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PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Presiding Judge**
Judge Hans-Peter Kaul
Judge Fumiko Saiga

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO

Public Document

AMICUS CURIAE OBSERVATIONS ON SUPERIOR RESPONSIBILITY SUBMITTED PURSUANT TO RULE 103 OF THE RULES OF PROCEDURE AND EVIDENCE

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I. INTRODUCTION

1. The effective exercise of command is an essential tool in ensuring that crimes under international law are prevented and, if they nonetheless occur, are punished: "Since commanders are the critical path to enabling [an] organization to fight collectively they – logically – must be the critical path to controlling and focusing the violence which they alone are responsible for releasing onto the battlefield."[1] The application and interpretation of the doctrine of superior responsibility is thus of paramount importance to military commanders and other superiors;[2] to those who can be affected by such superiors' exercise, or failure to exercise, their command or authority appropriately; and to the international community as a whole.

2. This case presents the International Criminal Court (the "Court") with its first opportunity to analyse the scope and content of the doctrine of superior responsibility under Article 28 of the Rome Statute (the "Statute"). It raises specific questions that could have a significant effect on the manner in which the doctrine is understood and implemented worldwide. In light of these considerations, on 6 April 2009, Amnesty International sought leave from the Pre-Trial Chamber, under Rule 103(1) of the Rules of Procedure and Evidence, to submit observations as *amicus curiae* on certain issues related to superior responsibility.[3] Pursuant to the decision dated 9 April 2009 granting this application,[4] Amnesty International hereby submits observations on: (*i*) the mental element applicable to military commanders absent actual knowledge; (*ii*) criminal responsibility for the failure to submit a matter to

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[1] Michael A. Newton and Casey Kuhlman, *Why Warlords Evade the Law of Command Responsibility: A Plea for a More Appropriate Conception of Effective Control* at 48 (draft article pending publication, on file with *amicus curiae*). Michael Newton is Professor of the Practice of Law at Vanderbilt University Law School. He is a retired military attorney, and was a member of the U.S. delegation that negotiated the Elements of Crimes, which assist the Court in the interpretation and application of the crimes within its jurisdiction.

[2] Unless otherwise specified, the terms "superior(s)" and "superior responsibility" refer to both military and civilian superiors, while the term "commander(s)" refers only to military superiors.

[3] Application For Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 6 April 2009, ICC-01/05-01/08-399.

[4] Decision on Application for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 9 April 2009, ICC-01/05-01/08-401.

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competent authorities as applied to non-state actors; and (*iii*) whether causation is an element of superior responsibility.[5]

II. MENTAL ELEMENT APPLICABLE TO MILITARY COMMANDERS ABSENT ACTUAL KNOWLEDGE

3. The mental states sufficient to ground criminal responsibility for military commanders under Article 28(a)(i) represent an express and intended policy choice of the drafters of the Statute to strengthen commanders' obligations beyond those under customary international law. As explained below, absent actual knowledge,[6] customary international law imposes criminal responsibility on a superior only if he or she is on notice of subordinates' crimes, while Article 28(a)(i) extends criminal responsibility to a military commander who "should have known" of subordinates' crimes. Consequently, Article 28(a)(i) replaces the passive notice standard under customary international law with a more active duty to take steps that will allow commanders to know of crimes committed by their subordinates.

A. Customary International Law Imposes Criminal Responsibility If a Superior is on Notice of Crimes, But Does Not Impose an Active Duty to Seek Information

4. International legal instruments codifying the doctrine of superior responsibility recognise both actual knowledge and constructive knowledge as satisfying the mental element requirement of this form of responsibility and, for the latter, articulate a notice standard. Article 86(2) of Additional Protocol I to the Geneva Conventions of 1949 ("Additional Protocol I") – the first comprehensive codification of the superior responsibility doctrine – provides that superiors are not absolved of responsibility "if they knew, or had information which should have

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5 Amnesty International wishes to thank the international law experts who provided advice during the drafting of this brief, including Charles Garraway (in his personal capacity), Michael A. Newton and Patricia Viseur-Sellers.

6 Both Article 28 and customary international law impose criminal responsibility on superiors for the crimes of their subordinates where the superior had actual knowledge of the crime. *See Prosecutor v. Delalić, Mucić, Delić, and Landžo*, Case No. IT-96-21-T, Judgment, 16 Nov. 1998 ("*Čelebići* Trial Judgment"), ¶ 383; *Prosecutor v. Mucić, Delić, and Landžo*, Case No. IT-96-21-A, Judgment, 20 Feb. 2001 ("*Čelebići* Appeal Judgment"), ¶¶ 222, 239; *Prosecutor v. Sesay, Kallon, and Gbao*, Case No. SCSL-04-15-T, Judgment, 2 Mar. 2009 ("*RUF* Trial Judgment"), ¶¶ 282, 309.

enabled them to conclude in the circumstances at the time" that a subordinate was committing or going to commit a breach of the Geneva Conventions or Additional Protocol I.[7] Similarly, draft Article 6 of the International Law Commission's ("ILC") Draft Code of Crimes against the Peace and Security of Mankind provides that superiors are not relieved of responsibility "if they knew or had reason to know, in the circumstances at the time" that a subordinate was committing or was going to commit a crime.[8] The statutes of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the Special Court for Sierra Leone ("SCSL") each provide that a superior is not relieved of criminal responsibility "if [he] knew or had reason to know" of the subordinate's crimes.[9] The study by the International Committee of the Red Cross (ICRC) also states that as a matter of customary international law, the mental element for superior responsibility is knowledge or "reason to know."[10]

5. Despite earlier case law suggesting a positive obligation on military commanders to obtain information irrespective of notice,[11] contemporary international criminal tribunals have limited constructive knowledge to a more

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[7] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 86(2), 1125 U.N.T.S. 3, *entered into force* 7 Dec. 1978 ("Additional Protocol I").

[8] Draft Code of Crimes Against the Peace and Security of Mankind, Art. 6, *in* Report of the International Law Commission on the Work of Its Forty-eighth Session, UN Doc. A/51/10 (1996) ("ILC Draft Code"). The ILC Draft Code seeks to codify international crimes pursuant to G.A. Res. 174 (II) (21 Nov. 1947).

[9] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, (1993) 32 ILM 1159, as amended by Security Council Resolution 1660 of 28 Feb. 2006 ("ICTY Statute"), Art. 7(3); Statute of the International Criminal Tribunal for Rwanda, (1994) 33 ILM 1602, as amended by Security Council Resolution 1534 of 26 Mar. 2004 ("ICTR Statute"), Art. 6(3); Statute of the Special Court for Sierra Leone, 2178 UNTS 138, U.N. Doc. S/2002/246, 16 Jan. 2002, Appendix II ("SCSL Statute"), Art. 6(3). These provisions have been held to reflect customary international law. *See Čelebići* Appeal Judgment, *supra* note 6, ¶ 241; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, 7 June 2001 ("Bagilishema Trial Judgement"), ¶ 37.

[10] Jean-Marie Henckaerts and Louise Doswald-Beck, International Committee of the Red Cross, *Customary International Humanitarian Law*, Vol. I (Rules) 558, r 153 (2005) ("*ICRC Study*").

[11] *See Trial of Wilhelm List and Others* (Case No. 47), United Nations War Crimes Commission, Law Reports of Trials of War Criminals (1949), Vol. VIII, p. 71 ("If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence.").

restrictive notice standard. In the *Čelebići* case, the Appeals Chamber of the ICTY considered the duties imposed on superiors under customary international law in the course of its interpretation and application of Article 7(3).[12] It held that it was consistent with customary international law for a superior to be found criminally responsible, in the absence of actual knowledge, "only if information was available to him which would have put him on notice of offences committed by subordinates."[13] It reached this conclusion after considering the instruments codifying the doctrine of superior responsibility referred to above, as well as the post-World War II jurisprudence on superior responsibility and the Field Manual of the United States Department of the Army.[14] Subsequent judgments at the ICTY, the ICTR, and the SCSL have consistently adopted and applied the *Čelebići* standard.[15]

6. The *ad hoc* tribunals have found that, under customary international law, a superior has no general duty to actively seek and obtain information about his or her subordinates' possible criminal conduct.[16] The tribunals have thus refused to recognise superior responsibility where a superior has merely been negligent in failing to acquire knowledge of his or her subordinates' criminal conduct.[17]

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12 *Čelebići* Appeal Judgment, *supra* note 6, ¶¶ 221, 228-39.

13 *Ibid*, ¶ 241.

14 *Ibid*, ¶¶ 228-39.

15 *See, e.g.*, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004 ("*Blaškić* Appeal Judgment"), ¶ 62; *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment, 17 July 2008 ("*Strugar* Appeal Judgment"), ¶¶ 297-98; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Judgment, 3 July 2002 ("*Bagilishema* Appeal Judgment"), ¶ 42; *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Judgment, 2 Aug. 2007 ("*CDF* Trial Judgment"), ¶ 233.

16 *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Judgment, 26 Feb. 2001 ("*Kordić and Čerkez* Trial Judgment"), ¶ 435 (there is no general duty to know in customary international law for either military or civilian superiors); *RUF* Trial Judgment, *supra* note 6, ¶ 312 ("[A] superior cannot be held liable for having failed in his duty to obtain such information in the first place.").

17 *Čelebići* Appeal Judgment, *supra* note 6, ¶ 226 (finding no liability under customary international law for failing to acquire knowledge about the criminal acts of subordinates); *Bagilishema* Appeal Judgment, *supra* note 15, ¶¶ 32-37 (finding that "the test for criminal negligence as advanced by the Trial Chamber cannot be the same as the 'had reason to know' test in terms of Article 6(3) of the Statute"); *Blaškić* Appeal Judgment, *supra* note 15, ¶¶ 61-63 (rejecting criminal negligence standard); *Prosecutor v. Brima, Kamara, and Kanu*, Case No. SCSL-04-16-T, Judgment, 20 June 2007, ¶ 796 ("[S]olely negligent ignorance is insufficient to attribute imputed knowledge."); *CDF* Trial Judgment, *supra* note 15, ¶ 245 (a superior may not be held liable for failing to acquire information in the first place).

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B. Article 28 Departs from Customary International Law By Incorporating a Negligence Standard for Military Commanders

7. In pointed contrast to customary international law as reflected in the jurisprudence of the *ad hoc* tribunals, Article 28(a)(i) imposes criminal responsibility on a military commander if he or she "should have known that the forces were committing or about to commit such crimes." Article 28(a)(i) must be interpreted in accordance with the ordinary meaning of its terms in context and in light of the object and purpose of the Statute.[18] The ordinary meaning of the phrase "should have known" is not restricted to circumstances where a commander is on notice, because it indicates an unmet obligation to obtain information.

8. Furthermore, an explicit object of the Statute is to "contribute to the prevention of [serious international] crimes."[19] Because of their position and powers, military commanders are uniquely placed to prevent crimes. If commanders are subject to active obligations to ensure they remain informed of the conduct of their subordinates, there is a greater likelihood that they will prevent future crimes or repress them more swiftly.[20] The notice standard assumes – without expressly saying – that command and control structures are in place that will ensure information reaches the superiors. In contrast, the "should have known" standard impels commanders to ensure that such mechanisms are in fact in place and are functioning correctly. Accordingly, it furthers the object and purpose of the Statute to interpret Article 28(a)(i) as imposing more heightened duties upon commanders to keep

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[18] Vienna Convention on the Law of Treaties, 23 May 1969, *entered into force* 27 Jan. 1980, U.N. Doc. A/Conf.39/27 (1969), 1155 U.N.T.S. 331 ("VCLT"), Art. 31; *Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ¶ 33 ("The interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of articles 31 and 32.").

[19] Rome Statute of the International Criminal Court, 17 July 1998, *entered into force* 1 July 2002, U.N. Doc. A/CONF.183/9, 37 ILM 1002 (1998), 2187 UNTS 90 ("Statute"), preamble.

[20] *See* Newton and Kuhlman, *supra* note 1, at 48 ("[I]nternational law entrusts commanders as the primary enforcement mechanism for the laws and customs of war," so "any commander in any conflict under any form of organization who fields a fighting force assumes the risk of criminality if he does not properly emplace mechanisms to ensure compliance with the laws and customs of warfare.").

informed of the activities of their subordinates.

9. For these reasons, Article 28(a)(i), properly interpreted, covers circumstances of notice, but also extends superior responsibility to a category of cases not criminalised by customary international law – where a commander's absence of knowledge is due to his or her failings in keeping informed of the conduct of subordinates.[21] Indeed, not less than a year after the adoption of the Statute, the ICTR noted the imposition by way of Article 28 of "a more active duty upon the [military] superior to inform himself of the activities of his subordinates."[22] In short, Article 28(a)(i) imposes criminal responsibility for a form of negligence.

10. The *travaux préparatoires* confirm this interpretation.[23] Despite the use of the "had reason to know" standard in the statutes of the ICTY and ICTR, early drafts of the Statute incorporated a "should have known" standard for all superiors.[24] As a result of concerns over applying the "should have known" standard to civilian superiors, the delegation of the United States to the Rome Conference proposed an amendment providing for differentiated mental standards for military and civilian superiors. In introducing its proposal, the representative of the United States stated that "[a]n important feature in military command responsibility and one that was unique in a criminal context was the existence of negligence as a criterion of criminal responsibility."[25] The United States representative stated that the "negligence standard was not appropriate in a civilian context and was basically contrary to the

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[21] *See* Kai Ambos, "Superior Responsibility," *in* 1 *The Rome Statute of the International Criminal Court: A Commentary* 823, 869 (Antonio Cassese *et al.* eds., 2003) (concluding that superiors are "responsible for . . . effective reporting system[s] within [their] command"); William J. Fenrick, "Article 28: Responsibility of Commanders and Other Superiors," *in Commentary on the Rome Statute of the International Criminal Court* 515, 519 (Otto Triffterer ed., 1999).

[22] *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999, ¶ 227.

[23] VCLT, *supra* note 18, Art. 32.

[24] *See*, *e.g.*, Preparatory Comm. on the Establishment of an Int'l. Crim. Ct., Working Group on Gen. Principles of Crim. Law and Penalties, *Chairman's Text, Article C: Command Responsibility*, A/AC.249/1997/WG.2/CRP.3 (18 Feb. 1997).

[25] U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Crim. Ct., *Summary Records of the 1st Meeting of the Committee of the Whole*, U.N. Doc. A/CONF.183/C.1/SR.1 (20 Nov. 1998) ("Rome Conference Summary Records"), ¶ 67.

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usual principles of criminal law responsibility."[26] However, the negligence standard for a military commander "appeared to be justified by the fact that he was in charge of an inherently lethal force."[27] There was widespread support for the proposal, and no delegation took issue with the United States's characterisation of the "should have known" standard as a negligence standard.[28] The drafters therefore deliberately departed from the "had reason to know" formulation of the statutes of the *ad hoc* tribunals, and intentionally incorporated a negligence standard for the mental element of superior responsibility for military commanders.

11. A negligence standard does not impose strict liability on commanders for the crimes of their subordinates. A commander that has taken sufficient steps to guarantee his or her knowledge but, notwithstanding these steps, did not learn of crimes, should not be convicted. These steps would include instititing an effective and efficient reporting system that ensures information about the conduct of subordinates is conveyed to the superior promptly and accurately. Ultimately, the specific steps that a reasonable commander must take will necessarily depend on the circumstances of a case. Therefore, Amnesty International does not attempt to propose in this brief the detailed criteria for determining what level and forms of negligence by a military commander are captured by Article 28(a)(i). However, the organisation may seek on another occasion to assist the Court in developing the specific detail of these more active duties as it applies the Article 28(a)(i) standard.

C. Circumstances Satisfying The "Had Reason To Know" Standard

12. Although customary international law imposes a different mental element standard for superior responsibility than Article 28(a)(i), the jurisprudence of international criminal tribunals applying that standard is nonetheless instructive. As Article 28(a)(i) extends the obligations imposed upon commanders, the types of circumstances that satisfy the customary international law standard will also satisfy

[26] Ibid, ¶ 68.
[27] Ibid, ¶ 67.
[28] Ibid, ¶¶ 69-82.

the requirements of Article 28(a)(i).

13. Under the "had reason to know" standard, information putting a superior on notice need not be specific.[29] In addition, it need not compel the conclusion of the commission of crimes.[30] It need only be "sufficiently alarming" to "justify further inquiry,"[31] or "sufficiently alarming" to put a superior on notice "of the risk that crimes might subsequently be carried out by his subordinates."[32] In addition, a superior may not remain willfully blind to information that is available to him or her.[33]

14. The jurisprudence indicates that a superior's knowledge of past crimes committed by subordinates that have gone unpunished may put him or her on notice of the risk of future crimes. The ICTY Appeals Chamber has made the following statement in a number of cases, which has been explicitly endorsed by the SCSL:

> [W]hile a superior's knowledge of and failure to punish his subordinates' past offences is insufficient, in itself, to conclude that the superior knew that similar future offences would be committed by the same group of subordinates, this may, depending on the circumstances of the case, nevertheless constitute sufficiently alarming information to justify further inquiry. . . . [34]

15. In *Strugar*, the ICTY Appeals Chamber, applying the more restrictive customary international law standard, rejected the Prosecution's submission that "notice of prior commission of crimes is, *per se*, notice of an unacceptable risk of

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[29] *Čelebići* Appeal Judgment, *supra* note 6, ¶ 238; *Bagilishema* Appeal Judgement, *supra* note 15, ¶ 42; *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Judgment, 26 Feb. 2009, ¶ 120.

[30] *Čelebići* Trial Judgment, *supra* note 6, ¶ 393; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, 31 Jan. 2005 ("*Strugar* Trial Judgment"), ¶ 369; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment, 30 Nov. 2005 ("*Limaj* Trial Judgment"), ¶ 525.

[31] *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Judgment, 22 Apr. 2008 ("*Hadžihasanović and Kubura* Appeal Judgment"), ¶ 28; see also *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, 17 Sept. 2003 ("*Krnojelac* Appeal Judgment"), ¶ 59.

[32] *Strugar* Appeal Judgment, *supra* note 15, ¶ 304.

[33] *Prosecutor v. Halilović*, Case No. IT-01-48-T, Judgment, 16 Nov. 2005 ("*Halilović* Trial Judgment"), ¶ 69 (citing *Čelebići* Trial Judgment, *supra* note 6, ¶ 387).

[34] *Strugar* Appeal Judgment, *supra* note 15, ¶ 301; *Hadžihasanović and Kubura* Appeal Judgment, *supra* note 31, ¶ 30; *Krnojelac* Appeal Judgment, *supra* note 31, ¶ 169; *RUF* Trial Judgment, *supra* note 6, ¶ 311.

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similar future crimes."[35] Nonetheless, it stressed that where a superior fails to punish crimes of which he or she has actual knowledge, this is likely to increase the risk of new crimes being committed.[36] Strugar's convictions arose out of the shelling of the Old Town of Dubrovnik. On the specific facts of the case, Strugar was found to have ordered the attack on Srđ (a position above Dubrovnik), and to have known that (*i*) previous military action in the area involved unauthorized shelling of the Old Town of Dubrovnik, (*ii*) his subordinates' had substantial artillery capacity, (*iii*) existing orders prohibiting the shelling of the Old Town had not proved effective, and (*iv*) there had been no punishment of previous acts of shelling of the Old Town.[37] In light of these facts, the Appeals Chamber found that the Accused "was alerted of the risk that similar acts of unlawful shelling [like those that had occurred previously] of the Old Town might be committed by his subordinates."[38]

16. In determining whether a superior has "reason to know," the jurisprudence indicates that the information the superior has must be viewed as a whole. In *Krnojelac*, the ICTY Appeals Chamber overturned the Trial Chamber's finding that there was not sufficient evidence that the Accused (a prison warden) knew, or had reason to know, that detainees were being tortured.[39] The Appeals Chamber found that the evidence, taken as a whole, was sufficiently alarming to put the Accused on notice of the risk that torture was, or would be, carried out. This evidence included proof that individuals were detained because of their ethnicity; Krnojelac's knowledge that Muslim detainees were being beaten and mistreated, because it was apparent physically and he had personally witnessed a beating; his witnessing detainees being told they would be punished as a result of an escape; and his supervisory role, which involved going to the prison every day of the working week. Similarly, with respect to murders that took place at the prison, the facts, "taken as a

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[35] *Strugar* Appeal Judgment, *supra* note 15, ¶ 286.
[36] Ibid, ¶ 301.
[37] Ibid, ¶ 305.
[38] Ibid, ¶ 306.
[39] *Krnojelac* Appeal Judgment, *supra* note 31, ¶ 169.

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whole" were found to constitute alarming information which should have prompted the Accused to open an investigation.[40]

17. ICTY judgments have cited with approval the factors identified in the ICRC Commentary to Article 86(2) of Additional Protocol I as information placing a superior on notice.[41] These factors include reports addressed to the superior, the tactical situation, the level of training and instruction of subordinate officers and their troops (including on international humanitarian law), and their character traits.[42] ICTY Chambers have also cited the indicia identified by the United Nations Commission of Experts in its Final Report[43] on the armed conflict in former Yugoslavia.[44] These indicia include the number, type, and scope of the illegal acts[45] and the time during which they occurred;[46] the number and type of troops involved;[47] the logistics involved; the geographical location[48] and the widespread occurrence of the acts; the tactical tempo of operations; the *modus operandi* of similar illegal acts; the officers and staff involved;[49] and the location of the commander at the time.[50] Reports

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40 Ibid, ¶¶ 166, 167, 169, 170, 175.

41 *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Judgment, 15 Mar. 2006 ("*Hadžihasanović and Kubura* Trial Judgment"), ¶ 99; *Hadžihasanović and Kubura* Appeal Judgment, *supra* note 31, ¶ 28 n. 75.

42 Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ¶ 3545 (Yves Sandoz *et al.* eds., 1987) ("*ICRC Commentary on the Additional Protocols*").

43 Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, ¶ 58 (1992), annexed to U.N. Doc. S/1994/674 (27 May 1994) (listing all relevant indices).

44 *Čelebići* Trial Judgment, *supra* note 6, ¶ 386; *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment and Opinion, 5 Dec. 2003 ("*Galić* Trial Judgment"), ¶ 174; *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment, 30 Nov. 2006, ¶ 183.

45 *Čelebići* Trial Judgment, *supra* note 6, ¶ 770 (finding that crimes were "so frequent and notorious that there is no way that Mr. Muci[ć] could not have known or heard about them."); *RUF* Trial Judgment, *supra* note 6, ¶ 2148 (commission of crime of forced marriage was widespread in the relevant district and throughout the country; in these circumstances, commander had reason to know of the fighters who committed this crime in the relevant location).

46 *Čelebići* Trial Judgment, *supra* note 6, ¶ 769 (determining that the accused's policy of absenting himself from the camp while the abuses were occurring "imputed knowledge" of the criminal actions of his subordinates); see also *Bagilishema* Appeal Judgment, *supra* note 15, ¶ 30.

47 *Blaškić* Appeal Judgment, *supra* note 15, ¶¶ 618 (imputing knowledge of mistreatment of detainees to an accused whose units were undermanned yet trenches continued to be dug).

48 *See Bagilishema* Appeal Judgment, *supra* note 15, ¶ 30.

49 *Čelebići* Trial Judgment, *supra* note 6, ¶ 770 (criminal tendencies of subordinate known to superior).

by international or human rights organizations, or by the media, may also be used to prove that a superior was on notice of the commission of crimes.[51]

III. DUTY TO SUBMIT THE MATTER TO COMPETENT AUTHORITIES FOR INVESTIGATION AND PROSECUTION

18. Under customary international law, superiors have a duty to ensure that subordinates are punished for their crimes.[52] This obligation applies to all superiors possessing the ability to affect the conduct of a subordinate, regardless of military or civilian status.[53] The specific actions required of a superior in order to discharge the duty to punish depend upon his or her *de jure* or *de facto* capabilities[54] and must be determined on a case-by-case basis.[55] Consequently, if a superior does not have the legal authority to punish a subordinate for the crime, he or she must submit the matter to an authority competent to do so.[56]

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[50] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, ¶ 58 (1992), annexed to U.N. Doc. S/1994/674 (27 May 1994) (listing all relevant factors).

[51] *Blaškić* Appeal Judgment, *supra* note 15, ¶ 618 (including as one of six factors establishing constructive knowledge that "(v) the practice was widely known to and reported by *inter alia* the ICRC, the ECMM, and UNPROFOR representatives;" (citations omitted)); *Galić* Trial Judgment, *supra* note 44, ¶ 704 (finding "in view of the circumstances which prevailed during the conflict, the notoriety of certain of the incidents scheduled in the Indictment and the systematic character of these criminal acts which extended over a prolonged period of time, in conjunction with the media coverage of which the SRK Corps command was aware, renders the Accused's professed ignorance untenable.").

[52] *See Strugar* Trial Judgment, *supra* note 30, ¶ 357 ("The principle of individual criminal responsibility of superiors for failure to prevent or to punish crimes committed by subordinates is an established principle of international criminal law . . . ."); *accord Limaj* Trial Judgment, *supra* note 30, ¶ 519.

[53] *Čelebići* Trial Judgment, *supra* note 6, ¶ 377.

[54] *Blaškić* Appeal Judgment, *supra* note 15, ¶ 417 ("[The Appeals Chamber] generally concurs with the *Čelebići* Trial Chamber which held: '[i]t must, however, be recognised that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers.'" (quoting *Čelebići* Trial Judgment, *supra* note 6, ¶ 395)).

[55] *Blaškić* Appeal Judgment, *supra* note 15, ¶ 72; *see also Halilović* Trial Judgment, *supra* note 33, ¶ 74.

[56] *See*, *e.g.*, *ICRC Commentary on the Additional Protocols*, *supra* note 42, ¶ 3562 (observing that the obligations of a superior "at any level" include "proposing a sanction to a superior who has disciplinary power, or – in the case of someone who holds such power himself – exercising it, within the limits of his competence, and finally, remitting the case to the judicial authority where necessary with such factual evidence as it was possible to find"); *Limaj* Trial Judgment, *supra* note 30, ¶ 529 ("The obligation on the part of the superior is to take active steps to ensure that the perpetrators will be punished."); *Kordić and Čerkez* Trial Judgment, *supra* note 16, ¶ 446 ("The duty to punish includes at

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19. This understanding of the practical requirements of the duty to punish is reflected in Article 28 of the Statute. In response to concerns expressed during the drafting process that "civilian superiors, in particular, are not always themselves in a position to prosecute,"[57] Article 28 does not explicitly refer to an obligation to "punish" subordinates; instead, it invokes the superior's duty to submit a subordinate's crimes to the competent authorities for investigation and prosecution. The Statute thus recognises that, even if a superior does not possess the authority to investigate and punish crimes within the Court's jurisdiction, he or she must nevertheless take "all necessary and reasonable measures" to ensure that subordinates who commit such crimes do not escape penal sanction.[58]

20. In addition to this duty to submit, Article 28 also reflects the superior's independent obligations under international law to prevent and repress the criminal conduct of subordinates. Under the Statute and customary international law, the duties to prevent, repress, and submit apply to superiors affiliated with state and non-state groups.[59] As explained below, in applying Article 28 to superiors affiliated with non-state actors, the following principles should be observed: *(1)* superiors affiliated with non-state groups have a duty to submit matters involving international crimes committed by subordinates to competent state or international authorities for investigation and prosecution, and may not discharge this duty

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least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities.").

[57] Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* 204 (1999); *see also* Ambos, *supra* note 21, at 862 (explaining that the 'duty to submit' formulation "fills a gap in that it formulates a specific duty for those superiors who have themselves no disciplinary powers to 'repress' a crime.").

[58] Statute, Art. 28(a)(ii), (b)(iii); *see also* Roberta Arnold and Otto Triffterer, "Article 28: Responsibility of Commanders and Other Superiors," *in Commentary on the Rome Statute of the International Criminal Court* 795, 838 (Otto Triffterer ed., 2d ed. 2008) ("[W]here disciplinary measures appear to be insufficiently severe to punish the crime that has been committed – this shall always be the case with regard to the crimes outlawed by the ICC Statute – [the superior] shall submit the case to the competent authorities, who shall then delegate the case to the military justice.").

[59] *See* Statute, Art. 28(a)(ii), (b)(iii); *RUF* Trial Judgment, *supra* note 6, ¶ 648 & pp. 677-87 (convicting accused Sesay and Kallon on basis of superior responsibility for crimes committed by the Revolutionary United Front, described as "a guerrilla army and an irregular force").

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through internal disciplinary measures or prosecutions; and *(2)* submission of a matter to the competent authorities does not absolve a superior of responsibility for a prior failure to prevent or repress.

A. Superiors Affiliated With Non-State Groups Must Submit Reports of International Crimes Committed by Subordinates to Competent State or International Authorities

21. Under Article 28, superiors may be held criminally responsible if they fail to submit reports of subordinates' crimes to the competent authorities for the purposes of "investigation and prosecution."[60] The crimes within the Court's jurisdiction are "the most serious crimes of concern to the international community."[61] While the obligation to "repress" such crimes may include the application of appropriate disciplinary or remedial measures on the accused perpetrators, those measures cannot satisfy the independent obligation to initiate an investigative and prosecutorial process that can result in criminal sanction.[62]

22. The Statute requires the Chamber to interpret and apply the law in a manner "consistent with internationally recognized human rights."[63] Thus, in interpreting the term "competent authorities,"[64] the Chamber should have regard to international

[60] Statute, Art. 28(a)(ii), (b)(iii).

[61] *Id.*, preamble.

[62] *See, e.g., Hadžihasanović and Kubura* Trial Judgment, *supra* note 41, ¶ 1777 (concluding that a "disciplinary sanction of a period of detention not exceeding 60 days" for "crimes of murder and mistreatment of prisoners of war is not sufficient punishment of the perpetrators of those crimes"). *Cf.* Amnesty International, "International Law Commission: The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)," AI Index No. IOR 40/001/2009 (3 Feb. 2009) (discussing the obligation of states to either prosecute individuals responsible for, *inter alia*, war crimes, crimes against humanity, or genocide, or extradite them to competent authorities for prosecution).

[63] Statute, Art. 21(3).

[64] The drafting history does not address the meaning of "competent authorities." Rome Conference Summary Records, *supra* note 25, ¶¶ 67-83 (discussing superior responsibility, but omitting to address the meaning of "competent authorities"). None of the leading commentaries on the Rome Statute provide guidance as to the correct interpretation of "competent authorities." *See, e.g.*, Lee, *supra* note 57, at 202-204; Ambos, *supra* note 21, at 862; M. Cherif Bassiouni, *The Legislative History of the International Criminal Court* 210-214 (2005). However, this term echoes the requirement in Article 7(1) of the Convention against Torture to "submit the case to its competent authorities for the purpose of prosecution." Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 7(1), G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85, *entered into force* 26 June 1987. The terms of Article 28 make it clear that the authorities must be able to *investigate and prosecute* the subordinate.

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human rights law, which requires that individuals suspected of a crime be given "a fair and public hearing by a competent, independent and impartial tribunal established by law."[65] The term "established by law" is interpreted strictly to mean only by "a parliamentary statute or equivalent unwritten norm of common law."[66]

23. Superiors of non-state groups may face particular difficulties in submitting matters to the competent authorities. Submission by a superior of a matter for eventual trial by a judicial body of his or her own non-state group would not normally satisfy the duty to submit to "competent authorities," as such bodies are not established by parliamentary statute or an equivalent source of law,[67] and may fail to comply with fair trial principles. In fact, in the context of an armed conflict, trials that are not conducted "by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensible by civilized peoples," are considered a war crime.[68]

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65 International Covenant on Civil and Political Rights, Art. 14(1) , G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 Mar. 1976. *See also* American Convention on Human Rights, Art. 8, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* 18 July 1978; American Declaration of the Rights and Duties of Man, Art. XXVI, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(1), 213 U.N.T.S. 222, *entered into force* 3 Sept. 1953, *as amended by* Protocols Nos. 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively. *See generally* Amnesty International, "Fair Trials Manual," AI Index No.: POL 30/002/1998 (Dec. 1, 1998).

66 Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 319 (2005); *see also Zand v. Austria*, App. No. 7360/76, 15 Eur. Comm'n H.R. Dec. & Rep. 70, ¶ 69 (1979) (holding "the object and purpose of the clause in Art. 6(1) [is that] . . . the judicial organization . . . must not depend on the discretion of the Executive, but that it should be regulated by law emanating from Parliament."), *accord Coëme v. Belgium*, App. Nos. 32492/96 et al., Eur. Ct. H.R. Judgment of 22 June 2000, ¶ 98.

67 *See* Jonathan Somer, *Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict*, 89 Int'l Rev. of the Red Cross 655, 664-665 (2007) ("To the extent that the "regularly constituted" requirement of IHL incorporates the "established by law" criterion as understood by human rights law, an armed opposition group may be barred from passing sentences."). In some rare cases, however, the rebel group may be able to satisfy these requirements. For example, the rebels had a state and local court system during the American Civil War. *See* Charles E. George, "The Supreme Court of the Confederate States of America," 6 *Virg. L. Reg. n.s.* 592, 599 (1920-1921).

68 *See* Statute, Art. 8(2)(c)(iv) (establishing jurisdiction over serious violations of Common Article 3, including the prohibition in Common Article 3(1)(d)of "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all

24. Though unable to refer such matters for internal prosecution, superiors of non-state groups nevertheless have other means by which they can meet their international obligations. It may be possible, for example, for superiors to submit reports of subordinates' crimes to the competent authorities within the state where the crimes were committed. Non-state groups often – but not always – oppose the authorities of the state within which they operate, so submission of reports to the established government may prove politically unfeasible, and the risk that courts would not be impartial during the armed conflict may discourage such submission.[69] In such cases, superiors may discharge the duty by making good faith efforts to submit reports of crimes to the authorities of other states and to prosecutors of international criminal tribunals with jurisdiction requesting investigation and prosecution.

25. Referral to foreign and international authorities provides an effective alternative means for superiors to ensure prosecution of their subordinates. An overwhelming majority of states are able to exercise universal jurisdiction over conduct constituting one or more crimes within the Court's jurisdiction,[70] and an increasing number of states are willing and able to investigate and prosecute alleged offenders.[71] Furthermore, prosecutors of international tribunals – including this

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the judicial guarantees which are recognized as indispensible by civilized peoples"). See also Additional Protocol I, *supra* note 7, Art. 75(4) (the body adjudicating cases "related to the armed conflict" must be "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure"); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, Art. 6(2), 1125 U.N.T.S. 609, *entered into force* 7 Dec. 1978 ("Additional Protocol II") ("No sentence shall be passed and no penalty . . . executed . . . except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.").

[69] *See, e.g.*, Somer, *supra* note 67, at 655, 685 (recognising that "armed opposition group superiors will most likely not be willing to discharge their duty by engaging the government party").

[70] *See generally* Amnesty International, "Universal Jurisdiction: The Duty of States to Enact and Implement Legislation," AI Index No. IOR 53/002/2001 – 53/018/2001 (Sep. 1, 2001) (discussing state practice in 125 states). This study is being updated in 192 comprehensive papers on each U.N. member state. Each of these documents is available on the organization's website (http://www.amnesty.org/).

[71] Since the Second World War, criminal investigations or prosecutions based on universal jurisdiction have been conducted by the courts of Australia, Austria, Belgium, Canada, Denmark,

Court – have discretion to initiate *proprio motu* investigations and prosecutions within their respective jurisdictions.[72]

26. A requirement that superiors make good faith efforts to refer reported crimes to competent authorities for investigation and prosecution best implements the principles and practical goals of the superior responsibility doctrine: it holds superiors to the requirement that they take "all necessary and reasonable measures" to respond to criminal conduct, while retaining a flexibility that permits Chambers to determine, on a case-by-case basis, whether the steps taken by an accused were sufficient to discharge the duty. In making this determination, the Chamber should take into account, among other things, (*a*) whether the superior has provided all information in his or her possession; and (*b*) whether he or she has cooperated fully in the investigation. In cases of submission to foreign or international authorities, the Chamber should have regard to whether the superior has made all reasonable efforts to request investigation and prosecution, such as submitting the matter to states that are able to exercise universal jurisdiction and to international criminal tribunals with jurisdiction.

B. Submission of Matter to Competent Authorities Does Not Absolve Superior of Responsibility for Failure to Prevent or Repress

27. The jurisprudence of the *ad hoc* international criminal tribunals has consistently confirmed that, under customary international law, the duty to prevent and the duty to punish are not alternatives: "[T]he obligation to 'prevent or punish' does not provide the accused with two alternative and equally satisfying options,"[73]

Finland, France, Germany, Israel, Netherlands, Norway, Spain, Sweden, Switzerland, the United Kingdom and the United States of America. Moreover, states are beginning to move to a shared responsibility model for investigation and prosecution, based on universal jurisdiction of crimes under international law, as they answer the Security Council's calls to accept cases transferred from the ICTY and ICTR, as well as with regard to other crimes, such as the routine transfer of piracy suspects captured on the high seas by naval forces to Kenya for trial.

[72] *See, e.g.*, Statute, Art. 15(1).

[73] *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, 3 Mar. 2000, ¶ 336; *accord, e.g., Kordić and Čerkez* Trial Judgment, *supra* note 16, ¶ 444; *Bagilishema* Trial Judgment, *supra* note 9, ¶ 49; *Strugar* Trial Judgment, *supra* note 30, ¶ 373; *Limaj* Trial Judgment, *supra* note 30, ¶ 527. *See also* William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* 322 (2006).

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because "the duty to prevent crimes and the duty to punish the perpetrators are distinct and separate responsibilities under international law."[74] Thus, a superior may not escape responsibility for an earlier failure to prevent or halt criminal conduct by later punishing or referring the matter.

28. In light of the direction in Article 21 of the Statute to apply the rules and principles of international law, Article 28 should be interpreted in accordance with customary international law, so that the duties reflected in subparagraphs (a)(ii) and (b)(iii) are acknowledged as separate and independent obligations imposed on superiors. That is, the term "or" in the phrase "failed to . . . prevent *or* repress their [the crimes'] commission *or* to submit the matter to the competent authorities"[75] does not present a superior with a list of options, but rather reflects the full range of his or her duties in respect of subordinate criminal conduct.[76]

29. As a result, the Chamber should conclude that if the other elements of superior responsibility are satisfied, a superior's submission of subordinates' alleged crimes to competent authorities does not absolve him or her of responsibility for a failure to prevent or repress those crimes.

IV. CAUSATION IS NOT AN ELEMENT OF SUPERIOR RESPONSIBILITY

30. Under customary international law, superior responsibility requires: (*i*) a superior-subordinate relationship; (*ii*) the superior's knowledge of the crimes committed by the subordinate; and (*iii*) the subsequent failure by the superior to halt, prevent or punish the crime.[77] Absent from this three-element test is any requirement that the superior's failure to act directly caused the subordinate's

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[74] *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004 ("Halilović Decision on Amendment of Indictment"), ¶ 31; *accord*, *e.g.*, *Bagilishema* Trial Judgment, *supra* note 9, ¶ 49; *Strugar* Trial Judgment, *supra* note 30, ¶ 373.

[75] Statute, Article 28(a)(ii), (b)(iii) (emphasis added).

[76] *See* Halilović Decision on Amendment of Indictment, *supra* note 74, ¶¶ 31-32 (observing that the "or" is disjunctive and reflects separate duties); *Blaškić* Appeal Judgment, *supra* note 15, ¶¶ 78-85; Alexander Zahar and Göran Sluiter, *International Criminal Law* 269 (2008).

[77] *See, e.g.*, *Čelebići* Trial Judgment, *supra* note 6, ¶ 346; Antonio Cassese, *International Criminal Law* 247-49 (2008) (identifying the cumulative conditions for superior responsibility).

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crime.[78] Instead, the link between the superior's failure and the underlying crime is captured through the requirement of effective control – the material ability of the superior to affect the subordinate's conduct – rather than through a separate causation element.[79]

31. In spite of this established doctrine, Article 28 has been understood by some to impose a new causation requirement.[80] To the contrary, an examination of the terms of the Article in light of their context, the Statute's object and purpose, and the drafting history, demonstrates that the provision was not intended to depart from customary international law by requiring, as a separate element, proof that the superior's failings caused the subordinate's crimes. In the alternative, even if Article 28 were read as requiring proof of causation, that causation requirement would be properly interpreted as satisfied by evidence that the superior's failings increased the risk that subordinates would commit crimes.

A. Causation Is Not Required Under Customary International Law

32. None of the international legal instruments reflecting customary international law on the elements of superior responsibility includes a requirement that the superior's omission caused the underlying crimes in question.

33. The language of Article 86(2) of Additional Protocol I does not require a causal link between the superior's failure to act and the subordinate's crimes:

> The fact that a breach . . . was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility . . . if

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[78] *See, e.g.*, *Čelebići* Trial Judgment, *supra* note 6, ¶ 398. *See also infra* note 90 and accompanying text.

[79] Cassese, *supra* note 77, at 241-42 (2008) (as the doctrine has been refined by the *ad hoc* jurisprudence, "the criminal liability of the superior [i]s increasingly seen as a consequence of his own culpability, not necessarily linked by means of a causal nexus to the responsibility of the subordinates"); *see also* Gideon Boas, James L. Bischoff, and Natalie L. Reid, 1 *International Criminal Law Practitioner Library: Forms of Responsibility in International Criminal Law* (2007) at 178, 232.

[80] *See, e.g.,* Ambos, *supra* note 21, at 860 (stating that Article 28 "implies a causal relationship between the superior's failure and the subordinate's commission of crimes"); Otto Triffterer, "Causality, A Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?," 15 *Leiden J. Int'l L.* 179, 197 (2002) (describing causation as a "constituent element" of Article 28); Mark Osiel, "The Banality of the Good: Aligning Incentives against Mass Atrocity," 105 *Colum. L. Rev.* 1751, 1779 n.123 (2005).

> they knew, or had information which should have enabled them to conclude . . . 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.[81]

34. While at least one commentator has claimed that this language reflects a "causal connection" between the superior's omission and the subordinate's crime,[82] there is no support for that interpretation in the text. Indeed, as international judgments interpreting this provision make clear, the issue is not one of causation, but rather of effective authority and control, so criminal responsibility is imposed not only on the superior who could have prevented the crime, but also on the superior who failed to stop or punish it.[83]

35. The provisions on superior responsibility in the Statutes of the *ad hoc* international criminal tribunals reflect the customary three-prong test,[84] and like Article 86(2), contain no separate causation requirement.[85] Similarly, the constituting documents of both the SCSL and the Extraordinary Chambers in the Courts of Cambodia do not identify causation as an element of superior responsibility.[86] Nor does the most recent ILC Draft Code of Crimes Against the Peace and Security of

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[81] Additional Protocol I, *supra* note 7, Art. 86(2). *See also, e.g., ICRC Commentary on the Additional Protocols*, *supra* note 42, ¶ 3543 (citing only the elements of the customary three-prong test and not including causation).

[82] *See* Triffterer, *supra* note 80, at 184 (Article 86(2) "establishes a causal connection between the omission of the superior and the crime committed by his or her subordinate" because "it implies that if a superior had used his power, he would have or at least could have prevented the attempted or complete crime").

[83] *See, e.g., Čelebići* Trial Judgment, *supra* note 6, ¶¶ 340, 378; *Čelebići* Appeal Judgment, *supra* note 6, ¶¶ 255-56.

[84] *See supra* note 77.

[85] ICTY Statute, *supra* note 9, Art. 7(3); ICTR Statute, *supra* note 9, Art. 6(3). In support of this reading, *see Čelebići* Trial Judgment, *supra* note 6, ¶ 398; *but see* Triffterer, *supra* note 80, at 185 (finding no causal connection with respect to the obligation to punish, but asserting that one must exist for the obligation to prevent).

[86] SCSL Statute, *supra* note 9, Art. 6(3); 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, as amended on 27 Oct. 2004, Doc. No. NS/RKM/1004/006, unofficial translation by the Council of Jurists and the Secretariat of the Task Force, revised on 26 August 2007, Art. 29.

Mankind.[87]

36. The jurisprudence of the *ad hoc* international criminal tribunals confirms that customary international law does not require proof of causation in order to impose individual liability on a superior. The Trial Chamber in *Čelebići* concluded that "causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors."[88] That Chamber observed that Art. 7(3) and customary international law both provide for liability for a superior's failure to punish a past crime – which could never have been caused by the later failure to punish – and concluded that this "demonstrates the absence of a requirement of causality as a separate element of the doctrine of superior responsibility."[89] Furthermore, the Trial Chamber "found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formulation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject."[90] It refused accordingly to consider causation as a separate element of the doctrine.

37. The ICTY Trial and Appeals Chambers have repeatedly followed *Čelebići* by holding that the prosecution need not prove that the superior's omissions caused the subordinate's commission of the crimes.[91] These judgments, along with the international legal instruments already discussed, provide compelling evidence that

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[87] ILC Draft Code, *supra* note 8, Art. 6.

[88] *Čelebići* Trial Judgment, *supra* note 6, ¶ 398.

[89] *Ibid*, ¶ 400; *see also* Boas, Bischoff, and Reid, *supra* note 79, at 261 ("If the … effective control test meant that a superior could only be held liable for a failure to punish crimes that occurred because of a prior failure to control his or her subordinates, the range of punishable omissions could be dramatically constrained, a possibility that has not been borne out by the actual practice of those tribunals.").

[90] *Čelebići* Trial Judgment, *supra* note 6, ¶ 398. The Trial Chamber rejected earlier contrary analysis by M. Cherif Bassiouni. *Ibid*, n.428. *See* M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 422-23 (2d ed. 1999) (asserting that "[t]he essential element in cases of 'command responsibility,' particularly with respect to those in the higher echelons in the chain of command is that of causation," but citing no authority).

[91] *See, e.g.*, *Blaškić* Appeal Judgment, *supra* note 15, at 77; *Prosecutor v. Orić*, Case No. IT-03-68, Judgment, 30 June 2006 ("*Orić* Trial Judgment"), ¶ 338; *Prosecutor v. Orić*, Case No. IT-03-68-A, Judgment, 3 July 2008 ("*Orić* Appeal Judgment"), Partially Dissenting Opinion and Declaration of Judge Liu Daqun, ¶ 32; *Hadžihasanović and Kubura* Appeal Judgment, *supra* note 31, ¶ 40.

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customary international law does not require causation to be proven as a separate element of superior responsibility.

B. Causation Is Not Required Under Article 28

38. As a treaty provision, the interpretation of Article 28 is governed by articles 31 to 33 of the Vienna Convention on the Law of Treaties ("VCLT").[92] In addition, Article 21 of the Statute directs Chambers to apply, where appropriate, other treaties, principles and rules of international law, and general principles of law derived from national laws.[93] In order to determine whether Article 28 includes a causation requirement, the Chamber should thus consider the plain text in context and in light of the treaty's object and purpose.[94] If the text is ambiguous, the Chamber may then consider the *travaux préparatoires* of the treaty,[95] and any guidance provided by conventional or customary international law, general principles of law, and a comparison of the six authentic language versions of the Statute.[96] Application of these interpretative steps confirms that Article 28 does not require proof that the superior's omissions caused the subordinate's commission of the crimes.

1. Viewed in context and in light of the Statute's object and purpose, the plain text of Article 28 does not require causation.

39. Article 28 of the Statute provides in its relevant parts that a superior "shall be criminally responsible for crimes within the jurisdiction of the Court committed by" subordinates "as a result of his or her failure to exercise control properly" over such subordinates, where the knowledge requirement is satisfied and the superior failed "to prevent or repress [the crimes'] commission or to submit the matter to the

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92 *See supra* note 18.

93 Article 21 of the Statute lists the sources of international law to which the Court may refer. While a Chamber must apply the Statute "in the first place," Art. 21(1)(a), it may also have resort to "applicable treaties and the principles and rules of international law," Art. 21(1)(b), and to "general principles of law derived… from national laws of legal systems of the world," Art. 21(1)(c); in all cases, "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights." Art. 21(3).

94 VCLT, *supra* note 18, Art. 31.

95 If confirmation is required or the conclusion reached based upon textual interpretation is ambiguous or absurd, recourse may be had to supplementary aids, including "the preparatory work of the treaty and the circumstances of its conclusion." VCLT, *supra* note 18, Art. 32.

96 VCLT, *supra* note 18, Art. 33.

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competent authorities for investigation and prosecution." The plain reading of this provision is that the clause "as a result of his or her failure to exercise control properly" refers to the superior's criminal responsibility, which is engaged by his or her knowing or negligent omissions.

40. An alternative interpretation of Article 28 asserted by some is that the clause beginning "as a result of" refers to the subordinates' crimes, and thus requires a causal nexus between the superior's omission and the crimes.[97] This attempt to introduce a distinct causation requirement must be rejected as discordant in the context of the Statute. *First*, it would render obsolete the distinct duty to submit for investigation and prosecution, because it would create an illogical – indeed, impossible – burden on the Prosecution to prove that a superior caused the crime by later failing to submit that crime for investigation after it was committed.[98] *Second*, it would ignore the Statute's recognition that superior responsibility is different in character from the modes of liability provided for in Article 25, which capture forms of participation in a crime. Superior responsibility, in contrast, is premised on the existence of a particular relationship with those who participated in a crime, and is only invoked when all the elements of the crime are satisfied by the conduct of others.[99] Requiring satisfaction of the additional element of causation would be tantamount to "chang[ing] the basis of command responsibility for failure to prevent or punish to the extent that it would practically require involvement on the part of

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[97] *See, e.g.*, Ambos, *supra* note 21, at 860 (stating that Article 28 "implies a causal relationship between the superior's failure and the subordinate's commission of crimes"); Triffterer, *supra* note 80, at 197 (describing causation as a "constituent element" of Article 28); Osiel, *supra* note 80.

[98] *Accord Čelebići* Trial Judgment, *supra* note 6, ¶ 400 ("The very existence of the principle of superior responsibility for failure to punish, therefore, recognised under Article 7(3) and customary law, demonstrates the absence of a requirement of causality as a separate element of the doctrine of superior responsibility.").

[99] *See* Boas, Bischoff, and Reid, *supra* note 79, at 330 n.327 ("[A]n accused held liable under superior responsibility need not have participated in the crime in any way, and may have had no connection to the criminal conduct save his failure to prevent, intervene to stop, or punish it."); Guénaël Mettraux, *The Law of Command Responsibility* (2009), at 79 ("[S]uperior responsibility presupposes that a [completed] crime has actually been committed by a subordinate.").

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the commander in the crime his subordinates committed,"[100] and superior responsibility would cease to have any practical reach beyond Article 25's modes of criminal liability premised upon participation.

41. Moreover, the plain reading cited above is more consistent with the object and purpose of the Statute than the proposed alternative interpretation. Superior responsibility is premised on the recognition that persons in positions of command and authority are best placed to prevent or repress criminal conduct, and is thus crucial to the realisation of the Statute's goals of an end to impunity and prevention of the most serious international crimes.[101] This purpose is best served by imposing criminal responsibility on superiors who fail in their duties to reduce the incidence or risk of such crimes, not only those whose failure caused the crimes.[102]

2. All other means of interpretation compel the conclusion that Article 28 does not require causation.

42. Application of the subsidiary means of interpretation and other guidance set forth in Articles 32 and 33 of the VCLT and Article 21 of the Statute confirms that Article 28 cannot be read to require causation. *First*, the plain reading discussed above places Article 28 in accord with existing international law and general principles of law as reflected in national legislation as of the drafting of the Statute.[103] As discussed above, neither treaties nor custom requires proof of causation as a separate element,[104] and prior to the Statute, the military and civilian criminal laws of

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[100] *Halilović* Trial Judgment, *supra* note 33, ¶ 78 (rejecting any causal link). *Accord Orić* Trial Judgment, *supra* note 91, ¶ 338 (If proof of causation were required, "the borderline between Article 7(3) . . . and Article 7(1) of the Statute would be transgressed and, thus, superior criminal responsibility would become superfluous.").

[101] Statute, preamble.

[102] The absence of a causation requirement fully complies with the principle of guilt, because a conviction cannot be secured without proof of the special relationship between those who participate in the crime and the superior charged with supervisory duties. Individual responsibility for a superior, as with other forms of liability, is triggered by his or her own conduct, and the link between the individual accused and the crime is captured by the requirement of effective authority and control. *See* Natalie L. Reid, "Bridging the Conceptual Chasm: Superior Responsibility as the Missing Link Between State and Individual Responsibility under International Law," 18 *Leiden J. Int'l L.* 795, 822-24.

[103] *See* Statute, Art. 21.

[104] *See* discussion, *supra*, at section IV.A.

over twenty nations surveyed by the ICRC[105] did not expressly require that the superior's failure to act have caused the subordinate's crimes in order for responsibility to arise.[106]

43. *Second*, the *travaux préparatoires* of the Statute support the absence of a causation requirement as the most plausible reading. Although the phrase "as a result of" had been included in the proposed text beginning with an early draft,[107] the Statute's drafting history reveals no express intention on the part of the drafters to introduce a new requirement of proof of causation into the doctrine of superior responsibility.[108] Of the two possible interpretations of the phrase discussed above in paragraphs 39 to 40, the first comports with the contemporary understanding of superior responsibility, while the second would mark a dramatic departure from established doctrine. Given the lack of deliberation on the causation issue,[109] it is doubtful that this phrasing was intended by the drafters to diverge so sharply from

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[105] Jean-Marie Henckaerts and Louise Doswald-Beck, International Committee of the Red Cross, *Customary International Humanitarian Law*, Vol. II (Practice) 3745-3751 (2005) (providing excerpts of the national legislation of 24 states on superior responsibility, including Argentina, France, Germany, Rwanda, Spain and the U.S., with only one – Canada – containing language requiring a causal nexus).

[106] Many States Parties to the Rome Statute have or are in the process of adopting legislation incorporating *verbatim* its provisions (including Article 28) in order to fulfil their complementarity obligations recognized in the Preamble and to develop a legal basis for cooperation with the Court. *See, e.g.*, International Criminal Court Act 2001, c. 17, § 65 (1), (2) (U.K.); Crimes Against Humanity and War Crimes Act 2000, c. 21, § 5 (Canada); International Criminal Court (Consequential Amendments) Act 2002 §268.115 (Australia). It remains to be seen how national courts interpret Article 28 with respect to causation. *But see* Völkerstrafgesetzbuch [Code of Crimes Against International Law], 26 June 2002, § 4 (Germany) (not requiring proof of causation for imposition of criminal liability pursuant to doctrine of command responsibility).

[107] The clause beginning "as a result of" originated in draft Article C of the 1996 Preparatory Committee and remained unrevised throughout the Rome Statute's evolution. *See* "General Principles of Criminal Law," *in* 2 *The Legislative History of the International Criminal Court* 182, 210-14 (M. Cherif Bassiouni ed., 2005).

[108] The Official Records of the Rome Conference reveal that delegates did not discuss the introduction of causation as a distinct element of the superior responsibility doctrine. Rome Conference Summary Records, *supra* note 25, ¶¶ 67-83 (in discussing the U.S. proposal, the delegates focused their discussions on the extension of the doctrine to civilian superiors and did not address the causation issue).

[109] The leading commentary on the negotiations does not identify causation as an area of contention. *See* Per Sarland, "International Criminal Law Principles," *in The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* 189, 202-04 (Roy S. Lee, ed., 1999) (identifying contentious issues relating to the doctrine of superior responsibility to be its applicability to civilian superiors; and its status as an additional form of liability).

established customary international law.

44. *Finally*, to the extent that the Chamber considers that an ambiguity remains after the application of Articles 31 and 32 of the VCLT to the interpretation of Article 28 of the Statute, it should adopt the reading that best reconciles the different versions of the Article in its six equally authentic texts.[110] While the Arabic, Russian, and Spanish versions of Article 28 all use a phrase equivalent to "as a result of his or her failure to exercise control," and are thus consistent with the English text, neither the French nor the Chinese versions contain any language that could be read to suggest a causation requirement. The French text uses the phrase "*lorsqu'*il ou elle n'a pas exercé le contrôle," which translates to "*when* he or she did not exercise control,"[111] and the Chinese version refers to the imposition of criminal responsibility "*if* a military commander … fails to exercise proper control."[112] The Chamber should thus adopt the reading that reconciles the French and Chinese text with the other authoritative versions of the Article by holding that criminal responsibility under Article 28 is imposed on a superior "as a result of" the failure to exercise control, and does not require that the crimes be committed "as a result" of that failure.

C. In the Alternative, Article 28 Requires Only That the Superior's Failures Increased the Risk of the Subordinate's Crimes.

45. In the alternative, if the Chamber were to interpret Article 28 as departing from pre-existing international law by requiring proof of causation, the text does not

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[110] *See* Statute Art. 128; VCLT, *supra* note 18, Art. 33(4) ("[W]hen a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.").

[111] The French text provides, in relevant part: "Un chef militaire ou une personne faisant effectivement fonction de chef militaire *est pénalement responsable des crimes relevant de la compétence de la Cour commis par des forces* placées sous son commandement et son contrôle effectifs, ou sous son autorité et son contrôle effectifs, selon le cas, *lorsqu'il ou elle n'a pas exercé le contrôle qui convenait sur ces forces*" (emphasis added).

[112] "**如果未对在其有效指挥和**控制下的部队" (emphasis added). The relevant part of the Chinese version of Article 28 is best translated to English as follows: "If a military commander or person effectively acting as a military commander fails to exercise proper control over the forces under his or her effective command and control, or effective authority and control as the case may be, under the following circumstances, such commander or person shall be criminally responsible for the crimes committed by such forces that come within the jurisdiction of the Court."

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provide any standard by which to judge the requisite proximity between the superior's omission and the subordinate's crime.[113] Given this lacuna, the appropriate causation standard would have to be determined in light of the Statute's context and object and purpose. For two reasons, the proper causation requirement must be lower than a "but for" standard. *First*, "but for" causation would render the superior no different from an ordinary perpetrator, because it would make his or her omission an integral element of the crime.[114] *Second*, a superior's individual exercise, or failure to exercise, effective control can affect the risk of crimes during hostilities far beyond the scope of that individual's direct actions. In order to hold accountable those persons in positions of authority who are best placed to prevent or repress crimes, the doctrine should provide liability where the superior's failures have *increased the risk* for crime and that risk was realised. For these reasons, if the Pre-Trial Chamber were to conclude that Article 28 includes a causation element, it should require the prosecution to prove only that the superior's failure "increase[d] the risk that the subordinates commit certain crimes."[115]

46. Under this "increased risk" standard, the causation requirement would be satisfied by presenting proof of either (*i*) a specific, isolated omission related to the crime in question; or (*ii*) a general, continuing series of omissions to exercise control properly. In context, practical considerations rule out a higher standard.[116] As an example of a specific omission, a superior may fail to take some action that unquestionably would have prevented a particular subordinate's crime of which he was aware. In this instance, the causal link is strongest between the omission and the crime, as the superior clearly had the ability to prevent commission and failed to do

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[113] Triffterer, *supra* note 80, at 196 ("It does not define… how tight or loose the connection between the failure and its result has to be.").

[114] *See supra* ¶ 40 (discussing the Statute's recognition of the unique nature of superior responsibility).

[115] Ambos, *supra* note 21, at 860. *See also* Volker Nerlich, "Symposium: Superior Responsibility Under Article 28 ICC Statute – For What Exactly Is the Superior Held Responsible?," 5 *J. Int'l Crim. Just.* 655, 673 (2007) ("[I]t suffices that the superior's failure to exercise control properly increased the risk that the base crime was committed.").

[116] Triffterer, *supra* note 80, at 197 (2002) (the nexus is not one "of strict causality according to the laws of natural sciences").

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so. However, the "increased risk" standard would also be satisfied by evidence of a general omission. As an example of a general omission, a superior may routinely omit to control his subordinates properly (by, for example, turning a blind eye or failing to educate them in international human rights or humanitarian law). The prosecution may allege that the superior's general failure to control his subordinates created an atmosphere of impunity, increasing the likelihood of commission of crimes. Although the causal relationship appears weaker, as the *Čelebići* Appeals Chamber acknowledged, a general, "ongoing failure to exercise the duties to prevent or punish," may be "of significantly greater gravity than isolated incidents," because of "its implicit effect of encouraging subordinates to believe that they can commit further crimes with impunity."[117]

47. If proof of causation is required, then the Statute's object and purpose best is accomplished by requiring the prosecution to prove only the superior's general failure to properly control his subordinates. Because international law charges superiors with affirmative duties to impart, enforce and abide by international humanitarian law, holding them criminally responsible in connection with crimes committed by their subordinates should not be limited to those instances where a direct causal link can be proven. To effectively implement international law and curtail the commission of crimes, the Statute should be interpreted to recognize that an atmosphere of impunity and lawlessness created by a failure of command is an important causal factor of crimes. In order to hold responsible military or civilian superiors who fail to exercise their supervisory authority, the doctrine should not require more proof of causation than that the superior's failures have *increased the risk* that crimes may be committed.

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[117] *Čelebići* Appeal Judgment, *supra* note 6, ¶ 739.

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V. CONCLUSION

48. For these reasons, the Chamber should conclude that (*i*) Article 28 incorporates a negligence standard for military commanders; (*ii*) superiors affiliated with non-state groups have a duty to submit matters involving subordinates' crimes to competent state or international authorities for investigation and prosecution, but such submission does not absolve a superior of responsibility for a prior failure to prevent or repress; and (*iii*) causation is not an element of superior responsibility.

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At London, United Kingdom, New York, USA and Aseret, Israel

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