

THE TEMPORAL SCOPE OF COMMAND RESPONSIBILITY REVISITED:
WHY COMMANDERS HAVE A DUTY TO PREVENT CRIMES
COMMITTED AFTER THE CESSATION OF EFFECTIVE CONTROL

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ABSTRACT

Must an outgoing commander prevent his troops from criminal activity even if their crimes will be committed after he ceased to have effective control over them? This question has received scant judicial or academic attention. Yet, the question is not simply hypothetical. In the Sesay et al. trial judgment, the accused Morris Kallon incurred command responsibility for his failure to prevent enslavement, which continued until December 1998, even though his effective control over the culpable troops ended in August 1998. While the trial chamber provided little reasoning for its conclusion, this paper endeavours to fill that gap in research and discussion by explaining 1) that all the elements of command responsibility under customary international law can be met at the same time, without contemporaneity with the subordinate's crime; 2) that command responsibility beyond a commander's period of effective control is consistent with a principled reading of the doctrine of command responsibility which seeks broad compliance with international humanitarian law to prevent violations thereof; and 3) why actual and theoretical arguments against the advocated position, such as those levelled by the majority in the 2003 Hadžihasanović Interlocutory Appeal, do not withstand scrutiny. This paper concludes that the customary law principle of command responsibility obliges a commander to prevent his subordinates from committing crimes at all times when he has the requisite knowledge and material ability to do so, regardless of whether the crimes were eventually committed after the commander left his position of command.

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INTRODUCTION	2
I. THE ELEMENTS OF COMMAND RESPONSIBILITY UNDER CUSTOMARY INTERNATIONAL LAW	5
II. PRINCIPLED READING OF COMMAND RESPONSIBILITY	12
A. History of the Command Responsibility Doctrine	13
1. Early Foundations of Command Responsibility	13
2. Aftermath of World War I	13
3. Post-World War II Trials	14
B. Object and Purpose of Additional Protocol I	16
C. Contemporary Formulations of Command Responsibility	18
1. Statutes of <i>ad hoc</i> International Criminal Tribunals	19
2. Rome Statute and the ILC Draft Codes	20
3. National Laws	22
D. Avoiding the Creation of a Loophole in Command Responsibility	24
III. REBUTTAL OF CONTRARY ARGUMENTS	27
A. Whether Customary International Law Allows for the Advocated Position	28
1. The Test for Determining Whether Customary International Law Allows for the Advocated Position	30
2. Exclusion of the Advocated Position by Customary International Law	31
a. Post-World War II Case Law	31
b. Rome Statute and the ILC Draft Code	33
c. State Practice and <i>opinio juris</i>	35
3. The Principles of <i>nullum rimen sine lege</i> and <i>in dubio pro</i> <i>reo</i>	36
B. Whether the Advocated Position Makes Command Responsibility Open-Ended or a Form of Strict Liability	37
C. Whether the Required Degree of the Subordinate's Preparation of the Crime Is Left Impermissibly Vague	38
D. Whether Evidentiary Concerns Militate Against the Advocated Position	39
CONCLUSION	40

INTRODUCTION

A commander's first duty is to exercise command.¹ When a commander exercises his powers responsibly by ensuring his troops' obedience to international humanitarian law, his soldiers will follow his

¹ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1017 (Yves Sandoz *et al.*, ICRC 1987).

dictates and broadly comply with the law. When he does not, the consequences are can be devastating.²

To ensure the execution of responsible command, the customary international law principle of command responsibility imposes criminal liability on military and other commanders who fail to comply with either of two distinct duties. First, a commander must punish his subordinates for crimes he has the requisite knowledge that they have committed in the past. Second, he must prevent crimes he has the requisite knowledge that they are about to commit in the future. According to the principle, a commander is bound by these duties only during the period in which he has the material ability to fulfill them (also known as ‘effective control’). However, the principle does not explicitly state whether the subordinates’ crimes that he is duty-bound to punish and prevent must occur within the period of effective control.

This raises two questions: First, must a new commander punish his troops for crimes they committed before he assumed effective control over them? Second, must an outgoing commander prevent his troops from criminal activity even if they will commit these crimes after he ceased to have effective control over them? These are very real scenarios, largely because commanders change on a regular basis in times of war and occupation.³

The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) Appeals Chamber answered the first question in the negative in a 2003 decision in the *Hadžihasanović* case.⁴ Others have extensively and persuasively criticized that decision,⁵ and a majority of the ICTY Appeals

² See *id.* at 1018 (‘In fact the role of commanders is decisive. ... the necessary measures for the proper application of the Conventions and the Protocol must be taken at the level of the troops, so that a fatal gap between the undertakings entered into by Parties to the conflict and the conduct of individuals is avoided. At this level, everything depends on commanders, and without their conscientious supervision, general legal requirements are unlikely to be to be effective.’) [internal references omitted].

³ See e.g. Prosecutor v. Orić, Case No. IT-03-68-A, Separate and Partially Dissenting Opinion of Judge Schomburg, ¶ 17 (July 3, 2008) [hereinafter Dissenting Opinion of Judge Schomburg in *Orić*].

⁴ Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, ¶ 51 (July 16, 2003) [hereinafter *Hadžihasanović* Decision].

⁵ *Id.*, Separate and Partially Dissenting Opinion of Judge David Hunt (July 16, 2003) [hereinafter Dissenting Opinion of Judge Hunt in *Hadžihasanović* Decision]; *id.*, Separate and Partial Dissenting Opinion of Judge Shahabuddeen (July 16, 2003) [hereinafter Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Decision]; Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-T, Judgment, ¶ 196-199 (Mar. 15, 2006); Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶ 335 (June 30, 2006) [hereinafter *Orić* Trial Judgment]; see Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, ¶ 295-306 (Mar. 2, 2009) [hereinafter *Sesay et al.* Trial Judgment]; ANTONIO CASSESE, INTERNATIONAL CRIMINAL

Chamber itself appears to have retracted from it in a subsequent case.⁶ This question, therefore, will not be the main focus of the present study, although recourse will be had to the debate surrounding the *Hadžihasanović* decision where appropriate. Rather, this paper will concentrate on the second question.

The second question has thus far received almost no scholarly attention; yet the issue is not hypothetical. In the case of *Sesay et al.*, Trial Chamber I of the Special Court for Sierra Leone ('SCSL') found that the accused Morris Kallon had effective control over fighters of the Revolutionary United Front ('RUF') in the Kono District of Sierra Leone until August 1998.⁷ These fighters enslaved hundreds of civilians in RUF camps throughout the Kono District between February and December 1998.⁸ Even though his effective control over the culpable troops ended in August 1998, the trial chamber found that Kallon incurred command responsibility for his failure to prevent the enslavement that continued until December 1998.⁹

Although the *Sesay et al.* trial chamber gave no legal or factual reasons for its conclusion,¹⁰ this paper argues that there was a legal basis for it. The principle of command responsibility obliges a commander to prevent his subordinates from committing crimes when he has the requisite knowledge and material ability to do so, regardless of whether the subordinates

LAW 246-47 (Oxford 2008); Carol T. Fox, *Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offences*, 55 Case W. Res. L. Rev. 443, 443 (2004); see also Prosecution v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶ 446 (Feb. 26, 2001) [hereinafter *Kordić and Čerkez* Trial Judgment] ("[p]ersons who assume command after the commission [of the crime] are under the same duty to punish.") (rendered before the *Hadžihasanović* Decision).

⁶ Prosecutor v. Orić, Case No. IT-03-68-A, Judgment, (July 3, 2008) [hereinafter *Orić* Appeal Judgment]; *id.*, Declaration of Judge Shahabuddeen, ¶ 12 (July 3, 2008) [hereinafter Declaration of Judge Shahabuddeen in *Orić*] (noting that by the time of the *Orić* Appeal Judgment, a total of fourteen ICTY judges, four of whom were at different times at the appellate level, had expressed judicial views contrary to the decision of the majority in *Hadžihasanović*); see also *id.*, Partially Dissenting Opinion and Declaration of Judge Liu, (July 3, 2008) [hereinafter Dissenting Opinion of Judge Liu in *Orić*]; Dissenting Opinion of Judge Schomburg in *Orić*, *supra* note 3.

⁷ *Sesay et al.* Trial Judgment, *supra* note 5, at ¶ 2141.

⁸ *Id.* at ¶ 1324-27.

⁹ *Id.* at ¶ 2151.

¹⁰ "[T]he Trial Chamber has failed to support, either by findings of facts or reasoning of applicable law, its conclusion that Kallon is criminally liable under Article 6(3) for the crimes of enslavement in Kono District found to have been committed, after August 1998." Prosecutor v. Sesay, Case No. SCSL-04-15-A, Judgment, ¶ 875 (Oct. 26, 2009) [hereinafter *Sesay et al.* Appeal Judgment]. As a result, the Appeals Chamber found that "the findings are insufficient as a matter of law to find [Kallon] liable under Article 6(3) for enslavement in Kono District after August 1998" and reversed the trial chamber's pertinent findings. *Id.* at ¶¶ 873, 876.

committed the crimes after his abilities had ceased. To hold otherwise would defeat the purpose of command responsibility. Such an interpretation would, in cases where subordinates are about to commit crimes after the period of the commander's effective control, impose no duty on the commander to prevent these crimes. This would be the case even if the commander had the requisite knowledge about the impending crimes, and, importantly, could have stopped them.

This paper presents a four step argument. First, Section II explains why all elements of command responsibility under customary international law can be met at the same time without the simultaneous coexistence of the subordinate's crime. Second, Section III describes how this is consistent with a principled reading of the doctrine of command responsibility. Third, Section IV seeks to rebut traditional and potentially new arguments against the advocated position. Finally, Section V proffers a concluding remark.

I. THE ELEMENTS OF COMMAND RESPONSIBILITY UNDER CUSTOMARY INTERNATIONAL LAW

The rationale underlying the principle of command responsibility in customary international law—to promote broad compliance with international humanitarian law by obliging commanders to curb their subordinates' criminal acts—has been constant since the principle's inception.¹¹ The details of the principle have evolved such that customary international law now knows it in terms of three elements. A plain reading of these elements demonstrates that they can coincide without the subordinate's commission of the crime occurring within the period of effective control. Therefore, on its face, the principle under customary international law allows for command responsibility even if the subordinate completed the crime after the period of effective control, provided the three elements are present during that period.

Preliminarily, in order for command responsibility to be prosecutable, a subordinate must have carried out a crime.¹² His conduct may be criminal under any mode of liability, such as 'commission,' 'aiding and abetting,' 'instigating,' *etc.*¹³ In this paper, therefore, reference to a subordinate's 'committing' a crime is to be understood as encompassing all forms of criminal liability.¹⁴

¹¹ See *infra*, Part III.

¹² See *Orić* Appeal Judgment, *supra* note 6, at ¶18.

¹³ *Orić* Trial Judgment, *supra* note 5, at ¶ 299-301. It appears this approach was at least tacitly accepted by the ICTY Appeals Chamber, as it considered extensively under which mode of liability the Trial Chamber had found *Orić*'s subordinate responsible. See *Orić* Appeal Judgment, *supra* note 6, at ¶ 38-48. See also ANTONIO CASSESE, *supra* note 3, at 247.

¹⁴ This study does not take a position on whether command responsibility can arise in

Customary international humanitarian law requires the following three elements to be established beyond reasonable doubt for command responsibility to arise in respect of the crime:

- (i) the existence of a superior-subordinate relationship;
- (ii) that the commander had the requisite knowledge that his subordinate was about to commit a crime or had done so; and
- (iii) that the commander failed to take the necessary and reasonable measures to prevent or punish his subordinate's criminal conduct.¹⁵

These elements together constitute the principle of command responsibility under customary international law. The first element, a superior-subordinate relationship, exists when an individual, whether military or civilian, has 'effective control' over another. Effective control means having 'the material ability to prevent and punish criminal conduct,'¹⁶ and can be based on either *de jure* or *de facto* powers, or a combination of both.¹⁷ Lesser degrees of control, such as 'substantial influence,' are

respect of a subordinate commander's command responsibility, sometimes referred to as 'double command responsibility.' See *Orić* Appeal Judgment, *supra* note 6, at ¶ 39.

¹⁵ E.g., Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment, ¶ 195 (Feb. 20, 2001) [hereinafter *Čelebići* Appeal Judgment]; *Hadžihasanović* Decision, *supra* note 4, at ¶ 18; Dissenting Opinion of Judge Hunt in *Hadžihasanović* Decision, *supra* note 5, at ¶ 8; *Orić* Appeal Judgment, *supra* note 6, at ¶ 18; Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgment, ¶ 484 (Nov. 28, 2007); Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶ 229 (Feb. 22, 2008); JEAN-MARIE HENCKAERTS and LOUISE DOSWALD-BECK, INTERNATIONAL COMMITTEE OF THE RED CROSS CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL I: RULES, at 559-563 (Cambridge University Press 2009). See also the statutes of the major international criminal tribunals: Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7(3), UN Doc. S/RES/827 (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, Art. 6(3), UN Doc. S/RES/955 (1994) [hereinafter ICTR Statute]; Statute of the Special Court for Sierra Leone, Art. 6(3), January 16, 2002 [hereinafter SCSL Statute]; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art. 29 [hereinafter ECCC Statute]; Rome Statute of the International Criminal Court, Art. 28, UN Doc. A/CONF.183/9, entered into force 1 July 2002, 2187 U.N.T.S. 90 (1998) [hereinafter Rome Statute]; Statute of the Special Tribunal for Lebanon, Art. 3(2), UN Doc. S/RES/1757 (2007) [hereinafter STL Statute]; Articles 86 and 87, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Protocol I (1977), entered into force 7 December 1978, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

¹⁶ E.g. *Čelebići* Appeal Judgment, *supra* note 15, at ¶ 256; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, Judgment, ¶ 86 (May 23, 2005) [hereinafter *Kajelijeli* Appeal Judgment]; *Šesay et al.* Appeal Judgment, *supra* note 10, at ¶ 848.

¹⁷ E.g. *Čelebići* Appeal Judgment, *supra* note 15, at ¶ 195; *Kajelijeli* Appeal Judgment, *supra* note 16, at ¶ 85; *Orić* Appeal Judgment, *supra* note 6, at ¶ 91; Prosecutor v. Bemba,

insufficient for command responsibility.¹⁸ This element does not require that the superior-subordinate relationship existed at the time of the subordinate's crime. That the subordinate carried out his crime before or after the period of effective control does not change the fact that during the period of effective control, the commander had a subordinate among his troops who had committed or was about to commit a crime.

The second element ensures that command responsibility is not a form of strict liability. One of two states of mind is required: actual knowledge or constructive knowledge.¹⁹ In this regard, it is important to distinguish between a commander's actual or constructive knowledge of crimes generally, which his troops may or may not have committed, and his actual or constructive knowledge of his own subordinates' crimes. Only the latter can lead to command responsibility.²⁰ As to the nature of the subordinate's criminal act, the commander must have the requisite knowledge with regard to the specific elements of the crime, including in particular the specific intent required for some crimes.²¹ Accordingly, where two offenses have a material element in common, but the second offense contains an additional element not present in the first (*e.g.* cruel treatment and torture), the requisite knowledge of the first offense alone is legally insufficient to put the commander on notice of the second offense.²²

Like the first element, the second element does not limit command responsibility to crimes committed within the period of the commander's effective control. To be sure, international criminal statutes variously refer to a commander's requisite knowledge either of crimes his subordinate 'was about to commit or had committed,'²³ or crimes his subordinates 'were

Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 408, 409, 415 (June 15, 2009) [hereinafter *Bemba* Decision on Confirmation of Charges].

¹⁸ *Čelebići* Appeal Judgment, *supra* note 15, at ¶ 266.

¹⁹ The statutes of the *ad hoc* tribunals refer to a commander's "reason to know" about crimes, and the Rome Statute of the ICC requires that military commanders "should have known" about, and that other superiors "consciously disregarded information which clearly indicated," subordinates' crimes. ICTY Statute, *supra* note 15, at Art. 7(3); ICTR Statute, *supra* note 15, at Art. 6(3); SCSL Statute, *supra* note 15, at Art. 6(3); Rome Statute, Art. 28. As noted by the ICRC, these formulations essentially cover the concept of constructive knowledge. JEAN-MARIE HENCKAERTS and LOUISE DOSWALD-BECK, *supra* note 13, at 562.

²⁰ *Orić* Appeal Judgment, *supra* note 6, at ¶ 59.

²¹ Prosecutor v. Milutinović, Case No. IT-05-87-T, Judgment (Vol. 1), ¶ 119 (Feb. 26, 2009) [hereinafter *Milutinović et al.* Trial Judgment] ("in respect of persecution, the accused must have knowledge or reason to know that the relevant subordinates possessed discriminatory intent").

²² *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶ 155 (Sept. 17, 2003) [hereinafter *Krnojelac* Appeal Judgment].

²³ ICTY Statute, *supra* note 15, at Art. 7(3); ICTR Statute, *supra* note 15, at Art. 6(3);

committing or about to commit.²⁴ Neither of these formulations exclusively limits a commander's requisite knowledge to crimes committed during the period of his effective control.²⁵

The third element specifies the commander's culpable conduct. It provides liability for commanders who fail to comply with one or both of two distinct legal duties: to punish subordinates for past crimes and to prevent them from committing future crimes.²⁶ Again, there is no reference to the period of the commander's effective control as a limitation on crimes he must punish and prevent. Rather, the duties are simply that the commander must 'prevent' crimes his troops are about to commit in the future, and 'punish' them for crimes they committed in the past. However, a commander is not expected to perform the impossible. He is only obliged to take the measures 'necessary and reasonable' to prevent or punish. What those measures are in a given case will depend on the commander's 'material ability' to act; in other words, the degree of effective control he wields over the criminal subordinates (*c.f.* first element).²⁷ But in no case does this obligation, as a matter of law, depend on whether the crimes themselves coincided with the commander's effective control.

As far as the temporal boundaries of command responsibility go, the three elements of command responsibility can be summed up as follows: The first element demarcates the period during which a commander is duty-bound to prevent and punish criminal conduct by his subordinates; the second element triggers those duties,²⁸ and the third element specifies their content. For example, assume a commander has *effective control* (first

SCSL Statute, *supra* note 15, at Art. 6(3); ECCC Statute, *supra* note 15, at Art. 29. See also JEAN-MARIE HENCKAERTS and DOSWALD-BECK, *supra* note 13, at 558.

²⁴ Rome Statute, *supra* note 15, at Art. 28; STL Statute, *supra* note 15, at Art. 3(2)(a).

²⁵ See Dissenting Opinion of Judge Schomburg in *Orić*, *supra* note 3, at ¶ 13; Dissenting Opinion of Judge Liu in *Orić*, *supra* note 6, at ¶ 29. For an explanation of why the phrase 'were committing or about to commit' in the Rome Statute does not exclude command responsibility in respect of past crimes, see *infra* Part D1(b).

²⁶ *E.g.* Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 83 (July 29, 2004) [hereinafter *Blaškić* Appeal Judgment]. The Rome Statute sets out three duties, namely, to prevent crimes, repress them, and submit the matter to the competent authorities for investigation and prosecution. Rome Statute, *supra* note 15, at Art. 28(a)(ii). However, in substance they are no different than the duties recognized by the *ad hoc* tribunals; the Rome Statute simply specifies the content of the commander's obligations in more detail. See *Bemba* Decision on Confirmation of Charges, *supra* note 17, at ¶ 435-442.

²⁷ *E.g.* Prosecutor v. Boškoski and Tarčulovski, Case No. IT-04-82-A, Judgment, ¶ 230 (May 19, 2010); *Blaškić* Appeal Judgment, *supra* note 26, at ¶ 72; *Bemba* Decision on Confirmation of Charges, *supra* note 17, at ¶ 443.

²⁸ Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment, ¶ 297 (July 17, 2008) [hereinafter *Strugar* Appeal Judgment]; Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-A, Judgment, ¶ 27 (Apr. 22, 2008) [hereinafter *Hadžihasanović and Kubura* Appeal Judgment].

element) over troops between May 1 and May 31. During this period, he will be under a duty to prevent and punish crimes by his troops. On May 30, still within that period, he acquires *requisite knowledge* (second element) that some of his troops plan to commit a crime on June 2. Between May 30 and May 31, he must thus *take all necessary and reasonable measures to prevent* them from committing the crime (third element). If he does so, the subordinate will most probably not commit the crime. But if he does not, the commander will incur command responsibility in respect of the crime, notwithstanding that the crime itself was committed on June 2, after his effective control ceased. This example demonstrates that all elements of command responsibility can be met at the same time, regardless of when the subordinate actually commits the crime.

Some might challenge this conclusion by asserting that command responsibility requires the commander's failure to cause or affect the crime, and moreover that the commander incurs criminal culpability not only for his own failure to punish or prevent the crime, but also for the crime itself.²⁹ A potential argument along this line might be that it is misguided to hold a commander liable for the crime in his capacity as a commander when there is no evidence that the crime resulted from the commander's failure at a time when he was still in charge over the culprit.

In response, it should first be mentioned that the principle of command responsibility under customary international law (in contrast to forms of vicarious liability under international criminal law³⁰) does not require any causality between the commander's conduct, be it his failure to punish³¹ or

²⁹ See e.g. Kai Ambos, *Chapter 21 Superior Responsibility*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, Vol. 1, 851—853 (Cassese *et al.* eds., Oxford University Press 2002) (“a specific causal relationship between the failure and the occurrence of the crime must exist . . . it would be more logical *not* to find the superior criminally liable for the intent crimes of the subordinates at all but this solution is not compatible with—certainly contradictory—wording of Article 28”).

³⁰ Joint criminal enterprise (“JCE”) requires that the accused's conduct lend a “significant contribution” to the crimes for which he is to incur this form of responsibility. *E.g.*, Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgment, ¶ 675 (Mar. 17, 2009) [hereinafter *Krajišnik* Appeal Judgment]. Planning, instigating and aiding and abetting all require a “substantial contribution” by the accused to the crime, whereas ordering means “instructing” person to commit an offence. *Id.* at ¶ 662; Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgment, ¶ 89-90 (Feb. 28, 2005).

³¹ See, e.g. *Blaškić* Appeal Judgment, *supra* note 26, at ¶ 76; *Orić* Trial Judgment, *supra* note 5, at ¶ 338 (with further references); Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 400 (Nov. 16, 1998) (“The very existence of the principle of superior responsibility for failure to punish . . . demonstrates the absence of a requirement of causality as a separate element of the doctrine of superior responsibility.”); *Bemba* Decision on Confirmation of Charges, *supra* note 17, at ¶ 424 (considering that, in respect of the commander's duties arising after the commission of the crimes, “it is illogical to conclude that a failure relating to those . . . duties can retroactively cause the crimes to be committed.”). *But*

prevent,³² and the subordinate's crime. The ICC has found a requirement of causation between the commander's failure to prevent and the subordinate's crime,³³ but that finding was based on an ambiguous interpretation of the court's own statute.³⁴ Given the abundant jurisprudence of the ICTY and the

see Volker Nerlich, *Superior Responsibility under Article 28 ICC Statute: For What Exactly Is the Superior Held Responsible?*, 5 J. INT'L CRIM. JUST. 665, 667-80 (2007). Nerlich argues that there exists a causal link between the crimes committed before the commander gained knowledge of such crimes and the commander's consequent failure to punish those crimes. In his view, a requirement of a causal link stems from the fact that the commander must have acted negligently—by failing to control his troops—in order for the crime(s) to have been committed in the first place. This argument seeking to establish a causality requirement assumes a great deal by essentially endowing commanders with the qualities of omniscience and omnipotence and completely dismissing the possibility that a crime could have been committed by a rogue subordinate acting of his own accord, completely independent of the commander's influence.

³² In fact, even those chambers of the ICTY and the SCSL that have disallowed command responsibility in respect of crimes committed before the accused's assumption of effective control agree that command responsibility is separate from liability for the crime, and that no causation is required. *Hadžihasanović* Decision, *supra* note 4, at ¶ 22 ("command responsibility looks at liability flowing from breach of [the] duties" comprised in the idea of command); *Hadžihasanović and Kubura* Appeal Judgment, *supra* note 28, at ¶ 40 (command responsibility "does not require that a causal link be established between a commander's failure to prevent subordinates' crimes and the occurrence of these crimes"); *Prosecutor v. Brima*, Case No. SCSL-2004-16-T, Judgment, ¶ 783 (June 20, 2007) [hereinafter *Brima et al.* Trial Judgment]; *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-T, Judgment, ¶ 234, 249 (Aug. 2, 2007) [*Fofana and Kondewa* Trial Judgment] ("a causal link between the superior's failure to prevent the subordinates' crimes and the occurrence of these crimes is not an element of the superior's responsibility Command responsibility is responsibility for omission, which is culpable due to the duty imposed by international law upon a commander" and does not require his involvement in the crime.") (internal quotation omitted). For further support, *e.g.* *Prosecution v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Judgment, ¶ 832 (Dec. 17, 2004) [hereinafter *Kordić & Čerkez* Appeal Judgment]; *Blaškić* Appeal Judgment, *supra* note 26, at ¶ 77; *Milutinović et al.* Trial Judgment, *supra* note 21, at ¶ 122; *Orić* Trial Judgment, *supra* note 5, at ¶ 338; *Prosecutor v. Halilović*, Case No. IT-01-48-T, Judgment, ¶ 78 (Nov. 16, 2005) [hereinafter *Halilović* Trial Judgment]; *Sesay et al.* Trial Judgment, *supra* note 5, at ¶ 298, 299.

³³ *Bemba* Decision on Confirmation of Charges, *supra* note 17, at ¶ 423, 424; *See also* Kai Ambos, *supra* note 27, at 850, 860; Christopher Greenwood, *Command Responsibility and the Hadžihasanović Decision*, 2 J. INT'L CRIM. JUST. 598, 603 (2004); Volker Nerlich, *supra* note 29, at 665, 672-73 (2007).

³⁴ Art. 28 reads, in relevant parts:

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

The wording of Article 28 allows for two different interpretations of the subject matter to which the phrase 'as a result of' refers. On the one hand, it could mean that that the *crimes*

SCSL to the contrary,³⁵ this finding does not reflect customary international law.³⁶ Second, there is agreement among both the *ad hoc* tribunals and the ICC that command responsibility is not a form of vicarious liability whereby the commander incurs liability for the crime itself.³⁷ Third, even on the view that command responsibility is liability for the crime itself and requires a causal link between the commander's failure and the subordinate's crime, it does not follow that the subordinate's crime must coincide temporally with the commander's effective control. A commander's failure to prevent a crime during his period of effective control may cause or affect a crime eventually committed thereafter. As a result, it is unnecessary to require that the crime temporally coincide with the effective control.

Rather, command responsibility arises when the commander's *failure* is contemporaneous with his effective control over and his discovery of the culpable or potentially culpable subordinate.³⁸ The timing of the subordinate's *crime* is a different matter. There is nothing inherent in a

were committed because the commander failed to exercise control properly over his forces. On the other hand, it could mean that the commander *is responsible because* he failed to exercise control properly over his forces. Whereas the former reading implies causality between the failure and the crime, the latter does not.

³⁵ *Hadžihasanović* Decision, *supra* note 4, at ¶ 22; *Hadžihasanović and Kubura* Appeal Judgment, *supra* note 28, at ¶ 40; *Kordić & Čerkez* Appeal Judgment, *supra* note 32, at ¶ 832; *Blaškić* Appeal Judgment, *supra* note 26, at ¶ 77; *Milutinović et al.* Trial Judgment, *supra* note 21, at ¶ 122; *Orić* Trial Judgment, *supra* note 5, at ¶ 338; *Halilović* Trial Judgment, ¶ 78; *Sesay et al.* Trial Judgment, *supra* note 5, at ¶ 298, 299; *Brima et al.* Trial Judgment, *supra* note 32, at ¶ 783; *Fofana and Kondewa* Trial Judgment, *supra* note 32, at ¶ 234, 249.

³⁶ See also JEAN-MARIE HENCKAERTS and L. DOSWALD-BECK, *supra* note 13, at 558-563 (setting out the customary principle of command responsibility, while conspicuously omitting any reference to a causality requirement).

³⁷ *Krnojelac* Appeal Judgment, *supra* note 22, at ¶ 171 ("It cannot be overemphasized that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with the failure to carry out his duty as a superior to exercise effective control"); *Halilović* Trial Judgment, ¶ 54; *Brima et al.* Trial Judgment, *supra* note 32, at ¶ 783. See also *Čelebići* Appeal Judgment, *supra* note 15, at ¶ 239 (stating that command responsibility is not a vicarious responsibility doctrine); Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Judgment (Reasons), ¶ 35 (July 3, 2002) [hereinafter *Bagilishema* Appeal Judgment] (describing superior responsibility solely in terms of a breach of duty). *Bemba* Decision on Confirmation of Charges, *supra* note 17, at ¶ 436. Consequently, the fact that Article 28 of the Rome Statute and some cases (and indictments) have expressed command responsibility as liability 'for' the subordinate's crimes should not be taken to mean that the commander himself participated in the crime. Rather, they merely signify that the punishment for the actual crime committed by the subordinate is a measure of punishment of the commander for his failure to control the subordinate. If interpreted otherwise, they would 'misrepresent the true meaning of the doctrine of command responsibility in international criminal law.' Declaration of Judge Shahabuddeen in *Orić*, *supra* note 6, at ¶ 22-25. For the mentioned misrepresentation, see Greenwood, *supra* note 31, at 603.

³⁸ GUÉNAËL METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY*, 191-192 (Oxford University Press 2009).

principle that imposes duties to punish or prevent criminal acts that those criminal acts must be simultaneous with the period during which the duties exist. To make the point in the extreme, domestic laws oblige a prosecutor to prosecute crimes within his jurisdiction and discretion even if the accused committed such crimes before the prosecutor took office.³⁹ Domestic laws similarly require a policeman to prevent crimes even if he believes they will occur after he leaves his post.⁴⁰ As a matter of customary international law, the principle of command responsibility requires only that its three elements—effective control, requisite knowledge, and failure to prevent or punish—coincide. That combination triggers command responsibility.⁴¹ The timing of the subordinate's crime in relation to these elements would only be a question of evidence.

II. PRINCIPLED READING OF COMMAND RESPONSIBILITY

The above conception of command responsibility is consistent with historic formulations of the doctrine, including those of Sun Tzu and Hugo Grotius, international responses to crimes committed during World War I and II, and contemporary legal approaches. Three points are evident from an analysis of these various formulations. First, the fundamental purpose of the principle of command responsibility has consistently been to promote broad compliance with international humanitarian law. The rationale is that because a single commander has the power to determine the conduct of subordinates, his response to subordinates who are about to commit crimes will have a direct and considerable effect on the number of crimes committed. As such, commanders play a crucial role in ensuring compliance with international humanitarian law. Second, this rationale is first and foremost expressed through a duty of commanders to prevent their subordinates' crimes. Third, none of the formulations limit the commander's duty in a manner that would exempt him from preventing crimes simply because the subordinate's criminal conduct may occur after the commander ceases to have command over the culpable subordinates. Rather, the purpose of ensuring broad compliance with international humanitarian law by obliging commanders to prevent subordinate's crimes mandates command responsibility in such circumstances.

³⁹ See e.g. Swedish Code of Judicial Procedure (1942:740), Ch. 20, sec. 6 (none of the exceptions to which section 7 refers to the fact that the prosecutor was not in office when the crime was committed).

⁴⁰ See e.g. Swedish Police Act (1984:387), sec. 9 (setting out a policeman's duty to report crimes, none of the exceptions to which refer to the fact that the crime will be committed after the policeman leaves his post); Danish Police Act (No. 444, 9 June 2004), Ch. 2 sec. 2.

⁴¹ See e.g. Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Decision, *supra* note 5, at ¶ 29.

A. History of the Command Responsibility Doctrine

1. Early Foundations of Command Responsibility

The foundations of the doctrine of command responsibility come from the writings of Sun Tzu, Hugo Grotius and international instruments such as the 1899 and 1907 Hague Conventions. Sun Tzu, focusing on the military context, wrote that troop insubordination is the fault of the general.⁴² Hugo Grotius expanded the concept to include rulers who “may be held responsible for the crime of a subject if they know of it and do not prevent it when they could and should prevent it.”⁴³ The Hague Conventions codified the obligation of armies, militia, and volunteer corps that were “commanded by a person responsible for his subordinates” to abide by the “laws, rights and duties of war.”⁴⁴ These early instruments set forth the basis for command responsibility, namely, the notion of responsible command.

2. Aftermath of World War I

After World War I, the international community attempted to hold commanders liable for their subordinates’ acts. The Preliminary Peace Conference of 1919 created a commission (“Commission”) to “inquir[e] into the responsibilities relating to [World War I].”⁴⁵ The majority of the Commission advocated that each belligerent state try individuals guilty of violating the laws and customs of war, but in certain instances the Allied powers should establish a “high tribunal.”⁴⁶ Among the Commission’s concerns were instances of a civilian or military authorities ‘abstain[ing] from preventing or taking measures to prevent’ violations of the laws or customs of war.⁴⁷ As with Hugo Grotius, the Commission’s report focused

⁴² William H. Park, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. 1, 3 (1973), citing MARK MCNEILLY, *SUN TZU AND THE ART OF MODERN WARFARE* 211-271 (Oxford University Press 2001).

⁴³ HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, 522-23 (Francis W. Kelsey trans., Carnegie Endowment for International Peace 1925).

⁴⁴ Convention (IV) Respecting the Laws and Customs of War and its annex: Regulations Concerning the Laws and Customs of Wars on Land art. 1, Oct. 18, 1907; Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land art. 1, Jul. 29, 1899 *reprinted in* THE LAW OF WAR, A DOCUMENTARY HISTORY, Vol. I (Leon Friedman ed., Random House 1972).

⁴⁵ *Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 19, 1919*, 14 AM. J. INT’L L. 95 (1920).

⁴⁶ *Id.* at 121-22.

⁴⁷ *Id.* at 121.

on the duty to prevent violations on the part of subordinates,⁴⁸ without any requirement that such violations occur during the commander's tenure.

3. Post-World War II Trials

The trial of General Tomoyuki Yamashita by the U.S. Military Commission in Manila was the first post-World War II trial to make use of the doctrine of command responsibility.⁴⁹ Yamashita submitted a *habeas corpus* petition before the U.S. Supreme Court. Ruling on the petition, the U.S. Supreme Court affirmed the fundamental purpose of command responsibility:

[T]he Law of War presupposes that its violations is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates. . . . [the purpose of the Law of War] to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection.⁵⁰

The year after *Yamashita*, the International Military Tribunal for the Far East (IMTFE) formulated an early test for command responsibility (referring to it as superior responsibility) in the *Tokyo War Crimes Trial*. It held that superiors are liable if “(1) [t]hey had knowledge that [war] crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the

⁴⁸ *See id.*

⁴⁹ Trial of General Tomoyuki Yamashita, United States Military Commission, Manila, 1 October-7 December 1945, in IV LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 1-37 (United Nations War Crimes Commission 1948).

⁵⁰ *Id.* at 43. For support, the Court pointed to Articles 1 and 43 of the 1907 Hague Convention, Article 19 of the Hague Convention (X), and Article 26 of the 1929 Geneva Convention for the wounded and sick. *Id.* at 43. In terms of liability, The Court also referenced and earlier military tribunal and an international arbitration to support the proposition that a breach of the laws of war can be penalized. *Id.* at 38-49. In particular, the court referenced Gen. Orders No. 221, Hq. Div. of the Philippines, 17th August 1901, where the issue centered on the liability of an officer for failure to take measures to prevent murder committed in his presence. It was held that an officer is not liable for a failure to prevent if he did not have the power to prevent. *Id.* at 44, n.1. As to International Arbitration proceedings, the Court referenced the *Case of Jenaud* and the *Case of The Zafiro*. *Id.* at 44. *See also, U.S. v. Pohl et al.*, V Trials of War Criminals, 1011 (“The law of war imposes on a military officer in a position of command an affirmative duty to take steps as a within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are the violations of the law of war.”)

future, or 2) [t]hey are at fault in having failed to acquire such knowledge.”⁵¹ In the end, the IMTFE convicted seven of the twenty-five accused for “having recklessly disregarded their legal duty by virtue of their offices to take adequate steps to secure the observance and prevent breaches of the laws and customs of war.”⁵² While none of the breaches seemed to have occurred after the accused ceased to be in command of the culprits, the test pronounced by the IMTFE—referring to the duty to prevent ‘crimes in the future’—did not exclude command responsibility in such cases.

Unlike the IMTFE trials, the trials of Nazi war criminals often centred on a superior or commander’s direct responsibility for atrocities, usually by way of ordering a crime or transmitting a criminal order.⁵³ The two central trials of Nazi war criminals with respect to the command responsibility doctrine, the *Hostage Case*⁵⁴ and the *High Command Case*⁵⁵, endorsed the idea of responsible command. For example, the *High Command Case* stated that when faced with illegal orders, the commander had the option of countermanding the order, sabotaging its enforcement, or resigning.⁵⁶ When the commander “merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal, [he] violates a moral obligation under International Law” and “by doing nothing he cannot wash his hands of international responsibility.”⁵⁷ Also, the *High Command Case* stated that “[t]he duty and responsibility for maintaining peace and order and the prevention of crime rests upon the commanding general.”⁵⁸ These

⁵¹ The Tokyo War Crimes Trial, International Military Tribunal for the Far East (Nov. 1948), *excerpted in* THE LAW OF WAR, A DOCUMENTARY HISTORY, Vol. II, 1039 (Leon Friedman ed., Random House 1972).

⁵² *Id.* at 1033.

⁵³ See e.g. *United States v. Oswald Pohl et al.*, November 1947, II LAW REPORTS OF THE TRIALS OF WAR CRIMINALS; *United States of America v. Wilhelm List et al.*, February 19, 1948, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. XI; *United States of America v. Wilhelm von Leeb et al.*, Nuernberg Military Tribunal, October 27, 1948, XI LAW REPORTS OF THE TRIALS OF WAR CRIMINALS; See also SHANE DARCY, COLLECTIVE RESPONSIBILITY AND ACCOUNTABILITY UNDER INTERNATIONAL LAW, 315 (Transnational Publishers 2005), *citing* Frick and Dönitz, International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946, *reprinted in* 41 AJIL 172 (1947); *citing also* *United States v. Anion Dossler*, 8-12 October 1945, I LAW REPORTS OF THE TRIALS OF WAR CRIMINALS.

⁵⁴ *Hostage Case*, Nuremberg (Feb. 1948), *excerpted in* THE LAW OF WAR, A DOCUMENTARY HISTORY, Vol. II, 1303 (Leon Friedman ed., Random House 1972).

⁵⁵ *High Command Case*, XII LAW REPORTS OF THE TRIALS OF WAR CRIMINALS (1949).

⁵⁶ *United States v. Wilhelm von Leeb et al.*, Nuernberg Military Tribunal, Oct. 27, 1948, XI TRIALS OF WAR CRIMINALS 511-12.

⁵⁷ *Id.* at 512.

⁵⁸ *High Command Case*, XII LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 109 (1949) (*citing* *United States v. Wilhelm et al.*, in V LAW REPORTS OF THE TRIALS OF WAR CRIMINALS).

statements buttress the notion that commanders play a crucial role in ensuring broad compliance with international humanitarian law by preventing crimes.

Charters of post-World War II war crimes tribunals similarly focused on a commander's duty to prevent crimes committed by their subordinates. For instance, Chinese law concerning war crimes trials expressly stated that superiors should be held accountable when they fail in their duty to prevent their subordinates' crimes.⁵⁹ Netherlands law concerning trials for war criminals considered a superior "equally punishable for" crimes that were being or "would be committed" by his subordinates.⁶⁰

From Hugo Grotius to the post-World War II trials, the duty to prevent future crimes in order to avoid violations of international humanitarian law is the critical foundation that the principle of command responsibility was built upon. Holding a commander responsible in respect of crimes he had the requisite knowledge of and could have prevented during the period of effective control, even though such crime occurred after he ceased to have effective control over his subordinates, is consistent with that foundation. Conversely, excluding command responsibility in such situations would defeat the principle at its core. It would allow commanders to neglect crimes in the making with impunity. As will be seen in the following sections, this is also consistent with the more detailed, recent formulations of the principle of command responsibility.

B.. Object and Purpose of Additional Protocol I

Articles 86(2)⁶¹ and 87(3)⁶² of Additional Protocol I expressly establish the duty to prevent impending crimes. These Articles seek to clearly define the responsibility of commanders⁶³ in relation to their subordinates' breaches

⁵⁹ Chinese Law Concerning Trials of War Criminals, art. IX, in XIV LAW REPORTS OF TRIALS OF WAR CRIMINALS, Annex (1948).

⁶⁰ Netherlands East Indies Statute Book Decree No. 45, art. 9 (1946), in XI LAW REPORTS OF THE TRIALS OF WAR CRIMINALS, Annex (1949), p. 100.

⁶¹ Additional Protocol I, *supra* note 15, at art. 86, ¶ 2. Article 86 holds commanders responsible in respect of breaches of their subordinates if "they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or *was going to commit* such a breach and if they did not take all feasible measures within their power to prevent or repress the breach." *Id.* (emphasis added).

⁶² Article 87, ¶ 3, reads: The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate to initiate disciplinary or penal action against violators thereof. Additional Protocol I, *supra* note 15.

⁶³ Article 86 is pertinent to all superiors, while Article 87 sets out the specific duties of

of the laws of war⁶⁴ They oblige a commander to prevent crimes a subordinate is going to commit.

On its face, this formulation does not exclude command responsibility in situations where the crime occurred after the commander ceased to have effective control over the relevant subordinate. Furthermore, interpreting Articles 86(2) and 87(3) in good faith and in light of the object and purpose of Additional Protocol I⁶⁵ militates against such a limitation. The object and purpose of Additional Protocol I, under paragraph 3 of its preamble, is to “reaffirm and develop provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application.”⁶⁶ Reading Articles 86(2) and 87(3) to include command responsibility in the aforementioned situations furthers this purpose as it reaffirms the existence, and reinforces the application, of the protections afforded to the victims of armed conflict. A contrary interpretation dilutes rather than reaffirms these protections, and hampers rather than reinforces their application.⁶⁷

Commentators have suggested that reading Articles 86 and 87 in light of the object and purpose of Additional Protocol I to analyze the temporal scope of the provisions “give[s] the treaty provision a broader meaning than its wording might suggest and then read[s] that back into customary law.”⁶⁸ This criticism may be valid if it were required that the customary law principle of command responsibility positively stipulate liability in factual situations where the relevant crimes occurred after an accused commander’s period of effective control. However, there is no such requirement. Rather, the pertinent question is whether such a factual situation reasonably falls within the principle of command responsibility established under customary

commanders. As suggested by state representatives of Spain and Canada, these articles are closely linked and should be read together. *See* Summary Record of the Fifty-first Meeting, CDDH/1/SR.51, 5 May 1976, *Official Records*, Vol. IX, ¶ 12, 18. ICRC Commentary on the Additional Protocol I also suggest that these provisions be read together. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 1, ¶ 3541.

⁶⁴ *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 1, ¶ 3524-28.

⁶⁵ Vienna Convention on Law of the Treaties, Article 31(1), May 23, 1969, 1155 U.N.T.S 331 (1969).

⁶⁶ Additional Protocol I, Preamble, ¶ 3. As noted by the ICRC Commentary, this paragraph provides the *raison d’être* of the entire undertaking to reinforce the measures ensuring the application of the rules of international humanitarian law. *See also* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 1, ¶ 26.

⁶⁷ *See* the similar arguments with respect to crimes committed before the commander assumed effective control over the culpable subordinate. Dissenting Opinion of Judge Hunt in *Hadžihasanović* Decision, *supra* note 5, at ¶ 22; Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Decision, *supra* note 5, at ¶ 24.

⁶⁸ *See* Greenwood, *supra* note 31, at 604.

international law. As aptly stated by Judge Hunt in his minority opinion in *Hadžihasanović*:

Surely it is the purpose of the relevant principle of customary international law which dictates the scope of its application, not the facts of the situation to which the principle is sought to be applied. . . . If [it were otherwise], no principle of customary international law could ever be applied to a new situation, simply because it *is* a new situation.⁶⁹

With regard to another legal issue regarding the command responsibility doctrine in the same decision, the majority in *Hadžihasanović* agreed with Judge Hunt's rule for determining the scope of the application of a customary international law principle, and trial chambers of the ICTY and the International Criminal Tribunal for Rwanda ("ICTR") have followed it.⁷⁰

The factual scenario wherein the subordinate's crime is committed after the cessation of the commander's effective control reasonably falls within the customary law principle of command responsibility as articulated by Articles 86(2) and 87(3) of Additional Protocol I. This ensures that commanders carry out their duty to prevent all crimes they are able to prevent, crimes committed during their tenure, as well as those completed thereafter.

C. Contemporary Formulations of Command Responsibility

Statutes of the international *ad hoc* tribunals, the Rome Statute, and various national laws all contain contemporary formulations of command responsibility. These sources do not directly set out the temporal scope of the command responsibility doctrine. However, this does not lead to the conclusion that command responsibility should be temporally limited to crimes committed during a commander's period of effective control. First,

⁶⁹ Dissenting Opinion of Judge Hunt in *Hadžihasanović* Decision, *supra* note 5, at ¶ 40 (emphasis in original).

⁷⁰ *Hadžihasanović* Decision, *supra* note 4, at ¶ 12 ("where a principle can be shown to have been so established [under customary international law], it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle"); *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, André Rwamakuba and Mathieu Ndirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, ¶ 37 (May 11, 2004) [hereinafter *Karemera* Decision]; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, ¶ 715 (Sept. 1, 2004) [hereinafter *Brđanin* Trial Judgment]. See also *infra*, § IV.1.a.

none of these contemporary formulations expressly disallow command responsibility in respect of subordinate crimes committed after the cessation of effective control. Second, these formulations reaffirm that the purpose of the doctrine is to ensure broad compliance with international humanitarian law by obliging commanders to prevent their subordinates from committing crimes. Against this backdrop, it would be incongruous to interpret the lack of temporal limits in the contemporary formulations as circumscribing the temporal scope of command responsibility to crimes committed within the period of a commander's effective control. Rather, the fact that a commander has a duty to prevent crimes that will occur after his period of effective control may have been so obvious that the drafters of these statutes did not see the need to make such a duty explicit.⁷¹ Indeed, it would be absurd for a commander to believe that he could say: 'Yes, I know that these men who are now my subordinates are about to commit an atrocious massacre after I leave my command – but, as I will not then be their superior, I am under no duty to prevent their crimes.'⁷²

The absence of explicit language supporting command responsibility in respect of crimes subordinates commit after the period of effective control does not mean that such responsibility does not exist.

1. Statutes of *ad hoc* International Criminal Tribunals

All the command responsibility provisions of the statutes of the *ad hoc* tribunals refer to future crimes⁷³ and a commander's duty to prevent crimes committed by his subordinates.⁷⁴

A commander's duty to prevent future crimes is also featured in the 1994 UN report of the Commission of Experts.⁷⁵ The report provided the Secretary-General with an analysis of possible violations of international humanitarian law committed in the former Yugoslavia and served as a foundation for the drafting of the ICTY statute.⁷⁶ According to the

⁷¹ *C.f.* Dissenting Opinion of Judge Hunt in *Hadžihasanović* Decision, *supra* note 5, at ¶ 12.

⁷² See Dissenting Opinion of Judge Hunt in *Hadžihasanović* Decision, *supra* note 5, at ¶ 12 (making the same statement, but for crimes committed before the commander's assumption of effective control).

⁷³ See ICTY Statute, *supra* note 15, at Art. 7(3); ICTR Statute, *supra* note 15, at Art. 6(3); SCSL Statute, *supra* note 15, at Art. 6(3); ECCC Statute, *supra* note 15, at Art. 29; STL Statute, *supra* note 15, at Art. 3(2)(a); On the Establishment of East Timor Panel Section 16, UNTAET/REG/2000/15 [hereinafter Regulation of East Timor Panel].

⁷⁴ See ICTY Statute, *supra* note 15, at Art. 7(3); ICTR Statute, *supra* note 15, at Art. 6(3); SCSL Statute, *supra* note 15, at Art. 6(3); ECCC Statute, *supra* note 15, at Art. 29; Regulation of East Timor Panel, *supra* note 73, at Section 16; STL Statute *supra* note 15, at Art. 3(2)(c).

⁷⁵ Commission of Experts Final Report, UN Doc. S/1994/674 (May 27, 1994)

⁷⁶ *Id.* at 1 (Letter Dated 24 May 1994 from the Secretary-General to the President of the

Commission of Experts, superiors, particularly military commanders, have a duty to prevent or repress breaches they knew that their subordinate “was committing or was going to commit.”⁷⁷

The statutes of the *ad hoc* tribunals, like earlier formulations of the command responsibility doctrine, impose a duty on a commander to prevent future crimes without requiring that these crimes be temporally concurrent with a commander’s period of effective control.

2. Rome Statute and the ILC Draft Codes

At the request of the United Nations General Assembly, the International Law Commission (ILC) prepared a Draft Code of Crimes against the Peace and Security of Mankind (“ILC Draft Code”) to “formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.”⁷⁸ Both the 1991 and 1996 ILC Draft Codes have provisions that establish criminal responsibility for superiors as a result of crimes that a subordinate “was committing or was going to commit” and that the superior did not take measures in his power to prevent or repress.⁷⁹ These draft codes ultimately served as a basis for the work of the Preparatory Committee for the Establishment of an International Criminal Court (“ICC Preparatory Committee”).⁸⁰

The ICC Preparatory Committee met in 1996 to prepare a “widely acceptable consolidated text of a convention for an international criminal court.”⁸¹ Its draft provisions addressing the responsibility of superiors used slightly different wording than the ILC Draft Codes, but similarly

Security Council).

⁷⁷ Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, Annex, at 16.

⁷⁸ See International Law Commission, *Draft Report of the International Law Commission on the Work of its Forty-Eighth Session*, UN Doc. A/CN.4/L.527 (May 6- July 26, 1996).

⁷⁹ 1991 International Law Commission Code of Crimes against the Peace and Security of Mankind, UN Doc. A/46/10 (1991), reprinted in LYAL S. SUNGA, *THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION*, Annex I, at 345 (Kluwer Law International 1997); 1996 International Law Commission Code of Crimes against the Peace and Security of Mankind, UN Doc. A/51/10 (1996), reprinted in SUNGA, *supra*, Annex VI, at 437.

⁸⁰ See United Nations General Assembly Preparatory Committee on the Establishment of a Criminal Court, *Report of the Preparatory Committee on the Establishment of the International Criminal Court*, Official Records, Fifty-First Session, UN Doc. A/51/22, Vol. I, at 1 (1996).

⁸¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/2, at 169 (Apr. 14, 1998), available at www.un.org/law/n9810105.pdf.

recognized command responsibility in respect of crimes that subordinates “were committing or intending to commit.”⁸² This phrasing remained unchanged in subsequent drafts prepared and considered by the ICC Preparatory Committee.⁸³

Parties to the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court deliberated in the summer of 1998 to complete the Rome Statute.⁸⁴ They had before them the Preparatory Committee’s draft article on superior or commander responsibility that established responsibility in relation to crimes subordinates “were committing or intending to commit.”⁸⁵ The exact terminology used to describe future crimes changed in the final draft when a representative for the Netherlands proposed replacing “intending to” with “about to” such that the provision would read: “the commander either knew, or should have known, that the subordinates were committing or about to commit such crimes.”⁸⁶ According to the Netherlands representative, the change in terminology would “ensure the greatest possible consistency” with the Additional Protocol I, “especially with regard to command responsibility.”⁸⁷ This change to mirror Additional Protocol I did not substantially alter the temporal description set out by the Preparatory Committee and, in the end, Article 28 preserved a duty to prevent future crimes.⁸⁸

Along with liability in respect of future crimes, the Rome Statute took care to preserve a commander’s corresponding duty to prevent such crimes. A commander’s duty to prevent was so central that the 1996 ICC Preparatory Committee’s Draft Article C considered whether “the

⁸² United Nations General Assembly Preparatory Committee on the Establishment of a Criminal Court, *Article C, Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Official Records, Fifty-First Session, UN Doc. A/51/22, Vol. II, at 85-86 (1996).

⁸³ See M. CHERIF BASSIOUNI, *LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE FROM 1994-1996*, Vol. 2, at 212-214 (Transnational Publisher 2005). Article C presented at the 1996 and 1997 Preparatory Committee meetings and Article 25 presented at the 1998 Preparatory Committee meeting all refer to crimes that forces/subordinates “were committing or intending to commit.” *Id.*

⁸⁴ See COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, at xix-xx (Otto Triffterer ed., Nomos, 1999).

⁸⁵ See *id.* at xix-xx.

⁸⁶ Summary Records of the Meetings of the Committee of the Whole, 2 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998), Official Records, UN Doc. A/CONF.183/13, Vol. II, at 137, available at http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf.

⁸⁷ *Id.*

⁸⁸ Rome Statute, *supra* note 15, at Art. 28.

imposition of punishment by the commander alone [was] sufficient to relieve a commander of responsibility for crimes committed by a subordinate, which the commander could have, but failed to prevent.”⁸⁹ The fact that the phrase “prevent or repress crimes” remained unbracketed while other terms, such as the duty to punish, remained bracketed and their inclusion up for debate reflects the primacy of the commander’s duty to prevent.⁹⁰ The 1996 draft suggests that this differing treatment of the duties to prevent and punish likely resulted from the concern that a commander could avoid liability for his failure to prevent his subordinate’s criminal activity by simply punishing the responsible subordinates after the crime occurred.⁹¹ This policy concern likely carried over to the Rome Conference, where the drafters of the Rome Statute did not include a duty to punish or reference to past crimes in Article 28.⁹² Neither the summary records of the Committee of the Whole or the Plenary Committee provide any insight into the absence of the duty to punish. However, the draft articles of the 1996, 1997, and 1998 ICC Preparatory Committee meetings suggests a hierarchy of duties, and that a commander’s duty to prevent is at the top of that hierarchy, as a commander cannot avoid it by exercising other duties such as the duty to punish.

ILC Draft Codes and the negotiating history of the Rome Statute prioritize the duty to prevent future crimes over the duty to punish past crimes to ensure that a commander or superior would not shirk his or her duty to prevent subordinate crimes by simply laying out a punishment after a subordinate committed a crime. This policy of prioritizing the duty to prevent future crimes ensures that commanders seek to prevent their subordinates’ crimes instead of taking another (lesser) action. This rationale applies with equal force to impending crimes that a subordinate commits after the period of a commander’s effective control, so long as the commander had the requisite knowledge of such crimes.

3. National Laws

Similar to the other legal sources surveyed thus far, the national laws of states do not expressly address whether command responsibility can arise as a result of crimes committed before or after a commander assumed

⁸⁹ Bassiouni, *supra* note 83, at 214, n.207.

⁹⁰ *Id.* at 212-14.

⁹¹ The 1996 Preparatory Committee’s Draft Article C on the responsibility of superiors, questions what type of failure should lead to liability and whether “the imposition of punishment by the commander alone [was] sufficient to relieve a commander of responsibility for crimes committed by a subordinate, which the commander could have, but failed to prevent.” Bassiouni, *supra* note 83, at 214, n.207.

⁹² Rome Statute, *supra* note 15, at art. 28.

command.⁹³ Nevertheless, they do refer to a commander's duty to prevent future crimes without excluding the possibility of command responsibility that will occur after the cessation of effective control. This is the case in many states' ICC implementing statutes.⁹⁴ Likewise, Cambodia and Bosnia-Herzegovina, state parties to the Rome Statute that have not enacted implementing statutes, currently have laws establishing command responsibility for future crimes, without limitation to crimes committed during the period of effective control.⁹⁵ In addition, non-party states, such as the United States, also have provisions imposing a duty to prevent future crimes absent such a limitation.⁹⁶

⁹³ The Court of Bosnia and Herzegovina provides one exception. The Court had occasion to take up the issue of the temporal scope of command responsibility in their Second Verdict against Miloš Stupar. The Court held that Stupar did not incur command responsibility in respect of crimes committed at Kravica Warehouse before the assumption of his command. The Court of Bosnia and Herzegovina, Second Verdict Against Miloš Stupar, ¶ 79 April 28, 2010. In support of its holding, the Court relies heavily on *Hadzihasanović*. *Id.* at ¶ 80-82. See, *supra* § IV for further discussion of *Hadzihasanović*, The Stupar second verdict decision did not explore domestic law on this issue. See The Court of Bosnia and Herzegovina, Second Verdict Against Miloš Stupar, ¶ 78-84 April 28, 2010. Due to the Court's internationalized bench and exclusive reliance on international criminal law in this case, a question remains as to the extent to which this verdict represents state practice. See The Law on the Court of Bosnia and Herzegovina, Official Gazette 49/09, available at http://www.sudbih.gov.ba/files/docs/zakoni/en/Law_on_Court_BiH_-_Consolidated_text_-_49_09.pdf.

⁹⁴ See e.g. England and Northern Ireland, International Criminal Court Act of 2001, ch. 17, § 65 ("were committing or about to commit"); Scotland, International Criminal Court Act of 2001, ch. 12, § 5 ("were committing or about to commit"); Malta International Criminal Court Act of 2002 ("were committing or about to commit"); Australia, International Criminal Court Consequential Amendments Act 2002, no. 42, Subdivision K, § 268.115 ("were committing or about to commit"); Canada, Crimes Against Humanity and War Crimes Act of 2000, ch. 24, § 5 ("about to commit or is committing"); Uganda, International Criminal Court Bill of 2006, § 19 (incorporating Article 28 of Rome Statute); Trinidad and Tobago, International Criminal Court Act 2006 (incorporating Article 28 of Rome Statute); See also Argentina, Second Draft Law on Crimes under the Jurisdiction of the ICC ("were committing these crimes or would commit these crimes"); Germany, Code of Crimes Against International Law of 2002, § 4 ("A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the same way as a perpetrator of the offence committed by that subordinate."); Netherlands International Crimes Act of 2003, Article 9 ("has committed or intends to commit"). These laws can be found at <http://www.iccnw.org/?mod=romeimplementation>.

⁹⁵ Cambodia, Law on the Khmer Rouge Trials of 2001, art. 29 ("was about to commit such acts or had done so"); Bosnia-Herzegovina Criminal Code of 2003, art. 180(2) ("was about to commit such acts or had done so").

⁹⁶ United States Field Manual 27-10 1956 ("are about to commit or have committed"). See also Armenia Penal Code 2003, Article 391(1) ("was committing or was going to commit"); El Salvador Amendments to Penal Code 1998, Article entitled "Punibilidad de la comisión por acción y por omisión en delitos contra la humanidad" ("was committing or was about to commit").

Finally, some national laws have command responsibility provisions that do not characterize subordinate crimes in terms of past or future crimes, but more generally espouse a duty to prevent violations of international humanitarian law.⁹⁷ An interpretation of the command responsibility doctrine that establishes command liability in respect of subordinate crimes committed after a commander ceases having effective control fits within the spirit of these laws. This interpretation encourages commanders to take serious steps in preventing the commission of crimes, without excluding the possibility that the final manifestation of the crime would not occur until another commander took over.

D. Avoiding the Creation of a Loophole in Command Responsibility

As a last step in the principled interpretation of the doctrine of command responsibility, it is useful to consider the consequences of disallowing liability for commanders who, during the period of effective control, fail to prevent crimes that subordinates then commit after such period. Just as disallowing command responsibility for a failure to punish crimes committed before the commander assumed effective control could leave crimes ‘between two stools,’⁹⁸ so too would prohibiting command

⁹⁷ See e.g. ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Vol. 2, Practice, Part 2 (Cambridge University Press 2005) setting out: Russia, Military Manual of 1990, § 14(b) (“a commander is obliged to put an end to any violation of the rules of IHL; to prosecute persons having committed a violation of the rules of IHL”); Azerbaijan Criminal Code of 1999, Article 117(1) (providing liability for failure by a commander to prevent violations of the laws and customs of war); Belarus Criminal Code of 1999, Article 137(1) (“a superior or officer intentionally does not take all measures possible in his power in order to prevent or repress the commission by his subordinates of crimes set out in articles 134 [use of weapons of mass destruction], 135 [violations of the laws and customs of war] and 136 [criminal infringement of the norms of international humanitarian law during armed conflicts] of this code [] is punishable”); Bangladesh, International Crimes (Tribunal) Act of 1973, § 4(2) (“any commander or superior officer...who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes [crimes against humanity, crimes against the peace, genocide, war crimes, violations of the any humanitarian rules applicable in armed conflicts laid down in the Geneva Convention of 1949 or any other crimes under international law] or who fails to take necessary measures to prevent the commission of such crimes is guilty of such crimes.”).

⁹⁸ Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Decision, *supra* note 5, at ¶ 14, 15. (“[C]rimes could fall between two stools. The crimes might have been committed very shortly before the assumption of duty of the new commander – possibly, the day before, when all those in previous command authority disappeared; on the other hand, according to the appellants’ [and the majority’s] view, the new commander is not under an obligation to act, even if he knows that the old commander was thinking of initiating proceedings had he continued in office. That is at odds with the idea of responsible command on which the principle of command responsibility rests and with the associated idea that the power to punish

responsibility for failing to prevent crimes committed after the cessation of the commander's effective control create a loophole in the law.

For example, the crimes could occur during a transition period when the prior commander no longer has effective control and the successor commander has yet to assume command. Alternatively, the end of a commander's period of effective control could come near the end of hostilities when there is not a successor commander to assume responsibility. For example, General Masao commanded the 37th Japanese Army during World War II from December 1944 until the cessation of hostilities.⁹⁹ Masao ordered the march of 504 British and American prisoners of war over 165 miles of difficult terrain to Ranau in May 1945.¹⁰⁰ Of the 540 prisoners, only 183 made it to their destination alive.¹⁰¹ Another 150 died shortly thereafter, and a subordinate of Masao ordered the killing of the 33 remaining prisoners on August 1, 1945, around the time General Masao had surrendered to allied troops.¹⁰² General Masao asserted that he did not have effective control over his subordinates at the time his subordinate ordered the killing of the 33 prisoners.¹⁰³ As General Masao was *de jure* commander of the 37th Japanese Army over his subordinates until the cessation of hostilities, and pointed to no other commander with effective control over the subordinates having committed the crime, this case illustrates a situation wherein there might be no subsequent commander that could incur command responsibility in respect of the crimes charged.¹⁰⁴

As this scenario shows, relying on successor command responsibility does not ensure the fulfilment of the primary purpose of command responsibility—the prevention of violations of international humanitarian law. If the predecessor commander had no duty to prevent violations, and no succeeding commander exists to punish the violators, then no commander has a duty to deter crimes committed by subordinates in such situations.

should always be capable of being exercised. ... I may add that, if it is said that someone else could act, an answer is that the doctrine of command responsibility could well apply to several persons at the same time.”)

⁹⁹ *Trial of Lt. General Baba Masao*, Australian Military Court, 28th May- 2nd June 1947, XI LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 56.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 57.

¹⁰⁴ *See id.* at 56. In the end, General Masao was found guilty and sentenced to death for failing “to discharge his duty as a...commander to control the conduct of the members of his command whereby they committed brutal atrocities and other high crime,” including the murder of 33 prisoners of war. *Id.* at 56-57. The initial abstract of the evidence included three charges, including the murder of 33 prisoners of war. *Id.* at 57. By the time of trial the three charges had been superseded by one overall charge, but the prosecution maintained that its case was based on the same facts underlying the three original charges. *Id.*

Moreover, even in situations where there is a successor who assumes effective control after the commission of the crime, that commander could only be held liable for failing to punish the culpable subordinates *after* the crime has occurred. Allowing the predecessor commander to be held liable for failing to prevent crimes about to be committed after his tenure more directly furthers the principle goal of preventing violations of international humanitarian law because it requires the commander to address the crime *before* it occurs.¹⁰⁵

Alternatively, because international humanitarian law imposes a duty on belligerent states to prevent and punish crimes of its armed forces, some suggest that state responsibility is an adequate substitute for command responsibility in situations where command responsibility might otherwise be insufficient.¹⁰⁶ This approach is unconvincing. First, it is not a response to an insufficiency of the principle of command responsibility that another, legally distinct concept might regulate the situation. Rather, international law should focus on how to interpret command responsibility within its separate paradigm of individual criminal responsibility to overcome the defect. Second, on a practical level, the alternative approach assumes that states have the genuine ability and willingness to prevent or punish the crimes of its armed forces. The fact that states often lack either or both is one of the reasons for the establishment of international criminal tribunals and the resulting development of international criminal law.¹⁰⁷ A defining feature of those tribunals, from Nuremberg onward, is that they adjudge

¹⁰⁵ This approach will result in dual liability in some cases: failure to prevent for the predecessor commander and failure to punish for the successor commander. However, the duties to prevent and punish are legally distinct from each other and may give rise to separate charges even for a single commander. The law does not foreclose such dual liability. *Milutinović et al.* Trial Judgment, *supra* note 21, at Vol. 1, ¶ 116; *Hadžihasanović and Kubura* Appeal Judgment, *supra* note 28, at ¶ 259; *Blaškić* Appeal Judgment, *supra* note 26, at para. 83. See also Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Decision, *supra* note 5, at ¶ 15 (citing *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, ¶ 304 (Mar. 3, 2000)); *The Prosecutor v. Milorad Kronjelać*, Case No. IT-97-25-T, ¶ 93 (Mar. 15, 2002).

¹⁰⁶ See Greenwood, *supra* note 31, at 604.

¹⁰⁷ On this issue regarding the establishment of the ICTY, *see, e.g.*, S/RES/808 (Feb. 22, 1993); Commission of Experts Final Report, UN Doc. S/1994/674 (May 27, 1994), Annex, at 319, 320. On the same issue regarding the establishment of the ICTR, *see, e.g.*, Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994), UN Doc. S/1994/1125, Annex, at ¶ 136 (“Municipal prosecution in these highly emotionally and politically charged cases can sometimes turn into simple retribution without respect for fair trial guarantees”), ¶ 138 (“It is ... also a matter of deterrence for the future. The coherent development of international criminal law better to deter such crimes from being perpetrated in the future not only in Rwanda but anywhere, would best be fostered by international prosecution rather than by domestic courts.”). Cf. also the ICC’s complementary function, Rome Statute, *supra* note 15, at Preamble, ¶ 10, Art. 17.

individual—as opposed to state—criminal responsibility.¹⁰⁸ To rely on state enforcement alone would be a step backwards in ensuring that enforcement of international humanitarian law has teeth.

In conclusion, neither historical nor contemporary formulations of the principle of command responsibility circumscribe it to crimes committed during the commander's tenure of effective control. The fundamental purpose of the principle—to ensure broad compliance with international humanitarian law by obliging commanders to prevent crimes—mitigates against such a limitation as the alternative would create a gap in liability detrimental to that purpose.

III. REBUTTAL OF CONTRARY ARGUMENTS

The debate concerning the temporal scope of the command responsibility doctrine to date has focused on whether command responsibility can arise with respect to crimes committed before a commander's assumption of command, and not whether a commander can be held liable in respect of crimes occurring after the end of his command. However, some of the arguments that have (mis)led chambers to exclude command responsibility in the former situations are relevant also to the latter cases, inasmuch as they suggest that customary international law requires that a subordinate's crime coincide with the commander's effective control over that subordinate. Three principle arguments in the majority opinion in the *Hadžihasanović* decision could be relevant to this issue. Subsection I examines these arguments in the context of command responsibility in respect of crimes committed after a commander's effective control ceases, and seeks to rebut them. First, the *Hadžihasanović* majority utilized the incorrect test for determining whether customary international law allows for command responsibility in respect of crimes committed outside the period of a commander's effective control. Second, the majority incorrectly concluded that customary international law excludes command responsibility in respect of crimes committed outside the period of effective control. Third, the principles of *nullum crimen sine lege* and *in dubio pro reo* do not prevent liability in such cases.

The three subsections hereafter address and rebut additional arguments that, although not raised in the *Hadžihasanović* decision, could be made

¹⁰⁸ This principle was first pronounced by the Nuremberg Tribunal: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'. Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, November 14, 1945—October 1 1946, accessed on http://untreaty.un.org/ilc/summaries/7_3.htm#_ftn7. The statutes of all international contemporary criminal tribunals provide for individual criminal responsibility and not for state responsibility.

against the position that command responsibility includes liability in respect of crimes committed after the end of the commander's effective control. These arguments are that this position makes command responsibility akin to a form of strict liability (Subsection 2), is impermissibly ambiguous in relation to the required degree of criminal preparation by the subordinate (Subsection 3), and will be exceedingly difficult to prove (Subsection 4).

A. *Whether Customary International Law Allows for the Advocated Position*

The *Hadžihasanović* decision was the first decision that explicitly dealt with the issue of whether customary international law allows a commander to incur command responsibility for failing to punish subordinates for crimes they committed before the commander assumed effective control over them. The accused Amir Kubura was charged with command responsibility in connection with, *inter alia*, unlawful killings, cruel treatment and wanton destruction allegedly committed by troops of the 3rd Corps 7th Muslim Mountain Brigade of the Bosnian Army.¹⁰⁹ According to the indictment these crimes occurred or started in January 1993. Kubura did not assume command over the alleged offenders until April 1, 1993, more than two months later.¹¹⁰ A 3-2 majority of the ICTY Appeals Chamber held in an interlocutory decision that Kubura could not incur command responsibility for these crimes.¹¹¹ The majority found that under customary international law a commander is not obliged to punish his troops for crimes they committed before he assumed effective control.¹¹² This decision has drawn extensive criticism. In fact, a majority of current and former judges of the ICTY Appeals Chamber are not in support of the *Hadžihasanović* decision.¹¹³

Despite criticisms, chambers of other *ad hoc* tribunals have ruled similarly to the *Hadžihasanović* court. Two chambers of the SCSL and the trial chambers of the ICTR have followed the *Hadžihasanović* majority.¹¹⁴ However, one of the SCSL chambers subsequently changed its mind,¹¹⁵ and

¹⁰⁹ *Hadžihasanović* Decision, *supra* note 4, at ¶ 38.

¹¹⁰ *Id.* at ¶ 38, 39.

¹¹¹ *Id.* at ¶ 51.

¹¹² *Id.*

¹¹³ By the time of the *Orić* Appeal Judgment, a total of fourteen ICTY judges, four of whom were at different times at the appellate level, had expressed judicial views contrary to the decision of the majority in *Hadžihasanović*. Declaration of Judge Shahabuddeen in *Orić*, *supra* note 6, at ¶ 12.

¹¹⁴ *Brima et al.* Trial Judgment, *supra* note 32, at ¶ 799, 1673; *Fofana and Kondewa* Trial Judgment, *supra* note 32, at ¶ 240.

¹¹⁵ Judges Boutet, Itoe, and Thompson endorsed the *Hadžihasanović* majority decision in

the ICTR trial chambers have never explained the reasons for, or the impact of, their holdings.¹¹⁶ The matter does not appear to have arisen before the Extraordinary Chambers in the Courts of Cambodia ('ECCC').¹¹⁷

In the *Bemba* case, the pre-trial chamber of the ICC, based on Article 28(a) of the Rome Statute, held that 'the suspect must have had effective

the *Fofana and Kondewa* Trial Judgment, *supra* note 32, at ¶ 240, but later rejected that decision in the *Sesay et al.* Trial Judgment, *supra* note 5, at ¶ 306.

¹¹⁶ Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 402, fn. 665 (May 15, 2003) (holding that command responsibility requires subordinates' past crime to coincide with the commander's effective control, and citing *Bagilishema* Appeal Judgment, *supra* note 37, at ¶ 50, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgment (Reasons), ¶ 294 (June 1, 2001), and *Čelebići* Appeal Judgment, *supra* note 15, at ¶ 266, none of which lends the holding any support). Subsequent ICTR trial judgments following the *Semanza* holding after the *Hadžihasanović* Decision neither elaborated on the reasons for nor consequences of the holding: *Prosecutor v. Nsengimana*, Case No. ICTR-01-69-T, Judgment, ¶ 807 (Nov. 17, 2009); *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Judgment and Sentence, ¶ 2012 (Dec. 18, 2008); *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-T, Judgment and Sentence, ¶ 628 (Feb. 25, 2004); *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 773 (Dec. 1, 2003). The *Kajelijeli* Appeals Chamber noted, but did not explicitly endorse this particular statement. See *Kajelijeli* Appeal Judgment, *supra* note 16, at ¶ 84-87.

¹¹⁷ It might be that it never will arise seeing as the prosecution at the ECCC, without any convincing reasons, appears to have taken a position consistent with the majority in the *Hadžihasanović* Decision. See *Prosecutor v. Kaing* (alias 'Duch'), Case No. 001/18-07-2007-ECCC/TC, Co-Prosecutors' Final Trial Submission with Annexes 1-5, ¶ 349 (Nov. 11, 2009) ("An accused may possess either permanent or temporary 'effective control' over the perpetrator(s), but this must have existed at the time of the commission of the crime(s)."), referencing *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 399 (Feb. 22, 2001). The relevant finding in *Kunarac et al.* was that for 'ad hoc or temporary' commanders, 'it must be shown that, at the time when the acts charged in the Indictment were committed,' the culpable subordinates were under the effective control of the accused. This distinction between 'temporary' and 'permanent' commanders is not useful as a matter of law; if the former has effective control and the necessary and reasonable measures at his disposal to punish and prevent his (temporary) subordinates' criminal conduct, he is no different from any other commander. The temporary nature of his command is only relevant as evidence of whether the elements of command responsibility are met on the facts. Moreover, the *Kunarac et al.* trial chamber did not explain why 'temporary' effective control and the subordinates' crimes must coincide, and the only support it gave for that contention is parts of the *Čelebići* Appeal Judgment (paras 197, 198, 256) which do not sustain it. The holding of the *Kunarac et al.* trial chamber did not arise on appeal. See *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, (June 12, 2002). Though not an *ad hoc* tribunal, but a court with an internationalized bench, the Court of Bosnia and Herzegovina has had occasion to take up the issue of the temporal scope of command responsibility in their Second Verdict against Miloš Stupar. The Court held that Stupar did not incur command responsibility in respect of crimes committed before he assumed command, citing heavily from *Hadžihasanović* for support. The Court did not reference domestic law. The Court of Bosnia and Herzegovina, Second Verdict Against Miloš Stupar, ¶ 79-83 April 28, 2010. For further discussion of *Hadžihasanović*, see, *supra* Part IV.

control *at least* when the crimes were about to be committed.¹¹⁸ This holding does not allow for command responsibility where the crimes occurred before the commencement of the commander's effective control. However, it does allow for liability in respect of crimes committed after the end of the commander's effective control. Even to the extent the *Bemba* decision intended to restrict command responsibility in respect of future crimes, it did so only with respect to command responsibility under Article 28(a) of the Rome Statute, whereas the ICTY is bound to apply customary international law.¹¹⁹ Therefore, the following analysis will focus on the *Hadžihasanović* majority's opinion.

1. The Test for Determining Whether Customary International Law Allows for the Advocated Position

The *Hadžihasanović* majority required that command responsibility be 'clearly established under customary law' in cases where the subordinate committed the crime before the assumption of effective control.¹²⁰ In other words, the majority would not recognize command responsibility in those cases unless it found an explicit rule of customary international law that positively allowed it. Because the majority found no such explicit support, it rejected command responsibility in such situations.¹²¹

Using this approach, command responsibility in respect of crimes committed after the cessation of effective control would only arise if there is a rule 'clearly established under customary law' that explicitly allows for it. The survey of the relevant laws provided above did not reveal any provisions that clearly establish that command responsibility can arise in such situations.¹²² However, the 'clearly established' test is not the correct approach. Instead, the pertinent question is whether the principle of command responsibility already established under customary international law 'reasonably encompasses' the factual situation at hand. In relation to another issue regarding the command responsibility doctrine in the same decision, the majority in *Hadžihasanović* agreed with the dissenters on this standard and it provided no reasons why it chose not to apply the standard with regard to the temporal scope of the doctrine.¹²³ Trial chambers at the

¹¹⁸ *Bemba* Decision on Confirmation of Charges, *supra* note 17, at ¶ 419 (emphasis in original).

¹¹⁹ See e.g. Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, May 3, 1993, § II.

¹²⁰ *Hadžihasanović* Decision, *supra* note 4, at ¶ 51.

¹²¹ *Id.* at ¶ 45, 52.

¹²² *Supra* Part C (1)-(3).

¹²³ *Hadžihasanović* Decision, *supra* note 4, at ¶ 12; Dissenting Opinion of Judge Hunt in *Hadžihasanović* Decision, *supra* note 5, at ¶ 10, 38, 40; Declaration of Judge Shahabuddeen in

ICTY and the ICTR have also applied the ‘reasonably encompasses’ standard; the latter deemed it a ‘well-established approach in international law.’¹²⁴ As discussed above, the literal reading and the principled interpretation of command responsibility under customary international law show that the principle reasonably encompasses the factual situation wherein the subordinate committed the crime after the commander’s effective control had ended.

2. Exclusion of the Advocated Position by Customary International Law

The *Hadžihasanović* majority made another, more forceful argument: that customary international law excludes command responsibility in situations where the crime occurred after the period of effective control. This argument looks to post-World War II case law, the Rome Statute, and state practice to find support for excluding command responsibility in those situations.

a. *Post-World War II Case Law*

Two World War II cases may provide support for this interpretation of customary international law. The first because it could be misread to imply that the subordinate’s crime must coincide with the commander’s effective control. The second because it has been referred to in support of a holding to that effect.

The *High Command Case* was the first of the post-World War II trials to peripherally address the temporal application of the command responsibility doctrine. The Nuremberg Tribunal in this case sought to fashion a form of command responsibility as closely akin to direct responsibility for the crime as possible by seeking to establish a direct link between the defendant and committed crimes.¹²⁵ The direct link became tenuous in the eyes of the Tribunal when the defendant assumed command too close to the time the crimes occurred.¹²⁶ Additionally, the reports before

Orić, *supra* note 6, at ¶ 17; Opinion of Judge Schomburg in *Orić*, *supra* note 3, at ¶ 14.

¹²⁴ *Karemera* Decision, *supra* note 70, at ¶ 37; *Brđanin* Trial Judgment, *supra* note 70, at ¶ 715.

¹²⁵ *United States of America v. Wilhelm von Leeb et al.*, Nuernberg Military Tribunal, 27 October 1948, XI TRIALS OF WAR CRIMINALS 543-544 (“[C]riminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be personal neglect amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence.”).

¹²⁶ *See id.* at 626-27 (With respect to defendant Von Salmuth, the Tribunal held that the executions of two Commissars, having taken place one month before he assumed command,

it covered a wide time period that failed to prove that the crimes resulted from some personal neglect or acquiescence.¹²⁷ The question before the Tribunal was not whether a defendant could be held liable in respect of crimes occurring before he assumed command, but whether there was a sufficient link between the defendant and the crimes in question to warrant criminal liability.¹²⁸ Therefore, the *High Command Case* does not definitively stand either for or against holding a defendant liable where the commission of the subordinate's crimes does not coincide with the commander's period of effective control.

The *Hostages Case* was the second significant case relating to command responsibility tried by the Nuremberg Tribunal. The majority in the *Hadžihasanović* decision noted that the *Hostages Case* imposed responsibility on defendant Kuntze for a failure to prevent crimes after he assumed command, but contained no reference to responsibility for crimes committed before that point in time.¹²⁹ This approach could suggest that the subordinate's crimes generally must coincide with the commander's effective control.

However, as both dissenting Judges Hunt and Shahabuddeen in the *Hadžihasanović* decision pointed out, relying on the absence of any mention of command responsibility in one situation to support excluding command responsibility in an entirely different situation is unpersuasive. This is because Kuntze was not charged with such responsibility;¹³⁰ the crimes in question took place during the period of effective control, two days after Kuntze had assumed command over the culpable troops.¹³¹ Therefore, the Tribunal could not have addressed command responsibility for crimes that

“from a time element, . . . cannot be said that they occurred with his acquiescence or approval or due to any order which he distributed.”) Note that the Tribunal cited reports covering a wide time period in relation to Von Kuechler, but the reports coupled with the defendant's testimony convinced the Tribunal that he had “knowledge and approved” the crimes in question. *Id.* at 568.

¹²⁷ See *id.* at 562 (“the document relied on in this connection is a report to the effect that in a given period, a number of civilians were sent from the Army Group North to the Reich for labor [but] Leeb was in command for only a part of the period covered in the report”).

¹²⁸ *Id.* at 543-44; Expressing a similar sentiment, Judge Shahabuddeen noted that the accused General Hoth in the *High Command* case was not charged with a distinct crime corresponding to a charge of command responsibility as set out in article 7(3) of the ICTY Statute. Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Decision, *supra* note 5, at ¶ 6.

¹²⁹ *Hadžihasanović* Decision, *supra* note 4, at ¶ 50, n.65.

¹³⁰ Dissenting Opinion of Judge Hunt in *Hadžihasanović* Decision, *supra* note 5, at ¶ 16, 17; Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Decision, *supra* note 5, at ¶ 3; see also Carol T. Fox, *supra* note 3, at 443, 483-84.

¹³¹ Dissenting Opinion of Judge Hunt in *Hadžihasanović* Decision, *supra* note 5, at ¶ 18.

occurred before the period of a commander's effective control.¹³² As a result, the *Hostages Case* does not support requiring the subordinate's crime be contemporaneous with the commander's effective control.

b. Rome Statute and the ILC Draft Code

The majority in the *Hadžihasanović* decision also relied on Article 28 of the Rome Statute¹³³ and Article 6 of the 1996 ILC Draft Code¹³⁴ to exclude command responsibility in respect of crimes committed before the period of effective control.¹³⁵ More specifically, the majority interpreted the phrases 'in the circumstances at the time' and 'were committing or about to commit' in both articles, and the absence of any reference to a duty to punish past crimes therein, as excluding command responsibility in respect of such crimes.¹³⁶ This interpretation could be understood as supporting the proposition that the subordinate's crime must coincide with the commander's effective control. However, such an understanding would be misplaced.

First, it is important to note that the ILC drafts and the negotiating history of the Rome Statute do not exclude the possibility of command responsibility for crimes committed after the cessation of a commander's period of effective control.¹³⁷ The policy concern that animated the exclusion of the duty to punish past crimes from Article 28 of the Rome Statute was ensuring that a commander would not shirk his or her duty to prevent subordinate crimes.¹³⁸ As discussed in Section III.3.(b), that concern

¹³² *Id.* at ¶ 19.

¹³³ The relevant parts of Article 28 of the Rome Statute read: "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; . . ." *Hadžihasanović* Decision, *supra* note 4, at ¶ 46) (emphasis in original).

¹³⁴ Article 6 of the 1996 ILC Draft Code reads: "The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, *in the circumstances at the time*, that the subordinate *was committing or was going to commit* such a crime and if they did not take all necessary and reasonable measures within the power to prevent or repress the crime." *Hadžihasanović* Decision, *supra* note 4, at ¶ 49 (emphasis in original).

¹³⁵ *Id.* at ¶ 46, 49. In terms of the temporal requirement of command responsibility under the Rome Statute, *see also*, Kai Ambos, *supra* note 29, at 849: "As far as the . . . mental element [is] concerned, the Rome Statute accepts the traditional temporal restriction "in the circumstances at the time" (Article 86(2) PA I) with regard to military superiors." In relation to non-military superiors, "it is self evident that *mens rea* can be proven only with regard to the time of the commission of the crimes by the subordinates; therefore, the circumstances of the time always have to be taken into account." *Id.*

¹³⁶ *Id.*

¹³⁷ *See* Bassiouni, *supra* note 83, at 212-14.

¹³⁸ The 1996 Preparatory Committee's Draft Article C on the responsibility of superiors,

strengthens the idea that a commander must be held to his duty to prevent crimes even if they occur after his command ended. A rule that only requires a successor commander to mete out a punishment for crimes that his predecessor could have prevented would not provide a sufficient safeguard against subordinate crimes.

Second, the *Hadžihasanović* majority's emphasis on the phrase "in the circumstances at the time" is unpersuasive. This phrase, which appears in the 1996 ILC Draft Code, Article 86(2) of Protocol I, and Article 28 of the Rome Statute, modifies the mental element of the command responsibility doctrine.¹³⁹ According to the International Committee of the Red Cross ('ICRC') Commentary on Additional Protocol I, in terms of the requisite knowledge for command responsibility,

Every case must be assessed in the light of the situation of the superior concerned at the time in question, in particular distinguishing the time the information was available, the time at which the breach was committed, also taking into consideration other circumstances which claimed his attention at that point, etc.¹⁴⁰

It can only be concluded that the phrase "in the circumstances of the time" directs the adjudicating authority to make the type of assessment advocated by the ICRC. It cautions against judging the commander's requisite knowledge with the undue advantage of hindsight. It does not define the temporal limit of subordinate crimes.

Third, the majority's reliance on the combination of this phrase and the phrase 'were committing or about to commit' to limit the application of command responsibility is inconsistent with the basic purpose of command responsibility. In his dissent, Judge Shahabuddeen pointed out the majority's obvious misconception in relying on these phrases in combination:

These words would seem to exclude crimes of subordinates

questions what type of failure should lead to liability and whether "the imposition of punishment by the commander alone [was] sufficient to relieve a commander of responsibility for crimes committed by a subordinate, which the commander could have, but failed to prevent." Bassiouni, *supra* note 83, at 214, n.207.

¹³⁹ Article 6 of the 1996 ILC Draft Statute: "if they knew or had reason to know, *in the circumstances at the time*, . . ."; Rome Statute, *supra* note 15, at Art. 28: "That military commander or person either knew or, owing to *the circumstances at the time*, should have known . . ." (emphasis added).

¹⁴⁰ See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 1, at ¶ 3545.

even if committed after the commencement of the commander's command where the commander knew, or should have known, of the commission of the crimes but only after they were committed; that is scarcely consistent with a theory the reasoning of which accepts that a commander has command responsibility at least in relation to acts committed by his subordinates after the commencement of his command.¹⁴¹

Furthermore, two Judges of the ICTY (Judges Bennouna and Robinson), who were members of the ILC in 1996, joined in the statement in the *Kordić* Trial Judgment that '[p]ersons who assume command after the commission [of the crime] are under the same duty to punish.'¹⁴²

Accordingly, the arguments based on Article 28 of the Rome Statute and Article 6 of the 1996 ILC Draft Code do not militate against the application of the command responsibility doctrine to a scenario wherein a subordinate commits the crime after the cessation of a commander's effective control.

c. State Practice and opinio juris

The *Hadžihasanović* decision suggested that because there is no state practice or *opinio juris* expressly envisaging that a commander can be held liable for crimes committed outside the period of his effective control, customary international law excludes command responsibility in such cases.¹⁴³

However, while national laws have lacked provisions setting out the temporal application of the command responsibility doctrine,¹⁴⁴ this does not mean that state practice *excludes* criminal responsibility in such a situation. National laws attempt to be precise, but there is always room for refinement through adjudication.

There may also be purposeful breadth in drafting laws to encompass multiple factual scenarios. Military manuals are often expressed in fairly

¹⁴¹ Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Decision, *supra* note 5, at ¶ 20.

¹⁴² Dissenting Opinion of Judge Hunt in *Hadžihasanović* Decision, *supra* note 5, at ¶ 26, n.51, *citing Kordić and Čerkez* Trial Judgment, *supra* note 5, at ¶ 446. Judge Shahabuddeen also noted this statement, albeit not for the exact same purpose as Judge Hunt and noting it was *obiter* in *Kordić*. Judge Shahabuddeen nonetheless noted that the statement 'seems to accord with basic ideas on the subject.' Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Decision, *supra* note 5, at ¶ 35.

¹⁴³ See *Hadžihasanović* Decision, *supra* note 4, at ¶ 45.

¹⁴⁴ *Supra*, Part C(3).

general terms that would permit command responsibility for crimes committed beyond a commander's period of effective control.¹⁴⁵ As discussed in Section III.3., the absence of explicit language supporting command responsibility for crimes subordinates commit after the period of effective control does not mean that such responsibility does not exist. The absence of state practice supporting command responsibility in respect of crimes subordinates commit after the period of effective control is therefore not decisive.

3. The Principles of *nullum crimen sine lege* and *in dubio pro reo*

The *Hadžihasanović* majority may have reached its restrictive holding out of a concern not to violate the principle of *nullum crimen sine lege*. This principle provides that 'a criminal conviction can only be based on a norm which existed at the time the acts or omissions with which the accused is charged were committed.'¹⁴⁶ It also requires that the criminality of the charged conduct was sufficiently foreseeable and accessible at the relevant time period.¹⁴⁷ However, the principle does not impede the development of the law through interpretation provided the interpretation occurs within 'the reasonable limits of acceptable clarification' and no new criminal offence is thereby created.¹⁴⁸

Here, the norm of command responsibility is well-established. The fact that it does not explicitly provide for liability in respect of crimes committed after the end of effective control is not detrimental to the foreseeability and accessibility of its application in such cases. Given the purpose of command responsibility to curb subordinates' crimes—paramount throughout history and in all contemporary formulations of the doctrine—it would be unreasonable for a commander to claim that he was unaware of the criminality of failing to prevent his subordinates' crimes simply because such crimes were about to be committed after his command ends. Command responsibility in those situations therefore is well within the reasonable limits of acceptable clarification, and there is no violation of *nullum crimen*

¹⁴⁵ Dissenting Opinion of Judge Hunt in *Hadžihasanović* Decision, *supra* note 5, at ¶ 12, quoting THE LAW OF WAR ON LAND BEING PART III OF THE MANUAL OF MILITARY LAW (UK, 1958); THE LAW OF LAND WARFARE (US, 1956 revised 1976).

¹⁴⁶ *Sesay et al.* Appeal Judgment, *supra* note 10, at ¶ 888; *Milutinović et al.* Decision on Jurisdiction—JCE, ¶ 37.

¹⁴⁷ *Sesay et al.* Appeal Judgment, *supra* note 10, at ¶ 888; *Milutinović et al.* Decision on Jurisdiction—JCE, ¶ 37.

¹⁴⁸ *Sesay et al.* Appeal Judgment, *supra* note 10, at ¶ 888; *Milutinović et al.* Decision on Jurisdiction—JCE, ¶ 38; *Prosecutor v. Aleksovski*, Case No. IT-95-14-01, Judgment, ¶ 126, 127 (Mar. 24, 2000); *Čelebići* Appeal Judgment, *supra* note 15, at ¶ 173; *Prosecutor v. Vasiljević*, IT-98-32-T, ¶ 196 (Nov. 29, 2002).

sine lege.

The defense in *Hadžihasanović* made a related argument: that any ‘uncertainty in the law must be interpreted in favor of the accused.’¹⁴⁹ Assuming *arguendo* that the maxim *in dubio pro reo*¹⁵⁰ applies to interpretations of law (as opposed to only to facts), it is still inapplicable. The maxim only applies if and when ordinary methods of interpretation produce an ambiguous result.¹⁵¹ In the present case, however, there is no residual doubt. The wording¹⁵² and the purpose¹⁵³ of the principle of command responsibility under customary international law show that it reasonably encompasses the factual situation at hand.

B. Whether the Advocated Position Makes Command Responsibility Open-Ended or a Form of Strict Liability

Although not discussed in the *Hadžihasanović* decision, one could argue that interpreting the temporal scope of command responsibility to include liability in respect of crimes committed after the period of effective control risks overly expanding the doctrine to include distant crimes that the commander had no way of knowing about. The fear is that this would transform command responsibility into a form of over-inclusive strict liability.

Strict liability is defined as liability without proof of the accused’s mental state, or *mens rea*.¹⁵⁴ The claim that the command responsibility doctrine is a form of strict liability has been rejected since the *Yamashita* decision.¹⁵⁵ Command responsibility in respect of crimes committed after a commander’s period of effective control does not alter or diminish the mental state required for command responsibility: that the commander have had knowledge or reason to know of crimes about to be committed by his subordinates. The period in which the crimes committed by subordinates

¹⁴⁹ Partial Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Decision, *supra* note 5, at ¶ 12.

¹⁵⁰ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment, ¶ 77 (Nov. 30, 2006) (“The principle of *in dubio pro reo* dictates that any doubts should be resolved in favour of the accused and encompasses doubts as to whether an offence has been proved at the conclusion of a case.”).

¹⁵¹ See Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Decision, *supra* note 5, at ¶ 12.

¹⁵² *Supra*, Part II.

¹⁵³ *Supra*, Part III.

¹⁵⁴ See ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW*, 164 (Oxford University Press 2003).

¹⁵⁵ See William H. Park, *supra* note 39, at 1, 37, 42-43, 72-73, 103-104; See also Roger S. Clark, *Offences of International Concern: Multilateral Treaty Practice in the Forty Years Since Nuremberg*, 57 *NORDIC J. OF INT’L L.* 49, 73 (1988); Kai Ambos, *supra* note 29, at 847.

occurred is one of many factors relied upon to assess whether a commander had the requisite knowledge necessary to incur liability.¹⁵⁶ A commander will only have a duty to prevent crimes that he has actual or constructive knowledge that his subordinate is about to carry out.¹⁵⁷ To be liable, a commander must still possess such knowledge and fail in his duty during the tenure of his effective control, because a commander is solely held responsible for his failure to fulfill his duty to prevent the crimes of subordinates *during his or her period of effective control*—not beyond.

C. *Whether the Required Degree of the Subordinate's Preparation of the Crime Is Left Impermissibly Vague*

Critics of the advocated interpretation of command responsibility may contend that command responsibility in respect of crimes committed after the period of effective control is nebulous because it does not specify whether the subordinate must have started preparing the crime while he was still under the commander's effective control, and if so, to what degree. This ambiguity as to the subordinate's preparation of the crime, critics may argue, does not arise when the subordinate commits the crime within the period of effective control because in such cases the subordinate will always have completed the crime while the commander is still in charge of the culpable subordinate. As a result, the position advocated in this paper would obfuscate the contours of command responsibility to the detriment of the accused.¹⁵⁸

This argument misconceives the command responsibility doctrine because the event that triggers a commander's duty to prevent is not when the subordinate starts 'preparing' the crime. The subordinate's conduct is only temporally relevant inasmuch as it, at one point or another, must amount to a crime.¹⁵⁹ Rather, the critical moment at which the duty to prevent materializes is when the commander acquires the requisite knowledge that his subordinate is about to carry out a crime.¹⁶⁰ As long as

¹⁵⁶ See Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council, UN Doc. S/1994/674, 27 May 1994, para. 58. See also COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 1, at ¶ 3545-3546.

¹⁵⁷ *Strugar* Appeal Judgment, *supra* note 28, at ¶ 297; *Hadžihasanović and Kubura* Appeal Judgment, *supra* note 28, at ¶ 27.

¹⁵⁸ *C.f. Bagilishema* Appeal Judgment, *supra* note 37, at ¶ 34.

¹⁵⁹ As noted, the subordinate's conduct can be criminal under 'commission,' 'planning,' 'aiding and abetting' or any other mode of liability. *Supra*, notes 12-13.

¹⁶⁰ *Strugar* Appeal Judgment, *supra* note 28, at ¶ 297; *Hadžihasanović and Kubura* Appeal Judgment, *supra* note 28, at ¶ 27. See also COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 1, at 1014, ¶ 3545 (Article 86(2), Additional Protocol I):

the commander acquires such knowledge during his tenure of effective control, the subordinate did not need to begin preparing the crime in order for the commander to be under a duty to prevent it. As a result, while the degree of the subordinate's preparation might be relevant as evidence of the commander's requisite knowledge that the subordinate was about to commit a crime, and what preventive measures were necessary and reasonable, it is not relevant as a matter of law to determining when a commander has a legal duty to prevent future criminal conduct.

D. Whether Evidentiary Concerns Militate Against the Advocated Position

Critics may also argue that proving the second and third elements of command responsibility will be too difficult and impracticable when the crimes occur after the cessation of effective control. The argument contends that allowing for command responsibility in the face of such evidentiary difficulties will lead down a slippery slope of tenuous convictions.

Evidentiary problems of this sort will no doubt arise. Normally, the further beyond the end of the commander's effective control the crime occurs, the harder it will be to show that the commander had the requisite knowledge of and could have prevented the crime at the time he had effective control over the relevant subordinate. As a matter of law, these difficulties do not militate against command responsibility in such cases. They only underscore the burden resting on a trier of fact not to convict unless it is satisfied beyond reasonable doubt that all the elements of command responsibility are met on the evidence.¹⁶¹ That burden weighs equally regardless of whether the crimes occurred within or outside the period of effective control, as indeed it does whenever a form of liability for individuals who may be temporally or geographically distant from the crime scene is being considered.¹⁶²

Every case must be assessed in light of the situation of the superior concerned at the time in question, in particular distinguishing the time the information was available and the time at which the breach was committed, also taking into account other circumstances which claimed his attention at that point, etc.

¹⁶¹ *C.f. Orić* Appeal Judgment, *supra* note 6, at ¶ 189 (reversing convictions entered under command responsibility for want of sufficient findings below that the relevant subordinate bore criminal responsibility and that the accused commander knew or had reason to know of the subordinate's criminal conduct).

¹⁶² *C.f. Krajišnik* Appeal Judgment, *supra* note 30, at ¶ 283, 284; *Sesay et al.* Appeal Judgment, *supra* note 10, at ¶ 455 (reversing convictions entered under the theory of JCE for want of sufficient findings below that the members of the JCE used principal perpetrators who were not members of the JCE in furtherance of the common purpose). See also *Sesay et al.* Appeal Judgment, *supra* note 10, Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher, ¶ 45 (emphasizing the burden resting on triers of fact applying JCE and

CONCLUSION

Obliging commanders to prevent their subordinates from committing crimes is of cardinal importance to the practical enforcement of the protections that international law offers civilians, prisoners of war, and other vulnerable persons and objects. Both the historical formulations of command responsibility and the current customary international law principle of command responsibility rest on this rationale, without limiting a commander's obligation to only those crimes committed during his tenure. It would be wholly inconsistent with this rationale to posit that a commander has no duty to intervene to stop his subordinates' crimes at a time when he could have done so only because the crimes will occur when he is no longer in command. No responsible commander would seriously think that he could remain passive when he knows that his soldiers are about to commit crimes simply because the crimes will not happen on his watch. For an irresponsible commander who might think otherwise, the principle of command responsibility should apply as an incentive for him to seriously reconsider his role in ensuring compliance with international humanitarian law.

warning of the unfortunate consequences that ensue when they fail to carry that burden).