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Some Other Men's Rea - the Nature of Command Responsibility in the Rome Statute

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SOME OTHER MEN'S REA? THE NATURE OF COMMAND RESPONSIBILITY IN THE ROME STATUTE

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The Rome Statute of the International Criminal Court provides for Command Responsibility. The provision addressing this is ambiguous and raises a number of interpretive issues. Command responsibility can either be understood as a mode of liability—a way of holding commanders vicariously responsible for the acts of their subordinates, or it can be understood as a separate, distinct crime based on the commander's dereliction of his supervisory duties. The Rome Statute is not clear on the matter and points in both directions. In recent years, the mode of liability approach has come under increasing scrutiny by academics and by judges, particularly at the ICTY. This is rightly so, because the mode of liability approach offends basic notions of justice and accountability for personal responsibility. The separate crime theory conversely, serves to punish commanders for their omissions and comports with modern notions of due process and fundamental fairness. A mode of liability approach is particularly problematic in the context of specific intent crimes, like genocide, because the Rome

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Statute only requires that a military superior be negligent to be punishable under command responsibility. If command responsibility is a distinct crime, there is no conflict here; however, if command responsibility is a mode of liability, it effectively nullifies the element of genocidal intent, the hallmark of the "crime of crimes." This dissertation explores some of the interpretive issues the Court must address in order to construe command responsibility in the Rome Statute as a distinct crime. The conclusion here is that there is sufficient foundation in the Rome Statute to construe command responsibility as a separate, distinct crime, and still maintain the Court's jurisdiction over that crime.

I. INTRODUCTION

In the Biblical story of King Ahab, the king's wife, Jezebel had a man stoned to death to settle a property dispute. King Ahab was not involved and had no knowledge of Jezebel's intentions.[1] He was held responsible, however, because as king he was deemed personally responsible for all acts in his kingdom. Ultimately, Ahab humbled himself and pleaded for mercy. In an early example of shifting responsibility, God commuted Ahab's sentence but transferred the punishment to Ahab's unborn son.[2] This is perhaps the earliest written example of what has become known as command responsibility ("CR").[3] While it has a long pedigree in public international law, as a component of international criminal law, it is relatively nascent.[4] It is uncontroversial that a commander who orders his subordinates to commit crimes, or tacitly approves of their occurrence can be held responsible for those crimes as acts of commission under a mode of liability.[5] (The

1. 1 *Kings* 21:1-14.

2. *Id.* at 21:27- 29.

3. *See* DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW 60 (James R. Fox ed., 3rd ed. 2003) (defining command responsibility as a military commander's "duty to assure that personnel under their command do not violate HUMAN RIGHTS LAW and the LAWS OF WAR"). It is used here more specifically to discuss the criminal responsibility flowing from breach of that duty.

4. As early as 1899, the general principle of superior responsibility was included in an international document. *See* Convention with Respect to the Laws and Customs of War on Land, annex art. 1, July 29, 1899, 1 U.S.T. 247 (1968) (In order to be accorded the rights and responsibilities of war, armed forces must "be commanded by a person responsible for his subordinates."). However, the first criminal trial for command responsibility under international law was for General Tomoyuki Yamashita, tried by a US Military Commission in Manila following World War II. *See* Trial of General Tomoyuki Yamashita, 4 U.N. War Crimes Comm'n, *Law Reports of Trials of War Criminals* 1, 35-36 (1948) [hereinafter *Yamashita*].

5. *See e.g., Draft Code of Crimes against the Peace and Security of Mankind*, *in* Report of the International Law Commission to the General Assembly, 48th Sess., 6 May-July 26, 1996, U.N. Doc. A/, *reprinted in* 2 Y.B. Int'l L. Comm'n 15, at 18,

masculine pronoun is used in this dissertation for convenience only.) During the first years of the ad hoc tribunals, ordering and omission liability were often confused, but the two are distinct.[6] In the former sense, the commander is directly liable for his own wrongful acts (actus reus), guilty mind (mens rea), and the consequences that result from them (the underlying crime).[7] The omission branch of CR is different.

The basis of criminal liability under the international law doctrine of CR for omissions is the failure of a military commander (and some civilian leaders—not dealt with in this dissertation) to prevent or suppress subordinates from committing war crimes, crimes against humanity, and genocide, and the faliure to punish subordinates after they have committed those crimes.[8] Normally, omissions do not trigger criminal responsibility, but because of the superior-subordinate relationship, and the significant authority and responsibilities vested in military commanders, international law confers on these leaders the affirmative duty to act.[9] When commanders fail to act, CR serves as a means of holding superiors criminally responsible in some manner for the resulting crimes committed by his subordinates.[10] CR is the flip side of command authority. CR is "a hybrid form of liability which is made of

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U.N. Doc. A/51/10 ("An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 [crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, war crimes] if that individual: . . . (b) Orders the commission of such a crime which in fact occurs or is attempted."); *see also* Chantal Meloni, *Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?*, 5 J. INT'L CRIM. JUST. 619, 620 (2007).

6. *See, e.g.*, Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgment, ¶¶ 210, 223, 492, 551-571 (May 21, 1999). The problem was first diagnosed in Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 337 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000). *See also* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 448 (Antonio Cassese ed., 2009) [hereinafter OXFORD COMPANION].

7. *See generally* RONALD C. SLYE AND BETH VAN SCHAACK, ESSENTIALS: INTERNATIONAL CRIMINAL LAW 285 (2009) ("Superior responsibility should not be confused with liability for ordering an act, which is a form of direct, not accessorial, liability."); OXFORD COMPANION, *supra* note 7, at 448. *But see,* Kai Ambos, *Superior Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 823, 853 (Antonio Cassese et al. eds., 2002) ("[O]rdering crimes and failing to prevent them, although conceptually distinct, seem to be different sides of the same coin.").

8. *See* Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶ 447 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001); Prosecutor v. Bagilishema, Case No. ICTR 95-1A-A, Judgment (Reasons), ¶ 35 (July 3 2002); *see also,* OXFORD COMPANION, *supra* note 6, at 445.

9. In its judgement in the Karadžić case in 1995, the U.S. Court of Appeals for the Second Circuit, recalling the judgement in the Yamashita case, stated: "[I]nternational law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of [war crimes]." Kadic v. Karadžić, 70 F.3d 232, 242 (2d Cir. 1995).

10. *See* Ambos, *supra* note 7, at 850 (explaining that the commander "is punished because of the failure to supervise the subordinates . . . . This kind of liability—for omission—is unique in international criminal law.").

composite elements that are traditionally found in different categories of forms of liability. Those are sewn together into what has sometimes been described as a *sui generis* form of liability for omission."[11] This doctrine fits awkwardly with modern notions of penal law. It "surprises, because it partly neglects and reaches beyond the traditional concept of criminal liability and personal guilt, the well accepted and acknowledged, indispensable basis of criminal law and responsibility for centuries in all major legal systems of the world."[12] Unlike most components of criminal law, for penal liability to attach under CR, the commander need not personally commit the underlying offences; he will have performed a different actus reus and have had a different mens rea than those who committed the predicate crimes, and yet he will be held responsible for their commissions.[13] This is a powerful prosecutorial tool. When the commander has not physically committed any crime or there is insufficient evidence to prove his direct participation, recourse can be had to CR.[14] While the doctrine has an important role to play in international law, its individual elements and its reach are controversial. There is no doubt, as the International Criminal Tribunal for the Former Yugoslavia (ICTY) pointed out in *Delalić*, that CR is a well-established norm of customary international law.[15] Its component parts and fundamental nature, however, are hotly debated.[16]

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11. GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 43 (2009) (internal citations removed).

12. Roberta Arnold & Otto Triffterer, *Article 28: Responsibility of Commanders and Other Superiors, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 795, 799 (Otto Triffterer ed., 2d ed. 2008) [hereinafter OBSERVERS' NOTES].

13. *See* ANTONIO CASSESE ET AL., CASSESE'S INTERNATIONAL CRIMINAL LAW 191 (3d ed. 2013).

14. Beatrice I. Bonafé, *Finding a Proper Role for Command Responsibility*, 5 J. INT'L CRIM. JUST. 599, 600 (2007).

15. Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment, ¶¶ 195, 222 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001); *see also* Prosecutor v. Halilović, Case No. IT-01-48-A, Judgment, ¶ 63 (Int'l Crim.Trib. for the Former Yugoslavia Oct. 16, 2007).

16. *See, e.g.*, WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 458 (2010) (citing *Delalić*, Case No. IT-96-21-A, ¶¶ 195, 222; *Halilović*, Case No. IT-01-48-A, ¶ 63; Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶¶ 11, 27, 29, 31 (Int'l Crim.Trib. for the Former Yugoslavia July 16, 2003)); *see also*, Rep. of the Int'l Comm'n of Inquiry on Darfur, established pursuant to Res. 1564 (2004), transmitted by letter of the Secretary General to the President of the Security Council, ¶ 9 & n.1, U.N. Doc. S/2005/60 (Feb. 1, 2005). *But see* Bonafé, *supra* note 14, at 601 ("[A]rguably the nature as well as the elements of command responsibility can be regarded as well established under customary international law."); Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573, 573-75 (1999); Erkin Gadirov & Roger S. Clark, *Art. 9: Elements of Crimes, in* OBSERVERS' NOTES, *supra* note 12, at 515-21; Matthew Lippman, *The Evolution and Scope of Command Responsibility*, 13 LEIDEN J. INT'L L. 139 (2000); Ambos, *supra* note 7, at 824-25.

Some courts and academics treat criminal responsibility for omissions as a mode of liability, making the commander vicariously responsible for the underlying acts committed by their subordinates. The mode of liability approach holds a military commander directly responsible for the crimes committed by his subordinates as if he had committed the crimes himself. The commander's "criminality is thus 'borrowed' from actual culprits."[17] Others construe CR based on omission liability to be a dereliction of duty.[18] Accordingly, the commander's omission resulting in a failure to properly supervise their troops constitutes a separate offense from the underlying crimes committed by the subordinates. These omissions are substantive offenses in their own right. Command responsibility is provided for in Article 28 of the Rome Statute. For the purposes of this discussion, the relevant parts of Article 28 provide:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
> (a) 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:
> (i) 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; and
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[19]

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17. Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 479 (2001).

18. *See* SCHABAS, *supra* note 16, at 456 (explaining that the "[t]wo alternatives indicated a conceptual difference, with one approach viewing superior responsibility as a form of participation or liability, and the other as a principle by which superiors were subject to prosecution for the crimes of their subordinates").

19. U.N. Diplomatic Conf. of Plenipotentiaries on the Est. of an Int'l Crim. Ct., June 15-July 17, 1998, *Rome Statute of the International Criminal Court*, art. 28, A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute]; *see also*, Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of Rome

Despite the fact that the article "was the subject of extensive negotiations and represents quite delicate compromises," or perhaps because of that, it does not explain what theory of liability is embraced under the Rome Statute.[20] This is surprising, because during the ten-year drafting process, several proposals with varying approaches to the question of its nature were put forward for inclusion in the Rome Statute.[21] The drafters, therefore, had reason to know that there was basic disagreement as to the underlying nature of CR. The obtuse provision above leaves many questions unanswered and raises new ones.

Writers, legislatures, and judges, particularly at the ad hoc tribunals—from where the International Criminal Court (ICC) will undoubtedly look for guidance—have often been confused as to the fundamental nature of CR. Its nature and elements shift depending on the jurisdiction and the judge. This dissertation addresses the fundamental nature of CR as it is provided for in the Rome Statute. This dissertation only addresses the branch of CR dealing with omission liability, that is, liability for a commander's failure to prevent crimes from being committed by his

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Statute, ¶ 407 (June 15, 2009) (where the Chamber explained that under article 28(a) "the following elements must be fulfilled: (a) The suspect must be either a military commander or a person effectively acting as such; (b) The suspect must have effective command and control, or effective authority and control over the forces (subordinates) who committed one or more of the crimes set out in articles 6 to 8 of the Statute; (c) The crimes committed by the forces (subordinates) resulted from the suspect's failure to exercise control properly over them; (d) The suspect either knew or, owing to the circumstances at the time, should have known that the forces (subordinates) were committing or about to commit one or more of the crimes set out in article 6 to 8 of the Statute; and (e) The suspect failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution."). This is somewhat different from the customary international law rule, where three elements must be satisfied for command responsibility to attach: (i) there must exist a superior-subordinate relationship; (ii) the superior must have known "or had reason to know that the criminal act was about to be or had been committed"; and (iii) the commander must have "failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrators of those acts." OXFORD COMPANION, *supra* note 6, at 270 (quoting Prosecutor v. Delalić, Case No. IT-96-21-T, Judgement, ¶ 346 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)). Normally, a predicate crime must have been physically committed by subordinates of the accused. For an exception, see Prosecutor v. Orić, Case No. IT-03-68-T, Judgement, ¶¶ 294-306 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006).

20. U.N. Dipl. Conf. of Plenipotentiaries on the Est. of an Int'l Crim. Ct., June 15-July 17, 1998, Rep. of the Working Grp. On Gen. Principles of Crim L., p. 3 n.8, U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add.1 (June 29, 1998); *see* SCHABAS, *supra* note 16, at 457 & n.24. *See also* Bonafé, *supra* note 14, at 603 (noting that the Rome Statute does not answer the question whether command responsibility is "a means of indirectly holding a superior responsible for the criminal acts carried out by his or her subordinates[.] Or rather, [whether] the superior criminally liable for his or her personal misconduct, that is, for not having prevented such crimes or for not having punished those responsible[.]").

21. *See* SCHABAS, *supra* note 16, at 456-57 (discussing the drafting history of Article 28).

subordinates, failure to supress on-going crimes, and failure to punish past crimes. Part I discusses the confusion surrounding CR, evident at the ad hoc tribunals, in domestic legislation and amongst academics. Part II of this dissertation addresses the application of CR in the context of specific intent crimes to show the significant problems in construing CR as a mode of liability. This is especially so because the Rome Statute requires only a negligent mens rea to convict military leaders via CR. Part III concludes that CR as a mode of liability offends basic notions of justice and fairness. Applying CR as a separate crime, on the other hand, avoids these critical errors. Having examined the arguments for doing so, Part III further shows that Article 28 can be properly construed so as to provide for a separate offense, without forfeiting the Court's jurisdiction over that crime. A brief conclusion then follows.

II. THE CONFUSED NATURE OF COMMAND RESPONSIBILITY

States have promulgated military manuals that provide for CR and have come to very different understandings of its nature. The doctrine was provided for in the statutes of the ICTY, International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone, but none clarified the nature of CR.[22]

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22. *See* Statute of the International Tribunal, U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Para. 2 of S.C. Res. 808 (1993)*, ann. art. 7(3), U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTYst.] ("The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.");

Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, ann. art. 6(3), U.N. Doc. S/RES/955 (Nov. 8, 1994) ("The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.");

Statute of the Special Court for Sierra Leone, U.N. Secretary-General, *Rep. of the Secretary-General on the Est. of a Special Ct. for Sierra Leone*, encl. art. 6(3), U.N. Doc. S/2000/915 (Oct. 4, 2000) ("The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.");

see also Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 29, NS/RKM/1004/006, http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf ("The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does

Among the ad hoc international and hybrid tribunals, the 2007 Statute of the Special Tribunal for Lebanon comes close to explaining the nature of the commander's criminality under CR.[23] There it is a mode of liability though not unequivocally, and the provision's reach is limited to commanders who either have knowledge of their subordinates' criminal activity or were reckless in that regard.[24] As will be discussed below, this encompasses a much narrower ambit than the Rome Statute does. When the Court construes Article 28, they will look for guidance from the ad hoc tribunals, and they will consider the way States have approached the matter, but the Court will not find clarity.

A. State Practice

At least thirty-six States have promulgated military manuals providing for CR (a number of States have also provided for CR in their domestic legislation, discussed in Part II).[25] Twenty-five of these military manuals provide for or allude to criminal sanctions for commanders based on omission liability.[26] But of these twenty-

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not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.").

23. Statute of the Special Tribunal for Lebanon , S.C. Res. 1757, attach. art. 3(2), U.N. Doc. S/RES/1757 (May 30, 2007) ("With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 [acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences] of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes; (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.").

24. *Id.*

25. These thirty-six states include Argentina, Australia, Belgium, Benin, Burundi, Cameroon, Canada, Chad, Columbia, Côte d'Ivoire, Croatia, Djibouti, Dominican Republic, El Salvador, France, Germany, Hungary, Italy, Madagascar, Netherlands, New Zealand, Nigeria, Peru, Philippines, Republic of Korea, Russian Federation, Sierra Leone, South Africa, Spain, Sweden, Switzerland, Togo, Ukraine, United Kingdom, United States and Uruguay. The relevant military portions of each military manual has been compiled by the International Committee of the Red Cross in their Customary IHL Database. *Practice Relating to Rule 153. Command Responsibility for Failure to Prevent Punish or Report War Crimes*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule153 (last visited Apr. 18, 2014) [hereinafter ICRC IHL Database].

26. *See id.* These states do not include Colombia, Croatia, Dominican Republic, El Salvador, Germany, Hungary, Italy, Madagascar, Russian Federation, South Africa and Switzerland. But note that criminal responsibility in Germany, for example, is provided for in domestic legislation. *See* discussion *infra* Section II.

five, only the military manuals of Côte d'Ivoire, the Netherlands, the Philippines, the United Kingdom and the United States explain the nature of the resulting criminal liability.[27] Côte d'Ivoire's military teaching manual tells the reader: "if you do not report violations [of the laws of war], you make yourself an accomplice to them."[28] Accomplice liability is a mode of liability, but this provision is not limited to commanders, rather to all personnel.[29] The provision of the manual specifically addressing the commander's responsibility does not mention accomplice liability and simply states that if a commander breaches his duties in this regard, "he can be prosecuted," without specifying what crime the prosecution would be for.[30] The military manual of the Netherlands provides that in some circumstances, commanders will be held responsible as if they committed the predicate crime ("as an accomplice"), but requires the military commander to "deliberately permit" subordinates to commit crimes, or "deliberately omit[] to take such measures as may be necessary" for this form of liability to arise. Otherwise, a separate criminal sanction is provided.[31] The Philippine's Handbook on Discipline provides for the nature of CR, but does so in a wholly indecisive way: "The immediate [commanding officer] of errant military personnel is held accountable *either* as conduct unbecoming [an officer], *or* as accessory after the fact . . . ."[32] Only the United States is unambiguous on this point. The U.S. Manual for Military Commissions provides that commanders are "punishable as a principal" when they "had reason to know, or should have known, that a subordinate was about to commit such acts or had done so

27. Nigeria's Manual on the Laws of War might be included in this list. It provides: "In some cases, commanders are responsible *for war-crimes* committed by their subordinates. For example, when soldiers commit acts of massacre against the civilian population of an occupied territory or against prisoners of war the responsibility for such acts may rest not only with the actual perpetrators but also with the commander. Such responsibility arises when the acts in question have been committed in pursuance of an order of the commander, when the act is done with the commander's knowledge or when the commander ought to have known about the act and failed to use all necessary means at his disposal to ensure compliance with the Laws of War." Lt. Col. L. Ode PSC, *The Laws of War*, § 8, undated (Nigeria). This seems to indicate that the commander is directly responsible for war crimes, but the language is not entirely clear on this point. *But see infra* Part III discussing similar language in the Rome Statute and concluding that it provides for a separate crime.

28. Ministère de la Défense, Forces Armées Nationales, *Droit de la guerre, Manuel d'instruction, Livre I: Instruction de base*, pp. 21 and 23, Basic Rule No. 12, Nov. 2007 (Côte d'Ivoire).

29. *Id.*

30. *Id*, Livre II, 1.2 at Lesson 4.

31. *Humanitair Oorlogsrecht: Handleiding*, Voorschift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, § 1074, art. 148, 2005 (Neth.).

32. *Handbook on Discipline*, Armed Forces of the Philippines, Part IV, p. 7, 1989 (Phil.).

and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[33] (As an aside, it is worth noting that the United States and United Kingdom have harsh rules of liability, such as the felony murder rule and CR as a mode of liability, but the harsh applications of these rules are counterbalanced by the ameliorative effect of the jury system.[34] Juries have the power of nullification where they can refuse to convict an individual when they feel that the facts prove the elements of a crime, but the application of that law would be too harsh in the case at hand.[35] There are no juries in international law, and judges at international courts have no power to acquit an individual when the facts prove the individual is technically guilty. Interpreting CR as a mode of liability in international law would adopt the harshest aspects of the common law without the counter-veiling check of the jury system.)[36]

The United Kingdom and Canada have ratified the Rome Statute and have incorporated it into their domestic laws.[37] The divergence in the practices of these two common law States illustrates the conceptual discord surrounding the issue. When the British parliament adopted the International Criminal Court Act 2001 incorporating the Rome Statute domestically, it copied Article 28 almost verbatim, but added this explanatory clause: "A person responsible under this section for an offence is regarded as aiding,

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33. U.S. DEPT. OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS 2010 ED. IV-2 (2012) (codified as amended at 10 U.S.C. Ch. 47A (2014)).

34. *See* Damaška, *supra* note 17, at 488 (noting that "throughout the history of common law, the jury of defendants's [*sic*] peers cushioned the severity of substantive criminal law").

35. *See* BLACK'S LAW DICTIONARY 936 (9th ed. 2009) (defining jury nullification as "[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness").

36. Further, as the American Military Tribunal stated in the *Hostages* case, "[t]he fact that the British and American armies may have adopted [a rule] for the regulation of its [sic] own armies as a matter of policy does not have the effect of enthroning it as a rule of International Law." Trial of Wilhelm List and Others (The Hostages Trial) U.N. War Crimes Comm'n, 8 Law Reports of Trials of War Criminals 1, 51 (1949); *see also* YORAM DINSTEIN, THE DEFENCE OF 'OBEDIANCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW 47, 48 (1965) (noting "it is not enough to direct the limelight at an isolated provision in one or two military manuals"). Dinstein further notes that as the editors of the Law Reports of the United Nations War Crimes Commission pointed out, the US and UK military manuals "are not legislative instruments, formally binding, and their publication is designed for informative purposes only." *Id.* (internal citation omitted).

37. *See* Elies van Sliedregt, *Article 28 of the ICC Statute: Mode of Liability and/or Separate Offense?*, 12 NEW CRIM. L. REV. 420, 428-429 (2009) [hereinafter Van Sliedregt, *Article 28*].

abetting, counselling or procuring the commission of the offence."[38] The Scottish International Criminal Court Bill incorporating the Rome Statute's CR provision likewise adds a clarification stating that a commander "shall be regarded as being art and part in the commission of the offence."[39] In other words, the British legislatures understood CR under the Rome Statute to be a mode of liability. Contrarily, when the Canadian legislature incorporated Article 28 into domestic law they too adopted the language almost verbatim, but then clarified that CR is a distinct "indictable" offense deriving from the commander's "breach of responsibility."[40] In other words, it is a distinct crime. The German International Criminal Code, also incorporating the Rome Statute domestically, takes a nuanced approach and refers to reckless conduct of commanders as a mode of liability and negligent conduct as punishable as a distinct crime, the "violation of the duty of supervision."[41]

B. International Jurisprudence

At the international tribunals, the charging practice of prosecutors has been to frame CR as a mode of liability through which the accused is guilty of the underlying crime.[42] The ad hoc tribunals have largely accepted the mode of liability approach without offering coherent analysis. Only a few cases at the tribunals dealt with the conviction of superiors under CR alone.[43] This is so because many cases, particularly at the ICTR, have ended in guilty pleas, and because the tribunals have applied a

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38. *Id.* at 428; *see also* International Criminal Court Act, 2001, (U.K.) *available at* http://www.legislation.gov.uk/ukpga/2001/17/contents. It is worth noting that the explanatory clause provided in the legislation is not very satisfying. Aiding, abetting, counselling and procuring are acts of commission (with perhaps some very narrow exceptions) and command responsibility in article 28 of the Rome Statute is concerned with omissions. The British legislation merges the two haphazardly.

39. International Criminal Court (Scotland) Bill, Part I, article 5(4) SPBill 27A, as amended at State 2 (2001).

40. *See* Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, § 5, (Can.) *available at* http://laws-lois.justice.gc.ca/eng/acts/c-45.9/FullText.html (last modified Jan. 23, 2014); *see also* 2 ICRC, HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW pt. 2, case no. 65, at 2 (Sassòli, et al. eds., 3d ed. 2011).

41. Gesetz zur Einführung des Völkerstrafgesetzbuches [Act to Introduce the Code of Crimes against International Law of 26 June 2002], BGBL. I at ch. 3, § 13, June 26, 2002 (Ger.), *available at* http://www.iuscomp.org/gla/statutes/VoeStGB.pdf (The language appears under the heading "Other crimes" and subsection "violation of the duty of supervision."); *see also* ICRC, *supra* note 40, pt. 2, case no. 64, at 7.

42. *See* CASSESE, *supra* note 13, at 19.

43. *See* OXFORD COMPANION, *supra* note 6, at 272.

rigorous approach to the superior-subordinate element.[44] Further, when faced with facts proving both direct criminal responsibility (where a commander orders his subordinates to commit crimes, for example) and indirect responsibility the tribunals have preferred to convict on the former basis, suggesting some intuitive unease with omission liability.[45] As the ICTY Appeals Chamber in *Blaskić* put it, where both direct criminal conduct and CR "are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of [direct responsibility] only . . . ."[46] In fact, the ICTY Trial Chamber in *Stakić* stated that the CR inquiry is "a waste of judicial resources" when direct liability can be established.[47] This notion was adopted by the Pre-Trial Chamber in *Bemba Gombo*, but it is not universally followed.[48]

The first ICTY case to flesh out CR was the *Delalić* case, also known as *Čelebići* after the concentration camp where the crimes were committed.[49] Although the trial judgment is notable in part

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44. *See id.; see also* Michael G. Karnavas, *Forms of Perpetration, in* ELEMENTS OF GENOCIDE 97, 139 (Paul Behrens & Ralph Henham eds., 2013) (stating "[u]nfortunately, the jurisprudence on this subject is often confused: vague indictments and guilty pleas have enabled the ICTR in particular to avoid having to embark on a coherent analysis of command responsibility and genocide").

45. *See* OXFORD COMPANION, *supra* note 6, at 751 (the Chamber "after considering the evidence indicating active participation, . . . determined that there were reasonable grounds to believe that they committed the crime of genocide"); Transcript of Hearing at 973-74, Prosecutor v. Karadžić & Mladić, Case No. IT-95-5/18 (Int'l Crim. Trib. for the Former Yugoslavia July 11, 1996). The Chamber went on to state that while the evidence established command responsibility under art. 7(3), art. 7(1) more accurately reflected their culpability under the Statute. *Id.* at 973. The Chamber invited the prosecution to supplement the indictment to emphasise the art. 7(1) aspects of the case. *Id.* at 974. *See also* Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 841 (Dec. 1 2003); Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶¶ 342-43 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006).

46. Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶ 91 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); *see also* OXFORD COMPANION, *supra* note 6, at 272 (noting "a number of superiors charged under command responsibility have been convicted only for their direct responsibility in the commission of international crimes, most of the time as either accomplices or participants in a joint criminal enterprise"); Bonafé, *supra* note 14, at 612.

47. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 466 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003); *see also* SCHABAS, *supra* note 16, at 458.

48. *See* Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the Confirmation of the Charges, ¶ 402 (June 15, 2009) ("Mr. Jean-Pierre Bemba's criminal responsibility under article 28 of the Statute shall not be examined, unless there is a determination that there is not sufficient evidence to establish substantial grounds to believe that the suspect is criminally responsible as a 'co-perpetrator' within the meaning of article 25(3)(a) of the Statute . . . ."). *But see* Guterres, Indonesian Ad Hoc Hum. Rts. Ct. for E. Timor, judgment No. 04/PID (Cent. Jakarta Dist. Ct. Nov. 25, 2002).

49. *See* Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment (Nov. 16, 1998). For an overview of the case law on command responsibility at the ICTY, see generally Elies Van Sliedregt, *Command Responsibility at the ICTY—Three Generations of Case-Law and Still*

for its thorough analysis of several important aspects of CR, the judgment did not at all discuss the nature of the doctrine, and applied the mode of liability approach without consideration.[50] This established the tenor of the debate at the tribunals early on: there was none. It took a full decade of jurisprudence following *Čelebići* for judges at the ICTY to analyse the nature of CR.[51] In his partially dissenting opinion in an interlocutory appeal decision of *Hadžihasanović*, Judge Shahabuddeen focused light on the controversy hiding in plain view, stating:

> The position of the appellants seems to be influenced by their belief that [the ICTY statute's CR provision] has the effect, as they say, of making the commander "guilty of an offence committed by others even though he neither possessed the applicable *mens rea* nor had any involvement whatsoever in the *actus reus*." No doubt, arguments can be made in support of that reading of the provision, but I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so. Reading the provision reasonably, it could not have been designed to make the commander a party to the particular crime committed by his subordinate.[52]

This thinking was adopted in *Krnojelac*, where the ICTY Appeals Chamber was even clearer in delineating the nature of criminal responsibility, writing "[i]t cannot be overemphasized that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control."[53] A vocal

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Ambiguity, *in* THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNE FOR THE FORMER YUGOSLAVIA 377, 377-400 (Bert Swart et al. eds., Oxford University Press 2011); *see also* ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW 186-187 (Oxford, 2012) [hereinafter VAN SLIEDREGT, CRIMINAL RESPONSIBILITY] (discussing *Delalić*).

50. *See Delalić*, Case No. IT-96-21-T, Judgment, ¶¶ 330-401.

51. Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003).

52. *Id.* ¶ 32 (Shahabuddeen, J., dissenting in part); *see also* OXFORD COMPANION, *supra* note 6, at 714; VAN SLIEDREGT, CRIMINAL RESPONSIBILITY, *supra* note 49, at 187-89.

53. Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 171 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003); *see also* Prosecutor v. Orić, Case No. IT-03-68-A, Judgment, pt. VII (Declaration of J. Shahabuddeen), ¶ 19 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008); METTRAUX, *supra* note 11, at 45 (discussing the case).

minority of ICTY cases followed this reasoning, most notably *Halilović*.[54] That case involved a Bosnian Muslim commander of military forces involved in the war crime of murder for the killings of 62 Bosnian Croat civilians and a prisoner of war.[55] Halilović was charged solely under the doctrine of CR, which gave the Trial Chamber the opportunity to more closely scrutinize its nature.[56] While the Chamber noted that the ICTY had fairly consistently applied CR as a mode of liability up to that point, it had done so without articulating why.[57] The Trial Chamber in *Halilović* concluded that the nature of CR is in fact a separate crime.[58] The ICTY statute provides that a commander is responsible for "acts . . . committed by a subordinate."[59] (The Rome Statute differs slightly in that a commander is responsible "for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control . . . .")[60] The *Halilović* Trial Chamber found that the "for the acts of his subordinates" language "does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act."[61] The Trial Chamber further stated that "a commander is responsible not as though he had committed the crime himself . . . ."[62] *Halilović*

54. Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶¶ 78-80 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005); *see* Prosecutor v. Halilović, Case No. IT-01-48-A, Judgment, ¶¶ 175-80 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 16, 2007).

55. OXFORD COMPANION, *supra* note 6, at 714 (for an overview of the case, see *id* at 713-16).

56. *Id.*

57. Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶ 53 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005), referring to holdings in Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment (Nov. 16, 1998) and Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement (June 25, 1999); *see also* OXFORD COMPANION, *supra* note 6, at 716 (noting that the trial judgment was "the first judgment in the jurisprudence of the ICTY that deals with the nature of superior responsibility, with its *sui generis* character analyzed in greater depth. Such a development of the concept of superior responsibility is important for its accurate and fair application as a form of individual criminal responsibility.").

58. *See* Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶¶ 372, 746, 747, 750-52 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005); *see also* OXFORD COMPANION, *supra* note 6, at 715 (noting "[w]hile this holding [Halilovic] indicates that superior responsibility is a *sui generis* responsibility distinct from the ones provided for in Art. 7(1) ICTYst., the TC did not explicitly state whether a commander should be convicted for his dereliction of duty rather than for the crimes committed by his subordinates"); *id.* at 715 (noting Halilović was acquitted on the grounds that the prosecution failed to establish beyond a reasonable doubt that he was in either de jure or de facto command of the forces involved in the crimes, nor did he have the material ability to punish the perpetrators).

59. ICTYst., *supra* note 22, art. 7(3).

60. Rome Statute, *supra* note 19, art. 28(1).

61. Prosecutor v. Halilović, Case No. IT-01-48-T, Judgement, ¶ 54 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005).

62. *Id.*

stands, therefore, for the proposition that commanders who breach their duty of supervision to ensure that subordinates respect international humanitarian law are held criminally responsible for their own omissions rather than for the predicate crimes resulting from those omissions.[63] These holdings have garnered academic support.[64] Unfortunately, the ICTY has not been consistent. The clear majority of decisions at the ad hoc tribunals have applied a mode of liability approach. Van Sliedregt, though advocating for the adoption of a separate crime application of CR, probably speaks for a majority of observers when she concludes that "[i]n essence, superior responsibility at the ad hoc Tribunals is a mode of liability, a mode of participating in subordinate crimes."[65]

That contemporary jurists and academics take divergent views of CR stands in stark contrast to the unanimity of the World War II-era courts, who pioneered the doctrine, in finding that CR was a distinct crime.[66] In the pioneering case of *Yamashita*, the defendant general was convicted not for the underlying humanitarian law violations committed by his subordinates, but for his own dereliction of duty.[67] In fact, the US Military Commission hearing *Yamashita* held "[i]t is absurd . . . to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape."[68] This is a point often misunderstood, perhaps because of

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63. *See* Van Sliedregt, *Article 28, supra* note 37, at 426-7. *But see* Darryl Robinson, *How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution,* 13 MELB. J. INT'L L. 1, 12 (2012) (arguing that this is a "throwaway" statement, which has been taken out of context. Robinson notes that the defendant was still found guilty of war crimes under command responsibility, even though he didn't commit the crimes.).

64. *See, e.g.*, Stefan Trechsel, *Command Responsibility as a Separate Offense*, 3 BERKELY J. INT'L. L. PUBLICIST, 26, 34-35 (2009) (where the former ICTY *ad litem* judge concludes that the Trial Chambers in *Halilović* and *Hadžihasanović* "correctly [found] that command responsibility does not imply responsibility for the crimes committed by subordinates but a responsibility *sui generis* by omission").

65. Van Sliedregt, *Article 28, supra* note 37, at 425; *see also id.* at 427 (concluding that while the separate crime theory is the one that best comports with principles of international criminal justice, the ICTY decisions construing command responsibility as a separate crime "cannot be regarded as part of the ICTY legal framework and the attempt to insert it into ICTY law should, therefore, be faulted"); *see also* Prosecutor v. Orić, Case No. IT-03-68-A, Prosecution's Appeal Brief, 11 152-203 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 16, 2006) (where the Prosecutor refers to ICTY case law (e.g., *Delalic Aleksovski, Blaskic, Naletelic, Krnojelac* cases) and ICTR case law (e.g., *Kambanda, Musema, Baraygwiza* cases) and indictments arguing that at the ad hoc tribunals command responsibility is a mode of liability and not a separate offense); *see also* Meloni, *supra* note 5, at 625.

66. *Cf.* Amy J. Sepinwall, *Failure to Punish: Command Responsibility in Domestic and International Law,* 30 MICH. J. INT'L L. 251, 269 (2009) (arguing that "the weight of history and precedent lies on the side of the mode of liability view"); Meloni, *supra* note 5, at 621.

67. *See Yamashita, supra* note 4; *see also* CASSESE, *supra* note 14, at 183 (discussing *Yamashita*).

68. *Yamashita, supra* note 4, at 35-36.

the severe sentence meted out against the general (he was hanged).[69] Following *Yamashita*, the American military courts hearing the *Hostages* and *High Command* cases under Control Council Law No. 10 rejected the controversial strict liability approach of *Yamashita*, but affirmed its "dereliction of duty" approach.[70] That is, the post-World War II courts were in agreement that CR is a separate, distinct crime committed by commanders and not a mode of liability.[71] The confusion regarding the nature of CR is a result of ambiguity in post-World War II developments, where international authority referring to the doctrine ceased defining its nature. Additional Protocol I of 1977 to the Geneva Conventions codified CR for omissions as a crime in an international treaty for the first time.[72] Yet, as the ICTY Trial Chamber later noted in *Halilović*, this treaty is "silent as to the nature of the criminal responsibility."[73] Similarly, when the International Committee of the Red Cross codified the customary rules of international humanitarian law, they did not address the nature of CR.[74] Ambiguity has remained the hallmark of CR in international criminal law since the Additional Protocol.

The divergent treatment of CR just outlined demonstrates that the world hardly speaks with a unified voice on this issue.[75] This

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69. *See* CASSESE, *supra* note 13, at 183.

70. The Hostages Trial, U.N. War Crimes Comm'n, 8 *Law Reports of Trials of War Criminals* 1, 71-72 (1949).

71. *See* CASSESE, *supra* note 13, at 185.

72. Int'l Comm. of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1125 U.N.T.S. 42-43, art. 86(2) ("The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."); *see also* Meloni, *supra* note 5, at 623-624.

73. Prosecutor v. Halilović, Case No. IT-01-48-T, Judgement, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005); *see also* Meloni, *supra* note 5, at 624 (the language of AP I "could allow both an interpretation of command responsibility as a mode of liability for the crimes of subordinates, as well as a separate offence of dereliction of duty of the superior. Moreover, not only does this provision remain in principle open to both these readings, but it also does not define the character of the responsibility, whether penal or disciplinary, primary or vicarious, to be imposed on the superior for failure to act. Such a determination is left to the domestic law.").

74. *See* Int'l Comm. of the Red Cross, 1 Customary International Humanitarian Law: Rules, r. 153, *available at* http://www.icrc.org/customary-ihl/eng/docs/v1_rul ("Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.").

75. Damaška, *supra* note 17, at 457 (stating "international legal sources do not now speak with a single voice" on this issue).

inconsistent application of the nature of CR shows that the mode of liability approach is not "so deeply rooted in international practice nor so widespread, as to deserve recognition of customary status."[76] The Court will not be breaking virgin ground if it should walk away from the mode of liability approach.

II. COMMAND RESPONSIBILITY FOR SPECIFIC INTENT CRIMES

When a commander knows of the impending or on-going criminality of his subordinates and does nothing to stop them, the commander's inactions can be read as tacit approval and his "omission shades into conventional complicity—aiding by omission."[77] Neither the statutes of the ad hoc tribunals nor the Rome Statute require actual knowledge of subordinates' activities for a commander to be convicted based on omission liability. The ICTY and ICTR statutes provide for a specific, minimum *mens rea* for CR: evidence must be present to prove that the commander "had reason to know" that his subordinates were engaging or were about to engage in criminal behaviour.[78] This is a standard of recklessness, because the commander must have at least disregarded information available to him, which would have given him knowledge of crimes being or about to be committed. The ICTR made clear that this standard is not one of negligence and warned that "[r]eferences to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought . . . ."[79] The ad hoc tribunals vociferously rejected the notion that negligence sits at the heart of the *mens rea* of CR.[80] In fact, the tribunal noted in *Čelebići* that customary international criminal law does not recognize a criminal should have known level of *mens rea*.[81] Whatever the wisdom, the drafters of the Rome Statute are free to contract out of customary international law and evidently chose to do just that.

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76. *Id.* at 493.

77. *Id.* at 462; *see also* Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶ 280 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (where judge opined that superiors may be able to instigate by omission); VAN SLIEDREGT, CRIMINAL RESPONSIBILITY, *supra* note 49, at 199-200.

78. ICTYst., *supra* note 22, art. 7(3), 6(3).

79. *See* SCHABAS, *supra* note 16, at 463 (quoting Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Judgement, ¶ 35 (July 3, 2002); *see also, Blaškić*, IT-95-14-T at ¶ 63.

80. *See* SCHABAS, *supra* note 16, at 457 (citing *Bagilishema*, ICTR-95-1A-A, Judgement, at ¶ 35; Proscutor v. Milutinovic, Case No. IT-05-87-T, Judgement, ¶ 79 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009)); *see also, Blaškić*, IT-95-14-T at ¶ 63.

81. *See* METTRAUX, *supra* note 11, at 209 (discussing *Čelebići*).

A. The Negligence Standard

Rome Statute Article 28 provides that a commander should have known that his subordinates were committing or were about to commit international crimes for liability to attach under CR.[82] The commander need not have actually known anything. This is a standard of simple negligence.[83] The Chamber in *Bemba Gombo* affirmed that the should have known standard is a form of negligence.[84] This is not problematic if CR is understood to be a separate crime. If Article 28 were so construed, the Rome Statute would require a negligent *mens rea* for the crime to be committed, and a commander that is negligent will have the appropriate *mens rea* to fit the crime. If CR is a mode of liability, on the other hand, the commander's *mens rea* and the *mens rea* necessary to commit the underlying crimes are no longer in parity. The default *mens rea* necessary to commit crimes at the ICC is "intent and knowledge"—for some crimes, it is a higher, specific intent.[85] For all of these crimes, however, the commander's required *mens rea* remains only negligence.

Commentators have panned Article 28's should have known standard, because as a mode of liability it leads to culpability for intentional conduct, regardless of the fact that the defendant had no criminal intent.[86] The commander who should have known, but did not actually know that his subordinate was about to commit an international crime has breached an important duty of supervision, but he is not an accomplice to the crime.[87] Yet a mode

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82. *See* Rome Statute, *supra* note 19, art. 28(1).

83. *See* Ambos, *supra* note 7, at 868 (stating "[i]t should be clear now, however, that the 'should have known' standard must be understood as negligence and that it, therefore, requires neither awareness nor considers sufficient the imputation of knowledge on the basis of purely objective facts") (internal citations removed).

84. *See* Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Pre-Trial Chamber II, ¶ 429 (June 15, 2009).

85. *See* Rome Statute, *supra* note 19, art. 30(1). Genocide and the crimes against humanity of extermination and forced pregnancy are examples of specific intent crimes in the Rome Statute. *See id.* arts. 6, 7(2)(b), (f).

86. *See e.g.*, SCHABAS, *supra* note 16. *But see* Ambos, *supra* note 7, at 864 (noting that the 'should have known' standard has support from the *Hostages* case ("information which should have enabled them to conclude") and 'reason to know' standards of the ILC and ICTYst); *see also*, SCHABAS, *supra* note 16, at 457 (citing U.N. Diplomatic Conf. of Plenipotentiaries on the Est. of an Int'l Crim. Ct., June 15-July 17, 1998, Summary Record of the First Meeting, ¶ 68, UN doc. A/CONF.183/C.1/SR.1 (1998) (Shabas notes that the U.S. delegate during negotiation of the Rome Statute "introduced the proposal that became the basis of article 28, presenting command responsibility of military superiors as a crime of negligence.").

87. *But see* Ambos, *supra* note 7, at 854 (citing Timothy Wu & Yong-Sung (Jonathan) Kang, *Recent Development, Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and Its Analogues in United States Law*, 38 HARV. INT'L L.J. 272, 274-89 (1997) (arguing that command responsibility is a form of accomplice liability).

of liability application of CR functions the same as accomplice liability.[88] Ambos notes that imposing negligence liability for intentional criminal acts represents "a construction which is not only logically impossible but, more importantly, hardly compatible with the principle of guilt."[89] The should have known standard "effectively replaces the requirement of knowledge with a legal fiction of knowledge whereby a commander is attributed knowledge of a fact which he did not possess. In so doing, the ICC Statute greatly dilutes the principle of personal culpability that underlies the doctrine of superior liability under customary law."[90] Labelling someone a negligent war criminal is oxymoronic, and negligence liability for intentional acts is clearly incongruent.[91] As Damaška notes:

> *Sub silentio*, as it were, a negligent omission has been transformed into intentional criminality of the most serious nature: a superior who may not even have condoned the misdeeds of his subordinates is to be stigmatized in the same way as the intentional perpetrators of those misdeeds. As a result of this dramatic escalation of responsibility, a commander's liability is divorced from his culpability to such a degree that his conviction no longer mirrors his underlying conduct and his actual *mens rea*.[92]

The "should have known" test for military commanders objectivizes a defendant's mental state and divorces it from the concept of personal accountability.[93] Yet the negligent commander is branded with the same stigmatizing iron as commanders that order their troops to commit war crimes and crimes against humanity.[94] (There is no provision under the Rome Statute denoting the commander's indirect liability even though he has far

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88. *See* Bert Swart, *Modes of International Criminal Liability*, *in* OXFORD COMPANION, *supra* note 6, at 91-92.

89. Ambos, *supra* note 7, at 871 (and further noting that the challenge for the ICC in coming years will be to restrain article 28 from becoming "a form of strict liability").

90. METTRAUX, *supra* note 11, at 210.

91. *See* van Sliedregt, *Article 28*, *supra* note 37, at 430 (" 'Negligence liability' for intentional acts is not a logical construction."); *see also* Damaška, *supra* note 17, at 466 ("it appears inappropriate to associate an official superior with murderers, tortures, or rapists just because he negligently failed to realize that his subordinates are about to kill, torture or rape").

92. Damaška, *supra* note 17, at 463-64.

93. *See* METTRAUX, *supra* note 11, at 211.

94. *See* Paul Behrens, *The Need for a Genocide Law*, *in* ELEMENTS OF GENOCIDE 238, 249 (Paul Behrens & Ralph Henham eds., 2013) [hereinafter Behrens, *Need for Genocide Law*].

less culpability than the direct perpetrators of the crimes.)[95] For a commander to be labeled *ex officio* as a war criminal based on negligence saps the stigmatizing power of those crimes. Simply put, holding a commander liable for atrocities committed by his troops when he neither ordered them nor knew about the crimes is "the most conspicuous departure . . . from the principle that conviction and sentence for a morally disqualifying crime should be related to the actor's own conduct and culpability."[96] A mode of liability approach also dilutes the normative powers of international crimes and weakens their stigmatizing force.[97]

The negligence standard for CR has little support in State practice when it is applied as a mode of liability. Eighteen States have enacted domestic legislation holding military commanders criminally responsible for the underlying crimes when committed by their subordinates (i.e. a mode of liability).[98] However, only six States provide for CR for the underlying crime when the commander is merely negligent. Of these, the United States, the United Kingdom and Finland provide for the same punishment for negligent commanders as for reckless and willfully blind commanders.[99] Germany, the Netherlands and Spain, on the other hand, provide for reduced charges for negligent military commanders.[100] In other words, 97% of the States in the world do not recognize CR as a mode of liability for negligent military commanders.[101] Holding individuals criminally responsible when they negligently supervise their subordinates and those subordinates engage in egregious conduct makes perfect sense if

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95. *See id.*

96. Damaška, *supra* note 17, at 468.

97. *See* Behrens, *Need for Genocide Law*, *supra* note 94, at 248 ("It is this tendency to blur the lines between the underlying crime and the conduct to which superior responsibility refers that causes problems in relation to the stigmatic principle.").

98. *See* ICRC IHL Database, *supra* note 25. These states include Armenia, Australia, Bangladesh, Croatia, Democratic Republic of the Congo, Finland, France, Germany, Lebanon, Luxembourg, Netherlands, Peru, Republic of Korea, Serbia, Spain and Uruguay. This list does not include states that have adopted a criminal command responsibility provision by way of incorporating the Rome Statute into domestic law. For a list of the States that have done so, *see Implementation of the Rome Statute*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, http://www.iccnow.org/?mod=romeimplementation (last visited Apr. 18, 2014).

99. *See* U.S. DEPT. OF DEFENSE, MANUAL FOR MILITARY COMMISSION, *supra* note 33; *supra* notes 38-39 and accompanying text, discussing British legislation; CRIMINAL CODE, ch. 11, § 12-13 (Fin.).

100. *See* ACT TO INTRODUCE THE CODE OF CRIMES AGAINST INTERNATIONAL LAW OF 26 JUNE 2002 (Ger.), *supra* note 41; INTERNATIONAL CRIMES ACT art. 9, undated (Neth.); CRIMINAL CODE, art. 615 (2011) (Spain).

101. This approximate calculation is based off the fact that there are 195 independent states in the world. *See* U.S. DEPARTMENT OF STATE, *Independent States in the World* (Dec. 9, 2013) http://www.state.gov/s/inr/rls/4250.htm.

the commander is charged as a separate crime. But holding the commander vicariously liable for intentional criminal conduct without having any intent to commit criminal acts excises an essential element of criminal conduct and departs from a rational application of justice. The problem becomes even more pronounced when CR is applied to specific intent crimes, like genocide.

B. The Mode of Liability Approach in the Context of Genocide

Rome Statute Article 30 contains the default mens rea necessary for conviction of crimes under the Rome Statute: intent and knowledge.[102] The provision begins with the qualifier, "unless otherwise provided."[103] Genocide is the quintessential specific intent crime at the ICC, though it is not the only one.[104] Genocide requires a very specific, heightened form of mens rea: the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[105] What makes genocide the "crime of crimes" is its *dolus specialis*, the specific genocidal intent associated with the crime.[106] The *dolus specialis* makes genocide qualitatively different from other international crimes, and imbues it with a powerful stigmatic association.[107] As one commendatory noted, "[s]uch an intent presupposes that the act as such needs to be committed intentionally; because who kills negligently, cannot intent [sic] to destroy a protected group just by his negligent behaviour."[108] This is exactly the outcome when a mode of liability approach is used.

As with the *ad hoc* tribunals' treatment of the nature of CR, they have demonstrated a certain "judicial malaise" with the issue of how negligent omission liability is reconciled with the *dolus specialis*.[109] The Trial Chamber in *Prosecutor v. Stakić* held that because the specific intent was what made genocide a unique crime, the *dolus specialis* was required for responsibility even

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102. *See* Rome Statute, *supra* note 19, art. 30(1) ("Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.").

103. *Id.*

104. *See supra* note 85.

105. Rome Statute, *supra* note 19, art. 6.

106. *See, e.g.*, Karnavas, *supra* note 44, at 138.

107. *See id.* at 144 ("Specific intent distinguishes genocide from other international crimes.").

108. OBSERVERS' NOTES, *supra* note 12, at 817.

109. Karnavas, *supra* note 44, at 138 (quoting WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 309 (2002)).

under CR.[110] Therefore, before a superior could be convicted for genocide under the CR, it must be proved that he possessed the requisite *dolus specialis*.[111] The Appeals Chamber disagreed, and found no difficulty in convicting an individual of genocide based on omissions and a lower mens rea.[112] The ICTR has also convicted for genocide based solely on CR.[113] It is sufficient, the tribunals have said, that the commander later gains the knowledge that his subordinates committed their crimes with the requisite mens rea.[114] This cannot be right. Not only does such a situation sever the mens rea and actus reus between individuals, but it also disjoins them temporally, offending the principle of simultaneity. Behrens has noted that under the principle of simultaneity (or contemporaneity):

> [I]t is mandatory that the mens rea extends to the period in which the *actus reus* is performed. In other words, if a perpetrator kills a victim because he bore a personal grudge against him, and later develops a general desire to destroy the entire group to which the victim belongs, it

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110. *See* Prosecutor v. Stakić, Case No. IT-97-24-T, Decision on Rule 98 *Bis* Motion for Judgment of Acquittal, ¶ 92 (Int'l Trib. for the Former Yugoslavia Oct. 31, 2002) (the Court further noted "the legal problems and the difficulty in proving genocide by way of an omission . . ."); *see also* SCHABAS, *supra* note 16, at 464.

111. *See Stakić*, Case No. IT-97-24-T, ¶ 92; *see also* Karnavas, *supra* note 44, at 139-40 (discussing the case).

112. *See* SCHABAS, *supra* note 16, at 464; *see also* Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgement, ¶¶ 720-721 (Int'l Trib. for the Former Yugoslavia Sept. 1, 2004).

113. *See* Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgment and Sentence, ¶¶ 2160, 2278 (Dec. 18, 2008); Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Judgement, ¶¶ 1051-1052 (Nov. 28, 2007) (where the conviction was for direct and public incitement to commit genocide); *see also* SCHABAS, *supra* note 16, at 464 & n.81.

114. *See* Prosecutor v. Ntageura, Case No. ICTR-99-46-T, Judgment and Sentence, ¶¶ 654, 821 (Feb. 25, 2004) (where the ICTR Trial Chamber considered the mens rea necessary for a commander to be liable for failing to prevent or punish genocide is actual or constructive knowledge). *See also, Brđanin*, Case No. IT-99-36-T, Judgement, ¶¶ 17, 711 (where the Trial Chamber said that it was sufficient if the subordinates had the *dolus specialis* and that the commander knew or had reason to know that his subordinates were going to commit or had committed genocide. The Trial Chamber further found that an accused "may be held liable for genocide as a result of his failure to carry out his duty as a superior . . . ."); Behrens, *supra* note 94, at 248 n. 60 (noting that "[i]t does not appear that the [*Brđanin*] Trial Chamber saw any contradiction in this to para 171 of the *Krnojelac* Appeal Judgment, to which it referred in support of this statement"). *See* Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 171 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003); Karnavas, *supra* note 44, at 138-40 (noting that most jurisprudence form the *ad hoc* tribunals suggests that the commander need not share genocidal intent with his subordinates to be guilty of the crime); METTRAUX, *supra* note 11, at 226 ("The ICTY and ICTR have both said that, under customary international law, a commander may be held responsible for a 'special intent' crime without him personally sharing that intent with the actual perpetrators."). *See, e.g.*, Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgement, ¶ 686 (Int'l Trib. for the Former Yugoslavia Jan. 17, 2005).

> would be inapposite to apply this desire to the act in question; it comes too late . . . .[115]

Similarly, if the commander learns of the crimes only after they have been committed (even if the legal fiction that the specific intent is transferred to the commander is adopted), the mental state and criminal conduct are not synchronized in time. Attaching a subordinate's intentional *actus reus* to the commander's negligent mens rea at some future point breaks the temporal connection between the crime's elements. This is simply not an issue if CR is treated as a separate crime, because the commander's responsibility is assessed on its own merits: the commander's negligent mens rea (not knowing when he should have known) arises at the same time that his *actus reus* (failure to act) occurs.

The case of *Stupar,* tried in the courts of Bosnia and Herzegovina, demonstrates the potential abuses associated with replacing the specific intent requirement of genocide by a looser CR standard.[116] Stupar was convicted of genocide for the sole wrong of failing to punish his subordinates for committing that crime, and was sentenced to forty years in prison for the commission of genocide despite no evidence put forth showing he had any genocidal intent.[117] The conviction was made possible by construing CR as a mode of liability.[118] As such, *Stupar* represents a "woeful misapplication of the law on genocide," and "a startling example of genocide convictions 'through the backdoor.' "[119] In 2011, the Appeals Chamber for the Special Tribunal for Lebanon

115. Paul Behrens, *A Moment of Kindness? Consistency and Genocidal Intent, in* THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS 125, 134 (Ralph Henham & Paul Behrens eds., 2007).

116. Prosecutor v. Stupar, [2008] X-KR-05/24, First Instance Verdict, 161-64 (Bosn. & Herz.).

117. *Id.* at 11; *see also* Karnavas, *supra* note 44, at 141 ("This judgment [*Stupar*] represents a woeful misapplication of the law on genocide: little to no legal authority is cited to support its conclusions and its discussion and application of the law are both contradictory and illogical. Incredibly, Stupar was sentenced to 40 years imprisonment for genocide, in the absence of any specific genocidal intent.").

118. *See* Karnavas, *supra* note 44, at 141; *see also* CRIMINAL CODE, art. 180(2), (2003) (Bosn. & Herz.).

119. Karnavas, *supra* note 44, at 140-41. On appeal, the Appellate Panel ordered a retrial, which resulted in acquittal. *See Stupar,* X-KRŽ-05/24, ¶ 67. However, as Karnavas has noted, the Appellate Court essentially ruled as it did because it was unconvinced that there was a sufficient superior-subordinate relationship. It did not revisit the trial court's logic on command responsibility and genocide. In other words, Stupar was acquitted on evidentiary grounds, not on the legal standard. Other commentators have scoffed at the decision. *See* Karnavas, *supra* note 44, at 142.

pushed back indirectly on this line of reasoning.[120] In an opinion written by Judge Cassese, the Chamber found that it was inappropriate to convict someone of joint criminal enterprise (JCE III) for terrorism.[121] The case is illustrative here, because the Tribunal defined terrorism—like genocide—as a specific intent crime and the mens rea necessary for culpability under JCE III, like CR under the Rome Statute, as simple negligence (*dolus eventualis*).[122] Except for the duty conferred on commanders to act under CR, the situations are otherwise analogous, and illustrative of a counter-trend.

When a commander lacks the specific intent to commit genocide (or any intent for that matter) the commander's "omission is not the contribution of a person who moves on the same level as the principal perpetrator."[123] Genocide is a heinous crime, but diluting its core element (the *dolus specialis*) is antithetical to the principles the Court strives to uphold, and does not comport with the principles put forth in the genocide convention.[124] A commander liable on CR grounds has breached an important duty, which "carries its own stigma, but a stigma which attaches not to the deliberate targeting of a group, but to a managerial lack of supervision."[125] A commander should be punished when his breaches of duty of supervision lead to the commission of crimes, but "he should not be transformed into a *'génocidaire'* without ever possessing specific genocidal intent."[126]

Using a negligence standard for specific intent crimes, like genocide, forced pregnancy and extermination, effectively nullifies the prosecutor's need to prove an essential element of a crime, at least vis-à-vis defendants charged under CR.[127] If CR cuts out the need to show criminal intent or knowledge on the part of the defendant, why would a rational prosecutor ever charge direct

120. *See* Prosecutor v. Ayyash, Case No. STL-11-01/1, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Spec. Trib. for Lebanon Feb. 16, 2011).

121. *See id.* ¶¶ 248-249.

122. *See id.*

123. Behrens, *supra* note 94, at 248.

124. *See* Karnavas, *supra* note 44, at 137 (noting that "[c]ommand responsibility is not envisaged as a form of criminal participation in the Genocide Convention" and further noting that the obligations in the Convention to suppress and punish are "obligation[s] aimed at *states*. If it were intended to extend to individuals, the Genocide Convention would have included this obligation in the forms of participation listed in Article III." (emphasis in original)); *see also,* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

125. Behrens, *supra* note 94, at 249.

126. Karnavas, *supra* note 44, at 140.

127. *See* Behrens, *supra* note 94, at 249 (noting that this relegates specific intent "to the sidelines and bec[a]me irrelevant for the assessment" of the commander's culpability).

responsibility? The case of *Guterres* before the Indonesian Ad Hoc Human Rights Court for East Timor is a case representing that very concern. In *Guterres*, the prosecutor relied solely on command responsibility—in a statutory provision virtually identical to Article 28—notwithstanding evidence showing the defendant's direct involvement in crimes against humanity.[128] Presumably, the prosecutor still must prove the subordinate's specific intent, but as noted above, there is no requirement that a principal culprit be tried, appear at court, or even be identified, and this raises a host of evidentiary and ethical problems.[129] This forces defense attorneys into the untenable position of having to defend and represent multiple clients simultaneously, some of whom the attorney may never have even met. For tactical reasons, a defense attorney may not wish to argue that a subordinate did not have the requisite intent. The commander and subordinate may have conflicting defenses (one may argue that the crime did not occur whereas the other may argue that it did but that he is not responsible, etc.). This forces a situation where attorneys must either breach ethical duties to their clients to represent them above all, or giving prosecutors a pass on having to prove an essential element of a crime. Pursuant to the negligence standard, military commanders can automatically be attributed the specific intent if his (unrepresented) subordinates are found to have had the requisite intent at the time the crimes were committed, without the commander in fact knowing anything about it. Negligence is anathema to specific intent, and it is not an appropriate level of culpability to convict a commander of a specific intent crime.[130] On the other hand, if CR is a separate crime, no such imbalance between the commander's *mens rea* and the crime's *mens rea* arises.

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128. *See* Guterres, Indonesian Ad Hoc Hum. Rts. Ct. for E. Timor, Judgment No. 04/PID (Cent. Jakarta Dist. Ct. Nov. 25, 2002); *see also* OXFORD COMPANION, *supra* note 6, at 707.

129. *See* METTRAUX, *supra* note 11, at 81.

130. *See* Karnavas, *supra* note 44, at 137 ("[T]he *mens rea* standard required for responsibility as a superior is considerably less than the *dolus specialis* required for genocide. Indeed, command responsibility is essentially liability through negligence. There is thus an obvious tension between specific genocidal intent, on the one hand, and the responsibility international law imposes on superiors who 'knew or should have known' that their subordinates were committing or about to commit crimes, on the other."); *see also* METTRAUX, *supra* note 11, at 227; William A. Schabas, *General Principles of Criminal Law in the International Criminal Court (Part III)* 6 Eur. J. Crime, Crim. L. & Crim. Just. 400, 417 (1998); SCHABAS, *supra* note 109, at 307; Ambos *supra* note 7, at 852 ("[T]he peculiar structure of superior responsibility leads to a stunning contradiction between the *negligent* conduct of the superior and the underlying *intent* crimes committed by the subordinates.").

Because of the conflict between specific intent crimes and negligent *mens rea*, the ICC might be required, in practice, to treat CR as a distinct crime.[131] Schabas has concluded that "[i]t is logically impossible to convict a person who is merely negligent of a crime of specific intent. Accordingly, the Court, if Article 28 of the Statute is to have any practical effect, will be required to convict commanders of a crime other than genocide . . . ."[132] That crime, he argues, "can only be negligent supervision of subordinates who commit genocide."[133] Following this argument to its conclusion means that a mode of liability approach is just as illogical when applied to general intent crimes as it is to genocide. There is no textual support to suggest that Article 28 should apply differently to genocide than to any other crime in the Rome Statue. Schabas's point above is just as salient when applied to general intent crimes. Those crimes (the war crimes of murder, torture, etc.), while not requiring a heightened mens rea still require a showing of the default, Article 30 mens rea, of intent or knowledge.[134] Substituting the negligence standard for the default standards still obliterates an essential element of each crime under the Rome Statute vis-à-vis the defendant. There is no indication that Article 28 is to be applied *mutatis mutandis*; it must be applied uniformly. Therefore, if CR as a mode of liability cannot apply to genocide, then it cannot apply to any other crime.[135] Article 28 should, therefore, be construed as providing for a distinct crime relating to the commander's breach of duty of supervision. The question now becomes whether the Court has the authority to so construe Article 28.

III. INTERPRETING ARTICLE 28 AS A DISTINCT CRIME

One commentator has suggested that Article 28 looks more "like raw criminal law material" than a proper criminal code because of its undifferentiated treatment of the forms of CR.[136] This is an opportunity for the Court to construe CR as a separate

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131. *See* Van Sliedregt, *supra* note 37, at 430 (quoting Ambos, *supra* note 8, at 852).

132. *Id.* (quoting William A. Schabas, *Canadian Implementing Legislation for the Rome Statute*, 3 Y.B. INT'L HUMAN. L. 337, 342 (2000)).

133. *Id.*

134. *See* Rome Statute, *supra*, note 102.

135. *But see* METTRAUX, *supra* note 11, at 226 (suggesting that this conflict could be addressed by recognizing that the *chapeau* of genocide states not only the elements of the crime, but also a condition on the exercise of the Court's jurisdiction).

136. Claus Kreß, *The International Criminal Court as a Turning Point in the History of International Criminal Justice*, *in* OXFORD COMPANION, *supra* note 6, at 149.

crime. In fact, it has already hinted that it might. In *Bemba Gombo* the ICC dealt with CR for the first time and used language suggesting that CR could be construed as a separate crime. The Chamber stated that the duty to prevent, to suppress, and to punish crimes deal with the past, present, and future.[137] Thus, the Chamber concluded, "a failure to fulfil one of these duties is itself *a separate crime* under Article 28(a) of the Statute."[138] The Chamber was not abundantly clear whether it was saying that each prong deals with a separate mode of liability (three avenues of triggering responsibility for the same underlying crime) or are really three distinct crimes. The unexacting nature of the language stands in contrast to the careful scrutiny the Chamber gave to the relationship between the causation element contained in the *chapeau* of Article 28 and subsequent commander's liability (or the lack thereof) for failure to punish subordinates engaged in criminal activity.[139] *Obiter dicta* in the case went far to elaborate Article 28, but did not directly address the nature of CR beyond the abstruse language quoted above. However, the Court cited to a number of treatises, in particular by Cassese, and ICTY case law including *Orić*, *Brđanin* and *Hadžihasanović* in other parts of the decision addressing CR.[140] These sources contain considerable analysis on its nature and growing controversy. Thus, the Chamber knew (or had reason to know) that they were treading upon contested ground. That they used the phrase "separate crime" instead of "separate mode" of liability should not be discounted.

Robinson argues that Article 28 "is quite explicit."[141] He points out that the language in the Rome Statute holds commanders "criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control."[142] Therefore, Robinson suggests, this is a mode of liability.[143] This language is hardly explicit, and could just as easily be interpreted to mean that the commander is criminally responsible (and punishable for his own breach of duty) when crimes within the jurisdiction of the Court are committed by forces under his or her effective command and control. Despite Robinson's

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137. *See* Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision on Confirmation of Charges, ¶¶ 435-36 (June 15, 2009).

138. *Id.* (emphasis added).

139. *See, e.g., id.* ¶¶ 420-426 (discussing the causation element in Article 8 *bis*' *chapeau*).

140. *See, e.g., id.* at 149 nn. 550-60.

141. Robinson, *supra* note 63, at 33.

142. *Id. See* Rome Statute, *supra* note 19, art. 28.

143. *See* Robinson, *supra* note 63, at 33; *see also* VAN SLIEDREGT, CRIMINAL RESPONSIBILITY, *supra* note 49, at 200; Meloni, *supra* note 5, at 633.

assertion, there is nothing in this language to suggest that the commander is responsible as if he committed the crimes himself.

Likewise, Article 28 beings with the prefatory clause: "In addition to other grounds of criminal responsibility under this Statute . . . ."[144] This appears to some to be a nod towards the modes of liability in Article 25. Article 25 contains the aiding, abetting and "otherwise assists" modes of liability, but also reveals the obvious in that "[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute."[145] Therefore, some have concluded that Article 28 provides for an omission mode of liability, because otherwise, there would be no additional ground of liability in the Rome Statute, and that would conflict with Article 28's prefatory clause. A simpler explanation is that Article 28's introductory clause refers to the other grounds of responsibility for which *a commander* may be punished (ordering, for example): Besides commanders' possible liability under Article 28, they may also have liability based on Article 25(3)(b) (ordering), for example. The title of Article 28 is "[r]esponsibility of commanders and other superiors."[146] The prefatory clause simply points out that forms of liability in that article are not the exclusive grounds of criminal liability relevant for commanders under the Rome Statute.

Further, the *chapeau* of Article 28 contains a causation element, meaning liability hinges on the commander's own "failure to exercise control properly," which is indicative of a breach of the duty of supervision, i.e. a separate crime.[147] Thus, the commander's wrong is provided for in Article 28: the breach of his duty. That is the crime the commander should be held responsible for, not the crime committed by his subordinates.[148] Under Article 28 the commander is still linked to the subordinates' crimes, but the scope of CR will be bounded by the *rationa material* of the Rome Statute. Article 5 crimes "trigger" a commander's liability.[149] As van Sliedregt has noted, "instead of an extension of *subordinate* liability, superior responsibility in Article 28 is phrased as resulting from a subordinate's *act* . . . . Subordinate liability is still the starting point . . . . This allows the requirement of a less specific link to subordinate crimes and again affirms the 'separate of-

144. Rome Statute, *supra* note 19, art. 28.
145. *Id.* art. 25(2), (3)(c).
146. *Id.* at art 28.
147. *Id.*
148. *See* Van Sliedregt, *supra* note 37, at 429.
149. *Id.*

fense' interpretation."[150] There is textual and teleological support for such an interpretation.

A. Contextual Matters

The location of the CR provision in the Rome Statute raises interpretive questions, but ones that can readily be addressed. Robinson points out that the definitions of crimes appear in part II of the Rome Statute, "whereas command responsibility appears in p[ar]t III, 'General Principles of Criminal Law.' "[151] This, he concludes, "indicate[s] that command responsibility is a principle of liability, not an offence."[152] This argument can run both ways: in the Rome Statute, CR appears in Article 28, whereas Article 25 contains the modes of liability, suggesting that CR is not a mode of liability, but a separate offence. If CR were a mode of liability, one would expect to find it contained in Article 25, along the other modes of liability applicable before the Court. Instead it is found in a self-contained article between provisions on the "[i]rrelevance of official capacity" and the "[n]on-applicability of statute[s] of limitations."[153] This notional disjunctive suggests that CR could be a separate crime. More to the point, although the definitions of crimes appear in Part II, there is actually no clause in Part II stating that an individual that commits one of those crimes is punishable by the Court. That provision, like CR, is found in Part III.[154]

If Article 28 is understood to provide for a separate crime, the Court would still have jurisdiction over it. (In fact, construing Article 28 as a distinct crime will actually expand the Court's jurisdictional reach.)[155] Article 5 of the Rome Statute lists the crimes the Court is competent to hear (war crimes, crimes against humanity, genocide and eventually aggression).[156] Nothing in

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150. *Id.*

151. *See* Robinson, *supra* note 63, at 32.

152. *Id.*

153. *See* Rome Statute, *supra* note 19, arts. 25(2), 3(c), 27, 29.

154. *Id.* art. 25(2) ("A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment . . . .").

155. Consider a situation where soldiers from State A (a non-member of the Rome Statute) are based on the territory of State B (a member of the Rome Statute). Troops from State A cross over into State C (a non-member of the Rome Statute) and commit war crimes without the commander's knowledge. After returning to State B, if the commander from State A becomes apprised of the war crimes and does not punish his subordinates, he will be violating article 28 and the Court could have jurisdiction, although the war crimes were committed by soldiers of a State that has not ratified the Rome Statute on a territory of a State that has not ratified the Rome Statute.

156. *See* Rome Statute, *supra* note 19, art. 5 ("The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.

Article 5 indicates a crime for dereliction of duty of supervision; therefore, one might conclude that the Court would not have competency to try CR if it was construed as a separate crime. This is incorrect. First, under general statutory and treaty drafting practice, Article 5 leaves open the question of whether it is exclusive or inclusive. If the enumerated crimes were exhaustive, the last semicolon in the list of crimes would be followed by an "or" or "and." This would indicate that the list is complete. This method is used elsewhere in the Rome Statute.[157] No disjunctive or conjunctive term follows the final semicolon in Article 5, leaving the matter unresolved. More importantly, other crimes are undoubtedly found in the Rome Statute beyond those listed in Article 5. It is not unusual to have "adjunct" crimes listed in various parts of criminal codes, such as those containing general principles.[158] This is the case with the Rome Statue. The most conspicuous examples are incitement to commit genocide and attempt, both found in Article 25.[159] For an individual to be guilty of inciting genocide under the Rome Statute, no genocide need be committed.[160] The point here is easy to miss because incitement is found amongst modes of liability in Article 25; however, it is not a means of attributing the underlying crime to a defendant, but a unique crime. This proposition can be proven by observing that, if no genocide were committed, it would be impossible to connect one who incites through a mode of liability (there being no liability for actual genocide) and yet an individual could still be punished under Article 25(3)(e).[161] Sanctioned for what crime? Sanctioned not for the crime of genocide, but for incitement to commit genocide. Similarly, Article 25(3)(f) provides:

The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.").

157. *See, e.g., id.* arts. 13, 19(2).

158. *See* Robinson, *supra* note 63, at 32-33 (citing JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 381 (LexisNexis, 5th ed., 2009) ("By 'adjunct' offences I mean a general set of offences that map on to and are defined by reference to the specific crimes enumerated in the definitions of crimes [sometimes *inchoate* crimes]. For example, 'attempt' and possibly 'incitement' are plausibly characterised as adjunct crimes, since neither requires actual completion of the referent crime." "In national systems, attempt and possibly incitement would be understood as adjunct offences (more specifically as inchoate offences) and this seems, subject to further reflection, a most plausible characterization." *Id.* at n.143.).

159. *See* Rome Statute, *supra* note 19, arts. 25(3)(e), (f). *See generally* VAN SLIEDREGT, CRIMINAL RESPONSIBILITY, *supra* note 49, at 151-54 (discussing attempt in the Rome Statute).

160. *See* Rome Statute, *supra* note 19, art. 25(3)(e).

161. *Id.*

> [A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . [a]ttempts to commit such a crime by taking action that commences its execution by means of a substantial step, *but the crime does not occur* because of circumstances independent of the person's intentions . . . .[162]

In other words, even though a crime listed in Article 5 is not committed and not punishable by the Court, there is a crime that has been committed and which the Court is competent to try: attempt. Since attempt is not found in Article 5 and yet it is a crime within the Court's jurisdiction, this substantiates the argument that Article 5 is not exclusive. Clearly, these extra crimes must be linked to one of the four core crimes contained in Article 5, which acts as an anchor for the Court's jurisdiction. Attempt is sanctionable, so long as the defendant has attempted to commit one of the crimes in Article 5. Attempt to commit bank fraud, for example, would not be justiciable by the Court, because the linking crime (fraud) is not found in Article 5. Incitement is not sanctionable for any crime, but only for genocide. Similarly, the Court will only have jurisdiction to punish a commander under CR if the defendant's omissions share a connection with his subordinates' commission of one of the crimes enumerated in Article 5.

Another issue that could be raised is that, if the Court construes CR as a separate crime, the Court is not competent to try individuals because a commander's failure in his supervisory role is not a crime of the most serious concern to the international community. Article 1 of the Rome Statute limits the Court's jurisdiction to "the most serious crimes of international concern . . . ."[163] Article 17(d) of the Rome Statute requires the Pre-trial Chamber to, when assessing admissibility of cases, ensure that such cases admitted are those of which are of "sufficient gravity to justify further action by the Court."[164] A commander's breach of duty is unquestionably of sufficient gravity to justify scrutiny by the ICC when his omissions are linked to the commission of crimes squarely in the interest of the Court to try—those in Article 5.[165]

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162. *Id.* art. 25(3)(f) (emphasis added).

163. *Id.* at pmbl. para. 4 ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . . .").

164. Rome Statute, *supra* note 28, art. 17(d).

165. *But see* Karnavas, *supra* note 44, 140 n.326 (quoting Schabas where he questions "whether international justice, with its limited resources, should be concerning itself with what is only negligent behavior").

B. Teleological Approach

A separate crime interpretation of CR is moreover warranted under a teleological reading of the Rome Statute. Pursuant to Article 2 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), which is customary international law, the Rome Statute is a treaty and its interpretation is governed by the rules of treaty interpretation.[166] Article 31(1) of the Vienna Convention provides that treaty provisions "shall" be interpreted in "light of [the treaty's] object and purpose."[167] Article 31(2) explains that the object and purposes of a treaty can be determined by, *inter alia*, looking at the preamble of the treaty.[168] Explicit language providing for defendants' rights and the guarantee of fair trial procedures are conspicuously absent from the preamble of the Rome Statute. However, they are incorporated implicitly. The Rome Statute "reaffirms" the principles and purposes of the United Nations Charter.[169] Human rights are a core precept of the UN Charter; due process rights, a liberal interpretation of criminal law, and fundamental fairness are surely part of human rights.[170] O'Reilly rightly concludes "respect for human dignity under the law requires a certain level of individualized fault before criminalization and punishment are appropriate. In those instances in which superiors are held liable for negligently failing to prevent or punish crimes of subordinates, the doctrine of command responsibility offends this basic tenet."[171]

As the ICTY Appeals Chamber stated in *Tadić*, "[t]he basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally

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166. Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (" '[t]reaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"); *see also* Gabčikovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 4 (Sept. 25) (where the ICJ applied the Vienna Convention to the dispute, even though neither state party was a member of the convention, because the convention reflects customary international law); *see also Frequently Asked Questions About Vienna Convention on Law of Treaties*, U.S. DEP'T OF STATE, *available at* http://www.state.gov/s/l/treaty/faqs/70139.htm.

167. VCLT, *supra* note 166, art. 31(1).

168. *Id.* art. 31(2).

169. Rome Statute, *supra* note 19, pmbl. para. 7.

170. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 441 (July 8) (Weeramantry, J., dissenting); LARRY MAY, GLOBAL JUSTICE AND DUE PROCESS (Cambridge Univ. Press 2011).

171. Arthur Thomas O'Reilly, *Command Responsibility: A Call to Realign the Doctrine with Principles*, 20 AM. U. INT'L L. REV. 71, 101 (2004) (*quoted in* Sepinwall, *supra* note 66, at 301 n.252).

responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)."[172] After all, "[i]n virtually all national legal systems the fundamental principle applies that criminal liability is based on personal guilt."[173] The separate crime theory comports with these notions; CR as a mode of liability, however, is liability based on someone else's personal guilt. Under a mode of liability approach, there is insufficient connectivity between the commander's behavior and his criminal responsibility. At least obliquely, the Rome Statute does indirectly incorporate fundamental principles of fairness as a governing principle of the Rome Statute. Since the Rome Statute is a treaty, it must be interpreted in light of its principles and purposes (*i.e.*, with promoting human rights not only of victims), but of defendants as well. A mode of liability approach offends human rights and due process; a separate crime theory does not.

Further, the Preamble of the Rome Statute states that the States Parties to the Rome Statute established the ICC because they were "[r]esolved to guarantee lasting respect for the enforcement of international justice."[174] The moral philosopher John Rawls has explained that justice must be understood as "fairness."[175] CR as a mode of liability is not fair in that it offends the retributive sense of justice—that the punishment is just when it is deserved—because the punishment does not fit the crime.[176] To turn "a commander into a murderer, a rapist or a *génocidaire* because he failed to keep properly informed seems excessive, inappropriate and plainly unfair."[177] There is no "moral link between punishment and guilt," under a mode of liability approach to CR.[178] The commander's guilt is negligence and his punishment must be for negligence (breach of duty, failure of supervision, etc.), not for intentional criminal activity. The commander does not receive his just deserts, but those belonging to someone else.[179] The

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172. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgment, ¶ 186 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); *see also* VAN SLIEDREGT, CRIMINAL RESPONSIBILITY, *supra* note 49, at 17-21 (discussing the philosophical and cultural origins of the principle of individual responsibility and the trend in broadening of the scope of criminal responsibility).

173. OXFORD COMPANION, *supra* note 6, at 89.

174. Rome Statute, *supra* note 19, pmbl. para. 11.

175. BANKS, CRIMINAL JUSTICE ETHICS: THEORY AND PRACTICE 349 (2d ed. 2009) (citing JOHN RAWLS, A THEORY OF JUSTICE 12 (1971)).

176. *Id.* at 142.

177. METTRAUX, *supra* note 11, at 211.

178. BANKS, *supra* note 175, at 142 (citing PHILIP BEAN, PUNISHMENT: A PHILOSOPHICAL AND CRIMINOLOGICAL INQUIRY 14-15 (Oxford, 1981).

179. *Id.* at 146-49 (discussing the theory of just deserts).

most frequently advanced rational for CR is the special need for deterrence in international criminal justice, but superimposing modes of liability onto omissions without knowledge does not comport with utilitarian notions of punishment like deterrence.[180] Deterrence rests on the presumption that individuals will refrain from acting a certain way because they fear the consequences of those actions. But deterrence does not work to stop someone from acting that has not acted, and it will not deter individuals from inaction when they were not aware there was a need to act. Utilitarian philosophers like Jeremy Bentham reasoned that if punishment does not deter future crime, it simply adds to the aggregate suffering of society.[181] It is hard to see how anyone is better off when a commander that is merely negligent is punished as if he were amongst the ranks of war criminals and *génocidaires.* The separate crime theory, however, comports with the retributive theory of justice and the implicit demand of the Preamble of the Rome Statute to mete out justice in a fair manner. One might retort that the Preamble of the Rome Statute also states that it is being established "to put an end to impunity for the perpetrators of these crimes . . . ."[182] Besides the obvious problem that the commander under omission liability is not the perpetrator of a crime, Trechsel notes this argument is "a mere tautology, a circular argument; the purpose of punishment, of course, is to punish."[183]

C. Nullum Crimen Sine Lege

Robinson argues that punishing CR based on omissions as a separate offence would "solve the culpability problem," but "at the price of an even more disconcerting legality problem."[184] *Nullum crimen sine lege*, or the principle of legality, is a foundational principle of international justice, which guarantees adequate notice to individuals that certain conduct may result in penal sanction.[185] The principle of legality will not bar the Court from adopting a separate crime theory because the principle exists exclusively for the benefit of defendants. It cannot be used to tether them to someone else's crimes. Even if commanders are

180. *See* Damaška, *supra* note 17, at 471.

181. *See* BANKS, *supra* note 175, at 139 (discussing Bentham) (internal citation removed).

182. Rome Statute, *supra* note 19, pmbl. para. 5.

183. Trechsel, *supra* note 64, at 33.

184. Robinson, *supra* note 63, at 30.

185. *See* SLYE AND VAN SCHAACK, *supra* note 7, at 85.

given the same period of detention under a "separate crime" approach as they would be under the "mode of liability" one, the stigmatic branding is lesser under the former and a separate crime approach is therefore beneficial to the defendant (being adjudicated a negligent supervisor is surely less caustic than as a war criminal). The only uncertainty is the nature of the criminal responsibility. There is no question that the commander's omission is going to lead to criminal responsibility. Therefore, the legality principle is satisfied. If anything, *nullum crimen sine lege* militates in favor of construing CR as a distinct crime. As Schabas notes, "the canon of strict construction of penal law is a corollary of the principle of legality. Ambiguity or doubt is to be resolved in favour of the accused: *in dubio pro reo*."[186] Article 22(2) of the Rome Statute demands that "ambiguity . . . shall be interpreted in favour of the person being investigated, prosecuted or convicted."[187] The judges at the ICC will be bound by this provision when they interpret Article 28 and the nature of command responsibility.

Academics who have examined Article 28 have come to dramatically opposed understandings of the provision, suggesting at best the provision is ambiguous.[188] Cherif Bassiouni, for example, writes conclusively "an accused under the command responsibility doctrine will be held individually criminally liable for participation in war crimes, crimes against humanity, genocide, or for command over individuals who committed such crimes, and not for a lesser offense, such as dereliction of duty."[189] Conversely, Ambos who has also contributed to a well-regarded commentary on the Rome Statute, reasons that CR under Article 28 is:

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186. SCHABAS, *supra* note 17, at 410 (referring to Rome Statute, *supra* note 20, art. 22(2)).

187. Rome Statute, *supra* note 19, art. 22(2); *see* Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision on Confirmation of Charges, ¶ 369 (June 15, 2009); *see also* OBSERVERS' NOTES, *supra* note 13, at 410 (noting that Pre-Trial Chamber II used this canon of interpretation in *Bemba Gombo*, when it construed Article 30's *dolus eventualis* (recklessness) exclusion).

188. *See, e.g.*, METTRAUX, *supra* note 11, at 80 ("Under international law, a conviction based on superior responsibility does not lead to a conviction for 'dereliction of duty' or for any particular category of misprision. Instead, liability pursuant to that doctrine is incurred in relation to the actual criminal offence which subordinates have committed and which the superior has failed to prevent or failed to punish.") (internal citations removed); Karnavas, *supra* note 44, at 138 ("[C]ommand responsibility is not itself a crime but merely a mode of liability."); OBERVERS' NOTES, *supra* note 12, at 823 ("[C]ommand responsibility [in the Rome Statute] is an additional, inherent responsibility 'for crimes within the jurisdiction of the court', and not for a *crimen sui generis*.").

189. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW: SECOND REVISED EDITION 361 (2013).

> [A] separate crime of omission that consists, on an *objective* level, of the superior's failure properly to supervise subordinates. The underlying crimes of the subordinates are neither an element of the offence nor a purely objective condition of the superior's punishability. Rather, they constitute the point of reference of the superior's failure of supervision . . . .[190]

Van Sliedregt suggests the Rome Statute "presents superior responsibility as a mode of liability but also leaves room for a 'separate offense interpretation.' "[191] Cassese too splits the difference and argues that commanders who know or have reason to know that subordinates are about to or are committing grave crimes and fail to stop them should be legally treated as direct participants in the crime.[192] But when the commander fails to punish, Cassese advocates for the application of a separate crime.[193]

The unexacting language of Article 28, guarantees that reasonable people—like the above mentioned commentators—can and will interpret the provision to mean dramatically different things. Some will come to the conclusion that Article 28 provides for imputed responsibility for the predicate crimes, and others will conclude the article provides for a distinct crime based on the commander's breach of the duty of supervision. Pursuant to *in dubio pro reo,* when reasonable people disagree in equal measure on the interpretation of a criminal provision, the interpretation that most favours the defendant must prevail. The drafters of the Rome Statute could have provided for CR as a mode of liability in clear language, similar to that put forth by a UN Commission of Experts four years prior.[194] The fact that they did not suggests they left open the possibility of a separate offence. *In dubio pro reo*

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190. Ambos, *supra* note 7, at 851 (internal citations removed).

191. Van Sliedregt, *Article 28, supra* note 37, at 431.

192. CASSESE, *supra* note 13, at 191.

193. *Id.*

194. *See* U.N. Secretary-General, Letter dated May 24, 1994 from the Secretary-General addressed to the President of the Security Council, ¶ 52, U.N. Doc. S/1994/674 (May 27, 1994). *See* UN Comm'n of Experts Est. pursuant to S.C. Res. 780 (1992). In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the Commission of Experts wrote "[s]uperiors are . . . individually responsible for a war crime or crime against humanity committed by a subordinate if they knew, or had information which should have enabled them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such an act and they did not take all feasible measures within their power to prevent or repress the act." In the same report, the Commission of Experts rejected the negligence standard for command responsibility.

and the requirements of Article 22(2) weigh in favour of the ICC adopting the separate crime interpretation of CR.[195]

IV. CONCLUSION

Some proponents have been candid in advocating for CR as a mode of liability based on their understanding that the separate crime theory would result in lenient sentences, as was the case in *Prosecutor v. Orić,* (following the *Halilović* line of cases), where the defendant was sentenced to only two years.[196] But there is nothing that sets in stone lenient sentences for commanders convicted of the separate crime. Yamashita, after all, was convicted for a dereliction of duty and was given the ultimate punishment.[197] The concerns regarding sentencing are valid, but this is an issue correctly addressed through legislation to provide for appropriate sentences for breach of duty. It is inappropriate to advocate for bad legal reasoning in order to arrive at one's desired sentencing outcome.

The ICC should interpret CR in the Rome Statute as a separate crime. There is enough textual support to allow the Court to do so in good faith. Ultimately, the Court must choose between such a reading of Article 28 and an irrational, unfair application of the Rome Statute. Choosing the mode of liability route means that the Court will either have to muddy the heightened *mens rea* of specific intent crimes, or they will have to refrain from an application of CR for genocide and other specific intent crimes all together. The separate crime theory of CR comports with traditional notions of justice, personal accountability for wrongdoing, and theories of punishment such as deterrence. An application of the mode of liability framework for CR saps the Court of its moral authority in its formative period. Support for the mode of liability approach for CR is no doubt driven in part to ensure someone is held accountable for atrocities. This is understandable, but just because the commander who has omitted to act (when he did not know there was a reason to) may be the easiest person to convict, or may be the most high profile individual available for punishment, does not mean they are the

195. *See* OBSERVERS' NOTES, *supra* note 12, at 808 ("In case this principle [of ambiguity] is applicable, does not the notion of article 28 deserve priority, not only as *lex posterior,* but because its application requires prove[sic] of more elements and, thus, is more favourable to the suspect?").

196. *See* Sepinwall, *supra* note 66, at 270 (discussing the case and suggesting that if Orić had been convicted under a mode of liability instead, he could have faced up to eighteen years in prison); *see also,* Meloni, *supra* note 6, at 620-21, 632.

197. *See* CASSESE, *supra* note 13, at 183.

right person to answer for atrocities. In such a situation the commander is culpable and should be punished, by way of pretending that he committed the crimes himself. An outcome that Judge Shahabuddeen pointed out in *Orić*, "is both untrue in fact and erroneous in law."[198] Commanders should be held responsible for their omissions, but that responsibility should reflect their level of culpability, not the level of culpability of someone else.

198. Prosecutor v. Orić, Case No. IT-03-68-A, Judgement, ¶ 24 (Int'l Crim.Trib. for the Former Yugoslavia July 3, 2008) (Declaration of J. Shahabuddeen).