Chapter 5

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Doctrines of International Criminal Law

1 Introduction

In this chapter various doctrines that are essential to the proper understanding of international criminal law, from command responsibility to amnesties, are considered. These legal doctrines, which are more or less exclusive to international criminal law, have emerged from the jurisprudence of the international *ad hoc* tribunals, national courts and international legal instruments. They are often linked to the unique nature of the core crimes prosecuted in international tribunals that will form the subject matter of prosecutions in domestic courts under the complementarity regime.

2 Command Responsibility

2.1 Foundation of the doctrine of command responsibility

Command responsibility is a form of liability for or mode of participation in international crimes.[1] It is the responsibility of a person in a position of command for the commission of crimes by those under his command. The term 'superior responsibility' is sometimes used, but it is perhaps less appropriate because command responsibility derives not only from a superior status but also from the duties and control attached to a position of command. In other words, it is the subordinate position rather than merely the inferior status of the main perpetrator of a crime that invokes command responsibility.

Command may be military or civilian. However, the notion of command responsibility has been most often employed in the military context and there are firm indications in the jurisprudence that civilian command responsibility is less easily invoked.[2]

Command responsibility deriving from the giving of orders to commit a crime under international law creates little difficulty in terms of determining liability since the commander has in such cases directly instigated the unlawful conduct. Where command responsibility is most contentious and difficult to determine is in cases of responsibility by virtue of the failure to control the unlawful conduct of subordinates. The term 'command

1 See generally Antonio Cassese, *International Criminal Law* (2003), pp 207-211; Kriangsak Kittichaisaree, *International Criminal Law* (2001), pp 251-257; Hessler, 'Command Responsibility for War Crimes',82 *Yale Law Journal*, 1274 (1973); William H Parks, 'Command Responsibility for War Crimes', 62 *Military Law Review* 1 (1973); Weston D Burnett, 'Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders at Shakila and Sabra', 107 *Military Law Review* 71 (1985).

2 See *Hirota* case, 'Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East', reprinted in R John Pritchard and Sonia Magbanua Zaide (ed), *The Tokyo War Crimes Trials*, Vol. 20 (1981), Garland Publishing: New York and London; *Prosecutor v Akeyesu*, ICTR Trial Chamber judgment of 2 September 1998 (case no. ICTR-96-4); *Prosecutor v Delalic 'Celebici'*, ICTY Appeals Chamber judgment of 20 February 2001 (case no. IT-96-21-T).

responsibility' is in current times often confined to this more controversial aspect of the responsibility of a commander, and it is on this aspect that the following discussion will focus.

The legal basis for the doctrine is customary international law, that is to say, a general State practice accompanied by *opinio juris* (accepted as law: that the practice is done through a sense of legal obligation).[3] The evidence of a customary norm on command responsibility is principally derived from Protocol I to the Geneva Conventions of 1949, with international and national case law[4] as a secondary indication of the state of this customary doctrine.

In terms of Article 87 of Protocol I:

"1 The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.

2 In order to prevent and suppress breaches, High Contracting Parties and the Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3 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."

Article 86 sets out the foundation for command responsibility for the war crimes of subordinates:

"1 The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2 The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as

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3 See Ian Brownlie, *Principles of Public International Law*, 4th ed (1990), pp 7-11; Andreas O'Shea, *International Law and Organization: A Practical Analysis* (1998), pp 22-23.

4 With respect to national case law there were a series of cases following World War II and pursuant to Control Council Law No. 10, where the doctrine was developed. See e.g. 'Trial of Wilhelm Von Leeb "High Command Case"', 12 *Law Reports of Trials of War Criminals* 1; *Yamashita v Lieutenant General Wilhelm D. Styer,* 327 US 1 (1946); 90 L ed 499; *United States v. Karl Brandt et al,* Vol. II, Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10 (1950) (hereinafter TWC) 186; *United States v. Wilhelm List et al*, '*Hostage Case*', Vol. XI, TWC, 1230; *United States v. Soemu Toyoda*, Official Transcript of Record of Trial, p 5005 *et sec*; *Trial of Friedrich Flick et al*, Vol. VI, TWC, 1187; *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others*, Indictment and Judgement of the General Tribunal of the Military Government of the French Zone of Occupation in Germany, Vol. XIV, TWC, Appendix B, 1061; *United States v. Oswald Pohl et al*, Vol. V, TWC, 958.

> 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."

This contains a direction to States to sanction any failure to act that resulted in a grave breach of the Geneva Conventions.[5] There is further the establishment of a principle of command responsibility to the effect that where a superior was aware or ought in the circumstances to have been aware from information available to him that a breach was being or about to be committed, he will be responsible for the failure to take all feasible measures within his power to prevent or repress the breach. Further, while Article 87 appears to focus on the duties of commanders, as opposed to policy makers, Article 86 by its reference to 'superiors' rather than 'commanders' makes no such distinction, or for that matter any distinction, between civilian and military superiors. On the other hand, it also endorses the fact that the mere position of command or superiority does not in itself imply command responsibility.

The principle of command responsibility for superiors as encapsulated in Article 86 therefore contains three essential elements: (1) there must be a superior-subordinate relationship; (2) there must be a degree of knowledge, actual or constructive, of the wrongdoing or potential wrongdoing of the subordinate; and (3) the superior must have failed to act in relation to this wrongdoing. These three basic limbs to command responsibility have been retained in subsequent formulations in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), the Special Court for Sierra Leone and the International Criminal Court (ICC).[6]

These courts all incorporate the general principle of law (known by the maxim *nullum crimen sine lege)* that a person should not be punished without the pre-existence of a law that was foreseeable and accessible, i.e., that statutes should not apply retroactively. It results from this principle that a form of liability, like a crime, must be not only envisaged in the Statute of the Court but reflected in general international law.[7] In the case of command responsibility it is founded in customary international law in that it has been retained in widely representative international instruments and implemented by international and national courts to the extent that one can speak of a general state practice accompanied by *opinio juris*.

The understanding of this form of liability under customary law has been developed through the jurisprudence of the ICTY and ICTR. In particular, some clarity has been reached with respect to the three essential elements – subordination, knowledge and failure to act – and the application of command responsibility to civilian commanders and to internal as well as international armed conflicts.

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5 See the discussion in Chapter 3 above regarding war crimes and grave breaches of the Geneva Conventions.

6 Statute of the ICTY, Article 7(3); Statute of the ICTR, Article 6(3); Special Court for Sierra Leone, Article 6(3); Statute of the ICC, Article 28.

7 See *Prosecutor v Tadic*, Appeals Chamber Judgment of 15 July 1999, esp. at para. 226.

2.2 The application of command responsibility under the ICC Statute

The Statute of the ICC incorporates the most advanced and detailed exposition of the concept of command responsibility to date. Thus, Article 28 reads:

> "In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
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> (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 or 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:
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> (i) That military commander or person either knew or, owing to circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
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> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
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> (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:
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> (i) The superior knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
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> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior;
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or suppress their commission or to submit the matter to the competent authorities for investigation and prosecution."

Article 28 adopts the three pillars of command responsibility discussed above. Thus, there must be knowledge, actual or constructive, control and a failure to take necessary and reasonable measures. It confirms that there is a distinction for the purposes of the application of the doctrine as between the position with regard to military and civilian superiors. In particular, one can note that while the tests with regard to control and failure to take measures are effectively identical in the case of both military and civilian superiors, the test of knowledge differs in a significant respect. The only slight modification with respect to control is the recognition of the concept of effective military command, as opposed to non-military authority, as a specific form of authority being sufficient indications of subordination.

The reference to "crimes within the jurisdiction of the Court" establishes that the doctrine of command responsibility is in principle capable of being applied to any of those crimes, not only war crimes. Since such crimes are defined in a manner that includes crimes committed in the context of internal conflicts, in principle the Statute permits the application of the doctrine to crimes committed in internal as well as international conflicts. The application of the doctrine of command responsibility to internal conflicts has already been confirmed by the ICTY.[8]

However, there might still be scope for an argument to the effect that the ICC Statute was intended to incorporate crimes already established under customary international law and in that sense must be interpreted in a manner that is consistent with the pre-existing law. Whether command responsibility can be applied to all crimes and internal conflicts arguably still depends not only on the plain meaning of the Statute, but also on its interpretation in the light of the state of customary international law prior to its adoption – as reflected, *inter alia*, in the jurisprudence of *ad hoc* tribunals. The same can be said with regard to the basic elements of command responsibility; that is, knowledge, subordination and failure to act. It is therefore worth considering each of these points in the light of the specific ICC provision in the context of previous jurisprudence.

2.2.1 Knowledge

Article 28 draws a distinction between the test for knowledge when dealing with a military commander and that for a civilian superior. In relation to a civilian superior, it is clear from the provision that such superior must possess a certain degree of knowledge even if there is not actual knowledge of the offences of subordinates. Thus it must be established that the civilian superior "knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes". The rationale of the Statute's distinction with respect to civilian commanders is emphasised in the ICTR Trial Chamber in the case of *Kayishema* in accepting that one should not "demand a *prima facie* duty on a non-military commander to be seized of every activity of all persons under his or her control".[9] The Trial Chamber drew inspiration from the Rome Statute of the ICC in so deciding.

The responsibility of the military commander should be much easier to establish since he must have actual or constructive knowledge in the sense that he should have known, having regard to the circumstances pertaining at the time. The jurisprudence itself on this point – running from World War II decisions through the modern interpretations of the ICTY and the ICTR – is, however, far from consistent or capable of general application. In the arena of the *ad hoc* tribunals there remains considerable doubt as to the line to be drawn between civilian and military commanders. The debate lies between the application of a public policy oriented approach, emphasising the price for neglect of important duties, and a recognition of the moral imperative in finding guilt for serious criminal offences, carrying an insistence on genuine personal dereliction.

Given that the ICC Statute requires a clear indication of offences by civilian leaders before they can incur responsibility, the debate in the *ad hoc* tribunals over the appropriate test of knowledge is likely to carry over into the exclusive arena of the military commander. The

8 See *Prosecutor v Hadzihasanovic et al*, ICTY Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 (case no. IT-01-47).

9 *Prosecutor v Kayishema*, ICTR Trial Chamber judgment of 21 May 1995 (case no. ICTR-95-1), para. 227.

test of 'should have known' is likely to draw significant inspiration from the analysis of the expression 'had reason to know' in the jurisprudence of these tribunals. Although the latter is potentially narrower, the *mens rea* (guilty mind or wrongful intention) requirement is likely to force the debate over what constitutes 'should have known' into the same general parameters as the analysis of what constitutes 'had reason to know'.

The interpretative difficulty in the *ad hoc* tribunals arises out of the phrase in Article 6(3) of the ICTR Statute and Article 7(3) of the ICTY Statute that the commander cannot escape responsibility where he "knew or had reason to know" that offences were being committed or were about to be committed. An expansive view of the expression 'reason to know' is adopted in the cases of *Bagilishema* before the ICTR[10] and *Blaskic* before the ICTY.[11] According to the Trial Chamber in *Bagilishema*, an accused possesses or will be imputed the *mens rea* of command responsibility if:

> "He or she had actual knowledge, established through direct or circumstantial evidence, that his or her subordinates were about to commit, were committing, or had committed, a crime under the Statutes"; or,
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> "He or she had information which put him or her on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such offences were about to be committed, were being committed, or had been committed by subordinates"; or
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> "The absence of knowledge is the result of negligence in the discharge of the superior's duties; that is, where the superior failed to exercise the means available to him or her to learn of the offences, and under the circumstances he or she should have known."[12]

The second limb of this analysis already broadens the net by referring to notice of risk, as opposed to notice of offences. It is unclear what level of risk is envisaged, but one might expect on the basis of this test reliance on the movement of information about matters that do not have any direct relation to an offence but that offer indications of very general criminal propensity, such as the character of a person or a history of racial tension. This removes command responsibility out of the realm of criminality and into the arena of negligence.

The third limb of the test then expressly endorses negligence as a basis for liability and even removes the necessity of any mental link to the offence, since all the commander must do to fall foul of this test is to neglect his normal duties as a commander as set out in international humanitarian law or even the national regulations governing his command. This view is also reflected in the Trial Chamber's conclusions on the point in *Blaskic*, where it was said:

> "The Trial Chamber finds that if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into

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10 See *Prosecutor v Bagilishema*, ICTR Trial Chamber judgment of 7 June 2001 (case no. ICTR-95-1).

11 See *Prosecutor v Blaskic*, ICTY Trial Chamber judgment of 3 March 2000 (case no. IT-95-14).

12 *Prosecutor v Bagilishema*, note 10 above, para. 46.

> account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute."[13]

This line was not followed by other Chambers, which have recognised the need to establish genuine criminal *mens rea*, as against mere negligence in the conduct of one's duties. In *Celebici*, the Appeals Chamber correctly observed that:

> "Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take the necessary and reasonable measures to prevent or to punish."[14]

The Appeals Chamber goes on to opine that the "argument that a breach of duty of a superior to remain constantly informed of his subordinates [sic] actions will necessarily result in *criminal* liability comes close to the imposition of criminal liability on a strict or negligence basis".[15] The idea that this should occur for the most serious crimes on the planet committed by persons other than the accused flies in the face of general principles of criminal law, especially those pertaining to the liability of those other than the principle perpetrator. This is properly evoked in the ICTR's first judgment, where the Trial Chamber states:

> "That it is necessary to recall that criminal intent is the moral element required for any crime and that, where the objective is to ascertain the individual criminal responsibility of a person accused of crimes falling within the jurisdiction of the Chamber, such as genocide, crimes against humanity and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereto, it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent."[16]

In order for negligence to reach this level of seriousness so as to be properly classified as criminal, it should involve the possession of information by the accused that would cause any reasonable person to suspect the commission of offences. This would more suitably be described as recklessness than negligence. It is the Trial Chamber in the *Celebici* case that provides the more legally sound and the most favourable explanation to the accused of the phrase 'reason to know'. According to this Trial Chamber:

> "A superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior

13 *Prosecutor v Blaskic*, note 11 above, para. 332.

14 See Appeal Chamber decision, note 2 above, para. 226.

15 Ibid.

16 See *Prosecutor v Akeyesu*, note 2 above, para. 489.

> was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates."[17]

If a commander is aware of a factual basis for suspecting that international crimes are in the process of being committed or are about to be committed, then a deliberate failure to verify the true position one way or another is a clear form of criminal dereliction that can be said to be tantamount to knowledge. The prosecution in *Celebici* interpreted the Trial Chamber's finding to mean that the commander must have information *on subordinate offences* in his actual possession. Information might relate to factual circumstances indicating a real likelihood of the commission of offences without actually revealing the offences. The Appeals Chamber, in rejecting the prosecution's understanding of the Trial Chamber's judgment, elasticised the test by focusing on the concept of 'actual possession' and dismissing any requirement of it. Thus, it stated that:

> "A showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he 'had reason to know'."[18]

The combination of the words 'general information' and 'possible' leaves a wide-open window as to the nature of the information available to the accused. The Chamber is internally inconsistent in its final conclusion on the matter when it states that "a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which *would have put him on notice of offences* committed by subordinates".[19] However, it seems clear from the examples that it provides that the former formulation most faithfully represents the Appeal Chamber's opinion on the matter. So, it states:

> "This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge."[20]

This perhaps takes the doctrine of command responsibility too far. Reservations on the Appeal Chamber's findings aside, it is suggested that the line taken in the *Celebici* judgments is to be preferred, on the basis of legal and policy considerations, to the wholesale acceptance of negligence as a standard. Most importantly it most closely reflects the position in terms of customary international law. The customary position is reflected in Additional Protocol I of the Geneva Conventions, which expressly uses the words "information which should have enabled them to conclude in the circumstances at the time".

2.2.2 Superior-subordinate relationship

17 See *Prosecutor v Delalic et al, 'Celebici'*, note 2 above, para. 393.

18 See Appeal Chamber judgment, note 2 above, para. 238.

19 Ibid, para. 241.

20 Ibid, para. 238.

The case law of the ICTY and the ICTR has developed some founding principles in relation to the question of the superior-subordinate relationship. These will have an important impact on the approach of the ICC to this question.

The position adopted in the ICC Statute, namely, that the doctrine of command responsibility applies not only to military commanders but *can* also apply to civilian commanders, has been established in a number of cases. In the Rwanda tribunal, this issue has been settled in the cases of *Akayesu*,[21] who was a bourgmestre, *Bagilishema*,[22] another bourgmestre, *Kayishema*,[23] a prefect and *Musema*,[24] the director of a tea factory. In *Musema*, the Trial Chamber held in no uncertain terms that:

> "The definition of individual criminal responsibility, as provided under Article 6(3) of the Statute, applies not only to the military but also to persons exercising civilian authority as superiors."[25]

The matter was not re-visited in the Appeals Chamber. In *Akayesu*, the first case to be concluded before the ICTR, a bourgmestre was found guilty under Article 6(3) of the Rwanda Statute, enshrining the principle of command responsibility. The question was not raised before the Appeals Chamber, but the Trial Chamber observed that "the application of the principle of responsibility, enshrined in Article 6(3), to civilians remains contentious".[26] Accordingly, the Trial Chamber, far from giving *carte blanche* to the extension of the doctrine to superiors, stated:

> "Against this background, the Chamber holds that it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof."[27]

Likewise, in the case of *Bagilishema*, it was noted that "the broadening of the case-law of command responsibility to include civilians, has proceeded with caution".[28] This echoes the sentiments of Judge Röling in his dissenting opinion in the case of *Hirota*, the foreign minister of Japan during World War II, where the learned judge indicated that:

> "Generally speaking, a Tribunal should be very careful in holding civil government officials responsible for the behaviour of the army in the field. Moreover, the Tribunal is here to apply the general principles of law as they exist with relation to the responsibility for omissions' [sic]. Considerations of both law and policy, of both justice

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21 *Prosecutor v Akayesu*, ICTR Trial Chamber judgment of 2 September 1998 (case no. ICTR-96-4).

22 *Prosecutor v Bagilishema*, ICTR Trial Chamber judgment of 7 June 2001 (case no. ICTR-95-1).

23 *Prosecutor v Kayishema*, ICTR Trial Chamber judgment of 29 May 1999; AC judgment of 1 June 2001 (case no. ICTR-95-1).

24 *Prosecutor v Musema*, ICTR Trial Chamber judgment of 27 January 2000 (case no. ICTR-96-13).

25 Ibid, para. 148.

26 *Prosecutor v Akayesu*, note 2 above, para. 491.

27 Idem.

28 See note 10 above, para. 40.

> and expediency, indicate that this responsibility should be recognised in a very restricted sense."[29]

While the case of *Kayishema* went to appeal, the issue of the applicability of the doctrine to civilian superiors was not specifically raised. The only other case where the Appeals Chamber has addressed the question of command responsibility is the *Celebici* case,[30] decided before the ICTY. In that case, the Appeals Chamber gave the strongest affirmation yet of the applicability of the doctrine of command responsibility to civilian leaders:

> "'Command', a term which does not seem to present particular controversy in interpretation, normally means powers that attach to a military superior, whilst the term 'control', which has a wider meaning, may encompass powers wielded by civilian leaders. In this respect, the Appeals Chamber does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control."[31]

This notwithstanding, and despite the lack of express distinction in the ICC Statute on the issue of subordination, there would appear to be some scope left for distinguishing between the position of a military and a civilian commander for the purpose of the question of subordination in the application of the concept of command responsibility. Whereas the Appeals Chamber in *Celebici* clearly places its stamp of approval on civilian command responsibility, it does not specifically discount that there might be such a distinction. It is the Appeals Chamber's treatment of the next important and inter-related point concerning the *de jure* or *de facto* nature of authority required that sheds some light on where the distinction might lie.

The tribunals have established that authority may be *de jure* or *de facto,* and that the essential question in each case is whether the accused had effective control over the action of subordinates, in the sense of the material ability to prevent or punish the commission of crimes. This authority is what is envisaged in the concept of 'command' in command responsibility. For example, Mucic was the civilian commander of the Celebici prison camp. The defence argued in that case that the Trial Chamber had erred in finding Mucic to be a *de facto* superior for the purposes of Article 7(3) of the Statute of the ICTY, dealing with command responsibility. The Appeals Chamber upheld the Trial Chamber's conclusion that "the term 'superior' is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control".[32] The Appeals Chamber added that "the showing of effective control is required in cases involving both *de jure* and *de facto* superiors".[33]

The Appeals Chamber in *Celebici* further held that:

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29 See *Hirota* case, note 2 above.

30 *Prosecutor v Delalic et al*, 'Celebici Camp', note 2 above.

31 Ibid, para. 196.

32 See Appeal Chamber judgment, ibid, para. 195.

33 Ibid, para. 196.

> "The concept of effective *control* over the subordinate – in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised – is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute."[34]

The Trial Chamber in the same case also put this point quite firmly when it indicated that "the factor that determines liability for this type of criminal responsibility is the actual possession or non-possession, of powers of control over the actions of subordinates". Again, the Appeals Chamber endorsed the Trial Chamber's opinion that:

> "[I]t is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences."[35]

Similarly, the Trial Chamber in *Aleksovski* observed that:

> "The decisive criterion in determining who is a superior according to customary international law is not only the accused's formal legal status but also his ability, as demonstrated by his duties and competence, to exercise control."[36]

This accords with the International Committee of the Red Cross' interpretation of customary international law as reflected in Article 86 of the 1977 Additional Protocol I to the Geneva Conventions of 1949. The Commentary reads:

> "… we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control. The direct link which must exist between the superior and the subordinate clearly follows from the duty to act laid down in paragraph 1. Furthermore only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach. However it should not be concluded from this that the provision only concerns the commander under whose direct orders the subordinate is placed. The concept of the superior is broader and should be seen in terms of hierarchy encompassing the concept of control."[37]

This raises interesting questions with regard to the authority of a government minister, whose functions are usually more in the nature of policy-making and execution of laws through policy directives than in controlling the actions of subordinates. The president of a nation is a notable exception in that he is often expressed to be the commander-in-chief of the armed forces and can take an active part in controlling the activities of the armies on the field in time of war or state of emergency. While control of the actions of subordinates is the relevant criterion for a finding of the exercise of command, there is

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34 Ibid, para. 256.

35 See *Prosecutor v Delalic 'Celebici'*, note 41 above, para. 378.

36 See *Prosecutor v Aleksovski*, Trial Chamber judgment of 25 June 1999 (case no. IT-95-14/1), para. 76.

37 See *ICRC Commentary, Additional Protocols* (1958), p 3544.

scope for considerable argument around the extent to which an ordinary minister can have command responsibility in the absence of the issuance of orders. The position of a minister is clearly, in this respect, distinguishable from other officials such as the commander, bourgmestre or prefect.

However, there are indications that the tribunals might broaden the notion of command responsibility even further than outlined in the *Celebici* judgments. Two particular passages are to the point. First, in the *Blaskic* decision, the Trial Chamber of the ICTY, while asserting that "[w]hat counts is his [the accused's] material ability",[38] indicated that this may entail "submitting reports to the competent authorities in order for proper measures to be taken".[39] One would not require control over the actions of subordinates in order to possess this kind of material ability. Secondly, in *Bagilishema*, an ICTR Trial Chamber said the following:

> "Article 6(3) incorporates the customary law doctrine of command responsibility. This doctrine is predicated upon the power of the superior to control *or influence* the acts of subordinates." [my emphasis][40]

Both of these statements must be considered to be *obiter dictum* (a judicial opinion that has only incidental bearing on the case in question and is therefore not binding) since in both cases, the one involving a general and the other a bourgmestre, it was found that the accused possessed effective control over the activities of subordinates. It is in any event submitted that these statements were incorrect. On the one hand it is suggested that an international tribunal cannot move outside the parameters of applicable treaties or customary international law. The customary principle of command responsibility is that reflected in Protocol I and this expressly addresses 'subordinates'. Article 86, dealing with command responsibility, must be read in the context of Article 87, which speaks of the duties of 'commanders' in relation to the acts of 'subordinates or other persons under their control'.

Apart from the questionable extension of command responsibility beyond the bounds of customary law, there is considerable force in the reasoning of the Appeals Chamber in *Celebici*, which rejects any notion of substantial influence as the sole basis for liability. As a matter of principle and policy, such an extension has the danger of destroying the clear lines of accountability that are essential to any military or police operation being conducted efficiently. It renders anyone in a position of influence potentially accountable. This further makes international criminal law an unmanageable tool since it would put in the dock a mass of individuals for any individual war crime.

In *Celebici*, the prosecution argued for a principle of substantial influence as a basis for liability. The reaction of the Trial Chamber was to reject any such notion in the following terms:

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38 *Prosecutor v Blaskic*, note 11 above, at para. 302.

39 Ibid.

40 See note 10 above, at para. 37.

> "The view of the Prosecution that a person may, in the absence of a subordinate unit through which authority is exercised, incur responsibility for the exercise of a superior authority seems to the Trial Chamber a novel proposition clearly at variance with the principle of command responsibility. The law does not know of a universal superior without a corresponding subordinate. The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops. It is a species of vicarious responsibility through which military discipline is regulated and ensured. This is why a subordinate unit of the superior or commander is a *sine qua non* for superior responsibility."[41]

The Appeals Chamber, after examining the World War II case law, similarly rejected the suggested threshold of substantial influence:

> "This latter standard appears to envisage a lower threshold of control than an effective control threshold; indeed, it is clear that in its natural sense the concept of 'substantial influence' entails any necessary notion of control at all …It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions."[42]

Furthermore, control must not be too remote. The Appeals Chamber in *Celebici* agreed with the Trial Chamber's proposition that:

> "While the Trial Chamber must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts, great care must be taken lest an injustice be committed in holding individuals responsible for acts of others in situations where the link of control is absent or too remote."[43]

De jure authority with respect to the actions of inferiors does not always mean *de jure* authority over such individuals amounting to control and subordination. Indeed, it has been recognised that even *de jure* authority over inferiors does not necessarily imply effective control and therefore subordination. In *Celebici*, the Appeals Chamber noted that:

> "In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced."[44]

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41 See *Prosecutor v Delalic 'Celebici'*, ICTY Trial Chamber judgment of 16 November 1998 (case no. IT-96-21-T), para. 647.

42 See Appeal Chamber judgment, note 2 above, para. 257.

43 Ibid, para. 197.

44 Ibid.

It should be added that by the term *de jure* power is meant independent power over subordinates that can, in the absence of other factors, be effectively exercised. It is suggested that where power is jointly exercised and cannot be independently exercised as control, it cannot be presumed that one individual acting independently but forming only one constituent part of the joint body could exercise control effectively.

2.2.3 Failure to act – necessary and reasonable measures to prevent or punish

The third and final requirement for command responsibility for the independent actions of a subordinate is the failure to take necessary and reasonable measures to prevent or punish the principal perpetrator. The question relating to what measures are necessary and reasonable is intimately connected with the question whether the accused had the material ability to prevent and punish the offences and therefore the effective control essential for a superior-subordinate relationship. So, in *Blaskic*, the Trial Chamber held that:

> "Accordingly, it is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he took the reasonable measures required either to prevent the crime or punish the perpetrator."[45]

There is little guidance in the case law as to whether the test for what is reasonable and necessary is objective or subjective, or whether one is concerned with *all* necessary and reasonable measures that could be taken or simply *any* necessary and reasonable measures. In *Celebici* the Trial Chamber noted that:

> "… any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard *in abstracto* would not be meaningful."[46]

Nonetheless, the Chamber stated that the "legal duty which rests upon all individuals in positions of superior authority requires them to take *all* necessary and reasonable measures …" [emphasis added].[47] It further described such measures to be those "that are within his material capacity". Even the question of what is in a person's material capacity should be looked at from a subjective perspective in some degree, since the superior may have to make difficult judgments on this weighing up of various factors, including the value of and risk to his own life. This means that the use of the word 'all' needs to be treated with caution since 'all' might ultimately mean any measures that the accused reasonably judged to be necessary and possible in the circumstances.

It is suggested that, as a matter of policy, great care should be taken in judging the actions of a person in a situation of complete chaos, as is the hallmark of armed conflict and a breakdown of law and order. If the person has tried his best in the circumstances and can show some evidence of his contribution to restoring order, however minor, that, in principal, should be sufficient to exempt him from individual criminal responsibility,

45 See *Prosecutor v Blaskic*, note 11 above, para. 335.

46 *Prosecutor v Delalic et al 'Celebici'*, note 41 above, para. 394.

47 Ibid.

providing it is not a sham. Indeed, no decision has yet attempted to put the tribunal in the shoes of the accused and list the specific measures that ought to have been taken and rejected the magnitude of the positive measures actually taken by the accused. Where the point has been significant the tribunal has rejected the position of the defence on the basis that no measures were taken at all. Thus, the ICTR Trial Chamber in *Kayishema* remarked that:

> "No evidence was adduced that he attempted to prevent the atrocities that he knew were about to occur and which were within his power to prevent."[48]

While this indicates an openness to the nature of the measures to be taken, the reference to proof from the defence of such measures is a dangerous supposition and inconsistent with the ICTY's stance on the question of causation. There may be cases where the superior's intervention clearly would have made absolutely no difference. As the Trial Chamber noted in the *Celebici* case, "international law cannot oblige a superior to perform the impossible".[49]

On causation, while the ICTY rejects the proposition that specific proof of causation must be tendered by the prosecution, it recognises that "a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior's failure to take measures within his powers to prevent them".[50] Therefore, if there was no causal connection, then by definition there were no measures that were necessary and reasonable to prevent or punish the crimes.

This simultaneous rejection of the requirement of causation and recognition of an inherent causal link also supports the proposition that a defendant need only show that some necessary and reasonable measures were taken in order to avoid liability as a commander. If it had to be shown that the commander had taken *all* possible measures, then the prosecution should, as a consequence, have to show what was not done that should have been done, and would not be able to prove the necessary and reasonable nature of those measures without establishing causation.

3 Superior Orders

3.1 The background to the doctrine of superior orders

The history of the doctrine of superior orders has been traced to the early references to the laws of war as manifested in the writings of Augustine, Grotius and Vitoria.[51] The earliest example of an international criminal court, the trial of Peter Von Hagenbach in 1474 in Germany for offences against the "laws of God and Man", involved a plea of superior orders that failed. Yet, there has never been a clear agreement in the practice of States on the extent to which an accused might rely on it as a ground for excluding responsibility for the commission of a crime under international law.

48 *Prosecutor v Kayishema*, note 9 above, para. 513.

49 *Prosecutor v Delalic et al 'Celebici'*, note 41 above, para. 395.

50 Ibid, para. 399.

51 See Green, *Superior Orders in National and International Law* (1976), pp 5-6.

A prominent example of a successful plea of superior orders is provided in the post World War I jurisprudence. In the case of *Dover Castle,* where the accused genuinely believed that the execution of an order was part of a lawful reprisal, this plea led to his acquittal.[52] The opposite result was found in the case of *Llandovery Castle* on the basis that the order was manifestly unlawful.[53]

The founding instruments of the Nuremberg Tribunal, the Human Rights Court for East Timor and the Special Court for Sierra Leone all expressly exclude the possibility of relying on superior orders to exclude responsibility. However, they permit reliance on it in mitigation of sentence. Thus, Article 6(4) of the Statute of the Special Court for Sierra Leone provides that:

> "The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires."

This is modelled on the Nuremberg Charter, and in the Nuremberg judgment the International Military Tribunal not only confirmed the position that the doctrine could not exclude responsibility but also qualified the circumstances when it could be relied upon in mitigation of sentence. The trials conducted pursuant to Control Council Law No 10 acknowledged the possibility of superior orders excluding responsibility in very limited circumstances.[54]

The Statutes of the ICTY and ICTR do not specify the position with respect to superior orders. In the *Erdemovic* case the matter was briefly discussed in the separate opinions of the Judges, and there was a divergence of view between those who rejected the defence of superior orders and those who regarded it as a conditional defence.[55]

3.2 Superior orders under the Rome Statute

The Statute of the ICC provides for the possibility of a defence of superior orders under strict and to some extent novel conditions. It does not, however, follow up on the judgment in Nuremberg by elaborating on the circumstances under which the doctrine may serve as a basis for mitigation of sentence. Article 33 states:

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

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

52 (1922) *American Journal of International Law (AJIL)* 704 et sec.

53 (1922) *AJIL* 708 et sec.

54 See the *Einsatzgruppen* case, the *Hostages* case and the *High Command* case (note 4 above).

55 See *Prosecutor v Erdemovic*, joint separate opinion of Judges Vohrah and McDonald; separate opinion of Judge Cassese.

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

(c) The order was not manifestly unlawful.

2. For the purpose of this article orders to commit genocide or crimes against humanity are manifestly unlawful."

The conditions for superior orders relieving a person of responsibility as set out in this provision reflect the deep controversy around this issue. At the Rome Conference there was a clear division between States that wished to maintain a strict interpretation excluding any manner of defence of superior orders and States that wished to retain a conditional position. Furthermore, the distinction between war crimes on the one hand and crimes against humanity on the other underscores not only the stigma attached to the latter crimes but also the concern that certain States had for the position of their own soldiers.

The conditions under (b) and (c) of Article 33(1), according to which a person must not have known that the order was unlawful and that it should not be manifestly unlawful, represent the classical formulation of the doctrine according to the school of thought that superior orders should amount to a defence in limited circumstances.

The condition that the person must have been under a legal obligation to follow orders excludes the possibility of the employment of this excuse where instructions are given in a private capacity. In the context of the application of international criminal law, this can be politically problematic because it creates, potentially at least, a more restrictive regime for rebel or liberation movements than that for governments.

According to one interpretation, rebels could not be following orders pursuant to a legal obligation since no national or international law requires that they follow the orders of a rebel leader who has no status under the national law of a State. Yet, international law does not outlaw all liberation movements and in fact arguably condones them in the context of the enforcement of the right to self-determination. There is therefore scope for the argument that 'legal obligation' must be interpreted as including the rules of an organisation to which a person belongs in his or her capacity as a fighter.

4 Immunity from Prosecution

4.1 Introduction

The ability of States to conduct international relations freely depends on the notion of sovereign equality. A necessary corollary of this is the principle that one State should not infringe on the jurisdiction of other States. Also, since States are equal the national courts of one State cannot determine a dispute between them. Thus, States have immunity from the jurisdiction of the national courts of foreign States and this necessarily extends to those limited individuals representing the persona of the State in its international activities, such as Heads of State and foreign ministers. This form of immunity is known as 'sovereign immunity'.

Similarly, the internal organs of a State should refrain from interfering in the State's international relations. Thus, the domestic law of many States recognise a principle of Act of State; that is, acts that amount to inter-State interaction. These acts are generally excluded from the scrutiny of national courts, whether the acts of the home State or a foreign State. This domestic law principle is a question of admissibility rather than immunity from jurisdiction, but it needs to be mentioned since it complements the international principle of sovereign immunity as an effective bar to prosecution.

Another complementary principle to sovereign immunity is that of diplomatic immunity, which protects the serving representatives of States from prosecution during office and in exercise of their official functions after the termination of their office.

This area has seen a developing attempt to limit immunity from prosecution for crimes against international law.

4.2 Sovereign immunity

Traditionally sovereign immunity is absolute, in the sense that the State could never be subject to the jurisdiction of a foreign State. However, just as the facilitation of international relations justifies immunity, it has also led to the development of restrictions on immunity. In the inter-State sphere, a distinction developed between acts of government (*jure imperii*), subject to immunity, and acts of a commercial nature (*jure gestionis*). This distinction facilitates international trade since it enables governments to enter into commercial arrangements under workable conditions. Such a distinction has not developed in the inter-State sphere in relation to violations of international law, even those most serious violations such as the violations of *jus cogens* or crimes against international law. There is virtually no State practice to examine in relation to the commission of international crimes by States, because of the real practical difficulty of understanding how a State can commit a crime or what the consequences are.

There is, however, a degree of State practice on the commission of crimes against international law by Heads of State and other State representatives, and this is where the problem of sovereign immunity becomes intricate and politically sensitive. The reason for this is that it is well established that the doctrine of sovereign immunity applies not just to the State but to the Head of State and other state representatives.

The doctrine of sovereign immunity emerged at a time when the Head of State was a sovereign and the distinction between the Head of State and the State itself was therefore a fine one. The subsequent proliferation of republics and democracies justifies a clear distinction between the State itself and its leaders. Another significant development in international law since the early crystallisation of norms on sovereign immunity has been the progression of the international legal order from one purely for the facilitation of inter-State relations to one in which there are global imperatives, as well as individual expectations and accountability to the international community through norms of humanitarian law, human rights and international criminal law. These areas of law have made important strides in the last 55 years. This has brought into question the absolute nature of sovereign immunity.

4.3 Diplomatic immunity

Whereas sovereign immunity applies to the State and those who manifest the *persona* of the State and require absolute immunity for the effective relations between States, diplomatic immunity is a potentially more restrictive form of immunity applicable to diplomats on official State business. The principles of diplomatic immunity have been codified in the Vienna Convention on Diplomatic Relations of 1961. Diplomats only have immunity *ratione personae* (personal immunity on account of their status) while in office, and only have immunity *ratione materiae* (functional immunity that attaches to their actions) for acts performed as part of their official functions once their status as diplomats has ceased. This immunity does not apply to private acts while in office once the diplomatic status has ceased. Even this restrictive form of immunity is brought into question in relation to crimes against international law because of the subsequent developments in international humanitarian, human rights and international criminal law, although the applicable principles remain far from clear or settled.

4.4 Developing restrictions on immunity for crimes against international law

The International Military Tribunal at Nuremberg imposed a significant restriction on the immunity of State representatives where such representatives were accused of crimes against international law. It was pointed out in the judgment of the Tribunal that crimes are “committed by men and not by abstract entities and that only by punishing men could international law be effectively enforced”. It went on to hold that immunities normally applicable could not be relied on for crimes under international law.

This principle was adopted in the Statutes of the *ad hoc* tribunals. Thus, Article 7(2) of the ICTY and Article 6(2) of the ICTR provide respectively that:

> “The official position of any accused person, whether as Head of State or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

This principle was acknowledged at the national level by the English House of Lords in two majority decisions with extensive and disparate reasoning. In the case of *Pinochet Ugarte* the House of Lords held that, while Heads of State benefited from immunity with respect to their person and their acts, this immunity could not apply to a former Head of State with respect to the crime of torture.[56] The principle and majority reasoning behind this decision was that torture could not be said to constitute an official function of a Head of State. However, if the person were still a Head of State then he would continue to benefit from immunity even for torture because the immunity is *ratione personae* as opposed to *ratione materiae*.

56 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International and Others Intervening),* 1 AC 61 (2000); *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 3),* 1 AC 147 (2000).

In the case of *Democratic Republic of Congo v Belgium*,[57] the International Court of Justice (ICJ) had occasion to rule on the question of the applicability of immunity to a serving state representative, and in particular a Minister of Foreign Affairs (see Box 5.1). The majority of the Court held that the Minister benefited from absolute immunity from the criminal jurisdiction of foreign States while in office.

Box 5.1: The Immunity of a Serving State Representative: *DRC v Belgium*

Belgium had issued an international arrest warrant against Abdulaye Yerodia Ndombasi, the Minister of Foreign Affairs of the Democratic Republic of Congo, pursuant to a law of 1993 on the punishment of grave breaches of international humanitarian law. Although Yerodia Ndombasi was no longer Minister by the time the case was heard by the International Court of Justice, he had been at the time the proceedings were filed and this was the factual basis upon which the case was decided. Since the injury was to the State and not to the individual, the Court rejected the submission that the dispute had become without object. It was held that the international arrest warrant issued by Belgium violated that country's international obligations under customary international law relating to immunity. This immunity was considered to be essential for the conduct of relations between States.

The Court noted that the position might differ in an international criminal court or tribunal. This *obiter dictum* viewpoint is open to question. The jurisdiction of an international court is premised on the understanding that it is exercising collectively a jurisdiction that individual States are entitled to exercise individually. That being the case, the restrictions applicable in national courts should be equally applicable in international courts, save where a home State's participation in the international court can be seen as a waiver of State immunity.

The majority did not consider it necessary to address the issue of whether Belgium could properly exercise universal jurisdiction since there was immunity from that jurisdiction. Other judges felt that the question of immunity could not be addressed without addressing the question of jurisdiction since the immunity was premised on the validity of the exercise of jurisdiction and was therefore intricately interconnected with it.

The Court distinguished the situation of international criminal courts by observing:

> "An incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council

57 *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* of 14 February 2002, http://www.icj-cij.org.

> resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Statute."[58]

This *obiter dictum* was applied by the Appeals Chamber of the Special Court for Sierra Leone in the case of *Prosecutor v Charles Ghankay Taylor*.[59] In this case, the Prosecutor of the Special Court for Sierra Leone issued an indictment and warrant of arrest for Charles Taylor, while he was still President of Liberia, for crimes against humanity and grave breaches of the Geneva Conventions committed within the territory of Sierra Leone. Charles Taylor claimed immunity from jurisdiction on the basis that he was President. The Government of Liberia did not waive immunity and supported his assertion.

The Special Court held that since it could be classified as an international criminal court, an incumbent Head of State could not claim immunity from its jurisdiction. Applying the *DRC v. Belgium* dictum, it held that a distinction could be drawn between national courts, whose adjudication on the conduct of another State might infringe the principle of sovereign equality of States, and international courts, where the principle of equality of States had no relevance. Thus, it explained:

> "A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign State does not adjudicate on the conduct of another State; the principle of State immunity derives from the equality of sovereign States and therefore has no relevance to international criminal tribunals which are not organs of a State but derive their mandate from the international community."[60]

The finding that the principle of sovereign equality of States has no relevance to international criminal courts is questionable since, as the International Military Tribunal at Nuremberg pointed out, such courts are merely a collective exercise of jurisdiction that each of the States involved in the exercise are entitled to exercise individually. It is no less an infringement of the principle of the sovereign equality of States for several States to collectively exercise judicial jurisdiction over the conduct of another State than for one State to do so. It is only permissible to speak of respect for sovereign equality if the State whose conduct is questioned has itself consented to the exercise of the jurisdiction. There might be an argument that Liberia had done so by becoming a member of the United Nations and therefore impliedly consenting to any proper exercise of power by that body, including the conclusion of a treaty for the setting up of a court.

However, to assert that the principle of sovereign equality of States has no relevance to the exercise of jurisdiction by an international criminal court takes the point too far. The principle could, for example, be invoked by a non-State Party to the Statute of the ICC in the event that the Court purported to exercise jurisdiction over one of its nationals.

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58 Ibid, para. 61.

59 See *Prosecutor v Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction of 31 May 2004 (case no. SCSL-2003-01-I).

60 Ibid, para. 51.

The strongest argument for distinguishing international criminal courts lies in the terms of the constituent instruments of these courts, which arguably exclude the possibility of immunity from jurisdiction. This creates for those States deemed to have consented to such an instrument an exception to the general rule, providing one can properly interpret the terms as extending to established principles of immunity. Thus, the Appeals Chamber of the Special Court for Sierra Leone relied principally on its own Statute,[61] which provides in Article 6(2) that:

> "The official position of any accused persons, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment".

This principle is also set out in the Statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, as well as the Nuremberg Charter and the Statute of the ICC. While these provisions would appear to exclude State immunity as a basis for excluding jurisdiction, those of the *ad hoc* tribunals do not expressly do so. In principal, the issue of criminal responsibility is a separate one from the issue of jurisdiction. A provision negating the possibility of relying on one's official status to relieve one from criminal responsibility still serves the purpose of ensuring that national provisions protecting the Head of State or other high ranking officials from prosecution may not be invoked as a defence. It makes clear that the international principle that an individual's acts are not to be considered his own if attributable to the State does not apply with respect to international crimes. Therefore, without an express reference to immunity from jurisdiction, there remains a cogent argument to the effect that States would not purport to revoke well-established immunities under customary international law without expressly doing so. Such was part of the reasoning of the minority in the *Pinochet* case. This potential hole has been plugged in the Statute of the ICC as is explained below.

4.5 Immunity under the ICC Statute

The question of immunity is directly dealt with, and far more comprehensively than ever before, in Article 27(2) of the Statute of the ICC. This provides that:

> "The Statute shall apply equally to all persons without distinction based on official capacity. In particular, official capacity as a Head of State or a Government, a member of a government or parliament, an elected representative or government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person."

The first and last sentences effectively exclude any argument by an accused that seeks to assert sovereign, diplomatic or other immunity for crimes under international law. The

61 Ibid, paras. 43-44.

Statute therefore endorses a firm distinction between national criminal proceedings and those before the ICC for the purposes of the doctrine of State immunity and its relevance to the application of international criminal law. It affirms a clear intention on the part of the States Parties to the Statute to create or confirm an exception to any pre-existing customary or treaty principles of State immunity in the international criminal context.

This article of the Statute does not, however, confirm any intention on the part of non-State Parties to endorse any exception to their right to State immunity. It follows that notwithstanding this provision there is still scope for argument in the case of nationals of non-State Parties who may find themselves before the ICC. The Statute is only binding on State Parties and requires a connection to a State Party for the exercise of jurisdiction. One such connection is territoriality, namely, that the crime was committed on the territory of a State Party. Accordingly, it is possible for the national of a non-State Party to be tried for an ICC offence where that offence was committed on the territory of a State Party. Given the clear terms of Article 27(2), the extent to which an argument of State immunity could succeed for the national of a non-State Party would depend upon the extent to which the Court recognises its ability to challenge the terms of its own constituent instrument for the purpose of determining its jurisdiction.

This is an area of some difficulty with no settled approach. The Appeals Chamber of the ICTY, in the case of *Prosecutor v Tadic*, acknowledged its power to determine the lawfulness of the establishment of the Tribunal on the basis of the principle of jurisdiction to determine jurisdiction. In the case of *Prosecutor v Karemera et al*,[62] the Appeals Chamber of the ICTR distinguished between (1) a preliminary motion challenging jurisdiction, in the sense of the indictment not referring to a situation for which the Tribunal had jurisdiction, and (2) challenging the grant of jurisdiction itself. By a majority, the Tribunal rejected the admissibility of a preliminary motion challenging its jurisdiction to apply the doctrine of joint criminal enterprise to internal as opposed to international armed conflicts. The implication of this finding is that the Tribunal may only examine whether it has jurisdiction under its Statute for the purpose of preliminary motions, but may not scrutinise the very grant of jurisdiction by the Statute.

The Special Court for Sierra Leone took the line that it "cannot ignore whatever the Statute directs or permits or empowers it to do unless such provisions are void as being in conflict with a peremptory norm of general international law".[63] This is a fairly restrictive approach. There is a cogent argument for asserting an implied term in the founding treaty or other constituent instrument of an international criminal court to the effect that the Court may review the legality of its own Statute in the light of public international law. This is implied from the direction to apply principles of international criminal law founded on international law outside the treaties or statutes themselves and the purpose of creating peace and reconciliation, which depends upon the credibility and legitimacy of the process.

62 *Prosecutor v Karemera et al*, Decision on Nzirorera's Preliminary Motion on Lack of Jurisdiction, June 2004 (case no. ICTR-98-44-I).

63 See *Prosecutor v Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, above, para. 43.

5 Amnesties

5.1 The practice of amnesty

An unusual feature of transitional societies is the fact that punishment and amnesty, two opposite solutions to dealing with past offences, have been adopted with equal fervour and sometimes even together.[64] Amnesty is immunity in law from either criminal or civil legal consequences, or from both, for wrongs committed in the past in a political context. The choice of amnesty is largely governed by the recognition of a political reality that reconciliation and advancement can only be obtained through forgiveness and oblivion. Amnesties have been a feature of post-conflict resolutions since time immemorial. In 1286 BCE the pharaoh Rameses II concluded a peace treaty with the Hittites following the battle of Kadesh that appears to have employed an amnesty. Later the Athenians gave amnesty to most of the Spartans after their draconian rule following the Peloponessian war, hence the Greek origin of the word. In the European wars amnesty was to become a regular feature of peace treaties. The Treaty of Westphalia set the trend in 1648 after the Thirty Years War, which required nothing less than "a perpetual Oblivion, Amnesty, or Pardon of all that has been committed since the beginning of these Troubles…".[65] While the practice is rife in European history, in non-European conflicts, also, amnesty has featured from time to time. In South Africa this is well illustrated by the Treaty of Vereeniging of 1902 ending the hostilities between the burgher (Boer) forces and Britain.[66]

Recent history has seen the frequent adoption of amnesties in response to the aftermath of internal conflict. Transitional societies of the twentieth century have employed amnesties in Argentina, Chile, Croatia, El Salvador, Haiti, Lesotho, Peru, Republica Srpska, Sierra Leone, South Africa, Uganda, Uruguay and Zimbabwe. Amnesties frequently begin as a matter of political necessity to facilitate transition and peace and are subsequently explained to the population in terms of reconciliation, forgiveness and truth. This is not to say that the latter objectives are not served, but they rarely constitute the initial impetus for a solution that is not actually preferred by the new emerging government at the time of the handing over of the reigns of power. Rather, it is initially perceived as a necessary evil and later hailed as a tool for reconciliation as if the outcome had been carefully planned. That amnesty is often an unavoidable consequence of a hard-won peace is illustrated by the circumstances surrounding its introduction in particular societies (see Box 5.2).

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64 See generally this author: Andreas O'Shea, *Amnesty for Crime in International Law and Practice*, Kluwer Law International (2002).

65 *http://www.yale.edu/lawweb/avalon/westphal.htm*

66 Arnold Toynbee, *Major Peace Treaties of Modern History, Vol. 1: 1648-1967* (1967), p 1146.

67 For the details of the amnesty law, see Robert J Quinn, 'Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model', 62 *Fordham Law Review* 905 at 906 (1994).

68 See Zalaquet, 'Chile' in Boraine, Levy and Scheffer (eds), *Dealing with the past: truth and reconciliation in South Africa*, 2nd edition (1997), pp 47-53.

69 Law 15.737 of 8 March 1985, reproduced in Kritz, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes* (1995), Vol III, *Laws, Rulings and Reports*, p 808.

> **Box 5.2: Amnesties in Chile, Uruguay and Argentina**
>
> In Chile, it was the former regime itself that enshrined the amnesty[67] and the new government simply did nothing to remove it.[68] After a 16-year military dictatorship (1973-1989) under General Augusto Pinochet, change had come about as a result of a plebiscite introduced by the former government but the military remained strong and influential.
>
> Although in Uruguay the amnesty law[69] was introduced by the emergent government rather than the former regime, it was clearly also perceived to be a political necessity in the prevailing circumstances. President Sanguinetti was forced to renege on his campaign promise of justice despite a brief attempt at instigating criminal proceedings against former military officials. Again here, there had been 10 years of military dictatorship and change only came through a plebiscite and agreement.[70] The military remained a powerful threat.
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> The case of Argentina was a little different in that, although the country had been subjected to seven years of military dictatorship when President Alfonsin took office in December 1983, the army was weak after suffering a military and moral defeat in the Falklands War against the British a year and a half before. That defeat was followed by the resignation of President Galtieri on 17 June 1982.[71] Accordingly, there was a more sustained attempt at prosecuting the military. The new President issued a decree ordering the prosecution of high-ranking military officers and, on 27 December 1983, Congress repealed the amnesty law that had been introduced by the previous regime. Trials were instituted before the Supreme Council of the Armed Forces. This notwithstanding, on 29 December 1986, three years into the emerging democracy, the *ley de puncto final* or full stop law was passed imposing a 60-day deadline on the institution of criminal proceedings. Ultimately, pressure from the army resulted in the passing of the 'due obedience' law on 4 June 1987. This created a presumption of innocence deriving from the inability to disobey orders and was tantamount to an amnesty, which were finally granted unconditionally to certain individuals in 1989 and 1990 through the mechanism of presidential pardons.[72]

5.2 International criminal law and amnesty

Amnesty, like immunity, is potentially a bar to the international criminal process taking its normal course. It is an ante-thesis to punishment. In that sense it is both an aspect of and a potential parameter to the application of international criminal law. The conflict between amnesty and punishment lies in the fact that amnesty constitutes "immunity in law from either criminal or civil legal consequences, or from both, for wrongs committed

70 See Kritz, note 69 above, Vol II, *Country Studies*, pp 383-384.

71 Ibid, pp 332-333.

72 See Decree 1002/89 of 6 October 1989 and Decree 2741/90 of 29 December 1990, both reproduced in Kritz, note 69 above, Vol III, *Laws, Rulings and Reports*, pp 529 and 531 respectively.

in the past in a political context".[73] A perpetrator cannot be simultaneously punished and amnestied for the same offence, although he may be punished in part and amnestied from the remainder of his sentence.

Amnesty and punishment have different objectives, and the extent to which they may be reconciled is a matter of some controversy. Thus, the main objectives of punishment may be stated to be retribution, denunciation, deterrence and reform, while the major objectives of amnesty are transition, peace, reconciliation, forgiveness and truth. Each mechanism pretends to achieve elements of the other's aims, but the emphasis is clearly different. Interestingly, the objectives of amnesty have in the international context been employed to justify punishment, as is illustrated by the establishment of *ad hoc* tribunals such as the ICTY, ICTR and Special Court for Sierra Leone. However, the efforts to harmonise the processes for punitive and restorative justice are in their very early stages.[74]

International criminal law has the effect of limiting amnesty because the State possesses a positive obligation to prosecute certain – some have argued all – crimes under international law, a notion essentially inconsistent with that of amnesty.

A number of treaties have included an obligation to prosecute or extradite international offenders, encapsulated in the maxim *aut dedere aut judicare*. In the context of war crimes, the four Geneva Conventions of 1949 provide in differently numbered articles for a duty to find and punish or extradite those guilty of grave breaches of the Conventions. Treaties dealing with other international crimes also incorporate a duty to prosecute. One may mention here the International Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the International Convention against Torture of 1984 and the International Convention for the Prevention and Suppression of the Crime of Apartheid of 1979. The duty to prosecute grave breaches of the Geneva Conventions, genocide and torture has, like their prohibition, reached customary status.[75] Additionally, there are crimes under customary law that have not been the subject of a general codified duty to prosecute, but for which there is a duty to prosecute under custom. These include piracy, slavery, crimes against humanity and violations of the laws and customs of war.

However, there is no treaty that contains in its substantive provisions an unambiguous duty to prosecute all crimes under international law in all circumstances. Only the preamble to the Statute of the ICC provides that:

> "…it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

Since this is a provision in a preamble, it cannot be taken as creating such an obligation but does constitute *opinio juris* of the existence of such an obligation under customary international law. One can perhaps confirm from this that there is an emerging general

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73 See Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (2002), pp 1-2.

74 Ibid, pp 294-336.

75 Ibid, pp 229-251.

duty to prosecute all international crimes, but it is doubtful whether it has yet crystallised from a general State practice. At most, it can be said that the majority of the serious and systematic violations of human rights and international humanitarian law are subject to a duty to prosecute in general international law by virtue of the combination of customary rules in relation to specific offences. Essentially, this covers all those international crimes under customary international law.

Another question that may arise is to what extent an amnesty may limit the ability to punish an individual on the international plane. The conflict between punishment and amnesty is most recently and prominently illustrated by the express rejection of amnesty in the Statute of the Special Court for Sierra Leone,[76] notwithstanding the Lomé Agreement in which combatants are granted unconditional amnesty for events prior to that agreement but covered by the jurisdiction of the Special Court (see Box 5.3). Since disarmament and the Truth and Reconciliation Commission were given effect by virtue of the provisions of the Lomé Accord, there is a strong argument for the proposition that this was an agreement that had not yet been terminated. The earlier amnesty in the Abidjan Accord is unaffected simply because the jurisdiction of the Court does not extend that far back, creating a political anomaly in the treatment of the atrocities of the past.

Box 5.3: The Decision of the Special Court of Sierra Leone on Amnesty

The Special Court for Sierra Leone has the peculiarity that the amnesty is contained in a bilateral agreement preceding the agreement establishing the Court and that one of the parties to the conflict, that is the Government of Sierra Leone, is both a principal party to the agreement establishing the Court and also a principal party to the previous bilateral agreement providing for amnesty. This may raise serious questions, particularly regarding any representations that may have been made at the time of disarmament, about political good faith and the credibility of mechanisms for transitional justice in future conflicts.

While the Special Court becomes busy with indictments against former members of the Revolutionary United Front (RUF),[77] armed conflicts in the Democratic Republic of Congo and neighbouring Côte D'Ivoire are the subject of negotiations that undoubtedly incorporate discussions on amnesty. Similarly, while rebels stood at the door of Monrovia, the capital of Liberia, President Charles Taylor agreed to cease military operations against them while peace negotiations were conducted.[78] This was a matter of days after the Special Court for Sierra Leone had indicted him and the Prosecutor had issued a statement calling on all States to bring him to justice. There was every indication that President Taylor was still very much in

76 Article 10 of the Statute of the Special Court for Sierra Leone.

77 At the time of writing there are five detainees, including four members of the RUF and one member of the government. Another three indictments have been issued. Fadoh Sankoh, the RUF leader is apparently mentally ill and the subject of a psychiatric report.

78 See CNN World News, 11 June 2003.

control, and the express exclusion of amnesty in the Special Court Statute might very well have impacted on how he handled the negotiations.

In its Decision on the Amnesty under the Lome Accord,[79] the Special Court rejected arguments to the effect that it would be an abuse of process to continue with proceedings in the face of an internationally valid amnesty. The Appeals Chamber held that the Lome Accord was not a treaty, that amnesty for international crimes was not enforceable on the international level and that Article 10 of the Statute of the Court, providing for the non-relevance of amnesty to the proceedings, trumped any attempt to rely on such amnesty.

In one sense it would seem correct that negotiating parties should not be allowed to frustrate international justice. The important difference between the ICC and the Special Court for Sierra Leone is that the former is founded on a widely representative agreement with no specific agenda in relation to any particular conflict. Furthermore, since it does not have jurisdiction over offences taking place before the treaty's entry into force,[80] it is unlikely to lead to the violation of an amnesty concluded prior to this.

The Statute of the ICC does not expressly allow for exemption from prosecution on the basis of amnesty. The international community is not bound by any individual State's exercise of political judgment and this is reflected in the Statute. The jurisdiction of the Court may be initiated in several ways that can all potentially ignore the existence of an amnesty, whether part of a national law or a bilateral agreement. The principle of 'complementarity', whereby the Court cedes to national jurisdiction, except where that jurisdiction is ineffective, is expressed in a way that confirms that amnesty will not deprive the Court of its jurisdiction. Thus, the Court retains jurisdiction if the national authorities of a State are "unwilling or unable genuinely" to investigate or prosecute the offence.[81]

An amnesty endorsed through a national law would effectively render a State either unwilling or genuinely unable to proceed with a prosecution. The context and object and purpose of the treaty would suggest that an investigation must be understood as an investigation for the purposes of prosecution, as opposed to some investigation for the purpose of a truth and reconciliation process.

However, the interests of peace and reconciliation, which underlie the rationale for amnesty, raise the question whether there might not be circumstances where the interests of States in granting immunity from prosecution as the price for peace should not be reconciled with the interests of the international community in ensuring the punishment of international offences.

79 *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, 13 March 2004, SCSL (AC).

80 See Article 11 of the Statute of the ICC.

81 Article 17 of the Statute of the ICC.

The South African model of transitional justice, at least in its design if not in its implementation, further illustrates how amnesty can be genuinely directed at enhancing, rather than violating, human rights. With respect to the ICC, although no express mechanism exists for accommodating the long-term interests in respecting amnesties in restricted circumstances, there are certain aspects of the operation of the Court that allow for this possibility. These tools of reconciliation are, however, far from ideal because they provide for very little control or predictability as to when and in what circumstances amnesties will be tolerated, or who will have the power to decide. The crimes committed under apartheid escape the censure of the ICC since they were committed before the Statute's entry into force. However, future societies (of States that are party to the ICC Statute) cannot confidently emulate the South African amnesty process until clearer provisions exist on the legitimacy of conditional amnesty.

The UN Security Council possesses the power to delay a prosecution, which could be done in the interests of preserving peace. The international community resisted giving the Council, let alone its permanent members, complete control over proceedings before the Court. However, the Council is granted a limited power of control in that it can halt a prosecution for a period of 12 months.[82] The resolution to halt a prosecution would require nine affirmative votes out of the fifteen members of the Council.[83] In principle, this power cannot be exercised except as a measure for the maintenance of international peace and security acting under Chapter VII of the United Nations Charter. Therefore, the Council must be satisfied that the prosecution of an individual beneficiary of an amnesty would constitute a threat to international peace and security. Unfortunately, any decision of the Council would be influenced by political factors and not subject to any guiding principles or requirement of consistency. One other obvious weakness in this mechanism is the ability of one permanent member to utilise the veto to prevent the respect of an amnesty even where it is in the interests of peace and reconciliation in the opinion of all the other members of the Council.[84] This mechanism has already been employed to prevent the prosecution of US military in operations abroad.

The Prosecutor also has the discretionary power to determine whether a prosecution should proceed. This power could arguably be applied to delay or terminate a prosecution in the light of an amnesty. According to Article 53(1) of the Statute of the ICC:

> "The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under the Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: …
>
> (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."

82 Article 16 of the Statute of the ICC.

83 Article 27(3).

84 The halting of a prosecution is likely to be treated as a non-procedural matter for the purposes of the voting procedure of the Security Council under Article 27(3).

There are difficulties associated with this approach. In particular, the Prosecutor is not an appropriate person to decide such fundamental issues of international peace and security.[85]

The possibilities for the reconciliation of the ICC with transitional arrangements demonstrate that the door is not closed on amnesties for the maintenance of peace. However, on a current reading of the Statute the scope for this is extremely limited. There would appear to be a need for the international community to address the issue of amnesties head on with a view to developing principles that can be harmonised with international criminal law.

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85 A more structured and predictable approach, it is suggested, would entail the conclusion of a Protocol to the Statute of the ICC, which would attempt to reconcile the interests of national reconciliation with that of the international rule of law. This would provide express guidance in the form of binding obligations upon States. Amnesties for certain categories of serious international crimes would be prohibited, except where an agreement is reached between the State and the United Nations, after the State had demonstrated that the interests of international peace and security were seriously threatened by the prospect of prosecution or civil liability. A proposed draft protocol, providing such a mechanism, is annexed to the current author's work on amnesty. However, in terms of this draft protocol it is further provided in relation to international offences generally that:

> An amnesty shall not include within its scope immunity from prosecution for serious violations of human rights or other serious international crimes other than those listed in Article 3, except in so far as there is, in all the circumstances, otherwise no reasonable prospect of achieving a peaceful transition. This provision is without prejudice to any other international obligations on a State.

This places the burden on the State to justify its position legally and politically having regard to the actual reality of the political situation. Here it can make an independent assessment of its legal position, but where listed serious international crimes are in question, the State determines the position in association with the UN, and there it has a heavy onus in establishing the difficulties and persuading the world of the reasonableness and necessity of its position.

See in this regard Article 4 of the Draft Protocol to the Statute of the ICC on the Proper Limitations to Municipal Amnesties Promulgated in Times of Transition, O'Shea, *Amnesty for Crime in International Law and Practice* (2002), Appendix, p 332.

Part II – The ICC Statute and Commonwealth States