

The Ascension of Blue Beret Accountability: International Criminal Court Command and Superior Responsibility in Peace Operations

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Abstract

Personnel involved in United Nations (UN) peace operations have been found to commit misconduct, some of which amounts to criminal conduct. The UN has been working to establish a disciplinary system which will prevent and punish any misconduct by peace operation personnel. However, the UN cannot prosecute criminal perpetrators. Criminal jurisdiction can only be enacted by states and the International Criminal Court (ICC). This article seeks to analyse how Article 28 of the Rome Statute of the ICC can be used to prosecute commanders and superiors of a UN peace operation for war crimes, crimes against humanity and genocide. The application of Article 28, however, is not straightforward, due to the complexity of the command, authority and control structure of a peace operation. Examination of both military command and civilian superior responsibility is undertaken, including recognition of the cross-over of the roles of military and civilian commanders and superiors in peace operations. While this article argues that prosecution under command and superior responsibility is essential, the complications that may arise with the application of such responsibility are recognized and directions for the prosecutor offered.

1. Introduction

Misconduct by personnel involved in United Nations (UN) peace operations has become the subject of much discussion in recent years; particularly as such misconduct may amount to criminal conduct. The discussion has resulted in significant change within the UN system. New rules, regulations, agreements and resolutions have been adopted, with the goal of reducing or hopefully eliminating misconduct, and punishing those who do commit offences.¹

The catalyst for the action was allegations of sexual exploitation and abuse (SEA) committed by peacekeeping personnel, in various missions including Haiti and the Democratic Republic of Congo.² While this continues to remain the principal target of UN actions, other types of misconduct have been committed and are covered by regulatory instruments.

One of the most significant factors highlighted by the UN in preventing and punishing misconduct is the role of superiors and commanders.³ There was found to be a perception that 'neither the [UN] nor its civilian managers and military commanders are held to account to make good-faith efforts to address the problem of sexual exploitation and abuse in peacekeeping operations'.⁴ A peace operation is primarily a military operation; the majority of personnel are military. A peace operation is inevitably hierarchical. As part of this hierarchy, the UN has specifically adopted instruments that task superiors and commanders with preventing misconduct and taking steps to ensure offenders are punished. For example, in relation to command responsibility, under Article 7 sexiens of the Model Memorandum of Understanding (MoU), sending state governments are obligated to take action if national contingent commanders fail to cooperate with a UN investigation, fail to exercise effective command and control, or neglect to immediately report to appropriate authorities or take action in respect of allegations of misconduct reported to the commander.⁵ It is the contingent commanders' 'obligation to maintain the discipline and good order of the contingent'.⁶ The commander's fulfilment of such requirements shall be evaluated in the commander's performance appraisal.⁷ There appears to

have been some success with this policy already, with the Conduct and Discipline Unit (CDU) reporting that contingent commanders have been repatriated for failures to ensure prevention of SEA.

Criminal jurisdiction of military personnel and civilian police is exclusive to the sending state; civilian personnel are subject to host state jurisdiction.⁸ However, this does not preclude absolutely the jurisdiction of the International Criminal Court (ICC). The ICC can exercise its jurisdiction when a state is unable or unwilling to investigate or prosecute a case.⁹ This article will assume that jurisdictional conditions for prosecution before the ICC have been met,¹⁰ including that a crime has been committed that falls within the jurisdiction of the Court.¹¹ Discussion will be on the issue of command and superior responsibility as a form of criminal liability under Article 28 of the Rome Statute.¹² An outstanding element of the military is the high level of discipline enforced, through a unique system of discipline and the hierarchical structure. Part of this expects certain conduct from commanders as they exercise control and command, giving them a higher level of responsibility. With regard to war crimes, crimes against humanity, and genocide, a similar responsibility is also applicable to civilian superiors. That is a responsibility not only to avoid the direct commission of a crime, but also to prevent and punish crimes by subordinates. A violation of this responsibility will incur criminal liability under Article 28 of the Rome Statute. Given the hierarchical structure of a peace operation, and the proximity of a mission to armed conflict (or involvement in such conflict), it is particularly relevant to consider how Article 28 liability would be applicable in peace operations. The adoption of the rules and regulations referred to above has repercussions for liability for criminal conduct.

In this article, 'command responsibility' will be used to refer to responsibility of military commanders, and 'superior responsibility' will refer to responsibility of civilian superiors. The first section will briefly outline the development of command/superior responsibility in international criminal law, before summarizing the elements of command and superior responsibility as it progressed prior to the Rome Statute. Section 2 will outline the authority, command and control structure of a peace operation. It is

particularly important to understand this when considering the application of command and superior responsibility in a peace operation, as the structure is more complex than a national military hierarchy. Section 3 will examine the application of Article 28 to crimes committed during peace operations, and the complications that may arise.

2. Development of Command/Superior Responsibility in International Criminal Law

‘The criminal responsibility of commanders for war crimes committed by their subordinates, based on the commanders’ failure to take measures to prevent or punish the commission of such crimes is a long-standing rule of customary international law.’¹³ Since Second World War, there has been case law in international criminal law dealing with command/superior responsibility, which has developed several elements of the doctrine.

Command/superior responsibility requires that there is a superior–subordinate relationship. This relationship can be in a military hierarchy or the superior can be a civilian. The status of the relationship is determined by whether the commander/superior had *effective control* over the subordinate: ‘actual possession, or non-possession, of powers of control over the actions of subordinates’.¹⁴

In *Blaskić*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber held that ‘where a person has the material ability to prevent or punish crimes committed by others, that person must be considered a superior’.¹⁵ The commander/subordinate relationship does not have to be *de jure* authority, but can be *de facto*, which is ‘sufficient to occasion liability of the commander’ (or superior).¹⁶ What it is important is the ‘actual possession of control over the actions of subordinates, in the sense of material ability to prevent and punish the commission of crimes, as the crucial criterion’.¹⁷ Thus, ‘it is a commander’s degree of effective control, his material ability, which will guide the [Court] in determining whether he reasonably took the measures required either to

prevent the crime or to punish the perpetrator'.¹⁸

With regard to civilian superiors, this has been defined by the ICTY in *Čelebići* as having 'the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders'.¹⁹ In the International Criminal Tribunal for Rwanda (ICTR) case of *Musema*, the Trial Chamber established that Musema exercised *de jure* authority over employees of the Tea Factory at which he was a superior.²⁰ This authority was exercised while they were on the premises of the Tea Factory and while engaged in their professional duties as employees, 'even if those duties were performed outside factory premises'.²¹ Musema was found to have legal and financial control over employees, as he had the power to appoint and remove employees. In particular, the Chamber noted

that Musema was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute. The Chamber also finds that, by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes. The Chamber finds that Musema exercised *de jure* power and *de facto* control over Tea Factory employees and the resources of the Tea Factory.²²

The case of *Yamashita* has been widely criticized for its imposition of a very high threshold of command responsibility.²³ *Yamashita* was convicted of 'unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes', despite being located nowhere near the troops and without attribution of knowledge of the crimes being committed.²⁴ However, the doctrine developed somewhat in subsequent cases. A significant distinction of command/superior responsibility from other forms of criminal responsibility is that it is responsibility by omission. The commander or superior is held liable for a failure to discharge their duty or obligation (to

prevent or punish crimes by subordinates), rather than an act they have carried out.²⁵ This is opposed to responsibility being accorded directly for the actions of subordinates through strict liability. Strict liability removes the element of *mens rea*, which would result in a commander/superior being held liable for an offence committed by a subordinate even though the commander/superior did not have the requisite *mens rea* to commit the offence (eg intent, knowledge, etc.).²⁶ In the *High Command Case*, the concept of strict liability was rejected.²⁷ It has also been rejected in cases before the *ad hoc* tribunals.²⁸ A commander is not held responsible by mere fact of position alone; rather, there must be some kind of intent involved, and if not malicious intent, at least negligence.²⁹

Case law has set the standard for knowledge required by a commander/superior. A commander/superior is held responsible if they *knew or had reason to know* that crimes were going to be, were being committed, or had been committed by their subordinate. The ICTY held that the knowledge could be actual knowledge, demonstrated by direct or circumstantial evidence, or constructive knowledge, which puts the commander/superior on notice that further investigation is necessary.³⁰ Cases have held that it is the duty of a commander to know about activities occurring within the scope of his/her power, although it has been recognized that a supreme commander could not possibly be aware of every detail of a military operation.³¹ The ICTY has clarified that a commander is liable if:

(1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes . . . or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.³²

The Trial Chamber went on to state that ‘in the absence of direct evidence of the superior’s knowledge of the offences committed by his subordinates, such knowledge cannot be presumed, but must be established

by way of circumstantial evidence’.³³ In order to determine such knowledge, the ICTY suggested the following factors to take into consideration:

- (a) The number of illegal acts;
- (b) The type of illegal acts;
- (c) The scope of illegal acts;
- (d) The time during which the illegal acts occurred;
- (e) The number and type of troops involved;
- (f) The logistics involved, if any;
- (g) The geographical location of the acts;
- (h) The widespread occurrence of the acts;
- (i) The tactical tempo of operations;
- (j) The modus operandi of similar illegal acts;
- (k) The officers and staff involved;
- (l) The location of the commander at the time.³⁴

In addition to knowledge, the commander/superior must have taken *necessary and reasonable measures* to prevent a crime or to *punish* the perpetrator of the crime. These measures must be within the competence of the commander/superior.³⁵ The commander/superior will not be held responsible if they did not have ‘the material ability to prevent and punish the commission of the offences’.³⁶ It is the failure to carry out these necessary and reasonable measures ‘within his material possibility’³⁷ that render the commander/superior criminally responsible—it is, essentially, a dereliction of duty to not prevent or punish the crime.³⁸ However, the ICTY has recognized the difficulty in imposing a standard on what is necessary and reasonable: ‘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’.³⁹ Hence, what measures are necessary and reasonable is to be determined based on the individual circumstances of the case. The ICTY has held that the commander does not necessarily have to

personally mete out the punishment; that 'under some circumstances, a commander may discharge his obligation to prevent or punish an offence by reporting the matter to the competent authorities'.⁴⁰

It is in the context of these elements of the doctrine of command/superior responsibility that Article 28 of the Rome Statute was formulated and it will be interpreted.

3. Authority, Command and Control Structure of a Peace Support Operation

Command and superior responsibility is of particular importance in relation to offences committed by peacekeeping personnel. The importance of managerial (superior) and commander responsibility has been recognized by the UN, which has taken a compliance-based approach and a risk assessment approach to managerial compliance. The Model Memorandum of Understanding (MoU) now contains specific provisions obligating sending states to take action when a commander fails 'to cooperate with a UN investigation, fail[s] to exercise effective command and control, or neglect[s] to immediately report to appropriate authorities or take action in respect of allegations of misconduct reported to the commander'.⁴¹ It is the commander's 'obligation to maintain the discipline and good order of the contingent'.⁴² Fulfilment of these obligations forms part of a commander's performance appraisal.

These obligations offer an effective starting point from which to examine the criminal responsibility of a peace operation superior or commander for crimes committed by subordinate personnel. However, first it is necessary to give an outline of the command structure with a peace operation. A peace operation is multi-dimensional in its authority, command and control distribution.⁴³

There are three dimensions: strategic, operational and tactical.⁴⁴ The strategic aspect of an operation consists of defining objectives and overall planning of general operations.⁴⁵ Operational and tactical command deals with the attainment of these objectives in the field.⁴⁶

The ultimate authority of a peace operation is the Security Council, which issues the mandate of the mission, and any subsequent alterations to this mandate. The mandate ultimately controls the direction of the mission operations.⁴⁷ The Security Council is essentially the head of the strategic dimension of an operation.⁴⁸ Under the Security Council within the strategic dimension is the Secretary-General, the UN Secretariat (as represented by the Department of Peacekeeping Operations and the Department of Field Support⁴⁹) and the Head of Mission.

The next dimension to a peace operation is operational. In the field, it is the Head of Mission (or Special Representative of the Secretary-General, SRSG) who 'exercises operational authority over the United Nations peacekeeping operation's activities, including military, police and civilian resources'.⁵⁰ The Head of Mission is a civilian, who is under the authority of the Secretary-General (through the Under-Secretary-General for Peacekeeping Operations). The Head of Mission is given 'significant delegated authority to set the direction of the mission and to lead its engagement with the political process on the ground'.⁵¹ The SRSG 'is responsible for coordinating the activities of the entire [UN] system in the field'.⁵² The SRSG and deputies form part of a Mission Leadership Team (MLT), which is comprised of the heads of the major functional components of the mission, and is responsible for 'overseeing the implementation of the mission's activities'.⁵³

Military personnel are 'under the operational control of the United Nations Force Commander or head of military component, but not under United Nations command'.⁵⁴ However, contingent commanders and their personnel are to report to the Force Commander, and to act according to the Force Commander's orders and directions, and not on national direction;⁵⁵ although, as previously discussed, national contingent commanders are responsible for discipline and good order of their contingent members.⁵⁶ Thus, after the Head of Mission and the MLT, the component heads (commanders or civilian superiors) constitute the final element of the operational dimension. The military component heads are appointed by the Force Commander.

The component heads form the highest level in the final dimension of a mission—tactical. Underneath the component heads, there are military units, civilian units and police units. Civilian regional offices also fall within the tactical sphere, although these are not directly connected to the component heads.

Thus, the authority, command and control structure is constructed as presented in (Figure 1).

The command and control structure thus seems fairly structured and straightforward. Ultimate individual responsibility lies with the Head of Mission; ultimate military responsibility with the Force Commander. Under both, there are deputy civilian superiors and military commanders. However, while the structure may seem straightforward, in praxis applying the criteria of Article 28 may be problematic, particularly with regard to military command.

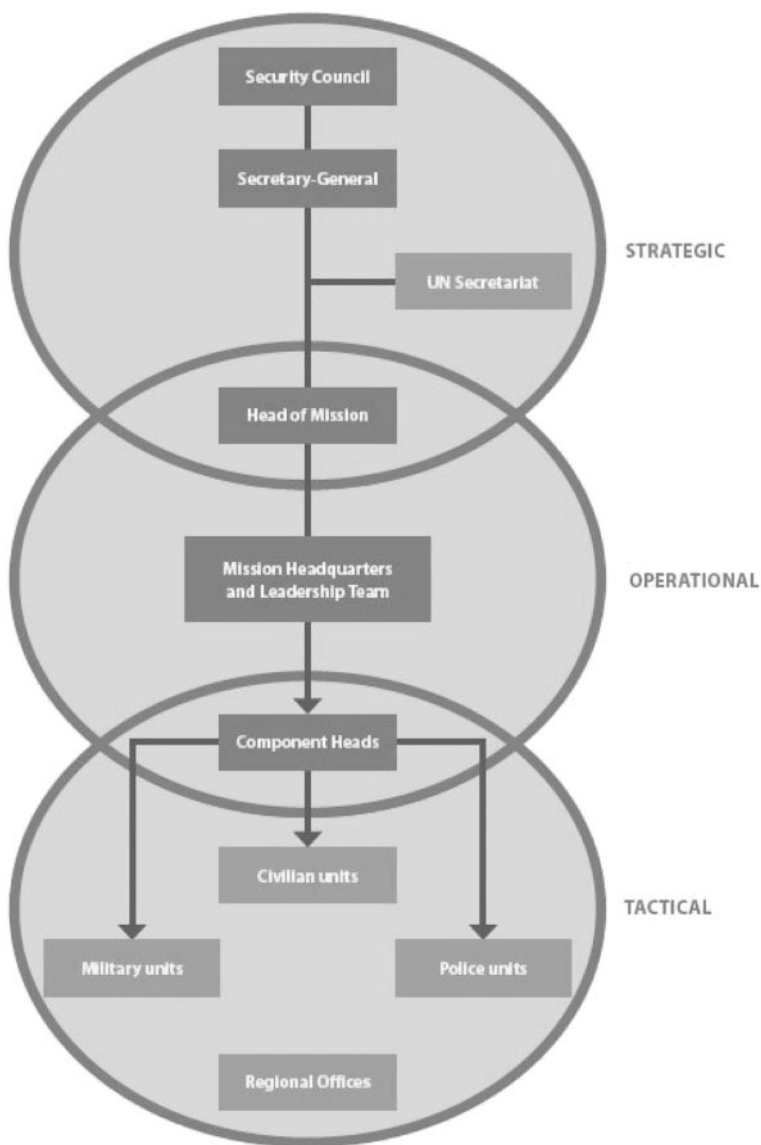


Figure 1. Authority, command and control in multidimensional UN peacekeeping operations.⁵⁹

4. Application of Article 28 of the Rome Statue to Peace Support Operations

A. Command Responsibility

The first requirement of Article 28(a) is that there exists a superior–subordinate relationship. The most important aspect of this relationship is not the rank of the superior, but the fact that the commander had command or authority over the subordinate.⁵⁷ Command results in responsibility for those subordinates underneath a commander. The existence of this relationship is inextricably linked to the concepts of command, authority and control, as it is these aspects that demonstrate the existence of the relationship.⁵⁸ If the person responsible is ‘effectively acting as a military commander’, this will be demonstrated by their effective command or authority and control, and this expression indicates that *de facto* command or authority is sufficient under Article 28.⁶⁰

A military commander is a person ‘formally or legally appointed to carry out a military commanding function (i.e., *de jure* commanders)... irrespective of their rank or level’,⁶¹ whereas those ‘effectively acting as a military commander’ encompasses ‘superiors who have authority and control over regular government forces such as armed police units or irregular forces (non-government forces) such as rebel groups, paramilitary units including, *inter alia*, armed resistance movements and militias that follow a structure of military hierarchy or a chain of command’.⁶² The commander must exercise effective command or authority ‘at least when the crimes were about to be committed’, and at the time of the commission of the crime.⁶³

A military commander or person effectively acting as a military commander will be held criminally responsible for crimes committed by forces *under his or her effective command and control, or effective authority and control*, as a result of his or her failure to exercise control properly over such forces.⁶⁴ Thus, in the case where a subordinate peacekeeper commits a crime, in order to establish command responsibility, the person or persons who exercise effective command and control, or effective authority and control, over that subordinate, need(s) to

be determined.⁶⁵ The ICC has noted some determining factors that may be taken into account include official position; the power to issue or give orders; the capacity to ensure compliance with the orders; the commander's military position and associated tasks; the capacity to order forces or units to participate in hostilities; the capacity to change command structure; the power to promote, replace, remove or discipline any force members; and the authority to allocate and withdraw forces.⁶⁶

The use of both 'command' and 'authority' provides for different superior–subordinate relationships. Command is the power to issue orders.⁶⁷ A superior may have authority but not command, but remains responsible for crimes by subordinates. The command or authority and control must be effective. This phrasing allows for both *de jure* and *de facto* command or authority. A *de jure* commander is not *per se* adequate. A commander who does not exercise effective command or authority and control may not be held responsible for crimes committed by superiors because the crimes were outside of their ability to prevent or report.⁶⁸ In contrast, a person with no official rank may exercise *de facto* command or authority and control over others, resulting in a superior–subordinate relationship. Hence, the particular circumstances of command or authority and control of each case must be examined to determine whether a commander held a position in which they exercised effective command or authority and control that would attract responsibility.⁶⁹ This would include considering the extent of the command or authority and control—what behaviour was encompassed within the parameters of the command or authority and control? It may be questioned whether the command or authority and control cover only work-related behaviour or if it also includes other activities. In a military setting, acts committed in a soldier's free time are usually still considered within the parameters of military discipline, as military personnel are always representing the military and their sending state, particularly when serving overseas.⁷⁰

Command responsibility is a crime by omission—failure to act—rather than a crime committed by positive actions.⁷¹ To fulfil duties that demonstrate control is properly exercised, a commander must

ensure his forces are adequately trained in IHL; ensure that due regard is paid to IHL in operational decision making; ensure that an effective reporting system is established so that he or she is informed of incidents when violations of IHL might have occurred; monitor the reporting system to ensure it is effective; and take corrective action when he or she becomes aware that violations are about to occur or have occurred.⁷²

Requiring a commander to fulfil certain duties indicates that responsibility is attributed when the crime would not have been committed but for the failure of the commander.⁷³ The crime would not have occurred had the commander fulfilled his duties; as such actions would have prevented the crime from occurring.⁷⁴ However, responsibility is also attributed when 'the superior's failure of supervision [merely] increases the risk that the subordinates commit certain crimes'.⁷⁵ It must also be noted that the crime must have been committed; a commander cannot be held responsible under the Rome Statute for a mere failure to exercise control if no crimes within the jurisdiction of the Court were actually committed.⁷⁶

Failure to exercise such control by a commander may be proven with regard to the duties of commanders that are imposed by the UN, including under the MoU, which specifically obligates the sending state to take action if a commander fails to exercise *effective command and control*.⁷⁷ As a specific example, commanders are tasked with the implementation of programmes and policies of the UN for the prevention of SEA. They are being assessed on how they perform these duties. It is clear what method and means of control and authority commanders have and are expected to carry out in order to prevent and ensure accountability for SEA.⁷⁸ Thus, they have the material ability and power to prevent and punish such misconduct.⁷⁹ The Prosecutor would be able to use this as evidence (particularly the UN assessments of performance) to determine whether a commander had failed to exercise control over the forces.

Failure to take all necessary and reasonable measures is the second element of omission triggering responsibility, and is the crux of command/superior responsibility.⁸⁰ A commander who fails to exercise effective control but does take all necessary and reasonable measures to

prevent or repress the crimes or to submit the matter to the competent authorities will not be held responsible when subordinates have committed crimes. The failure to take necessary and reasonable measures can be committed intentionally or with negligence. The necessary and reasonable measures must be within the legal competence and the material possibility of the commander.⁸¹

The failure to prevent or repress or submit to the competent authorities follows the principle detailed above that command responsibility is based on a failure to act rather than imputed liability for the subordinate's actions.⁸² Thus, the *mens rea* required is one of negligence rather than intent, differentiating Article 28 responsibility from Article 25 criminal responsibility.⁸³

Prevention of a crime takes priority over actions to punish an act. 'Obviously, where the accused knew or had reason to know that subordinates were about to commit crimes and failed to prevent them, he cannot make up for the failure to act by punishing the subordinates afterwards.'⁸⁴ Prevention of a crime stops the crime when it has not yet been committed. Repression of a crime takes place by a commander when a crime is already in the process of being committed. Reporting of the crime to the competent authorities takes place after the fact, with the aim of reporting intended to ultimately result in punishment of the offender through triggering of investigation.⁸⁵

It is notable that Article 28 only requires a commander to prevent or repress the commission of crimes, or to submit the matter to the competent authorities for investigation and prosecution. This is in contrast to the phrasing found in the Statutes of the *ad hoc* tribunals, which expressly include command responsibility for failure to punish.⁸⁶ It is also distinct from customary law, which has developed the requirement to punish perpetrators of international crimes.⁸⁷ However, the ICC has elected to interpret 'repress' as encompassing two separate duties at two different stages of the commission of the crimes—a duty to stop ongoing crimes, and to punish forces after the commission of crimes.⁸⁸ The duty to punish may involve the commander taking necessary measures or by referring the matter to the competent

authorities, and which duty is applicable will depend upon the circumstances of the case.⁸⁹

Command responsibility may ultimately be attributed to the Force Commander, as it is the Force Commander who issues all of the orders for a mission. All military personnel are under the operational control of the Force Commander, who is therefore responsible for directing the behaviour of all mission military personnel. In this regard, the Force Commander must take all necessary and reasonable measures within his or her power to prevent or repress the commission,⁹⁰ by issuing orders or directives to mission personnel detailing prohibited behaviour, off-limits locations and consequences for any violations of these orders.

In addition, if the Force Commander *knew, or should have known*⁹¹ that military personnel were committing or about to commit such crimes, s/he would be under an obligation to take action to prevent such crimes through his/her position as Force Commander. The knowledge requirement of Article 28 is likely to follow that of the *ad hoc* tribunal case law: actual knowledge, demonstrated by direct or circumstantial evidence. The determination of knowledge could be ascertained through, *inter alia*, the elements listed by the ICTY in *Čelebići*.⁹² When a commander *should have known* is likely the equivalent of the constructive knowledge element developed by the ICTY.⁹³ A commander is not required to actively search for information but must acknowledge any information already available to him, and failure to take notice of such information will incur liability.⁹⁴ What the commander knew or should have known will depend on the individual circumstances of the case.⁹⁵

One notable aspect of this provision is that it applies to situations where forces 'were committing or about to commit crimes', but not where a commander knew or should have known that crimes had been committed. This phrasing leaves a gap in the reach of the Court, as on strict application of Article 28, it cannot hold a commander responsible for failure to report a crime he becomes aware of only after it has been committed.⁹⁶ It can only be assumed that the Court will interpret this wording broadly, to

include crimes already committed, in order to avoid a lacuna in a central division of command responsibility.

The fact that the Force Commander ultimately has no disciplinary authority over national contingent members would not bar prosecution, as the Rome Statute does not require a commander to punish the perpetrator, but only to submit the matter to the competent authorities for investigation and prosecution. Thus, the Force Commander would be under an obligation to refer any allegations to both the UN, for administrative disciplinary action, and to the alleged perpetrator's national contingent commander for investigation and prosecution by the sending state authorities. Under the wording of Article 28, this is where the responsibility of the Force Commander would end, as there is no requirement to ensure that investigation or prosecution does actually take place, and no express requirement to punish. Provided the Force Commander has taken all necessary and reasonable measures within his or her power to refer the matter to the competent authorities, s/he has fulfilled obligations under Article 28.⁹⁷

This logic would also apply to commanders ranked under the Force Commander, depending upon their area of command, authority and control. Contingent commanders would likely only be held responsible for the actions of members of their own contingent, as they do not exercise any authority, control or command over members of other national contingent. Responsibility of any commander would have to be assessed by analysing over which subordinates a particular commander held authority, command and control, either *de facto* or *de jure*.⁹⁸

However, there may be problems with the determination of authority. Despite the projected command/authority hierarchy in a mission, the reality is unfortunately that national contingent members sometimes refuse to acknowledge the *de jure* authority and command (as appointed by the Force Commander) of a commander originating from a different sending state.⁹⁹ This is a problem that has been recognized by the UN. For example, national contingents in UNOSOM¹⁰⁰ were not following mission orders, but instead were following orders from their sending state command, who were also applying mission orders at their own discretion.¹⁰¹

It is possible that the Court could find that, in this situation, two commanders in fact had authority and command: the UN-appointed commander and the national contingent commander. The categorization of the authority as *de jure* or *de facto* would depend on the interpretation of the circumstances. The UN-appointed commander would hold *de jure* authority by means of their appointment by the Force Commander, and would be held responsible based on this authority. Should that commander carry out their *control effectively*, they would be criminally responsible based on their obligation to prevent or report crimes. However, in praxis the UN-appointed commander may hold no *effective authority and control*, and thus may not be held responsible for the actions of subordinates.¹⁰² This may be evidenced by the fact that subordinates were not following the commander's orders. As held in *Čelebići*, a commander must have *actual control* of the subordinate.¹⁰³ Thus, the national contingent commander, whose orders the subordinate was actually following, and therefore had *actual or effective control* of the subordinate, could be deemed to have *de facto* authority.¹⁰⁴ At the same time, given the fact that a national contingent leader is responsible for the discipline and good order of national contingent members, and thus has the *effective control* and material ability to prevent and punish, the national contingent member could also be found to hold *de jure* authority in this regard. Given the fact that a contingent member is receiving orders from two sources, the national commander and the UN commander,¹⁰⁵ the result is that there are two different commanders who may be held responsible for the actions of the subordinate.

Yet responsibility only attaches if the commander *knew* (actual knowledge)¹⁰⁶ or, owing to the circumstances at the time, *should have known* (negligence in failing to acquire knowledge)¹⁰⁷ about the commission of the crime(s).¹⁰⁸ There are multiple factors that the ICC is likely to take into account when considering the actual knowledge of a commander. Aspects such as logistics, geographical location, widespread occurrence of the acts and the location of the commander at the time¹⁰⁹ will be particularly relevant in relation to a peace operation, but may greatly differ between

missions, owing to the circumstances at the time. For example, some missions are located in geographically small areas, and do not have a large number of personnel involved. In such a situation, a higher level of knowledge of the Force Commander and other commanders would be expected. For a mission located in an expansive territory (such as the Democratic Republic of the Congo), where units are spread far and wide, it may be less practical for a Force Commander to have knowledge of details of all unit operations. In this latter case, it would be more likely to be unit commanders who would bear responsibility for crimes committed by subordinates. However, in general, the military, and a peace operation, are organized structures with established reporting and monitoring systems, rendering it simple to prove actual knowledge.¹¹⁰

However, even in the latter case, this would not necessarily absolve the Force Commander of responsibility. For example, it is the responsibility of commanders, including the Force Commander, to be aware of locations designated as off-limits (especially considering that these are also off-limits to commanders), and to maintain awareness that such off-limits orders are being adhered to. It is the responsibility of national commanders to ensure conduct and discipline, and therefore to maintain knowledge that orders and directive relating to conduct and discipline are being implemented and followed by their subordinates.

B. Superior Responsibility

Superior responsibility is the responsibility of non-military, or civilian, leaders for crimes committed by subordinates. The existence of this relationship is also determined in the same manner as a commander/subordinate relationship, by examining effective authority and control.

Within the UN, this will include all levels of superiors up to the SRSG, and possibly even the Secretary-General. As with commanders, a superior must also have *effective authority and control* over the subordinates in question.¹¹¹ This provision is similar to the one under Article 28(a), with the

notable difference that there is no requirement of effective command and control. The difference is due to the fact that superior–subordinate relationships differ from commander– subordinate relationships. Command is a military concept without application in a non-military context. Another distinction is that there are likely to be more limitations on the scope of authority and control of a superior.¹¹² It may be determined that a subordinate’s behaviour in the workplace is the only conduct under the effective authority and control of a superior, while actions committed outside this time and location do not fall within the authority and control of the superior.¹¹³

There is an additional requirement of superior responsibility, namely that the crimes were within the effective responsibility and control of the superior. This requirement is linked to the concept of effective authority and control. This additional element is again due to the fact that superior–subordinate relationships are very different to military relationships, in which commanders generally exercise authority and control over all areas of a soldier’s conduct.¹¹⁴ With regard to civilian superiors, if the crimes were not within the competence of the superior to control, they cannot be held responsible.¹¹⁵ A failure to exercise control properly will be determined in the same manner as those under command responsibility, although duties of a civilian superior may be determined to be different to those of a military commander.¹¹⁶ Again, this will depend on the particular role and status of the superior.

Mission superiors are in a position to take reasonable measures to attempt to prevent or report crimes by their subordinates due to their authority.¹¹⁷ Within a peace operation, a civilian superior will have *authority and control* over mission civilian personnel, which includes the power to appoint and remove (dismiss and repatriate) UN employees. Which subordinates fall within their authority and control will depend on the exact role of the superior, but superiors can exercise both *de jure* and *de facto* authority and control over their subordinates. At the highest level, the SRSg has *authority and control* over the entire mission, over all military and civilian personnel, and thus could be held responsible for crimes committed

by either military or civilian personnel.¹¹⁸

Superiors within the UN are also specifically tasked with the implementation of programmes and policies of the UN for the prevention of SEA, and are assessed on their performance in this implementation.¹¹⁹ This clearly demonstrates that superiors are expressly given the material abilities (and duty) to prevent such crimes, thus rendering SEA prevention within the *effective responsibility and control* of UN managers.¹²⁰ It also demonstrates that a superior is required to maintain awareness (have knowledge) of misconduct, and once that knowledge is acquired, to act upon such information by referral to the relevant disciplinary channels (eg the CDU and the Office of Internal Oversight). These requirements and assessments would also be clear evidence for the Prosecutor as to whether or not the superior failed to exercise control properly by taking all necessary and reasonable measures within his or her power to prevent or repress the commission of the crimes, or to submit the matter to the competent authorities for investigation and prosecution.¹²¹ Fulfilment by a superior of his/her duties with regard to misconduct would avoid criminal responsibility for not acting on knowledge obtained, but also for consciously disregarding information clearly indicating the commission of crimes.¹²²

It is clear that ‘consciously disregarded information’ is a different threshold from that required by command responsibility, as a superior is not held responsible for what they should have known, but rather, if they consciously disregarded information. This means that a superior will be held responsible if they were put on notice of crimes being committed (or about to be) but did not take action on this information. The standard is generally viewed as being lower than that required by a military commander, due to the fact that a military commander ‘would have far more possibilities to receive information on the conduct of their subordinates’.¹²³ This ability is connected with the realm of authority and control exercised by commanders and superiors, which is greater for military commanders than civilian superiors.

Superiors are held responsible if information clearly indicating a significant risk that subordinates were committing or were about to commit

crimes existed and was available to the superior; that the superior ‘declined to refer to the category of information’.¹²⁴ This is a criterion similar to the ‘wilful blindness’ concept, which does not presume knowledge, but results in responsibility for ignoring available information.¹²⁵

The obligation to not consciously disregard information clearly indicating that subordinates were committing or about to commit crimes differs from the obligations of military commanders, and is seen as a lower threshold than ‘should have known’.¹²⁶ Again, the reasoning behind the lower threshold is that civilian superior–subordinate relationships are not of the same mould as military commander–subordinate relationships. The military is built on a system of discipline and good order, and a definitive hierarchy based on authority, command and control. This is not the case with regard to superior–subordinate relationships, which are hierarchical, and involve authority, but do not have such an emphasis on command and control—civilian superiors do not usually have disciplinary powers.¹²⁷ However, this does not absolve civilian superiors of any responsibility, although clearly responsibility will be determined based on the individual circumstances of any case. While superior responsibility for crimes of a high-level politician (such as a head of state) is more obvious, such responsibility of lower level superiors will be more challenging to ascertain. However, within the UN, it is the responsibility of superiors to refer any allegations to the appropriate authorities, both within the UN for administrative investigation and disciplinary action (potentially dismissal and repatriation), and with regard to military personnel, to the national contingent commander.

5. Conclusion

In the broader context, prosecution of peacekeeping personnel superiors and commanders will affirm the principle that the Rome Statute is applicable to all personnel, regardless of their official capacity.¹²⁸ The Statute applies ‘equally to all persons without any distinction based on official capacity’, and immunities are no bar to the Court exercising its jurisdiction.¹²⁹ While it was

heads of state, rather than peacekeepers, that Article 27 was envisioned to cover, it provides the perfect platform for ensuring responsibility for peacekeepers who commit international crimes, and, in particular, superiors and commanders who also attract criminal responsibility for the conduct.

Accountability of superiors and commanders in peacekeeping is essential to reinforce the role of international criminal law in general, and to guarantee more functional, effective and humane peace operations. The responsibility of superiors and commanders to control the behaviour of their subordinates must be carried out to the best of the ability of those in charge. Any failure to do so which results in the commission of an international crime should be prosecuted, to avoid impunity, through the dual role of punishment and prevention.

The Rome Statute is still a relatively new instrument, and most provisions remain untested. The ICC has many years ahead of it to develop its case law. The emphasis on prosecuting high-ranking offenders by the Prosecutor [FN] means that it is likely there will be a significant amount of analysis of Article 28 by the Court. Command responsibility has already arisen in the Bemba case confirmation of charges, so we have a glimpse of how the Article 28 will be interpreted and applied by the ICC.

It is clear that command and superior responsibility are particularly relevant forms of criminal responsibility for crimes committed by peacekeeping personnel. Both military commanders and civilian superiors have an express duty to ensure prevention and punishment of misconduct.¹³⁰ In addition, military commanders are tasked with the discipline and good order of their forces.¹³¹ It is their role to issue mission directives and rules of engagement that dictate how mission personnel should conduct themselves, in both combat and daily life. This places quite a high level of responsibility upon mission commanders and superiors with respect to criminal conduct. These responsibilities in turn assist with prosecution as the duties of superiors and commanders are expressly articulated in regulations and agreements, and followed up by performance appraisals. Indicting under Article 28 responsibility would expand the jurisdiction of the ICC beyond direct perpetrators. Were the ICC to be seized of jurisdiction over alleged

crimes committed by peacekeeping personnel, then it would be vital to explore the responsibility of any superiors and commanders, to ensure accountability at all levels for such crimes. Such action would also contribute to the prevention further failures by commanders and superiors to exercise control and authority over their subordinates.

The rule imposing responsibility to exercise control and authority over sub-ordinates and prevent criminal conduct is customary international humanitarian law.¹³² This means it applies to all authorities involved in armed conflict, which may include periods after a cease-fire; therefore under the majority of circumstances, peacekeeping operations would be included. Whether subordinates or superiors/commanders, peacekeeping personnel should not be excluded from responsibility for serious crimes on the basis of their role as peacekeepers. They are protectors rather than belligerents; those who are tasked with advancing human rights and creating a secure and stable environment.¹³³ As the ICTR has stated, punishment for those who commit war crimes should 'be applicable to everyone without discrimination', as 'international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a violation of [international humanitarian law] under the pretext that they did not belong to a specific category'.¹³⁴

Crimes under the Rome Statute are international crimes; defined as international because they are crimes that shock the consciousness of humanity, and are committed against the world community as a whole, constituting a threat to international peace and security.¹³⁵ The commission of international crimes by peacekeeping personnel risks the success of a peace operation through the distrust created in the local population and the global community, resulting in endangerment to both the local population and to international peace and security. Given the vital role of a peacekeeper and the integral link between this role and the success of the mission, any personnel suspected of committing a criminal offence should be prosecuted for such offence, and, where failure to prevent or punish exists, superiors and commanders prosecuted too.

6. References

- ¹ For example, Secretary-General's Bulletin, 'Special measures for protection from sexual exploitation and sexual abuse', ST/SGB/2003/13, 9 October 2003; additional provisions within the Model MoU. The Model MoU can be found in A/C.5/60/26, ch 9, at 148. The initial revised draft model MoU was part of the Report of the Group of Legal Experts on ensuring accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations, A/60/980, 16 August 2006 ('Report on ensuring accountability'); and the final revised draft model MoU is in the Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session, A/61/19 (Pt III), Annex, 12 June 2007. The later draft was adopted by A/RES/61/291, 24 August 2007.
- ² For official reporting of allegations in all peace operations and against personnel from other UN bodies, see the annual reports of the Secretary-General. The reports cover statistics on allegations and investigations; as well as an explanation of actions taken by the UN in the past year to combat sexual misconduct. Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary General, A/59/782 (2005), A/60/861 (2006), A/61/957 (2007), A/62/890 (2008), A/63/720 (2009) and A/64/669 (2010).
- ³ The Zeid Report is a report by His Royal Highness Prince Zeid Ra'ad Zeid Al-Hussein, who was commissioned by the Secretary-General in 2004 to advise and assist in addressing the problem of sexual exploitation and abuse by UN peacekeeping personnel. 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations' (report accompanying Letter dated 24 March 2005 from the Secretary-General to the President of the General Assembly), A/59/710, March 2005.
- ⁴ Zeid Report (n 3), para 37.
- ⁵ Model MoU, Art 7(2) sexiens.
- ⁶ Art 7(4) sexiens.
- ⁷ Art 7(2) sexiens.
- ⁸ Jurisdiction over UN peace operation personnel is complex but a full discussion is outside the scope of this article. The relevant instruments are the MoU, Status of

Forces Agreement, the Convention on the Privileges and Immunities of the United Nations, Directives for Disciplinary Matters Involving Military Members of National Contingents (Military Disciplinary Directives) and Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers (CivPol Disciplinary Directives).

⁹ Art 17, Rome Statute of the International Criminal Court, 2187 UNTS 90, adopted 17 July 1998.

¹⁰ Arts 12 and 13, Rome Statute.

¹¹ Whether or not individual crimes by peacekeepers fall within the Rome Statute Arts

6–8 is a discussion beyond the scope of this article.

¹² Command ‘is the authority lawfully exercised by a commander over his or her subordinates by virtue of the rank or appointment held. Command provides the authority and responsibility for effectively planning and executing the employment of assigned resources to accomplish the mission’. Control ‘is the process through which the commander, assisted by staff, organises, directs and co-ordinates the activities of the assigned forces’. R Murphy, ‘Legal Framework of UN Forces and Issues of Command and Control of Canadian and Irish Forces’ (1999) 4 JArmed Conflict L 48.

¹³ J-M Henckaerts and L Doswald-Beck, Customary International Humanitarian Law Volume I: Rules (Cambridge University Press, Cambridge 2005) 559.

¹⁴ Prosecutor v Delalić et al. (Čelebići) (Judgment) Case No IT-96-21-A, Appeal Chamber (20 February 2001) para 198; Prosecutor v Aleksovski (Judgment) Case No IT-94-14/1-T, Trial Chamber (25 June 1999) para 76; Prosecutor v Blaškić, Judgement, Case No IT-95-14-T, Trial Chamber (3 March 2000) Case No IT-95-14-T, Trial Chamber (3 March 2000) paras 301–35; Prosecutor v Krstić (Judgment) Case No IT-98-33, Trial Chamber (2 August 2001), para 648.

¹⁵ Blaškić (n 14) para 335; Prosecutor v Bemba, Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Bemba Confirmation of Charges) ICC-01/05-01/08-424 (15 June 2009), para 415–16.

¹⁶ Henckaerts and Doswald-Beck (n 13) 561. Čelebići Appeal Judgment (n 14) para 251;

Blaškić, Trial Judgment (n 14) para 300.

¹⁷ Čelebići, Appeal Judgment (n 14) para 256. See also Henckaerts and Doswald-Beck

(n 13) 561.

¹⁸ Blaškić Trial Judgment (n 14) para 335. See also Aleksovski (n 14) paras 73–8.

¹⁹ Čelebići Appeal Judgment (n 14) para 266.

²⁰ Prosecutor v Musema (Judgment) Case No ICTR-96-13-A, Trial Chamber (27 January

2000), para 880.

²¹ Ibid.

²² Ibid.

²³ See eg Justice Murphy's dissent In re Yamashita (1945) 327 US 1. See also Greg R.

Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court' (2000) 25 Yale J Intl L 106–8; Kai Ambos, 'Superior Responsibility', in A Cassese and other (eds), The Rome Statute of the International Criminal Court Vol I (OUP, Oxford 2002) 823–72, 825–28.

²⁴ Ibid.

²⁵ A Cassese, International Criminal Law (OUP, Oxford 2008) 242.

²⁶ Vetter (n 23) 106.

²⁷ US v Wilhelm von Leeb et al (High Command Case), UN War Crimes Commission, 12

Law Reports of Trials of War Criminals 23 (1948).

²⁸ Prosecutor v Akayesu (Judgment) Case No ICTR-96-4-T, Trial Chamber (2 September 1998), paras 488–9.

²⁹ High Command case (n 27); Prosecutor v Akayesu (n 28), para 489.

³⁰ Prosecutor v Delalić et al (Čelebići) (Judgment) Case No IT-96-21-T, Trial Chamber

(16 November 1998) paras 141–6, 383, 393.

³¹ O Triffterer and R Arnold, 'Article 28 Responsibility of commanders and other superiors' in Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court (Hart, Oxford 2008), 828.

³² Čelebići Trial Judgment (n 30) para 383.

³³ Ibid, para 386.

³⁴ Ibid. See also G Mettraux, *The Law of Command Responsibility* (OUP, Oxford 2009)

214–5.

³⁵ *US v von List et al* (Hostage case), 8 Law Reports of Trials of War Criminals 34 (1949);

11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control

Council No 10 (1950); *Čelebići Trial Judgment* (n 30) para 707.

³⁶ *Čelebići Trial Judgment* (n 30) para 378; *Aleksovski, Trial Judgment* (n 14) paras 81; *Blaškić Trial Judgment* (n 14) paras 302, 335; *Bemba Confirmation of Charges* (n 15) para 415. A superior cannot be expected ‘to perform the impossible’: *Čelebići Trial Judgment* (n 30) para 395.

³⁷ *Čelebići Trial Judgment* (n 30) para 395.

³⁸ Hostage case (n 35) 71.

³⁹ *Čelebići Trial Judgment* (n 30) para 394.

⁴⁰ *Prosecutor v Kvočka et al. (Judgment)* Case No IT-98-30/1-T, Trial Chamber (2 November 2001), para 316; *Blaškić Trial Judgment* (n 14) para 335; *Prosecutor v Strugar (Judgment)* Case No IT-01-42-T, Trial Chamber (31 January 2005), para 376.

⁴¹ Model MoU, A/61/19 (Pt III), Annex, 12 June 2007, Art 7(2) *sexiens*.

⁴² Model MoU, Art 7(4) *sexiens*.

⁴³ UNDPKO, ‘United Nations Peacekeeping Operations Principles and Guidelines’ (Peacekeeping Best Practices Section, Division of Policy, Evaluation and Training, Department of Peacekeeping Operations, United Nations, New York January 2008) 66–9, http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf4 (‘DPKO Principles and Guidelines’) (accessed 12 November 2010).

⁴⁴ It must be remembered that ‘the detailed structure of command in a UN force inevitably differs somewhat from situation to situation’; H McCoubrey and N White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Dartmouth, Aldershot 1996) 142.

⁴⁵ Ibid, 138.

- ⁴⁶ Ibid.
- ⁴⁷ Ibid, 139. However, it is the Rules of Engagement (ROE) that ultimately govern any use of force; *ibid*, 146. The Force Commander ultimately defines a mission's ROE, although national contingents will usually also implement their own; P Rowe, 'Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents' (2000) 5 JCSL 59–62.
- ⁴⁸ J Houck, 'The Command and Control of United Nations Forces in the Era of "Peace Enforcement"' (1993–1994) 4 Duke J Comp & Intl L 23.
- ⁴⁹ The DPKO provides policy guidance and strategic direction; the DFS provides logistical and administrative support. DPKO Principles and Guidelines (n 43) 66.
- ⁵⁰ Ibid, 68.
- ⁵¹ Ibid.
- ⁵² Ibid.
- ⁵³ Ibid.
- ⁵⁴ Ibid.
- ⁵⁵ Consultation with national commanders on operational issues has been deemed 'indispensable', provided such consultations do 'not lead to delays in the execution of tasks or prevent the Mission from retaining the necessary operational flexibility'; Sixth report of the Secretary-General on the United Nations Mission in Sierra Leone, UN Doc S/2000/832 (24 August 2000), para 47.
- ⁵⁶ Model MoU, Art 7 *ter* Discipline; Art 7 *quinquies* Exercise of jurisdiction by the Government. Houck (n 48) 26.
- ⁵⁷ Ambos (n 23) 856.
- ⁵⁸ Ibid, 857.
- ⁵⁹ Figure from DPKO Principles and Guidelines (n 43) 66.
- ⁶⁰ Bemba Confirmation of Charges (n 15) para 409.
- ⁶¹ Ibid, para 408.
- ⁶² Ibid, para 410.
- ⁶³ Bemba Confirmation of Charges (n 15) para 419.
- ⁶⁴ Art 28(a) Rome Statute (emphasis added).
- ⁶⁵ Bemba Confirmation of Charges (n 15) para 414.
- ⁶⁶ Ibid, para 417.
- ⁶⁷ Ambos (n 23) 857.

⁶⁸ Triffterer and Arnold (n 31) 825–6, 828.

⁶⁹ Ibid, 826.

⁷⁰ See eg *Re Colonel Aird; Ex-parte Alpert* [2004] HCA 44; 220 CLR 308; 209 ALR 311.

⁷¹ Triffterer and Arnold (n 31) 823; Mettraux (n 34) 37–53, 269.

⁷² Ibid, 822, citing Fenrick in the 1st edition of the same book. See also Bemba Confirmation of Charges (n 15) para 438.

⁷³ This is an element of causation: *ibid.* Triffterer and Arnold (n 31) 835–6; Mettraux (n 34) 87–9.

⁷⁴ Ambos (n 23) 860. This is distinct from the commander's or superior's action causing the crime: A Swart, 'Modes of International Criminal Liability' in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 82–93, at 88.

⁷⁵ Ibid, 860; Bemba Confirmation of Charges (n 15) para 425.

⁷⁶ Thus, a commander cannot be held responsible for an attempted crime that was not carried out due to the interception of the commander: Triffterer and Arnold (n 31) 827–8.

⁷⁷ Model MoU, Art 7(2) *sexiens*; the language used echoes that of Art 28 Rome Statute.

⁷⁸ See text accompanying n 5, 6 and 7 above.

⁷⁹ Bemba Confirmation of Charges (n 15) paras 415–16. See also N Karsten, 'Distinguishing Military and Non-Military Superiors' (2009) 7 JICJ 983–1004, at 990.

⁸⁰ R Cryer, 'General Principles of Liability in International Criminal Law', in D McGoldrick, P Rowe and E Donnelly (eds) *The Permanent International Criminal Court* (Hart, Oxford 2004), 233–62, at 261.

⁸¹ Ambos (n 23) 861.

⁸² M Lippman, 'Humanitarian Law: The Uncertain Contours of Command Responsibility' (2001) 9 *Tulsa J Comp & Intl L* 86.

⁸³ Criminal responsibility under Art 25 requires intent and knowledge; as defined in Art 30 Mental element.

⁸⁴ Blaškić Trial Judgment (n 14), para 336. See also Protocol Additional to the

Geneva

Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS 3, adopted 8

June 1977, Arts 86 and 87.

⁸⁵ Mettraux (n 34) 67, 250–2.

⁸⁶ ICTY (Art 7(3)), ICTR (Art 6(3)) and Special Court for Sierra Leone (SCSL) (Art 6(3)), and the Law on the Extraordinary Chambers in the Courts of Cambodia (ECCC) (Art 29).

⁸⁷ Henckaerts and Doswald-Beck (n 13) 558–63; Additional Protocol I, Art 87(1).

⁸⁸ Bemba Confirmation of Charges (n 15) paras 439–40.

⁸⁹ Ibid, paras 440–1.

⁹⁰ Art 28(a)(ii) Rome Statute.

⁹¹ Art 28(a)(i) Rome Statute.

⁹² See text accompanying n 34 above.

⁹³ Lippman (n 81) 86–7; Ambos (n 23) 864.

⁹⁴ Triffterer and Arnold (n 31) 829–30.

⁹⁵ Ambos (n 23) 867.

⁹⁶ This also brings into question the ability to prosecute a commander who assumes command after the commission of the crimes and does not take action to report the matter, as he could not have been aware of the crimes until after their commission; Triffterer and Arnold (n 31) 836–7.

⁹⁷ Ibid, 839.

⁹⁸ Prosecutor v Sesay, Kallon and Gbao (RUF Case) (Judgment), Case No SCSL-04-15-T, Trial Judgment (2 March 2009), para 366; Bemba Confirmation of Charges (n 15) para 443; Karsten (n 79).

⁹⁹ There may be an ‘override’ of force commanders orders by national contingent commanders, resulting in ‘parallel command’; Murphy (n 12) 55; J Arbuckle, *Military Forces in 21st Century Peace Operations: No job for a soldier?* (Routledge, Abingdon 2006) 121.

¹⁰⁰ United Nations Operation in Somalia.

¹⁰¹ The UN found ‘this made them unreliable in the mission area and reduced the mission’s effectiveness’: The Comprehensive Report on Lessons Learned from United Nations Operation in Somalia (UNOSOM) April 1992 to March 1995, paras 44–6,

<http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/UNOSOM.pdf>
4 last

accessed 12 November 2010. See also C Gray, 'Peacekeeping after the Brahimi Report: Is there a crisis of credibility for the UN?' (2001) 6 JCSL 281; M Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff, Leiden 2005) 40–1.

¹⁰² Triffterer and Arnold (n 31) 826; Mettraux (n 34) 122–3.

¹⁰³ Čelebići Appeal Judgment (n 14) para 255. This control may be direct or indirect; *ibid*, para 252.

¹⁰⁴ One state example is that of Canada, which deems that national command is never withdrawn during any international operation: Murphy (n 12) 41–2.

¹⁰⁵ B Tittmore, 'Belligerents in Blue Helmets: Applying International Humanitarian

Law to United Nations Peace Operations' (1997) 33 *Stan J Intl L* 61, 80.

¹⁰⁶ Bemba Confirmation of Charges (n 15) para 429.

¹⁰⁷ *Ibid*, para 432.

¹⁰⁸ Art 28(a)(i) Rome Statute.

¹⁰⁹ Bemba Confirmation of Charges (n 15) para 431.

¹¹⁰ *Ibid*.

¹¹¹ Art 28(b).

¹¹² Ambos (n 23) 858.

¹¹³ *Ibid*, 858; see also Musema Case No ICTR-96-13-A, Trial Judgement (27 January 2000) Trial Judgment, para 880.

¹¹⁴ Vetter, however, believes this renders Art 28(b)(ii) superfluous, because other aspects of the provision differentiate the military and civilian relationships: Vetter (n 23) 120.

¹¹⁵ Triffterer and Arnold (n 31) 841.

¹¹⁶ Mettraux (n 34) 108.

¹¹⁷ Musema Trial Judgment (n 113).

¹¹⁸ The SRSG does not have command over the military personnel, but only authority and control is required under Art 28(b).

¹¹⁹ See text accompanying n 5, 6 and 7 above.

¹²⁰ Art 28(b)(ii).

¹²¹ Art 28(b)(iii).

¹²² Art 28(b)(i).

¹²³ Triffterer and Arnold (n 31) 841.

¹²⁴ Ibid, 841.

¹²⁵ Discussed in Čelebić Trial Judgment (n 30) para 387. Vetter (n 23) 124; Ambos (n 23)

870.

¹²⁶ This has been criticized by some, see particularly Vetter (n 23).

¹²⁷ Triffterer and Arnold (n 31) 841.

¹²⁸ Art 27, Rome Statute.

¹²⁹ Ibid.

¹³⁰ Model MoU.

¹³¹ Ibid.

¹³² Henckaerts and Doswald-Beck (n 13) 558–63.

¹³³ DPKO Principles and Guidelines (n 43) 14 and 23.

¹³⁴ Akayesu (Judgment), Case No ICTR-96-4-A, Appeal Chamber (1 June 2001), para

443.

¹³⁵ M Bassiouni, Introduction to International Criminal Law (Transnational Publishers, New York 2003) 119, 121.