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Criminal Responsibility of the Superior for Omission in International Criminal Law

criminal responsibility of the superior for the crimes committed by their subordinates represents one of the key issues for the criminal law. For the criminalization of omission of political and military leaders, the criminal law requires the effective notion. In the article the author analysis the concept on superior (command) responsibility developed by the international criminal law, which makes it possible to punish the omission conditioned in absence of direct intention from the side of superiors. According to the author, it fills up the gap, which is not well covered or "left open" by other approbated modes of individual responsibility.

Key words: individual responsibility, omission of superior, recklessness, negligence, international criminal law.

I. Introduction

One of the main goals of criminal law is to criminalize omission of civilian (political) and military superiors. This issue is especially important in XXI century – development of modern technologies and their effective utilization facilitates the investigation of crimes as well as destruction of important evidences. Often, the “mechanism” useful for the criminal law is used against it and the criminal law is forced to act based on objective (material) circumstances, due to the destruction of evidences, reflecting the subjective (mental) circumstances. In the event of impossibility to prove the omission conditioned by the direct intent, for the criminal law the key issue is the punishability of “objectively existing omission”.

International criminal law¹ is working comprehensively on the issue of criminal responsibility of the superiors for omission. In particular, international criminal courts apply the *superior (command) responsibility* concept for establishing the individual responsibility of superiors; The concept considers criminal prosecution over military and civilian persons, for failure to implement measures preventing international crimes, inappropriate control, authority and command. Above mentioned concept makes the punishment of omission of superiors, conditioned without direct intent.

International criminal law requires superior responsibility doctrine for achieving higher effectiveness of criminal prosecution of political and military leaders,² namely, in the event of high wide-spread and systemic crimes, where the officials consciously demonstrates omission with the purpose “not to leave some traces”, in order to justify himself later and to prove that he/she was not guilty for

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¹ On notion of international criminal law, see *Turava M.*, Fundamentals of International Criminal Law, Tbilisi, 2015, 1-16 (in Georgian); *Kreß C.*, International Criminal Law, Max Planck Encyclopedia of Public International Law, Vol. V, Oxford University Press, Oxford, 2013, 717-732.

² Compare *Olasolo H.*, The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes, Hart, Oxford and Portland, Oregon, 2009, 82-109.

the commission of a crime. If it is not possible to prove direct intention of superior for omission, based on perpetration (mostly of indirect perpetration) concept, superior responsibility doctrine ensures punishability of “objectively existing omission”.

According to the recent cases of international criminal court (hereinafter referred to as *ICC*), role of superior’s individual responsibility concept is increasing, due to the establishment of strict standard for direct intent in the Article 30³ of the *Rome Statute*.⁴ Namely, in case of crime committed without direct intention, the notion of superior responsibility remains the “only mean” for criminal prosecution of superior.

ICC establishes material and mental elements of superior responsibility doctrine based on the case law of *ad hoc* tribunals. If the objective of the well known responsibility modes from the practice of international criminal courts, as *joint criminal enterprise* (hereinafter referred to as – *JCE*) *co-perpetration*, *indirect perpetration* and *indirect co-perpetration* – is mostly to prosecute individuals for commission of crimes via the action and direct intent, superior responsibility doctrine, literally, establishes punishments for crimes committed by the way of omission and without direct

³ Article 30 of the *Rome Statute*:

“1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly”.

⁴ Current case law of *ICC*, in the mental element of Article 30 of *Rome Statute* contains only *dolus directus in the first degree* [first alternative of Article 30(2)(b)] and *dolus directus in the second degree* [second alternative of Article 30(2)(b)].

Initially *ICC* Pre-Trial Chamber for *Prosecutor v. Lubanga* case attempted to read the mental element of *dolus eventualis* in the Article 30(2)(b) of the *Rome Statute*, namely, when in relation to a consequence a person has intent “that it will occur in the ordinary course of events”. See *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, §349-365. Such interpretation is not without grounds. Compare *Jain N.*, *Perpetrators and Accessories in International Criminal Law, Individual Modes of Responsibility for Collective Crimes*, Hart, Oxford, 2014, 90. Later, Pre-Trial Chamber for *Prosecutor v. Bemba* case, changed the above-mentioned interpretation by the rejection of *dolus eventualis*. With the literal interpretation *consequence will occur*, in its view, means *inevitably expected*. According to the same interpretation, if we read the second part of the sentence – “in the ordinary course of events”, namely, “consequence will occur in the ordinary course of events”, it is clear that the necessary standard for the consequence is close to certainty. The Chamber defined this standard, as *virtual certainty* or *practical certainty*, that consequence would result in case of exclusion of unforeseen and unexpected “intervention”, which would prevent the consequences. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §362, 341-371. *ICC* Trial Chamber for *Prosecutor v. Katanga* case supported the above mentioned narrow interpretation of intent via Judgment of 2014 year. See *Prosecutor v. Germain Katanga*, Judgment Pursuant to Article 74 of the Statute (ICC-01/04-01/07), Trial Chamber II, 7 March 2014, §770-779. The same approach was applied by *ICC* Appeal Chamber for *Prosecutor v. Lubanga* case, by which, at this stage, left the mental element of *dolus eventualis* outside the Article 30. See *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against his Conviction (ICC-01/04-01/06 A5), Appeals Chamber, 1 December 2014, §441-452. On mental element in *Rome Statute*, see *Badar M., Porro S.*, “Rethinking the Mental Elements in the Jurisprudence of the ICC”, in *Stahn G.* (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, 649-668.

intent. It can be stated that it supplements the field which is not well coped or “left open” by perpetration concept.

Doctrine on superior responsibility punishes superior for committing the international crime – on the one hand, when he/she consciously “participates” and cannot be punished by means of other responsibility forms, or, secondly, “participates” with the lower mental element – according to the Georgian criminal law terminology, if not via the indirect intent then due to the conscious or unconscious negligent.

Objective of the Article is to analyze the newest concept of superior responsibility based on the *ICC Statute*. In particular, in the process of analysis of Article 28 of the *Rome Statute*, *ICC practice*, it is important to understand, which material and mental elements, unlike the principal and accessory liability, shall it satisfy for qualification. Based on *ICC court practice*, namely, based on *Prosecutor v. Jean-Pierre Bemba Gombo* case and via the parallels with the case law of *ad hoc tribunals*, we shall discuss the circumstances to be satisfied and its legal evaluation.

For the achievement of set objective, the following issues shall be studied: notion of *command responsibility* or *superior responsibility*; grounds for establishing superior’s responsibility in accordance with *ad hoc tribunals*; material elements considered under the *Rome Statute* for superior’s responsibility, namely, groundings considered for responsibility of military and civilian superiors; who could be military commander, person effectively acting as a military commander and civilian superior; what are the differences between them; notion of effective control and elements of its existence; importance of proving the causation between the committed crime and failure to exercise control properly over the subordinates; mental elements of superior responsibility, such as knowledge, “should have known”, negligence, “had reason to know”, “consciously disregarded information” and recklessness⁵; standards of duty to carry out preventive, repressive and necessary and reasonable measures; and finally, based on the conducted research, the concept on superior responsibility must be summarized; in particular, in competition with the responsibilities considered for the perpetration of crime, which responsibility shall be given priority – Article 28 or Article 25(3)(a) of the *Rome Statute*; how is it different from other modes of individual responsibility and to which form of participation in crime does it belong?

II. Notion of Superior Responsibility

The concept on superior responsibility was developed in the international case law in XX century, namely after the end of Second World War.⁶ The doctrine was well applied in the international criminal tribunals for the former Yugoslavia (hereinafter referred to as – *ICTY*) and Rwanda (herein-

⁵ On the Georgian equivalent of *recklessness*, see *Turava M.*, *The Concept of Crime*, Tbilisi, 2011, 289 (in Georgian).

⁶ Historical overview of development of superior responsibility, see *Meloni C.*, *Command Responsibility in International Criminal Law*, T.M.C. Asser Press, The Hague, 2010, 33-76; Also, see *Mettraux G.*, *The Law of Command Responsibility*, Cambridge University Press, Cambridge, 2009, 3-20; *Arnold R., Triffterer O.*, ‘Responsibility of Commanders and other Superiors (Article 28)’, in *Triffterer O.* (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., C.H.Beck.hart.Nomos., München, 2008, 799 *et seq.*

after referred to as – *ICTR*⁷ and even today, attempts to establish its place in the current activities of *ICC*.

Mode of superior (command) responsibility, similar to *JCE*⁸, is concept developed in an “original” manner by the international criminal law, “example” of which is not encountered in the national legal system.⁹ It represents *sui generis*, separate form of individual responsibility. Despite the fact that the concept is independent from the modes of responsibility indicated in the Article 25 of the *Rome Statute* and it is provided in the Article 28,¹⁰ form of superior responsibility is organically part of Article 25.

The Statutory and doctrinal concept of superior responsibility is simple. Doctrine considers criminal prosecution for the military and civilian persons for failure to take all preventive, repressive and necessary and reasonable measures, for inappropriate control, authority and command whereas in connection with international crimes we can often identify some type “engagement” and “silent support”, omission from the side of superior.¹¹

In the event of failure to carry of measures by the military and civilian superiors for the prevention of international crimes, inappropriate control, authority and command, in the view of prosecution, the superior is responsible as he/she has not prevented co-participation in the crime (for example: *aiding and abetting*), participation of subordinates in the *JCE* and etc.¹²

In order to analyze superior responsibility doctrine, it is important to discuss *Prosecutor v. Jean-Pierre Bemba Gombo* case, where *ICC* has, for the first time, interpreted Article 28 of the *Rome Statute*. Based on the above case and by making parallels with the case law of *ad hoc* tribunals, it can be stated that international law has got concept on superior responsibility matched with the new requirements.

⁷ In relation to the superior responsibility in *ad hoc* tribunals, see *Sliedregt E.*, ‘Command Responsibility at the ICTY – Three Generations of Case-law and still Ambiguity’, in *Swart B., Zahar A., Sluiter G.* (ed.), *The Legacy of the ICTY*, Oxford University Press, Oxford, 2011, 377-400; Also, see *Boas G., Bischoff J., Reid N.*, *International Criminal Law Practitioner Library: Forms of Responsibility in International Criminal Law*, Cambridge University Press, Cambridge, 2008, 174 *et seq.*

⁸ The key concept of *JCE*, which unites all its members, is the common intention of co-perpetrators – participation in the group for the achievement of common purpose. Common plan is represented by the commission of specific or/and abstract crimes. In *ICTY* case law, namely, at the very first stage of *ad hoc* tribunal – for *Prosecutor v. Dusko Tadic*, the “key precondition” for the creation of *JCE* was “inability” of statutory notion of individual criminal responsibility and its over-abstract contents. Article 7(1) of *ICTY* Statute does not offer specific way for establishing the individual criminal responsibility at the level of specific principles, doctrine. Accordingly, focus was drawn towards the case law, in order to overcome such “inability” and abstractedness. See *Prosecutor v. Tadic*, Judgement (IT-94-1-A), Appeal Chamber, 15 July 1999, §185-232; Also, see *Cassese A.*, *the Members of the Journal of International Criminal Justice*, Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine, *Criminal Law Forum*, Vol. XX, 2009, 289-330.

⁹ Compare *Werle G., Jessberger F.*, *Principles of International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2014, 221; *Ambos K.*, *Treatise on International Criminal Law, Foundations and General Part*, Vol. I, Oxford University Press, Oxford, 2013, 206.

¹⁰ Compare *Schabas W.*, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, 457.

¹¹ *Arnold R., Triffterer O.*, ‘Responsibility of Commanders and other Superiors (Article 28)’, in *Triffterer O.* (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., C.H.Beck.hart.Nomos., München, 2008, 798.

¹² Compare *O’Keefe R.*, *International Criminal Law*, Oxford University Press, Oxford, 2015, 201-202.

Notions of superior responsibility in the legal literature are used via the interchangeable terms.

III. Command Responsibility or Superior Responsibility?

There are two titles for superior responsibility in the international law – “*command responsibility*” and “*superior responsibility*”. Doctrine was initially directed towards the justification of criminal responsibility for only military commanders and, therefore, the title – “*command responsibility*” is the result of the above approach. Later, the concept included in itself non-military, civilian persons as well, thereafter the concept has been referred to as “*superior responsibility*” as well.¹³ In the international criminal law literature, both titles are used as interchangeable terms.¹⁴ The *Rome Statute* refers to the responsibility of the superior’s in the Article 28, as the “*superior responsibility*”, based on its contents, to be discussed later in the article.

The basis for the modified notion for the superior responsibility, as mentioned above, derives from the case law of *ad hoc* tribunals.

IV. Superior Responsibility in *ad hoc* Tribunals

Proceeding from the objective of the work, which is to analyze the modified notion of superior responsibility according to the *Rome Statute*, the requirements defined by *ad hoc* tribunals case law for the failure to act by commander, shall be noted.¹⁵

For the concept of superior responsibility *ad hoc* tribunals defined several requirements determining the responsibility; these requirements are:

- the existence of a superior-subordinate relationship;
- the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof;
- the superior knew or had reason to know¹⁶ that the criminal act was about to be or had been committed.¹⁷

¹³ In relation to the terms – *command responsibility* and *superior responsibility*, see Weigend T., ‘Superior Responsibility: Complicity, Omission or Over-Extension of the Criminal Law?’ in Burghardt C., Triffterer O., Vogel J. (ed.), *The Review Conference and the Future of the International Criminal Court*, Kluwer Law International, The Hague, 2010, 67; Also, see Meloni C., *Command Responsibility in International Criminal Law*, T.M.C. Asser Press, The Hague, 2010, 1-5.

¹⁴ Sliedregt E., *Article 28 of the ICC Statute: Mode of Liability and/or Separate Offence?* *New Criminal Law Review*, Vol. XII, 2009, 420, footnote 1.

¹⁵ On the doctrine on superior responsibility in *ad hoc* tribunals, see Dvalidze I., ‘JOINT CRIMINAL ENTERPRISE in International Criminal Law’, in Nachkebia G. (ed.), *Issues of Criminalization of Modern Aspects of Organized Crime and Responsibility in the Georgian Criminal Law*, Tbilisi, 119-123 (in Georgian).

¹⁶ Two necessary requirements of *mens rea* are in place: *knew* and *had reason to know*. Above mentioned elements will be discussed in more detail later in the article.

¹⁷ *Prosecutor v. Boskoski/Tarculovski*, Judgment (ICTY-IT-04-82-T), Trial Chamber II, 10 July 2008, §406; *Prosecutor v. Halilovic*, Judgment (ICTY-IT-01-48-T), Trial Chamber I, 16 November 2005, §56; *Prosecutor v. Limaj and others*, Judgment (ICTY-IT-03-66-T), Trial Chamber II, 30 November 2005, §520; *Prosecutor v. Kajelijeli*, Judgment (ICTR-98-44A-T), Trial Chamber II, 1 December 2003, §772; *Prosecutor v. Aleksovski*, Judgment (ICTY-IT-95-14/1-T), Trial Chamber, 25 June 1999, §69; *Prosecutor v. Delalic and others*, Judgment (ICTY-IT-96-21-T), Trial Chamber, 16 November 1998, §346.

Moreover, the fourth necessary element was defined. This element was created based on the contents of the doctrine on superior responsibility – the international crime shall be committed by the subordinate of accused person.¹⁸

Article 28 of the *Rome Statute* expands all four elements in the modified manner.

V. Notion of Superior Responsibility According to the Rome Statute

Doctrine on superior responsibility is defined as follows under the Article 28 of the *Rome Statute*:

“Article 28: Responsibility of commanders and other superiors 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) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

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

¹⁸ Above mentioned fourth, additional element was defined by ICTY for *Prosecutor v. Oric* case. See *Prosecutor v. Oric*, Judgement (ICTY-IT-03-68-T), Trial Chamber II, 30 June 2006, §294, 295-306.

The contents and structure of the above provided Article is somewhat difficult to understand¹⁹ and complex,²⁰ which, based on the history of *Rome Statute*, must not be surprising. Article 28, as well as the overall Statute is the result of negotiations held between the legal advisers representing various legal systems; therefore, it is also referred to as a good example of compromise for achieving desired outcome under the condition of differing positions.²¹

1. Material Elements of Superior Responsibility

In order to determine the material elements for establishing responsibility under the superior responsibility doctrine, we, first of all, have to define – who could be *military commander-superior* or *civilian superior* and what does *effective control* notion imply, including existence of *effective command and control* over the subordinated forces, or *effective authority and control*; How necessary is it to identify causation between the committed crime and failure to implement control properly over the subordinates? All these elements are important in various contexts, depending on whether the *military commander-superior* or *civilian superior* is demonstrating omission, for the identification of the key material element for the superior responsibility main material element – omission.

1.1. Grounds for Establishing Responsibility of Military Commander-Superior and Civilian Superior

According to the Article 28 of the *Rome Statute*, the special subject of the doctrine on superior responsibility, who could be imposed the criminal responsibility, is *military commander-superior*, *person effectively acting as a military commander* and *civilian superior*. We shall discuss each of them separately.

1.1.1. Military Commander-Superior

ICC Pre-Trial Chamber for Prosecutor v. Bemba case, defined that *military commander-superior* is the person, who formally or lawfully fulfills functions of military commander, i.e. *de jure* commander, despite his/her official rank. This may include the commander, who, on the one hand, occupies high position in the military forces and large military unit is subordinated to him/her, or on the other hand, this could be person, who does not occupy high position and only few soldiers are his/her subordinates.²² Military commander also considers the head, which “does not exclusively fulfill the functions of commander”. This is a case, when head of the state is the commander-in-chief of the military forces (*de jure* commander) and despite the above, does not fulfill military functions

¹⁹ Compare *Weigend T.*, ‘Superior Responsibility: Complicity, Omission or Over-Extension of the Criminal Law?’ in *Burghardt C., Triffterer O., Vogel J.* (ed.), *The Review Conference and the Future of the International Criminal Court*, Kluwer Law International, The Hague, 2010, 71.

²⁰ Compare *Sliedregt E.*, *Individual Criminal Responsibility in International Law*, Oxford University Press, Oxford, 2012, 199.

²¹ Compare *Mettraux G.*, *The Law of Command Responsibility*, Cambridge University Press, Cambridge, 2009, 23.

²² *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §408.

assigned to him/her “exclusively” (so called. *quasi de facto* commander). In this case, he/she will be responsible for the actions carried out by subordinates.²³

In the ICC’s current practice, in addition to *Prosecutor v. Bemba* case, is also interesting *Prosecutor v. Ntaganda* case, relating to the situation in the *Democratic Republic of the Congo*. In this case, charges include the responsibility for crimes committed by subordinates, with reference to the responsibility of *military commander-superior* [Article 28(a)].²⁴

1.1.2. Person Effectively Acting as a Military Commander

Person effectively acting as a military commander implies the “commander”, who “has not been elected under the law”;²⁵ Accordingly, the person is not legally responsible to fulfill “function of military commander”,²⁶ or “has been illegally elected under the law”.²⁷ He/she implements actions *de facto*, for the implementation of effective control over the group.²⁸

In case of criminal responsibility of *Person effectively acting as a military commander*, same as “*military-like commanders*”²⁹, it must be proved that he/she could implement *effective command and control*, or *effective authority and control* in relation to the subordinated forces.³⁰

1.1.3. Civilian Superior. Difference Between the Military and Civil Superiors

According to the Article 28(b) of *Rome Statute*, *civilian superior* is a person, who does not satisfy requirements of Article 28(a), implying that paragraph (b) of Article 28 is the “subsidiary element” of superior notion considered under paragraph (a), Article 28.³¹

The two essential differences between the *military commander-superior* and *civilian superior* are the following: differing mental elements and additional (ii) sub-paragraph of Article 28(b).³²

Article 28 of *Rome Statute* names implementation of *effective authority and control* as the common necessary requirement for both types of superiors. However, according to the additional (ii) sub-paragraph of Article 28(b), crime shall cover such activities, “that were within the effective responsibility and control of the superior”. Proving of the latter element – *effective responsibility and*

²³ Ibid, footnote 522.

²⁴ *Prosecutor v. Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/04-02/06), Pre-Trial Chamber II, 9 June 2014, §164-175.

²⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §409.

²⁶ Compare *Schabas W.*, *The International Criminal Court: A Commentary on the Rome Statute*, O Press, Oxford, 2010, 459.

²⁷ Compare *Mettraux G.*, *The Law of Command Responsibility*, Cambridge University Press, Cambridge, 2009, 28.

²⁸ Here ICC Pre-Trial Chamber for *Prosecutor v. Jean-Pierre Bemba Gombo* case, provides as an example the superiors, who have authority to implement control over the forces subordinated to the state (police). See *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §410.

²⁹ Ibid.

³⁰ *Mettraux G.*, *The Law of Command Responsibility*, Cambridge University Press, Cambridge, 2009, 28.

³¹ Compare *Meloni C.*, *Command Responsibility in International Criminal Law*, T.M.C. Asser Press, The Hague, 2010, 144.

³² Compare *Schabas W.*, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, 460; The first differing sign will be discussed in detail below.

control – is somewhat problematic, more so, as the case law of *ad hoc* tribunals does not include any provisions regarding this issue.³³ Such a provision is not also included in the Article 28(a).

One of the main problems is the following – what is the relationship between the superior, approved under non-military context and his subordinate, based on the complexity of proving the requirement for the *effective control* under the civilian context.³⁴

Both above-mentioned cases shall be evaluated based on the individual case, status, position of civilian superior.

Superiors mentioned in the Article 28 of *Rome Statute*, to state it simply, can be political leaders, heads of states, members of the government or other official persons, as well as civilian persons from the private sector, business, occupying high positions and have high authority and control in the situations, where the legally protected interests under the international criminal law are under danger.³⁵

In this regard, the case *Prosecutor v. Nahimana and others*, reviewed by *ICTR* is noteworthy. *Nahimana* was professor of history and director of *Rwanda Information office – ORINFOR*. *Nahimana* and other accused persons, in addition to other accusations, were tried for commission of genocide and crimes against humanity, with the indication to the superior responsibility. In particular, *Nahimana* was superior to the personnel of private radio, who had not prevented and repressed the criminal addresses.³⁶

It can be stated that Article 28(b) becomes effective, when the specific case does not satisfy the requirements of the Article 28(a). If the requirements, set for the *civilian superior* under the *Rome Statute* are not proved, superior can be punished for the co-participation (accessorial liability) in the crime.

The element of *effective control* is to be discusses, proving of which represents the necessary condition for the superior responsibility.

1.2. Existence of Effective Command and Authority in Relation to the Subordinated Forces

According to the doctrine on superior responsibility, not all the superiors are responsible for omission, non-implementation of measures for the prevention of crime, but only those superiors, who occupied special position for the protection of legal interests protected under the *Rome Statute*.³⁷

Article 28 of *Rome Statute* requires that the military forces are under *de jure effective command and control of military commander-superior* and under the *effective authority and control of de facto military commander-superior*, or *non-military superior*.³⁸

³³ Compare *Ibid*.

³⁴ Compare *Meloni C.*, *Command Responsibility in International Criminal Law*, T.M.C. Asser Press, The Hague, 2010, 159.

³⁵ *Ibid*, 160.

³⁶ *Higgins G., Evans J.*, ‘*Nahimana and others*’, in *Cassese A.* (ed.), *The Oxford Companion to International Justice*, Oxford University Press, Oxford, 2009, 833-839; In detail, see *Prosecutor v. Nahimana and others*, Judgment (ICTR-99-52-A), Appeal Chamber, 28 November 2007.

³⁷ Compare *Kiss A.*, ‘*Command Responsibility under Article 28 of the Rome Statute*’, in *Stahn G.* (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, 612.

³⁸ *Schabas W.*, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, 460.

ICC Pre-Trial Chamber for the *Prosecutor v. Bemba* case noted that there is no essential, substantive difference between the *effective command* and *effective authority*.³⁹ According to the position of the Chamber, “command” means influence, especially within the military forces and “authority” means possibility to issue the order. However, “or” construction, present in the article, forces the Chamber, despite the common contents, to make differing interpretation for the *effective command* and *effective authority*.⁴⁰

It is necessary to review the mentioned above provision based on the structure of Article 28, *Rome Statute*.

1.3. Effective Control

We shall separate notion of *effective control* from the above mentioned material elements of the concept of superior responsibility. This is the key element for the prosecutor – did the commander have opportunity to implement *effective control* over subordinates? The court defines effective control as *de jure* as well as *de facto* hierarchical relationships between the superior and his/her subordinates.⁴¹

Effective control shall be defined as the material possibility or authority to prevent commission of crime and possibility to implement repressive measures.⁴² According to the context of Article 28, *effective control*, in addition to the preventive and repressive measures of crime commission, also refers to the opportunity to “submit the matter to the competent authorities for investigation and prosecution”.⁴³ However, above mentioned does not mean that any low level *control*, even if it later becomes *essential*, has to be assigned to the above mentioned situation.⁴⁴

It is important to define the signs of *effective control* necessary for the superior responsibility under the *ICC*, when are such satisfactory. These signs are: the official position of the suspect; his power to give orders; the capacity to ensure compliance with the orders issued; his position within the military structure and the actual tasks that he carried out; the capacity to order forces or units under his command; the capacity to re-subordinate units or make changes to command structure; the power to promote, replace, remove or discipline any member of the forces; the authority to send forces where hostilities take place and withdraw them at any given moment.⁴⁵

³⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §412.

⁴⁰ *Ibid*, §413.

⁴¹ *Ibid*, §414. Pre-Trial Chamber in the process of definition of *effective control*, is based on *ICTR* judgments: *Prosecutor v. Bagosora and others*, Judgment and Sentence (ICTR-98-41-T) Trial Chamber, 18 December 2008, §2012; *Prosecutor v. Kajelijeli*, Judgment (ICTR-98-44A-A), Appeal Chamber, 23 May 2005, §84; *Prosecutor v. Kajelijeli*, Judgment and Sentence (ICTR-98-44A-T), Trial Chamber, 1 December 2003, §773.

⁴² *Ibid*, §415. Pre-Trial Chamber is based on *ICTY* and *ICTR* judgments: *Prosecutor v. Bagilishema*, Judgment (ICTR-95-1A-A), Appeal Chamber, 3 July 2002, §51; *Prosecutor v. Delalic and others*, Judgment (ICTY-96-21-A), Appeal Chamber, 20 February 2001, §256; *Prosecutor v. Musema*, Judgment (ICTR-96-13-A), Appeal Chamber, 27 January 2000, §135.

⁴³ *Ibid*. Pre-Trial Chamber is based on *ICTY* judgments: *Prosecutor v. Hadzihasanovic and Kubura*, Judgment (ICTY-IT-01-47-T), Trial Chamber, 15 March 2006, §80, 795; *Prosecutor v. Kordic and Cerkez*, Judgment (ICTY-IT-95-14/2-T), Trial Chamber, 26 February 2001, §412-413.

⁴⁴ Compare *Ibid*.

⁴⁵ *Ibid*, §417. Pre-Trial Chamber is based on *ICTY* judgments.

Several signs, required for the satisfaction of existence of *effective control* are similar to the field of perpetration responsibility; however, here it is important to have element of *effective control* as well as other grounds for establishing criminal responsibility in the context of *effective control*.

Next important issue is – at which stage shall the superior have possibility for the implementation of *effective control* over his subordinates.

1.4. Effective Control and Criminal Conduct

Period of existence of *effective control* is essential for the individual responsibility of the superior. In particular, according to the case law of superior responsibility doctrine, only showing that the person had possibility for the *effective control* is not sufficient without definition of time frame required for the enforcement of such control.

International criminal law acknowledges two positions in relation to the stage at which the existence of *effective control* is required: first – is the position of *ad hoc* tribunals, according to which, *effective control* must have existed at the time of the commission of the crime;⁴⁶ second – is the different position, which existed among the minority judges of *ICTY*⁴⁷ and was shared by the Sierra Leone's *hybrid* tribunal (hereinafter referred to as– *SCSL*).⁴⁸ Namely, “superior must have had *effective control* over the perpetrator at the time at which the superior is said to have failed to exercise his powers to prevent and repress” the commission of crime, to implement adequate measures.⁴⁹

With the consideration of the above mentioned, *ICC*, based on the Article 28(a) of *Rome Statute* contents, is of the view that possibility for implementation of *effective control* from the side of the accused person, as minimum, shall exist at the moment when the crimes were about to be committed (prior to the commission of specific crime).⁵⁰ Above mentioned means that it is not obligatory to have *effective control* at the moment of the commission of a crime. This position was expressed by the Pre-Trial Chamber for the *Prosecutor v. Bemba* case based on the contents of Article 28(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”. The last sentence shall be underlined – “as a result of his or her failure to exercise control properly over such forces”. According to the court, contents of the Article “failure to exercise control properly“ is indicating that commander was already implementing control before the commission of specific crime.⁵¹

⁴⁶ Ibid, §418. Pre-Trial Chamber is based on *ICTY* and *ICTR* judgments: *Prosecutor v. Bagosora and others*, Judgment and Sentence (ICTR-98-41-T), Trial Chamber, 18 December 2008, §2012; *Prosecutor v. Halilovic*, Judgment (ICTY-IT-01-48-A), Appeal Chamber, 16 October 2007, §59.

⁴⁷ Ibid. In detail, see *Prosecutor v. Oric*, Judgment (ICTY-IT-03-68-A) Appeal Chamber, 3 July 2008, §65-85.

⁴⁸ Ibid. In detail, see *Prosecutor v. Sesay and others*, Judgment (SCSL-04-15-T), Trial Chamber, 2 March 2009, §299.

⁴⁹ Ibid, §418.

⁵⁰ Ibid, §419.

⁵¹ Ibid. In detail, see *Kiss A.*, ‘Command Responsibility under Article 28 of the Rome Statute’, in *Stahn G.* (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, 618-622.

1.5. Existence of Causality Between the Crime and Failure to Exercise Control Properly over the Subordinates

According to the Article 28 of *Rome Statute*, superior will be responsible for the committed crime, if it was “result” of his failure to exercise control properly over the subordinates. The above can be considered as a new causal requirement.⁵²

It must be noted that case law of *ad hoc* tribunals did not define the need to prove the causal element for the superior responsibility doctrine, as the *sui generis* form of responsibility.⁵³ Accordingly, prosecutor did not have to prove that crime committed by the subordinates was the result of failure to exercise control properly.⁵⁴

It is necessary to separate *failure to exercise control properly* context in relation to the element of *effective control*. According to ICC, *effective control* element shall precede element of *exercise control properly*, as without demonstration of the first the existence of the second is impossible.⁵⁵ Accordingly, *failure to exercise control properly* by the superior within the Article 28(a) is possible only after the existence of *effective control* over his/her subordinates is proved – case considered under the Article 28(a)(ii).⁵⁶

Need for the causal relationship between the crime and *failure to exercise control properly* is directly proceeding from the notion of superior according to the Statute, namely, based on the construction “as a result of” from the Article 28(a),⁵⁷ as the independent material element composing the Article.⁵⁸

Proving of causality does not cover the failure to implement all three necessary obligations defined under the Article 28(a)(ii) of *Rome Statute*, namely: *the duty to prevent crimes, the duty to repress crimes* and *the duty to submit the matter to the competent authorities for investigation and prosecution*. Proving the element of causation is possible only for the first element of *prevention of the crime*, as remaining two elements are in place in the process of or after the commission of crime.⁵⁹ According to Pre-Trial Chamber, proving the above is illogical.⁶⁰

In order for a *military commander-superior* or *person effectively acting as a military commander* be criminally responsible, prosecution office shall prove, whether his failure to implement

⁵² Compare *Cryer R.*, *Prosecuting International Crimes, Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge, 2005, 323; *Mettraux G.*, *The Law of Command Responsibility*, Cambridge University Press, Cambridge, 2009, 33.

⁵³ *Prosecutor v. Hadzihasanovic and Kubura*, Judgment (ICTY-IT-01-47-A), Appeal Chamber, 22 April 2008, §39; *Prosecutor v. Halilovic*, Judgment (ICTY-IT-01-48-T), Trial Chamber, 16 November 2005, §78.

⁵⁴ *Schabas W.*, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, 461.

⁵⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §422.

⁵⁶ *Ibid.*, §421-422.

⁵⁷ *Ibid.*, §423.

⁵⁸ *Triffier O.*, *Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?* *Leiden Journal of International Law*, Vol. XV, 2002, 197-198.

⁵⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §424.

⁶⁰ *Ibid.* On the differing position, see *O’Keefe R.*, *International Criminal Law*, Oxford University Press, Oxford, 2015, 205.

the obligation to prevent the crime increased the risk of committing the crime by subordinates,⁶¹ whether his omission increased the danger for a risk.⁶²

2. Mental Elements of Superior Responsibility

After the element of omission, the “exclusive” establishing ground for criminal responsibility of superior responsibility doctrine is its mental element.

Underlining the fact that *Rome Statute* does not recognize principle of *strict liability*, imposing criminal responsibility for any crime depends on the mental element of relevant mode of responsibility.⁶³ Only the superior is responsible for the crimes committed by his/her subordinates if he/she:

- a) *knew*;
- b) *should have known; had reason to know*;
- g) *consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.*

Article 30 of *Rome Statute* defines three necessary mental element requirements in relation to any crime: 1) element of *unless otherwise provided*; 2) intent; and 3) knowledge.⁶⁴ Mental elements of superior responsibility doctrine, discussed below, shall be defined within the element of *unless otherwise provided*,⁶⁵ which by its contents is not covered under the intent and knowledge. Mental element standard under the Article 28 of *Rome Statute*, is evidently lower, compared with the general approach considered for Article 30 (intent and knowledge).⁶⁶

2.1. Knowledge

Mental element of *knew* is mandatory for the responsibility of *military commander-superior* as well as *civilian superior*. Superior shall have full information about what are his/her subordinates

⁶¹ Ibid, §426.

⁶² Ibid, §425. On causal relationship, see *Kiss A.*, ‘Command Responsibility under Article 28 of the Rome Statute’, in *Stahn G.* (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, 634-638.

⁶³ Compare *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §427.

⁶⁴ Article 30 of the *Rome Statute*, see footnote 4.

⁶⁵ According to the contents of the element – *Unless otherwise provided* – objective elements of the crime, according to the Article 30(2)(3) of the *Rome Statute*, where ICC considers *conduct, consequence and contextual elements*, are committed with the *intent and knowledge*, if not otherwise provided under the *Rome Statute* and *Elements of Crime* for the specific crime. *Recklessness* and *negligence* could be covered within the framework of this element. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §353-354; Also, see *Schabas W.*, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, 474-475; In relation to the element of *Unless otherwise provided*, see *Werle G., Jessberger F.*, *Unless Otherwise Provided: Article 30 of the ICC and the Mental Elements of Crimes under International Criminal Law*, *Journal of International Criminal Justice*, Vol. V, 2005, 35-55; On the objective (material) and subjective (mental) elements of the crime, see *Turava M.*, *Fundamentals of International Criminal Law*, Tbilisi, 2015, 163-171 (in Georgian).

⁶⁶ Compare *Werle G., Jessberger F.*, *Principles of International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2014, 229, §595, 599.

carrying out or do they intend to commit the crimes considered under the Statute, and, despite such information, superior does not implement necessary and reasonable measures in order to prevent or repress the results. According to the case law of ICC and *ad hoc* tribunals, element of *knew* shall not be “presumed”,⁶⁷ but must be drawn from the direct and detailed evidences, such as: number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts.⁶⁸

2.2. Should Have Known

Mental element of *should have known* is considered only for the responsibility of *military commander-superior*, which makes the process of proving the elements for establishing criminal responsibility easier for the prosecution.⁶⁹ *Should have known* standard requires to prove, whether the superior had possibility to know about the commission of crime considered under the Statute.

ICC Pre-Trial Chamber rightly notes for the *Prosecutor v. Bemba* case, that *should have known* mental element standard contains the signs of *negligence*.⁷⁰

2.2.1. Negligence

Negligence is the mental element conditioning the lowest individual responsibility. It can be stated that it plays the role of additional, excluding mental element.⁷¹ If the higher mental element standard is excluded, such as, with the exception of intent, the *recklessness*, then the above standard can be applied.

We can distinguish *culpa levis* and *culpa gravis negligence*. In the event of first one, the person is not aware of the “risk” that could be caused by the commission of crime. As for the second one, unlike the *recklessness*, it is mental element of lower level; person is convinced that the heavy criminal outcome will not happen based on the measures, he has implemented or is going to implement.⁷²

⁶⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §430; *Prosecutor v. Delic*, Judgment (ICTY-IT-04-83-T), Trial Chamber, 15 September 2008, §64.

⁶⁸ *Ibid*, §431; *Prosecutor v. Bagosora and others*, Judgment and Sentence (ICTR-98-41-T), Trial Chamber, 18 December 2008, §2014; *Prosecutor v. Oric*, Judgment (ICTY-IT-03-68-A), Appeal Chamber, 3 July 2008, §319; *Prosecutor v. Hadzihasanovic and Kubura*, Judgment (ICTY-IT-01-47-T), Trial Chamber, 15 March 2006, §94; *Prosecutor v. Delalic and others*, Judgment (ICTY-IT-96-21-T), Trial Chamber, 16 November 1998, §386.

⁶⁹ Compare *Mettraux G.*, *The Law of Command Responsibility*, Cambridge University Press, Cambridge, 2009, 31.

⁷⁰ Compare *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §429.

⁷¹ Compare *Gargani A.*, ‘Negligence’, in *Cassese A.* (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, 433.

⁷² About *negligence*, see *Gargani A.*, ‘Negligence’, in *Cassese A.* (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, 433-434.

The standard of *should have known*, based on the contents of Article 28 of *Rome Statute*, considers *culpa gravis negligence*. In particular, *should have known* standard implies commander's *negligence* for the received information on the illegal actions implemented by his subordinates.⁷³

Element of *should have known* requires from the superior the "active obligation", development of required measures for provision of information on the actions of his subordinates. Statute "authors" desired to set stricter approach for *military commander-superiors* and *persons effectively acting as military commanders*, compared with the approach defined for *other superiors* considered under the Article 28(b). Lower mental element standard was decided based on the nature of responsibility imposed for the above-mentioned category superiors.⁷⁴

2.2.2. Should Have Known

Standard of *Should have known*, defined under the Article 28(a) of *Rome Statute* by ICC for the superior responsibility differs from standard of *had reason to know*, defined for the same mode of responsibility by *ad hoc* tribunals and *SCSL*,⁷⁵ namely in relation to the mental element of *negligence*.⁷⁶

Mental element standard – *had reason to know* – fluctuates between *dolus eventualis* (or *recklessness*) and *negligence*, as for the mental element standard *Should have known*, it implies more the form of *negligence*.⁷⁷ Despite the mentioned difference, ICC Pre-Trial Chamber for the *Prosecutor v. Bemba* case notes, that the mental element standard defined by the case law of *ad hoc* and *SCSL* tribunals, could be useful for *Should have known* element as well.⁷⁸ However, in case of *dolus eventualis*, according to the ICC's case law, it is expedient to at first check the modes of responsibility considered under the Article 25⁷⁹ and then to focus on the Article 28.

⁷³ Compare *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §432.

⁷⁴ *Ibid*, §433.

⁷⁵ *Ibid*, §434.

⁷⁶ ICTY Appeal Chamber for *Prosecutor v. Blaskic* case was based on the formulation presented by ICTR Appeal Chamber for *Prosecutor v. Bagilishema* case regarding the following – there is no element of *negligence* existing in the context of superior responsibility. Its contents would cause differing views in the practice of tribunals. See *Prosecutor v. Blaskic*, Judgment (ICTY-IT-95-14-A), Appeal Chamber, 29 July 2004, §63; *Prosecutor v. Bagilishema*, Judgment (ICTR-95-1A-A), Appeal Chamber, 3 July 2002, §34-36; Also, see *Schabas W.*, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, 463; *O'Keefe R.*, *International Criminal Law*, Oxford University Press, Oxford, 2015, 205-206.

⁷⁷ On differentiating signs, see *Meloni C.*, *Command Responsibility in International Criminal Law*, T.M.C. Asser Press, The Hague, 2010, 183-186.

⁷⁸ In detail, see *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §434.

⁷⁹ Dgebuaдзе G., 'Perpetration in International Criminal Law', in *Turava M.* (ed.), *Criminal Law Science in the Process of European Development*, Tbilisi, 2013, 325-354 (in Georgian); *Ambos K.*, A Workshop, a Symposium and the *Katanga* Trial Judgment of 7 March 2014, *Journal of International Criminal Justice*, Vol. II, 2014, 219-229; *Vest H.*, Problems of Participation — Unitarian, Differentiated Approach, or Something Else?, *Journal of International Criminal Justice*, Vol. II, 2014, 295-309; *Ohlin J.*, *Sliedregt E.*, *Weigend T.*, Assessing the Control-Theory, *Leiden Journal of International Law*, Vol. XXVI, 2013, 725-746.

2.2.3. Light Mental Element for the Military Superior's Responsibility

Accordingly, Article 28(a) of the *Rome Statute* defines responsibility for a *military commander-superior* or *person effectively acting as a military commander*, if they based on the circumstances in place for the time *knew* or *should have known*, that their subordinated forces were committing or intended to commit crimes considered under the *Rome Statute*,⁸⁰ via the application of two mental elements: *knew*, which implies “active knowledge” and *should have known* element, which implies *negligence*.⁸¹ This is a lower element compared with the one considered for the *civilian superior*.

2.3. Consciously Disregarded Information

According to the Article 28(b)(i) of the *Rome Statute*, for the *civilian superior* it must be demonstrated that “the superior either knew, or consciously disregarded information, which clearly indicated, that the subordinates were committing or about to commit such crimes”.

Mentioned criterion is more “demanding”⁸² for *military commander-superior*, compared with the mental element mentioned above. According to the mental element of Article 28(b)(i), information shall “clearly” contain note on the commission of crime.⁸³ ICC sets higher mental element for the *civilian superior*.⁸⁴ Namely, unlike the *negligence* standard set for the *military commander-superior*, the standard of *recklessness* or *dolus eventualis* is valid for the *civilian superior*. *Schabas* considered the construction provided in the Article 28(a)(i) – “consciously disregarded information” as the form of *recklessness*,⁸⁵ unlike the mental element considered for the *military commander-superiors*, which at some level includes the form of *negligence*. In this case *Schabas* relies on the mental element of *ad hoc* tribunals – *had reason to know*, in which superior had to have a reason to know about criminal risk, intention of his subordinates to commit international crime, about the process of committing the crime or about already committed crime. Mentioned information about the crime that could be committed by his subordinates must be available for the superior.⁸⁶

⁸⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §428.

⁸¹ *Ibid*, §429.

⁸² Compare *Schabas W.*, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, 463.

⁸³ Compare *Kiss A.*, ‘Command Responsibility under Article 28 of the Rome Statute’, in *Stahn G.* (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, 647.

⁸⁴ Compare *Cryer R., Friman H., Robinson D., Wilmschurst E.*, *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge University Press, Cambridge, 2010, 394; Also, see *Meloni C.*, *Command Responsibility in International Criminal Law*, T.M.C. Asser Press, The Hague, 2010, 186.

⁸⁵ *Schabas W.*, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, 463; Also, see *Meloni C.*, *Command Responsibility in International Criminal Law*, T.M.C. Asser Press, The Hague, 2010, 184-185; *Werle G., Jessberger F.*, *Principles of International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2014, 229, §595, 599.

⁸⁶ *Ibid*. 463; Also, see *Prosecutor v. Milutinovic and others*, Judgment (ICTY-IT-05-87-T), Trial Chamber, 26 February 2009, Vol. 1 of 4, §120; *Prosecutor v. Strugar*, Judgment (ICTY-IT-01-42-A), Appeal Chamber, 17 July 2008, §298, 304; *Prosecutor v. Blaskic*, Judgment (ICTY-IT-95-14-A), Appeal Chamber, 29 July 2004, §62.

2.3.1. Recklessness

For the *civilian superiors*, *Schabas* thoroughly considers, the mental element of *recklessness*, as the exceptional element of the Article 30, *Rome Statute*.⁸⁷

The notion of *recklessness* is not directly defined by the international criminal courts statutes and case law. According to the simple formulation, the term shall be defined as person's inattentive attitude towards the "risk" and possible outcomes;⁸⁸ in other words, when the anticipated result is perceived by the offender but neglected.⁸⁹ This is a main difference between the *recklessness* and *negligence*, when person *should have known* about the "risk" conditioned by the realization of material elements.⁹⁰

The Article 28(a)(i) of *Rome Statute*, "consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes", also implies inattentive, reckless attitude of the person ("consciously disregarded information which clearly indicated") towards the "risk" and possible outcomes ("that the subordinates were committing or about to commit such crimes").

2.3.2. Stricter Mental Element for the Civilian Superior's Responsibility

Existence of higher mental element, considered for the *civilian superior*, the same possible to say for material element, is based on specific subordination existing between the *civilian superior* and subordinate, compared with the subordination between the *military commander-superior* and his/her subordinate. The latter is more structured; there is a system for strict punishment in place, requiring possibility for the strict control over the subordinates. Based on the fact that there is no such system in case of *civilian superior*, *Rome Statute* exercises "stronger control" over the *civilian superior*.⁹¹

VI. Failure to Fulfil the Duties by the Superior

There are three duties to be fulfilled by the superior to be distinguished, considered under the Article 28(a)(ii) and (iii), such duties are: implementation of *preventive*, *repressive* and *necessary and reasonable measures*.

1. Preventive Duty

Failure to fulfil the duty to *prevent* implies the case, when crime has not been committed yet, and the superior, who *knew* or *should have known* about the anticipated threat, is not implementing

⁸⁷ Compare *Ibid*.

⁸⁸ Compare *Martino A.*, 'Recklessness', in *Cassese A.* (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, 479. About the notion of *recklessness*, see *Ibid*, 479-482.

⁸⁹ Compare *Meloni C.*, *Command Responsibility in International Criminal Law*, T.M.C. Asser Press, The Hague, 2010, 185, footnote 226.

⁹⁰ Compare *Ibid*.

⁹¹ Compare *Kiss A.*, 'Command Responsibility under Article 28 of the Rome Statute', in *Stahn G.* (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, 613.

preventive measures.⁹² For example, superior shall make sure that subordinates are adequately trained with the international humanitarian law; how the military actions were carried out in accordance with international law; is there sufficient discipline in order to *prevent* the commission of atrocities by the troops under the superior's command and etc.⁹³

2. Repressive Duty

Failure to fulfil the duty to *repress* implies three factors: on the one hand, a duty to stop ongoing crimes from continuing to be committed;⁹⁴ on the other hand a duty to punish forces after the commission of crimes;⁹⁵ and thirdly, failure to transfer information to the relevant bodies for the commencement of investigation and prosecution.⁹⁶

3. Duty to Take all Necessary and Reasonable Measures

Failure to fulfil the duty to take all *necessary and reasonable measures* refers to *preventive* as well as *repressive* duties, considering that if it was not possible to take all *necessary and reasonable measures*, superior cannot be punished for failure to fulfill *preventive* and *repressive* duties.⁹⁷ This element is subject for the definition by the international humanitarian law. The above considers “material possibility” to take all measures.⁹⁸ Taking *necessary* measures implies taking all measures to be implemented by the superior, which altogether would ensure fulfillment of *preventive* and *repressive* duties. As for the *reasonable* measures, it must be proportionate, namely, it must consider probability for the commission of crime and any circumstances created in the conflict situation.⁹⁹

VII. Conclusion

Following the review of the necessary grounds for establishing individual criminal responsibility of superior by ICC, it is possible to summarize the newest concept of superior responsibility.

1. “Special subject” of superior responsibility

Subject of superior responsibility doctrine could be only the superior – the high level official with the high authority, as well as the lower title or rank superior, controlling several persons.¹⁰⁰ For qualification purposes, it is not necessary to identify the direct offender.¹⁰¹

⁹² *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §437.

⁹³ *Ibid*, §438.

⁹⁴ *Ibid*, §439-441.

⁹⁵ *Ibid*, §439.

⁹⁶ *Ibid*, §442.

⁹⁷ Compare *Werle G., Jessberger F.*, *Principles of International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2014, 231.

⁹⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §443.

⁹⁹ *Kiss A.*, ‘Command Responsibility under Article 28 of the Rome Statute’, in *Stahn G.* (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, 631-632.

¹⁰⁰ Compare *Ibid*, 614-615.

¹⁰¹ Compare *Ibid*, 615.

2. Material and Mental Elements of Omission

Article 28 of the *Rome Statute* contains two material elements of omission: first, this is a general omission – when superior is punished for *failure to exercise control properly*, which resulted in commission of crime; Second – case of special omission, considered under Article 28(a)(ii) and (b)(ii) – when 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*.¹⁰² Attitude of *military commander-superior* as well as *civilian superior* towards the both types of material elements of omission shall be limited with the general mental element of *knowledge*, based on the interpretation of Article 30 (*default rule*).

Superior responsibility doctrine defines new mental element standard in the *Rome Statute*, outside the literal meaning of Article 30. In particular, via the application of *negligence, recklessness* and other mental elements, “*it remains the only means*” for the prosecution in case of commission of crime with no direct intention.

Based on the element of omission, superior responsibility concept punishes omission of superior for failure to exercise control, to take preventive and repressive measures and to submit the matter to the competent authorities. In this way, it differs from *JCE*.

3. Superior Responsibility and *JCE*

Research of superior responsibility doctrine demonstrates that it fundamentally differs from *JCE*.¹⁰³ In wider sense, both of them create the impression of similar modes of responsibility. In particular, similar to the co-perpetration considered under *extended JCE*¹⁰⁴, superior obediently “takes the risk”, that the crime will not be committed. However, the key difference is still in omission and mental element.

In relation to the element of omission – *JCE* requires more “positive act”¹⁰⁵, or contribution to the enterprise, when the omission is sufficient for the superior responsibility. It is necessary for the superior responsibility to have hierarchal, “vertical” relationship among the persons, out of which obligation of one is to implement supervision, surveillance, and for the other person – to commit the crime. Unlike this formula, *JCE* members, specifically, *basic JCE* co-perpetrators, generally depend on one and the same hierarchal level and act in the “horizontal” form. Inside the *JCE*, it is not neces-

¹⁰² Compare *Sliedregt E.*, *Individual Criminal Responsibility in International Law*, Oxford University Press, Oxford, 2012, 199.

¹⁰³ Compare *Ambos K.*, ‘Command Responsibility and *Organisationsherrschaft*: Ways of Attributing International Crimes to the ‘Most Responsible’’, in *Nollkaemper A., Wilt H.* (ed.), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, 138.

¹⁰⁴ According to the *extended JCE* notion, within the common plan, group of people carries out actions not considered under the plan. For the individual responsibility, it must be identified: whether one of the group members contemplated the commission of crime and one of the members of the group, with the knowledge about the crime, voluntarily, obediently “has taken risk”. See *Prosecutor v. Tadic*, Judgement (IT-94-1-A), Appeal Chamber, 15 July 1999, §204, 220, 228; *Prosecutor v. Stakic*, Judgement (ICTY-IT-97-24-T), Trial Chamber, 31 July 2003, §436.

¹⁰⁵ Compare *Ambos K.*, ‘Command Responsibility and *Organisationsherrschaft*: Ways of Attributing International Crimes to the ‘Most Responsible’’, in *Nollkaemper A., Wilt H.* (ed.), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, 139.

sary to show the responsibilities of the superior, position of the political leader. *JCE* concept requires minimal coordination, represented as “the horizontal manifestation of will”, which unites perpetrators. Unlike the concept of superior responsibility, its key weapon is the informal union and simple relationship of co-perpetrators.¹⁰⁶

Essential difference is also felt in the mental elements. In case of *basic JCE*, perpetrator shares the intention of other co-perpetrators, where the common *mens rea* is directed towards the commission of specific crime and overall purpose of enterprise. In case of other categories of *JCE*, especially in the event of *extended JCE*, offenders must have the common purpose considered and must be characterized with the foreseeability element. In the case of superior responsibility, unlike the above mentioned, material element is demonstrated via failure to exercise proper leadership by the superior and accordingly, the element of mental element shall cover non-implementation of leadership, however, not for the crimes committed by subordinates.¹⁰⁷

Despite the discussed differences, the above-mentioned doctrines also have common characteristic features. Due to the above, it is possible to use them simultaneously, when the accused persons occupy certain positions in the hierarchy and there is a hierarchic difference between the perpetrators.¹⁰⁸

Superior responsibility doctrine differs from the forms of principal responsibility.

4. Superior Responsibility and Perpetration

Despite the fact that Article 25(3) defines modes of individual responsibilities, the *Rome Statute* separates the superior responsibility in the Article 28, as the additional, *sui generis* form of individual responsibility.¹⁰⁹ Accordingly, based on its nature, the responsibility shall be lighter in comparison with the perpetration.¹¹⁰ For the qualification of omission, it is important, which article is to be given preference, when there is competition between the articles and it is possible to impose criminal prosecution over the person by means of both articles.

In the process of qualification of specific crime, when there is competition between the perpetration (Article 25(3)(a) of the *Rome Statute*) and superior responsibility (Article 28 of the *Rome Statute*), preference is given to the first one. *ICC Pre-Trial Chamber for the Prosecutor v. Bemba* defined, that imposing criminal responsibility in the international criminal law, based on the superior responsibility doctrine is possible only in case, when there is no reasonable ground that accused person is responsible as the perpetrator of the crime within the framework of Article 25(3)(a).¹¹¹ In par-

¹⁰⁶ Compare *Ibid*, 138-139.

¹⁰⁷ Compare *Ibid*, 139.

¹⁰⁸ Compare *Ibid*. On the differing and common signs, see *Ibid*, 138-142; Also, see *Ambos K.*, Joint Criminal Enterprise and Command Responsibility, 5 *Journal of International Criminal Justice*, 2007, 159-183.

¹⁰⁹ Compare *Schabas W.*, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, 457.

¹¹⁰ Compare *Burghardt B.*, ‘Modes of Participation and their Role in a General Concept of Crimes under International Law’, in *Burghardt C, Triffterer O., Vogel J.*, *The Review Conference and the Future of the ICC*, Kluwer Law International, London, 2010, 90-91.

¹¹¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the Rome Statute (ICC-01/05-01/08), Pre-Trial Chamber III, 3 March 2009, §342.

ticular, when based on the available evidences for the specific case, there is “active perpetration” as well as “passive perpetration” – superior responsibility, the preference is given to the perpetration.¹¹²

It must be noted that for the *Prosecutor v. Bemba* case, prosecution was initially requesting to impose responsibility within the Article 25(3)(a) of the *Rome Statute*; however, later it was replaced by Article 28. Pre-Trial Chamber was reassured that imposing criminal responsibility upon the accused person was impossible within the Article 25(3)(a), in the form of co-perpetration and moved to the form of responsibility envisaged under the Article 28, as the alternative mean.¹¹³

Accordingly, in the process of crime investigation, when based on the obtained “evidences”, prosecutor “doubts” that specific person, might have *essential contribution* to the crime, prosecutor can initially start prosecution in accordance with the doctrine of perpetration. If the *essential contribution* of accused person to the crime is excluded, then in case of existence of *effective control* from the side of offender, criminal prosecution will be continued based on the doctrine of superior responsibility.

In relation to the issue on “competition of modes of individual responsibility”, the ICC’s case – *Prosecutor v. Al Bashir* is also noteworthy – Why did not the prosecution apply concept on superior responsibility?

Actually, application of superior responsibility concept on *Prosecutor v. Al Bashir* was not without basis,¹¹⁴ namely, imposing criminal responsibility upon *Al Bashir*, within the framework of Article 28(b) of the *Rome Statute*, as for the *civilian superior*, “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”.¹¹⁵ In the legal literature this position is supported by the argument that existence of “control” element, which is required by the theory – *perpetrator behind the perpetrator, Täter hinter dem Täter*¹¹⁶, in relation to the rape, is difficult to prove.¹¹⁷ Within the superior responsibility concept, prosecution shall only prove omission of *Al Bashir*, by means of element of his *effective authority and control* over the “organization”. *Al Bashir*’s official position would make this process easier. To prove publicly that rape has taken place

¹¹² Compare *Schabas W.*, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, 458.

¹¹³ Compare *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the Rome Statute (ICC-01/05-01/08), Pre-Trial Chamber III, 3 March 2009, §40-49.

¹¹⁴ *Jessberger F.*, *Geneuss J.*, On the Application of a Theory of Indirect Perpetration in *Al Bashir*, *Journal of International Criminal Justice*, Vol. VI, 2008, 865-866, who consider the superior responsibility for *Prosecutor v. Al Bashir* case, as the most adequate mode of individual responsibility.

¹¹⁵ Article 28(b) of the *Rome Statute*.

¹¹⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges (ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, §496-497. ICC Pre-Trial Chamber quotes *Roxin C.*, *Straftaten im Rahmen organisatorischer Machtapparate*, *Goldammer’s Archiv für Srafrecht*, 1963; English version, see *Roxin C.*, *Crimes as Part of Organized Power Structures*, *Journal of International Criminal Justice*, Vol. IX, 2011, 193-205. Following the above, *Claus Roxin’s* theory was recognized by the Federal Court of Justice of Germany (*Bundesgerichtshof*). In relation to the above, see *Weigend T.*, *Perpetration through an Organization, The Unexpected Career of a German Legal Concept*, *Journal of International Criminal Justice*, Vol. IX, 2011, 94-99; In relation to the critics of the doctrine, see *Ibid*, 99-101.

¹¹⁷ *Giamanco T.*, *The Perpetrator Behind the Perpetrator: A Critical Analysis of the Theory of Prosecution Against Omar Al-Bashir*, *Temple International and Comparative Law Journal*, Vol. XXV, 2011, 239, 242-243.

in *Darfur*, could be used as a good evidence for the fact that he *failed to take all necessary and reasonable measures prevent or repress commission of crime*.¹¹⁸

However, the main argument, which at this stage excludes the application of superior responsibility concept for *Prosecutor v. Al Bashir* case, is the formula adopted at *Prosecutor v. Bemba case* – preference of Article 25(3) of *Rome Statute* over the Article 28.¹¹⁹ Based on the evidences obtained for the case, when there is a grounded suspicion that there was “active commission” as well as superior responsibility in place, the preference is given to the first.¹²⁰ If prosecution was not able to prove the above mode of responsibility for *Prosecutor v. Al Bashir* case, prosecution’s moving to the doctrine on superior responsibility would not be ruled out.¹²¹

5. Superior Responsibility and Accessorial Liability

Despite the fact that superior responsibility and accessorial liability have number of common signs, the first cannot be considered among the modes of criminal responsibility of the latter.¹²² According to the doctrine, imposing responsibility upon the superior for the crime committed by his subordinates is made not as for the accessories, but due to his omission and for inappropriate leadership; on the other hand, accessorial liability considers moral or practical support to the *principal* by the *accessory*,¹²³ namely, *substantial contribution*.¹²⁴

¹¹⁸ Ibid, 234; Also, see Article 28(b)(iii) of the *Rome Statute*.

¹¹⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the *Rome Statute* (ICC-01/05-01/08), Pre-Trial Chamber III, 3 March 2009, §342.

¹²⁰ *Schabas W.*, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, 458.

¹²¹ As for the application of other modes of individual responsibility: *ICC* would not be able to use *JCE*’s doctrine for *Prosecutor v. Lubanga* case, due to its rejection; Concept of co-perpetration, proceeding from the position of *Al Bashir*, due to his participation in the “vertical direction”, would not be productive. Co-perpetration develops criminal responsibility in the “horizontal direction”; As for the individual responsibility for the accessorial liability in the crime, its forms do not contain elements of *control over the commission of crime* – elements of *domination of the act*. Accessory, who is “second level” participant of the crime, does not have possibility for the *control over the crime*, implements not *essential contribution* to the crime, but the *substantial contribution*. This is the key difference between principal and accessorial liability, which was underlined in the *Prosecutor v. Lubanga* case; The same is valid for the form of individual responsibility under the Article 25(3)(d) of the *Rome Statute*, which requires *significant contribution* standard. See *Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges (ICC-01/04-01/10), Pre-Trial Chamber I, 16 December 2011, §283; *Prosecutor v. Germain Katanga*, Judgment Pursuant to Article 74 of the Statute (ICC-01/04-01/07), Trial Chamber II, 7 March 2014, §1620, 1632-1636. As mentioned above, according to the prosecutor’s office, *Al Bashir* had full control over the persons, directly committing the crimes, namely, control over the direct perpetrators. Article 25(3)(d) of the *Rome Statute*, which is considered as the form related to *JCE*, is carrying the residual nature, excluding its application. See *Giamanco T.*, *The Perpetrator Behind the Perpetrator: A Critical Analysis of the Theory of Prosecution Against Omar Al-Bashir*, *Temple International and Comparative Law Journal*, Vol. XXV, 2011, 239, 242-243; *Dgebuadze G.*, *Indirect (Co)Perpetration Doctrine in the International Criminal Law (analysis of the case Prosecutor v. Al Bashir)*, *Justice and law*, 3(34), 2012, 91-101 (in Georgian).

¹²² Compare *Bonafe B.*, ‘Command Responsibility’, in *Cassese A.* (ed.), *The Oxford Companion to International Justice*, Oxford University Press, Oxford, 2009, 270; Also, see *Mettraux G.*, *The Law of Command Responsibility*, Cambridge University Press, Cambridge, 2009, 38. For opposite position, see *Prosecutor v. Halilovic*, Judgment (ICTY-IT-01-48-T), Trial Chamber, 16 November 2005, §43.

¹²³ Compare *Mettraux G.*, *The Law of Command Responsibility*, Cambridge University Press, Cambridge, 2009, 40.

¹²⁴ On accessorial liability standard, see *Olasolo H., Rojo E.*, ‘Forms of Accessorial Liability under Article 25(3)(b) and (c)’, in *Stahn G.* (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, 557-591.

Omission is punishable, as the international law defines the superior's liability, which is demonstrated via the prevention and repression of commission of crime by subordinates. Superior does not share the responsibility together with the subordinate, who committed the crime. Superior is responsible for inappropriate leadership.¹²⁵

It must be noted that the Grand Chamber under the European Court of Human Rights for the *Koronov v. Latvia* case, understood the superior responsibility for non-implementation of measures preventing the crime as “*dereliction of a superior's duty to control*” and not as the responsibility for the actions of others.¹²⁶ Above mentioned position does not correspond to the case law for the superior responsibility, which considers it as the type of first level responsibility.

When the criminal law gives the question to the superior – “what happened?” and receives the response – “I did not know and how would I know, what was happening”, superior responsibility concept is the ideal mean for checking such response (omission).

The above-mentioned notion of superior responsibility is not final. Definition of material and mental grounds for establishing criminal responsibility could change in future, based on the different views in relation to the mentioned circumstances, existing in the practice and theory. The reason for the above is that it contains aspects, which are important and fundamental for the general part of criminal law,¹²⁷ which has also been confirmed by the present work.

¹²⁵ *Prosecutor v. Halilovic*, Judgement (ICTY-IT-01-48-T), Trial Chamber, 16 November 2005, §54; On the differentiating signs for superior responsibility and accessorial liability, see *Mettraux G.*, *The Law of Command Responsibility*, Cambridge University Press, Cambridge, 2009, 37-44.

¹²⁶ *Koronov v. Latvia*, Judgment (ECHR-36376/04), Grand Chamber, 17 May 2010, §156, 211, 213, 223; *O'Keefe R.*, *International Criminal Law*, Oxford University Press, Oxford, 2015, 207.

¹²⁷ Compare *Kiss A.*, ‘Command Responsibility under Article 28 of the Rome Statute’, in *Stahn G.* (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, 648.