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SUPERIOR RESPONSIBILITY UNDER THE ICC STATUTE: RESTATEMENT OR ADVANCEMENT OF THE LAW?

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Abstract

The principle of superior responsibility has evolved into a vital tool for bringing military commanders and civilian superiors to justice irrespective of the punishment meted on their subordinates who commit international crimes. The previous instruments and old decisions on superior responsibility, which now form part of customary international law, adopted the general mental fault standard for the superior —'know or had reason to know'. They did not have separate standards of mental fault for military and civilian superiors and required no causal connection between the superior's failure to control and the crime committed by the subordinate. Again, they did not particularise the ambits of the authority of the superior and did not mandate the superior to take all necessary and reasonable measures in the performance of his duties. This paper enquires into whether the relevant provisions of the International Criminal Court (ICC) Statute 1998 restates or advances the law on superior responsibility. It argues that the ICC Statute, apart from providing for causal connections, has also advanced the

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law by providing for a separate, stricter mental fault standard for military commanders, when compared with that of civilian superiors, even as the Court now lays emphasis on motivation and geographical remoteness.

Keywords: Superior responsibility, customary international law, the ICC Statute, restatement, advancement, international criminal law.

1. Introduction

One of the most useful innovations of international criminal law so far is the principle of superior responsibility, which enables the court to hold a person responsible not just because he[3] individually committed an international crime, but also because he was in effective command or control of the forces or subordinates who committed the crime. This principle has evolved through the years and is codified in the Rome Statute of the International Criminal Court (herein Rome Statute or ICC Statute) 1998.[4] Under the Rome Statute the ICC made its very first conviction on superior responsibility in *The Prosecutor v Jean-Pierre Bemba Gombo*,[5] for war crimes and crimes against humanity,[6] which the Appeal Chambers of the ICC reversed eventually.[7] These crimes were allegedly committed by forces under Bemba Gombo's authority during the armed conflicts in the Central African Republic between 26 October 2002 and 15 March 2003. The objective of this paper is to ascertain whether the relevant provisions of the ICC Statute 1998 merely restate the international criminal law on superior responsibility or advance the law in this area. The paper begins with an analysis of the provisions of previous instruments and old decisions. It then proceeds to evaluate the

[3] The pronoun 'he' or 'she' and the noun 'man' or 'woman' or any of their derivatives are used in this paper in a gender-neutral sense.

[4] Adopted 17 July 1998, 2187 UNTS 90.

[5] ICC-01/05-01/08.

[6] Ray Murphy, 'Command Responsibility after Bemba' (2019) *New Zealand Yearbook of International Law* 94, 118 DOI:10.1163/9789004387935_008.

[7] *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 A, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the *Statute'* (AC, 8 June 2018).

provisions of the ICC Statute 1998 in this subject area and finally assesses whether the Statute merely restates existing law or advances the law on superior responsibility. This will add existing to literature on the scope and impact of the ICC Statute 1998 in the development of the principle of superior responsibility in international criminal law.

2. Nature of Superior Responsibility

Through international instruments, domestic legislation and case law, the principle of superior responsibility has evolved in international criminal law. Nevertheless, the concept is not a recent development, but flows from the nature of military organisations which gives commanders control over their subordinates.[8] Superior responsibility developed initially from international criminal justice, and has now been adopted by domestic jurisdictions.[9] It is an important concept in international humanitarian and criminal law. It is a *sui generis* or special mode of liability for crimes committed by subordinates.[10] Superior responsibility is an omission-oriented form of individual criminal responsibility wherein the superior can be punished for failing to act. Essentially, what the superior is held responsible for is his lack of action with regard to the criminal activity of the subordinates. This principle does not punish a superior for the crimes of his subordinate. Rather, it punishes the superior for the failure to carry out his duty to exercise effective control.[11]

Superior responsibility encompasses the responsibility of military commanders and civilian superiors. It is thus wider in conception than command responsibility which addresses the responsibility of military

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[8] Case Mtrix Network, *International Criminal Law Guidelines: Command Responsibility* (Centre for International Law Research and Policy 2016) 17−19.

[9] International Committee of the Red Cross (ICRC), 'Superior Orders and the International Criminal Court: Justice delivered or Justice Denied' (31 December 1999) < https://www.icrc.org/en/doc/resources/documents/article/other/57jq7h.htm> accessed 28 November 2022.

[10] Chantel Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' (2007) 5(3) *Journal of International Criminal Justice* DO I- 10.1093/jicj/mqm029.

[11] Judgment, *Krnojelac*, (IT-97-25-A), Appeal Chamber, 17 September 2003, para 171; see H van Der Wilt, 'Halilović on Appeal: the Intricate Concept of Effective Control' (2007) 2(3) *Hague Justice Journal* 5, 8.

commanders alone.[12] So, the superior, in the context of this paper, can be a military commander or a civilian authority. It may, on the surface, seem as if only military commanders should bear responsibility for the forces' breaches of the law of war. However, this may be inconsistent with common practice whereby countries put their army under the authority and control of non-military political leaders. Most civilian presidents are styled commander-in-chief of the armed forces. Similarly, some private armies, militia groups, resistance forces or rebel groups are under the effective authority and control of civilian superiors. Hence, the need to also make these civilians bear superior responsibility for the crimes of their subordinates.

International criminal tribunals and courts often lack the human and financial capacity as well as the structure to prosecute each and every foot soldier that committed international crimes. Even if the tribunal or court has the capacity and structure to try this multitude of international criminal suspects, it may be difficult to identify and apprehend each and every one of them. So, getting the heads of government, ministers, military commanders and other superiors to account for their failure to control the forces is a vital way of ensuring that someone gets to be responsible for the crimes. These superiors can no longer find defence to international crimes by arguing that they did not set foot in the arena of combat.[13]

Superior responsibility is the doctrine of hierarchical accountability in cases on international crimes. It insists that superiors should diligently perform their duty of supervising subordinates or assume criminal responsibility for failing to do so. It covers *de jure* or *de facto* superior. Superior responsibility applies to both internal and international armed conflicts.[14] It has become a

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[12]Michala Chadimova, Ondrej Svacek and Ivana Prochazkova, 'Superior Responsibility in International Criminal Law' (December 2017) <https://www.researchgate.net/profile/Michala-Chadimova/publication/ Superior-Responsibility-in-International-Criminal-Law.pdf?origin=publication_detail> accessed 20 March 2022.

[13] JA Williamson, 'Some Consideration on Command Responsibility and Criminal Liability' (2008) 90(890) *International Review of the Red Cross* 303, 309.

[14] Decision on Joint Challenge on Jurisdiction, *ICTY Prosecutor v Hadžihasanović* (IT-01-47-AR72) Trial Chamber, 16 July 2003, para 716. This was confirmed in the interlocutory appeal filed by the defendants which the Appeals Chamber unanimously dismissed. See

principle of customary international law.[15] By this principle, the superior is not responsible for personally committing the crime, but for omitting to prevent, repress, punish or report it.[16] However, the view of Mateus-Rugeles (even though unsupportable) is that by implication, the superior responsibility principle equates personal commission.[17] Saying that superior responsibility is personal means equating it with strict liability, which is not the case.[18] For superior responsibility to be personal means that the guilty mind of the subordinate is imputed to the superior. Criminal responsibility is generally individual-based; the guilty mind of one cannot be imputed to another, except in some cases of common intention.

Individual criminal responsibility is direct, whereas superior responsibility is indirect. In this context, superior responsibility is not strict liability.[19] The superior is required to have prescribed mental fault before he can be convicted. It is not vicarious liability,[20] as the superior is punished for failure

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Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Superior Responsibility, *Hadžihasanović*(IT-01-47-AR72), Appeal Chambers, 16 July 2003, para 57; C Bishai, 'Superior Responsibility, Inferior Sentencing: Sentencing Practice at the International Criminal Tribunals' (2013) 11(3) *Northwestern Journal of International Human Rights* 83, 84.

[15] K Kudo, 'Command Responsibility and the Defence of Superior Orders' (PhD thesis on file at the University of Leicester, October 2007) 232.

[16]Michael A Newton, 'The *Bemba* Appeal Judgment Prevented Misalignment between the ICC Implementation of Article 28 and Best Practices Governing Military Operations around the World: Criminal Culpability of Commanders cannot be Predicated on a Judicially Mandated Duty to Withdraw Forces from Ongoing Operations', (27 May 2019)ICC Forum <https://iccforum.com/responsibility#Newton> accessed 26 March 2022.

[17] A Mateus-Rugeles, 'Command Responsibility for Omission when the Military Commander should have known' (2007) 2(1) *Interdisciplinary Journal of Human Rights* 61.

[18]*The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-3636-Anx2, Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, paras 33, 35, 36 (AC, 8 June 2018).

[19] R Värk, 'Superior Responsibility' (2012) 15 *Estonian National Defence College Proceedings* <http://works.bepress.com/rene_vark/7/> accessed 30 July 2021).

[20]Bishai (note 12);cf K Ambos, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 *Journal of International Criminal Justice (JICJ)* 159, 176, who argues, insupportably, that 'although, in structural terms, the superior is to be blamed for his improper supervision, he is not only punished for this reason, but also for the crimes of the subordinates. As a result, the concept creates, on the one hand, direct liability for the

to prevent, repress or report the subordinate's crime. The superior is not taking the punishment on behalf of or in place of the subordinate. Indeed, the imposition of superior responsibility on the superior does not dispense with the individual criminal responsibility due to the subordinate who personally committed the crime. The subordinates too, as individuals, are bound to respect the law of war and will be held personally accountable for breaches committed by them.[21] Similarly, a person can bear individual criminal responsibility and superior responsibility in the same case where the facts permit.[22] A person charged with both modes of participation may be convicted of one and exculpated from the other.[23]

3. Evolution, Previous Instruments and some Old Decisions

The origins of superior responsibility can be traced as far back as 2,500 years ago in *The Art of War*, written by Sun Tzu, then ruler of China.[24] In 1439, Charles VII of France promulgated an order providing for command responsibility within the military hierarchy:

> That each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company, and as soon as he receives any complaint complaining of any such misdeed or abuse, he brings the offender to justice so that the said offender be

lack of supervision, and, on the other, indirect liability for the criminal acts of others (the subordinates), thereby producing a kind of vicarious liability.'

[21] Kudo (note 13); Williamson (note 11) 304;

[22] In Judgment, *Krnojelac,* (IT-97-25), Trial Chamber, 15 March, 2002, the defendant was charged and convicted as both individual direct perpetrator and for superior responsibility. See Bishai (note 12) 92−93. The two accused persons in Judgment, *Naletilic,* (IT-98-34-T), Trial Chamber, 31 March 2003 were charged and convicted both for individual criminal responsibility and superior responsibility.

[23] In Judgment, *Blaškić,* (IT-95-14A), Appeal Chamber, 29 July 2004, para 702, the defendant was charged with direct perpetration and for superior responsibility, and found guilty only of direct perpetration.

[24] M Markham, 'The Evolution of Command Responsibility in International Humanitarian Law' (2011) *Penn State Journal of International Affairs* 50, 51; J Harvey, 'A Case Study of *Mens Reas* of Command Responsibility', *The GULS Law Review* (2016) 1 <file:///C:/Users/ZINOX/Documents/Command%20AdditionalResponsibility/A%20study%20of%20the%20Mens%20Rea%20of%20command%20responsibility%20_%20GULS%20Law%20Review.htm> accesses 4 June 2020.

> punished in a manner commensurate with his office, according to these Ordinances. If he fails to do so or covers up the misdeed or delays in taking action, or if, because of his negligence or otherwise, the offender escapes investigation or punishment, the captain shall be responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been.[25]

The above ordinance seems to say that the superior will be punished only when the erring subordinate escapes punishment, which differs from the current state of the law that permits concurrent punishment for both the subordinate and the superior. Värk assumes that superior responsibility was implicitly applied in the trial of Peter von Hagenbach in 1474.[26] The Archduke of Austria charged Hagenbach with having links to 'crimes which he had the duty to prevent',[27] found him guilty and beheaded him. The principle was codified in the Leiber Code 1863, Article 71 and developed during the American Civil War.[28] Superior responsibility was established by Hague Regulations of 29 July 1899, Article 1(1) and the Hague Rules (IV) of 8 October 1907, Article 1(1).[29]

The principle was applied by the German Supreme Court at the Leipzig War Crime Trial after the First World War (WWI) in the 1921 trial of Emil Müller.[30] It was also applied by the United States (the US) Supreme Court in the trial of Japanese general Tomoyuki Yamashita in 1945, who was charged with 'unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting

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[25] Quoted in SF Hendin, 'Command Responsibility and Superior Order in the Twentieth Century — A Century of Evolution' (2003) 10(1) *Murdoch University Electronic Journal of Law* 1, 4 para 6.

[26] Värk (note 17) 144.

[27] Markham (note 22) 51.

[28] Instructions for the Government of Armies of the United States in the Field, General Orders 100, 24 April 1863.

[29] The Hague Rules (IV) of 8 October 1907 Art 1 s 1.

[30] German War Trials, Report of Proceedings before the Supreme Court in Leipzig with Appendices 1921cmd 1450, 26, 30.

them to commit war crimes'.[31] The court in *Yamashita* reasoned that the subordinates would obey the laws of war only when the duty is firmly imposed on their superior to prevent the violations.[32] The court was guided by a three-step reasoning process, namely: 1) the conduct of war by troops who are not well controlled by their commander is most likely to result in violations of the law of war. 2) The principles of international humanitarian law and the law of war that aim at protecting civilian populations and prisoners of war from the brutality of military operations would be violated if the commanders of invading troops are at liberty to neglect their duty of effectively controlling the army. 3) Therefore, making the superior responsible for the excesses of the troops is a panacea for avoiding the violation of the law of war. The tribunal found no proof that Yamashita knew of the atrocities of his subordinates and appeared not to consider knowledge an element of superior responsibility.[33]

The principle of superior responsibility was applied in the *High Command Case*,[34] where the court tried to ascertain the degree of knowledge of the crime the superior would have, to be convicted. In the *Hostage Case*,[35] the US Military Tribunal seemed to limit the situation to cases where a commander has a duty to know. The Tribunal confined the situation to instances where the commander has already had some information regarding the subordinate's unlawful action. Superior responsibility was also applied in the 1971 trial of the US Army Captain Ernest Medina in connection with the My Lai Massacre during the Vietnam War.[36] Medina was acquitted.

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[31]*In re Yamashita, No 61,* Misc Supreme Court of the United States 372 US 1 (1945); 66 S Ct 340; 90 L Ed 499; 1946 US LEXIS 3090.

[32]Ibid*;* Miles Jackson, 'Command Responsibility from Part VI - Other Forms of Responsibility' in Marjolein Cupido, Manuel J Ventura and Lachezar Yanev (Ed) *Modes of Liability in International Criminal Law* (Cambridge University Press 2019) 409, 432.

[33]Ibid; see the dissenting opinion of Supreme Court Justice Murphy in *In re Yamashita,* quoted in Värk (note 16) 145−146; Bishai (note 12) 84; Harvey (note 22) 2.

[34]*The United States of America v Wilhelm von Leeb et al. (High Command Trial)* US Military Tribunal Nuremberg, Judgment of 27 October 1948.

[35]*United States v List (Wilhelm) and Ors (Hostage Case)* Trial Judgment, Case No 7, (1948) 8 LRTWC 34, (1948) 7 LRTWC 444, (1948) 11 LRTWC 1230, (1948) 11 TWC 757, (1948) 15 ILR 632, ICL 491 (US 1948), 19th February 1948, Nuremberg Military Tribunal [NMT] [1947-8].

[36]*The US v Ernest Medina*<http://law2.umkc.edu/faculty/projects/ftrials/mylai/NYTIMES.html#MEDINA%20FOUND%20NOT> accessed 4 August 2021.

The four Geneva Conventions of 12 August 1949 do not expressly provide for superior responsibility;[37] although Convention III, Article 4(A)(2)(a), describing the status or category of prisoners of war, refers to militias, volunteer corps or organised resistance movements *commanded by a person responsible for his subordinates.*[38] The implication of this provision is that members of the stated groups (as distinguished from members of the regular armed forces of a state), who have fallen into the power of the enemy, are entitled to protection as prisoners of war. It was, however, Article 86(2) of the Additional Protocol I (AP I) 1977 that became the first international instrument to expressly and for general purposes provide for superior responsibility:

> The fact that a breach of the Conventions or this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[39]

This provision applies only to international armed conflicts, as Additional Protocol I 1977 is not applicable to internal armed conflicts, nor is it applicable to civilian superiors. Additional Protocol I 1977, Article 87 imposes an affirmative duty on members of the armed forces to obey the laws of war and on the superior to prevent the violation of these laws by his

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[37] Markham (note 22) 52.

[38] Emphasis added.

[39] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protection I), Geneva 8 June 1977 Art 86 was adopted by consensus. CDDH, Official Records, vol VI CDDH/SR.45, 30 May 1977 307; Värk (note 17) 146−147; J Dungel and S Ghadiri, 'The Temporal Scope of Command Responsibility Revisited: Why Commanders have a Duty to Prevent Crimes Committed after Cessation of Effective Control' (2010) 17(1) *University of California, Davis* 16, 17.

subordinates and to punish any subordinate who commits such crime.[40] The provision is understood in relation to Additional Protocol I 1977, Article 43(1) which mandates 'compliance with the rules of international law applicable in armed conflict.' However, the Protocol, just like the Geneva Conventions of 12 August 1949, were neither written nor negotiated as criminal law texts.[41] They needed national or international statutes of criminal law or tribunal to convert their provisions to criminal law.

The tension of the Cold War did not provide the enabling environment for the further development of international criminal law necessary to criminalise the provisions of the Geneva Convention and Additional Protocol I 1977 thereto. Soon after the end of the Cold War in 1991, however, the armed conflicts in the former Yugoslavia and in Rwanda offered the opportunity for the Security Council of the United Nations to pass Resolutions promulgating statutes of ad hoc international criminal tribunals.[42] The International Criminal Tribunal for the former Yugoslavia (ICTY) Statute 1993, Article 7(3) provided for superior responsibility as part of the broader provision on individual criminal responsibility.

> The fact that any of the acts referred to … in the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if *he knew* or *had reason to know* that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[43]

[40]Mateus-Rugeles (note 14) 65; Markham (note 22) 53.

[41] AW Dahl, 'Command Responsibility and the Defence of Superior Orders', (Lecture 20 April, 2015) <www.uio.no/studier/emner/jus/jus/JUS5570/v15/undervisningsmateriale/manus-international-criminal-law.pdf> accessed 1 August, 2021; Ambos (note 187) 177.

[42] Resolutions 827 of 25 May 1993 and 955 of 8 November 1994 established the International Tribunal for the former Yugoslavia (ICTY) and for Rwanda (ICTR) respectively.

[43] The International Criminal Tribunal for the former Yugoslavia (ICTY) Statute 1993, Art 7(3); Värk (note 17) 146-147.

The ICTY Statute provides for the mental fault 'knew or had reason to know' for both military commanders and civilian superiors. In *Prosecutor v Zejnil Delacić,*[44] the ICTY held that the clause 'had reason to know' in the ICTY Statute 1994, Article 7(3) means that a commander must have had in his possession information of a nature, which at the least would put him on notice of the risk of offences by indicating the need for investigation in order to ascertain whether crimes were committed or were about to be committed by his subordinates.[45] The ICTY here gave the right interpretation of the statutory provision and even emphasised that the threshold of the mental fault for superior responsibility under the Statute should not be higher. It is puzzling therefore that the same ICTY in *Prosecutor v Tihomir Blaškić*[46] held that 'had reason to know' also imposes a stricter 'should have known' standard of mental fault.[47] *Blaškić* seems to be an incorrect interpretation of the statutory provision; it was decidedly harsh under that regime, and in direct conflict with *Delacić* which was the judgment of an equivalent Trial Chamber. It was not a surprise then that the Appeal Chambers of the ICTY in the *Celebići*[48] *case* addressed the conflicting views in *Delacić* and *Blaškić* and held that some information of unlawful act by subordinates must be available to the commander following which he did not, or inadequately, discipline the perpetrator.[49]

Again, the ICTY Statute 1993 does not provide for the nexus requirement,[50] as it suffices for superior responsibility that the superior, who failed to take necessary and reasonable measures, knew or had reason to know that the subordinate committed an international crime. A nexus of causation is not required in the ICTY.[51] Bishai says that nexus connection needs not be

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[44] Judgment, *Delacić,* (IT-96-21-A) Appeals Chamber, 20 February 2001.

[45]Ibid.

[46] Judgment, *Blaškić* (IT-95-14-T), Trial Chamber, 3 March 2000.

[47]Ibid.

[48] Judgment, *Celebići* (IT-96-21-A), Appeals Chamber, 20 February 2001.Compare Judgment, *Halilovic,* (IT-01-48-T), Trial Chamber, 16 November 2005 paras 22-100, dealing with the knowledge element of superior responsibility. See Judgment, *Popović et al.* (IT-05-88-T) Trial Chamber, 10 June 2010, para 511 on the same subject.

[49] Judgment, *Celebici,* Appeals Chamber, ibid.

[50] Compare ICC Statute 1998, Art 28(a) and (b).

[51] BJ Moloto, 'Command Responsibility in International Criminal Tribunals' (2009) 3 *Berkeley Journal of International Law Publicist* 12, 21. A nexus of connection is not also

demonstrated under the ICTY Statute,[52] and this is the court's decision in *Prosecutor v Delacić et al.*[53] The ICTY Statute 1993 makes no distinction between forces under the effective command and control of the military commander, and those under effective authority and control of a civilian superior.[54] The ICTY Statute 1993, Article 7(3) does not refer to civilian superiors.[55] The absence of express mention of civilian superiors does not however mean that the provision does not apply to such superior. After all, the ICTR Statute 1994, Article 6(3) which was substantially formulated after the ICTY Statute 1993, Article 7(3) was applied in *Prosecutor v Jean-Paul Akayesu*[56] to convict a civilian under superior responsibility.

All that the ICTY Statute 1993 requires is that the superior takes the necessary and reasonable measures to prevent such crimes or to punish the perpetrators thereof, which prevention or punishment the superior can personally effect. It does not go to the extent of requiring the superior to take *all* necessary and reasonable measures within his power to prevent or repress the commission of the crimes or to submit the matter to the competent authorities for investigation and prosecution.[57]

Superior responsibility was also provided for in the Statute of the International Criminal Tribunal for Rwanda (ICTR) 1994, Article 6(3) which provision is the same word-for-word with that of the ICTY Statute 1993, Article 7(3). The ICTR provision was applied in *Prosecutor v Jean-Paul Akayesu.*[58]Akayesu, as Mayor of Taba, was responsible for performing functions and maintaining order there. He had command of the communal police and any gendarmes assigned to the commune. He was subject only to the prefect. The ICTR found that Akayesu refrained from stopping the killing of Tutsis in Taba during the Rwandan Genocide of mid-1994; he supervised the murder of those victims, gave a death list to the perpetrators, and ordered

required in the Statute of the ICTR 1994, Statute of the SCSL, and the UNTAED Regulation No. 2000/15 2000.

[52]Bishai (note 12) 85.

[53] Judgment (IT-96-21-T) para 346.

[54] Compare ICC Statute 1998 Art 28(a) and (b) ICCSt.

[55]Mateus-Rugeles (note 15) 78.

[56] Judgment, *Akayesu* (ICTR-96-4-T) Trial Chamber, 2 September 1998.

[57] Compare ICC Statute 1998, Art 28(a)(ii) and 28(b)(iii).

[58] (ICTR-96-4-T).

house-to-house searches to local Tutsis. Akayesu's defence team argued that he had no hand in the killings; that he had been powerless to stop them, and that Akayesu was being made a scapegoat for the crime of the people of Taba. Not swayed by these arguments, the ICTR found Akayesu guilty of genocide and crimes against humanity on the grounds of command responsibility. Akayesu did not argue that he did not know or had no reason to know of the crimes committed by those under him, which could have been a valid defence for him under that regime. Rather, his contention was that he was powerless to stop the perpetrators from committing the crime, which is irrelevant in a charge of superior responsibility, as a superior is expected to have the necessary ability or machinery to stop erring subordinates.

The foregoing decisions of these international tribunals/courts shaped the jurisprudence on superior responsibility and were further codified in subsequent international (criminal) law instruments. For example, Article 6 of the International Law Commission (ILC) Draft Code of Crimes against Peace and Security of Mankind 1996, has provisions on superior responsibility:

> The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.[59]

Similarly, the Statute of the Special Court of Sierra Leone 2000[60] provided for superior responsibility in the same wording as the ICTY and the ICTR Statutes. Likewise, the United Nations Transnational Administration in East Timor (UNTAET) Regulation No. 2000/15 of 6 June 2000[61] prescribes

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[59] ILC Draft Code of Crimes against Peace and Security of Mankind Art 6 <http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf> accessed 31 July 2021; Dungel, and Ghadiri (note 37) 20.

[60] Art 6(3).

[61] S 16.

superior responsibility as a mode of participating in crimes, using substantially the same wording as above, in spite of peculiar introductory sentence.

So far, the previous instruments and old decisions on superior responsibility adopted the general mental fault standard 'know or had reason to know'. They did not have separate standards of mental fault for military commanders and for civilian superiors. They required no causal relationship between the superior's failure to control and the crime committed by the subordinate. They did not particularise that a military commander has effective command and control, and a civilian superior effective authority and control. Except Additional Protocol I 1977,[62] the old instruments had no provisions on the duty of the superior to repress ongoing crime of the subordinate and or a duty to submit the matter of a completed crime to the competent authorities for investigation and prosecution. In all, they did not mandate the superior to take *all* necessary and reasonable measures in the performance of his duties; although the Additional Protocol I 1977 Article 86(2) refers to a duty to take *all feasible measures*. With this, the paper now turns to ascertaining the extent to which the ICC Statute 1998 restates these principles as it met them or advances them.

4. Superior Responsibility under the ICC Statute

The gradual evolution of the principle of superior responsibility culminated in the provision of the ICC Statute 1998 Article 28, under which Bemba Gombo was convicted. The Appeal Chambers of the ICC reversed this conviction and acquitted the defendant in *The Prosecutor v Jean-Pierre Bemba Gombo*.[63] The ICC Statute is conceived as a permanent code of international criminal law. Its relevant principles on superior responsibility ought not to merely restate, but should advance the law. The previous instruments and old decisions may sooner or later outlive their usefulness and the prospect of future statutes of ad hoc international criminal tribunals is

[62] Art 86(2).

[63] ICC-01/05-01/08 A, Judgment of the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the ICC Statute (AC, 8 June 2018).

bleak.[64] But the ICC Statute will likely inure in perpetuity and be the reference point on principles of superior responsibility in customary international law. The ICC Statute's approach to superior responsibility is already part of customary international law.[65] Under the marginal note 'responsibility of commanders and other superiors', the ICC Statute 1998 Article 28 provides:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> (a) A *military commander* or *person effectively acting as a military commander* shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her *effective command and control*, or *effective authority and control* as the case may be, *as a result of his or her failure to exercise control properly over such forces*, where:
>
> (i) That military commander or person either *knew* or, owing to the circumstances at the time, *should have known* that the forces were committing or about to commit such crimes; and
>
> (ii) The 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*.
>
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the court committed by subordinates *under his or her effective authority and control*, *as a result of his or her failure to exercise control properly over such subordinates*, where:
>
> (i) The superior either *knew* or *consciously disregarded information* which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crime concerned activities that were within the effective responsibility and control of the superior; and

[64] Harvey (note 21) 4.
[65] Kudo (note 18) 230.

(iii) The superior failed to take *all* necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[66]

The above provision is considered 'the most advanced codification of the command responsibility doctrine'.[67] The elements of superior responsibility under this provision are the existence of (1) a superior-subordinate relationship; (2) the superior's knowledge of the subordinate's criminal conduct; and (3) failure of the superior to prevent, repress or report the crime.[68] The ICC Trial Chamber III convicted a person under superior responsibility the first and so far the only time in *The Prosecutor v Jean-Pierre Bemba Gombo.*[69] This was a case where the defendant recruited a private army in the Democratic Republic of Congo (DRC) and deployed them to fight in an internal armed conflict in the Central African Republic (CAR). Bemba Gombo's soldiers allegedly committed crimes against humanity and war crimes in the CAR and the ICC Prosecutor charged him with superior responsibility for those crimes. The court convicted him.[70]

The defendant appealed against this decision and the Appeal Chambers set aside the trial decision and discharged and acquitted the defendant on two grounds, namely: 1) that the Trial Chambers made erroneous findings on the motivation of the defendant to take all reasonable and necessary measures to prevent, repress and punish the crime, and 2) that the defendant was a remote commander with geographical limitations on his ability to prevent, repress and punish erring subordinates.

5. Restatement or Advancement?

5.1. The 'Should have Known' Standard for Military Commanders

Under the earlier International Criminal Tribunal for former Yugoslavia (ICTY) Statute 1993, International Criminal Tribunal for Rwanda (ICTR)

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[66] Emphasis added.
[67] Ambos (note 18) 176.
[68] Mateus-Rugeles (note 15) 66-67; Värk (note 17) 146-167; Bishai (note 12) 86; Williamson (note 11) 306−7; Ambos (note 18) 161; Markham (note 22) 50.
[69] Judgment, *Bemba,* (note 3).
[70] *Bemba* (note 3) paras 742, 653-656.

Statute 1994, Statute of the Special Court of Sierra Leone (SCSL) 2000 and the United Nations Transnational Administration in East Timor (UNTAET) Regulation 2000, the mental fault for superior responsibility was that the superior knew or had reason to know of the subordinate's crime. That is to say, the superior either had knowledge of the crime or possessed information that should enable him know of it. This is an alternation of the subjective test 'knew' or the objective test 'had reason to know', the latter using the reasonable man's standard to judge the defendant. Williamson calls the concept of 'had reason to know' a form of constructive knowledge.[71] If a reasonable man in possession of information available to the defendant will know of the crimes, the defendant is deemed likewise to know of it. Interpreting the 'had reason to know' standard, the ICTR Appeals Chambers had this to say in *Prosecutor v Bagilishema:*

> Reason to know standard does not require that actual knowledge, either explicit or circumstantial, be established. Nor does it require that the Chamber be satisfied that the accused actually knew that crimes had been committed or were about to be committed. It merely requires that the Chamber be satisfied that the accused had 'some general information in his possession', which would put him on notice of possible unlawful acts by his subordinates.[72]

However, under the ICC Statute 1998, Article 28 the objective test 'had reason to know' is replaced with a new 'owing to the circumstances at the time, should have known'[73] of the crime, for a military commander. Though both tests are objective, the one under the ICC Statute 1998 applicable to a military commander is more stringent than the one under the ICTY Statute 1993.[74] In *The Prosecutor v Jean-Pierre Bemba Gombo,*[75] Trial Chamber III observed the difference between the previous instruments and the ICC

[71] Williamson (note 11) 307.
[72] Judgment, *Bagilishema,* (ICTR-95-IA-A), Appeals Chamber 3 July 2002 para 28.
[73] ICC Statute 1998, Art 28(a)(i).
[74]Moloto (note 49) 19; Bishai (note 12) 86.
[75] ICC-01/05-01/08.

Statute 1998, Article 28(a): 'The Chamber is mindful of the fact that the "had reason to know" criterion embodied in the statutes of the ICTR, ICTY and SSCL sets a different standard to the "should have known" standard under article 28(a) of the Statute'.[76]

The 'should have known' standard demands that the commander shall be imputed with knowledge of the subordinate's crime whether he had reason to know of it or not, provided that the circumstances at the time were such as he should have known. This test almost equates strict liability[77] and certainly includes a situation where the commander is negligent[78] or reckless as to the commission of crimes by his subordinates. It seems to adopt the Yamashita standard whereby the superior is imputed with constructive knowledge even without proof that he actually knew of the subordinate's crime. The new standard is 'an attempt by the ICC to encourage commanders to take more responsibility, as negligent actions will offer no defence.'[79] The 'should have known test' comes within the ICC Statute 1998, Article 30 on the general mental fault element for international crimes,[80] as it captures the awareness of the superior that the subordinate will commit the crime in the ordinary course of event. However, the Court will consider the circumstances of the case at the time before coming to the conclusion regarding whether the superior is deemed to have knowledge of the subordinate's crime. Being applicable only to military commanders, the strictness of this test may be justified on the ground that such military commanders have better understanding, than civilian superiors, of the rules of engagement and greater capacity to be in effective command and control; such that if they fail to take *all* necessary and reasonable measures within their power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution, they may well be held criminally responsible on a very strict test.

[76]Ibid para 434; Harvey (note 22) 3.
[77]Mateus-Rugeles (note 15) 68; Van Der Wilt (note 9) 6.
[78]Mateus-Rugeles (note 15) 63; Harvey (note 22) 3.
[79] Harvey (note 22) 3.
[80]I*bid.*

The ICC Statute 1998 advances the law by making the standard of mental fault for the military commander stricter than it was under the previous instruments and old decisions, and, for the first time, equally stricter than that of a civilian superior.

5.2. Separate Mental Fault for Civilian Superior

The earlier regimes under the ICTY Statute 1993, ICTR Statute 1994, Statute of the SCSL 2000 and the UNTAET Regulation 2000 prescribed a uniform standard of mental fault for both the military commander and a civilian superior: the 'know or had reason to know' formulation. But the ICC Statute 1998, Article 28 in addition to substituting 'should have known' for 'had reason to know', separates the formulation and prescribes different standards for military commanders and civilian superiors.[81] By the ICC Statute 1998, Article 28(a)(i), the military commander or any person effectively acting as a military commander shall be criminally responsible if he 'either knew or, owing to the circumstances at the time, should have known' of the crime. When proof of knowledge of a military commander, which is subjective, is impossible, the ICC can convict on the objective test that may almost equate strict liability, and certainly encompasses negligence[82] or recklessness.[83]

In the case of a civilian superior, the ICC Statute 1998, Article 28(b)(i) provides that he shall be criminally responsible if he 'either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes'. The first alternate mental fault element 'knew' is simply subjective as in the case of the military commander above. What matters here is what the defendant actually knows, not what he ought to or may constructively know. The second alternate threshold appears to fuse both subjective and objective elements.[84] It supposes that the defendant possesses information which *clearly indicated* that the subordinates were committing or about to commit such crime and he

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[81]Elies van Sliedregt, 'Article 28 of the ICC Statute: Mode of Liability and/or Separate Offense?' (Summer 2009) 12(3) *New Criminal Law Review: An International and Interdisciplinary Journal* 420, 432.

[82] J Pictet, 'Commentary to the 1977 Additional Protocol to the 1949 Geneva Conventions' in Dahl (note 38) 4.

[83] Ambos (note 18) 179.

[84]Ibid.

consciously disregarded it. The fact of *conscious disregard* of the information addresses a subjective element of the test; the disregard here is an act or omission done or made with the functioning of the defendant's knowledge. However, the clause 'clearly indicated' seems to speak to an objective element of the test. This may become clear if the question is asked: to whom does the information 'clearly indicate' that the subordinate committed or might commit crime. If it is to the superior, it will amount to nothing but the superior's knowledge, which is already covered in the first limb 'knew, being the subjective test. The drafter of the statute could not have intended to enact double-barrel mental fault elements both of which require the superior's subjective knowledge. It seems correct to interpret the clause to mean that the information in the possession of the superior clearly indicates to a reasonable man that the subordinates committed or will commit crimes. This interpretation makes the objective element of this test more obvious:

> By requiring it to be shown that non-military commanders 'consciously disregarded' information which 'clearly indicated' that subordinates were taking certain unlawful actions, the burden of proof to establish superior responsibility for such commanders becomes that much more exigent. Consequently, it might become more difficult effectively to prosecute non-military commanders for violations of IHL through command responsibility. Some may argue that to so apply a different and stricter *mens rea* requirement for non-military superiors can only weaken the fight against impunity, as many of the accused before international criminal tribunals are civilian leaders.[85]

The reasoning in the last-quoted paragraph seems arcane, as it suggests that the standard for a civilian superior is more stringent than that of the military commander! Though an objective test, this mental fault regime for civilian superiors is less stringent than the 'should have known' standard for the military commander under the ICC Statute 1998 or even the general 'had

[85] Williamson (note 11) 309.

reason to know' formulation of the ICTY and the ICTR Statutes.[86] It is less stringent because the information the superior disregarded must be one which *clearly indicate* the commission or imminent commission of crimes by his subordinates. If the information is equivocal, or indicates by some means less clear of the commission of crime, prosecution will have failed to prove this mental fault element. The benefit of adopting a less stringent mental fault regime for the civilian superior under the ICC Statute 1998 is to ensure that the superior who may have no or insufficient knowledge of the rules of engagement is not too hastily or unfairly imputed with knowledge that his subordinates committed or were about to commit crimes.

In this regard, the ICC Statute 1998 advances the law by lowering the threshold of guilty knowledge for the civilian superior. However, the Trial Chamber III's conviction of Bemba Gombo was based on the simple first limb of actual knowledge according to the subjective test, not on the more logically rigorous but less stringent second limb of conscious disregard of information clearly indicating commission of crime. As noted above, the entire judgment of the Trial Chamber III was set aside on appeal.[87]

5.3. Causal Relationship

The ICTY Statute 1993, the ICTR Statute 1994, the Statute of the SCSL 2000 and the UNTAET Regulation 2000 do not require a causal relationship between the failure of the superior to control his subordinates and the latter's commission of international crimes. It suffices for superior responsibility under these regimes that the superior, who failed to take necessary and reasonable measures, knew or had reason to know that the subordinate committed an international crime.[88] The ICC Statute 1998, Article 28 introduced a change here which requires that there must be such causal

[86] In Judgment, *Kayishema and Ruzindaana,* (ICTR-95-1-T), Trial Chamber, 21 May 1999, paras. 227-228, the ICTR applied this standard even where the then enabling statute required the 'had reason to know' criterion. See Moloto (note 49) 19; Mateus-Rugeles (note 15) 71.

[87] *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3636-Anx2, Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, para 33 (AC, 8 June 2018).

[88] Moloto (note 49) 21.

relationship. Accordingly, both the military commander and the civilian superior will bear criminal liability only if the subordinates' crimes were committed 'as a result of his or her failure to exercise control properly over such subordinates'.[89] In other words, causality requires that the underlying crimes of the subordinates are 'caused' by the failure of supervision.[90]

The implication of this causality requirement is that the defendant will not be convicted even when he fails in his command or control and his forces or subordinate commit crimes, but there is no causal relationship between the failure and the crime. This new position under the ICC Statute 1998, aiming to lower the threshold of superior responsibility, actually opens a black hole in criminal responsibility. For instance, if the court finds that the superior is not responsible for a subordinate's crime for want of causal relationship, and the particular subordinate is not prosecuted to bear individual criminal responsibility thereof, the international criminal justice system has lost the opportunity to punish that particular crime. A system whereby a superior is exculpated for want of causal relationship, only on condition that the particular subordinate responsible for that crime is prosecuted, will be better able to meet the justice need of each case. For then, the superior will be held responsible, with or without causal relationship, until he makes available to the competent authorities the responsible subordinate for prosecution. This will guarantee that the subordinate is punished where the responsibility of the superior fails for want of causality.

5.4. Effective Command and Control, or Effective Authority and Control

The ICTY Statute 1993, the ICTR Statute 1994, the Statute of the SCSL 2000 and the UNTAET Regulation 2000 talk about a subordinate-superior relationship without clarifying the status of the superior and the nature of the relationship. The ICC Statute 1998, Article 28 however explains that the superior may be a military commander or a civilian superior. The function of

[89] ICC Statute 1998, Art 28(a) and (b); Newton (note 14).
[90] Ambos (note 18) 179.

the military commander may be performed by any person effectively acting as a military commander and such person will bear the superior responsibility of a military commander.[91] The military commander or any person acting on his behalf, on the one hand, is said to be in effective command and control and his subordinates are describes as 'forces'.[92] A civilian superior, on the other hand, is said to be in effective authority and control and those under him are described merely as 'subordinates'.

The common element in the status of both the military commander and the civilian superior is 'effective control'. They are expected to have the capacity to order, limit, instruct, or rule over the acts and omissions of their subordinates and produce the result that is intended, which is to ensure that the subordinates obey the rules of engagement and do not commit international crimes during hostilities. Lesser degree of control is insufficient. The possibility of (effective) control forms the legal and legitimate basis of the superior's responsibility.[93] Effective control is the first element of the doctrine, and it means material ability to prevent the crimes or punish the perpetrators.[94]

Although the civilian superior may not be as skilled as the military commander or other combatant superior in the management of forces, he is bound to be in effective control and failure to prevent, repress or report a subordinate's crime will ground him with superior responsibility in equal measure as the military commander. A person who is not officially a military commander but who acts effectively as one also has a duty to be in effective control. Effective control may thus be *de jure* or *de facto*,[95]and could only be assumed if the superior had the material ability to prevent, punish or report (perpetrators of) crimes by virtue of his superior position over his subordinates.[96] It is only when a superior is established to be in effective

[91] Dahl (note 39) 3.
[92] ICC Statute 1998, Art 28(a).
[93] Ambos (note 18) 177.
[94] Dungel and Ghadiri (note 37) 3, 6; van Der Wilt (note 9) 6.
[95] Dungel and Ghadiri, (note 37) 6; Williamson (note 11) 306.
[96] van Der Wilt (note 9) 7.

control that enquiry may begin as to whether the subordinate's crime was as a result of the superior's failure to exercise control.

The respective elements peculiar to military commander and civilian superior is that the former holds command while the latter holds authority. Command is the capacity to give someone an order, and is peculiar to the military.[97] 'Military commanders are regarded to have responsibility for their soldiers and thus assume accountability for their actions; they can therefore be punished for crimes committed by soldiers'.[98] Authority, on the other hand, is the moral or legal right or ability to control, and is peculiar to civilian superiors.[99] This does not mean that the military commander's exercise of effective command is without moral or legal right, for, in the circumstance, despite the language used in the ICC Statute 1998, the military commander has the right to ensure effective command of forces under him. The difference in language here may be significant only as regards the separate standards of mental fault applicable to the military commander or to the civilian superior.

5.5. All Necessary and Reasonable Measures within his Power

The ICTY Statute 1993, the ICTR Statute 1994, the Statute of the SCSL 2000 and the UNTAET Regulation 2000 merely required the superior to take 'necessary and reasonable measures' to prevent such acts or to punish the perpetrators thereof. However, Additional Protocol I 1977, Article 86(2) refers to the responsibility of superiors to take *all feasible measures within their power*. ... Necessary measures are those required to discharge the obligation to prevent or punish in the circumstances prevailing at the time; whereas, reasonable measures are those which the commander is in a position to take in the circumstances.[100] The ICC Statute 1998, Article 28(a)(ii) and (b)(iii) advances the law by providing that the superior must take *all* necessary and reasonable measures within his power to prevent or repress the

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[97] The Britannica Dictionary, < https://www.britannica.com/dictionary/command> accessed 28 November 2022; Bryan A Garner, *Black's Law Dictionary* (8th edn, Thomson West) 248.

[98] Harvey (note 22) 3.

[99] Bryan A Garner, *Black's Law Dictionary* (8th edn, Thomson West) 142.

[100] This is the Trial Chamber's interpretation of 'necessary measures' and 'reasonable measures' in *Bagilishema*, (note 67) paras 47-50, and nothing suggests that their meanings are different under the ICC Statute 1998, Art 28.

commission of crimes or to submit the matter to the competent authorities for investigation and prosecution.[101] The first point of advancement here is that the superior who does his best but has not taken *all* necessary and reasonable measures to prevent the crime or punish the perpetrator may be exculpated under the previous regimes but convicted under the ICC Statute 1998.[102] The superior under the ICC Statute 1998 must take *all* measures, as his best, which is short of *all* necessary and reasonable measures, may not be good enough.

The second point of advancement is that under the previous regimes, the superior had only two duties, namely: to prevent the act before the crime is committed, and or to punish the perpetrator after the crime has been committed. The ICC Statute removes the responsibility under the second duty to personally punish the perpetrator after the commission of the crime, and substitutes a fresh duty to 'submit the matter to the competent authorities for investigation and prosecution'. The rationale behind this fresh duty is to forestall the possibility of the superior conducting a sham trial for the erring subordinate with a view to shielding him from justice. Being his subordinate, the superior may conduct sham investigation and exculpate the perpetrator, or hand down too lenient a punishment; hence, the need for him to submit the subordinate to the competent authorities to administer justice.[103] This new regime under the ICC Statute advances the law by insisting that the superior cannot avoid responsibility by punishing crimes he failed to prevent.[104] There was some evidence in *The Prosecutor v Bemba Gombo*[105] that the defendant took some disciplinary action against some of his erring subordinates. The Trial Chamber III of the ICC did not find these sufficient to be discharge of

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[101] Leila Nadya Sadat, 'Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v Jean-Pierre Bemba Gombo' *EJIL Talk* (Jun. 12, 2018), <www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/> accessed 27March 2022.

[102] Michala Chadimova, 'Superior Responsibility in the Bemba Case – Analysis of the Court's Findings on Necessary and Reasonable Measures' (2019) 19(2) *International and Comparative Law Review* 300, 312. DOI: 10.2478/iclr-2019-0026.

[103] Kazuya Yokohama, 'The Failure to Control and the Failure to Prevent, Repress and Submit: the Structure of Superior Responsibility under Article 28 ICC Statute' (2018) *International Criminal Law Review* (Published online on 17 Apr 2018).

[104] Dungel, and Ghadiri, (note 37) 22.

[105] *Bemba* Trial Judgment (note 3).

the duties of the superior. This was one of the grounds of acquittal at the Appeal Chambers, which held that the measures the defendant took were enough to discharge the obligation on him especially as he was a 'remote commander'.[106]

The last point of advancement is that the ICC Statute 1998, unlike the previous regimes, creates a duty of the superior to repress the commission of ongoing crime being committed by the subordinates. The earlier regimes thought that a crime can only be prevented before its commission or the perpetrator punished after the commission thereof. However, Additional Protocol I 1977, Article 86(2) refers to the duty of the superior to *repress* the subordinates' breach of the law of war. With the ICC Statute 1998, the superior now has a duty to repress the subordinate's crime in the course of its commission; otherwise, he will bear superior responsibility for it.

6. Conclusion

The principle of superior responsibility is a vital tool for bringing superiors to justice irrespective of the punishment meted on their subordinates who commit international crimes. The previous instruments and old decisions on superior responsibility adopted the general mental fault standard 'knew or had reason to know' for the superior. Just like they did not have separate standard of mental fault for military commanders and civilian superiors. They required no causal relationship between the superior's failure to control and the crime committed by the subordinate. They did not specify that a military commander has effective command and control, and a civilian superior effective authority and control. They had nothing on the duty of the superior to repress ongoing crime of the subordinate and or to submit the matter of a completed crime to the competent authorities for investigation and prosecution. In all, they did not mandate the superior to take *all* necessary and reasonable measures in the performance of his duties.

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[106]*The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3636-Anx2, Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, para 33 (AC, Jun. 8, 2018); Leila Nadya Sadat, 'Judicial-Speculation-Made-Law: More Thoughts about the Acquittal of Jean-Pierre Bemba Gombo by the ICC Appeals Chamber and the Question of Superior Responsibility under the *Rome Statute*,' ICC Forum (May 27 2019), <https://iccforum.com/responsibility#Sadat> accessed 26 March 2022.

The ICC Statute 1998 does not merely restate but advances the law by substituting a more stringent 'should have known' for the previous 'had reason to know' standard of mental fault for the military commander. It creates a separate, less stringent standard for the civilian superior. The ICC Statute 1998 creates a nexus requirement or causal relationship between the superior's failure of control and the crime committed by the subordinate; and particularises that the military commander has effective command and control while the civilian superior has effective authority and control. It finally mandates the superior to take *all* necessary and reasonable measure within his power to prevent, repress or report the crime of the subordinate. The advancement introduced by the ICC Statute 1998 is necessary to ensure that both civilian and military superiors take seriously the duty of effectively controlling their subordinates during hostilities to prevent, repress or report violations of the law of war; or be ready to bear criminal responsibility for such crimes of their subordinates. The Appeal Chamber's decision in *The Prosecutor v Jean-Pierre Bemba Gombo*[107] discharging and acquitting the defendant on the grounds of motivation and geographical remoteness seems to dash the hope of the ICC advancing in practice the law on superior responsibility.[108] In the future, the Appeal Chamber will need to stick to a requirement that the defendant takes all necessary and reasonable measures to check the excesses of his troop or subordinate, irrespective of motivation and the geographical remoteness of the superior.

[107] *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3636-Anx2, (AC, 8 June 2018)

[108] Miles Jackson, 'Commanders' Motivations in Bemba' (2018) EJIL Talk (15 June 2018); cf. Newton (note 14).