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Superior Responsibility for International Crimes in Ethiopian Criminal Law

LLM Thesis

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School of Law

Superior Responsibility for International Crimes in Ethiopian Criminal Law

A Thesis Submitted in the partial fulfillment for the awards of Master Degree of Law (LL.M) in Constitutional and public Law at the College of Law and Governance studies, School of Law, Addis Ababa University

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Declaration

I, Ezedin Fedlu, hereby declare that the thesis titled "Superior Responsibility for International Crimes in Ethiopian Criminal Law" is my original work and that it has not been submitted for any degree or examination in any other university. I also pledge that all sources used in any form are duly acknowledged.

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Examiner 1	Signature	Date
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Examiner 2	Signature	Date

Dedication

I dedicate this work to my wife and children.

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I would like to express my deep sense of gratitude to my Adviser Dr. Wondmagengn Taddese (PhD) for his clear guidance in doing my thesis, my wife Hanan Nuredin for her assistance and my friend Maeruf Alliye for his constant feedback and assistance in the course of accomplishing the thesis.

ACRONYMS

CIL-Customary International Law

SR-Superior Responsibility

ECCC-Chamber of the Extraordinary Chambers in the Courts of Cambodia

FDRE-Federal Democratic Republic of Ethiopia

ICC-International Criminal Court

ICL-International Criminal Law

ICTR -International Criminal Tribunal for Rwanda

ICTY-International Criminal Tribunal for the Former Yugoslavia

IHL-International Humanitarian Law

WWII-World War Two

List of Cases

International Cases

1. Prosecutor v. Akayesu ICTR 96-4-T

2. Prosecutor v Bemba case no. ICC-01/05-01/04424/2009

3. Prosecutor v. Blaskic case no IT-95-2/2004

4. Prosecutor v. Celebic. IT-98-30/1-T/2000

5. Prosecutor v. Delalic eta l Case No. IT-96-21/2001

6. Prosecutor v. Halilovic, Case No. IT-48-A/2007

7. Prosecutor v. Momcilo Mandic case no.KR-05-58/2007

8. Prosecutor v. oric case no-IT 03-68 A/2001.

9. High Command case

10. Hostage Case

11. Kordic case

Domestic Cases

1. SPO v. Mengistu Hailemariam eta l files no 01/93 EFHC

2. SPO v. Degnnet Ayale eta l (1993) ASC

ABSTRACT

This paper aimed to assess the status of Superior/command responsibility in Ethiopian criminal law. For this purpose the international criminal law on the issue of SR, comparative criminal law, international as well as domestic cases and the Ethiopian criminal law are assessed. The study employed a doctrinal as well as qualitative approach. The qualitative approach has been employed to better understand the practice of SR in Ethiopian courts and its application as customary international law (if any). Therefore the researcher administered interviews with judges, prosecutors and lawyers at the federal high court Lideta bench for international crimes are seen in this bench. The assessments of the study show that: SR is a form of criminal responsibility that addresses the culpability of superiors who fail to prevent or punish their subordinates committing international crimes. It has been developed through CIL especially in cases after the Second World War (WWII) and in domestic jurisdictions. The justification for the development of SR in international criminal law was that low-level officials or military personnel often commit crimes because their superiors failed to prevent or repress them. The doctrine aimed at promoting compliance with IHL by obligating Superiors to curb the criminal acts of subordinates. This in turn promotes effective and merit based leadership for the principle of SR entails criminal liability for failure of effective control while they could do it, superiors do not be eager to take positions above their capacity. Accordingly, taking superior position will be a burden but not a means of generating income as main objective. However, the doctrine of SR is not established in Ethiopian criminal law. It is not also practiced as CIL despite cases having the nature of SR are usually charged with article 240 and the following of the FDRE Criminal Code. As to indirect responsibility, though the Ethiopian criminal Code has recognized criminal liability by way of omission in its general part, there is no any special provision that provide a military commander or civilian superior shall be criminally responsible for his failure to prevent his subordinate from committing an offence. The absence of the doctrine of SR in the Ethiopian criminal law, cosseted the country a lot because while violation of human rights and commission of international crimes has been witnessed, no superior has been held criminally responsible based on the principles and elements of SR. All in all, as the study show, in the case of Ethiopia there is a legal gap on the issue of SR.

Key words: superior responsibility, direct SR, Indirect SR, International crimes, Ethiopian criminal law, customary international law

Chapter One

Introduction

1.1. Background of the Study

The doctrine of Superior Responsibility (SR) –also referred to as command responsibility- is one of the most important concepts developed in international criminal law after the WWII.[1] It is a responsibility for an omission. Under ICL, commanders have a duty to ensure that their troops respect that body of law during armed conflict and hostilities.[2] This duty does not extend to training of troops alone, but also the taking of necessary measures to prevent and punish subordinates committing criminal violations of international crimes. If a military commander fails to prevent his/her subordinates from committing criminal acts while possessing knowledge of such actions, it entails criminal liability referred to as superior/command responsibility.

When we see international recognition of the concept of holding commanders liable for the criminal acts of their subordinate;[3] as early as the 15th century, King Charles VII of Orleans decreed that his military commanders were to be held liable should those under their command commit crimes against the civilian population, irrespective of the commanders' participation in the crimes.[4] In 1625, it was recognized as part of the definition of civic duties and military professionalism.[5]

However, the legal recognition of SR took place after the WWII. During the seventeenth century, Hugo Grotius articulated the basic precept that a community, or its rulers, could be held responsible for the crime if they knew of it and did not prevent it when they could and should

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[1]Guénaël Mettraux, The Law of Command Responsibility (Oxford University Press 2009).

[2] Jamie Allan Williamson, 'Some Considerations on Command Responsibility and Criminal Liability' (2008) 90 International Review of the Red Cross.

[3] William H Parks, 'Command Responsibility in War Crimes' (1973) 62 Military Law Review 1.

[4] Anne E Mahle, 'Command Responsibility: International Focus'(2012)

[5] Cortney C Hoecherl, 'Command Responsibility Doctrine: Formulation Through Ford V. Garcia and RomagozaV.Garcia' [2004] Journal of International Law Policy 1.

have prevented it.[6]SR calls for criminal responsibility of Superiors/commanders for the criminal acts of their subordinates during an armed conflict. The concept of SR and the commensurate duty of a superior/commander to control his troops were developed along two paths.[7]

The first path dealt with the question of the general responsibility of superior/commander; the second, with the specific criminal responsibility of the superior/commander.[8] The justification for the development of SR in international criminal law (ICL) was that low level officials or military personnel often commit crimes because their superiors failed to prevent or repress them.[9]It aimed at promoting compliance with ICL by obligating superiors/commanders to curb the criminal acts of subordinates. A superior having an effective command and authority over his or her troops/subordinate bears the responsibility in ensuring that his subordinates do not violate international criminal law.[10]

When we see international cases; in the case of, Prosecutor vs Sefer Halivovic; it was held that: superior/*command responsibility is responsibility for an omission. The superior/commander is responsible for the failure to perform an act required by international law.*[11]

The classical definition of crime is any act or omission prohibited by the law that is enacted for the protection. Criminal liability also bases on the principle of legality.[12] The legality principle requires that; no conduct shall be held criminal unless it is specifically described.[13] SR is a

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[6] Arthur Thomas O'reilly, 'Command Responsibility: A Call to Realign Doctrine with Principles' (2004) 72 AM. U Int'l L. Rev 71

[7]William H Parks, 'Command Responsibility in War Crimes' (1973) 62 Military Law Review 1.

[8] ibid

[9] Jamie Allan Williamson, 'Some Considerations on Command Responsibility and Criminal Liability' (2008) 90 International Review of the Red Cross.

[10] Antonio Cassese and others, International Criminal Law: Cases and Commentary (Oxford University Press 2011).

[11] The Prosecutor of the Tribunal v. Sefer Halilovic (2001) ICTY Case No: IT-01-48-I. Indictment Para 55

[12] Bert Swart, 'Modes of Criminal Liability' in Antonio Cassese (ed) The Oxford Companion to International Criminal Justice (Oxford University Press 2009).

[13]Wiliam Musyoka, Criminal Law (Law Africa 2013).

means of demanding accountability from military and non-military superiors for the criminal acts of their subordinates because they failed to prevent or control their subordinates. The superior/commander must have authority over the subordinates, possess knowledge of their criminal acts and fail to take necessary and reasonable measures to prevent the criminal acts.[14]

Concisely, the applicability of SR requires fulfillment of the following three conditions: that the superior had the authority to control the actions of his subordinates; that the superior knew or in the given circumstances should have known that a subordinate had or was about to perpetrate a human rights violation and that the superior failed to take necessary measures, within the scope of his authority, to prevent or repress the commission of the human rights violations.[15]

Elements of the law of SR are codified in statutes and case law such as the international criminal tribunals and International Criminal Court (ICC). The international case laws such as The High Command case[16] provide a growing jurisprudence on the interpretation of SR. The duties of a superior/commander in international criminal law include those laid out in Article 1 of The Hague Convention of 1907 and Article 4(A) (2) of the Geneva Convention III of 1949.

In addition, the Customary International Law (CIL) expectations in regards to humanitarian law and the law of armed combat as developed through the ICC, International Criminal Tribunal for the Former Yugoslavia (ICTY) and the other international tribunals provide for duties of a superior/commander during an armed conflict.[17] Article 7(3) of the ICTY statute provides that a commander is criminally responsible for a crime committed by a subordinate if the three elements mentioned above fulfilled.

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[14] Arthur Thomas O'reilly, supra(n6)

[15]Viplav Kumar Choudhry, 'Defense of Superior's Order and Command Responsibility under Criminal Laws in India' (2014) 2 Indian Journal of Public Administration 195.

[16] Crowe, C. N., 'Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution',(1994) 29 University of Richmond Law Review, p. 213

[17]Scott James Meyer, 'Responsibility for an Omission? Article 28 of the ICC Statute on Command Responsibility' (2011) 8 Miskolc Journal of International Law 27.

Article 28 (a) of ICC statute provides that: A military commander shall be criminally responsible for crimes, where that military commander knew that the forces were committing or about to commit such crimes; and failed to take all necessary and reasonable measures to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[18]

The doctrine of Superior/command responsibility is ultimately predicated upon the power of *the superior to control the acts of his subordinates. A superior may only be held liable for the acts of his subordinates if it is shown that he "knew or had reason to know" about them.*[19]

The doctrine of superior responsibility plays great role in prevention of human rights violations and atrocities. For one thing as mentioned above, the justification for the development of the doctrine is that in most instances superiors are the most appropriate to prevent or punish their subordinates under their effective control for committing international crimes. This obviously promotes effective and merit based leadership. This is because since failure to prevent or punish their subordinates for committing international crimes entails superiors criminally responsible, they tend to coup up themselves with leadership qualities before assuming offices. So that assuming offices will be considered as a burden for serving a nation as a primary objective than considering it as means of income. For example; in USA, superior responsibility is seen as atrocity prevention imperative.[20]

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[18] Article 28 (b) of ICC Statute holds a commander criminally responsible for the crimes of subordinate where: he either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or were about to commit such crimes; crimes concerned activities that were within the effective responsibility and control of the superior; and he 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] The Prosecutor v. Sefer Halilovic (2001) ICTY Case No: IT-01-48-I. Indictment Para 55

[20] United States v. List (The Hostage Case), Trial of the War Criminals before the Nuremberg Tribunal (1950) and United Nations War Crimes Commission,8 Reports of Trials of War Criminals, The United Nations War Crimes Commission, 1949, pp.66-79, Bing Bing Jia, "The doctrine of Command Responsibility: Current Problems", in Yearbook of International Humanitarian Law, 2000, Vol. 3, p.141.

But when we see the case of Ethiopia, while heinous human rights violation and commissions of international crimes become prevalent, no superior has been held criminally responsible for his failure to prevent or punish his subordinates committing international crimes. The main reason for this is that the doctrine of superior responsibility is not enshrined under the Ethiopian criminal law. Neither the special nor the general part of the Ethiopian criminal code, expressly deals with situations of superior or command responsibility. As to indirect responsibility, though the Ethiopian criminal Code has recognized criminal liability by way of omission in its general part[21], there is no any special *provision* that provide a superior shall be criminally responsible for his failure to prevent his subordinate from committing an offence. However, any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to as principal criminal perpetrators.

Therefore, in order to promote effective and merit based leadership and for effective prevention of human rights violation by subordinates, the doctrine of superior responsibility needs to be studied and it is this factor that attracted the researcher to choose this topic as a research title.

1.2. Statement of the Problem

Superior/Command responsibility has been developed as a principle of customary international law.[22] It has been playing great role to held superiors liable for their failure of preventing the commission of international crimes by their subordinates, or for their failure to punish or repress their subordinates for the commission of international crimes. This in turn helped to promote effective and merit based leadership. Because since failure to effective control or prevent the commission of crimes by subordinates entails criminal liability, superiors become more effective and alert in their duties. However, the legal nature of command responsibility is still open to debate in international criminal law in the context of whether it is a mode of liability for the crimes committed by subordinates or a separate offence of the superior for failure to discharge

[21] Article 23 of the FDRE criminal code.

[22] Reports of Trials of War Criminals, The United Nations War Crimes Commission, 1949, p. 76

his duties of control.[23] Difficulties arise if superior responsibility is understood as a mode of liability pursuant to which the superior shall be sentenced for the intentional crimes of his subordinates. This is particularly evident with respect to two aspects of superior responsibility: when the superior negligently failed to know, and thus to prevent or punish the commission of crimes by his subordinates, and when liability is solely based on the failure to punish.[24]

The issue is more complex in the context of Ethiopia because on one hand commission of international crimes has been increasing in an alarming rate in the country[25] while superior responsibility for the commission of international crimes by their subordinates has not been exercised effectively and on the other hand the Ethiopian criminal law does not have clear stipulation for superior responsibility (the failure to control or the failure to punish). Rather the Criminal Code raised an issue as defense to exonerate from criminal liability.[26] On the other hand, though crime by omission and negligence is recognized under article 23 and article 59 of the criminal code consecutively, yet it needs specific provision as the principle of legality demands promulgation of the act as prohibited before its commission to hold someone criminally liable. Furthermore, according to the criminal code, crimes by omission and negligence must be specified in the criminal code.[27] Thus, to make superiors liable for failure to prevent their subordinates from committing international crimes, the principle of superior responsibility needs independent provision for the sake of clear application. In the Ethiopian scenario, suspects for committing of international crimes have been charged under article 241 of the criminal code for armed raising and civil war or under article 241 of the criminal code for crimes against the national and political integrity of the nation.[28] Furthermore, some others have been charged

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[23] Viplav Kumar Choudhry, 'Defense of Superior's Order and Command Responsibility under Criminal Laws in India' (2014) 2 Indian Journal of Public Administration 195.

[24] ibid

[25] <http//ohchr.org/International Commission of Human Rights Experts on Ethiopia Findings> , accessed on 5, January, 2022, 12:35 AM.

[26] Article 73 of the FDRE constitution

[27] Articles 58 and 59 of the FDRE constitution

[28] Armed rising or civil war; where the crimes have entailed serious crimes against public security or life; proclamation no. 414; the Criminal Code of the democratic republic of Ethiopia, article 240.

under the anti corruption proclamation no 881/2015[29] or the anti terrorism proclamation no 652/2009.[30] All these imply that, whether superior/command responsibility is recognized under the Ethiopian criminal law is an issue of ambiguity. Hence, this thesis has assessed and come up with clarity.

In some countries where the domestic law doesn't effectively cover the doctrine of Superior responsibility, superiors have been held responsible for their failure to prevent their subordinates from committing international crimes through customary international law. In countries such as France and Germany, Superior/command responsibility has developed through customary international law.[31] This helped the countries to fill the legal gap in effective way accompanied by strong rule of law culture. However, in Ethiopia holding superiors responsible for their failure of controlling their subordinates from committing international crimes through customary international law is not practicable. Because since application of customary international law needs consistent state practice[32], assessing the court practices in the ground is vital in order to come up with clear conclusion. Therefore, whether command responsibility is developed in Ethiopia as customary international law is also another area which needs clarity. Thus, this thesis has assessed the issue and come up with clarity.

In addition, a central principle of human rights law that applies directly to the international criminal law system is the principle that to incur criminal responsibility, behavior must be prohibited and carries criminal sanction at the time of conduct. This is known as the principle of legality.[33] Even if the issue is developed as customary international law, it is difficult to

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[29] Attack on the political or territorial integrity of the state, Proclamation no. 414; the Criminal Code of the democratic republic of Ethiopia article 241.

[30] The anti corruption proclamation no 881/2015, the anti terrorism proclamation no 652/2009.

[31] Article 190 of the French Penal Code 27, The translation of Penal Code of the Federal Republic of Germany is available at <http://wings.buffalo.edu/law/bclc/Germind.htm > accessed at August 1 2018.

[32] Scott James Meyer, 'Responsibility for an Omission? Article 28 of the ICC Statute on Command Responsibility' (2011) 8 Miskolc Journal of International Law 27.

[33] Bert Swart, 'Modes of Criminal Liability' in Antonio Cassese (ed) The Oxford Companion to International Criminal Justice (Oxford University Press 2009).

determine punishing superior in Ethiopian criminal justice system. In most international crimes entertained by Ethiopian courts, there were issues of superior/command responsibility, but the courts have been unable to establish such responsibility as clear enough. Thus, the practices of the Ethiopian courts need to be analyzed in the context how cases having elements of Superior/command responsibility are being handled. Therefore, this study has assessed the practice of Ethiopian courts in the context of how courts have handled cases having elements of superior responsibility. In addition to the above, the study has also assed the perception of judges, prosecutors and lawyers on the issue of superior responsibility with respect to the practice in the ground. Furthermore, a comparative analysis is important to the legal gap (if any) to take lessons. Thus, this study has also made a comparative analysis.

1.3. Research Objectives

1.3.1. General Objective

1.3.1.1. To assess the status of superior/command responsibility for international crimes in Ethiopian criminal law.

1.3.2. Specific Objective

1.3.2.1. To assess comparatively the practice of superior/command responsibility for international Crimes under international law and other jurisdictions.

1.3.2.2. To assess whether the principle of superior/command responsibility for international crimes is recognized in Ethiopian criminal law.

1.3.2.3. Assessing the practice of superior/command responsibly for international crimes in Ethiopian courts.

1.3.2.4. Assessing the practice of superior/command responsibility for international crimes in Ethiopia as customary international law.

1.4. Research Questions

1.4.1. Does comparative criminal law show the responsibility of superiors for their failure to prevent their subordinates from committing international crimes?

1.4.2. Does Ethiopian criminal law recognize the responsibility of superiors for international crimes committed by their subordinates?

1.4.3. What is the practice of Ethiopian courts on the question of the responsibility of superiors for their failure to prevent their subordinates from committing international crimes?

1.4.4. Is the responsibility of superiors for their failure to prevent their subordinates from committing international crimes practiced as customary international law in Ethiopia?

1.5 Research Method and Methodology

The researcher employed the following method and methodology.

1.5.1 Research Design

In order to answer the research questions, the method is largely doctrinal. Analysis of international statues, case laws and customary international law, the Ethiopian criminal law, Comparative analysis of Ethiopian criminal law with some other countries, analysis of international practice with international and comparative criminal laws and decisions. Rather than exhaustive collection, the most emblematic judicial decisions, judgments of international tribunals and Ethiopian courts, international criminal legislations, commentaries and books of leading publicists at the time of writing this thesis have been assessed.

Though the research used primarily a doctrinal approach; yet, it was also supplemented by interviews with some judges, prosecutors and lawyers at the Federal high courts of criminal benches. This approach has helped me to clarify and analyze the practice of Ethiopian Courts on the issue of command responsibility. Thus, both doctrinal as well as qualitative approaches were employed.

When we see, the process of selecting judges, prosecutors and lawyers for interviews; the study focused on the Federal High Court's Lideta bench. Because cases having an issue of command responsibility are litigated in this bench. In this bench, there are two hearings on Constitutional and terrorism issues. These are divided into the 1st Constitutional and Terrorism and the 2nd Constitutional and Terrorism issues hearings. Cases having the issue of command responsibility are usually seen in these hearings. There are three judges at each hearing. Accordingly, the researcher interviewed a total of 4 judges two from each.

On the other hand, one of the directorates under the former Federal Attorney General (the current Ministry of Justice) is the Directorate for National and border crossing crimes. It is located in the back office of the Federal High Court's Lideta Division, and is the office to prosecutors who handle terrorism and border crossing crimes.

At the 1st and 2nd Constitutional and Terrorism issues hearings, usually one prosecutor is assigned for one case and sometimes 3 or four prosecutors may assigned. Accordingly, two experienced prosecutors were interviewed. In addition, the researcher has worked for 5 years as a federal prosecutor. Furthermore, at the time of the study, he was working as a lawyer in federal courts. This helped the researcher to access the experienced lawyers, prosecutors and judges. As a result, the researcher interviewed two prosecutors who have handled the case of Derg official as special prosecutor.

Similarly, in the case of lawyers, four of the most experienced and well-known lawyers representing the defendants in Constitutional and terrorism issues were interviewed. The questions to the interviewees are also attached.

1.5.2 Sources of Data and Method of Data Gathering

Both primary and secondary sources of data were used. For the primary source of data, the researcher has administered interviews with judges, prosecutors and lawyers at the federal high court Lideta bench located in Addis Ababa. This is because international crimes which amount to command responsibility are usually seen in this bench. The interviews helped the researcher to better understand the practice of command responsibility issue in the courts. The researcher has also assessed books, journals, cases, international law, the practice of some countries, and Ethiopian criminal law.

1.5.3 Population and Sampling

Apart from the doctrinal approach for the case of qualitative one, the researcher has selected as his target; judges, prosecutors and lawyers through purposive sampling on the bases of their exposure for the issue. The researcher selected judges from the federal high court Lideta bench because international crimes are usually seen in this bench. The lawyers and prosecutors were also selected from those who are frequently handling cases of international crimes. In addition to this, two prosecutors participated in the litigation of Mengistu Hailemariam's case were interviewed. This is because the case has an issue of command responsibility.

1.5.4. Methods of Data Analysis and interpretation

For the case of doctrinal part, as a doctrinal research is basically normal judicial research, statutory analysis, descriptive analysis and comparative analysis has been applied. On the other

hand; for the qualitative part, qualitative analysis is applied. Therefore the study incorporated a hybrid approach of analysis.

1.6 Scope of the Study

In substance, the research limited itself to assess the status of command responsibility for international crimes under the Ethiopian criminal law, case laws, customary international practices and the Ethiopian criminal law. For the qualitative approach, with regard to the geographical scope of the study, the study has been conducted at the federal high court Lideta bench located at Addis Ababa.

1.7 Significance of the Study

This research has significance such as contribution to the knowledge in the area, it shows over the gaps on the legal framework and the practical challenges seen in the study will serve as an initial point for further researches. In addition, it will also give information for legislative branches of the government to fill the gap.

1.8. Organization of the Paper

The thesis is organized into four chapters. The first chapter is the introductory chapter which includes the background of the study, statement of the research problem, research questions, research objectives and the methodology. The second chapter deals the review of literatures and legal framework for the command responsibility for international crimes. The third chapter deals the trends in Ethiopian Federal high court Lideta bench, data analysis and interpretation. The fourth chapter deals with conclusions and recommendations.

Chapter Two

Conceptual and Theoretical Framework

2.1. The Meaning of Command Responsibility

Superior/Command Responsibility is a legal term where Commander will be subject to individual criminal liability if the following elements exist:
A superior-subordinate relationship; the superior knew or had reason to know that a criminal act was about to be, was being or had been committed, and failure to take necessary and reasonable measures to prevent or punish the conduct in question.[34] A superior-subordinate relationship exists where a superior has effective control over a subordinate, which means that the superior has the material ability to prevent or punish the subordinate's criminal conduct. Superior responsibility can arise by virtue of the superior's *de jure* or *de facto* power over the relevant subordinate.

The possession of *de jure* power may not suffice to incur superior responsibility if it does not manifest itself in effective control.[35] A superior had reason to know only if information was available to him, which would have put him on notice of offences committed by subordinates. With respect to necessary measures, it means appropriate action; which show that the superior genuinely tried to prevent or punish. Reasonable measures are those reasonably falling within the material powers of the superior. Such measures may include carrying out an investigation, transmitting information in a superior's possession to the proper administrative or prosecutorial authorities, issuing special orders aimed at bringing unlawful practices of subordinates in compliance with the rules of war, protesting against or criticizing criminal action, reporting the matter to the competent authorities or insisting before a superior authority that immediate action be taken.

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[34]Chantal Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' (2007) JICJ 5 619-637

[35] Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, 29 July 2004, paras 41-42 ('Blaškić Appeals Judgment')

While the theory of indirect command responsibility punishes a superior for an omission, the direct command responsibility of superiors holds them responsible for the positive acts that have directly triggered the commission of international crimes, such as ordering, soliciting, inducing, aiding and abetting the perpetration of a war crime or a crime against humanity.[36]

For the person ordering the crime to be held responsible, it is also required that the person who received the order actually proceeds to commit the offence. As well, a causal link between the act of ordering and the physical perpetration of a crime needs to be demonstrated in that the order must have had direct and substantial effect on the commission of the illegal act. While ordering entails a superior-subordinate relationship between the person giving the order and the person carrying it out, *effective control will not have* to be proven or not a necessary element of this mode of criminal participation nor is a formal superior-subordinate relationship required for a finding of ordering so long as the person possessed the authority to order, including *de facto* authority. It is not necessary that an order be given in writing or in any particular form.[37]

2.2. Development of Superior/Command Responsibility

When we see with respect to customary international law, Custom is generally understood as consisting of: state practice and opiniojuris. The state practice must be consistent, uniform and general among the relevant states, although it does not have to be universal. Opiniojuris can be defined as a general belief or acceptance among states that a certain practice is required by law. This sense of legal obligation, coupled with state practice, differentiates custom from acts of courtesy, fairness or mere usage. It is difficult to unequivocally state whether command responsibility is a mode of liability or a crime *per se* in customary international law. When we see case law, post-WWII shows that the "mode of liability" approach was favored, although the jurisprudence was not uniform in its determination.[38] In the Nuremberg Trial In 1942, the United Nations War Crime Commission was established by the Declaration of St James signed by the

[36]Joseph Rikhof, The Interplay between International Criminal Law and Refugee Law in the Area of Extended Liability(2011)

[37] Hendin, Stuart E, 'Command Responsibility and Superior Orders in the Twentieth Century: A Century of Evolution', (2003) 10 Murdoch University Electronic journal of Law, para. 38

[38] Article 7 of the Nuremberg Charter.

allied powers in order to conduct investigations and obtain evidence of war crimes.[39] It was not until World War II that the issues of leader responsibility were seriously debated. The issues of direct responsibility of commanders were discussed thoroughly in the Nuremberg Trial and the Tokyo Trial. However, the indirect responsibility of superiors seems to have been discarded in Nuremberg. Regarding immunity of Head of State, Article 7 of the Nuremberg Charter denied the immunity of a head of state completely.[40]

Article 7 also denied the immunity of responsible officials. Also, it is very important to note that neither the Nuremberg Charter nor the Judgment of the Nuremberg Trial mentioned the responsibility for failure to act. Instead, Article 6 of the Charter provided that 'leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the forgoing crimes are responsible for all acts performed by any persons in execution of such plan'.[41] Apparently, Article 6 intended to punish individuals directly involved in the commission of the crimes. The chief purpose of the Nuremberg Charter was to establish individual responsibility, and negate the superior order defense, and deny the immunity of Head of States. As seen under Article 6 of the Charter, the drafters apparently did not intend to charge individuals with indirect responsibility for failure to control subordinates or prevent their atrocities. In Nuremberg, as the defendants were high ranking politicians and military commanders and were actively involved in the formulation or execution of a common plan or conspiracy to commit heinous crimes, they were charged with direct responsibility of individuals or superiors. Therefore, the Nuremberg Trial did not have a chance to deal with indirect responsibility of commanders.

2.3. Rational for the Development of Superior/Command Responsibility

The purpose for the development of the doctrine of command responsibility was to demand accountability from military commanders and non-military superiors for the criminal acts of subordinates under their control and authority. This was based on the fact that most of the

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[39] Article 6 of the Nuremberg Charter. As seen, there is no mention of indirect responsibility for failure to act.

[40] Crowe, C. N., 'Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution', (1994) 29 University of Richmond Law Review, p. 213

[41] 12 Reports of Trials of War Criminals, The United Nations War Crimes Commission, 1949, p. 76

international crimes were committed by low-level officials because the commanders or superiors failed to prevent or suppress them.[42]

The rationale for punishing superiors for crimes that they did not commit under the doctrine of command theory has been subject to debate. O'reilly argues that the doctrine is incompatible with a deontological retributive theory of criminal law that values the individual as the necessary unit of moral accountability.[43] The criminal liability under the theory of command responsibility is based on negligence and omissions rather than conduct of the accused and a mental element that reflects a guilty mind. It is based on the position of superior rather than the gravity of the crime. Rather the length of sentencing has to be determined by circumstances such as the gravity and nature of offence and the position of commander.[44]

It is argued that the doctrine of command responsibility is a utilitarian tool for victor's justice favoring deterrence of crimes and the punishment of superiors over the principle of individualized fault.[45] Scholars, institutions and even states have voiced their concern about possible abuse of the doctrine for political purposes.[46] However, reason for the responsibility is that those who have superior positions are the most appropriate persons to control or stop subordinates' acts on the battlefield in terms of position and power.

2.4. Scope of Application of Superior/Command Responsibility

Some early case law suggested that a form of liability, the criminal responsibility of a commander arising from the crimes of his subordinates constituted a discrete category of violations of the laws and customs of war.[47] However, the doctrine later developed, not as a separate category of war crimes, but as a form of criminal liability that applies not just to war

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[42] Jamie Allan Williamson, supra(n 9)

[43] Arthur Thomas O'reilly, supra(n 6)

[44] ibid

[45] Major Michael L Smidt, 'Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations', (2000) 164 Military Law Review 155.

[46] ibid

[47] See Bassiouni, M. Cherif, The Law of the International Criminal Tribunal for the Former Yugoslavia, Transnational Publishers, 1996, p. 345

crimes, but to other categories of international crimes, such as crimes against humanity and genocide.[48]

The most recent and most persuasive jurisprudential pronouncements have characterized this doctrine as a form of liability for culpable omission.[49] According to that view, a superior may be held criminally responsible, not for his part in the commission of crimes by his subordinates, but because of a personal and culpable failure on his part to adopt necessary and reasonable measures to prevent or punish those crimes.

International law has added one category of criminal liability which applies solely to those who bear sufficient authority over other people.[50] Those who can exercise such authority - in the form of an ability to exercise 'effective control', have a duty under international law to take necessary and reasonable measures to prevent or to punish crimes of subordinates where they have likely commission.

Liability is incurred for a personal failure on his part to perform an act required of him by international law, namely, to take necessary and reasonable measures to prevent or punish crimes of subordinates.[51]

2.5. Mode of Superior/Command Responsibility

When a commander issues an illegal order he would be held liable, as he is ultimately in charge on the battlefield.[52] The liability incurred by this situation is direct responsibility for issuing illegal orders regardless of the fact that the order was actually executed. However, in some cases the commander does not notice what is going on the battlefield. Command responsibility includes two concepts of criminal responsibility:

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[48] ibid

[49] ibid

[50] ibid

[51] See Bassiouni, M. Cherif, The Law of the International Criminal Tribunal for the Former Yugoslavia, Transnational Publishers, 1996, p. 345

[52] Bassiouni, M. Cherif, Crimes against Humanity in International Criminal Law, Kluwer Law International, 2nd ed., (2000) p. 419

The first concept is direct responsibility, where the commander is held liable for ordering unlawful acts.[53]

The indirect command responsibility of commanders is the criminal liability for international crimes committed by their subordinates if the commanders fail to exercise sufficient control over their subordinates.[54] And it is imputed criminal responsibility, where the commander is held liable for a subordinate's unlawful conduct. It is based on the commander's failure to act.[55] For example, a military officer might be held criminally responsible under imputed command responsibility for "failing to establish policies and procedures for the prevention of violations and for the punishment of violators, and for failing to implement them.

In addition to these, there is also a concept of civilian superior responsibility. It has been customary throughout international law since Nuremberg that civilians may be charged with an illegal order or failure to act, if they maintain effective command or control over their subordinates. Political leaders are theoretically civilians; however, they can be prosecuted if the elements of command responsibility fulfilled.[56]

The Tokyo Trial dealt with political leaders rather than commanders in the Army or Navy. Hirota, former Foreign Minister of Japan was convicted for the atrocities named the 'rape of Nanking'. There was no evidence that Hirota as foreign minister was a person effectively acting as a military commander. The Tokyo Trial held Hirota liable based on the notion of negligence.[57]

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[53]Bassiouni, M. Cherif, Crimes against Humanity in International Criminal Law, Kluwer Law International, 2nd ed., (2000) p. 419

[54] M. Cherif BassiouniI& Peter Manikas, The Law of the International criminal Tribunal for the former Yugoslavia (1996) 345, 348-50.

[55] See Vetter, Greg R., 'Command Responsibility of Non-military Superiors in the International Criminal Court (2012) 25 Yale Journal of International Law, p. 95

[56]Celebici para. 354.

[57] Vetter, Greg R., supra(n41)

During the Celebici case, the Trial Chamber concluded that a superior-subordinate relationship may include civilians, too.[58]

One scholar states that the civilian responsibility standard should be the same as command responsibility.[59] However, the military commander has a more influential position than civilian leaders, as he has pre-established authority with threat, punishment, or discipline over their subordinates. Thus, the Appeals Chamber of the Celebici case hesitated to admit that civilian superiors have the same liability as that of commanders' liability.[60] Article 28 of the ICC Statute appears to include civilian superiors.[61] Considering the circumstances of civilian superiors, the ICC Statute takes a more reasonable approach, compared with the ICTY and ICTR.[62]Article 7(3) of the ICTY Statute and Article 6 of the ICTR Statute will impose liability on commanders or civilians when they 'knew or had reason to know' of the subordinate's crime and 'failed to take the necessary and reasonable measures' without showing any tolerance to civilian leaders. But the ICC Statute has a similar criteria the 'knew or owing to the circumstances should have known' standard, which is easy to be applied to military commanders but is not civilians. Article 28 (2) of the ICC Statute gives civilians a lenient standard, lowering the 'should have known' standard as follows: (a) 'The superior either knew, or consciously disregard information' about the crime; (b) the crime was 'within the effective responsibility and control of the superior'; (c) 'failed to take all necessary and reasonable measures'. This standard is based on a duty to be informed. Thus, a willful disregard by a civilian superior against the duty noticed will be sufficient to establish the required mensrea.

2.6. Elements of Superior/Command Responsibility

The purpose of the doctrine is to ensure the effective compliance and enforcement of international humanitarian law.[63] Establishing criminal liability is based on commander's failure to act is based on the commander's failure: (a) to prevent the unlawful conduct, (b) provide for

[58] Prosecutor v. Delalic et al., Appeals Chamber Judgment, IT-96-21-A, February 20, 2001, para. 240.

[59] Article 28 the Statute of the International Criminal Court.

[60] Vetter, Greg R supra(n38)

[61]Orić, Judgment, para. 18

[62]Halilović Judgment, para. 204.

[63] See Bemba Trial Judgment, para. 172

general measures likely to deter the unlawful conduct; (c) investigate allegations of unlawful conduct; and (d) prosecuting and punishing the perpetrator of the unlawful behavior.[64]

2.6.1 Existence of a Superior-subordinate Relationship

The superior-subordinate relationship is a fundamental requirement for the establishment of command responsibility. However, there are limits to the doctrine of superior responsibility, and not all superiors can incur criminal liability. It is required in international criminal law that the superior has "effective control" over the subordinates. This notion is developed through jurisprudence and often attributed to the *Čelebići* case.[65] According to the *Čelebići* Appeal Judgment, a superior has effective control over the subordinate if he has "the material ability to prevent and punish criminal conduct."[66] This means that the control does not have to be formal, the *ad hoc* tribunals have applied command responsibility to *de facto* commanders as well.[67] Thus, establishing whether a commander has effective control is a question of evidence.

The doctrine of command responsibility also extends to civilian superiors and is explicitly provided for in Article 28 (b) of the Rome Statute.[68]

Some tribunals have taken the view that the commander must have been in control at the time when the crimes were committed. Superior-subordinate relationship may have existed either *de jure,* i.e., it was a relationship sanctioned by law, or *de facto*, in the sense of a relationship of subordination forged in factual and personal factors connecting the accused and the perpetrators.[69]

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[64] M Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, (2nd edn, Oxford University Press1999)

[65]Čelebići Trial Judgment, para. 378.

[66]Čelebići Appeal Judgment, para. 256.

[67] See Halilović Appeal Judgment, para. 85

[68]Čelebići Trial Judgment, paras. 355-363.

[69] Prosecutor v MomciloMandic, Verdict, No: X-KR-05-58, 18 July 2007 (State Court of Bosnia and Herzegovina), at 152.

A *de jure* superior-subordinate relationship for the purpose of the doctrine "superior responsibility" means that the superior has been appointed, elected or otherwise assigned to a position of authority *for the purpose of commanding or leading* other persons who are thereby to be legally considered his subordinates.[70] In the case of *De facto,* an individual could be regarded as being in a position of superior-subordinate for the purpose of this doctrine, not only where he was granted legal authority to lead or to command, but also where such a relationship has arisen from other factual and personal factors connecting the accused and the perpetrators. Where the source of the superior's authority arises from a source other than his domestic law, international law refers it as a *'de facto*' relationship of command. A *de facto* relationship of command can be defined as a relationship in which one party - the superior - has acquired over one or more people enough authority to prevent them from committing crimes or to punish them when they have done so. The origin or basis for such *de facto* authority may be diverse, but it must be such that there is an expectation of obedience to orders on the part of the superior and a parallel expectation of subjection to his authority on the part of those who are under his authority.[71]

2.6.2 Effective Control

To be liable as a superior, the accused must have exercised 'effective control' over those who are alleged to have committed the underlying crimes or must have had material ability to prevent or punish the principal offenders.[72] Effective control' is a necessary condition for criminal liability to be entailed as a superior.[73]

The Appeals Chamber of the ICTY has noted that those indicators of effective control are limited to showing that the accused had the power to prevent, punish or initiate measures leading to proceedings against the alleged perpetrators where appropriate. The authority which the superior

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[70]See Celebici Appeal Judgment, par 197.

[71]Celebici Appeal Judgment, par 192.

[72]Bagilishema Appeal Judgment, par 50 and jurisprudence cited. In Bagilishema, the Appeals Chamber noted that it 'is not suggested that "effective control" will necessarily be exercised by a civilian superior and by a military commander in the same way, or that it may necessarily be established in the same way in relation to both a civilian superior and a military commander.

[73] See Bagilishema Appeal Judgment, par 56.

had over the perpetrators must be 'effective', that is 'real',[74] as opposed to being merely theoretical or potential.

2.6.3 Requirement of Knowledge

To establish the commander's responsibility for failure to prevent or punish, he must have possessed the required criminal intent. Under customary international law, the commander must possess either actual or constructive knowledge of the subordinate's crimes.[75] However, it is widely accepted that the commander does not need to know all the details of the crimes committed.[76] This does not mean that a general knowledge is sufficient. According to the *Naletilić and Martinović* Appeal Judgment, "the principle of individual guilt requires that an accused can only be convicted for crimes *if his mensrea comprises the actusreus of the crime*."[77]

The issue of constructive knowledge is more complex. It is useful to distinguish between the standard in customary international law as expressed by the *ad hoc* and international tribunals, and the standard provided for by the Rome Statute. The Appeals Chamber of the *ad hoc* tribunals has defined constructive knowledge as "showing that a superior had *some general information in his possession, which would put him on notice of possible unlawful acts* by his subordinates."[78] The Pre-Trial Chamber also noted that the standard imposes an "active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, *regardless of the availability of information at the time on the commission of the crime*."[79] This shows that threshold for incurring criminal responsibility is lower than in the statutes of the *ad hoc* tribunals.

2.6.4 Failure to Prevent or Punish

Article 28 of the Rome Statute adopts the word "repress", instead of "punish". The duty to repress includes both a duty to stop ongoing crimes, as well as punishing the forces after

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[74]Kordic Trial Judgment, par 422

[75] See Article 7 (3) of the ICTY Statute; Article 6 (3) of the ICTR Statute; Article 6 (3) of the SCSL Statute; Article 16 of the SPSC Regulation; Article 29 (3) of the Law on the ECCC; Mettraux (2009) p. 195.

[76] Bemba Trial Judgment, para. 194.

[77]Naletilić and Martinović Appeal Judgment, para. 114

[78]Čelebići Appeal Judgment, para. 238

[79] Ibid para. 433

the commission of the crimes.[80] The two requirements are separate, in that the superior must have failed to prevent the crimes *or* failed to punish his subordinates after the commission of the crimes. Naturally, the superior can also incur criminal responsibility if he failed to perform both duties. If a commander learns of the crimes prior to their commission, he cannot avoid responsibility by simply punishing the subordinates after the fact.[81] The statutes of all international criminal courts adopt this wording, whereas AP I Article 86 (2) adopts "feasible" instead, without being substantially different. A plain reading of "necessary" suggests that the commander must take measures which are sufficient to prevent the crimes from being committed, or which adequately punish the subordinates after the fact. This is supported by the *ad hoc* tribunals, describing it on one occasion as "measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish)."[82]

2.6.5 The Requirement of Causation

Article 28 of the Rome Statute, and Article 3 (2) of the STL Statute, require causation between the superior's failure to prevent or punish, and the commission of the crimes. None of the other international tribunals include such an explicit requirement, and the *ad hoc* tribunals have held that causality does not have to be established to prove command responsibility.[83] Yet, Article 28 and Article 3 (2) require that the crimes occur "*as a result of his or her failure to exercise control properly* over such forces".[84] Proving causality is logically a difficult task which involves counterfactual exercises. The Trial Chamber in *Bemba* found that the link would be satisfied when "it is established that the crimes would not have been committed, in *the circumstances in which they were*, had the commander *exercised control properly*, or the commander exercising control properly would have prevented the crimes."[85] The doctrine of command responsibility comprises two legal duties of superiors: the duty to prevent future commission of crimes by its subordinates and the duty to punish subordinates in the instance of committing criminal acts

[80] ibid para. 206.

[81] ibid para. 201.

[82]Halilović Appeal Judgment, para. 63.

[83]Blaškić Appeal Judgment, para. 77

[84] Rome Statute Article 28; STL Statute Article 3 (2).

[85] Bemba Trial Judgment, para. 213

during war. The two types of liabilities are separate. The duty to prevent arises as soon as the commander acquires actual knowledge or has reason to know that a crime is being or is about to be committed, whereas the duty to punish arises once the crime has been committed.[86]

2.7. Superior/Command Responsibility under International Law

As a mode of liability, command responsibility assigns criminal responsibility to high-ranking members of military as well as militia for the crimes committed by their subordinates. At the most basic conceptual level, the individual criminal responsibility of such high-ranking individuals is attributed through their inactivity and requires both that they hold a superior subordinate relationship with the direct perpetrators and that they knew or should have known that the crimes were being or had been committed.[87]

These requirements have been codified in various ways in international legal instruments, as forms of military discipline in international humanitarian law, into a mode of individual criminal responsibility which is applicable to military leaders as well as leaders of military-like organizations, such as paramilitary groups, armed defense organizations and rebel groups. As such it has been recognized as an important tool in punishing those in superior positions for lack of supervision over persons under their command or authority[88] but also as a peculiarity of international criminal law.[89]

2.7.1. International Criminal Tribunal for the Former Yugoslavia (ICTY, 1993), International Criminal Tribunal for Rwanda (ICTR, 1994)

Each of the *ad hoc* and international Tribunals has adopted provisions to assign criminal responsibility to high-ranking members of military and military-like bodies for the crimes committed by their subordinates.[90] *The fact that any of the acts referred to in articles of the*

[86]Halilovic judgment para 72.

[87] Chantal Meloni, 'Command Responsibility Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?'(2007) Journal of International Criminal Justice, vol. 5, no. 3, p. 632.

[88]Elies van Sliedregt, Individual Criminal Responsibility in International Law, (Oxford University Press 2012) pp. 183-184.

[89] Chantal Meloni, 'Command Responsibility Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?'(2007) Journal of International Criminal Justice, vol. 5, no. 3, p. 632.

[90] ibid

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.[91] Unlike the ICC, the Statutes of these Tribunals do not distinguish between the status and organizational belonging of the superior.

Whereas ICC Art. 28 distinguish between the liability of military commanders and other superiors, the legal provision in the Statutes of the Tribunals that has applied the superior status to those in the military or military-like organizations, including paramilitary organizations and armed resistance groups, as well as civilian organizations. The early case law of the adhoc Tribunals, starting with the landmark judgment in Delalic and others. That command responsibility is a type of individual criminal responsibility for the illegal acts of subordinates is a common affirmation in ICTY judgments.

2.7.2. ICC, the International Criminal Court (1998)

Following the adoption of the ICC Statute, the responsibility of military and military-like leaders has been distinguished from the responsibility of non-military leaders, through the provision of alternate liabilities for commanders and superiors (of non-military or military like bodies).[92] The provision defines two liabilities – command responsibility and superior responsibility in the following terms: Article 28 states that: (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

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[91] ICTY Statute, Art. 7(3); ICTR Statute, Art. 6(3);

[92] In Bemba, the ICC Pre-Trial Chamber affirmed that military-type commanders may include those superiors who have authority and control over irregular forces, including rebel groups, paramilitary units, armed resistance movements and militias, where they are structured in a military like hierarchy and operate with a chain of command. See ICC, Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009,para. 408.

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. (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) 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.[93]

2.7.3. The Extraordinary Chambers in the Courts of Cambodia (ECCC, 2004)

In establishing the ECCC, the Government of Cambodia combined the ICC's alternate control requirement of effective command and control or effective authority and control into the text of its Statute.[94] The fact that any of the acts referred to in Articles 3, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does 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.[95]

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[93] ICC Statute, Art. 28.

[94] As a hybrid tribunal, the ECCC is founded under national law and is supported internationally through its agreement with the United Nations. See Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003.

[95] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Art. 29. Crimes under the jurisdiction of the ECCC include homicide, torture religious persecution, genocide, crimes against humanity, grave breaches of the Geneva Conventions, and destruction of cultural property during armed conflict, crimes against internationally protected persons.

2.7.4. The Special Tribunal for Lebanon (STL, 2007)

The Statute of the STL[96] adopts the Rome Statute provision on superior responsibility (Art. 28(b)) as its Art. 3(2): With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 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.[97]

2.7.5. IHL, International Humanitarian Law

The structure of command responsibility is rooted in International Humanitarian Law (IHL), which develops the duties of commanders to prevent, punish or report crimes committed during periods of war.[98] However, ICC Art.28 (a) differs in several key functions: first, it is structured as a positive mode of liability, whereas under IHL it is often established as an as an exclusionary clause (*the fact that … does not absolve/ relieve superiors from…*); second, it establishes the individual criminal responsibility of the commander, whereas IHL establishes options for penal Responsibility alongside disciplinary measures; third, the ICC has material jurisdiction over genocide, crimes against humanity *and* war crimes, whereas IHL concerns only war crimes; and fourth, Art.28(a) contains an explicit requirement of causation.

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[96] Statute of the Special Tribunal for Lebanon, Agreement between the United Nations and the Lebanese Republic pursuant to Security Council Resolution 1664, 29 March 2006, Art. 3(2).

[97] Crimes under the jurisdiction of the STL include terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences. See summary in ICTJ, Handbook on the Special Tribunal for Lebanon, 10 April 2008.

[98] Article 28(a) of the ICC statute.

2.7.6. Hague Regulations (1899, 1907)

The responsibility of commanders of the armed forces over their subordinates can be traced to the *Hague Regulations* adopted in 1899 and 1907, which establish that, in order for the armed forces to be accorded the rights of belligerents, they must '*be commanded by a person responsible for his subordinates*.[99]

2.7.7. Hague Convention and Geneva Convention (1907, 1929)

The Hague Convention of 1907 and the 1929 Geneva Conventions established a general duty of the commanders-in-chief of fleets[100] and armies[101] to ensure that their forces act in conformity with the general principles of the respective Conventions, although they do not establish any sanction or consequence for the failure to do so. In Art.19, the Hague Convention provides: The commanders-in-chief of the belligerent fleets must properly carried out; in conformity with the general principles of the present Convention. Art.26 of the Geneva Convention provides: The Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding articles as well as for cases not provided for in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.

Additional Protocol I (1977) a more complete framework detailing the concept of the responsibility of superiors emerged in *API* of the 1949 Geneva Conventions.[102] Adopted 16 years before the ICTY Statute, provisions of the API establish the responsibility of superiors for acts of their subordinates. (API Art. 86(2)) The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their

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[99] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, Art. 1(1); and Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Art. 1(1).

[100] Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[101] Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929

[102] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977

command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol and the positive obligations of military commanders to prevent repress and report (API Art. 87). However, it should be noted that the jurisdictional scope of the two API provisions are limited only to international armed conflicts. Art.86 (2) provides: The fact that a breach of the Conventions or this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, 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. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

2.8. Comparative Aspect of Superior/Command Responsibility

Countries have been using the doctrine of superior responsibility as a mechanism to prevent violation of human rights and international crimes. The legal doctrine of Superior responsibility was codified in the 19th century, at the Hague Conventions of 1899 and 1907, and is partly based upon the Lieber Code (1863), a war manual for the United States Armed Forces, two years into the American Civil War (1861–1865).[103] However, it has been widely practiced by states as customary international law after WWII. Thus, the developments of SR show that it has been come to practice due to the prevalence of atrocities and international crimes. For example, as we have seen above, the Hostages Trial was held from 8 July 1947 until 19 February 1948 and was the seventh of the twelve trials for war crimes that United States authorities held in their occupation zone in Germany in Nuremberg after the end of World War II. In addition to this, the Tokyo trial and others have proven that the doctrine of SR is used as CIL throughout the living planet.

[103] Lieber Code (1863), a war manual for the United States Armed Forces.

However, for the purpose of this study, the researcher takes two countries; France and Germany as an example on the bases of the wider application of the doctrine.

2.8.1. France

In France, Article 4 of the Ordinance of 28 August 1944 concerning the suppression of war crimes provided that: where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organized or tolerated the criminal acts of their subordinates.[104] Article 4 implied that superiors have duty to prevent criminal acts of the subordinates. The word 'organize' probably implies his direct participation, and 'tolerated' denotes his indirect responsibility of the subordinates' acts. It is very interesting to see that French law noted both of them should not be equally responsible and treated a superior's failure as a kind of accomplice liability. It seems that the precise rules of superior responsibility cannot be found in Article 4.

At the same time, it has to be noted that the purpose of the Ordinance was to give the basis for the trials of the war crimes during World War II, so actual principles applicable in France would have been found in French Codes. As Article 190 of the former French Penal Code upheld the doctrine of respondeat superior therefore imposed liability to superior officers as follows; 'in such cases the punishment…shall be applicable only to the superior officers who have originated the order'.[105] It can be said that there was understanding that superiors took responsibility in the case of illegal orders. As to negligence of superiors, Article 63 would have been used, which provided that any person who, by his immediate action and without danger to himself or others, could have prevented either a felonious act or a misdemeanor against the person, willfully fails to do so, shall be punished.

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[104]Bantekas, Ilias, Principles of Direct and Superior Responsibility in International Humanitarian Law, Manchester University Press, 2002

[105]Article 190 of the French Penal Code

In summary, France dealt with military issues with the former Penal Code, Article 190 of which clarified the direct responsibility of commanders when they actually issued illegal orders in order to acquit those who followed orders under the doctrine of respondeat superior.

However, as to the indirect responsibility of commanders and superiors, the former French Criminal Code did not mention, but one and only possible Article of which was Article 63 concerning willful failure. Article 63 could have been applied to anyone who had authority or power to prevent 'a felonious act or misdemeanor against a person'. The newly made French Criminal Code punishes instigation and negligence under Article 121-7, and the accused will be liable as an accomplice. However, Article 121-7 is not exactly a provision on superior responsibility, as it can be committed by non-military people without any authority.

On the other hand, France signed the Rome Statute on July 18, 1998 and ratified on 9 June 2000, becoming the 12th State Party. Thus, for one this since the statute recognizes superior responsibility as a mode of criminal liability, France is duty bound to apply it and for the other thing since France was one of the major actor of WWII and the legal proceedings at the end of the war to prosecute the Germany officials for committing international crimes based on the doctrine of superior liability as seen in the high command case and the hostage case, we can say that SR has been practiced in France as customary international law.

2.8.2. Germany

Section 47 of the German Military Code adopted in 1872, provided that 'if the execution of a military order in the course of duty violates the criminal law, then the superior giving the order will bear the sole responsibility there for. In Germany the direct responsibility of superior issuing illegal orders was already established in the 19th Century though there was no reference to indirect responsibility of commanders. Article 10 (4) of the 1956 Soldiers Act clarified that a superior gives orders only for military service purposes. Thus, orders for other purposes would have been unlawful in 1987 Penal Code of the Federal Republic of Germany.[106] The Code did not have an exact provision on superior responsibility, so the direct order by superior officers

[106]Bantekas, Ilias, Principles of Direct and Superior Responsibility in International Humanitarian Law, Manchester University Press, 2002

would have been punished by Section 26, which provided that 'whoever intentionally incites another to intentionally commit an unlawful act shall be punished as an instigator in the same as the perpetrator'.[107] There was no reference to indirect responsibility of superior officers, but Section 13 of the Codes clarified that omission by anyone is punishable when the person was under a legal duty to prevent the harm, and if his failure to act was equivalent to an affirmative act.[108] In Germany, Section 357 (1) of the German Criminal Code116 provides: A superior who suborns or undertakes to suborn a subordinate to commit an unlawful act in public office or allows such an unlawful act of his subordinate to happen, has incurred the punishment provided for this unlawful act.[109]

As to indirect responsibility, Section 41 of the German Military Criminal Code punishes superior officers who failed to control the subordinates' acts. Section 41 provides that the requisite mensrea is gross negligence and a grave consequence is required to apply.[110] Finally, the new German Code of Crimes against International Law (came into force in 2002), implementing the Rome Statute of International Criminal Court into national law, has provisions of superior responsibility. As to indirect responsibility, Section 4 (1) of the Code provides that 'a military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the same way as a perpetrator of the offence committed by that subordinates'.[111] With regards to direct responsibility, Section 4 (2) provides that 'any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to a military commander. Any person effectively exercising command and control in a civil organization or in an enterprise shall be deemed equivalent to a civilian superior.'[112] In Germany, the direct responsibility of commanders was already established in the 19th Century, but the principle of indirect responsibility of commanders caused by subordinates

[107] Article 190 of the French Penal Code 27

[108] The translation of Penal Code of the Federal Republic of Germany is available at <http://wings.buffalo.edu/law/bclc/Germind.htm > accessed at August 1 2018

[109] ibid

[110] ibid

[111] The new German Criminal Code was promulgated on 13 November 1998.

[112] ibid

would not have been recognized yet in this period. The Penal Code of the Federal Republic of Germany had a provision on superior orders at the time of 1987, which was just on direct responsibility caused by their own acts of intentional incitement. Simultaneously, it may have been still possible for a superior to be charged with omission in the case of subordinates' crimes where he did not order anything but failed to take a necessary step to prevent them.

The Military Criminal Code adopted in 1974 had direct responsibility of superiors more precisely. Section 32 prohibits giving orders or demands by abusing his authority. Section 41 punishes superiors' negligence that failed to control subordinates, which requires the mensrea of gross negligence. Thus, the Military Criminal Code is very similar to the principles of current international criminal law; however the 'had reason to know' standard cannot be seen here. The new German Code of Crimes against International Law came into force in 2002 has a provision on superior responsibility. The Code stipulates not only direct responsibility of superior but indirect responsibility of superiors caused by subordinates. Although the standard is 'omits' is very ambiguous compared with the ICC standard, the Code has implemented the ICC Statute into national law.

2.9. International Cases

2.9.1. The High Commanding Case

In the High Command case, one of the most important trials dealt with command responsibility, where thirteen higher ranking German officials were charged with committing offences; crimes against peace, war crimes, crimes against humanity, and conspiracy to commit the said crimes. General von Leeb claimed that he was not aware of the atrocities and that they were different from the given orders. He disagreed with the Commissar Order from the beginning, so asked von Brauchitsch to persuade Hitler to rescind it. As soon as he noticed the mass killings at Kowno, he immediately took steps to prevent their repetition. Indeed it is clear from the evidence that 'the accused von Leeb had protested against the order in every way short of open and defiant refusal to obey it'. The tribunal referred to criminality of superiors and stated that 'criminality does not attach to every individual in this chain of command from that fact alone'.[113]

[113]Crowe, C. N., 'Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution', (1994) 29 University of Richmond Law Review, p. 213

Relying on the ordinary notion of negligence, the tribunal does not seem to have agreed to the 'should have known' standard of the Yamashita case: [t]here must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.[114] A 'personal dereliction' implied two cases; one is where his direct act is traceable to him, and the other is personal neglect tantamount to acquiescence. In the case of 'a personal neglect', the tribunal held that the mensrea might be established without actual knowledge.

2.9.2. Hostage Case

After World War II ended, the allies established courts in each of their occupied zones in Germany to prosecute German officials for their role in the commission of war crimes, crimes against peace, and crimes against humanity. In the Hostage case,[115] the US government created Military Tribunal in order to charge twelve German high ranking officers with murdering thousands of civilians from Greece, Yugoslavia, Norway, and Albania during the occupation of these countries. In Hostage, the duty of commanders was specifically explained as follows: it is the duty of the commanding general in occupied territory to maintain peace and order punish crime and protect lives and property. This duty extends not only to the inhabitants of the occupied territory but to his troops and auxiliaries as well. Regarding the responsibility for what happened for the crimes under his command, the tribunal held that: the duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defense.[116]

The tribunal also answered the question as to whether or not the commander can excuse himself from responsibility when he did not have actual knowledge: an army commander will not

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[114] 12 Reports of Trials of War Criminals, The United Nations War Crimes Commission, 1949, p. 76

[115] United States v. List (The Hostage Case), Trial of the War Criminals before the Nuremberg Tribunal (1950) and United Nations War Crimes Commission,8 Reports of Trials of War Criminals, The United Nations War Crimes Commission, 1949, pp.66-79.

[116] ibid

ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. This statement considered the crime committed by the subordinates can be prima facie evidence of actual knowledge of the superiors, which suggests that knowledge of commanders may be presumed to have had if the crime is committed by his subordinates within the occupied territory.[117]

2.9.3. Tokyo Trial Case

In Tokyo, not only commanders but also political leaders were indicted, the ideas of which were new under international criminal law at that time. One of the unique aspects of criminal liability in Tokyo is that the notions of direct responsibility and indirect responsibility of superiors were clearly distinguished, and both of them were found to be an act of crime. Although the Nuremberg Trial dealt only with direct responsibility of superiors, the concept of indirect responsibility of superiors was suddenly affirmed in Tokyo. A peculiarity of the difference is that a number of prisoners of war were mistreated by Japanese soldiers without actual orders of superiors during war time, and the superiors in charge claimed that they did not issue orders to mistreat the prisoners of war.[118] Although there remains the question that indirect responsibility of superiors was established under international law at that time, the notion of indirect responsibility of superiors was accepted in subsequent trials concerning crimes committed during the Second World War. In reality, the Tokyo Charter did not have a general provision on individual responsibility, but Article 5 promulgated that 'leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan'.[119]

Article 6 of the Charter negates the immunity of official positions and the plea of superior orders as a defense. However, the Tokyo Charter as well as the Nuremberg Charter was silent on the issue of indirect responsibility of superiors caused by subordinates, which would have been

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[117] U.S.A. v. Wilhelm List et al., in Trials of War Criminals, Vol. XI, p. 1271. 59

[118] Article 5 of the Tokyo Charter

[119] Article 6 of the Tokyo Charter.

evidence that drafters of the Charters did not intend to prosecute leaders and commanders based on indirect responsibility of superiors. In consequence of the mistreatment of prisoners of war by Japanese soldiers, indirect responsibility of leaders was thoroughly discussed in Tokyo. At the outset, the tribunal confirmed responsibility resting on political leaders and the government in terms of responsibility to prisoners of war as follows: in the case of the duty of government to prisoners held by them in time of war those persons who constitute the government have the principal and continuing responsibility for their prisoners, even though they delegate the duties of maintenance and protection to others. Contrary to Nuremberg, the Tokyo trial dealt with cases of indirect responsibility of superiors. Some of them were similar to the notion of ordinary negligence of criminal law, but the 'should have known' standard seems to have gone beyond that level.

2.9.4. Celebic Case

The Celebici case is the first international case dealing with command responsibility since the World War II trials. Regarding command responsibility the Trial Chamber quoted the Report of the Secretary-General stating that individuals who actually 'participate in the planning, preparation or execution of serious violations of international humanitarian law' are liable. In relation to the responsibility of commanders who did not issue actually illegal orders, the Chamber held that*: that military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law. Thus, a superior may be held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates.*[120]

As to indirect command responsibility, the Chamber noted that three elements are required for the application of command responsibility; '(i) the existence of a superiors subordinate relationship; (ii) the superior knew or had reason to know that the criminal act was about to be or

[120]Rockoff, Jennifer M., ''Prosecutor v. ZejnilDelalic (The Celebici Case), (2000) 166 Military Law Review pp. 172-176.

had been committed; and (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[121]

2.9.5. Blaskic Case

In the Blaskic case, General Blaskic was charged with serious violations of international humanitarian law,[122] committed against Bosnian Muslims in Vitex, Busovaca, Kiseljak and Zenicain the Lasva Valley region of Central Bosnia from May 1992 to January 1994. As to his knowledge of the crimes, the Trial Chamber held that: the accused had more than a constructive knowledge of the crimes. It is satisfied beyond all reasonable doubt that General Blaskic ordered attacks which targeted the Muslim civilian population and thereby incurred responsibility for crimes committed during these attacks or at least made himself an accomplice thereto and, as regards those crimes not ensuring from such orders, he failed in his duty to prevent them and did not take the necessary measures to punish their perpetrators after they had been committed.[123]

2.9.6. Kordic Case

Kodic was a civilian leader who had the positions of Vice-President of the separatist Croatian and President of the Croatian Democratic Union of Bosnia and Herzegovina, and the principal Bosnian Croat political party. He was charged with a crime of genocide as a superior committed by the Croatian Defense Council. In Kordic the standard of de jure or de facto authority was confirmed stating that 'no formal superior-subordinate relationship is required, but a superior's subordinate relationship was needed. The Chamber used a higher standard of proof to civilians. In the Chamber, the availability of command responsibility to civilians was discussed in order to establish Kordic's responsibility:[124] Although liability under Article 7(3) may attach to civilians as well as military personnel, once it is established that the requisite power to prevent or punish exists, the Chamber holds that great care must be taken in assessing the evidence to determine command responsibility in respect of civilians.

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[121]Celebici judgment para. 333.

[122] ibid

[123] Prosecutor vs. General Blaskic, ICTY Judgment, No IT-95-14-T, Nov. 16, 1998 (1999) was charged with crimes against humanity, grave breaches and violation of the laws and customs of war.

[124] ibid

In the first place, it is established that substantial influence (such as Kordic had), by itself, is not indicative of a sufficient degree of control for liability under Article 7(3). Secondly, while liability under Article 7(3) may attach not only to persons in formal positions of command, but also to those who are effectively in command of more informal structures, the Chamber finds that Kordic lacked effective control, which the Appeals Chamber in the Celebici case defined as "a material ability to prevent or punish criminal conduct, however that control is exercised."[125]

[125]Kordic judgment (2001), para. 388.

Chapter Three

3. Superior Responsibility for International Crimes under Ethiopian Criminal Law

In this section the status of command responsibility under Ethiopian Criminal law is assessed in aspects of statutes, court practices and trends.

3.1. Superior Responsibility for International Crimes in Ethiopian Criminal Law

The criminal Code of Ethiopia provides the modes of responsibility from Articles 32 to 40. These provisions classify the participants in criminal conduct into two categories: Principal, and Secondary offenders. The Code provides three situations in which a person participates in criminal activity as principal offender. These are: Material Offender; Moral Offender; and, Indirect Offender. The material offender is the person who actually commits the crime either directly or indirectly. While the direct means is when the person commits the criminal conduct in person with the required *mensrea* where as the indirect means refer to the situation in which the perpetrator employs animals or natural forces.

Proclamation no. 414/2004, the criminal code of the Federal Democratic Republic of Ethiopia, article 73 stats that in the case of an act committed by a subordinate on the express order of an administrative or military superior who was competent to do so, the person who gave the order is responsible for the crime committed and is liable to punishment, where the subordinate's act constitutes a crime and did not exceed the order given (Art. 58/3).

Whereas according to article 58/3 of the criminal code, no person shall be convicted for what he either knew of or intended, nor for what goes beyond what he intended either directly or as a possibility, subject to the provisions governing negligence. From this one may argue that indirect command responsibility is recognized under Ethiopian criminal law for the commanders' failure by negligence to prevent their subordinates from committing international crimes. Because as per article 59/1/b, a person is guilty of criminal negligence when, having regard to his personal circumstance, education, occupation and rank, he fails to take such precautions as might reasonably be expected in the circumstances of the case.

This argument can be further strengthened by the statement of the criminal code under article 23/1. It states that "In this code, an act consists of omission of what is prescribed by law." But the last paragraph of the provision stipulates that "a crime is an act which prohibited and made punishable by law. In this code, an act consists of omission of what is prescribed by law."

In addition to the above, as per article 59/2 of the first paragraph, crimes committed by negligence are liable to punishment only if the law so expressly provides by reason of their nature, gravity or the danger they constitute to society. But the criminal code has no any provision which make a military commander responsible for his failure to prevent his subordinates from committing international crimes.

Furthermore, the FDRE constitution is the supreme law of the land. As per Article 9/4 of the constitution, all international agreements ratified by Ethiopia are an integral part of the law of the land. Since command responsibility as individual criminal responsibility is enshrined under international conventions, one can argue that the applicability of command responsibility can be practiced under the Ethiopian Criminal justice system. However, the Ethiopian criminal Code governs only those acts mentioned above and yet it needs its applicability as customary international law in Ethiopia.

On the other hand, on can also argue that, command responsibility is not recognized under the general part of the criminal code since article 23 of the criminal code talks about personal liability based on the actions associated with the person himself but not for the actions of others. As stipulated under Article 69 of the criminal Code, superiors will criminally be held liable only for acts committed or omitted with their express order and so far as the subordinate's act did not exceed the order given. Article 69 of the FDRE criminal Code provides that 'if the execution of a military order in the course of duty violates the criminal law, then the superior giving the order will bear the sole responsibility therefore.'

According to the doctrine of command responsibility under international law, failure of the superior to submit the matter to the concerned authorities or punish the perpetrator who is under

his effective supervision is a dereliction of duty, which entails criminal responsibility. Article 73 of the 2004 criminal code stipulates that 'whoever intentionally incites another to intentionally commit an unlawful act shall be punished as an instigator in the same as the perpetrator'. There was no reference to indirect responsibility of superior officers, but article 23 of the Codes clarified that omission by anyone is punishable when the person was under a legal duty to prevent the harm, and if his failure to act was associated with criminal conduct. Besides, for Art.73 to be applicable, it is not required that the superior should be a high-ranking official or military commander. It rather suffices that he/she should be of a higher rank than the person executing the order, i.e. he/she should have the right to give orders and that his subordinate should have corresponding duty to obey. He who gives the order must, therefore, be a person in an authority. But his being in a position to give orders does not entitle him to demand from his subordinates that he should act in violation of the law. Further, the superior who orders an act to be done, which is unlawful, is liable only for those acts. This is to say that, if the subordinate exceeds or departs from the order, the superior is not answerable for the excess or departure unless he directly or indirectly intended it to occur.

Art.74 (1) provides that the subordinate cannot escape punishment if he/she carries out an illegal order, which he is aware of it. Hence the subordinate must control the lawfulness of the orders he receives and is liable to punishment if he intentionally violates the law on being ordered to do so. The duty to obey, therefore, ceases to bind the subordinate when the doing of an act is ordered which is contrary to the law. It appears however; the law does not impose a higher duty on the subordinate to check the legality of every ordered act. He/she is required to refuse execute an order, which is *manifestly unlawful* as regards to its form and or contents.

As per article 320 of the criminal code, breaches of Military Duty Committed by Officers or Commanding Officers; in all cases of breach of liability to performance military service, of breach of military order or discipline, of service or of military obligation in general, an officer or commanding officer, irrespective of rank, shall be subject to exemplary and drastic punishment, according to his degree at guilt, within the limits of the punishments.

As to indirect responsibility, though the Ethiopian criminal Code *has recognized criminal liability by way of omission in its general part, there is no any special provision* that provide a military commander or civilian superior shall be criminally responsible for his failure to prevent his subordinate from committing an offence. However, any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to as principal criminal perpetrators. The problem of superior subordinate relation arises when a person commits an offense on the order of someone to whom he owes obedience. This can happen in numerous occasions. Articles 73/74 on the other hand are applicable only to specific types of relation, i.e. administrative and military superior subordinate relation. Whenever there is hierarchical relation and chain of command, there will be a superior who exercises hierarchical powers over his subordinates and giving them general or specific orders. Thus, such kind of relation involves a rather simple question with regards to whether the person who gives the order is guilty of the offense in every occasion. A much more controversial question is whether the person who carries out the order is guilty of an offense. The main issue therefore is one of liability and not of participation.

On the other hand, the military defense establishment proclamation no.1100/2019 of Ethiopia does not say anything about command responsibility. The Ethiopian military defense force proclamation no. 1100/2019 talks about the powers, functions and structures of the defense force. It talks about the establishment and functions of especial military investigation, prosecution and courts without dealing with criminal responsibility. Rather the criminal responsibility of military commanders for their participation of criminal acts is stipulated under the criminal code.

Article 16 of the defense force proclamation stipulates that "…where any member of the defense forces violates provision of military laws, regulations, directives……and the offence committed is so minor that it cannot be brought to a military court case shall be disposed of in accordance with the defense forces' disciplinary regulation." Thus, this provision cross refers the military court. On the other hand article 28 of the proclamation states that especially military investigation; prosecutions and court shall be established.

But under article 37 it gives the final appellate power for the federal Supreme Court while article 38/1/a states that "the primary military court shall have jurisdiction over matters that persons

responsible for military offences provided from article 284 to article 322 of the criminal code." Therefore, from the above, we can infer that the general principles and the special provisions of criminal liability issue is left for the criminal code which governs the general principles of criminal liability for all laws having provisions of criminal issues. Furthermore, when we see the anti-terrorism proclamation no 652/2009, it has not incorporated the elements of command responsibility.

To sum up though some elements of command responsibility is recognized under the Ethiopian Criminal law, it failed to incorporate this essential principle in a clear way as independent principle of criminal liability in the general part of the criminal code and to be accompanied by special provisions either in the criminal code itself or to be incorporated by different proclamations.

Under the Ethiopian criminal law, therefore, it is impossible to hold superiors criminally liable for failure of taking necessary measure on the commission of crime by subordinates unless there is a proof of direct participation in the commission of the offence, either as a principal or co-offender.

Consequently, in the Ethiopian genocide trial, it is becoming common to see superiors are liable when they participate by direct order to subordinates. But it is difficult to ascertain indirect command responsibility of military/civilian superior. When Ethiopia ratifies Geneva Convention and a norm of command gets the status of customary international law, it is an obligation of states under international law to implement it. As parts of customary international law prohibitions of crimes against humanity have binding effect on the entire globe, including Ethiopia, Ethiopia bears an obligation to give effect to this prohibition. To fulfill this obligation the country is expected to domesticate the customary norm of command responsibility to its national laws.

3.2. The practice of Superior/Command Responsibility in Ethiopian Courts vs. Customary International law

In this regard, the researcher interviewed judges, prosecutors and lawyers in the Federal High Court's Lideta Division.

When we see, the process of selecting judges and prosecutors as well as lawyers for interviews; the study focused on the Federal High Court's Lideta bench. Because cases having an issue of command responsibility are litigated in this bench. In this bench, there are two hearings on Constitutional and terrorism issues. These are the 1st constitutional and terrorism hearing and the 2nd constitutional and terrorism hearings. There are three judges at each hearing. Accordingly, the researcher interviewed a total of 4 judges from each.

On the other hand, one of the directorates under the former Federal Attorney General (the current Ministry of Justice) is the Directorate for National and border crossing crimes. It is located in the back office of the Federal High Court's Lideta Division, and is the office to prosecutors who handle terrorism and border crossing crimes.

At 1st and 2nd constitutional and terrorism issues hearings, usually 1 prosecutor is assigned for one case and sometimes 3 or four prosecutors may assigned. Accordingly, two experienced prosecutors were interviewed. In addition, the researcher has worked for 5 years as a federal prosecutor. Furthermore, at the time of the study, he was working as a lawyer in federal courts. This helped the researcher to access the experienced lawyers, prosecutors and judges. As a result, the researcher interviewed two additional prosecutors who have handled the case of Derg officials as special prosecutor.

Similarly, in the case of lawyers, four of the most experienced and well-known lawyers representing the defendants in constitutional and terrorism issues hearing were interviewed.

The judges have reflected different views on the issues such as the practice of command responsibility in the Ethiopian courts and the practical scenarios that they encountered in the course of litigation.

Two of them replied that in most instances suspects for cases having the elements of command responsibility are charged with either article 240 of the criminal code for crimes of armed rising or civil war or under article 241 for crimes of attack on the political or territorial integrity of the state. Article 240 begins with: "who so ever intentionally…" and the details of the provisions show that the suspect will be liable if he has direct participation.

But the scope of article 241 is broader because it says "whosoever, by violence or any other unconstitutional means, directly or indirectly, commits…." This gives chance for the prosecutors proof their case during the witness examination.

Two of the judges said that during witness examinations, the nature of the cases appeared to be cases having the elements of command responsibility. As their statements, this could occur where the prosecutor dos not find direct provision to charge with command responsibility. Because unless there is direct and clear provision; the burden of proof will be difficult for the prosecutor.

Furthermore, they said that cases of command responsibility nature have rarely appeared in direct charge of expressly the elements of SR/CR. Thus, the practice of command responsibility is rare before courts and nor practiced as customary international law.

From the above we can infer that the status of command responsibility in the Ethiopian criminal law is that; it is not practiced as customary international law as well as there is no direct stipulation which incorporates the three elements of command responsibility: authority to control his subordinates, failed to prevent or repress within the capacity of his authority and failed to take necessary measures.

Similarly the researcher has administered interviews with prosecutors on the same issues. Three of them have begun their response with the demand for amendment of the criminal law of Ethiopia to incorporate command responsibility as a separate and clear stipulation. According to them, this will reduce their burden of proof during the litigation. They have mentioned an example for the cases of gross human rights violations in Ethiopia because of the absence of that

clear stipulation. Were that provisions exit, commanders would work their job effectively within their authority to prevent the commission of international crimes before its destructive results.

Three of the prosecutors argued that most cases have an element of command responsibility but charged with article 240[126], article 241[127] and the following of the FDRE Criminal Code. They added that when officials or commanders became liable of failing the effective control of their subordinates within the scope of their authority, prosecutors are unable to charge them under the doctrine of command responsibility because there is no direct provision in the criminal law of Ethiopia. Rather usually charged with the above provisions and the provisions under the anti terrorism proclamation. As they said there is no practice of command responsibility neither in the direct charge against offenders nor as customary international law. The prosecutors mentioned the case of Abdi Mohhamd Omar; the former Somali regional government's president. He is charged under article 240/2[128] of the FDRE criminal code.

From the above we can reason out that command responsibility is not stipulated in a clear and separate manner in the Ethiopian criminal law. There is a clear legal gap because prosecutors tend to charge under command responsibility, but for fearing of burden of proof, and because of the absence of provision, they usually charge under article 240 and the followings of the FDRE criminal code.

Prosecutors further argued that if there will be direct provision on the issue of command responsibility, the security of the country could be better because commanders can effectively perform their jobs under their authority in order to avoid responsibility.

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[126] Rising or civil war; where the crimes has entailed serious crimes against public security or life; proclamation no. 414; the Criminal Code of the democratic republic of Ethiopia, article 240.

[127] Attack on the political or territorial integrity of the state, Proclamation no. 414; the Criminal Code of the democratic republic of Ethiopia article 241.

[128] Federal High court Lideta Bench 1st terrorism bench, file no.231812; charged with armed rising or civil war where the crimes has entailed serious crimes against public security or life as per proclamation no. 414; the Criminal Code of the democratic republic of Ethiopia, article 140/2.

Furthermore, the researcher has conducted interviews with lawyers on the same issues. Two of them began their responses with mentioning of suspects charged for committing corruption crimes and violations of constitutional order of the country. They mentioned cases of prosecutor vs. the former intelligence center officers, prosecutor vs. Dr. Debre-Tsion Gebre-Michael. They have explained that in the case of the former intelligence officers, the charge mentions that the accused persons have violated human rights and in the case of Dr. Debre-Tsion, the case mentions direct command of civil war. They argued that though the charges do not have mentioned command responsibility directly; it has incorporated the elements. Three of the lawyers replied that there is no the practice of command responsibility in the Ethiopian courts because no element of command responsibility has been taken as a reason for the litigations before the courts.

When we see the above responses in the context of the legal elements of command responsibility, that first the superior must had the authority to control the actions of his subordinates, Second, that the superior knew or in the given circumstances should have known that a subordinate had or was about to perpetrate a human rights violation and lastly that the superior failed to take necessary measures, within the scope of his authority, to prevent or repress the commission of the human rights violations. From this we can reason out that the concept of command responsibility is a kind of allegation against commanders for the crimes committed by their subordinates within the context of the above elements.

Hence, for the case of the former intelligence officers, there is an element of authority. But the charge claims an act committed by them directly. Hence, though the offence mentioned in the charge amounts to international crimes, the allegation is based up on their direct participation. Hence the concept of command responsibility is there but confused. The suspects were first charged with the anti-corruption proclamation no. 881/2009 and latter the court altered the provision when a judgment was given to defend. Even the court ordered some of them to defend under article 555 of the criminal code for grave and intentional injury against the victims as a principal offender. This shows how far the contents of the charge and the provision under which the suspects were charged mismatched. In the case of Dr. Debre-Tsion and his co-suspects; the charge mentions that the accused have directly ordered the civil war and had prepared for it.

Element of authority, subordinate relationship and ability to control is there in the charge. But the charge mentions a direct participation and the claim is directly against his participation and the outcome for his direct participation but not the offences of his subordinates. But they were charged under the anti-terrorism proclamation and the criminal code article 240, and article 241 for crimes of armed raising and civil war; crimes against the political and territorial integrity of the state consecutively. Hence, the concept of command responsibility is confused. Therefore, there is no clear practice of command responsibility either directly or asa customary international law. The same works with the case of the former Somali regional government president, Abdi Mohamed.

Furthermore, the lawyers argued that if the principle of superior/command responsibility existed in Ethiopian criminal law as independent and clear way, human rights violation would decrease and effective leadership would be promoted.

They mentioned the situation of the current regional states as an example. In most heinous crimes committed in some regional states, no effective accountability of leaders or superiors has been seen not only for superior responsibility as enshrined under international law and customary international law but also for principal offences even by the superiors themselves.

They related the situation with general principles enshrined under the continental legal system. Under the continental legal system, the conduct of crimes is highly related with legality, culpability and personal liability. They also mentioned crime of improper omission; which is the concept of commission by omission. The later denote a distinct mode of criminal liability arising from committing a crime of improper omission as a principal perpetrator.

But basically omission is based on the theory that failure to perform a legal duty when one has capacity to do so is substitute for the commission of a crime. A criminal offence is committed by an omission to act only where the perpetrator has an obligation to act but fails to do so.

To establish that a crime has been committed by omission, it is necessary to show three elements. Firstly that there was a duty of care, secondly that this duty was breached and finally that there is a casual connection between the breach of duty and the conduct.

On the other hand culpability is a legal responsibility of a criminal act; an individual's blameworthiness; the quality of being culpable. It also refers to the mental state (mens rea) that must be proven for a defendant to be held criminally liable. This in turn must be accompanied by the legality principle that to hold the suspect criminally liable, a conduct must be prescribed by law as a criminal act before the conduct.

When we see the situation of Ethiopia specifically; in some regional states, sometimes the leaders manifest that they have information for the commission of the crime and the repeated actions show that there is elements of commission by omission even resembles a principal offender in giving green light for the commission of human rights violation. However as lawyers argued, to hold the leaders criminally liable, there must be a pre-legislated law which makes the omission as a criminal act.

Thus, they argued that the better medicine for such failures and acts of the leaders in the regions; where human rights violations occur frequently is that of incorporating the concept of superior responsibility in the criminal law of Ethiopia in a clear manner as independent and separate principle of criminal liability.

Furthermore, even extending the crime commission by omission as enshrined under the criminal code of Ethiopia for superior responsibility will be restricted by the principle of legality. Because the criminal code clearly demands that to hold a suspect criminally liable for an omission, the duty must be specified first, second that duty must be breached and thirdly there must be a casual connection between the breach of the duty and the conduct.

In addition to this, even criminal acts by negligence must be also promulgated under the specific part of the criminal code. Hence, extending the crime commission by omission and negligence as stated under the criminal code to the principle of superior/command responsibility is impossible

in the Ethiopian criminal law for five main reasons: First that there must be the principle of legality as stated under article 2/2 of the criminal code "the court cannot consider an act as a crime unless it is prescribed by law as a crime".

Secondly, while mode of criminal conducts are exhaustively listed under articles from 32 to 40 (Principal, and Secondary offenders) of the criminal code, the mode of superior liability is not enshrined. Thirdly, under the above provisions, The Ethiopian Criminal Code provides three situations in which a person participates in a criminal activity as principal offender. These are: Material Offender; Moral Offender; and, Indirect Offender. But the situations listed above do not include the case of superior liability for his failure to prevent his subordinates from committing international crimes.

Fourthly, under article 59/2 of the criminal code, it is stated that crime by negligence is not punishable unless enshrined under the specific part of the criminal code as a criminal conduct.

Last but not least, the special part of the Ethiopian criminal code doesn't recognize superior responsibility as a mode of criminal liability or as an act of crime. Therefore, as the lawyers argued that under the Ethiopian criminal law, the possibility of holding leaders or superiors criminally liability for their failure to prevent their subordinates from committing international crimes is less. For that in some regional states, there have been frequent violations of human rights while no superior has been criminally held responsible for his failure to prevent or punish his subordinates for the commission of international crimes.

3.3. Practical Cases in Courts

3.3.1. Mengistu Hailemariam Case

Special prosecutor office (hear in after SPO) vs. Mngistu Hailemariam eta 1 charges of genocide and crimes against humanity.

According to the special prosecutor, the suspects were charges with 211 counts of genocide and crime against humanity. Accordingly, the charges divided the accused in to three different categories; policy and decision markers, officials who passed an order or reached decision on their own and allege crimes as per art 32/1/ b and 281 of penal code of Ethiopia. In view of the first objective, the SPO has brought over 5000 former leaders and other officials to justice for crimes allegedly committed while they were in power from 1974-1991.

The defendants were; (a) policy makers (146 defendants) - senior government officials and military commanders – those who deliberated on and designed the plan of genocide in their effort to eliminate their political opponent; (b) field commanders (2133 defendants) - both military and civilians who commanded the forces, groups and individuals that carried out the violations;(c) Material offender individual perpetrators (soldiers, police, officers, interrogators) who involved in material commission of the crime in line with the nationwide plan.[129]

Among the charges the top leader who have been charged and convicted in the trial were Lt.col Fisseha Desta (former vice president of Derge), Major general Legesse Asfaw (who had allegedly ordered the bombing of civilian in market place in the town of Hawzen in Tigray province as per art 32/1/b and 281/1a/ of penal code.[130] The key mode of criminal responsibility provisions in the 1957 Ethiopian Penal Code invoked by the Special Prosecutor against the principal accused were Articles 32(1)(a) and (b), which apply to principal offences committed by offenders and co-offenders. According to Article 32(1) (a), a person shall be regarded as having committed an offence and punished as such if: 'He actually commits the offence either directly or indirectly, for example by means of an animal or a natural force; or (b) he without performing the criminal act itself fully associates himself with the commission of the offence and the intended result' (emphasis added). This makes the direct and indirect participation in the commission of crimes the most important mode of criminal responsibility. As pointed out, the core group of the accused was comprised of members of the Derg. When the Derg collapsed in 1991, seventy-three original members faced prosecution. The prosecutor alleged that these members committed crimes in their capacity as members of the Derg General Assembly and as members of committees and sub-committees that were responsible for executive decisions.[131]

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[129] Alebachew B. Enyew, Transitional Justice Through Prosecution: The Ethiopian Red Terror Trials in Retrospect(2010) Bahir Dar University Journal of Law vo1 no1

[130] Special Prosecutor v. Col. Mengistu Hailamariam et al., File No. 1/87, Ethiopian Federal High Court.

[131]Firew KebedeTiba, 'The Mengistu Genocide Trial in Ethiopia'(2007) Journal of International Criminal Justice1 of 16

According to the prosecutor, these leaders exercised effective control over the police, security and paramilitary forces who directly committed crimes.[132]According to the court decision Mengistu and senior official of Derge were prosecuted and convict about the responsibility of leadership and trials addressed crime committed by defendants through direct participation by giving direct orders. However, the provision of 32/1/b of penal code deal with individual responsibility of moral criminal that designed and plan the commission of such crime, but the case show that such higher official of Derge participation on the commission on crime through giving order. Even though, concept of command responsibility was not clearly incorporate penal code, but the fact in the case show the order of higher official to subordinate to commit the crime of genocide and crime against humanity were possible to include in the definition of direct command responsible where the superior actually delivered illegal orders to the subordinates, which will be unlawful rather wrongly determining as moral criminal as per art 32/1/b. However, there was no clear indication of indirect command responsibility that failure of superior taking of reasonable measure to prevent or punish subordinate in law as well as in the case law in Ethiopia. Therefore, conception of command responsibility for international crime was developed; even Ethiopia is party to Geneva and Hague convection which are incorporate command responsibility but, it has practical problem of establishment of indirect command responsibility, but in international Tribunals and other national jurisdiction develop as customary international. Thus Ethiopia obliged to punish military or civilian superior commission or omission of international crime.

3.3.2. Dagnnet Ayalew Case

The case was brought before Amahara Regional state Supreme Court. The special prosecutor brought eleven counts of charge in single file against Derge official in Amhara Region on crime of genocide and crime against humanity in violation of art 32/1/b/ and 281of penal code of Ethiopia. In particular of charge state that during Derge regime that crime genocide and crime against humanity commit in place where Amharakala-DegaDamot and Awraja 1970-1980 through making an order to commit the crime of genocide in political group.[133] The court convicted and punished the defendant as they were charged. However, prosecutor charged and

[132] Special prosecutor vs. DegnnetAyale eta l (1993) Amhara Region Supreme court.

[133] Special prosecutor vs. DegnnetAyale eta l (1993) Amhara Region Supreme court.

court convicted as per 32/1/b/, the accused as moral criminal, the fact and the analysis of the court showed that there was civilian superior order in the case, because as the case the higher official given direct order to subordinate committed such crime through written order to destroy in whole or in part of opposing parties show that someone else was not found as behind the commission of crime that organized as moral offender; rather it acted as superior order. Therefore, there was conception of direct command responsibility to give unlawful order, but the prosecutor and the court failed to establish and determine indirect command responsibility in the case.

Chapter Four

4. Findings, Conclusions, Recommendations

4.1. Findings

It is established fact that superior/Command responsibility is recognized under international criminal law, customary international law and case law. In addition Comparative criminal laws on the issue of command responsibility show that countries such as Franc and Germany have incorporated command responsibility under their Criminal Law. on the other hand, though the general part of the Ethiopian criminal code have an element of indirect command responsibility in an ambiguous manner; for it recognizes crimes by omission, there no especial provision in Ethiopian criminal law on command responsibility for international crimes. In addition, the Ethiopian criminal law has no incorporated command responsibility as a principle in the general part of the law directly or indirectly. Rather cases having the nature of command responsibility has been charged under either article 240 of the criminal code for crimes of armed rising or civil war or article 241 for crimes of attack on the political or territorial integrity of the state.

4.2. Conclusions

International law recognizes superior responsibility as a *sui generis* form of liability for omission that now forms part of customary international law. Liability pursuant to that doctrine is based on a grave and personal dereliction of duty on the part of a superior. The omission relevant to this form of liability consists of a gross, culpable and intentional failure on the part of an individual in a position of sufficient.

Authority to comply with his legal duties to prevent and punish crimes of his subordinates, as provided under international law and as might be specified by that superior's domestic law.

There remain certain issues, however, as regard the relationship that must exist between that culpable omission or dereliction of duty and the underlying offence in relation to which the superior could be held responsible. Superior responsibility is perceived as a crime of omission in relation to the commander's duty to punish crimes, and as a mode of liability in relation to his duty to prevent crimes.

As noted, a rule attains the status of customary international law if exists a widespread practice of that rule amongst States, and if there exists a conviction that the practice is required by international law based on the foregoing examination of international legal instruments and jurisprudence as evidence of customary international law, as well as domestic legislation and jurisprudence.

Ethiopia is party of Geneva and Hague convection with optional protocol one that incorporate command responsibility. However, the Ethiopian penal/criminal code does not expressly deals with situation of command or superior responsibility. As to direct command responsibility, Ethiopian criminal Code does not provide that a military commander or civilian superior shall be criminally responsible for his failure to prevent his subordinate from committing an offence. However, any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to as principal criminal perpetrators. On the other hand though indirect command responsibility by way of omission is recognized under the general part of Ethiopian

criminal code in an ambiguous manner, it is not clearly stipulated and supported by any especial provision.

All in all the Ethiopian criminal law does not stipulate command responsibility as a principle in the general part with its full elements in a clear manner.

Under the Ethiopian criminal law, therefore, it is impossible to hold superiors criminally liable for failure of taking necessary measure on the commission of crime by subordinates unless there is a proof of direct participation in the commission of the offence, either as a principal or co-offender.

Consequently, in the Ethiopian genocide and other trials, it is becoming common to see when superiors are liable when they participated as a principal offender through direct order to subordinates; while it is difficult to ascertain indirect command responsibility of military/civilian superior.

As the case entertained in different courts showed that there was concept of command responsibility provisions. Therefore, it should have more detailed enough law that regulates command responsibility.

Even though, command responsibility developed as customary international law in international as well as domestic area of criminal tribunals, the practice is not existed in Ethiopian courts.

4.3. Recommendation

Even if superior responsibility developed as customary international law as individual criminal responsibility, it is difficult to charge, convict and punish individual superior, unless domesticating such responsibility in the domestic criminal law because the principle of legality must be observed. However, it doesn't mean that criminalizing certain act as crime is only domestic criminal law, it is sufficient to act as crime in international criminal law, but what matter most is nullapoenasine lege per-determined amount of punishment to certain act.

In Ethiopia, the criminal law doesn't stipulate superior responsibility as a general principle at all and not clear even if mentioned incidentally. The court practices also show that command responsibility is not practiced as customary international law. In addition, there is un-clarity even among the lawyers. Hence, we can say that there is a legal gap in Ethiopia on the issue of command responsibility.

Therefore,

1. Ethiopia should incorporate superior responsibility for international crimes as individual criminal responsibility.
2. The legal gap on superior responsibility in the Ethiopian Criminal law has to be solved by new legislation or amending the criminal law (specifically the criminal code) by the ministry of justice.
3. As a secondary solution, Ethiopian courts should apply superior responsibility as customary international law.

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Annexes

Annex 1

ADDIS ABABA UNIVERSITY

College of Law and Governance Studies

Public and Constitutional Law LL. M Thesis Interview Questions

Interview questions for Judges, Public Prosecutors and lawyers

This interview format (Guideline) is prepared by Ezedin Fedlu to gather data for his Thesis titled "The Status of Command Responsibility for International Crimes in Ethiopian Criminal Law" as a partial fulfillment of Master Degree of Law in Public and Constitutional Law.

I kindly request my interviewee to give the interview in a responsible manner for the sake of scientific admissibility and integrity.

1. Have you encountered International Crime cases?
2. Have you seen the issue of command responsibility for international crimes in the cases that you have encountered?
2. What is the practice of Ethiopian courts on the Issue of Command Responsibility for international Crimes?
4. Is command responsibility for international crimes practiced in Ethiopia as customary international law?
5. Is command responsibility for international crimes recognized under the Ethiopian criminal law?

Many Thanks!

Annex 2

አዲስ አበባ ዩኒቨርሲቲ

የድህረ-ምረቃ ፕሮግራም

የአስተዳደርና ህግ ትምህርት ክፍል

ይህ የቃለ መጠይቅ መምሪያ የተዘጋጀው የአዲስ አበባ ዩኒቨርሲቲ ድህረ-ምረቃ ፕሮግራም በህግና አስተዳደር ትምህርት ክፍል በአስተዳደርና ህገ-መንግስት ህግ ዘርፍ የማስተር ዲግሪ ተማሪ የሆነው ኢዘዲን ፊድሉ በአለም አቀፍ ወንጀሎች የአዛዥ/ኃላፊ ተጠያቂነትን በተመለከተ የኢትዮጵያ ወንጀል ህግ ቁመና በሚል ርእስ ለሚሰራው ጥናት መረጃ ለመሰብሰብ በአጥኚው የተዘጋጀ ነው።

ክቡር/ክብርት ተሰታፊ ለሳይንሳዊ ጥናቱ መሳካት ሲባል በሀላፊነት መጠይቁን እንዲሞሉ በማክበር እጠይቃለሁ።

1. **በስራዎ አጋጣሚ አለም አቀፍ ወንጀል የነበረባቸው ጉዳዮች አጋጥመዎታል?**
2. **እርስዎ ባጋጠምወት ዓለም አቀፍ ወንጀል በነበረባቸው ጉዳዮች የአዛገሮች ተጠያቂነት ነበረበት?**
3. **ለአለም አቀፍ ወንጀሎች የአዛዥ ተጠያቂነት ባለባቸው ጉዳዮች የኢትዮጵያ ፍርድ ቤቶች አሰራር እንዴት ነው?**
4. **ለዓለም አቀፍ ወንጀሎች የአዛገሮችን ተጠያቂነት በተመለከተ በኢትዮጵያ ውስጥ እንደ ዓለም አቀፍ ልማዳዊ ህግ አተገባበርን በተመለከተ ምን ይመስላል?**
5. **በኢትዮጵያ የወንጀል ህግ ለዓለም አቀፍ ወንጀሎች የአዛገሮች ተጠያቂነት አለን፤ እንዴት?**

አመሰግናለሁ!