrelevant according to the Article since it explicitly refers to both national and international law [Schabas, 2010, p. 449].

i. Waiver of immunity for state parties

Article 27 is to be interpreted as a waiver of immunity accorded to the state officials by the state parties to the Rome Statute [Schabas, 2010, p. 450, Kreß and Prost in Triffterer, 2008, p. 1607]. By acceding to the Rome Statute the state consents to Article 27 and the provision stating that immunities shall not bar the court from exercising jurisdiction over their state officials. Thereby the state has waived the immunity that would otherwise be accorded to its state officials. The waiver of immunity is, according to most authors, to be interpreted as having effect not only in the relation between the state party and the ICC, but also in the relation between two or more state parties to the Rome Statute since all state parties has consented to waive the immunities of its state officials [Kreß and Prost in Triffterer, 2008, p. 1607]. Also, it has been argued that not giving the waiver effect in the relationship between different state parties would deprive the Article of all practical meaning. If it only would have effect in the relationship between the individual member state and the ICC the Article would be practically useless since the ICC then would have to obtain a specific waiver from the member state of a state official when requesting other member states to cooperate with the arrest and surrender of that state official [Kreß and Prost in Triffterer, 2008, p. 1607, Akande, 2004, p. 420]. The question of the scope of the waiver is important when discussing Article 98(1).

ii. The relationship between Article 27 of the Rome Statute and non-member states to the Statute.

When it comes to the relationship between the ICC and non-member states the general rule in Article 34 of the Vienna Convention on the Law of Treaties must be held in mind. According to that Article contracting states cannot create obligations for states that are not parties to a convention. This is true also when it comes to the Rome Statute and Article 27, meaning that state officials of non-state parties to the Rome Statute still may be accorded immunity in accordance with international law since the state parties to the Rome Statute cannot remove the immunity of state officials of non-member states [Schabas, 2010, p. 450].

Article 27 has been up for discussion in two decisions by the Pre-Trial Chamber in the case of Prosecutor v. Omar Al Bashir. These two decisions shall be commented. When reading the decisions it shall be kept in mind that Omar Al Bashir is currently the incumbent president of Sudan, which is a non-member state to the Rome Statute. The situation in Sudan was referred to the ICC by the United Nations Security Council by Resolution 1593 (2005) under Article 13(b) of the Rome Statute.

Pre-Trial Chamber Decision of 4 March 2009

In Prosecutor v. Omar Al Bashir, ICC PT. Ch. 1, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, Pre-Trial Chamber I addressed the question of whether Al Bashir’s status as head of state of a non-state party to the ICC would shield him from proceedings before the ICC. The conclusion of the Pre-Trial Chamber was that Al Bashir does not enjoy immunity from proceedings before the ICC (para. 41). When reaching that conclusion the Chamber
considered, among other things that one of the clearly stated goals of the Rome Statute is to end the impunity of perpetrators of international crimes [para. 42]. The Chamber also relied on three core principles derived from Article 27, being that "(i) [the Rome Statute] shall apply equally to all persons without any distinction based on official capacity;" (ii) "official capacity as a Head of State or Government, a member of Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence;" and (iii) "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person" [para. 43]. The Pre-Trial Chamber also stated that there is a provision in the Rome Statute dealing with the immunity of state officials and that this provision must, according to its interpretation of Article 21 of the Rome Statute, be used also in relationship to non-party states [para. 44].

The Pre-Trial Chamber's decision of 4 March 2009 has been widely discussed. According to Schabas, the Pre-Trial Chamber has interpreted the applicability of Article 27(2) incorrectly. The Pre-Trial Chamber has interpreted Article 27 as being applicable also to states that are not parties to the Rome Statute even though the Vienna Convention on the Law of Treaties explicitly provides that a treaty cannot create obligations for third states [Schabas, 2010, p. 451]. Gaeta is however of the same opinion as the Pre-Trial Chamber and argues that Article 27(2) is indeed applicable also to state officials of non-party states even though she admits that the arguments put forward by the Pre-Trial Chamber in its decision are unconvincing [Gaeta, 2009, pp. 322-325]. Kreß is also of the view that Article 27(2) is applicable to state officials of non-state parties. He argues that when a situation is referred to the ICC from the United Nations Security Council, the Security Council can (and has, in the case of Sudan, indeed intended to) place a non-state party in a position that is analogous to the position of a state party. Consequently, the ICC can apply the provisions of the Rome Statute regardless of whether the state concerned is a party or not to the Rome Statute [see Kreß, 2012, 241-242].

Pre-Trial Chamber Decision of 12 December 2011
In Prosecutor v. Omar Al Bashir, ICC PT. Ch I, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, the Pre-Trial Chamber stated that heads of states of non-parties to the Rome Statute do not enjoy immunity according to international law [para. 36]. The Pre-Trial Chamber supports its finding by referring to the statutes of the ICTY and the ICTR and that the ICTY has stated that the corresponding Article in the ICTY Statute is declaratory of customary international law [paras. 29-31]. It is however worth noting that the statutes of the ICTY and ICTR does not explicitly waive the immunity accorded to state officials, which Article 27 of the Rome Statute does. A reference was also made by the Pre-Trial Chamber to an obiter dictum in the Arrest Warrant Case stating that incumbent high ranking state officials may be subject to proceedings before some international courts, including the ICC [para. 33] and to an argument given by Cassese that the underlying rationales for immunity ratione personae are different depending on whether a national or an international court is exercising jurisdiction [para. 34]. According to the Pre-Trial Chamber Article 27 of the Rome Statute is declaratory of customary international law not only when it comes to immunity ratione materiae but also with regard to immunity ratione personae. Whether that is the case or not is however, as earlier mentioned, discussed in the literature. No certain answer to the question of the status of immunity ratione personae in customary law has been reached. It is however clear from the two Pre-Trial Chamber decisions that the ICC considers that there is an exception from the immunity ratione personae when it comes to international crimes.

Cross-reference:
Article 28 - General Remarks

[280] Responsibility of commanders and other superiors

General Remarks

Article 28 sets out the parameters for how the ICC shall apply the doctrine of superior responsibility under which, in specific circumstances, military commanders, persons effectively acting as military commanders and certain other superiors are held accountable for the crimes undertaken by their subordinates, or perhaps more accurately, with regard to the crimes of their subordinates.

Superior responsibility has its origins in military law and finds its basis in the principle that armed forces always should be "commanded by a person responsible for his subordinates" as expressed in Article 1(1) of the Hague Regulations from 1899 and the corresponding legal duty of the superior to "ensure that members of the armed forces under their control are aware of their obligations" and "to prevent and repress breaches undertaken by subordinates" as expressed in Article 87 and 86 of Additional Protocol I from 1977 respectively. The doctrine has successively been developed and refined and is now understood to also cover relationships that are not military in nature (see commentary on Article 28(2)(b) below).

Article 28 has kept the old distinction between the responsibility of military commanders and persons effectively acting as military commanders on the one hand and other superiors (often referred to as 'non-military' or 'civilian superiors') on the other. The responsibility of the former is addressed in Article 28(a).
whereas the responsibility of the latter, non-military superiors, are regulated in Article 28(b). Hereinafter the term 'command responsibility' will be used when referring to the responsibility under Article 28(a), the term 'non-military superior responsibility' will be used when referring to the responsibility under Article 28(b), and the term 'superior responsibility' will be used when referring to the overall responsibility covered under article 28.

Early ICTY case law articulated a three-prong-test under which one would determine whether a person could be convicted on the basis of superior responsibility under ICTY Statute Article 7(3) (the Article corresponding to the Rome Statute Article 28):

- Existence of a superior-subordinate relationship
  Put in simple terms, this entails that in situations where a certain individual (military as well as non-military), in a de jure or de facto position of authority, possesses a material ability to prevent and punish subordinates from committing international crimes, there exists a superior-subordinate relationship.

- Subjective element (Mens rea)
  There are different standards set out as the subjective element for superior responsibility:
  - Actual knowledge: The superior has actual knowledge that his subordinates are about to commit or have committed crimes. (The actual knowledge can be proven with direct or circumstantial evidence)
  - "Reason to know" standard: i.e. the superior possesses information of a nature which would put him on notice of the risk of such offences by indicating a need for additional investigation in order to ascertain whether the crimes were about to be or had been committed.
  If fulfilled, either of these subjective elements would give rise to responsibility under the doctrine of superior responsibility.

- The superiors failure to prevent or punish the crimes
  The superior can incur responsibility for either:
  - Failing to prevent the crimes before they occur, or,
  - Failing to punish the subordinates for committing the crimes after they have occurred.
  (Ambos, 2002, p. 833-835)

The same three elements are also present in Article 28 of the Rome Statute. The elements do however differ in some respects from the standards set out in the jurisprudence from the ICTY and other ad hoc tribunals. These elements, as well as some additional requirements (e.g. causality) and interpretations of the doctrine, will be presented and explained in the following commentary. The elements of the doctrine will however, as far as possible, be presented in the same order as they appear in the wording of the Article and will therefore follow the structure as laid out therein.

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Updated: 30 June 2016

Article 28

[28] In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court
According to the first line of the Article, superior responsibility adds to “other grounds of criminal
responsibility" which are to be found elsewhere in the Statute. These "other grounds of criminal responsibility" (hereinafter referred to as 'modes of participation') are specifically listed in Article 25.

Superior responsibility is thus distinct from e.g. "ordering" under Article 25 which requires the superior to have actively contributed to the crime in question. (Prosecutor v. Bemba, ICC PT Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 15 June 2009, § 405.) With regards to accountability under Article 28, there need not be proof of any order or action undertaken by the superior him- or herself. Rather, under this doctrine, the superior incurs responsibility on the basis of his or her inaction, or more accurately, for the failure or omission to prevent or punish the actions of the perpetrators. However, the exact nature of the doctrine of superior responsibility has long been discussed and differing opinions on the subject have emerged in both academic debate and case law.

It has, for example, sometimes been questioned as to what extent the doctrine is merely disciplinary as opposed to penal or criminal in nature. This question partly originates from the wording of and the discussions held during the adoption of Article 86(2) of Additional Protocol I from 1977. Article 86(2) reads: "The fact that a breach of the Conventions or this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be. [...]". (emphasis added) The Rome Statute has eliminated any such confusion, making Article 28 equally relevant to all "crimes within the jurisdiction of the Court" and by, at the outset of the article, specifying that it is criminal responsibility of the superior that the Article gives rise to.

Another interesting question relating to the nature of the doctrine is precisely what the superior is held criminally responsible for if he/she is found guilty strictly on the basis of Article 28. Put in simple terms, the issue at hand is how superior responsibility relates to the "principal crime" (i.e. the crime committed by the subordinates; war crime, crimes against humanity or genocide). In other words, should the superior, if convicted strictly based on the doctrine of superior responsibility, for example be held criminally responsible merely for his/her own "dereliction of duty" or should he/she be held accountable for the "principal crime"? This is not merely a theoretical question. Depending on what one believes that the superior is responsible for, there will be practical consequences, not only in relation to the stigma attached to a guilty verdict under the doctrine, but also in respect of e.g. sentencing considerations, evidentiary demands and possibly even the interpretation of the elements of the doctrine.

The wording of Article 28 suggests that the superior should be responsible for the crimes committed by his subordinates. A literal interpretation hereof would thus lead to the conclusion that the superior should be held responsible for the "principal crime". The interpretation of the Article is nevertheless, not as clear cut as it might seem prima facie. The issue is still under debate and so far unresolved. A straightforward answer to these questions could hence not be provided until it has properly been addressed by the ICC, however, various thoughts have been purported in the academic debate and case law emanating from the ad hoc tribunals. The following is a brief presentation of a few examples of differing opinions concerning the interpretation of the nature of the doctrine.

(1) One possible interpretation as to the nature of the doctrine is that the superior is responsible for actually having participated in the commission of the "principal crime". As such the superior becomes responsible for the "principal crime" under the theory of "commission by omission".

The general rules pertaining to criminal omission is a complex area of law wherefore a few words about the meaning hereof seem to be called for in this respect. A simplified explanation of the concept (or rather one variant hereof) is that where there is a duty to act prescribed by law, a person omitting to fulfill such a duty could be held criminally responsible for the crime.

An Article dealing with a general responsibility for omission as suggested in the Draft Statute, was excluded from the final version of the Rome Statute. It could be argued that the only remnants of a rule on omission in the Statute, is enshrined in Article 28. (Ambos, 2002, p. 850)
The basis of the doctrine of superior responsibility is, unquestionably, the superior's legal duty to control subordinates. Since the adoption of Article 86(2) of AP I from 1977 there has been a clear, codified legal duty in international humanitarian law for a superior to prevent and punish criminal activities undertaken by his/her subordinates. Omitting to fulfill this legal duty gives rise to criminal responsibility. It could thus be argued that these rules are in line with general rules on commission by omission.

However, whether the criminal responsibility covers solely the superior's own "failure to supervise" or the "principal crime", with respect to theories of omission, is still under debate. The idea that superior responsibility should give rise to direct responsibility for the "principal crime" under the theory of commission by omission, has been heavily criticized.

(2) Another possible interpretation of the nature of the doctrine is whether superior responsibility is a Mode of Participation and the superior in this manner is convicted as a participant in the "principal crime". Superior responsibility shares common feature with other Modes of Participation in that they are accessory to the principal crimes committed by other perpetrator/s. The difference is however that in respect of the other Modes of Participation there needs to be a positive act or, at least, a certain level of contribution to the commission of the principal crime. As stated earlier, superior responsibility is rather characterized by inaction/non-action of the superior. Despite this fact, there have been strong proponents for an interpretation of that superior responsibility should be interpreted as a Mode of Participation. (Orić Prosecution Appeal Brief, 18 October 2006, § 162)

Case law emanating from the aftermath of WWII tends to view superior responsibility as a Mode of Participation and the superiors were convicted for the principal crime committed by the subordinates. (US v. Leeb (Hostage Case), TWC vol XI, 512-543; US v. List (High Command Case), TWC, Vols X and XI, 1271)

The early case law from the ICTY also tend to treat superior responsibility as a Mode of Participation or at least that the superior is responsible for the principal crime (e.g. Prosecutor v. Mucic et al., ICTY T. Ch., 16 November 1998, § 333, Prosecutor v. Mucic et al., ICTY A Ch, 20 February 2001, § 198, Prosecutor v. Aleksovski, (Case no. IT-95-14/1-T), ICTY T. Ch., Judgement, § 67). According to a survey undertaken by the Trial Chamber in the Halilović judgement, it was concluded that, up to that date, the superior had consistently been "responsible for the crimes of his subordinates [when convicted] under Article 7(3)" i.e. the responsible for the "principal crime". (Prosecutor v. Halilović, ICTY T. Ch., Judgement IT-01-48-T, 16 November 2005, § 53). Exactly what is meant by the fact that the superior is responsible for "the crimes of his subordinates" is however still not clear.

In the Halilović judgement, the Trial Chamber did however reach a different conclusion than what had been indicated in previous case law. The interpretation given in that case was that the superior is 'merely responsible for his neglect of duty with regard to the crimes committed by subordinates'. (Prosecutor v. Halilović, ICTY T. Ch., Judgment, IT-01-48-T, 16 November 2005, § 293). This view was subsequently reiterated in e.g. the Orić and Hazihasanovic Trial Chamber judgements (see below).

A shift does accordingly seem to have occurred from the early case law, where superior responsibility was viewed as a Mode of Participation, alternatively that the superior in some other form was held responsible for the "principal crime", to later case law purporting a more restrictive view concerning the nature of the doctrine.

(3) A third possible interpretation of the nature of the doctrine is that the criminal responsibility of the superior is limited to his/her own failure to act with regard to, or in relation to, the "principal crime". In accordance with this interpretation, the superior is convicted, not for the "principal crime", but merely for his/her own failure to act. This interpretation does however evaluate the level of responsibility, not only to the gravity of the superiors own failure, but also to the gravity of the "principal crime". This view is supported by the Halilović Trial Chamber judgement which deemed that the superior does not share the same responsibility as the subordinates and that superior responsibility solely is limited to his/her failure to perform the duties prescribed by international law. The Trial Chamber did however
stress the connection to the gravity of the principal crime in the following: “The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed.” (Prosecutor v. Halilović, ICTY T. Ch., 16 November 2005, § 54) (Emphasis added) The connection between the responsibility of the superior and the gravity of the “principal crime” is further developed in the Hadzihasanovic Appeal Judgement. (Prosecutor v. Hadžihasanović, (Case no. IT-01-47-A), ICTY A. Ch, Judgement, 22 April 2008, §§ 312–318). The conclusion of some is that command responsibility is a “sui generis form of culpable omission” which has (no equivalence / is incomparable / is distinct) from any other responsibility in either domestic or international criminal law. (Melonie, Matteaux, Ambos, Shahabodeen)

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Updated: 30 June 2016

Article 28(a) - Military commander

A military commander or person effectively acting as a military commander

As mentioned in the opening paragraph to the commentary on Article 28, the elements of the doctrine of superior responsibility consists of three major parts; (1) the existence of a superior-subordinate relationship, (2) the subjective element (mens rea), and (3) the failure to prevent and punish. (Prosecutor v. Mucic et al., ICTY T. Ch., 16 November 1998, § 346) This, the second paragraph of Article 28, deals with the first part; the conditions established for determining the existence of a superior-subordinate relationship. Explained in broad strokes, the existence of a superior-subordinate relationship entails that the superior (military or non-military) is in a position of effective “command and control” or “authority and control” (as the case may be) to the extent that he/she possesses the material ability to prevent or punish the subordinate when the latter are about to or have committed crimes. There are however, several details that need further consideration and clarification. These clarifications will be offered following the structure provided by the wording of the Article. The first step in the assessment of the existence of a superior-subordinate relationship, is determining the status of the superior. Secondly, the “principal crime” has to be identified and evaluated. Thirdly, the status of the subordinate as well as his/her relation to the “principal crime” has to be assessed. The fourth aspect to consider is the requirements placed on the relationship as such (i.e the quality or effectiveness thereof). Finally, the link between the superior, subordinate and the “principal crime” needs to be tied together through a causality test.

As to the first step of the evaluation, i.e. the status of the superior, Article 28(a) strictly deals with military commanders and persons effectively acting as a military commander (unless otherwise provided, these two will hereinafter be referred to as commanders). The particular status of and elements relating to non-military superiors are covered in Article 28(b) and are explained in the commentary provided with respect thereof. Non-military superiors are dealt with in a separate section of the Article.

A “military commander” is generally a member of the armed forces who is formally assigned authority to issue direct orders to subordinates or, given that there are generally several commanders in a chain-of-command, a commander may also have the authority to issue orders to commanders of units further down the chain-of-command. The rank of the commander is not of importance as such (e.g. be he/she a section leader, a platoon commander, a company commander, a battalion commander, a brigade commander, a division commander and others in ascending seniority), (Arnold, 2008, p. 830) wherefore a Head of State also may be considered a commander who may incur responsibility under the present doctrine. (Fenrick, p. 517) Superiors high up in the line of command may be held responsible with regard to crimes undertaken by units in much lower echelons in the chain-of-command. Prosecutor v. Orić, (Case no. IT-03-68-T), ICTY T
Ch, 30 June 2006, § 313. This standpoint is also reflected in the Bemba decision: "In this respect, a military commander could be a person occupying the highest level in the chain of command or a mere leader with few soldiers under his or her command". *Prosecutor v. Bemba*, ICC PT Ch. II, 15 June 2009, § 408.

It is hence not necessary that the commander is the direct superior of the subordinate who commits the principal crime. Of importance for the formal assessment of the status of the superior is whether the commander indeed possesses the authority to issue orders in a formal hierarchical structure. (*Prosecutor v. Mucic et al.*, ICTY T. Ch., 16 November 1998, confirmed in *Prosecutor v. Mucic et al.*, ICTY, A. Ch., 20 February 2001, §§ 251-252)

A "person effectively acting as military commander" is a wider category and may include police officers who have been assigned command over armed police units or persons responsible for paramilitary units not incorporated into the armed forces. (Fenrick, 1999, p. 517)

The above mentioned examples deal with the determination of the legal status of the commanders who have been formally assigned authority to issue orders. Situations where someone is formally assigned command are referred to as being "de jure commanders" or having a "de jure position of command". In conflict situations it is nevertheless common that a person, who is not formally assigned command, despite this fact, assumes command over units or other subordinates. If the units indeed pay heed to the instructions of such a person (i.e. if the person in reality possesses "effective command and control" or "effective authority and control"), he/she is said to be a "de facto commander" or having a "de facto position of command". The concept "person effectively acting as military commander" may accordingly also include persons who have assumed de facto control over armed forces, armed police units or paramilitary units. (Fenrick, 1999, p. 518) That a person may be accountable under the doctrine of superior responsibility based on "de facto command" finds support in the case law of both the ad hoc Tribunals and the ICC. Representative of this opinion is the following quote from the Celebici T Ch.: "Formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's de facto, as well as de jure, position as a commander". (*Prosecutor v. Mucic et al.*, ICTY T. Ch., 16 November 1998, § 370) The same pronouncement is encapsulated in the following quote from the ICC: "With respect to a "person effectively acting as a military commander", the Chamber considers that this term is meant to cover a distinct as well as a broader category of commanders. This category refers to those who are not elected by law to carry out a military commander's role, yet they perform it de facto by exercising effective control over a group of persons through a chain of command". *Prosecutor v. Bemba*, ICC PT Ch. II, 15 June 2009, § 409.

It is furthermore not necessary that the commander is in the direct chain-of-command to the subordinate, as long as effective "command and control" or "authority and control" can be established. (*Prosecutor v. Mucic et al.*, ICTY A Ch., 20 February 2001, §§ 251-252)

A person who formally has been assigned the authority to issue orders may nevertheless have lost control of the subordinates in real life. Despite attempts to make the subordinates adhere to his/her orders, the commander might not be able to reach them. In these situations, the commander lacks de facto command notwithstanding his/her de jure position of command. (According to Ambos, these cases should be interpreted in a restrictive manner, see below (Ambos, 2002, p. 857)) In these cases, it is of course the actual material ability of the commander that needs to be considered and the disobedience of the subordinates can instead be counted as evidence of the lack of effective control. *Prosecutor v. Blaškić*, (Case no. IT-95-14-A), ICTY A Ch., Judgement, 29 July 2004, §§ 69, 399. As stated by the Trial Chamber in the Celebici Case "Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates". *Prosecutor v. Mucic et al.*, ICTY T. Ch., 16 November 1998, § 370.

The status of the commander is thus closely connected to the interpretation of the elements "effective command and control" as well as "effective authority and control". These qualitative elements will be
addressed below (note 333), however, first, a few thoughts about the “principal crime” and the status of the subordinates shall be presented.

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Updated: 30 June 2016

**Article 28(a) - Criminally responsible**

[283] shall be criminally responsible for the crimes within the jurisdiction of the Court committed

For a comment about “criminally responsible for the crimes” please refer to the discussion provided on above under the heading “In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court.”

“Crimes within the jurisdiction of the Court” under the statute refers to genocide, crimes against humanity and war crimes according to Articles 5(1)(a)-(c) and 6-8.

According to the text of Article 28, one of the above listed “principal crimes” needs to have been “committed” in order for the superior to incur responsibility under the doctrine. There are however differing opinions as to the meaning of the term “committed” as well as the consequences that might follow from this term. One such opinion is that the term “committed” means that the crime has to have been “successfully been brought to an end”. (Arnold, 2008, p. 827) Another opinion is that the word “committed” is a generic term with no particular legal significance. When viewed as a generic term there are not many problems arising from this element, however, some problems are encountered if committed should entail that the crime has to have been successfully brought to an end.

A crucial issue in this respect is whether “committed” means that the superior never could incur liability under the doctrine for so called “inchoate offences” (e.g. attempt, situations when the primary perpetrator voluntarily withdraws, solicitation, incitement, complicity).

Responsibility for attempted commission of the crimes in the Statute is provided under Article 25(3)(f) Rome Statute. Consequently, the Rome Statute is in general open to holding people responsible for the attempted commission of a crime. (Ambos, 2008, p. 765-767) However, the term “committed” in Article 28 creates some confusion with regard to the applicability of the doctrine of superior responsibility to attempted or inchoate crimes. The issue of inchoate offences was addressed in the Hadzihasanovic case, where it was concluded that the doctrine was not applicable to inchoate offences. (Prosecutor v. Hadzihasanovic, ICTY A. Ch, 22 April 2008, § 204) The Trial Chamber in the Orić case seemed to disagree with this position. In the latter case the Trial Chamber, concluded that the duty of the superior to prevent crimes starts already at the preparation phase of the crime, and that the doctrine hence is applicable to inchoate offences. (Prosecutor v. Orić, ICTY T Ch, 30 June 2006, § 328)

With regards to the voluntary withdrawal of the principal perpetrator, there seems to be a tendency to conclude that, as superior responsibility is accessoriel to the principal crime, it would be unfair to hold the superior more liable than the principal perpetrator. Article 28 would thus not be applicable in these situations.

Another discernible problem is the issue as to whether the superior can be charged under the doctrine when the subordinates are merely convicted for the “principal crime” as an accomplice or linked to the crime under any other Mode of Participation under Article 25(3)(b-e). In the international discourse, arguments have been brought forth contending that the word “committed” should be isolated to crimes undertaken by the principal perpetrator (i.e. solely those covered under Rome Statute, Article 25(3)(a)). However Ambos asserts that a person can “commit” a crime by any Mode of Participation listed in Article 25(3), at least in the context of that same Article. (Ambos, 2008, p. 747) An extensive interpretation of the
term “committed” in this respect has also been preferred with regard to the ICTY Statute. An example hereof is provided by the expansion of Article 7(1) to include the concept of Joint Criminal Enterprise (via the word "committed"). The 

Orić Trial Chamber addressed the issue as to the interpretation of the term "committed" with regards to other Modes of Participation in direct connection to its applicability to the doctrine of superior responsibility; "For these and other reasons which, taking into account the relevant case law of this Tribunal, are elaborated in more detail in the Boškoski case, the Trial Chamber holds that the criminal responsibility of a superior under Article 7(3) of the Statue is not limited to crimes committed by subordinates in person but encompasses any modes of criminal responsibility. (Orić, ICTY T Ch, 30 June 2006, § 301) Statements made in the Orić Appeal judgment support such a conclusion. (Prosecutor v. Orić, (Case No. IT-03-68), ICTY A. Ch, 3 July 2008, §§ 47) The issue is however still open for debate.

Another interesting question is whether the crime can be considered to have been “committed” if the primary perpetrator is not identified or for any other reason is not convicted of the crime. It can thus be established that the actus reus of the crime have been perpetrated, nevertheless, since the primary perpetrator has not been identified or convicted for the crime, it cannot be fully proven that all the elements of the crime are fulfilled (e.g. the mental element). The question is whether the crime can be considered as “committed” despite the fact that some of the material elements of the crime thus cannot be established. The Appeals Chamber addressed the issue of unidentified subordinates in relation to the doctrine of superior responsibility in the Orić case: "The Appeals Chamber considers that, notwithstanding the degree of specificity with which the culpable subordinates must be identified, in any event, their existence as such must be established. If not, individual criminal liability under Article 7(3) of the Statute cannot arise". (Orić, ICTY A. Ch, 3 July 2008, §§ 35, 48) Reasonably, some level of identification must hence take place, however the level of specificity hereof is still open to debate.

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Updated: 30 June 2016

**Article 28(a) - Forces**

In the following section the status of the subordinate is addressed. Up to this point, the person that committed the "principal crime", with regard to which the superior bear’s responsibility under the doctrine, has been referred to as a “subordinate”. This is an overarching term meant to also include the civilian aspect of the relationship. This is furthermore the term used in the ICTY, statute Article 7(3). However, in Article 28(a) the subordinates are referred to as “forces” (as opposed to Article 28(b) which also utilizes the term subordinate). The precise significance of the choice to use this term is not clear, however, if interpreted in accordance with its ordinary meaning the term ought to entail certain restrictions in line with similar definitions provided in international humanitarian law.

In order for members of irregular armed forces to be counted as combatants and granted prisoner of war status, they need to be under a command responsible for the conduct of his/her subordinates, as well as be subjected to an internal disciplinary system which enforces compliance with international humanitarian law (Geneva Convention III, Article 4(A)§2). According to Fenrick, “forces” ought to be interpreted in lines herewith and may thus signify the armed forces of a party to a conflict i.e. all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates. (Fenrick, 1999, p. 518) According to Arnold, the concept of forces does not merely include the regular and irregular armed forces under a responsible command, but also guerilla groups and private subcontractors (even when the illegal actions undertaken by such groups are not imputable to the state) so long as effective "command and control" or "authority and control" can be traced back to a person in a position of
responsible command. Arnold also is of the view that the term forces include armed police and paramilitary units. The concept of "forces" may thus be broader than what it seems *prima facie* and might be closer to the concept of subordinates as it has been applied in most international tribunals. (Arnold, 2008, p. 826)

One interesting question relating to the status of the subordinates is whether he/she needs to be the principal perpetrator of the principal crime, or whether superior-subordinate relationship also can be established between a superior and a subordinate who is merely an accomplice to the principal crime. Another question concerning to the status of the subordinates, is whether the requirements of superior-subordinate relationship can be satisfied in cases where the subordinates cannot be individually identified. These questions were addressed above under the discussions with regards to the meaning of the term "committed".

In the *Bemba* confirmation decision it seems as if the Trial Chamber has chosen to avoid these complexities, consequently using the terms forces and subordinates synonymously (*Prosecutor v. Bemba*, ICC PT Ch. II, Decision Pursuant to Article 61(1)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, § 428).

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**Updated:** 30 June 2016

## Article 28(a) - Effective command and control or effective authority and control

As for the distinction between the phrases "command and control" or "authority and control" a few thoughts have been presented in both the academic debate and ICC case law. According to Ambos, "control" is an umbrella term encompassing both command and authority. (Ambos, 2002, p. 857) According to Fenrick, forces under the commander's "command and control" are subordinated to the commander in a direct chain-of-command. This chain-of-command may however, as mentioned above, be either *de jure* or *de facto*. Forces under the "command and control" also encapsulate forces in lower echelons of the chain-of-command, as long as it can be ascertained that the commander is able to issue orders, either directly or through intermediate subordinate commanders. (Fenrick, 1999, p. 518) This view is furthermore upheld in the *Prosecutor v. Orić*, (Case No. IT-03-68), ICTY T Ch, Judgement, 30 June 2006, § 313.

"Authority and control" is a somewhat broader concept than "effective command and control" according to Fenrick. Effective authority and control also encompasses commanders who exercise control over forces which are not placed under him/her in a direct chain of command (e.g. third parties who do not belong directly to the chain of command or armed forces under said commander). One such example is the occupational zone commander who has the authority to give orders to all forces within their occupational zone, relating to matters of public order and safety. (Fenrick, 1999, p. 518)

The definition and the distinction between these terms was addressed by the ICC in the *Bemba* case, where it was concluded that "Article 28(a) of the Statute refers to the terms "effective command and control" or "effective authority and control" as applicable alternatives in situations of military commanders *strictu sensu* and military-like commanders. In this regard, the Chamber considers that the additional words "command" and "authority" under the two expressions has no substantial effect on the required level of standard of "control". "In this context, the Chamber underlines that the term "effective command" certainly reveals or reflects "effective authority". Indeed, in the English language the word "command" is defined as "authority, especially over armed forces", and the expression "authority" refers to the "power
or right to give orders and enforce obedience". *Prosecutor v. Bemba*, ICC PT Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, §§ 412-413.

The "command and control" as well as the "authority and control" has to be "effective". Read as a whole, this phrase encapsulates the "qualitative test" as to the nature of the superior-subordinate relationship as such; the commander needs to have effective "command and control" alternatively "effective authority and control" over forces (i.e. subordinates, see discussion above) under his/her command. As a reiteration of previous statements provided above, the cornerstone of the qualitative aspect of the relationship, namely the effectiveness hereof, is that the superior possesses "the material ability to prevent or punish the criminal conduct of his/her subordinates". *Prosecutor v. Mucic et al.*, ICTY A. Ch, Judgement, 20 February 2001, § 256. The Appeals Chamber, in the same case, stresses the fact that it is not sufficient that a superior has "substantial influence" as to incur responsibility under the doctrine of superior responsibility. The interesting question to be addressed here, is however, what precisely is meant by the effectiveness prerequisite, i.e. possessing the material ability to prevent and punish. The issue has been addressed in several international cases, however the Appeals Chamber in the *Blaškić* case succinctly expresses the requirement in the following terms: "The indicators of effective control are a matter of evidence rather than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate proceedings against the alleged perpetrators where appropriate". *Prosecutor v. Blaškić*, ICTY A Ch., Judgement, 29 July 2004, §§ 69. In order to evaluate the effectiveness of the commander's control, it is hence necessary to look on the evidence provided on a case by case basis. A *de jure* position of command (see above note 330) as well as the ability to issue orders can be seen as good evidence of effective control. *Prosecutor v. Mucic et al.*, ICTY, A. Ch., Judgement, 20 February 2001, §197. However, disrespect of a *de jure* commander or disobedience of orders issued from such a commander could instead be evidence of lack of effective control. *Prosecutor v. Blaškić*, ICTY A Ch., Judgement, 29 July 2004, §§ 69, 399. (Friman, 2008, p. 857) In accordance herewith, it is the *de facto* control, i.e. the actual, real-life, material ability of the commander that is of the highest significance when ascertaining whether effective control actually exists. Nonetheless, Ambos asserts that a duty to control may only be rejected if there is no control at all. This may be the case where the subordinate is totally out of control and no longer obeys the orders of the commander, committing widespread or isolated excesses (as the case may well be with regards to a commander with solely administrative control as opposed to operational control). In such a case, the commander is, in any way, at least supposed to use the available administrative means or sanctions to prevent the commission of crimes. (Ambos, 2008, p. 857) Fenrick furthermore stresses that the lack of competence, should not be viewed as a factor which in and of itself negates the existence of the effective control prerequisite within the superior subordinate relationship all together: "The subjective competence of a commander is not a basis for an argument that the forces were not under his or her effective command and control". (Fenrick, 1999, p. 518)

However, again, the material ability has to be evaluated on a case by case basis. The material ability may differ depending on the distinct role and function of various commanders; whether it is operational, tactical, administrative or otherwise. The assessment of whether there is a superior-subordinate relationship is in existence and if such a relationship is effective, i.e. the commander possesses the material ability to prevent and punish the principal crime, can hence not be made in isolation from the evaluation of which measures that in all actuality are within the commanders powers. The evaluation of the qualitative nature of the superior-subordinate relationship does therefore have to be made in relation to which "all necessary and reasonable measures within his or her power" are.

The ICC succinctly summarized several factors which "may indicate the existence of a superior’s position of authority and effective control. These factors may include: (i) the official position of the suspect; (ii) his power to issue or give orders; (iii) the capacity to ensure compliance with the orders issued (i.e., ensure..."
that they would be executed); (iv) his position within the military structure and the actual tasks that he carried out; (v) the capacity to order forces or units under his command, whether under his immediate command or at a lower level, to engage in hostilities; (vi) the capacity to re-subordinate units or make changes to command structure; (vii) the power to promote, replace, remove or discipline any member of the forces; and (viii) the authority to send forces where hostilities take place and withdraw them at any given moment. *Prosecutor v. Bemba*, ICC PT Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, § 417.

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**Article 28(a) - As a result of**

[286] *as a result of*

These words indicate that a new, rather controversial element of superior responsibility has been introduced in Article 28, namely the need to prove a causal link between the superior and the commission of the principal crime by the subordinates. Generally, in criminal law, the existence of a causality element entails that the prosecution would have to prove that the criminal conduct is somehow related to the action of the defendant. Normally causality is attached to a positive action, whereas in the case of superior responsibility we are dealing with inaction/non-action. This fact creates some difficulties in and of itself which has furthermore been addressed in the Bemba confirmation decision at the ICC. (*Prosecutor v. Bemba*, ICC PT Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, § 425.)

It could be argued that there are different degrees of causality, where the strongest is a called *condition sine qua non* (meaning "without which it could not be" - requirement). In the case of superior responsibility this would entail that, but for the inaction of the superior, the principal crimes would not have occurred. It becomes logically very complicated to place such a strict condition as a prerequisite for responsibility under the current doctrine. This has also been the views presented in the case law of the ICTY.

"Notwithstanding the central place assumed by the principle of causation in criminal law, 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. Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formulation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject". *Prosecutor v. Mucic et al.*, ICTY T. Ch., Judgement, 16 November 1998, 398 At the same time, the Celebici Trial Chamber finally concludes that "...the superior may be considered to be causally linked to the offence, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed." *Prosecutor v. Mucic et al.*, ICTY T. Ch., 16 November 1998, § 399. supported in *Prosecutor v. Blaškić*, ICTY A Ch., Judgement, 29 July 2004, § 75-77 and *Prosecutor v. Halilović*, ICTY T. Ch., Judgement, 16 November 2005, § 77.

The issue of causation becomes even more complicated when considering the fact that it is not only the superior's failure to prevent that is covered within the doctrine of superior responsibility, but also the superior's failure to punish. Providing the necessity to establish a causal link between the commission of the principal crime and the superiors' failure to punish said crime, is impossible. This difficulty has been pointed out by the Orić TC where the causal element was discredited in its totality: "As concerns objective causality, however, it is well established case law of the Tribunal that it is not an element of superior
criminal responsibility to prove that without the superior's failure to prevent, the crimes of his subordinates would not have been committed”. *Prosecutor v. Orić*, ICTY T Ch, Judgement, 30 June 2006. 338.

In dealing with the issue of the causal link between the superiors' failure to punish and the possible future commission of crimes, the Trial-Chamber in Celebici concluded that there of course exists such a connection, however, this has no bearing on the causal connection to past crimes. *Prosecutor v. Mucic et al*., ICTY T Ch, Judgement, 16 November 1998, § 400

Ambos also adheres to the idea that there cannot be a *condition sine qua non* requirement between the inaction of the superior and the commission of the principal crime. Ambos states that, if there indeed would be such a causation requirement, as the text of Article 28 suggests, it must suffice that the superior's failure of supervision *increases the risk* that the subordinates commit certain crimes, also referred to as the *risk theory*. (Ambos, 2002, p. 860. Emphasis added.) This idea is furthermore the position taken in the Bemba confirmation decision at the ICC. However, in the *Bemba* decision the TC seems to present a causality requirement as something different from the risk theory. “There is no direct causal link that needs to be established between the superior's omission and the crime committed by his subordinates. Therefore, the Chamber considers that it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under Article 28(a) of the Statute”. ... “Accordingly, to find a military commander or a person acting as a military commander responsible for the crimes committed by his forces, the Prosecutor must demonstrate that his failure to exercise his duty to prevent crimes increased the risk that the forces would commit these crimes”. *Prosecutor v. Bemba*, ICC PT Ch II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, §§ 425-426. Ambos concurs with this decision in his commentary to the decision. (Ambos, 2009, p. 715-726)

This requirement is hence not generally accepted as a requirement to liability under the doctrine of superior responsibility.

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*Updated:* 30 June 2016

**Article 28(a) - Failure to exercise control properly**

[287]**his or her failure to exercise control properly**

Article 87 of AP from 1977 codifies a duty of commanders to take all practicable measures to ensure his forces comply with international humanitarian law. Examples of measures that the commander is obliged to undertake in order to exercise control properly could be:

• Provide adequate training in IHL
• Ensure that international IHL is regarded in operational decision making
• Ensure the existence of and properly monitor an effective reporting system
• Take corrective action if violations are under way or have been committed (Fenrick, 1999, p. 518. Arnold, 2008, p. 834.)

Failing to exercise this control properly is one of the cornerstones of the doctrine of superior responsibility. However, the most interesting part in this phrase is not this, but rather the words “as a result of”. A commentary to this element is offered in the following.

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*Updated:* 30 June 2016
Article 28(a)(i)

[288] That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes

This phrase encompasses the second part of the three-prong-test to the doctrine of superior responsibility, namely the requirement of a certain mental state or attitude of the commander. Hereinafter the mental element will be referred to with the latin term *mens rea*. For more general information concerning the *mens rea* requirement in the Rome Statute, please refer to the commentary on Article 30 and Article 25.

Article 30 of the Rome Statute states: "unless otherwise provided, a person shall be criminally responsible [...] only if the material elements are committed with *intent and knowledge*". (emphasis added)

Since Article 28 provides an alternative *mens rea* element, it shall hence be seen as *lex specialis* which, as such, trumps the default provision provided in Article 30. In the following section focus shall thus be given specifically to the requirements in Article 28(a)(i) (whereas the *mens rea* standard in Article 28(b), which differs significantly, will be covered in the commentary dealing herewith).

Article 28(a)(i) establishes that the commander either needs to have known or, owing to the circumstances at the time, should have known that the forces were about to or had committed the principal crime. There is thus two alternative *mens rea* standards provided in the Article; (1) actual knowledge or (2) a so called "should have known"-standard.

Several cases from the ICTY, ICTR and SCSL have dealt with the mental element of the doctrine of superior responsibility as formulated in the statutes of these tribunals (Article 7(3) and 6(3) respectively). The second alternative *mens rea* standard in Article 28(a)(i), i.e. that the commander "should have known", is somewhat controversial and, according to many, differs from the standard provided in the statutes of these tribunals. *(Prosecutor v. Bemba*, ICC PT Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, § 432) The "actual knowledge"-standard, however, is considered to be the same in all statutes, wherefore the jurisprudence concerning this point, can offer some insight into the interpretation of its content. In previously mentioned case law, it has been settled that actual knowledge can be proven by either direct or circumstantial evidence. These factors could be: the number, type, scope or time of the illegal acts, the type of troops or the logistics involved, as well as the location or the spread of occurrence. It was furthermore held, in the Hadzihasanovic case, that "[a]ctual knowledge may be proven if, "apriori, a military commander is part of an organized structure with established reporting systems". *Prosecutor v. Hadzihasanovic*, T Ch, Judgement, 22 April 2008, § 94, as cited in *Prosecutor v. Bemba*, ICC PT Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, §§ 431. In the Bemba confirmation decision, it was confirmed that the interpretation of actual knowledge provided in the *ad hoc* tribunals, also is applicable with respect of Article 28(a)(i). *(Prosecutor v. Bemba*, ICC PT Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, §§ 430-431.

The "should have known"-standard in Article 28(a)(i) is much more complicated. With regard hereto it is not as easy to take direct guidance from the jurisprudence provided in *ad hoc* tribunals. The reason for this being that these statutes provide for a "reason to know"-standard, which *generally* (nevertheless not according to some scholars, see below) is considered to be much higher than the "should have known" standard. (*Werle, 2005, p. 325. Prosecutor v. Bemba*, ICC PT Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, § 434.)

A commander has "reason to know" according to the case law of the *ad hoc* tribunals, "[...] where he had in
his possession information of a nature, which at the least, would put him on notice of the risk of such
crimes were committed or were about to be committed by his subordinates”. (Prosecutor v. Mucic et al., ICTY T.
Ch., Judgement, 16 November 1998, § 383, confirmed in Prosecutor v. Mucic et al., ICTY, A. Ch., Judgement,
20 February 2001, §§ 223, 241). The concept was further explained by stating that “a showing that a
superior had some general information in his possession, which would put him on notice of possible
unlawful acts by his subordinates would be sufficient”. The evaluation of the “reason to know”-standard was
further exemplified by “a military commander who has received information that some of the soldiers
under his command have a violent or unstable character, or have been drinking prior to being sent on a
mission, may be considered as having the required knowledge”. Prosecutor v. Mucic et al., ICTY, A. Ch.,

In the Bemba confirmation decision, the Trial Chamber pointed out that the “had reason to know”-standard
in the statutes of the ad hoc tribunals differ from the “should have known”-standard in the Rome Statute
Article 28(a)(i). Prosecutor v. Bemba, ICC PT Ch. II, 15 June 2009, § 434. It concluded that the “should have
know”-standard merely requires that the superior has been negligent in failing to acquire knowledge of his
subordinates illegal conduct Prosecutor v. Bemba, ICC PT Ch. II, Decision Pursuant to Article 61(7)(a) and (b)
of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, §
432 and that the new standard in Article 28(a) “requires more of an active duty on the part of the superior to
take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless
of the availability of information. Prosecutor v. Bemba, ICC PT Ch. II, Decision Pursuant to Article 61(7)(a)
and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June
2009, § 433. The Chamber, nevertheless also makes an obiter dictum where it concludes that the “criteria
developed by the ad hoc tribunals to meet the standard of “had reason to know” may also be useful when
applying the “should have known” requirement.

Important to note in this context is that some scholars view both the “reason to know” and “should have
known”-standards, solely as different aspects of negligence. Two such proponents seem to be Ambos and
Arnold (Ambos, 2002, p. 868 and Arnold, 2008, p. 837). With regards to this matter, Ambos further stresses
that “it should be clear now [...] that the ‘should have known’ standard must be understood as negligence and
that it, therefore, requires neither awareness nor considers sufficient the imputation of knowledge on the
basis of purely objective facts”. Ambos, furthermore, makes a specific comment as to this point with
regard to the Bemba confirmation decision. He thus points out that both of these standards ought to
constitute a negligence standard and that it would be beneficial for the ICC to apply a restrictive
interpretation of the “should have known” –standard in order to bring it closer in line with the “reason to
know” –standard. (Ambos, 2009, p. 722) Ambos views are in stark contrast to views expressed by the
ICTY and ICTR Appeals Chambers, which have rejected the negligence standards with emphasis: “(...) the
Appeals Chamber recalls that the ICTR Appeals Chamber has on a previous occasion rejected criminal
negligence as a basis of liability in the context of command responsibility, and that it stated that “it would be
both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not
clearly been defined in international criminal law”. [...] The Appeals Chamber expressly endorses this
view”. Prosecutor v. Blaškić, ICTY A Ch., 29 July 2004, § 63

When comparing these standards, it is important to make note of the words “owing to the circumstances at
the time”. This phrase may help in the interpretation of bridging the possible gap between the concepts.
However, as it stands today, the interpretation of the “should have known”-standard is still undetermined
and under scholastic debate.

One issue that has caused considerable debate and still is unresolved is how the low mens rea
requirement for superior responsibility shall be reconciled with special intent crimes, such as e.g.
genocide (for further information concerning special intent please refer to the commentary on Rome
Statute Article 6 and Article 30).

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**Updated:** 30 June 2016

### Article 28(a)(ii)

[289] That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

The last part of the three-prong-test entails determining whether the superior has failed in his duty to control his subordinates; i.e. if he/she has taken all necessary and reasonable measures within his or her power to prevent or repress the subordinate’s criminal undertakings?

The wording with regards to this final prerequisite for incurring responsibility under the doctrine, is differently phrased in Article 28(a)(ii) of the Rome Statute as compared to the ICTY, ICTR and SCSL Statutes’ Article 7(3) and 6(3) respectively. The ad hoc tribunals use the phrase: “the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof” (emphasis added) when formulating this prerequisite. The duties placed on the superior in these statutes are thus two-fold. Responsibility for the superior is incurred for his/her (1) failure to prevent or (2) failure to punish. Whereas, the Rome Statute distinguishes between three separate duties which the commander may fail to undertake, hence giving rise to responsibility under the doctrine for; (1) failing to prevent (2) failing to repress or (3) failing to submit the matter to the competent authorities for investigation and prosecution. Prima facie, these differences may appear rather significant. However, in reality they do indicate very similar duties for the commander.

The three stage attack to the duties of the commander signifies duties attached to different stages in the commission of the crime. The superior has a duty to (1) prevent before (2) repress during and (3) submit/report after the commission of the crime.

Initially it is important to note that, despite the fact that the wording of Article 28(a)(ii) signifies the three duties in the alternative (i.e. by the usage of the word or), the commander could be convicted based on failing to undertake either one of the different duties or all. A commander can hence not avoid responsibility under the doctrine if he/she fails to prevent and repress, nevertheless reports the commission of the principal crime to the competent authorities after the completion of the crimes. The Trial Chamber in the Bemba confirmation decision thus held that “failure to prevent crimes [...] cannot be cured by fulfilling the duty to repress or submit the matter to the competent authorities”. *Bemba* ICC PT Ch II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, § 436. (emphasis added)

A commentary on each of these three duties to control subordinates will be presented separately below. However, there is one important common factor to consider when dealing with all three alternatives. The duties all need to be determined from the perspective of what is considered to be “necessary and reasonable measures” as well as within the superior’s powers. This will be addressed in the subsequent paragraphs.

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**Updated:** 30 June 2016

### Article 28(a)(ii) - All necessary and reasonable
measures within his or her power

This phrase corresponds to the nearly literal wording used in the statutes of the ad hoc tribunals as well as the prerequisites established in Article 86(2) of Additional Protocol I from 1977, namely that the countermeasures that the superior is under a duty to carry out needs to be “feasible”. (Ambos, 2002, p. 861) Any requirement that is not possible for the particular superior in question to carry out is, generally, considered to be above and beyond his/her duty, wherefore he/she may not be held responsible for a failure in this regard.

The powers of the superior, as well as what is necessary and reasonable measures, have to a certain extent already been discussed when dealing with the first part of the three-prong-test, i.e. the existence of a superior-subordinate relationship. In that section of this commentary, it was pointed out that the prerequisite of the commanders effective “command and control” or “authority and control” needs to be evaluated in conjunction with what is considered to be “necessary and reasonable measures within his or her power”. These two issues can thus never be assessed in isolation from one another. Some reiteration of previous mentioned prerequisites will thus be necessary in the following.

The corrective measures available to the commander, are both dependent on his/her de jure (i.e. "legal competence") and the de facto (i.e. "material" or "actual" possibility) position of the superior to control his/her subordinates. The measures need to be commensurate to the superior's actual possession of command and control or authority and control. It is hence difficult to generalize about which measures are necessary and reasonable. What is considered to be necessary, reasonable and within the power of the commander may for instance depend on his or her position in the chain-of-command, e.g. the demands of a high ranking commander may be more in line with issuing orders and initiating judicial proceedings, whereas a commander lower down in the echelons of command may be charged with a duty to have a much more hands on approach, alternatively, if the low-ranking commander lacks those possibilities, he/she may nonetheless recommend that disciplinary action be taken (Fenrick, 1999, p. 520) The measures available to the commander may also depend on whether he/she obtain a position that is more operational, tactical, administrative or otherwise. The measures do therefore have to be considered on a case by case basis. The measures that can be expected of the superior were well presented in the Blaskic Appeals Chamber: "What constitutes such measures is not a matter of substantive law but of evidence". Prosecutor v. Blaškić, ICTY A Ch., Judgement, 29 July 2004, § 72.

In this connection it is important to reiterate that the subjective incompetence of a particular commander is cannot be used as an argument that forces were not under his or her effective command and control (Fenrick, p. 518). "A superior's plea of lack of authority to take the necessary measures under internal regulations does not generally free him or her from criminal responsibility". Prosecutor v. Mucic et al, ICTY T. Ch., Judgement, 16 November 1998, § 396.

According to Arnold, "a commander's position and possibility to intervene shall rather be assessed on the basis of what any commander, in such a situation, would have objectively done at the time of the facts". She does however emphasize that it is important to take the available preventive measures into consideration. Arnold places much emphasis on the need for education, the responsibility of which in her view, falls on high levels of command and the government. (Arnold, 2008, p. 839, emphasis added).

As presented above, there are however some objective requirements as to what is considered to be necessary and reasonable. This is based on principles developed in international humanitarian law. Examples hereof are; providing instruction in international humanitarian law, creating an effective reporting system, supervising the monitoring system, recourse to disciplinary measures or removal of rank. Prosecutor v. Bemba, ICC PT Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009.
As to the matter of what is considered as being within the powers of the commander, a controversial and heavily criticized part of a decision in the ICTY needs to be mentioned. In the Hadžihasanović case, the Appeals Chamber namely held that the “principal crime” has to have been committed whilst the superior had effective control over the subordinates. The reasoning behind this decision was based on the fact that a commander who was appointed after the commission of the principal crime would not have had the possibility to prevent said crimes during their commission. Considering that the duty of the commander is three fold (or rather two fold in the ICTY statute, which was relevant to the present case), it could however be argued that the possibility exists for the commander, who assumes a position after the commission of the crime, to punish said crimes. By so doing, the superior would be fulfilling one of the main objectives of the doctrine, namely clearly condemning the actions and hence undermining chain effects hereof. It should be noted that it was a 3:2 decision with strong dissenting opinions on the matter. *Prosecutor v. Hadžihasanović*, ICTY A Ch., Judgement, 22 April 2008, § 37-56.

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Updated: 30 June 2016

**Article 28(a)(ii) - Prevent**

As mentioned above, the various duties are attached to different stages in the commission of the crime. Preventive measures are expected to be undertaken at any stage *before* the crime has been committed. The issue as to what is expected of the commander in this regard has at times been linked to the matter as to whether the doctrine is applicable to inchoate offences. As noted previously in this commentary, the relationship between the doctrine of superior responsibility and inchoate crimes has not been conclusively established in the case law of the ad hoc tribunals (see commentary on “committed” in note 317 on Article 25(3)(a) and inchoate offences in note 322 on Article 25(3)(f)). The Orić Trial Chamber did however purport the view that the commander could be responsible for inchoate crimes. (*Prosecutor v. Orić*, ICTY T Ch, Judgement, 30 June 2006, § 328) The Trial Chamber in the Orić case correctly concluded that: “it is not only the execution and full completion of a subordinate’s crimes which a superior must prevent, but the earlier planning or preparation” and that “the superior must intervene as soon as he becomes aware of the planning or preparation of crimes to be committed by his subordinates and as long as he has the effective ability to prevent them from starting or continuing”. (*Prosecutor v. Orić*, ICTY T Ch, Judgement, 30 June 2006, § 328).

In the Orić case, the Trial Chamber furthermore formulated a normative yardstick in order to measure whether the superior has fulfilled his/her duty to prevent “first, as a superior cannot be asked for more than what is in his or her power, the kind and extent of measures to be taken ultimately depend on the degree of effective control over the conduct of subordinates at the time a superior is expected to act; second, in order to be efficient, a superior must undertake all measures which are necessary and reasonable to prevent subordinates from planning, preparing or executing the prospective crime; third, the more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentive and quicker the superior is expected to react; and fourth, since a superior is duty bound only to undertake what appears appropriate under the given conditions, he or she is not obliged to do the impossible”. *Prosecutor v. Orić*, ICTY T Ch, Judgement, 30 June 2006, § 329.

The Bemba Confirmation Decision gave further general guidance on how to evaluate specific preventive measures, such as the duty of the commander: “(i) to ensure that superior’s forces are adequately trained in international humanitarian law; (ii) to secure reports that military actions were carried out in accordance with international law; (iii) to issue orders aiming at bringing the relevant practices into accord with the
rules of war; (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior’s command”. *Prosecutor v. Bemba*, ICC PT Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, § 438.

Despite these formulations of yardsticks and general guidance, it is however important to stress, that the assessment of what is considered to be necessary and reasonable preventive measures for a particular commander has to be made on a case by case basis. *Prosecutor v. Orić*, ICTY T Ch., Judgement, 30 June 2006, § 330. It is hence, once again, both the *de jure* and *de facto* abilities of the commander that must be established.

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*Updated:* 30 June 2016

### Article 28(a)(ii) - or repress

[292] or repress

**Failure to punish**

As previously mentioned, the “failure to punish”-requirement in the statutes of the *ad hoc* tribunals, is formulated as two separate requirements in Article 28(a)(ii) of the Rome Statute, namely (1) to repress and (2) to report (or rather to ‘submit the matter to the competent authorities for investigation and prosecution’). A few words shall first be mentioned as to the interpretation of the punish-requirement provided by the *ad hoc* tribunals, after which attention subsequently shall be given to the alternative requirements found in article 28 of the Rome Statute.

Several issues have been addressed with regard to the “failure to punish”-requirement. One such issue is at what stage in the commission of the crime the punishment should be meted out. Considering that there is liability not only for completed offences in international criminal law, but also for e.g. planning and attempting to commit the crime (see ICTY Statute Article 7(1), ICTR Statute Article 7(1) and Rome Statute Article 25), the conclusion must be that the punishment should be carried out as soon as any of these “punishable” actions have been undertaken. *Prosecutor v. Orić*, ICTY T Ch., Judgement, 30 June 2006. In that same case, the distinction between at what time the preventive as opposed to the punitive measures should be carried out, was described in the following terms; “whereas measures to prevent must be taken as soon as the superior becomes aware of the risk of potential illegal acts about to be committed by subordinates, the duty to punish commences only if, and when, the commission of a crime by a subordinate can be reasonably suspected” *Prosecutor v. Orić*, ICTY T Ch., Judgement, 30 June 2006, § 336.

Another issue is the precise conditions placed on the “effective control”-requirement of the commander in correlation to the “duty to punish”-requirement. In order for the commander to punish the subordinates he/she of course has to have effective control at the time when the punishment should be carried out. However, as already noted, the Appeals Chamber in the Hadžihasanović case decided that the commander also has to have had control over the subordinates during the time of the commission of the offence. *Prosecutor v. Hadžihasanović*, ICTY A. Ch., Judgement, 22 April 2008, § 37, 51. Heavy criticism has been levied against this decision. The *Orić* Trial Chamber, even expressly articulated its strong disagreement with the lack of logic in this decision. *Prosecutor v. Orić*, ICTY T Ch, Judgement, 30 June 2006, § 335.

However, as it considered itself bound by the Appeals Chambers decision, it could not reach an alternative conclusion. The question of challenging this issue was avoided on appeal. *Prosecutor v. Orić*, ICTY A. Ch, Judgement, 3 July 2008, § 167.

The last issue that will be addressed within the confines of this commentary as to the conditions placed on the “duty to punish”-requirement, is more precisely what measures that would be considered as
appropriate for the commander to undertake in order to punish the perpetrators. If considered to be in effective control over the subordinates, at the right time, the superior has to either execute appropriate sanctions him or herself, alternatively conduct an investigation to establish the facts. The commander needs to undertake these actions either by him or herself, alternatively, if lacking such punitive measures within the ambit of his/her position, a report has to be transmitted to the competent authorities for further investigation and sanction. The superiors own lack of legal competence does not relieve him or her from pursuing these avenues, if he/she is considered to be in effective control of the perpetrators of the principal crime.

Failure to repress
Interpreted in accordance with the ordinary meaning to be given to the term, it would suggest that repressive measures solely entails a duty of the commander to stop the ongoing commission of a crime (Ambos, p. 863), and that this concept therefore does not cover his/her obligation to punish the perpetrators.

However, according to the Bemba Confirmation Decision, the “duty to repress” arises at two different stages of the commission of the crime. Firstly it includes the duty to stop ongoing crimes from continuing to be committed and, secondly, it entails the duty to punish the forces after their commission. (Prosecutor v. Bemba, ICC PT Ch. II, Decision Pursuant to Article 61(7(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, § 440) Hence, repressive measures also include punishment by the commander him or herself.

The measures which ought to be taken in order to stop the ongoing crimes has to be evaluated on a case by case basis depending on his/her power to control as explained above. (Prosecutor v. Bemba, ICC PT Ch. II, Decision Pursuant to Article 61(7(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, § 441). Besides punishment, these measures could include, but are certainly not limited to; conducting an investigation to establish the facts, issuing orders and securing the follow through of such orders. Perhaps, even more important would be more subtler measures aiming at establishing and sustaining an environment of discipline and respect for the law. Prosecutor v. Orić, ICTY T Ch, Judgement, 30 June 2006, §336 and Prosecutor v. Halilović, ICTY T. Ch., Judgement, 16 November 2005, §§ 97-100.

The punishment after the commission of the crime could either be done by (1) the commander's own action or, if such punitive measures are limited for that particular commander, (2) by submitting the matter to the competent authorities. (Prosecutor v. Bemba, ICC PT Ch. II, Decision Pursuant to Article 61(7(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, § 440)

This requirement was interpreted in the Bemba Confirmation decision in the following way: "The duty to

Article 28(2)(ii) - Submit the matter

submit the matter to the competent authorities for investigation and prosecution

Prima facie, this may seem like a new requirement which differs from the Statutes of the ICTY, ICTR and SCSL. As such it would be filling the gap for those commanders who have themselves no disciplinary powers to 'repress' a crime. (Ambos, 2002, p. 862) Nevertheless, despite the fact that it is not spelled out in the ad hoc tribunals' statutes, it has already been read into the concept of "duty to punish" according to the case law of these tribunals.

This requirement was interpreted in the Bemba Confirmation decision in the following way: "The duty to
submit the matter to the competent authorities, like the duty to punish, arises after the commission of the crimes. Such a duty requires that the commander takes active steps in order to ensure that the perpetrators are brought to justice. It remedies a situation where commanders do not have the ability to sanction their forces. This includes circumstances where the superior has the ability to take measures, yet those measures do not seem to be adequate. *Prosecutor v. Bemba* ICC PT Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 9 June 2009, § 442

**Author:** Linnea Kortfält

**Updated:** 30 June 2016

### Article 28(b)

**[294] Superior and subordinate relationships not described in paragraph (a)**

In this section of the commentary to Article 28, only those requirements which differ from the ones provided in paragraph 28(a), or for any other reason needs to be commented on separately, will be discussed. For comments relating to the other prerequisites, please refer back to the commentary on 28(a).

This phrase refers to the applicability of the doctrine of superior responsibility to superiors-subordinate relationships that are not covered in Article 28(a), i.e. the concept which, in this commentary is called “non-military superior responsibility”. This section of the Article hence encompasses those superiors who are not military commanders or effectively acting as military commanders (i.e. *not* military or “quasi-military” commanders). The reasoning behind this clear separation of the requirements placed on superior responsibility for military and quasi-military commanders from the superior responsibility of non-military superiors is that there has been some controversy as to whether the doctrine should be applicable to civilians at all. Separating the requirements into distinct section of the Article consequently seemed to be an appropriate compromise during the Rome Conference. (Vetter, 2000, p. 8) The jurisprudence of the *ad hoc* tribunals has, on several occasions, established that the doctrine of superior responsibility is applicable to non-military or civilian leaders.

One of the first cases, which basically paved the way for an argumentation as to the applicability of the doctrine of superior responsibility for civilian leader, was the *Celebici* case. In the *Celebici* case it was established that the term “superior” as used in e.g. the Statutes of the *ad hoc* Tribunals as well as in Article 86(2) of the Additional Protocols from 1977, is broad enough to encompass, not only strictly military commanders in a *de jure* command position, but also *de facto* superiors. A subsequent conclusion drawn hereof was that the effective control could exist in both “civilian and within military structures”. *(Prosecutor v. Mucic et al., ICTY T. Ch., 16 November 1998, §§ 354, 378. emphasis added.)* This conclusion was supported upon appeal. *Prosecutor v. Mucic et al., ICTY, A. Ch., 20 February, Judgement, y 2001, § 195.* The applicability of the doctrine to non-military commanders was upheld in, amongst others, the *Akayesu, Kayishema, Musema* and *Bagilishema* cases.

The Trial Chamber in the *Akayesu* case was not as bold in it’s pronouncements as to the applicability of the doctrine to civilian leaders. It questioned whether the doctrine should at all be applicable in general terms to purely civilian leaders, since this issue, according to the Trial Chamber, still remained controversial and therefore held that “it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.” *(Prosecutor v. Akayesu (Case no. ICTR-96-4-T), ICTR T. Ch., Judgement, 2 September 1998, § 491)* Musema was a Tea factory owner, hence, a position which was strictly civilian in nature. If studying the
applicability of the doctrine to non-military superiors, this case would thus be an excellent point of reference. The Trial Chamber concluded that Article 6(3) was applicable to a person exercising civilian authority as superiors. (Prosecutor v Musema (Case no. ICTR-96-13-A), ICTR T. Ch., Judgement, 27 January 2000, § 148) It is important to note that Musema was convicted both on the basis of 6(1), for personally having ordered the commission of the crimes, and for superior responsibility under 6(3). (Prosecutor v. Musema, ICTRT. Ch., Judgement, 27 January 2000, § 926 see also e.g. § 936) In stark contrast to the above mentioned cases, which voiced some concern as to the applicability of the doctrine to civilian superiors, the Trial Chamber in the Kayishema and Ruzindana case did not seem to find the applicability hereof to be at all problematic. (Prosecutor v. Kayishema and Ruzindana (Case no. ICTR-95-1), ICTRT. Ch., Judgement, May 21 1999, §§ 213-215) The issue regarding the limitations of the doctrine of non-military superior responsibility was up for assessment in the Bagilishema Case. The Trial Chamber, had namely ruled that the doctrine was solely applicable to superiors who exercise “military-style command authority” over subordinates. The Appeals Chamber however clarified, once again, that the doctrine was applicable to civilian superiors. (Prosecutor v. Bagilishema (Case no. ICTR-95-1A-A), ICTR A Ch., Judgement, 3 July 2002, §§ 47, 51). It confirmed the finding in the Celebicic case that it was sufficient that the civilian superior “exercise a degree of control over their subordinates which is similar to that of military commanders”. Prosecutor v. Bagilishema, ICTR A Ch., Judgement, 3 July 2002, §§ 51-52 (emphasis added)

The applicability of the doctrine to non-military superior responsibility has thus successively become established in the case law of the ad hoc Tribunals and the codification of such a provision in the Rome Statute is incontestable. However, the exact contours and content of the elements of this responsibility are not as clear, even in the case law from the ad hoc tribunals. The exact contours hereof with regard to the Rome Statute Article 28(b) is even more uncertain, however, needless to say, the text of the Article provides some guidance as to the interpretation hereof. These contours, or rather, the specific elements of the doctrine of non-military superior responsibility, shall be addressed in the following.

First however, a general comment concerning a crucial distinction between the ad hoc tribunals and the ICC statute, need to be mentioned. The case law of the ad hoc tribunals made little distinction as to the content of the doctrine of command responsibility as opposed to the doctrine of non-military superior responsibility, wherefore the question whether the superior was military, quasi-military or civilian did not lead to significant consequences. In the ICC, these consequences will however be much more significant, since the elements of the doctrine differ considerably between 28(a) and 28(b).

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Updated: 30 June 2016

Article 28(b) - a superior

[295] a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly

a superior

As previously noted, Article 28(b) is only applicable when the superior cannot be considered a military or a quasi-military commander. This sub-Article is accordingly subsidiary to Article 28(a). (Arnold, 2008, p. 840) In determining whether to charge a person under Article 28(b) it is therefore of importance both to assess the status of the defendant “upwards” and “downwards”; upwards, in order to exclude the superior’s status as a potential military or quasi military leader, and, downwards, by ascertaining his/her status as actually possessing effective control with the material ability to prevent or repress crimes of
The Kordic case in the ICTY addressed the standard for what was not considered to be a military commander: “while he played an important role in military matters, even at times issuing orders, and exercising authority over HVO forces, he was, and remained throughout the indictment period, a civilian, who was not part of the formal command structure of the HVO. *Prosecutor v Kordic*, (Case no. IT-95-14), ICTY T. Ch, Judgement, 26 February 2001, § 838. (emphasis added)

It could be argued however that the importance of making a differentiation between military, quasi-military and non-military commanders are of less importance in the judgements from the *ad hoc* tribunals as opposed to the ICC since there is considerable difference between the elements in the latter and not in the former. Arnold accordingly correctly concludes that the ICC will carefully have to address this issue. (Arnold, 2008, p. 840)

The matter as to the lower boundaries of the doctrine of non-military superior responsibility is still under debate. It has been established, in both case law and the academic debate, that, as long as the effective control test is satisfied (see below), non-military superiors can for instance include leaders within non-military components of government and political parties (such as mayors, party leaders, Heads of State (that are not at the same time the commander-in-chief)), business leaders (e.g. industrial leaders, tea factory owners) as well as senior civil servants. To the category of non-military commanders have also been included prison-camp commanders and chiefs of police. (Fenrick, p. 521, Werle p. 132).

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*Updated:* 30 June 2016

**Article 28(b) - Subordinates**

Subordinates are anyone under the effective authority and control of a superior, i.e. any subordinate who has a superior who can direct his work or work related activities. The middle-management in a large organization, can, needless to say, be both superiors and subordinates. (Fenrick, 1999, p. 521) Examples may include, but are not limited to, subordinate members of political parties, prison guards, workers in factories, civil servants, private contractors, civil personnel in a peace keeping mission, NGO workers.

These are formal, or in order to use a more familiar term at this point, *de jure* subordinates of a non-military superior. However, a relevant question is whether the doctrine also applies to so called “indirect subordinates, i.e. other people or the civilian population at large, who, somehow *de facto* are under the effective control of the superior.

The issue concerning indirect subordinates was raised in the Musema case. Even if reaching the conclusion that Musema did not wield *de facto* control over the indirect subordinates in this particular case, it did however conclude that it would be possible to view people who were not employees of the superior as his/her subordinates in accordance with the doctrine of superior responsibility. (*Prosecutor v Musema*, ICTR T Ch, Judgement, 27 January 2000, §§ 144, 148, 881-883).

The range of the doctrine to indirect subordinates has, to some extent, been limited in the Rome Statute by the clause “as a result of his failure to exercise control properly” and “activities that were within the effective responsibility and control of the superior” in Article 28(b). By some scholars, these clauses have, been interpreted as limiting the reach of the superior’s *de facto* control to work-related activities and consequently also limiting the fold of indirect subordinates accordingly (e.g. Fenrick, p. 521-522 and Arnold, p. 840-841).

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Article 28(2)(b) - under his or her effective authority and control

In the commentary to Article 28(a) the concept of "effective control" as well as "authority and control" was discussed in relation to military and quasi-military commanders. In this section comments shall be limited to the specific interpretation of this requirement with regards to non-military superiors. For more extensive information, please refer to the previous commentary.

As already concluded, the doctrine of superior responsibility is applicable to non-military superiors so long as it can be established that a superior-subordinate relationship exists between the superior and the perpetrator of the principal crime. Some aspects of this relationship has already been discussed, namely the (possible) definition of the superior and the (possible) definition of the subordinate. These subsequent sections will however deal with the quality of the relationship as such. The relationship has to be characterized by the superiors' "effective control", i.e. his/her de facto material ability to prevent or punish the perpetrators.

Amongst others, the Čelebici, Musema, Bagilishema cases expressed similar views. "[I]t is . . . the Trial Chamber's conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his de facto position of authority . . .". "[I]n order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences". Prosecutor v. Mucic et al, ICTY T. Ch., Judgement, 16 November 1998, § 377-378 "It is also significant to note that a civilian superior may be charged with superior responsibility only where he has effective control, be it de jure or merely de facto, over the persons committing violations of international humanitarian law". Prosecutor v. Musema, ICTR T Ch., Judgement, 27 January 2000, § 141 "the effective control test applies to all superiors, whether de jure or de facto, military or civilian" Prosecutor v. Bagilishe, ICTRA Ch., Judgement, 3 July 2002, § 50 (emphasis added).

There are however some more caveats and restrictions to this "material ability" that are of particular importance with regards to civilian superiors as opposed to military or quasi-military commanders. A few of these concerns and difficulties will be addressed hereinafter.

Effective control-test does not require proof of both de jure and de facto authority

The first issue as to the interpretation of the extent of "effective control" - requirement, is whether, besides proof of de facto authority, the court also has to be satisfied as to the existence of a de jure authority. The Appeals Chamber in the Bagilishe case had to correct the findings of the Trial Chamber on this point. The Trial Chamber had held that there needed to be proof of both de jure and de facto authority: "...the Trial Chamber wrongly held that both de facto and de jure authority need to be established before a superior can be found to exercise effective control over his or her subordinates. The Appeals Chamber reiterates that the test in all cases is whether the accused exercised effective control over his or her subordinates; this is not limited to asking whether he or she had de jure authority. The ICTY Appeals Chamber held in the Čelebći Appeal Judgement that "[a]s long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control" Prosecutor v. Bagilishe, ICTRA Ch., Judgement, 3 July 2002, § 61 It

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ought however be mentioned that the Celebici Trial Chamber at another section of the judgment held that “[..] it is sufficient if there exists, on the part of the accused, a *de facto* exercise of authority. The Trial Chamber agrees with this view, provided the exercise of *de facto* authority is accompanied by the trappings of the exercise of *de jure* authority. By this, the Trial Chamber means the perpetrator of the underlying offence must be the subordinate of the person of higher rank and under his direct or indirect control. *Prosecutor v. Mucic et al.*, ICTY T. Ch., Judgement, 16 November 1998, § 646. Hence, the confusion of the Bagilishema Trial Chamber may be understandable.

**Assessment of the effective control on a case-by-case basis**

As already recognized above, the Trial Chambers in both the Akayesu and Musema case were not convinced as to the general applicability of the doctrine of superior responsibility to non-military superiors. In line herewith, both Chambers expressed that the authority of the non-military superior needed to be assessed on a case-by-case basis. (*Prosecutor v. Akayesu*, ICTR T. Ch., Judgement, 2 September 1998, § 491, *Prosecutor v. Musema*, ICTR T Ch., Judgement, 27 January 2000, § 867) A thorough assessment on a case-by-case basis may be of particular importance in civilian structures, nevertheless, it should not be forgotten the importance hereof in military and quasi-military settings as well.

**Broad interpretation, psychological pressure and power of influence as opposed to military-style command**

The issue of how to interpret the content of the “effective authority and control” - requirement of a non-military superior has been rather challenging. Differing opinions have surfaced on the subject, ranging from the authority needing to be proved solely by psychological pressure and powers of influence to the necessity of demonstrating a military style of command. The *Musema* Trial Chamber thus spoke in terms of psychological pressure: “The influence at issue in a superior-subordinate command relationship often appears in the form of psychological pressure. This is particularly relevant to the case at bar, insofar as Alfred Musema was a socially and politically prominent person in Gisovu Commune”. *Prosecutor v. Musema* (Case No. ICTR-96-13-A) ICTR T Ch., Judgement, 27 January 2000, § 140. In the Aleksovski case, the Trial Chamber stressed the need to interpret the civilian superior’s authority broadly (*Prosecutor v. Aleksovski*, Case No. IT-95-14/1) ICTY T. Ch, Judgement, June 25 1999, § 78) This was subsequently restricted with an alternative view in the *Kordic* case, where the ideas of substantial influence was limited: “[A] government official will only be held liable under the doctrine of command responsibility if he was part of a superior-subordinate relationship, *even if that relationship is an indirect one*. Even though arguably effective control may be achieved through *substantial influence*, a demonstration of such powers of influence will not be sufficient in the absence of a showing that he had effective control over subordinates, in the sense of possessing the material ability to prevent subordinate offences or punish subordinate offenders after the commission of the crimes. A showing that the official merely was generally an influential person will not be sufficient”. *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2 ICTY T. Ch., Judgement, 26 February, 2001, §§ 415-416 (emphasis added) As noted previously (see note 342), an attempt was furthermore undertaken by the Bagilishema Trial Chamber, to restrict the boundaries of the doctrine of non-military superior responsibility to solely cover so called “military-style” command situations. The argumentation was partly supported by the fact that the *Celebici* Trial Chamber had concluded that the exercise of *de facto* authority had to be accompanied by the trappings of the exercise of *de jure* authority. The *Bagilishema* Trial Chamber interpreted these trappings of authority to include “for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action,” and that “[i]t is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other persons of influence”. *Prosecutor v. Bagilishema* (Case No. ITCR-95-1A-A) ICTRT. Ch., 7 June 2001, §§ 42-43 This attempt was however
assertively shot down by the Appeals Chamber through referring to the conclusions of the Celebici Trial Chamber which held that civilian control solely had to be similar to that of military commanders. *Prosecutor v. Bagilishema* (Case No. ICTR-95-1A-A), ICTR A Ch., 3 July 2002, § 52.

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**Article 28(b) - as a result of**

[298] *as a result of his or her failure to exercise control properly*

This, like the same requirement under Article 28(a), indicates a new causality requirement under the doctrine of superior responsibility. Accordingly, the principal crime undertaken by the subordinates has to be a result of the non-military superior’s failure to exercise control properly. As to a discussion about the actual content of the “result” or “causality” requirement, see the commentary above.

According to many scholars, the sphere of the civilian superior’s ability to “exercise control properly” has to be limited to work or work-related activities. Hence, what is expected of the non-military superior in order to “exercise control properly” is limited accordingly. (Arnold, 2008, p. 840, Fenrick, 1999, p. 521.)

The reason being that as opposed to a military commander, a non-military superior cannot be charged with the responsibility to control his/her subordinates 24/7, and, furthermore he/she is normally not involved in efforts that generally increase the risk of subordinates committing international core crimes.

However, as to what is to be expected of the non-military superior Fenrick asserts that he/she is “obligated to establish and maintain an effective reporting system to ensure his subordinates comply with international humanitarian law in their work and work related activities and, if he or she becomes aware of potential or actual violations, to take all practicable measures to prevent or repress such violations”.

Fenrick does however make a distinction as to the kind of workers or work that could result in IHL violations; e.g. care of POW’s, interned civilians of forced labor or factories producing prison gas for use in camps. He furthermore gives the example of workers in a paint factory who, outside working hours engage in genocidal activities. A non-military superior to these workers could not, according to Fenrick, be convicted under Article 28(b) for these genocidal activities. (Fenrick, 1999, p. 521.) Arnold, reiterates Fenricks conclusions as to the description of that “failure to exercise control properly” solely entails work-related activities. (Arnold, 2008, p. 840)

(For an alternative view please refer to *Prosecutor v. Musema*, ICTR T. (Case No. ICTR-96-13-A), Ch., 27 January 2000, § 148)

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**Article 28(b)(i) - knew**

[299] *Knew or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes*

This part of the mens rea requirement for non-military superiors is the same as the actual knowledge standard expressed under 28(a)(ii). Comments as to the content hereof are therefore referred to the information provided above.
Article 28(b)(i) - consciously disregarded information

**[300] consciously disregarded information which clearly indicated**
The "consciously disregarding information which clearly indicated"-requirement in Article 28(b)(i), does however entail a much higher *mens rea* standard than what is provided for the doctrine of command responsibility (i.e. the "reason to know" or "should have know" –standards under ICTY-statute Article 7(3) and Rome Statute Article 28(a) respectively). This new standard has, for example, been equated to "willful blindness" i.e. that the superior is aware of a *high probability* of the existence of a fact (as long as he actually does not believe that it exists) and, yet, he/she decides to "turn a blind eye" to this fact. As such, it has furthermore been explained that this new criterion stands somewhere between "actual knowledge" and "recklessness" (defined as "consciously disregarding a risk") (Ambos, 2002, p. 870).

This new standard is one of the main reasons why Article 28(b) is the common understanding to provide a higher threshold and consequently more difficulties for the prosecution under the doctrine. (e.g. Ambos, 870).

One of the reasons that there has been a much higher threshold placed upon non-military superiors is that, superiors in civilian structures generally do not have as many possibilities to receive information on the conduct of their subordinates as do military commanders. (Arnold, 2008, p. 841) The standard has therefore been identified to entail that it is necessary to establish that: (1) information clearly indicating a significant risk that subordinates were committing or were about to commit offences existed, (2) this information was available to the superior, and (3) the superior, while aware that such a category of information existed, declined to refer to the category of information. (Fenrick, 1999, p. 521, Ambos, 2002, p. 870, Arnold, 2008, 841) Obviously the exact content of each of these conditions could be further discussed. Fenrick briefly touched upon these additional issues in his commentary, stating for instance that considering that a superior has a *duty to be informed*, and subsequently fails to avail him - herself of information sent to his/her office, he/she could be considered to consciously disregard said information.

Article 28(b)(ii)

**[301] activities that were within the effective responsibility and control of the superior**
The application and interpretation of this requirement, which obviously is an additional requirement under the doctrine of non-military superior responsibility as opposed to Article 28(a), is closely connected to the comments given under "failure to exercise control properly".

Subordinates within the meaning of Article 28(b) are according to many scholars, only within the effective responsibility and control of the superior while they are at work or while engaged in work related activities. Outside these circumstances, the activities undertaken by the subordinates are not generally considered to be under the control of the superior. (Fenrick, 1999, p. 522, Arnold, 2008, p. 841)

This is thus considerably different from a military commander who is considered to be on duty 24/7. The forces under military command are, by definition, furthermore subject to an internal disciplinary system. This is not generally the case for non-military superior-subordinate relationships.
Article 28(b)(iii) - Failed to take all necessary and reasonable measures

Failed to take all necessary and reasonable measures within his or her power

The measures to prevent or repress the commission of the crimes by the subordinates, has to be necessary, reasonable and within the superiors' power. The duty of the superior should hence not be beyond what can reasonably be expected of him/her. Even if this condition has the same terminology as in Article 28(a), needless to say, it would entail different conditions when applied in a civilian context.

To a certain extent, the matter as to what can be considered necessary and reasonable measures within the superiors powers, are connected to what has been addressed above concerning the requirements: “as a result of his or her failure to exercise control properly” and “activities that were within the effective responsibility and control of the superior”.

The non-military superior is unlikely to have disciplinary powers. Action that can be expected of the superior in lines with his/her duty to prevention and repress could e.g. be issuing orders to the subordinates that the activities should cease, immediate dismissal or repatriation when stationed abroad.

If all of these possibilities do not work, of particular importance when dealing with the doctrine of non-military superior responsibility is the possibility of submitting the matter to the competent authorities for investigation (e.g. higher superiors, police, military and or civil/criminal judicial authorities).

All of these possible avenues would subsequently have to be followed-up, especially when repatriation is involved. In this latter case it is also important to ascertain that criminal investigations are undertaken upon arrival at the country of origin. (Fenrick, 1999, p. 522, Arnold, 2008, p. 841)

Doctrines:

7. William Fenrick, "Article 28", in Otto Triffterer (Ed.), Commentary on the Rome Statute of the

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Updated: 30 June 2016

Article 29

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

General Remarks

Article 29 provides for the non-applicability of statutory limitations to the international crimes that are subject matter of the International Criminal Court.

Preparatory Works

providing that 'there is no statute of limitation for genocide, serious war crimes, and crimes against humanity (or aggression)' (Association Internationale de Droit Pénal (ADP)/International Institute of Higher Studies in Criminal Sciences (ISISC)/Max-Planck-Institute for Foreign and International Criminal Law (MPI), 'Draft Statute for an International Criminal Court-Alternative to the ILC Draft', prepared by a Committee of Experts, Siracusa/Freiburg, July 1995, Article 33q). In 1995, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court (Report of the Ad Hoc Committee on the Establishment of a Permanent International Criminal Court, GA 50th Sess. (1995), UN Doc. GAOR A/50/22). In its first report, the Ad Hoc Committee pointed at the divergences between provisions on statutory limitations contained in domestic legislation, and some delegations questioned whether they should apply with respect to serious crimes (Ibid, at §2(f), para. 127):

'Some delegations felt that the question of the statute of limitations for the crimes within the jurisdiction of the court should be addressed in the Statute in the light of divergences between national laws and bearing in mind the importance of the legal principle involved, which reflected the decreasing social importance of bringing criminals to justice and the increasing difficulties in ensuring a fair trial as time elapsed. However, other delegations questioned the applicability of the statute of limitations to the types of serious crimes under consideration and drew attention to the 1968 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity.'

In the same year, the General Assembly established the Preparatory Committee on the Establishment of an ICC, with the task of preparing a 'widely acceptable consolidated text of a convention for an international criminal court' (UN GA Res, A/RES/50/46, 18 December 1995). In 1996, the Preparatory Committee submitted its first report, containing five proposals on the (non-)applicability of statutory limitations (1996 Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GA 51st Sess. Supp. No. 22, UN Doc. A/51/22 (1996), Volume II, Article F). The five different proposals illustrate that the ICC drafters highly disagreed on this matter. The first proposal provided for prescription periods of an unidentified length, as well as detailed rules governing their application. The second proposal provided that statutes of limitation do not apply to crimes within the jurisdiction of the Court. The third proposal provided for the non-applicability of statutory limitations to such crimes, unless 'owing to the lapse of time, a person would be denied a fair trial'. The fourth proposal limited the material scope of the rule to only some of the crimes within the jurisdiction of the Court. The fifth and final proposal provided for a number of detailed rules concerning the application of statutes of limitation to all crimes within the jurisdiction of the Court. The five different proposals illustrate that the delegations highly disagreed on the matter. The debate was even more complicated, since the material scope of a statute for an international court was not yet defined. Their comments have been summarised in the report as follows (Preparatory Committee on the Establishment of an International Criminal Court, 25 March - 12 April 1996, A/AC.249/CRP.3/Add.1, 8 April 1996):

'Many delegations (Israel, Malaysia, and Ukraine) were of the view that owing to the serious nature of the crimes to be dealt with by the court, there should be no statute of limitations for such crimes. On the other hand, some delegations felt that such a provision was mandatory and should be included in the statute, having regard to their national laws, to ensure fairness for the accused. The view was expressed that statutory limitation might apply to lesser crimes (France). In the view of some delegations (Japan), this question should be considered in connection with the issue of the availability of sufficient evidence for a fair trial. Some delegations (Canada) suggested that instead of establishing a rigid rule the Prosecutor or President should be given flexible power to make a determination on a case-by-case basis, taking into account the right of the accused to due process. In this connection, it was noted that Article 27 of the statute was relevant to this issue. It was suggested that an accused should be allowed to apply to the court to terminate the proceedings on the basis of fairness, if there was lack of evidence owing to the passage of many years.'
The proposals discussed by the Preparatory Committee on the Establishment of an ICC eventually were not consolidated in the Zutphen Report of 1998 (Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, 4 February 1998, UN Doc. A/AC.249/1998/L.13, pp. 57-58, Article 21(f)). However, the 1998 Report of the Preparatory Committee on the Establishment of an International Criminal Court, which formed the basis for the negotiations during the Rome Conference, did reflect the five proposals as described supra (Draft Statute of an International Criminal Court, 14 April 1998, UN Doc. A/Conf.183/2/Add.2, pp. 53-54, Article 27: 'Statute of limitation'). During the Rome Conference, the Working Group on General Principles of Criminal Law proposed a provision providing for the non-applicability of statutory limitations to all crimes within the jurisdiction of the court (Working Group 2 on General Principles of Criminal Law', UN Doc A/Conf.183/C.1/WGGP/L.4, p. 4; Schabas, 1999, p. 525). Japan changed its previous position, but maintained that the passage of time should provide for a mitigating factor in allowing a prosecution to proceed before the ICC (Saland, 1999, p. 204). The drafters of the 1998 ICC Statute eventually adopted the proposal of the Working Group, which is contained in Article 29. The only disagreement on this provision can be found in the joint statement submitted by China and France in a footnote of the Working Group’s Report. They firstly disagreed on the application of this rule with respect to war crimes, and secondly, stressed their concern with regard to the effect of the passage of time in terms of securing a fair trial (UN Doc A/Conf.183/C.1/WGGP/L.4, p.4, footnote. 7). However, the proposal was adopted by the Conference without changes.

Analysis

i. Retroactivity

Article 29 is silent on its retroactive application. However, pursuant to Article 11, the ICC has jurisdiction only with regard to crimes committed after the entering into force of the 1998 ICC Statute. The ICC Statute entered into force on 1 July 2002. The issue of retroactivity, therefore, does not arise.

ii. Complementarity

The so-called ‘complementarity’ provision contained in Article 17 of the 1998 ICC Statute provides that states have the main responsibility for the adjudication of international crimes. Schabas points out that a problem of complementarity may arise if the prosecution of a crime at a national level is barred by a domestic statute of limitations but still possible pursuant to the 1998 ICC Statute (Schabas, 1998, p. 103). The ICC could declare that this state is ‘unable’ to prosecute; the ICC would then be entitled to exercise its jurisdiction. For this reason, most states’ parties that still had domestic provisions on statutes of limitation to crimes within the jurisdiction of the ICC have abolished or amended them, although not all states’ parties have done so. However, if a state has not done so, it shows its unwillingness to prosecute these crimes, thus entailing that the case is admissible before the ICC. Indeed, it appears that a number of states, despite the ratification of the 1998 ICC Statute, did not (fully) amend their domestic legislation in this regard, and still apply statutes of limitation to (some) international crimes. Illustrative for the divergences between Article 29 and the domestic provisions are the implementation processes in France, Germany, and the Netherlands respectively.

First, whereas the French legal system since 1964 has provided for the imprescriptibility of crimes against humanity, war crimes remain subject to statutes of limitation (see the Journal Officiel du 29 Décembre 1964, No. 17.788 and Bulletin Législatif Dalloz, décembre 1964, p. 33). In 1999, the French Constitutional Council (Constitutional Court, Decision 98-408 DC of 22 January 1999 (Treaty on the Statute of the International Criminal Court), Journal officiel, 24 January 1999, 1317) considered that if a crime became statutorily barred due to the expiration of the prescription period provided for in the French legal system, the ICC would incur jurisdiction over the crime. Since such circumstances would infringe upon the exercise of national sovereignty, the Constitutional Court concluded that the 1994 new French Penal Code
should be amended by providing for the non-applicability of statutory limitations to war crimes as well (ICRC Report 2003, p. 1).

Second, Article 5 of the German 2002 Code of Crimes against International Law, that entered into force on 30 June 2002, confines the non-applicability of statutory limitations to ‘serious criminal offences’. As a consequence, this provision does not extend to war crimes subject to less than one-year imprisonment, such as the violation of the duty of supervision and the omission to report a crime as these sections form “less serious criminal offences” (Satzger, 2002, p. 272). These crimes remain subject to the ordinary provisions on statutory limitations, provided for in Article 78 of the German Penal Code. The German legislature exempted these crimes from imprescriptibility because it considered them of a significantly less serious nature than some ordinary crimes that remain subject to ordinary provisions on statutory limitations provided for in the Penal Code. Theoretically, the ICC could exercise its jurisdiction with respect to these minor war crimes pursuant to the complementarity provisions. However, it seems in most circumstances rather unlikely that the ICC, in effect, would start adjudicating such crimes, as the ICC aims at exercising its jurisdiction with respect to the most serious and gravest core international crimes exclusively. The Preamble 1998 ICC Statute states: ‘[A]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation; [...] Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.’

Third, the Dutch International Crimes Act (2003 International Crimes Act, 19 June 2003, Stb. 270, 3 July 2003, 28337), that entered into force on 1 October 2003, provides in Article 13 for the non-applicability of statutory limitations to the crimes covered by the Act. The International Crimes Act confines the material scope of Article 29 of the 1998 ICC Statute, by excluding war crimes subject to a maximum sentence of 10-years imprisonment from its application. On the other hand, the International Crimes Act extends this provision, since it also applies with respect to the crime of torture sui generis, thus not constituting a crime against humanity. The legislature decided to extend the provision to this crime, owing to the very serious nature of the crime of torture, as well as the ius cogens character of the prohibition on torture (See the Dutch government in their explanatory memorandum on the International Crimes Act, Bijl. Hand. II 2001/2002, 28 337, No. 3, p. 33). The International Crimes Act applies retroactively with respect to the crime of torture, unless its prescription period has already expired as of the date of the entering into force of the ICC Statute (Boot-Matthijssen and R. van Elst, 2002, pp. 1745 - 1747).

**International instruments and jurisprudence**

i. The Statutes of the Ad Hoc Tribunals

The Statutes of the International Criminal Court for the Former Yugoslavia (hereinafter referred to as ICTY) and the International Criminal Court for Rwanda (hereinafter referred to as ICTR) do not contain any provisions on the (non-)applicability of statutory limitations. The only reference to the aspect of time can be found in the provisions providing for the Ad Hoc Tribunal’s temporal jurisdiction. The ICTY Statute provides in Article 8: ‘The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.’ The ICTR Statute provides in Article 7: ‘The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.’ Even though at this stage the (non-)applicability of statutory limitations to international crimes already had been addressed frequently in various international instruments, the drafters apparently considered that a provision was unnecessary. First, too little time had passed for a possible expiration of prescription periods. After all, the ICTY was established during the armed conflict in the Socialist Federal Republic of Yugoslavia, and the ICTR in a few months after the genocide terminated in Rwanda. Secondly,
both the Socialist Federal Republic of Yugoslavia and Rwanda had already become parties to the 1968 UN Convention before the events occurred on the territories in the 1990s. The Socialist Federal Republic of Yugoslavia ratified the 1968 UN Convention on 9 June 1970; Rwanda acceded to the 1968 UN Convention on 16 April 1975. Moreover, the penal codes of the Former Yugoslavia and Rwanda provide for the non-applicability of statutes of limitation to international crimes.

There is some case law of the ICTY on statutes of limitation. In 1997, the Trial Chamber in the Tadić case (Tadić (Case No. IT-94-1-AR72-T), T. Ch. II, Judgement, 7 May 1997, at §§641-642) referred to a decision of a French domestic court in the French case of Barbie (Court of Appeal, Criminal Chamber, decision of 4 October 1985, ILR 125) concerning the applicability of statutory limitations to crimes against humanity. However, the Chamber itself did not express any opinion on the permissibility of the application of statutory limitation. This is different in the judgement of the Trial Chamber in the Furundžija case (Furundžija (Case No. IT-95-17/1-T), T. Ch. II, Judgement, 10 December 1998, at §156). In an obiter dictum, that Trial Chamber concluded that, considering the **jus cogens** character of the prohibition of torture, ‘it would seem that other consequences include the fact that torture may not be covered by a statute of limitations...’ (Furundžija (Case No. IT-95-17/1-T), T. Ch. II, Judgement, 10 December 1998, at §156). However, the Trial Chamber did not explain how it reached such a conclusion. In addition, the Chamber recognised this rule with respect to the crime of torture as a war crime, rather than the crime of torture sui generis (Cassese, 2003, p. 119). In later judgements, no Trial Chamber has pronounced itself on the same matter. In 2004, in the case of Mrđja (Mrđja (Case No. IT-02-59-S), T. Ch. I, Sentencing judgement, 31 March 2004, at §§103-104), the Trial Chamber discussed the difference between statutes of limitation versus the right to be tried without undue delay. In analysing the effect of the passage of time on the determination of the sanction, the Chamber recalled that:

’T]he importance of international prosecution of the perpetrators of such serious crimes diminishes only slightly over the years, if at all. On this point, it is important to recall Article 1 of the 1968 UN Convention (ratified by the former Yugoslavia on 9 June 1970 and currently in force in Bosnia and Herzegovina), which stipulates that such crimes are not subject to statutory limitation ... [F]or crimes of a seriousness justifying their exclusion from statutory limitation, the Trial Chamber considers that a lapse of time of almost twelve years between the commission of the crimes and sentencing proceedings is not so long as to be considered a factor for mitigation.’

At present, the Ad Hoc Tribunals are engaged in putting into effect so-called ‘completion strategies’, which imply that they will stop trying cases in the near future. Statutes of limitation play no role in these strategies.

**ii. The Statutes of the Internationalised Tribunals**

**a) The Panels in East Timor**

By its Resolution 1272 (1999) adopted on 25 October 1999, the Security Council of the United Nations, acting under Chapter VII of the Charter of the UN, decided to establish a United Nations Transitional Administration in East Timor (UNTAET). Among other things, UNTAET was empowered to exercise all legislative and executive authority, including the administration of justice. In 2000, the Representative of the UN, pursuant to the authority given to him under the Security Council Resolution, adopted UNTAET Regulation 2000/15, whereby Panels with the exclusive jurisdiction with respect to serious criminal offences were established (UNTAET Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/Reg./2000/15, 6 June 2000). The Regulations provide for the prosecution of genocide, war crimes, crimes against humanity, murder, sexual offences and torture. The drafters of the Regulations of the Panels did not need to fear for a possible expiration of the prescription periods as provided for in the Timor-Leste Penal Code (In Timor-Leste, Art 78 of the Indonesia 1918 Penal Code, as well as the Portuguese Penal Code apply), since the tribunal’s subject matter jurisdiction concerns crimes committed in 1999 (UNTAET/Reg./2000/15, 6 June 2000, Sec. 2(3)). Nevertheless, the Regulation
provides for the non-applicability of statutory limitations to crimes of genocide, war crimes, crimes against humanity, and the crime of torture. Ordinary crimes, such as murder and sexual offences, remain subject to domestic provisions providing for statutory limitations as contained in the Timor-Leste domestic Penal Code.

b) The Special Court for Sierra Leone

In 2002, the United Nations and the government of Sierra Leone agreed on the establishment of a Special Court for Sierra Leone (Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002)). The Statute does not contain any provision providing for the (non-)applicability of statutory limitations (Ambos and Othman, 2003; Romano, Nollkaemper and Kleffner, 2004). Obviously, there was no reason to provide for a provision in this regard, as the Special Court has jurisdiction over crimes committed only since 30 November 1996 (Statute of the Special Court for Sierra Leone, Article 1). At the time of the Special Court's establishment (2002), too little time had passed for a possible expiration of the prescription periods. In addition, since the common law as applied within the Sierra Leonean domestic criminal law does not apply statutes of limitations to felonies, the drafters probably considered the inclusion of a provision unnecessary.

c) The Extraordinary Chambers in Cambodia

In 2003, the UN General Assembly in its Resolution 57/222B approved a draft agreement between the United Nations and the government of Cambodia with regard to the establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (UNGA Res. 57/222B, 13 May 2003, 'Khmer Rouge Trials', adopted during the 85th Meeting of the 57th Sess. of the UN General Assembly). The agreement between the United Nations and the government of Cambodia was signed on 6 June of the same year, and entered into force on 29 April 2005. The (non-)applicability of statutory limitations was one of the aspects debated during the drafting stage of the Act on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, adopted in 2001 (Cambodia, Reach Kram No. NS/RKM/0801/12, 10 August 2001 promulgating the Act on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea). This third internationalised court has jurisdiction over crimes committed almost thirty years earlier (in the period from 1975 to 1979). At the time of the adoption of the Act in 2001, and amended in 2004 pursuant to the Act on the amendment of the Act on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (adopted by the National Assembly on 05 October 2004), many crimes had become statutorily barred pursuant to the expiration of prescription periods of a maximum of ten years as provided for in the Cambodian Criminal Code (provisions relating to the Judiciary and Criminal Law and Procedure, Applicable in Cambodia, During the Transitional Period, Decision of 10 September 1992, Article 30: 'Statute of Limitations: The statute of limitations is three years for misdemeanours and ten years for felonies). In order to overcome this obstacle, the 2004 Act on the Amendments of the 2001 Act on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea in Article 3 Act extends the prescription periods of common crimes by thirty years. Second, it provides for the non-applicability of statutory limitations to the crime of genocide and crimes against humanity in Article 4. It is unclear why war crimes remain subject to the ordinary statute of limitations in Article 6. It may be the case that the French approach towards statutory limitations for war crimes influenced the Cambodian legislature. The discrepancy between the core international crimes suggests that the drafters of the Act consider war crimes not of a similar grave nature as crimes against humanity and genocide. In addition, the Statute does not regulate its retroactivity with respect to crimes that have already become prescribed pursuant to Cambodian
domestic law. The absence of a provision in this regard suggests that the Statute applies retroactively; it thus permits the reopening of cases involving already prescribed crimes (Swart, 2004, pp. 312-313).

Discussion on statutory limitations

i. Scholarly organisations and scholars

Since the establishment of the ICC, scholarly organisations and scholars have broadened the discussions on the (non-)applicability of statutory limitations to core international crimes other than the ones committed during World War II. Finkielkraut, 1992, emphasises the renewed interest for France’s position during World War II as a consequence of the war crimes trials of Barbie and Touvier. Moreover, they also discussed this question with respect to crimes of forced disappearance of persons and the crime of torture. Poncela, 2000, pp. 887-895, points at the restrictive material scope of the French 1964 Act declaring imprescriptibility of crimes against humanity. Zaffaroni, 2000, discusses this concept with respect to military junta crimes through analysing the Argentinean case law. Zimmermann (1997) carries out a similar inquiry on statutory limitations with respect to communist crimes through analysing case law and legislation in the Czech Republic, France, Germany, and Hungary. When in 1995 an independent group of experts associated with the International Association of Penal law addressed this concept for a second time, it introduced in the so-called 'Syracusa-Draft' a new provision providing that 'there is no statute of limitation for genocide, serious war crimes, and crimes against humanity (or aggression)' (Association Internationale de Droit Pénal (ADP)/International Institute of Higher Studies in Criminal Sciences (ISISC)/Max-Planck-Institute for Foreign and International Criminal Law (MPI), 'Draft Statute for an International Criminal Court-Alternative to the ILC Draft', prepared by a Committee of Experts, Siracusa/Freiburg, July 1995, Art. 33(q)). Another example is provided for by the Princeton Principles adopted in 2001, which recommends in Principle 6 the adoption of a provision on the imprescriptibility of a number of international crimes. Other contemporary scholars remain hesitant in recognizing the existence of a rule of customary international law or general principle of law and rather speak of the ‘crystallization’ of such a rule (Abrams and Ratner, 2001, p. 143 referring to Van den Wyngaert, 1999, pp. 227 and 233; Delmas-Marty, 2002, pp. 617, 618; Gaeta, 2001, p. 766; Kreicker, 2003, p. 377; Schabas, 1999, p. 524; Zimmermann, 1997, p. 251). Some consider the imprescriptibility of international crimes a rule of customary international law, or even *jus cogens* (Bassiouni, 1999, p. 227 and 2002, p. 17; Cassese, 2003, p. 319; Page, 2004, p. 47; Schiffrin, 2003, p. 147; Van den Wyngaert and Dugard, 2001, p. 887). An example is provided for by the Advisory opinion in the case of Bouterse, in the proceedings before the Amsterdam Court of Appeal in 2000, in which the expert concluded that crimes against humanity are imprescriptible pursuant to customary law (Opinion Re Bouterse, ELRO- No. AA 8427, 7 July 2000, at §4.5.6.). Notwithstanding this opinion, neither the Court of Appeal, nor the Supreme Court pronounced itself on this issue. Therefore, the expert opinion is of no significance in determining the customary character of the non-applicability of statutory limitations to international crimes. Despite discussions on various legal aspects, scholars hardly addressed the desirability of the imprescriptibility of international crimes from a criminological, philosophical, or moral perspective. An exception forms, for instance, the study carried out by the Max Planck Institute for Foreign and International Criminal Law, presented during the Conference ‘Strafverfolgung von Staatskriminalität, Vergeltung, Wahrheit und Versöhnung nach politischen Systemwechseln’, Berlin 2004.

ii. Non-governmental organisations

In 2005, the International Committee of the Red Cross (ICRC), which carried out an extensive study on customary international humanitarian law (Henckaerts, Doswald-Beck, Alvermann, Dörmann, Rolle, 2005, p. 614; Volume II, Chapter 43, Section E) concluded that '[s]tatutes of limitation are not applicable to war crimes'. Non-governmental organisations on various occasions actively called upon states not to apply statutory limitations to international crimes. A clear example of this activism is the establishment of the

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Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, adopted by the 'Violence against Women in War Network Japan' and other Asian women's and human rights organizations in 2000. Article 6 of its Charter provides that '[s]tatutory limitations do not apply with respect to international crimes committed against women before and during World War II. These crimes include, but are not limited to the following acts: sexual slavery, rape, and other forms of sexual violence, enslavement, torture, deportation, persecution, murder, and extermination.' Furthermore, the International Commission of Jurists, together with Amnesty International, called upon the Argentinean authorities to recognise the imprescriptibility of various human rights violations committed by former military junta regimes. Moreover, Human Rights Watch emphasised that statutes of limitation should not preclude criminal proceedings against former Chad president Hissène Habré before Belgian or Senegalese courts. Another example is provided for by the Argentinean non-governmental organisation called 'Mothers of the Playa de la Mayo', which emphasised for over thirty years that the 'desaperacidos' cases should not become prescribed, as long as the victims' whereabouts have not been discovered. Finally, in 2004 Human Rights First submitted an extensive analysis on statutes of limitation to the Peruvian Truth and Reconciliation Commission, established in 2000, in which this NGO concluded that crimes committed during the regime of former President Fujimori are not subject to statutes of limitation.

Doctrine:

Article 30

Mental element

General remarks

For the first time in the history of international criminal law, and unlike the Nuremberg and Tokyo Charters and the ICTY and ICTR Statutes, Article 30 of the ICC Statute has provided for a general definition of the mental element triggering the criminal responsibility of individuals for core international crimes.

This provision, which is applicable and binding within the jurisdiction of the ICC, has not put an end to the lively debate on \textit{mens rea} that during the last two decades has confronted the jurisprudence of the ICTY and ICTR. Quite the contrary, the negotiations on Article 30 ICC Statute involved actors coming from different legal cultural experiences, who engaged in an effort of comparative law synthesis (on the drafting history of Article 30 ICC Statute see Clark, 2001). Despite the attempt to find a shared grammar, practitioners and scholars still disagree in relation to the exact meaning of the standards of culpability set out in the norm in question. Professor Joachim Vogel notes that the main reason of such confusion 'is that intent and knowledge are defined in Articles 30(2) and (3) ICC Statute under clear influence of the common law principles, but in a manner that is a compromise and therefore not consistent and not without overlaps, and applies to \textit{dolus eventualis} in the German understanding (awareness that a circumstance exists or a
consequence will occur in the ordinary course of events') (Vogel, 2009, margin 95).

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Updated: 30 June 2016

Article 30(1)

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

Article 30 of the ICC Statute is based on a rule-exception dynamic. Criminal responsibility for core international crimes can normally be attached only to those who realized the material elements with 'intent and knowledge', even though exceptions to the default rule on the mental element are to some extent allowed ('unless otherwise provided' – this wording will be addressed below).

The use of the terms 'intent and knowledge' could appear to point to two distinct types of mental element. However, according to the early practice of the ICC and commentators this formula refers to will and cognition as being both necessary components of the one mental element of intent (see, inter alia, Prosecutor v. Katanga and Ngudjolo Chui, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, para. 529; Eser, 2002, p. 907). The choice of the terms 'intent and knowledge' is rather unfortunate. Criminal systems of civil law countries generally consider 'knowledge' (Wissen, conscience) to be a requirement of intent alongside the element of will (Wollen, volonté) (on the German criminal system see Jescheck & Weigend, 1996, p. 293; on the French criminal system see Soyer, 2004, p. 98; Bell, Boyron & Whittaker, 2008, p. 225). In criminal systems of common law countries, 'knowledge' can even be a kind of intent, namely intent based on perception of the unlawful outcome with a level of likelihood bordering with certainty (on the US criminal system see s. 2.02(2)(b) US Model Penal Code; Badar, 2013, pp. 107 ff). It can be said, hence, that 'in comparative criminal law [...] 'knowledge' figuratively finds its place within (and not outside) the circle of intent, either as a part (civil law) or as a form of it (common law)' (Badar & Porro, 2015, p. 651; on this aspect see also Porro, 2014, p. 176).

As a point of reference for the agent's 'intent and knowledge', Article 30(1) of the ICC Statute mentions the 'material elements' of the crime. The ICC Statute, however, lacks a general provision on the definition of the material elements of the crime or actus reus. The deficiency is partially remedied in Article 30(2) and (3) of the ICC Statute. These provisions, which will be addressed in detail below, set out the notions of intent and knowledge in relation not to the crime as a whole, but to the elements of conduct, consequence and circumstance separately. Such a drafting technique assigns different levels of culpability to each of the material elements of the crime. This represents a notable move from an 'offence analysis' approach to mens rea to an 'element analysis' approach to mens rea (Prosecutor v. Bemba Gombo, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/05-01/08-424, 15 June 2009, para. 356, endorsing inter alia Badar, 2008, pp. 475 ff; Badar, 2013, pp. 384 ff) that finds a remarkable precedent in s. 2.02 of the US Model Penal Code. The move from 'offence analysis' to 'element analysis' has historically aimed to achieve 'a rational, clear, and just system of criminal law' (Robinson & Grall, 1983, p. 685). Determining the level of culpability required for criminality in relation to each single material element improves the precision of the offence definition, what in turn provides fair notice of the extent of the criminal ban and reduces the possibilities of extensive interpretation (Robinson & Grall, 1983, pp. 703 ff; on this point see also Badar & Porro, 2015, p. 652).

According to the opening clause at the beginning of Article 30(1) of the ICC Statute, the requirement of 'intent and knowledge' applies 'unless otherwise provided'. It is widely accepted that this formula allows the ICC to infer exceptions to the default rule on the mental element from other provisions of the ICC.
Statute, such as Article 6 on genocide or Article 28 on superior responsibility. It is controversial, in contrast, whether departures from the standard of 'intent and knowledge' can also derive from the Elements of Crime (in this sense, inter alia, Werle & Jeßberger, 2005, pp. 45 ff; Badar, 2008, p. 501; Schabas, 2010, pp. 474 ff; Porro, 2014, pp. 192 ff), or even customary international law (in this sense, inter alia, Werle and Jeßberger, 2005, pp. 45 ff). The early practice of the ICC has sustained the view that both the ICC Statute and the Elements of Crime can provide 'otherwise'. Paragraph (2) of the General Introduction to the Elements of Crime asserts in this direction that:

'[a]s stated in Article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crime to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in Article 30 applies [...]'.

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Article 30(2)

[306] 2. For the purposes of this article, a person has intent where: Adhering to the already mentioned 'element analysis' approach to mens rea, paragraph (2) of Article 30 ICC Statute defines intent in relation to the material elements of conduct and consequence separately.

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Article 30(2)(a) - Intent in Relation to Conduct

[307] (a) In relation to conduct, that person means to engage in the conduct;
Concerning the definition of intent in relation to conduct, which the early practice of the ICC has not yet addressed, commentators have proposed two competing interpretations.

According to a first approach, Article 30(2)(a) ICC Statute would merely require that the conduct be accomplished as a result of the agent's free determination to act. Intent in relation to conduct would in other words be established unless the action or omission was performed during unconsciousness, was due to an automatism, or in other ways was involuntary. To take an example, criminal responsibility for core international crimes might not be attached to an individual who, attacked by a swarm of bees, involuntarily or even automatically realized the conduct (in this sense, inter alia, Eser, 2002, p. 913; Werle, 2014; Schabas, 2010, p. 477; Porro, 2014, pp. 177 ff).

Other commentators, and in particular Ambos, have instead opined that the voluntariness to accomplish a certain conduct would be part already of the notion of act relevant to the criminal law. Article 30(2)(a) ICC Statute would impose an additional element of conscious will to engage in the conduct, or awareness to engage in it. In either case the agent would be required to have known the factual circumstances qualifying the action or omission as relevant to the criminal law (in this sense, inter alia, see Ambos, 2002, p. 765 ff; Finnin, Elements of Accessorial Modes of Liability, 2012, pp. 163 ff; Finnin, Mental Elements, 2012, pp. 341 ff; Badar, 2013, p. 388).

The latter interpretation of intent in relation to conduct relies on the concept of act relevant to the criminal
law acknowledged in continental European countries such as Austria, Germany, Italy and Spain that includes a component of free determination to act (on the German criminal system see Jescheck & Weigend, 1996, pp. 219 ff). However, this concept of criminal act has not attained world-wide diffusion, since for instance s. 1.13(2) of the US Model Penal Code provides that "act" or "action" means a bodily movement whether voluntary or involuntary. It can be questioned whether the notion of criminal act as including an element of voluntariness is representative enough to establish a general principle of law common to the major legal systems of the world pursuant to Article 21(1)(c) ICC Statute (Badar & Noelle, 2014). Only such a general principle of law might legitimately play a role in the interpretation of Article 30(2)(a) ICC Statute (on this point see also Porro, 2014, pp. 177 ff).

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Article 30(2)(b) – Intent in Relation to Result

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

While the former alternative of Article 30(2)(b) of the ICC Statute refers to cases where the agent aimed to bring about the consequence or result, the latter one applies to situations where the agent foresaw the result with a certain degree of likelihood.

Competing interpretations

The main issue that has arisen in respect to intent as awareness that the result ‘will occur in the ordinary course of events’ concerns the level of likelihood with which the agent must have foreseen the result.

A first school of thought has argued that the default rule of Article 30 of the ICC Statute would not accommodate any standard of mens rea below the threshold of knowledge of result in terms of practical certainty (in this sense, inter alia, Prosecutor v. Bemba, ICC PT. Ch., Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, paras. 359 ff; Prosecutor v. Lubanga, ICC T. Ch., Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 1011; Prosecutor v. Lubanga, ICC A. Ch., Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-A-5, 1 December 2014, paras. 441 ff; Eser, 2002, pp. 915 ff; van der Vyver, 2004, pp. 70 ff; Cryer, Friman, Robinson & Wilmshurst, 2010, pp. 385 ff; Heller, 2011, p. 604; Finnin, Elements of Accessorial Modes of Liability, 2012, pp. 172 ff; Finnin, Mental Elements, 2012, p. 358; Badar, 2013, p. 392; Ohlin, 2013, p. 23; Porro, 2014, pp. 179 ff).

Other voices have on the contrary maintained that also some forms of conscious risk-taking in relation to result that in domestic criminal laws satisfy the standards of dolus eventualis or recklessness could meet the requirements of Article 30 ICC Statute (in this sense, inter alia, Prosecutor v. Lubanga, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, 29 January 2007, paras. 352 ff; Prosecutor v. Katanga and Ngudjolo Chui, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, para. 251 fn. 329; Jescheck, 2004, p. 45; Weigend, 2008, p. 484; Cassese, Gaeta, Baig, Fan, Gosnell & Whiting, 2013, p. 56; Gil Gil, 2014, pp. 86 and 107).

The Lubanga Dyilo decision on the confirmation of charges

The early practice of ICC addressed this crucial problem already in 2007, in its first decision on the confirmation of charges issued in the Lubanga Dyilo case. PTC I of the ICC stated that the volitional element appearing in Article 30 ICC Statute includes also
"situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it (also known as dolus eventualis) (Prosecutor v. Lubanga, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, 29 January 2007, para. 352(ii)).

After having set out a concept of dolus eventualis based on the idea of acceptance of a criminal risk, the Pre-Trial Chamber added the following specification:

"[t]he Chamber considers that in the latter type of situation, two kinds of scenarios are distinguishable. Firstly, if the risk of bringing about the objective elements of the crime is substantial (that is, there is a likelihood that it "will occur in the ordinary course of events"), the fact that the suspect accepts the idea of bringing about the objective elements of the crime can be inferred from:

i. the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realization of the objective elements of the crime; and

ii. the decision by the suspect to carry out his or her actions or omissions despite such awareness.

Secondly, if the risk of bringing about the objective elements of the crime is low, the suspect must have clearly or expressly accepted the idea that such objective elements may result from his or her actions or omissions' (Prosecutor v. Lubanga, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, 29 January, paras. 353 ff, fns. omitted).

PTC I of the ICC appears first of all to assert that a literal interpretation of the element of awareness that the result 'will occur in the ordinary course of events' laid down in Article 30 ICC Statute would refer to a level of substantial criminal risk. Moreover, the Pre-Trial Chamber seems to further enlarge the concept of intent applicable within the jurisdiction of the ICC. It does so by stating that even the perception of a low risk of bringing about the objective elements of the crime can satisfy the requirements set out in the provision in question, if the agent explicitly accepted the occurrence of such objective elements. Lacking the component of acceptance of the crime – as '[this would be the case of a taxi driver taking the risk of driving at a very high speed on a local road, trusting that nothing would happen on account of his or her driving expertise] – the threshold of intent pursuant to article 30 ICC Statute would not be attained (Prosecutor v. Lubanga, ICC P.T. Ch., Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007, para. 355 fn. 437; on the discussion on the mental element in this decision see also Badar, 2013, pp. 394 ff; Badar & Porro, 2015, pp. 657 ff; Porro, 2014, pp. 182 ff).

Subsequent ICC jurisprudence

The broad interpretation of intent put forward in the Lubanga decision on the confirmation of charges was endorsed in principle in Katanga and Ngudjolo Chui (Prosecutor v. Katanga and Ngudjolo Chui, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, para. 251 fn. 329), with Judge Anita Ušacka dissenting (Partly Dissenting Opinion of Judge Anita Ušacka to Prosecutor v. Katanga and Ngudjolo Chui, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, para. 22). Subsequently, however, it was turned down in the Bemba Gombo decision on the confirmation of charges of 2009, where PTC II of the ICC argued that:

'[w]ith respect to dolus eventualis as the third form of dolus, recklessness or any lower form of culpability, the Chamber is of the view that such concepts are not captured by Article 30 of the Statute. This conclusion is supported by the express language of the phrase "will occur in the ordinary course of events", which does not accommodate a lower standard than the one required by dolus directus in the second degree
The Pre-Trial Chamber developed a reasoning based on the principles of treaty interpretation pursuant to Articles 31 and 32 of the Vienna Convention on the Law of Treaties, stressing again that a literal interpretation of "the words "will occur", read together with the phrase "in the ordinary course of events", clearly indicates that the required standard of occurrence is close to certainty. In this regard, the Chamber defines this standard as "virtual certainty" or "practical certainty" (Prosecutor v. Bemba Gombo, ICC PT.Ch., Decision on the Confirmation of Charges, ICC-01/05-01/08-424, 15 June 2009, para. 362). This standard is undoubtedly higher than the principal standard commonly agreed upon for dolus eventualis – namely, foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility. Hence, had the drafters of the Statute intended to include dolus eventualis in the text of Article 30, they could have used the words "may occur" or "might occur in the ordinary course of events" (Prosecutor v. Bemba, ICC PT.Ch., Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 363, fn omitted).

In support of its analysis, the Bemba decision on the confirmation of charges drew upon the drafting history of Article 30 of the ICC Statute, and in particular a proposal that the Preparatory Committee put forward in 1996. In the relevant parts, it reads as follows:

"[...] 2. For the purposes of this Statute and unless otherwise provided, a person has intent where: [...] (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. [...] 4. For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if: [...]"

"Note. The concepts of recklessness and dolus eventualis should be further considered in view of the seriousness of the crimes considered. Therefore, paragraph 4 would provide a definition of "recklessness", to be used only where the Statute explicitly provides that a specific crime or element may be committed recklessly. In all situations, the general rule, as stated in paragraph 1, is that crimes must be committed intentionally and knowingly [...]" (Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22A, U.N. Doc. A/51/22 (1996) (Vol. II), reprinted in this part in Bassiouni, 2005, p. 226).

PTC II of the ICC reported that the references to dolus eventualis and recklessness disappeared from the general provision on the mental element at later stages of the negotiations (Prosecutor v. Bemba, ICC PT.Ch., Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 366). It also highlighted that "the fact that paragraph 4 on recklessness and its accompanying footnote, which stated that "recklessness and dolus eventualis should be further considered", came right after paragraph 2(b) in the same proposal, indicates that recklessness and dolus eventualis on the one hand, and the phrase "will occur in the ordinary course of events" on the other, were not meant to be the same notion or to set the same standard of culpability" (Prosecutor v. Bemba, ICC PT.Ch., Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 366).
2009, para. 368; on the drafting history of Article 30(2) the ICC Statute see Badar, 2009, pp. 444 ff).

The Pre-Trial Chamber concluded therefore that 'the suspect could not be said to have intended to commit any of the crimes charged, unless the evidence shows that he was at least aware that, in the ordinary course of events, the occurrence of such crimes was a virtually certain consequence of the implementation of the common plan' (Prosecutor v. Bemba, ICC PT.Ch., Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 368; on the discussion on the mental element in this decision see also Badar, 2013, pp. 397 ff; Badar & Porro, 2015, pp. 660 f; Porro, 2014, pp. 185 f).

This restrictive interpretation of the concept of intent is at present the leading view in the early practice of the ICC.

In the first trial judgment issued in the Lubanga case, in 2012, TC I of the ICC accepted the approach of PTC II of the ICC to the notion of intent (Prosecutor v. Lubanga, ICC T. Ch., Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 1011). Yet, the Trial Chamber also added in paragraph 1012 of the judgment that the prognosis underlying the awareness that result will occur in the ordinary course of events involves consideration of the concepts of 'possibility' and 'probability', which are inherent to the notions of 'risk' and 'danger' (Prosecutor v. Lubanga, ICC T. Ch., Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 1012). In the context of a narrow interpretation of the concept of intent, such a mention of the notion of risk, that is a notion referring to a dimension of mere possibility as opposed to virtual certainty, was sharply criticized within the ICC itself as 'potentially confusing', or even 'out of place' (respectively Separate Opinion of Judge Adrian Fulford to Prosecutor v. Lubanga, ICC T. Ch., Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 15; Concurring Opinion of Judge Christine van der Wyngaert to Ngudjolo, Judgment, ICC-01/04-02/12-4, 18 December 2012, para. 38).

In March 2014, Trial Chamber II of the ICC adjudicating upon Katanga opined that 'the form of this criminal intent requires the person to have known that realizing the acts will necessarily bring about the consequence in question, unless an unexpected intervention or unforeseen event impede it. To put it differently, it is nearly impossible for him to foresee that the consequence will not occur' (Prosecutor v. Katanga, ICC T.Ch., Judgment, ICC-01/04-01/07-3464, 7 March 2014, para. 777, unofficial translation S. Porro).

The Appeals Chamber of the ICC pronounced itself on the notion of intent under Article 30 ICC Statute in December 2014 (Prosecutor v. Lubanga, ICC A. Ch., Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-A-5, 1 December 2014, paras. 441 ff.). The Lubanga appeal judgment confirmed the interpretation put forward in the Bemba decision on the confirmation of charges, that under Art. 30 of the ICC Statute 'the standard for the foreseeability of events is virtual certainty'. The Appeals Chamber confirmed also that this standard of virtual certainty had already emerged from the Lubanga trial judgment. In relation to the use of the word "risk" by TC I of the ICC in Lubanga, the Appeals Chamber claimed that '[i]n the Trial Chamber, in defining the requisite level of "risk", specified [...] that this entailed an "awareness on the part of the co-perpetrators that the consequence will occur in the "ordinary course of events"" and distinguished this from a "low risk".'

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Updated: 30 June 2016

**Article 30(3)**

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and
"knowingly" shall be construed accordingly.

Adhering to the already mentioned 'element analysis' approach to mens rea, paragraph (3) of Article 30 ICC Statute defines knowledge in relation to the material elements of circumstance and consequence separately.

The early practice of the ICC has not yet addressed the definition of knowledge in relation to circumstance in Article 30(3) first sentence first alternative ICC Statute. A strict interpretation of the wording 'awareness that a circumstance exists' appears to limit the meaning of this standard of culpability to actual awareness of the relevant fact. This would exclude from the notion of knowledge cases of constructive knowledge, i.e. where a reasonable person would have recognized the circumstance, as well as cases of 'wilful blindness', i.e. where the agent was aware that the fact probably existed, but deliberately refrained from obtaining the final confirmation (Williams, 1961, p. 159). On the plan of criminal policy it has however also been claimed that 'should reliable means to resolve one's suspicions be available, we are faced with something more than mere suspicion' (Sullivan, 2002, p. 214; on the interpretation of art. 30(3) first sentence first alternative ICC Statute see also Badar & Porro, 2015, pp. 664 f).

On the other hand, the definition of knowledge in relation to consequence or result in Article 30(3) first sentence second alternative ICC Statute overlaps substantially with the definition of intent based on foresight of result as a virtual certainty in Article 30(2)(b) second alternative ICC Statute. Due to the cumulative reference to 'intent and knowledge' in Article 30(1) ICC Statute, the requirement of knowledge in relation to result should apply even to an agent who clearly wanted to bring about the result pursuant to the first alternative of Article 30(2)(b) ICC Statute. Finnin illustrates the practical outcome of this by inviting the reader to

'consider the case of an accused who plants an improvised explosive device (or 'IED', which have a notoriously low success rate), which he or she intends to initiate remotely when civilians come within range. It is the perpetrator's conscious object to kill those civilians; however, unless it could be shown that he or she knew (at the time the device was initiated) that the device would explode successfully and thereby result in the death of those civilians, the perpetrator would not satisfy this gradation of intent [...]

This obviously represents an unexpected and undesired consequence of the conjunctive 'intent and knowledge' wording of Article 30' (Finnin, Elements of Accessorial Modes of Liability, 2012, p. 165; Finnin, Mental Elements, 2012, p. 343; on this point see also Badar & Porro, 2015, pp. 653 f).

Doctrine:

Grounds for excluding criminal responsibility

General Remarks

This provision concerns defences that may lead to the exclusion of criminal responsibility. Defences serve the purpose that the accused is ensured fairness in a substantive sense, meaning that prohibited acts under certain circumstances are justifiable.

The provision does not cover all defences, other defences that were neither recognized nor rejected during the negotiations of the Rome Statute include: alibi, consent of victims, conflict of interests/collision of duties, reprisals, general and/or military necessity, the *tu quoque* argument, and immunity of diplomats. Article 31(3) allows the consideration of other grounds than those referred to in paragraph 1 for excluding criminal responsibility derived from international or national sources through the reference to Article 21.

The Charter of International Military Tribunal in Nuremberg and the statutes of the ad hoc tribunal did not allow for defences. Instead defences such as superior orders and official cakapcity were excluded (*IMT* Charter, Articles 7 and 8, *ICTY* Statute, Article 7(2) and (4)). *ICTR* Statute, Article 6(2) and (4)).

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Updated: 30 June 2016

Article 31(1)

*In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:*

The chapeau avoids using the common law term of "defence". Instead the provisions speak of "excluding criminal responsibility" where "criminal responsibility" should be understood in a broad sense, meaning that exclusion may not only be procured by exculpatory factors connected to the subjective capability of the actor (such as incapacity, paragraph 1(a)) but also genuine justifications concerning that may negate the objective wrongfullness of the act (such as self-defence, paragraph 1(c)).

The chapeau indicates that there are other grounds provided for in the Statute. These include: abandonment (Article 25(3)(f)), exclusion of jurisdiction of persons under 18 (Article 26), mistake of fact and mistake of law (Article 32), superior order and prescription of law (Article 33).
**Article 31(1)(a)**

(a) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

This defence concerns the mental state of the defendant at the time of the commission of the crime, not at the time of the trial.

One question is whether the defendant should conclusively prove the defence of insanity, or merely raise the defence shifting the burden of negating it to the prosecutor? In *Delalic et al.*, one of the accused pleaded lack of mental capacity, or insanity. The Trial Chamber considered that the accused was presumed to be sane. It was for the accused to rebut the presumption of sanity on the balance of probabilities. The Trial Chamber held that "[t]his is in accord and consistent with the general principle that the burden of proof of facts relating to a particular peculiar knowledge is on the person with such knowledge or one who raises the defence". (*Prosecutor v. Delalić et al.* (case no. IT-96-21), ICTY T. Ch., 16 November 1998, paras. 78, 603, 1157–1160, 1172). Turning to the ICC, the combined effect of Articles 66(2) and 67(1)(i) would render it appropriate to rule in such cases that the accused is only required to raise a reasonable doubt as to the mental condition.

Rule 79(1) provides, *inter alia*, that the defence shall notify the Prosecutor of its intent to raise a ground for excluding criminal responsibility provided for in Article 31(1).

**Article 31(1)(b)**

(b) The person is in a state of intoxication that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

This provision allows a narrow defence for intoxication by alcohol or drug consumption. The defence is denied in cases of voluntary intoxication in an attempt to exclude cases were a person puts himself or herself in a state of non-responsibility with objective of committing a crime and later invoke this as a ground of excluding criminal responsibility. It is less clear whether this defence excludes cases where a defendant disregarded the risk that he or she would commit crimes when intoxicated.

Rule 79(1) provides, *inter alia*, that the defence shall notify the Prosecutor of its intent to raise a ground for excluding criminal responsibility provided for in Article 31(1).
Article 31(1)(c)

[314] (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph; This paragraph concerns self-defence, defence of other persons and in the case of war crimes defence of property essential for accomplishing a military mission. It does not concern the defensive use of force by States (or equivalent non-State actors) as provided for in Article 51 of the UN Charter.

The ICTY Trial Chamber in Kordić and Čerkez has stated that the principle of self-defence enshrined in Article 31(1)((c) "reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law" (Prosecutor v. Kordić and Čerkez, (Case no. IT 95-14/2), ICTY T. Ch., Judgment, 26 February 2001, para. 451). According to the same Trial Chamber "[t]he notion of ‘self-defence’ may be broadly defined as providing a defence to a person who acts to defend or protect himself or his property (or another person or person’s property) against attack, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack". (para. 459).

From the requirement the danger has to be "imminent" and "unlawful use of force" it follows that the defence cannot be used for pre-emption, prevention or retaliation. Further the defensive reaction must be reasonable in the sense that it is necessary and it must be proportionate.

Rule 79(1) provides, inter alia, that the defence shall notify the Prosecutor of its intent to raise a ground for excluding criminal responsibility provided for in Article 31(1).

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Updated: 30 June 2016

Article 31(1)(d)

[315] (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person’s control.
The defence duress concerns the situation when a person is compelled to commit a crime as a result of a threat to his or her life or another person. Necessity is a related defence, the difference is that the threat is the result of natural circumstances. They have a close affinity and paragraph (d) is an attempt to blend into one norm the traditional necessity and duress defence, as known in national criminal justice systems. In Aleksovski the Appeals Chamber considered the defence of necessity, but rejected its application to the case. The Appeals Chamber considered it "unnecessary to dwell on whether necessity constitutes a defence under international law, whether it is the same as the defence of duress", see Prosecutor v. Aleksovski, (Case No. IT-95-14/1), ICTY A. Ch., Judgment, 24 March 2000.

Duress is often confused with the defence of superior orders, but the two defences should be treated as distinct and different.

The question whether the defence of duress could amount to a ground for excluding criminal responsibility or merely a mitigating circumstance was addressed in the Erdemović case. The majority found that duress "cannot afford a complete defence" (Prosecutor v. Erdemović, ICTY A. Ch., Judgement, Joint Separate Opinion of Judge Mcdonald and Judge Vohrah, 7 October 1997, para. 88) while Judge Cassese in minority considered that the defence of duress could be accepted taking into account at minimum the following four criteria: (1) a severe threat to life or limb; (2) no adequate means to escape the threat; (3) proportionality in the means taken to avoid the threat; (4) the situation of duress should not have been self-induced (Prosecutor v. Erdemović, ICTY Appeals Chamber Judgement, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 41). The drafters of the Rome Statute effectively adopted the minority view of Judge Cassese.

Rule 79(1) provides, inter alia, that the defence shall notify the Prosecutor of its intent to raise a ground for excluding criminal responsibility provided for in Article 31(1).

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Updated: 30 June 2016

Article 31(2)

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

Paragraph 2 dates from early drafting stages when some delegations held the view that defence should not be codified, the judges should determine them on a case-by-case basis. In the end defences were codified in paragraph 1 and paragraph 2 was a concession to those delegations that had favored a minimalist approach. Eser argues that that "paragraph 2 provides that the Court may alter, in the interests of justice, each and every of the Statute’s codified grounds for excluding criminal responsibility according to the facts of the individual case" (p. 890). Schabas finds this an "extravagant interpretation" meaning that the Court is not bound by Article 31(1) and (3). Instead he argues that paragraph 2 confirms the role of the Court in determining the applicability of various defences on a case-by-case basis within the general framework of the rest of Article 31 and other relevant provisions (pp. 491-492).

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Article 31(3)

[317] 3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in Article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Paragraph 3 concerns uncodified defences to the extent they can be found in the applicable law as set forth in Article 21. This may include the defences listed above. The reference in Article 21(b) to the "established principles of the international law of armed conflict" is of particular relevance.

Rule 79(1) provides that the defence shall notify the prosecution of its intent to raise the existence of an alibi and contains special instructions, including that the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi. Rule 80 regulates the procedural way of how the defence may raise an exclusionary ground under paragraph 3.

Cross-references:
Rules 79 and 80

Doctrine:


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Updated: 30 June 2016

Article 32

[318] Mistake of fact or mistake of law

General Remarks

Throughout history defendants have sometimes relied on claims of mistake of fact or law to establish their innocence. A mistake of fact implies that the defendant mistakenly interpreted a situation or the facts of the case. If, for example, forbidden to kill civilians in an armed conflict. If a defendant – who stands trial for killing civilians in an armed conflict – can demonstrate that he honestly mistook the civilians for soldiers he may successfully invoke the defense of mistake of fact. A mistake of law, on the other hand, implies that the defendant erroneously evaluated the law [Ambos, 2011, p. 318]. A defendant who claims that he did not know
that the law prohibited killing civilians in an armed conflict relies on a mistake of law. Yet, ignorance of the law can never be an excuse (ignorantia iuris nocet) unless the defendant acted upon superior orders or if the mistake negated the mental element of the crime [Darcy, 2011].

The defenses of mistake of fact and law are codified in the Rome Statute. Article 32 of the Rome Statute provides:

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime or provided for in Article 33.

This commentary will discuss both defenses under the Rome Statute. Before turning to both defenses, it will start with describing how the defenses found their way into the Rome Statute.

Preparatory Works
The question whether or not to include the defenses of mistake of law and fact in the Rome Statute was for the first time discussed by the International Law Commission in 1986 during its work on a revised Draft Code of Offenses against the Peace and Security of Mankind [Triffterer, 2008, p. 897]. This Code was drafted in 1954 in the wake of the Second World War; the UN General Assembly established the International Law Commission in 1948, which was tasked with undertaking the progressive development and codification of international law. In 1954, the Draft Code of Offences against Peace and Security of Mankind, consisting of four Articles, was developed. Defendants at Nuremberg had already invoked defenses of mistake of fact or law during their trials before the International Military Tribunal (IMT) or in the subsequent proceedings conducted under Control Council Law No. 10 of 1945 [Triffterer, 2008, p. 897]. While a defense based on a mistake of fact could be found admissible, defenses based on a mistake of law were generally dismissed [Triffterer, 2008, p. 897; Milch, US NMT, 20 December 1946 – 17 April 1947, p. 64]. The defense of mistake was raised in the infamous doctors’ trials before the Nuremberg Military Tribunal (NMT). Physicians stood trial for war crimes as they had committed medical experiments on human beings. A defense of mistake of fact can be successful if the physician honestly and reasonably believed “that there existed factual circumstances making the conduct unlawful” [Cassese, 2003, p. 251].

The mistake of fact defense was invoked in combination with the defense of superior orders. One of the arguments raised by the defendants was that the "research subjects" could avoid punishment by participating in the "medical" experiments or that they were "condemned to death and in any event marked for legal execution" [Mehring, 2011, p. 271; United States of America v. Karl Brandt et al "The Doctors’ Trial", Trials of War Criminals Vol. I & II, Judgment, 19 August 1947]. It cannot be said, however, that the defendants lacked mens rea and that they were honestly and reasonably mistaken about the unlawfulness of their actions [Mehring, 2011, p. 273]. In another case, the Almelo Trial before the British Military Court for the Trial of War Criminals, the Judge Advocate advised the court that:

“if . . . the existing circumstances were such that a reasonable man might have believed that a victim whose killing was charged had been tried according to law and that a proper judicial legal execution had been carried out, than it would be open to the court to acquit the accused.” [Law Reports of the Trials of War Criminals, Volume XV, Digest of Laws and Cases, 1949 p. 184, referring to the Almelo Trial, Sandrock et al, BMC, 24-26 November 1945, p. 41].

Mistake of fact also surfaced in the Hostages Trial before the NMT:

“In determining the guilt or innocence of an army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation as it appeared...
to him must be given first consideration. Such commander will not be permitted to ignore obvious fact in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision and if he willfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence.” [Law Reports of the Trials of War Criminals, Volume XV, Digest of Laws and Cases, 1949, p. 184, referring to the Hostages Trial, List et al., NMT, p. 58].

In 1991, however, mistake of fact and law [at that time: error of law and fact] were removed from the 1986 ILC Draft Code, which probably had to do with the sensitive nature of these defenses vis-à-vis international crimes as well as the perceived limited function in law practice of including these defenses [Triffterer, 2008, p. 898]. Several reasons therefor can be identified.

First, mistake of fact and law were perceived as part of “general principles of law”, as these concepts had legal standing in both national and international jurisdictions. The two defenses were not incorporated in the statutes of the IMT, ICTY and ICTR yet, the defendants could nevertheless rely on them since “generally accepted legal rules” did apply [Triffterer, 2008, p. 898]. This does not take away that generally recognized principles may still be subject to controversy; the Erdemović case constitutes a clear example thereof. Although the defense of duress raised by Erdemović is an admissible defense in numerous domestic law systems, it was heavily disputed whether this defense could be invoked in cases of crimes against humanity [Weigend, 2004, 321; Prosecutor v. Erdemović, ICTY A. Ch., 7 October 1997, paras. 75-79, the Majority held that duress was not a defense if innocent life was taken]. Secondly, the differences between certain legal systems may have contributed to the hesitancy in codifying these defenses. In 1986, the ILC considered that written law, which predominates in certain legal systems, could not adapt and express “all the contours and nuances of a reality that is ever-changing . . .”. [United Nations, Yearbook of the International Law Commission 1986, Volume II Part One, Documents of the thirty-eighth session, para. 187]. Common law systems, where written law is less relevant, evaded this problem:

*“An offence is constituted by a material element, which is the act, and a moral element, which is the intention. The intervention of written law is not necessary.” [United Nations, Yearbook of the International Law Commission 1986, Volume II Part One, Documents of the thirty-eighth session, para. 188].

Another reason why the defense of mistake could supposedly be excluded from the statute relates to the “mental element”. For a defense on the basis of mistake of law or fact to succeed, the mistake as such is not decisive; rather the criterion is whether the defendant lacked mens rea [Article 32 includes the provision that a mistake of law or fact "shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime"; see also Dinstein, 2012, p. xxiii-xxv]. Yet, this requirement was already encapsulated in Article 30 of the Rome Statute which deals with mens rea, providing that a person only incurs criminal responsibility if the material elements of a crime have been committed with "intent and knowledge". The defenses of "mistake" in Article 32 of the Rome Statute are a reflection thereof, as the defendant must demonstrate that the mental element was lacking (lack of mens rea), rather than the prosecution having to prove intent and knowledge (existence of mens rea).

The issue whether or not to include the defense of mistake of law and fact was still not settled in the ILC’s Consolidated Draft of 14 April 1998 [in footnote 20 it was stated that there were still “widely divergent views on this Article”, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998; see also Triftener, 1999, p. 560]. Two options for mistake of fact or law – at that time enshrined by draft Article 30 – were under consideration. The first option was:

*Unavoidable mistake of fact or of law shall be a ground for excluding criminal responsibility provided
that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact or of law may be considered in mitigation of punishment". [Article 30 option 1 Consolidated Draft Statute, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998].

Even though this option did not make it into the final Statute, it still bears relevance for interpreting the law on mistake as the issue of (un)avoidability prominently featured in the drafting history of Article 32 [see, for example, Heller, 2008, p. 440; Cassese, 2003, p. 256]. This option encompassed a culpa in causa element, which means that resorting to a mistake of law defense can be barred if the mistake was "avoidable". If a defendant has done everything within his power to inform himself of the law or a particular rule then the defense of mistake of law may be open to him as a result of his "excusable" ignorance [Van Sliedregt, 2003, p. 305]. Despite the fact that this option was left out of the final Statute, some legal scholars argue that it is still an implicit element of mistake of law, as it is covered by general principles of criminal law [Van Sliedregt, 2003, p. 305; Triffterer, 2008, p. 908; see Article 21(1)(c) of the Rome Statute}. Yet, others argue that this observation is incorrect as the common law tradition explicitly rejects the notion of reasonableness, thus, it cannot be considered as a "general principle" of criminal law [Heller, 2008, p. 441].

The second option in the Consolidated Draft consisted of two separate paragraphs; mistake of fact and mistake of law respectively. There was discussion as to whether or not to include mistake of fact as some delegations opined that it was already covered by mens rea [footnote 21 Consolidated Draft Statute, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998]. In footnote 22 to the provision on mistake of law it was observed that "whether a particular type of conduct is a crime under the Statute or whether a crime is within the jurisdiction of the Court, is not a ground for excluding criminal responsibility", which became the basis for the final wording in the Rome Statute [Triffterer, 2008, pp. 899-900].

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Updated: 30 June 2016

**Article 32(1)**

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

Mistake of fact actually pertains to a false representation of a material fact. If a soldier, for example, mistook a hospital for a military target, he may successfully invoke the defense of mistake of fact, as long as the mistake was reasonable [Van Sliedregt, 2003, p. 305]. Even though Article 32(l) of the Rome Statute does not expressly state that the mistake must be reasonable, the likelihood of succeeding with this defense increases if the reasonableness of the mistake increases. The defendant claiming a mistake of fact has the burden of making probable that he or she was honestly mistaken [Knoops, 2008, pp. 143-144].

The ILC, in its 1986 Draft Statute, underlined the distinction between avoidable and unavoidable mistakes. As follows from Article 30 of the Rome Statute crimes within the jurisdiction of the Court must have been committed with “intent and knowledge” in order to hold a person criminally responsible, unless there is a regulation that provides otherwise, such as Article 28 of the Rome Statute on command responsibility which encompasses a negligence standard. This negligence standard may apply to defendants who were mistaken about a certain fact while this could have been avoided (as opposed to an unavoidable mistake of fact) [Triffterer, 2008, p. 905]. Article 28 of the Rome Statute excludes the defense of mistake of fact, if the defendant should have known of the relevant facts; a requirement that is also embedded in certain Elements of the Crimes [Article 8(2)(b)(xxvi) Elements of the Crimes, War crime of using, conscripting or enlisting
children. A perpetrator may be held criminally responsible for this war crime if he 'knew or should have known' that persons enlisted in the national armed forces or used to actively participate in hostilities were under the age of 15 years; see also Cryer et al., 2010, p. 415]. Thus, if the error was avoidable, for example, an error due to negligence or imprudence, a defendant will incur criminal responsibility. Yet, such errors may be used in mitigation of a sentence [United Nations, Yearbook of the International Law Commission 1986, Volume II Part One, Documents of the thirty-eighth session, para. 215].

In its’ 1986 Draft Statute, the ILC considered that a mistake of fact can be invoked as a defense against war crimes, if the defendant can demonstrate that the mistake was “unavoidable”. The defense must include characteristics of force majeure, as only such characteristics may lift a person from criminal responsibility in this regard [United Nations, Yearbook of the International Law Commission 1986, Volume II Part One, Documents of the thirty-eighth session, para. 215]. A mistake of fact can never be a defense to crimes against humanity or genocide:

“A person who mistakes the religion or race of a victim may not invoke this error as a defence, since the motive for his act was, in any case, of a racial or religious nature”. [United Nations, Yearbook of the International Law Commission 1986, Volume II Part One, Documents of the thirty-eighth session, para. 214].

Another question that arises is whether a mistake of fact may be a defense to perpetrators who were ignorant about the facts. According to Triffterer both states of mind (i.e. ignorance and mistake) have to be treated equally as a perpetrator who does not perceive one or more of the material elements cannot fulfill the requisite mental element as the basis thereto is lacking [Triffterer, 2008, p. 903]. Triffterer argues that mistake and error as well as lack of knowledge and awareness can be subsumed under the concept of "mistake of fact":

“They do not have to be differentiated because they both lead to the result that the basis to build the required mens rea upon is missing and, therefore, this element does not exist, which is a ground for ‘excluding criminal responsibility” [Triffterer, 2008, p. 903].

Ignorance of the law – as opposed to ignorance of the facts – can never constitute a ground for excluding criminal responsibility [Cassese, 2008, 294]. The rationale thereof is clear: if defendants could successfully defend themselves by arguing that they were not aware of the existence of a legal ban, this would open the road to a state of lawlessness [Cassese, 2008, 295].

In practice, the defense of mistake of law and fact are frequently intertwined. Cassese, as did the US Military Court, cited the case against Lieutenant William A. Calley, who stood trial for a US Military Court for killing unarmed civilians in custody of US troops during the Vietnam war, as an example of mistake of fact [Cassese, 2008, 291]. Calley had argued that he genuinely thought that the civilians had no right to live as they were the enemy and that he had been ordered by his superiors to kill the inhabitants of My Lai (i.e. civilians). The Court held:

“To the extent that this state of mind reflects a mistake of fact, the governing principle is: to be exculpatory, the mistaken belief must be of such a nature that the conduct would have been lawful had the facts actually been as they were believed to be… An enemy in custody may not be executed summarily”. [Calley v. Callaway, 1975]

It seems that Calley was not mistaken about whether the inhabitants were civilians, but he was mistaken about the legality of killing civilians. A distinction must be made between descriptive and normative elements. The former concern mistakes of fact, which are mistakes related to the non-recognition of certain facts, and the latter concern mistakes of law, which are mistakes related to erroneous evaluations [Van Sliedregt, 2003, p. 302; according to Van Sliedregt Mistakes relating to normative elements can qualify as both mistakes of fact and mistakes of law, depending on the way the mistake is made: as failed
recognition or as erroneous evaluation", p. 303]. These two are often intertwined, as noted by Van Sliedregt:

"Elements are seldom purely descriptive or purely normative. The material elements of a crime often have a double nature. After all, normative material elements are not abstract legal definitions but legal evaluations of facts, the false perception of which can qualify both as mistake of fact and law". [Van Sliedregt, 2003, p. 302].

The relationship between "mistake" and "superior orders" also surfaced in the Calley case, as the Court held that superior orders will not exculpate a defendant if the order "is one which a man of ordinary sense and understanding would . . . know to be unlawful, or if the order in question is actually known to the accused to be unlawful". [Calley v. Callaway, 1975].

Author: Geert-Jan Alexander Knoops
Updated: 30 June 2016

**Article 32(2)**

[320] 2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime or provided for in Article 33.

Mistake of law encompasses a normative element of the definition of a certain offence. It arises if a defendant erroneously evaluated the law [Ambos, 2011, p. 318]. An example thereof could be a soldier throwing a grenade to a cultural building and subsequently claiming he did not know that the law prohibited destroying cultural property during an armed conflict. Yet, as follows from Article 32(2) ICCSt, a mistake of law related to whether a particular type of conduct is a crime within the jurisdiction of the court can never exclude criminal responsibility. It stems from the principle that ignorance of the law can never be an excuse (ignorantia iuris nocet), unless the defendant acted upon superior orders or if the mistake negated the mental element of the crime [Darcy, 2011, pp. 231-245]. This provision reflects ICTY case law which also rejected the defense of mistake of law, but accepted the defense of mistake of fact [Manual on International Criminal Defence, ADC-ICTY, 2011, para. 69]. It is questionable whether a mistake of law based on an honest but unreasonable believe negates the mental element of a crime. Before turning to this question, the historical background of mistake of law will be discussed.

**Early discussions on mistake of law**

In its' 1986 Draft Code the ILC considered the following acts as an "error of law":

"Error of law is clearly related to the implementation of an order which has been received, when the agent is called upon to assess the degree to which the order is in conformity with the law. It may also exist independently of an order, when the agent acts upon his own initiative, believing that his action is in conformity with the rules of law". [United Nations, Yearbook of the International Law Commission 1986, Volume II Part One, Documents of the thirty-eighth session, para. 204].

If there is a conflict between internal and international law, then the latter should prevail [United Nations,
Yearbook of the International Law Commission 1986, Volume II Part One, Documents of the thirty-eighth session, para. 206]. This principle was first established in the Nuremberg Charter and subsequently in the Control Council Law No. 10, which nullified the benefits of national amnesty laws and reinstated the criminality of the acts [United Nations, Yearbook of the International Law Commission 1986, Volume II Part One, Documents of the thirty-eighth session, para. 206]. Thus, if an act would be in conformity with national legislation, while it would violate international law, then the defendant cannot rely on a defense of mistake of law.

The defense of mistake of law may not be as successful under national law as it is under international law. One is expected to know – or at least be aware – of the national legislation, while this cannot (always) be expected of all international legislation. The latter is sometimes based on “customary practice”, which means that it is not based on an agreed rule. Moreover, the evolution of international law and the advent of warfare make certain concepts obsolete, while other concepts emerge, which contributes to the diffuse nature of international law [United Nations, Yearbook of the International Law Commission 1986, Volume II Part One, Documents of the thirty-eighth session, para. 207]. As a result of this ambiguity mistakes about such rules may be judged more leniently. Antonio Cassese identified four factors that a court should take into account when judging upon alleged mistakes of international criminal law [Cassese, 2008, p. 296-297]:

(i) The universality of the international rule that has allegedly been breached, whether the rule, on the one hand, has been written down in legal documents of which the defendant is apprised or, on the other hand, is controversial, obscure or subject to discussion;
(ii) The defendant's intellectual status (e.g. a layperson could more easily rely on the defense of mistake of law than a lawyer or someone working in the criminal justice system, as the latter are supposed to know the law as a result of their educational background);
(iii) The defendant's position within the military hierarchy (the higher the rank the more the defendant is expected and required to know the law);
(iv) The importance of the value of the rule that has allegedly been breached (human life and dignity are protected under both national and international rules, as such, one may be more demanding in protecting these values) [Cassese, 2008, p. 296-297].

Difficulties regarding "customary international law" were already expressed by the US Military Tribunal sitting at Nuremberg in the IG. Farben case. In this case it was argued that private industrialists could not be held responsible for carrying out economic measures in occupied territories at the direction – or approval – of their government. Moreover, the limits of permissible action related to the crimes charged, were not clearly defined in international law and the Hague Regulations were said to be outdated by the concept of total warfare [Krauch et al., NMT, 30 July 1948, p. 1137]. Yet, this defense was dismissed as the Tribunal held that:

"It is beyond the authority of any nation to authorize its citizens to commit acts in contravention of international penal law. A custom is a source of international law, customs and practices may change and find such general acceptance in the community of civilized nations as to alter the substantive content of certain of its principles . . . Technical advancement in the weapons and tactics used in the actual waging of war may have made obsolete, in some respects, or may have rendered inapplicable, some of the provisions of the Hague Regulations having to do with the actual conduct of hostilities and what is considered legitimate warfare." [Krauch et al., NMT, 30 July 1948, p. 1138].

As with mistake of fact, doubts related to the rules in question may arise with respect to the scope of war crimes, but this is much less likely for crimes against humanity. The ILC considered that mistake of law cannot be an excuse for crimes against humanity as:

"No error of law can excuse a crime which is motivated by racial hatred or political prejudices".

It follows that a mistake of law can also never excuse a defendant for the crime of genocide, which is, by
definition, a crime motivated by hatred or political prejudices (i.e. the intent to destroy certain groups; Article 6 ICCSt. defines genocide as "any of the following acts [listed sub (a)-(e)] committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group"). Given the nature of crimes against humanity and the judicial precedents, it is unimaginable that such crimes can be justified on the basis of any error, as:

"the error must have been unavoidable . . . the agent must have brought into play all the resources of his knowledge, imagination and conscience and, despite that effort, he must have found himself unable to detect the wrongful nature of his act". [United Nations, Yearbook of the International Law Commission 1986, Volume II Part One, Documents of the thirty-eighth session, para. 209].

Faith in a certain political ideology or acts committed due to a regime’s propaganda cannot exonerate a defendant for crimes against humanity on the basis of an error of law, as:

"He should have known, by consulting his conscience, that the act of which he is accused was wrongful". [United Nations, Yearbook of the International Law Commission 1986, Volume II Part One, Documents of the thirty-eighth session, para. 209].

Thus, a defense of mistake of law can only succeed if the error on part of the defendant is an *excusable* fault [United Nations, Yearbook of the International Law Commission 1986, Volume II Part One, Documents of the thirty-eighth session, para. 202]. Unawareness of a certain rule of law is an inexcusable fault, as is the blindness to detect the wrongfulness of an act [United Nations, Yearbook of the International Law Commission 1986, Volume II Part One, Documents of the thirty-eighth session, para. 210].

**Contemporary case law**

Mistake of law surfaced in several contempt cases before the ICTY. In the Florence Hartmann case, the defendant, who was a former employee of the ICTY, faced contempt charges because she allegedly revealed confidential information through the publication of her book. The defense argued that the defendant was not aware of the illegality of her conduct, as she could reasonably believe that the information in her book was no longer confidential as a result of the public discussions in the media that took place prior to publication [Hartmann, ICTY Contempt Case, 14 September 2009, para. 63]. The Trial Chamber rejected this argument holding that the defendant's "misunderstanding of the law does not, in itself, excuse a violation of it" [Hartmann, ICTY Contempt Case, 14 September 2009, para. 65]. The Chamber recalled the standard set in the Jović case that "if mistake of law were a valid defence [...] orders would become suggestions and a Chamber's authority to control its proceedings, from which the power to punish contempt in part derives, would be hobbled." [Hartmann, ICTY Contempt Case, 14 September 2009, para. 65; see also Manual on International Criminal Defence, ADC-ICTY, para. 71]. This consideration is congruent with the mentioned rationale behind Article 32(2) ICCSt, namely that if defendants could successfully argue that they were not aware of the existence of a legal ban, a state of lawlessness could arise [Cassese, 2008, p. 295].

The defense team of Kanu before the SCSL also invoked a mistake of law. The defense held that Kanu was not aware of the unlawfulness of conscripting, enlisting or using child soldiers below the age of 15, because "the ending of childhood [in the traditional African setting] has little to do with achieving a particular age and more to do with physical capacity to perform acts reserved for adults" [Prosecutor v. Brima et al, SCSL T. Ch., 20 June 2007, para. 730]. Furthermore, the defense contended that various governments in Sierra Leone, prior to the war, had recruited persons under the age of 15 into the military [Prosecutor v. Brima et al, SCSL T. Ch., 20 June 2007, para. 730]. The Trial Chamber rejected this defense holding the crime of enlisting and conscripting child soldiers had attained the status of customary international law, and that this customary status required that the victim be younger than 15 years of age.
The Trial Chamber was furthermore not persuaded that the defense of mistake of law could be invoked in this particular case:

"The rules of customary international law are not contingent on domestic practice in one given country. Hence, it cannot be argued that a national practice creating an appearance of lawfulness can be raised as a defence of conduct violating international norms" [Prosecutor v. Brima et al, SCSL T. Ch., 20 June 2007, para. 732].

The Trial Chamber rejected all defenses related to the definition of childhood and the cultural differences thereto [Prosecutor v. Brima et al, SCSL T. Ch., 20 June 2007, para. 1251]. Likewise, mistake of law defenses based on the *tuoquque* argument were also rejected. The Trial Chamber refused to evaluate evidence related to the conditions of the Sierra Leonean State prior to 1997 because this had "no bearing on the perpetration of international crimes by individuals within the state" [Brima et al., T. Ch., 20 June 2007, para. 1251]. Yet, when taking into account the ambiguous nature of "customary international law", as was already recognized by the ILC in 1986, while one is expected to know or be aware of national legislation, it is not surprisingly that the defendant relied on the policy practice of the Sierra Leonean government – or at least raised this as a defense.

Mistake of law also surfaced during the confirmation of the charges phase in the *Lubanga* case before the ICC. The defense team submitted that *Lubanga* could not have known that conscripting and enlisting child soldiers could result in individual criminal responsibility now that neither Uganda nor the DRC "brought to the knowledge of the inhabitants of Ituri the fact that the Rome Statute had been ratified" [Prosecutor v. Lubanga, ICC PT. Ch. I, ICC-01/04-01/06-803-tEN, 29 January 2007, para. 296]. Under the heading "the principle of legality and mistake of law" the Trial Chamber elaborated on the issue and concluded that "absent a plea under Article 33 of the Statute, the defence of mistake of law can succeed under Article 32 only if [the defendant] was unaware of a normative objective element of the crime as a result of not realizing its social significance (its everyday meaning)" [Prosecutor v. Lubanga, ICC PT. Ch. I, ICC-01/04-01/06-803-tEN, 29 January 2007, para. 316]. Thus, the principle of morality is essential blindness to the wrongfulness of an act is not deemed to be an excuse [United Nations, Yearbook of the International Law Commission 1986, Volume II Part One, Documents of the thirty-eighth session, para. 210].

To conclude, mistake of fact and law were heavily debated prior to their codification in the Rome Statute. It was questioned whether mistake of fact had to be included in the Statute, as it was already covered by the *mens rea* provision. Mistake of fact is deemed to be a valid defense; yet, "mistakes" are seldom of such a nature that this defense can be successfully raised in cases of international crimes. Even though mistake of law should be interpreted very strictly – as expressed in the wording of Article 32(2) ICCSt. – the defense has been raised in several cases. In principle, mistake of law cannot exonerate an accused. Yet, due to the complex nature of international criminal law, in particular related to war crimes, one should perhaps differentiate between international and national laws in terms of the unavoidability of the error. Future judgments of the ICC will have to learn whether alleged war criminals are expected to bear the same level of knowledge of international law as the level expected of own national laws. Despite the limited successfullness of a mistake of law defense, it did create case law as to its boundaries, which may serve future cases; these factors relate to a defendant's status and position, the universality of the rule and the value that the rule is trying to protect [Cassese, 2008, 296-297]. The importance of these precedents cannot be underestimated, as the "general principles of criminal law" are often subject to discussion. The codification of the defense in the Rome Statute, and the discussions that preceded it, have been essential for the proliferation of international criminal law.

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Updated: 30 June 2016

Article 33

Superior orders and prescription of law

General Remarks

Article 33 attempts to resolve the quandary which arises when a soldier, bound by law to obey his superiors, is ordered to commit an act that would amount to an international crime. Plainly, it could be read in three steps: (i) in the usual course of action, obedience to superior orders cannot be invoked as a defence, (ii) unless the three requirements prescribed in (a), (b) and (c) are cumulatively met, (iii) however, this does not apply when orders were given to commit genocide or crimes against humanity. In this vein, Article 33 departs from the "Nuremberg model" where subordinates were always responsible for crimes committed while following orders. Conversely, it represents a compromise between the two opposing approaches, where the first (conditional liability approach) is adopted for war crimes and the crime of aggression and the second (principle of absolute liability) was chosen for genocide and crimes against humanity.

The conditional/limited approach was propounded in a decision of the Austro-Hungarian Military Court in 1915. [Gaeta, 1999, p.175] Subsequently, it was further reaffirmed in the two famous cases before the Leipzig Court after the First World War: The Llandovery Castle and Dover Castle case.

However the subordinate obeying an order is liable to punishment if it was known to him that the order of the superior involved the infringement of civil or military law ... It is certainly to be urged, in favour of the military subordinates, that they are under no obligation to question the order of their superior officer and they can count upon its legality. But no such confidence can be held to exist if such and order is universally...
known to everybody including the accused, to be without any doubt whatever against the law." [the Llandovery Castle case, 16 July (1922) 16 AJIL 708, at 721–722]

The court stipulated that basically if the order is “universally known to everybody, including also the accused, to be without any doubt whatever against the law”, or in other words “manifestly unlawful”, the subordinate is liable to the punishment. Therefore, the conditional liability approach asserts as a rule that the plea of superior order is a complete defence. In this vein, a soldier can be held responsible only if the order was manifestly illegal, or, he knew or should have known that the order was illegal.

The principle of absolute liability was introduced in the London Agreement establishing the International Military Tribunal at Nuremberg (IMT). The prevailing view at the time was that the crimes prosecuted were too grave to relief accused from liability using the plea of superior orders. Thus, Article 8 of the Charter of the IMT unequivocally rejected the defence of superior orders, prescribing that “[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.” Later on the IMT held that “[t]he provisions of this Article [8] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment.” Furthermore, it stated that “[t]he true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.” [France et al. v. Göring et al.,(1946) 22 IMT 203, 13 ILR 203, 41 AJIL 172, p. 221]

Contrary to the conditional liability approach, the plea of following orders is never a defence and can only mitigate the sentence since a soldier ought to always assess the orders of his superiors, and if they are illegal he is not bound to obey them. Similarly, Article 6 of the Charter of the Tokyo Tribunal had a provision stipulating that “[n]either the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.” This was considered by some to be a more flexible and a more logical provision than the one from Nuremberg. [Dinstein, 2012, p.157]

In the 1990’s, both the ICTY and ICTR Statutes embraced the principle of absolute liability. The ICTY adopted the view that a defence of superior orders is possible through duress. Judge Cassese argued that a soldier has a duty to disobey orders only in instance of a manifest unlawfulness, otherwise he has a right to plea of duty to superior orders as a defence. [Prosecutor v. Drazen Erdemović, Case No. IT-96–22-A, Separate and Dissenting Opinion of Judge Cassese, at 15]

As for Article 33 of the Rome Statute, the drafters have conflated two separated approaches and opted for a negative formulation. Accordingly, paragraph 1 (conditional liability) prescribes that if a person was under a legal obligation to obey orders, and he did not know that the order was unlawful and the order was not manifestly unlawful, he or she could be relieved of criminal responsibility. Paragraph 2 (absolute liability) articulates the impossibility of defence of superior orders in cases of genocide and crimes against humanity. In this vein, the plea of superior orders can be made exclusively in the context of the crime of aggression and war crimes. This provision however begs the question whether there is an example of a war crime under the Rome Statute which can be considered as “not always manifestly illegal”, so the plea of superior orders has an actual sense.

It should also be borne in mind that the importance of Article 33 is far from paramount, as the main focus of the ICC is on leaders and not on low-ranking officers or foot soldiers, for whom conventionally the plea of superior orders is reserved. Nonetheless, Article 33 was invoked by the Appeals Chamber when discussed about the term “gravity” in Article 17(1)(d) of the Rome Statute. The Appeals Chamber held that the existence of Article 33 substantiates the view that the Rome Statute is not reserved only to “senior leaders”. [Situation in the Democratic Republic of the Congo [ICC-01/04], Judgment on the Prosecutor’s
Article 33(1)

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

From the words "crime within the jurisdiction of the court" follows that Article 33 is only applicable for the crimes listed in Article 5—namely, genocide, crimes against humanity, war crimes and the crime of aggression—and it does not regulate whether other crimes should be treated in the same way.

The term "order" in its broadest sense is ought to be understood as a request for certain behaviour of a group or a single individual, given by the legitimate authority. Such behaviour could be either an act or omission. The order articulates a form of communication between a superior and his subordinates, where the former has a right to demand certain pattern of action from the latter. Whilst the form is less relevant, an order should be direct, unequivocal, and should therefore be acknowledged by a subordinate. If it is given to a number of people—e.g. detachment—it should be understood as an order given to the every individual therein.

There should be a causal connection between order and conduct, in a way which Article 33 prescribes "by a person pursuant to an order". According to this provisions, a subordinate must have intended to execute the order. Otherwise, if he commits a crime separately from the order, on his own wish and even though the order existed at the time of the commission, Article 33 does not apply.

"Orders of a Government" means that this provision applies to everyone whose actions might be attributed to the Government. However, an order which emanate in such instances must be issued by a competent person and has to be formally legitimate. Otherwise, there would be no legal obligation to obey such orders. This however does not mean that "a Government or of a superior" provides for an alternative, and superiors outside the Government should not be considered in the context of this article. Consequently, the...
relationship between superiors and subordinates within a criminal organisation is not a subject for the defence of superior orders.

The wording “military or civilian” stipulates that a superior could be either a military officer or high-ranking Government agent. This provision however demands another interpretation of the superior-subordinate relationship, unlike the one from Article 28. In the realm of commander responsibility (Article 28), the ICTY held that “in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. With the caveat that such authority can have a de facto as well as a de jure character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.” [Čelebići, Trial Judgment, para.388]

In this context de facto relationships are based on effective control. Accordingly, this includes any commander who do not necessarily have a nexus with the Government, as long as “they exercise a degree of control over their subordinates which is similar to that of military commanders”. In other words, if a civilian superior has a duty and the “material ability” to thwart his minions of committing crimes, or punish them if they have committed crimes, he or she is liable under Article 28.

On the other hand, Article 33 does not apply to superiors outside the government authority and de facto superior-subordinate relationships. A “civilian” in this context is a political superior or government agent. [van Sliedregt, 2012, p. 294] Nonetheless, if a de facto superior is effectively acting as de jure military commander under the government aegis, the orders which emanate thereof can be taken into account in the context of Article 33 as such commander is not de facto in traditional meaning (“being so close to de jure command”).

The reason for the two different approaches in Article 28 and 33 is the very essence of a plea of superior orders: it is reserved exclusively for the relationship between military superiors and their subordinates, which is, on the other hand, “based on the military duty to obey and the ensuing presumption of legality of orders”. [van Sliedregt, 2012, p. 294] The word “unless” is followed by three conditions set out in sub-paragraphs (a)-(c) that all have to be fulfilled in order to relive the accused of criminal responsibility.

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**Updated:**
10 April 2017

**Article 33(1)(a)**
(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

The condition that the accused "was under a legal obligation to obey orders of the Government or the superior in question" relates to whether there was an obligation under domestic law within which the superior and the subordinate acted. Orders must exist at the time when the crime was committed. If a subordinate erroneously believed that he had an obligation to obey orders, Article 33 would not apply as a defence option. Conversely, he would have a defence pursuant to Article 32. Furthermore, if an order is accompanied with a threat, the subordinate can plead a defence of duress. In this case the nature of the order, whether legal or illegal, is not relevant.

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Updated: 10 April 2017

Article 33(1)(b)

(b) The person did not know that the order was unlawful; and

To be relieved of responsibility the person has to "not know that the order was unlawful". This is a subjective condition and the subordinate has to demonstrate that he did not know that the order was unlawful. It is a low threshold for the defendant and in cases of doubt, the subordinate has to be treated as if he had known that the order was unlawful.

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Updated: 10 April 2017

Article 33(1)(c)

(c) The order was not manifestly unlawful.

The third condition is an objective one and it is formulated in a negative way (not manifestly unlawful). It is applicable when it cannot be proven (based on the available evidence) that the order was manifestly unlawful. The condition appears to contain a contradiction in the sense that all crimes under the jurisdiction of the Court are manifestly unlawful. As Schabas argues [p. 512] even experts may disagree on the existence and scope of a prohibition which may justify a defence of superior orders. Nonetheless, the manifest unlawfulness test is subject to a Garantenstellung, as van Sliedregt averred ("What is manifestly unlawful for the specialized military personnel is not necessarily manifestly unlawful for the average soldier.") [p. 295]

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Updated: 10 April 2017
Article 33(2)

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

The second paragraph excludes the defence of superior orders for genocide and crimes against humanity. It represents a compromise made during the drafting process to the delegates supporting the absolute liability approach.

This provision makes a distinction between war crimes and the crime of aggression on the one hand (where the defence of superior orders is available under the circumstances listed in the first paragraph), and genocide and crimes against humanity on another (where the defence is always denied). This division is not based on customary international law nor can be traced in domestic law. It appears that the prevailing opinion amongst the delegates in Rome was that war crimes are less grave than crimes against humanity and genocide. (Zimmermann, p. 972)

Doctrine:


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Updated:
10 April 2017