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STEPPING FORWARD OR STUMBLING BACK? COMMAND RESPONSIBILITY FOR FAILURE TO ACT, CIVILIAN SUPERIORS AND THE INTERNATIONAL CRIMINAL COURT

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The application of the doctrine of command responsibility ("CR") to civilian leaders is unsettled under international law. Jurisprudence which has applied CR to civilian leaders has been inconsistent, unprincipled and potentially unjust. International decisions such as the Celebici case at the ICTY suggest that CR can theoretically apply to civilians, but the subsequent Kordic decision indicates that international jurists are extremely wary of extending CR to civilian leaders. The Rome Statute of the nascent International Criminal Court is the first codified international law that explicitly provides for individual criminal liability for civilians on the basis of CR. This paper argues that, given the unsettled status of civilian CR under customary international law, the Rome Statute is an improvement for the mere fact that it explicitly provides CR for civilians. As such, criticisms that the ICC provisions weaken the doctrine in relation to civilian leaders are incorrect because they misconstrue the status quo under international custom. It is not settled under international law whether and to what extent command responsibility even applies to civilians. Moreover, in the few cases in which command responsibility has been used to hold civilians responsible for international crimes, the doctrine has resulted in injustice. As such, the explicit codification of the doctrine in relation to civilians is an improvement on, rather than a regression of, the status quo of CR.

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I. INTRODUCTION

The international law doctrine of command responsibility ("CR") has generated controversy since at least 1946, when Japanese General Yamashita was executed for war crimes committed in the Philippines by soldiers under his command.[1] Traditionally, CR imposes individual liability on military commanders for failure to prevent or punish unlawful acts committed by subordinates.[2] In the decades between 1946 and the early 1990s, CR essentially arose only with regard to the 1968 massacre of civilians by U.S. soldiers in My Lai, Vietnam, and the pogroms by Phalangist militia in Israeli-controlled refugee camps in Lebanon in 1982.[3] With the creation of the International Criminal Tribunals for Rwanda ("ICTR") and the Former Yugoslavia ("ICTY") in the 1990s, CR gained new importance. The doctrine is no less relevant today. Questions of individual liability for violations of international humanitarian law ("IHL")[4] are bound to arise as states struggle to redefine that body of law in the novel and complex context of international terrorism. With the legal rules in a state of in flux, torture and other violations of IHL appear to be becoming all too common occurrences in the global war on terror.[5]

The application of CR to military commanders is generally settled at international law. Much more controversial is the application of CR to non-military superiors, such as civilian political leaders. International decisions on this issue are sparse, and often questionable in their reasoning. There

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[1] Major William H. Parks, "Command Responsibility for War Crimes" (1973) 62 Mil. L. Rev. 1 at 2, 22-23 [Parks]; see also *In re Yamashita* (1945) 1 327 U.S. 1 [*Yamashita*].

[2] *Ibid.*

[3] Weston Burnett, "Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra" (1985) 107 Mil. L. Rev. 71 at 72-76; William Fenrick, "Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the former Yugoslavia" (1995-1996) 6 Duke J. Comp. & Int'l. L. 103, at 118, 120 [Fenrick, "ICTY Problems"].

[4] This term refers to the body of law which governs situations of armed conflict, sometimes called the laws of war or law of armed conflict.

[5] See generally Jordan Paust, "Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees" (2004-2005) 43 Colum. J. Transnat'l L. 811.

has also been scant comment by international legal scholars. As such, the question of whether and how CR applies to civilian superiors is unclear. Yet, CR offers a potentially powerful basis for holding civilian superiors to account for violations of IHL. Rwandan Prime Minister Jean Kambanda's conviction at the ICTR illustrates that war criminals often wear business suits rather than military fatigues.[6]

Given the unsettled *status quo*, the *Rome Statute of the International Criminal Court* ("ICC")[7], which codifies distinct CR provisions for military commanders and civilian superiors in its Article 28, is an improvement on the existing customary international law of CR. There has been little academic discussion of Article 28. The most detailed analysis of Article 28, by commentator Greg Vetter, criticises the provision for "weaken[ing] the reach of the doctrine for civilian superiors" by holding civilians to a lower standard in relation to military commanders.[8] Relying on the "contemporary authority"[9] on CR, the *Celebici* decision of the ICTY,[10] Vetter argues that the ICC's "bifurcated" approach regresses from past IHL jurisprudence, which has on occasion convicted civilian superiors on the basis of command responsibility.[11]

This paper is a response to Vetter's criticisms.[12] It will show that Vetter's critique is well-intentioned, but are based on a misreading of customary

[6] *Prosecutor v. Kambanda* (1998), ICTR-97-23-S (International Criminal Tribunal for Rwanda, Trial Chamber) (Kambanda was convicted on a guilty plea, and sentenced to life imprisonment; he appealed, essentially trying to withdraw the plea. His claim was dismissed: *Kambanda v. Prosecutor* (2000), ICTR-97-23-A (ICTR, Appeal Chamber)).

[7] 17 July 1998, Can. T.S. 2002 No.13, art.28 (entered into force in Canada 1 July 2002) [*Rome Statute*].

[8] Greg Vetter, "Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)" (2000) 25 Yale J. Int'l. L. J. 89 at 93-94, 126, 141[Vetter].

9 Alexander Zahar, "Command Responsibility of Civilian Superiors for Genocide" (2001) 14 Leiden. J. Int'l. L. 591 at 592 [Zahar].

[10] *Prosecutor v. Delalic et al.* (1996) Case No. IT-96-21-T (ICTY, Trial Chamber) [*Celebici*].

[11] Vetter, *supra* note 8 at 95.

[12] There is very little academic discussion specifically addressing the issue of CR for civilians in the context of the Article 28 of the *Rome Statute*. While some commentators and jurisprudence rely on the post-WWII and ICTY/ICTR jurisprudence to assert that customary CR applies to civilians (see generally Lippmann, *infra; Celebici, supra*). Vetter explicitly uses such reasoning to critique the ICC provisions as a regression from the customary state of the law. Responding to Vetter's criticism is thus important, as a codified CR provision for civilians is a new—and in this author's opinion—welcome development.

international law. *Celebici* certainly suggests that CR can be applied to civilian superiors. Vetter, however, is overly optimistic about the scope of *Celebici*. In the light of the later *Kordic* decision,[13] it is doubtful whether courts will ever actually apply *Celebici* to hold civilian superiors to account. Vetter's criticisms of the *Rome Statute* rely blithely on questionable and inconsistent precedents from the post-World War II Tokyo Trial[14] and the ICTR.[15] Given the unsatisfactory and unsettled state of CR at customary international law, this paper argues that Article 28 of the *Rome Statute* is not a regression. Rather, it codifies a clear standard in an area of IHL that has historically been applied inconsistently and possibly, unjustly.

In Part II CR will be described and distinguished from related concepts, which also provides an outline of the fundamental rationale and theoretical justification for the doctrine. After briefly distinguishing between two main sources of IHL, several specific legal sources of CR are outlined. Part III concludes with an examination of the contested CR provisions of the *Rome Statute*. In Part IV the main argument is drawn out, showing that certain examples of past international decisions applying CR to civilians are poorly reasoned, do not accord with the doctrine's fundamental justifications, and weaken the practical effect of *Celebici*.

[13] *Prosecutor v. Kordic and Cerkez* (2001), Case No. IT-95-14/2-T (ICTY, Trial Chamber) [*Kordic*].
[14] Matthew Lippman, "Humanitarian Law: The Uncertain Contours of Command Responsibility" (2001) 8 Tul. J. Comp. & Int'l. L. 1 at 22-24 [Lippman].
[15] *Prosecutor v. Musema* (2000), Case No. ICTR-96-13-T (ICTR, Trial Chamber I) [*Musema*]; *Prosecutor v. Kayishema & Ruzindana* (1999), Case No. ICTR-95-1-T (ICTR, Trial Chamber II); see also *Zahar*, *supra* note 9 at 592.

II. DEFINING THE DOCTRINE

A. Command Responsibility for Failure to Act

There are two related and overlapping forms of CR which should be distinguished. The first is "direct" CR, whereby criminal liability arises when a commander *orders* his or her subordinates to commit unlawful acts.[16] Direct CR is a separate mode of liability for what could broadly be termed 'direct participation' in the offence, which includes 'ordering' and 'planning' offences. Article 7(1) of the ICTY's constating statute ("*ICTY Statute*"), for instance, provides for direct CR as follows:[17]

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

Article 6 of the ICTR's statute ("*ICTR Statute*")[18] mirrors article 7(1) of the *ICTY Statute*. The *Rome Statute* similarly provides for direct CR in article 25(3)(b), which imposes individual CR where the accused person "orders, solicits or induces the commission of such a crime".[19]

However, the debate surrounding the *Rome Statute* hinges on "indirect" CR, or CR "*stricto sensu*".[20] This form of the doctrine, which is the focus of this

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[16] *Celebici*, *supra* note 10 ¶ 333.

[17] *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, SC Res. 827, UN SCOR, 1993, U.N. Doc. S/RES/827 (1993) [*ICTY Statute*].

[18] *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994*, SC Res. 955, UN SCOR, 1994, UN Doc. S/RES/955 (1994) [*ICTR Statute*].

[19] *Rome Statute*, *supra* note 7 art. 25(3)(b).

[20] *Celebici*, *supra* note 10 ¶ 333-334.

paper, is termed more precisely as "command responsibility for failure to act."[21] As Bill Fenrick points out, it is this more controversial variety with which IHL specialists have been primarily concerned.[22] In this form, CR imposes criminal liability on superiors for failing to prevent or punish the international crimes of subordinates. As I discuss further in Part III, indirect CR is provided for by article 7(3) of the *ICTY Statute*,[23] article 6(3) of the *ICTR Statute*[24] and article 28 of the *Rome Statute*.[25]

B. The Rationale for Command Responsibility

CR for failure to act is a mode of liability whereby, under certain conditions, individual criminal liability will be imputed to a superior for unlawful acts committed by his or her subordinates.[26] Traditionally, CR has applied primarily to military commanders.[27] The doctrine is designed to deter the unchecked violence which can so quickly erupt during armed conflict. Under the threat of individual criminal liability, commanders have incentive to keep a tight rein on the conduct of subordinates. As Matthew Lippman notes: [28]

> The imposition of criminal culpability is intended to create an incentive to insure that subordinates abide by the humanitarian law of war. This extension of liability is necessitated by the lethal consequences resulting from the contravention of the code of conflict.

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[21] This is a term used by Bill Fenrick in his course in International Humanitarian Law at Dalhousie University (2007); see generally *Celebici, supra* note 10 ¶ 338; William Fenrick, "Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the former Yugoslavia" (1995-1996) 6 Duke J. Comp. & Int'l. L. 103, at 110 [Fenrick, "ICTY Problems"].

[22] Fenrick "ICTY Problems", *supra* note 3 at 110.

[23] *ICTY Statute*, *supra* note 17 art. 7(3).

[24] *ICTR Statute*, *supra* note 18 art. 6(3).

[25] *Rome Statute*, *supra* note 7 art. 28.

[26] Parks, *supra* note 1 at 20; *Celebici*, *supra* note 10 ¶ 333-334; Lippman, *supra* note 14 at 1.

[27] See Parks *supra* note 1; Fenrick "ICTY Problems", *supra* note 3 at 110; Burnett, *supra* note 3 at 76.

[28] Lippmann, *supra* note 14 at 1.

In addition to its deterrent value, CR imposes an additional mode of liability, beyond direct participation, on those responsible for violations of IHL. As Vetter suggests, "the doctrine of command responsibility has been an important tool to hold accountable leaders who plan, participate in, or acquiesce in large-scale human rights abuses."[29] The practical effect for prosecutors, and accused superiors in the dock, is that CR provides an alternative argument for liability; in the event the accused is acquitted of ordering a breach of IHL, the accused may still be held liable for failing to prevent or punish the breach.[30] The ICTY indictment of Tihomir Blaskic illustrates the additional prosecutorial scope provided by CR:[31]

> From May 1992 to January 1994 Tihomir BLASKIC, together with members of the HVO, planned, instigated, ordered, or otherwise aided and abetted in the planning, preparation, or execution of a crime against humanity by persecuting Bosnian Muslim civilians on political, racial, or religious grounds […]
>
> and, or in the alternative, knew or had reason to know that subordinates were about to do the same, or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

CR, therefore, provides both deterrent and procedural benefits. It deters violations by threatening punishment for failure to control subordinates. It also expands the basis on which superiors can be held liable. As such, CR is useful for preventing deterring war crimes and punishing those who orchestrate them.

Nevertheless, the other side of the coin is – or should be – concerned with fairness and rights of the accused. CR has great potential for delivering

[29] Vetter, *supra* note 8, at 92.
[30] William J. Fenrick, *The Prosecution of Unlawful Attack Cases before the ICTY* (2004) 7 Y.B. Int'l. Human. L. 153, at 177-178 [Fenrick, "ICTY Prosecution].
[31] *Prosecutor v. Blaskic* (2000), Case No. IT-95-14 (ICTY, Trial Chamber I) (Second Amended Indictment).

justice. Yet, as will be shown, if improperly applied, it has commensurate potential for injustice.

C. Basis for Liability under CR

CR imposes criminal liability on commanders for crimes which they did not directly commit. By punishing one person for the acts of another, CR can be fraught with moral and legal pitfalls. The underlying justification for the "potential harshness" of the doctrine is the recognition of the commander's legal "duty to control the conduct of his subordinates, insuring their compliance with the law of war."[32] As *Celebici* holds:[33]

> [CR] is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act… [I]nternational law imposes an affirmative duty on superiors to prevent persons under their control from committing violations of [IHL], and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility…

The imposition of criminal liability on a commander for failure to prevent or punish crimes committed by subordinates thus requires that the commander was under a positive duty to do so. This principle is "reasonable and fair," and in accordance with general principles of criminal justice.[34] If civilian superiors are to be held accountable on the basis of CR, they must also be under such a duty.

The duty imposed on military commanders does not arise simply because they don a uniform. It cannot be the case that every superior becomes criminally liable for the unlawful acts of every rank and file soldier. Rather, the duty arises because of the "control" a commander exerts over the conduct

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[32] Parks, *supra* note 1 at 20, 35.
[33] *Celebici*, *supra* note 10 ¶ 334.
[34] Arthur Thomas O`Reilly, "Command Responsibility: A Call to Realign Doctrine with Principles" (2004-2005) 20 Am. U. Int'l. L. Rev. 71 at 98.

of subordinates.[35] Lippman notes that CR presumes that "military officers and civilian officials possess the knowledge, authority and power to curb the transgressions of their troops."[36] Presaging *Celebici*, Lieutenant Commander Burnett puts it best, stating that CR "hinges to a great extent, on the degree of effective control actually wielded by the commander over the detailed activities of his subordinates."[37] In the absence of actual control, therefore, the basis for imposing the legal duty breaks down.

CR is traditionally a military doctrine, with roots going back millennia.[38] The archetypical strict military command structure suggests that soldiers obediently carry out superior orders without question or hesitation. Where subordinates commit atrocities, one presumes that either they were ordered to do so, or that their superior has lost control over their conduct. The same presumption of control, however, does not arise as readily with respect to civilian superiors. Indeed, given the less centralised nature of modern military command structures, control can no longer be safely presumed even in the case of military commanders.[39] This highlights the key issue of whether the legal duty to control subordinates can properly be imposed on civilian leaders. The question is, under what circumstances, and to what extent, can civilian leaders be expected to control those "on the ground" who directly violate IHL? Jurisprudence on this issue, as I show below, does not answer this issue satisfactorily.

[35] Parks, *supra* note 1 at 35, 63, 65.
[36] Lippman, *supra* note 14 at 90.
[37] Burnett, *supra* note 3 at 76.
[38] Parks, *supra* note 1, at 3.
[39] Burnett, *supra* note 3 at 76.

III. OVERVIEW OF INTERNATIONAL LEGAL SOURCES OF COMMAND RESPONSIBILITY

A. Sources of IHL

IHL, like all international law, arises from two main sources: conventional international law, such as treaties and conventions; and customary international law.[40] Customary international law arises from state practice, and requires that there is "a consistent and general international practice among states, and [that] the practice [is] accepted as law by the international community.[41] This latter element is termed *opinio juris.*[42] The significance of customary law is that it is binding on *all* states, unless a particular state has "consistently and unequivocally [refused] to accept a custom in the process of formation."[43] Conventional international law, by contrast, binds only those states which have signed and ratified a particular agreement.[44] However, conventional law can pass into customary international law.[45] For example, Roberts and Guelff suggest that the *Geneva Conventions*[46] and the *1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land*[47] have over time emerged as customary international law.[48]

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[40] See *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7, art. 38 (entered into force in Canada 24 October 1945), cited in Hugh M. Kindred *et al.*, eds., *International Law Chiefly as Interpreted and Applied in Canada* , 7th ed. (Toronto: Emonds Montgomery Publications, 2006), at 107.

[41] Kindred et al., *ibid.* at 148.

[42] I*bid.*.

[43] Adam Roberts & Richard Guelff, eds., *Documents of the Laws of War,* 3rd ed. (Oxford: Oxford University Press, 2003) at 7.

[44] Kindred *et al.*, *supra* note 40 at 113.

[45] Roberts & Guelff, *supra* note 43 at 7-8.

[46] *Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* [*Geneva Convention I*]; *Geneva Convention II for the Amelioration of the Condition of Wounded Sick and Shipwrecked Members of Armed Forces at Sea* [*Geneva Convention II*]; *Geneva Convention II Relative to the Treatment of Prisoners of War* [*Geneva Convention III*]; *Geneva Convention IV Relative to the Treatment of Civilian Persons in Time of War* [*Geneva Convention IV*]. All the aforementioned signed 12 August 1949, Can. T.S. 1965 No. 20 (entered into force 21 October 1950, entered into force in Canada 14 May 1965).

[47] 18 October 1907, [treaty series] (entered into force 26 January 1910) [*Hague Convention IV*], cited in Dietrich Schindler & Jiri Toman, eds.*, The Laws of Armed Conflict* (Leiden & Boston: Martinus Nijhoff Publishers, 2004) at 55-87.

[48] Roberts & Guelff, *supra* note 43 at 8.

B. Early International Instruments: Hague Convention IV

In 1907, the *Hague Convention IV* and its *Hague Regulations*[49] became the first international instrument to codify a form of CR.[50] The *Hague Convention IV* allowed for state liability rather than individual criminal liability.[51] The *Hague Regulations* require that, in order to qualify as a lawful belligerent, the party's armed force must be "commanded by a person responsible for his subordinates."[52] In the context of the development of CR, the *Hague Convention IV* "is a manifestation and codification of that which was custom among the signatory nations, giving early recognition to the duties and responsibilities of the commander."[53]

The *Hague Convention IV* therefore codified the general notion that commanders are responsible for their subordinates. It did not, however, impose individual criminal liability on commanders for breaches of the laws of war committed by their subordinates. Such liability did not arise until after the Second World War.

C. The Second World War Trials and CR as Custom

The aftermath of the Second World War established a number of crucial precedents with respect to CR. It is partly this foundation upon which Vetter relies to assert that Article 28 is a regression from the scope of CR as it exists as customary international law. This section attempts to show that the customary foundation for CR does not go so far as Vetter suggests. The impact of the *Yamashita* decision, two key Nuremberg decisions and the Tokyo Trials are briefly summarised here.

The customary international law foundation for CR was the 1945 prosecution of General Yamashita, commander of Japanese forces in the Philippines, and military governor of the Philippines, before an American military commission

[49] *Annex to the Convention (IV): Regulations Respecting the Laws and Customs of War on Land,* 18 October 1907, [Treaty Series] [*Hague Regulations*].
[50] Parks, *supra* note 1 at 10-11; L.C. Green, "Command Responsibility in International Humanitarian Law" (1995) 5 Transnat'l. L. & Contemp. Probs. 319 at 325 [Green, "CR"]]
[51] *Hague Convention IV, supra* note 46 art. 3.
[52] Parks, *supra* note 1 at 10-11, citing *Hague Regulations*, art. 1.
[53] *Ibid*, at 11.

consisting of lay members.[54] Yamashita was convicted of war crimes committed by his troops.[55] *Yamashita*'s significance with respect to CR stems from his petition for *habeas corpus* to the United States Supreme Court.[56] In dismissing the petition, the Court held that international law imposed "an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."[57]

Some have mistakenly interpreted *Yamashita* as imposing a "strict liability" standard, whereby knowledge of subordinates' crimes is presumed from a position of command and widespread occurrence of crimes.[58] This interpretation has been firmly rejected by subsequent jurisprudence and commentary.[59] What it did establish was that CR imposed individual criminal liability on military commanders for failure to control their subordinates. *Yamashita* thus provided a basis for subsequent international trials.

The Nuremberg Trial was created in 1945.[60] The most important CR precedents are the *High Command* [61] and *Hostages*[62] cases.[63] *High Command* involved 14 high-ranking German officers.[64] Most of the charges related to illegal conduct committed by soldiers and the issuance and transmission of illegal orders.[65] The decision defined the parameters of the commanders' duty

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[54] *Ibid,* note 1 at 37; Burnett, *supra* note 3 at 87.
[55] Parks, *ibid.* at 22, 37, 64.
[56] *Yamashita*, *supra* note 1.
[57] *Ibid*.
[58] Vetter, *supra* note 8 at 107-108; Lippman, *supra* note 14 at 14.
[59] Burnett, *supra* note 3 at 92-94, 98; Parks, *supra* note 1 at 31; *Celebici*, *supra* note 10 ¶ 384-386; William Hays Parks, "A Few Tools in the Prosecution of War Crimes" (1995) 149 Mil. L. Rev. 73, at 74 [Parks, "A Few Tools"].
[60] *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 U.N.T.S. 280 (entered into force 8 August 1945) [*London Agreement*].
[61] *U.S. v. Wilhelm von Leeb et al.*, UN War Crimes Commission, 12 Law Reports of Trials of War Criminals 23 (1948) [*High Command*], cited in Burnett, *supra* note 3 at 88, note 114.
[62] *U.S. v. Wilhelm List et al.*, UN War Crimes Commission, 8 Law Reports of Trials of War Criminals 34 (1948) [*Hostages*], cited in Burnett, *supra* note 3 at 99, note 113.
63 Parks, *supra* note 1; Burnett, *supra* note 3; Lippman, *supra* note 14; Green, "CR", *supra* note 53.
[64] Burnett, *supra* note 3 at 88.
[65] *Ibid*, at 99.

confirmed in *Yamashita*.[66] The "standard of responsibility" was interpreted as "a breach of some moral obligation, fixed by international law, a personal act voluntarily done with knowledge of its inherent criminality under international law."[67] Any strict liability theory was rejected.[68] Participation or even "acquiescence" in the transmission of illegal orders would attract liability.[69] Superior orders were rejected as a defence, but might mitigate punishment.[70] Liability required more than the mere existence of a superior-subordinate relationship.[71] Instead, crimes must be "directly traceable" to the commander, or the failure to supervise subordinates must constitute "criminal negligence."[72] The threshold was "a wanton, immoral disregard of the action of his subordinates amounting to acquiescence."[73] Any other standard "would go far beyond the basic principles of criminal law as known to civilized nations."[74]

Hostages involved 12 generals accused of war crimes committed in countries occupied by Germany.[75] The accused were charged for "the murder and deportation of thousands of persons" on their orders.[76] The main CR issue was whether commanders could be liable for troops over which they do not exercise operational control.[77] *Hostages* distinguished between commanders with tactical control, and those charged with administering an occupied territory. Those exercising "tactical command" were responsible only for the acts of troops over which they had operational control.[78] Commanders in control of an occupied area, however, had a broader responsibility.[79] The Tribunal imposed more expansive CR on such commanders based on the

[66] Parks, *supra* note 1 at 63.
[67] *Ibid.* at 40, citing *High Command*.
[68] *Ibid*.
[69] *Ibid.* at 41-42.
[70] *Ibid.* at 42.
[71] *Ibid.* at 43.
[72] *Ibid.*
[73] *Ibid.*
[74] *Ibid.*
[75] Burnett, *supra* note 3 at 109.
[76] Parks, *supra* note 1 at 58.
[77] *Ibid.* at 60.
[78] Burnett, *supra* note 3, at 110.
[79] Burnett, *supra* note 3, at 110.

international legal obligation of those charged with administering occupied territory.[80]

The International Military Tribunal for the Far East ("Tokyo Trial") was established in 1946.[81] 28 Japanese officers and civilian Cabinet ministers were charged with international crimes spanning decades,[82] including the 1937 Rape of Nanking.[83] The charges alleged on the basis of CR dealt mainly with "the mistreatment and security of prisoners of war."[84] The Tokyo Trial's main significance with regard to CR is two-fold. First, the Tribunal held civilian political leaders liable on the basis of CR. This issue will be dealt with further below. This section addresses the second main significance, its discussion of CR for military commanders.

The Tribunal found that customary law imposed a duty to prevent mistreatment of prisoners of war and civilian internees.[85] This duty was imposed on the responsible government members and military officers.[86] Superiors had to prevent mistreatment by "establishing and securing a continuous and efficient working system."[87] If this duty was met, but war crimes were nevertheless committed, superiors could be held responsible on two bases. First, they would be liable if they knew of the crimes and "failed to take such steps as were within their power to prevent the commission of

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[80] See Leslie Green, *The Contemporary Law of Armed Conflict,* 2nd ed. (Manchester: Manchester University Press, 2000), at 303, note 110 [Green, "LOAC"]; Parks, *supra* note 1 at 256-267; Burnett, *supra* note 3 at 112.

[81] General Douglas MacArthur, United States Army, General Orders No. 1, *Special Proclamation: Establishment of an International Military Tribunal for the Far East* (signed in Tokyo, 19 January 1946), as am'd by General Order No. 20;*Charter of the International Military Tribunal for the Far East* (signed in Tokyo, 19 January 1946) [*Tokyo Trial Charter*], reprinted in R. John Pritchard & Sonia Magbanua Zaide, eds., *The Tokyo War Crimes Trial, v. 1* (New York & London: Garland Publishing Inc.,1981).

[82] See Pritchard & Zaide, *ibid*, "Indictment", Group One, Count 1.

[83] Parks, *supra* note 1 at 68.

[84] Lippman, *supra* note 14 at 17; Pritchard & Zaide, *supra* note 85, at "Indictment", Group Three, Counts 53-55; Burnett, *supra* note 3 at 115.

85 Volume 200, *Official Transcript of the International Japanese War Crimes Trials in the International Military Tribunal for the Far East*, at 48 442 to 48 447 [*Transcript*].

[86] *Ibid.*

[87] *Ibid.*

such crimes in the future."[88] Second, criminal negligence would arise if they "failed to acquire such knowledge."[89]

In sum, the post-World War II decisions recognised that, as a matter of customary international law, a commander has "a duty to supervise and control the conduct of his subordinates in accordance with existing principles of the law of war."[90] The distinctions drawn between officers with little operational control over subordinates and those with broad authority suggest that the standard of CR is commensurate to the commander's actual power to control his or her subordinates. *Yamashita* provided the basis that a failure to prevent or punish violations imposes individual criminal responsibility on commanders, even before international tribunals.[91] With regard to the required elements of CR, liability arises where commanders intentionally transmit or give illegal orders. Moreover, commanders can be held liable if their failure to ascertain the illegal nature of the orders, or failure to sufficiently supervise the conduct of their troops, amounted to criminal negligence. *High Command* suggests that this will be a high threshold.[92] The principle of strict liability was rejected in all cases. The defence of superior orders was also rejected, although it might be a mitigating factor in imposing punishment. Thus CR emerged as a doctrine of customary international law.

D. Additional Protocol I to the 1949 Geneva Conventions[93]

In 1977, the first CR doctrine, in the sense of imposing individual criminal liability on commanders, was codified in an international agreement.[94] Article 86(1) of *AP I* provides that states parties "shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from failure to act

[88] *Ibid.*
[89] *Ibid.*
[90] Parks, *supra* note 1, at 77.
[91] *Ibid.* at 37.
[92] Parks, *supra* note 1 at 43.
[93] *Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3, Can. T.S. 1991 No. 2 (entered into force 7 December 1978) [*AP I*].
[94] *CR*, *supra* note 50 at 341.

when under a duty to do so."[95] Article 86(2) codifies the CR standard, stating:[96]

> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as 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 with their power to prevent or repress the breach.

As Green points out, this provision "confirms that a commander is responsible if he fails to prevent or repress a breach committed by a subordinate."[97]

Articles 87(1) and (3) codify the military commander's duty to prevent or punish breaches of the *Geneva Conventions* or *AP I* committed by persons under his or her control. It states that:

> [Parties] shall require military commanders, with respect to members of their armed forces under their command and other persons under their control, to prevent, and where necessary, to suppress and to report to competent authorities breaches of the Conventions and this Protocol.
>
> [Parties] shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or this Protocol, to initiate such steps as are necessary to prevent such violations…, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

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[95] *AP I*, *supra* note 93,art. 86(1).
[96] *Ibid*, art. 86(2).
[97] *CR*, *supra* note 50 at 341.

The effect of *AP I* was to codify a form of CR in conventional international law. Superiors are not absolved of responsibility simply because subordinates violated the *Geneva Conventions* or *AP I*. The duty to prevent and punish violations of the treaties is imposed on military commanders who are "aware" that those under their control have committed or are about to commit violations.[98] The mental standard of "aware" remains undefined by *AP I*.[99] However, article 86(2) provides a "specific and detailed mental standard," namely that the commander "knew, or had information which should have enabled them to conclude in the circumstances at the time" that a breach had occurred or would occur.[100] The latter mental element of "had information" is similar to the standard evinced in *Hostages*. It thus appears to preclude the commander being 'wilfully blind' or criminally negligent by failing to make inquiries when put on notice of possible breaches.

Two final points should be made regarding *AP I*. The first is that the treaty only applies to "international armed conflict" involving parties to the *Geneva Conventions* and *AP I*.[101] The CR provisions are thus inapplicable in internal disturbances. The second point is that *AP I* does not refer explicitly to civilian superiors. While it could be argued that the use of the term "superiors" in article 86(2) is broad enough to include civilians, it is ambiguous at best. Moreover, the exclusive use of the terms "military commanders" and "commanders" in the text and heading of article 87 suggests that it applies solely to military commanders. Parks suggests otherwise, asserting that this provision includes civilians in the "command and control chain," such as the U.S. President, who is Commander-in-Chief of American armed forces.[102] This is undoubtedly so. However, Parks does not suggest that civilians outside the formal chain of command and control structure, without *de jure* legal authority, would be included as "commanders." As such, *AP I* provides little clarity regarding the problem of civilian CR.

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[98] *AP I, supra* note 93 art. 87(3).
[99] Burnett, *supra* note 3 at 144.
[100] Burnett, *supra* note 3 at 144, 145.
[101] *AP I, supra* note 93 art. 1(3), referring to common art. 2 to the *Geneva Conventions*; see Burnett, *supra* note 3, at 139.
[102] Parks, "A Few Tools", *supra* note 59, at 77.

E. The ICTR and ICTY Statutes

No major developments in CR emerged until the establishment of the ICTR and ICTY in the 1990s. The ICTR and ICTY statutes contain identical codified CR provisions. Thus, only the ICTY need be discussed here. Article 7(3) and (4) state as follows:[103]

> The fact that any of the acts referred to in articles 2 to 5 of 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.
>
> The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

In a manner resembling *High Command,* article 7(4) provides that the defence of superior orders will not prevent a finding of liability, but may be considered to mitigate punishment. Article 7(3) provides the basis for CR before the ICTY. Several points can be made about this standard. First, the mental standard "is couched in standard legal terminology," including both actual knowledge ("knew"), and constructive knowledge ("had reason to know").[104] Second, the provision imposes the duty to prevent or to punish perpetrators. Third, the duty will be satisfied by necessary and reasonable measures, a "more objective" standard than that in *AP I.*[105] Finally, the term "superior" is undefined, thus leaving it open to interpretation as to whether CR applies to civilians. The ICTY's interpretation of this provision will be discussed below.

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[103] *ICTY Statute*, *supra* note 17, art. 7(3), (4); *ICTR Statute*, *supra* note 18, art. 6(3), (4).
[104] Ann B. Ching, "Evolution of the Command Responsibility Doctrine in Light of the *Celebici* Decision of the International Criminal Tribunal for the former Yugoslavia" (1999-2000) 25 N.C. J. Int'l L. & Comm. Reg. 167, at 184.
[105] *Ibid.*

F. The Rome Statute and its Critics

1. Article 28(b) - CR Applies to Civilians

The *Rome Statute* creating the world's first permanent international criminal tribunal, the ICC, came into force in 2003.[106] In contrast to the ICTY, Article 28 of the *Rome Statute* includes a bifurcated CR provision, the heading of which distinguishes between "commanders" and "other superiors."[107] Article 28(b) applies to a superior who is not a "military commander" or "person effectively acting as a military commander,"[108] thus creating the first codified CR doctrine which unambiguously encompasses civilians. Article 28(a) recreates the traditional military CR standard, in wording more detailed than, but essentially to the same effect as, the ICTY provisions.

The more novel feature of the *Rome Statute* is Article 28(b), which provides the CR standard for "other superiors". Article 28(b) states:[109]

> (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:
>
> 1. The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> 2. The crimes concerned activities that were within the effective responsibility and control of the superior; and

[106] *Rome Statute, supra* note 7.
[107] *Ibid,* art. 28.
[108] *Ibid,* art. 28(a).
[109] *Ibid,* art. 28(b).

3. 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.

Although the "inaction elements" in articles 28(a)(ii) and 28(b)(iii) are substantively identical,[110] there are three key differences between the military standard in Article 28(a) and the civilian standard in Article 28(b). First, an obvious difference is that the provision distinguishes between commanders and persons effectively acting as such on one hand (Article 28(a)(i), and all other superior-subordinate relationships on the other (Article 28(b)). Moreover, as Vetter suggests, Article 28(b)(ii), which requires that "the crimes concerned activities that were within the effective responsibility and control of the superior," could be interpreted as "a modification of the superior-subordinate relationship element."[111] The second, related difference is that Article 28(b)(ii) could also be interpreted as creating a *new* element, one requiring "a nexus between the criminal activity of the subordinate and the subordinate's activities that the superior can control."[112] This latter interpretation, as noted below, is used by Vetter to support his argument that the ICC provision weakens CR from its customary state.

The final difference, and the main basis for the criticisms of the ICC civilian standard, is that the "knowledge" element in Article 28(b)(i) requires that the "superior either knew, or *consciously disregarded information which clearly indicated*" that crimes had been or were about to be committed.[113] The military standard, by contrast, requires only that the commander "knew, *or owing to the circumstances at the time*, *should have known*" of the offences.[114] The significance of this difference is that the military standard appears to be based on the straight knowledge/criminal negligence standard used in the

[110] *Ibid,* at 115.
[111] *Ibid.*
[112] *Ibid.*
[113] *Rome Statute*, *supra* note 7, art. 28(b)(ii).
[114] *Ibid,* art. 28(a)(i) [emphasis added].

post-World War II decisions, whereas the civilian standard requires that the superior must have consciously disregarded information clearly indicating the commission, actual or potential, of crimes.

2. Criticisms of Article 28

The main criticism Vetter levies against the CR provision of the *Rome Statute* is that it "hinders the deterrent power of the doctrine" by lowering the standard for civilians *vis-à-vis* military commanders.[115] Vetter summarises his essential argument:[116]

> Historically, the military command responsibility doctrine applied not only to military commanders, but also to civilians. Thus, one can argue that in bifurcating the command responsibility standard based on the type of superior-subordinate relationship, the ICC Statute lessens the efficacy of the permanent court because the bifurcated structure allows a lesser knowledge standard for civilians, that is, "consciously disregarded," and allows the potentially new nexus element, that is "crimes concerned activities," to also potentially bar liability for civilians.

Vetter thus makes two main points. First, he notes that the "consciously disregarded" standard may be interpreted by the ICC as imposing a CR lower standard on civilian leaders.[117] If this concern materialises, civilians will be under "a significantly lessened duty… compared to the military commander, to remain informed of events within the superior's domain."[118] Superiors will have incentive to remain uninformed, and "might systematically fail to acquire such knowledge"[119] in order to avoid liability. The practical result is that there will be less evidence of the superior's knowledge of wrongdoing, as the superior will ensure that he or she is not apprised of such information.[120] This would impose a higher

[115] Vetter, *supra* note 8, at 96.
[116] *Ibid,* at 116.
[117] *Ibid,* at 124.
[118] *Ibid,* at 123.
[119] *Ibid,* at 124.
[120] *Ibid.*

"evidentiary burden" on the prosecutor "when the defendant is a civilian supervisor."[121]

Vetter's second criticism is of Article 28(b)(ii); the "crimes concerned activities" element. As noted above, he suggests that this could either be interpreted a modification of the superior-subordinate relationship element contained in the main paragraph of Article 28(b), or it could be interpreted as requiring a "nexus between the criminal activity of the subordinate and the subordinate's activities that the superior can control."[122] His concern is with the latter interpretation. If Article 28(b)(ii) requires a proof of a new element, it would "give defence counsel an additional weapon" whereby "counsel can vigorously advocate that the prosecutor must prove this new element in its entirety."[123]

To be fair, Vetter's criticisms of the CR provision of the *Rome Statute* are based largely on a comparison weighing the civilian standard against its companion military provision in the *Rome Statute*.[124] However, Vetter implies that Article 28(b) is a regression from CR's past state under customary international law.[125] Indeed, he notes particularly that the post-war precedents are "persuasive authority" that CR applies to civilians, and that its customary form is stronger than that in the *Rome Statute*.[126] The question is, however, what actually was the *status quo* from which the standard was weakened? In this respect, Vetter cites the civilian standard against the *Celebici* decision, on the basis that it best reflects the current state of customary law.[127] Moreover, his argument is also based on the post-war precedents "prior to *Celebici*."[128]

This argument warrants reviewing the cases which have addressed the question of CR and civilians. The following section uses these cases to illustrate that Vetter's argument is problematic. Vetter's conclusions with

[121] *Ibid.*
[122] *Ibid,* at. 115.
[123] *Ibid,* at 118-119.
[124] *Ibid,* at 111-112.
[125] *Ibid,* at 118.
[126] *Ibid.*
[127] *Ibid,* at 111-112.
[128] *Ibid,* at 111.

respect to the comparison of the bifurcated ICC CR standards are not challenged. Rather, it will be shown that precedents holding civilians liable on the basis of CR are wildly inconsistent, and worse, unjust. Moreover, the ICTY judgment in *Kordic* calls into question whether, in the absence of a codified civilian standard, CR will ever be applied to civilians. As such, despite its weaknesses, the ICC civilian CR standard improves on the existing state of the law for the mere fact that it explicitly and unambiguously applies to civilian superiors.

IV. INTERNATIONAL JURISPRUDENCE ON CR AND CIVILIANS

A. Hirota

At the Tokyo Trial, Cabinet minister Koki Hirota was charged on the basis of CR with the mistreatment of prisoners and failure to ensure observance of IHL.[129] Hirota, a civilian, served as Japan's Foreign Minister during the infamous 1937 Rape of Nanking.[130] At the time, Hirota had received diplomatic reports of the atrocities, but relied on assurances from the War Ministry that the soldiers would be reined in.[131] Hirota persisted in relying on the assurances, despite the fact these reports continued.[132] On the Tokyo Trial reasoning described above,[133] Hirota was found to have failed to create a system to ensure the proper treatment of prisoners, and was negligent in relying on assurances from the War Ministry.[134] Holding that he should have "insisted before the cabinet" that the atrocities end, the Tribunal

[129] Pritchard & Zaide, *supra* note 83, "Indictment", Group Three, Counts 54, 55.
[130] Lippman, *supra* note 14 at 22.
[131] *Ibid.* at 22-23.
[132] Vetter, *supra* note 8 at 125-126.
[133] *Transcript*, *supra* note 87.
[134] Solis Horwitz, "The Tokyo Trial" (1950) 28 Int'l. Conciliation 473, at 572-573; Vetter, *supra* note 8 at 126.

convicted Hirota on these counts and for crimes against peace.[135] Hirota was executed.[136]

The CR counts of the *Hirota* conviction do not accord with the fundamental premise that CR arises where there is a legal duty created by the superior's power to actually control subordinates' conduct. Hirota had no formal authority over the Japanese army. At best, he might have had "influence" over the military,[137] perhaps through his position in Cabinet.[138] Indeed, Justice Röling would have acquitted Hirota on the basis that the accused "certainly could not have prevented…atrocities."[139] Hirota in fact resigned from Cabinet in 1938 following a dispute with the military, and Röling's view is thus that Hirota "was not in a position to change what happened."[140]

The lack of control indicates that Hirota's conviction, with regard to the CR counts, is deeply problematic. The basis for imposing a legal duty and commensurate CR rests on the superior's ability to actually control the conduct of his or her subordinates. In *Hirota*, however, individual criminal liability of the most severe nature was imposed on the flimsy basis of "influence". The imposition of criminal liability for the acts of soldiers over which a civilian superior exercises only an indirect influence seems contrary to principles of justice. Finding Hirota guilty in the absence of any ability to prevent or punish those who violated the laws of war calls into question the basis upon which he could justly be held personally responsible.

The obverse to an overly-strict conception of CR is a dangerous potential for injustice. Where superiors are charged with the gravest offences, and under threat of severe punishment, on the basis that they failed to prevent or punish the acts, it behoves prosecutors and judges to be wary that the

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[135] Vetter, ibid, at 126.
[136] *Ibid,* at 126.
[137] Lippman, *supra* note 14 at 23.
[138] Vetter, *supra* note 8 at 126.
[139] Justice B.V.A. Röling, cited in Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951* (Austin, London: University of Texas Press, 1979) at 30.
[140] B.V.A. Röling & Antonio Cassese, *The Tokyo Trial and Beyond* (Cambridge: Polity Press, 1993) at 32, 42.

desire for punishment does not come at the expense of fairness and justice for the accused. *Hirota* indicates that a codified standard of civilian CR can only benefit the international community. The *Rome Statute* requirement that "crimes concerned activities that were within the effective responsibility and control of the superior"[141] might prevent recurrences of rulings such as *Hirota*.

B. The Musema Case at the ICTR

Musema is another example of CR gone awry in the absence of a codified civilian CR provision. The accused civilian was the manager of a tea factory in Rwanda[142] who was charged with offences, including genocide, both directly and on the basis of CR.[143] These charges arose from a series of killings and rapes that Musema was alleged to have participated in and failed to prevent and punish.[144] The trial chamber found Musema guilty on the basis of both participation *and* CR.[145]

The most problematic issue with this decision is the Trial Chamber's finding that Musema's "influential power" over factory workers was sufficient to establish liability under CR."[146] This was based on the finding that Musema exercised "legal and financial control" over employees, "particularly through his power to appoint and remove" employees from their jobs.[147] This gave him the power to "take reasonable measures to attempt to prevent or punish the use of Tea Factory vehicles, uniforms, or other Tea Factory property" in the commission of offences. This was sufficient to create "*de jure* and *de facto* control" over employees.[148] As Alexander Zahar points out, this finding is extremely problematic:[149]

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[141] *Rome Statute*, *supra* note 7 art. 28(b)(ii).
[142] *Musema*, *supra* note 15 ¶ 10-16.
[143] Zahar, *supra* note 9 at 601.
[144] *Musema*, *supra* note 15 at "Summary", ¶ 32-53.
[145] *Ibid.* at "Summary", ¶ 61.
[146] Zahar, *supra* note 9 at 601.
[147] *Musema*, *supra* note 15 ¶ 880.
[148] *Ibid.*
[149] Zahar, *supra* note 9 at 602-603.

> This reasoning is misguided. It does not distinguish Musema from any ordinary factory director. Yet it cannot be that all business managers stand liable to be convicted for international crimes perpetrated by their employees for the reason only that they were linked to them through commonplace ties of labour. The commander envisaged by the Article 6(3) doctrine, in its classical (martial) form, was connected to his or her troops not by a mere supervisory link; he or she was at the core of a combat unit with powers of life and death over defenceless subjects, whether these were civilians in a combat zone or prisoners of war; and he or she was sworn to abide by the laws of war.

Alfred Musema surely committed horrendous crimes. However, the Trial Chamber's application of CR to a tea factory manager is absurd. The ability to dock pay or fire someone is in no way analogous to a commander's power to dispense military justice. *Musema* highlights the fact that in the absence of an express civilian CR standard, inconsistent and problematic decisions can result.

C. ICTY Cases – Celebici and Kordic

1. Celebici

The leading authority on the required elements of CR is *Celebici*. *Celebici* provides the first decision of an international tribunal since WWII to address the issue of CR. It thoroughly reviews its application to civilians. As such, it is the "contemporary authority" on CR.[150] *Celebici* is often cited as authority that CR can be applied to civilians.

Celebici involved charges against four Bosnian men charged with murder, torture, and other offences committed while they worked as guards and commanders of a prison camp in the village of Celebici.[151] Three of the accused were charged on the basis of CR.[152] Delic was deputy commander

[150] *Ibid,* at 592.
[151] *Celebici*, *supra* note 10 ¶, 2, 3.
[152] *Ibid.* ¶ 21.

of the prison, without formal legal authority. Mucic also acted as *de facto* commander. Delalic was a military commander with responsibility for the prison-camp.[153] All were charged with failing to prevent or punish the mistreatment of prisoners.[154]

Celebici is most useful for its rendering of the essential elements of CR under the *ICTY Statute. Celebici* held that CR required proof of three elements:[155]

1. the existence of a superior-subordinate relationship;
2. the superior knew or had reason to know that the criminal act was about to be or had been committed; and
3. the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

It is in respect to the superior-subordinate element that the question of civilians arose in *Celebici*.

The Trial Chamber relied on post-war precedents such as *Hirota* to hold that civilians could satisfy the superior-subordinate element.[156] Formal command was unnecessary; *de facto* command could satisfy the superior element.[157] However, *Celebici* is extremely cautious in demarking when civilians would satisfy this element. While noting that in cases like *Hirota*, CR had been imposed on civilians on the basis of "powers of persuasion rather than formal legal authority to order action to be taken," the Trial Chamber cautioned that "the fundamental considerations underlying the basis of [CR] must be kept in mind."[158] In this regard the ICTY stated:[159]

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[153] Zahar, *supra* note 9 at 604.
[154] *Ibid.* at 604-605.
[155] *Celebici, supra* note 10 ¶ 346.
[156] *Ibid.* ¶ 357-358 363.
[157] *Ibid.* ¶ 370.
[158] *Ibid.* ¶ 376-377.
[159] *Ibid.* ¶ 377.

> [CR] is ultimately predicated upon the power of the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. It follows that there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and, accordingly, cannot properly be considered "superiors" within the meaning of Article 7(3) of the Statute. While the Trial Chamber must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts, great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.

Celebici accordingly required "effective control over the person committing the underlying violations," defined as the "material ability to prevent and punish the commission of these offences."[160] The control exercised must be to a degree analogous to that of military commanders.[161] The ICTY was obviously concerned about the injustice which can arise if CR is too loosely applied, and *Celebici* certainly casts doubt on the correctness of *Hirota*.

In the result, only Mucic was convicted on the basis of CR.[162] The ICTY did not go so far as to refer to Mucic as a "civilian," but they did note that he was not formally appointed as a commander, having only *de facto* authority.[163] This result might suggest that *Celebici* imposed CR on a civilian, in the sense that Mucic had no *de jure* authority over the prison camp. Such a conclusion, however, is not entirely evident. Mucic was certainly "less of a civilian than a tea-factory director."[164] Indeed, the willingness to find that Mucic had *de*

[160] *Ibid.* ¶ 378.
[161] *Ibid.*
[162] *Ibid.* ¶ 775, 1237.
[163] *Ibid.* ¶ 733, 775, 1237.
[164] Zahar, *supra* note 9 at 606.

facto authority was partly based on the fact that the complex Yugoslavia situation was such that "control and command structures" were "ambiguous and ill-defined."[165] Thus, the ICTY may not have considered Mucic a civilian at all, but rather an informal military commander in a new, improvised, and dynamic control and command structure.

2. Kordic

Kordic concerned the prosecution of a Bosnian Croat civilian political leader charged with offences arising from fighting between Bosnian Croats and Muslims in central Bosnia.[166] The indictment charged Kordic on the bases including CR.[167] The facts and holding of this decision are most clearly stated in the ICTY's acquittal on the CR charges:[168]

> Dario Kordic was a civilian and a politician with tremendous influence and power in Central Bosnia. He occupied an important position in the leadership of the HZ H-B, but was not in the top echelon, being answerable to Mate Boban.
>
> While he played an important role in military matters, even at times issuing orders, and exercising authority over HVO forces, he was, and remained throughout the Indictment period, a civilian, who was not part of the formal command structure of the HVO.

These findings indicate that *Kordic* was a perfect case to apply the *Celebici* standard to find a civilian liable on the basis of CR. Kordic had great influence and power, and played an important role in military matters. Indeed, he ordered attacks which were carried out. While not in formal command of the Bosnian Croat forces, he certainly exercised *de facto* control akin to that of a military commander. Simply put, he could have prevented or punished international crimes.

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[165] *Celebici*, *supra* note 10 at 354.
[166] *Kordic*, *supra* note 13 ¶ 1.
[167] *Ibid.* ¶ 5(f).
[168] *Ibid.* ¶ 838-839.

Nevertheless, Kordic was acquitted on the CR charges. Other than citing the caution in *Celebici*, the decision gives little indication as to why Kordic did not exercise *de facto* command. As the decision states:[169]

> Although liability under Article 7(3) may attach to civilians as well as military personnel, once it is established that the requisite power to prevent or punish exists, the Chamber holds that great care must be taken in assessing the evidence to determine command responsibility in respect of civilians, lest an injustice is done. In the first place, it is established that substantial influence (such as Kordic had), by itself, is not indicative of a sufficient degree of control for liability under Article 7(3). Secondly, while liability under Article 7(3) may attach not only to persons in formal positions of command, but also to those who are effectively in command of more informal structures, the Chamber finds that Kordic lacked effective control, which the Appeals Chamber in the *Celebici* case defined as "a material ability to prevent or punish criminal conduct, however that control is exercised".
>
> In sum, the Chamber finds that Kordic was neither a commander nor a superior in respect of the HVO, since he possessed neither the authority to prevent the crimes that were committed, nor to punish the perpetrators of those crimes, and as such, he is not liable under Article 7(3) of the Statute.

These reasons are difficult to reconcile with the holding. The Trial Chamber finds that Kordic exercised authority over the military and ordered the commission of illegal acts, which were indeed carried out. And yet it somehow concludes that Kordic lacked the ability to prevent the crimes. Such reasoning strains credulity. It is difficult to imagine how someone who orders the commission of a crime, knowing it will be carried out at their behest, cannot also prevent that crime. Of course, the Trial Chamber could

[169] *Ibid.* ¶ 840-841.

afford to neglect the CR charges, as they had already convicted Kordic for direct liability. Nevertheless the Kordic decision obviously calls into question whether a civilian would *ever* be held liable on the *Celebici* standard, tenuous cases such as *Musema* notwithstanding.

V. CONCLUSION

The debate over the application of CR to civilian superiors stems from a more fundamental tension, one common in the context of criminal justice in Western democracies: balancing fairness and justice to the alleged offender against the need to prevent and punish the most deplorable international crimes. This paper has indicated that CR is one of relatively few means by which the international community can hold civilian leaders individually responsible for breaches of IHL. On this view, it is more unjust to allow civilian leaders to dodge responsibility by exploiting a *de jure*, formalistic distinction between military and civilian authority. This view certainly has merit. As Vetter's lucid critique indicates, the *Rome Statute*'s bifurcated CR provision imposes lower responsibility for civilian superiors *vis-à-vis* military commanders. From the perspective of the efficacy of prosecuting breaches of international humanitarian law, this lower standard is problematic. It is particularly so because the critique implicitly holds that CR has always been applied to civilians in the past without issue or ill effects.

This paper, however, has shown that the application of CR to civilians is not at all settled. Cases like *Hirota* and *Musema* illustrate the potential injustice which can arise when CR, in the absence of a settled standard, is applied in an unprincipled manner. The underlying justification for punishing superiors for offences committed by subordinates is that the superior has both a duty and the power to prevent such conduct. Where the superior fails to do so, either intentionally or through criminal negligence, punishment becomes both morally and legally justifiable. It is very likely the haphazard manner in

which CR was applied in cases such as *Hirota* contributed to the development of the cautious *Celebici* view – so starkly exemplified by *Kordic* – that CR must be tightly controlled. International jurists are reticent to extend CR too far, especially when tasked with applying a traditionally military doctrine to civilians on the basis of unclear, inconsistent and sparse historical precedent, and in the absence of a codified, clear civilian standard.

In this respect, Article 28 of the *Rome Statute* is not a stumble backwards from past customary international law on CR, but a strong step forward. While its civilian CR standard may not be as strict as some might have hoped for, the *Rome Statute* nevertheless codifies a solid starting block for applying CR to civilian superiors with consistency, principle, and justice.