ENDING IMPUNITY: BRINGING SUPERIORS OF PRIVATE MILITARY AND SECURITY COMPANY PERSONNEL TO JUSTICE

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Abstract

This article argues that the doctrine of command responsibility, as set out in art 28 of the Rome Statute, should be used to combat the current impunity of private military and security companies (PMSCs). The origins, form, rationales and development of the doctrine are discussed before art 28 is explored in detail. The relationship between PMSCs and command responsibility is then examined with a focus on how art 28 can be applied to the superiors of PMSC personnel from the contracting state or from within the PMSC itself.

I. Introduction

The doctrine of command responsibility is one of the most contentious forms of individual criminal responsibility. The doctrine extends liability to a military commander, or civilian superior, for his or her failure to prevent, repress or report the crimes of his or her subordinates.[1] Article 28 of the 1998 Rome Statute of the International Criminal Court (Rome Statute) is the most recent codification of this doctrine. This article examines how the Rome Statute's formulation of command responsibility can be used to attribute liability to superiors of private military and security companies (PMSCs). These superiors may be the state officials that hire PMSCs, military commanders that work alongside them, or superiors within the PMSCs themselves.[2] PMSCs are not a new phenomena, but their extensive use in the "War on Terror" has raised significant questions about how responsibility can be attributed for any international crimes committed by PMSC personnel.

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1 Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002), art 28 ["Rome Statute"].

2 This article will focus on the superior/ subordinate relationships that may arise if a PMSC is contracted by a state. However, if a PMSC is contracted by a rebel group or a non-governmental organisation, the relevant superiors from that organisation could also potentially be held liable. The assessment of whether the superiors from the rebel group or non-governmental organisation should be held responsible under art 28(a) or (b) will be very similar to the discussion of PMSC superiors in this article.

This article first discusses the origins, form, rationale and development of command responsibility. In order to understand whether the doctrine can be applied to superiors of PMSCs, it is important to first understand the doctrine itself. The requirements for both military commanders and civilian superiors under art 28 are also explored in order to determine how they can be applied to superiors of PMSCs.[3] The second part of this article then discusses the problem presented by PMSCs and considers how command responsibility under art 28 can be used to address this problem. Issues regarding the relationship between PMSCs and command responsibility, the jurisdiction of the International Criminal Court (ICC) and the application of art 28 to superiors of PMSCs are examined. The argument advanced by this article is that command responsibility under art 28 of the Rome Statute can and should be used to combat the impunity surrounding PMSCs.

II. The Doctrine of Command Responsibility

A. Origins of Command Responsibility

While command responsibility was only properly recognised as a doctrine of international criminal law after World War II, some elements of the concept are much older. The idea that a commander is responsible for the actions of his troops dates back at least 2500 years. In what is thought to be the first military manual, Sun Tzu wrote, "when troops flee, are insubordinate, distressed, collapse in disorder or are routed, it is the fault of the general."[4] In 1439 Charles VII d'Orléans issued an ordinance requiring his commanders to bring subordinate offenders to justice. If the commanders did not, the King stipulated that, "the captain shall be deemed responsible for the offence as if he had committed it himself and be punished in the same way as the offender would have been."[5] This early formulation of the doctrine establishes the idea that a commander is not only responsible, but will be punished for offences committed by his or her subordinates.

The roots of the modern form of command responsibility can be found in the Hague Regulations 1907, which require that militia and volunteer corps be "commanded by a person responsible for his subordinates" in order to be classified as belligerents.[6] Today however, the doctrine has progressed beyond the basic concept of the requirement of responsible command. In its

3 The terms "commander" and "civilian superior" will be used throughout this article. Commander means a military commander. Command responsibility includes superior responsibility. Where superior is used by itself, it includes both commanders and civilian superiors.

4 Sun Tzu *The Art of War*, translated by Samuel B Griffith (Clarendon Press, Oxford, 1963) at 125 cited in Chantal Meloni *Command responsibility in international criminal law* (T M C Asser Press, The Hague, 2010) at 3.

5 Major William H Parks "Command Responsibility for War Crimes" (1973) 62 Mil L Rev 1 at 5.

6 Hague Regulations Respecting the Laws and Customs of War on Land (opened for signature 18 October 1907, entered into force 26 January 1910) ["Hague Regulations"], art 1.

current form, a superior can be found individually criminally responsible at international law for his or her subordinates' crimes, which the superior failed to prevent, repress or report.[7]

This modern form of individual criminal responsibility is enshrined in customary international law and, as such, is binding on all states in both international and non-international armed conflicts.[8] A norm of customary international law requires both *opinio juris*, or acceptance of the practice as law, and evidence of general state practice.[9] Jean-Marie Henckaerts and Louise Doswald-Beck concluded the doctrine is a norm of customary international law after careful consideration of the relevant treaties, international instruments, military manuals, national legislation, national case law, other national practice, practice of the United Nations and international case law.[10] The doctrine can be found in many international treaties and instruments, including Additional Protocol I to the Geneva Conventions,[11] the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)[12] and the Rome Statute.[13] Command responsibility is also included in the military manuals of numerous countries.[14] The United Kingdom's manual includes the text of art 28 of the Rome Statute and outlines command responsibility for both military commanders and civilian superiors.[15]

Further, after a thorough examination of the law relating to command responsibility, the ICTY in the case of *Prosecutor v Delalić et al (Čelebići)* declared "the principle of individual criminal responsibility of superiors for failure to prevent the crimes committed by subordinates forms part of customary international law."[16] While it is accepted now that the doctrine is a norm of customary international law, there is some contention about

7 Rome Statute, art 28.

8 Jean-Marie Henckaerts and Lousie Doswald-Beck (ed) *Customary International Humanitarian Law/ International Committee of the Red Cross* (Cambridge University Press, Cambridge, 2005) at 559; see also *Prosecutor v Delalić et al (Judgment)* ICTY Trial Chamber IT-96-21-T, 16 November 1998, [Čelebići] at [343]; *Prosecutor v Hadžihasanović (Judgment)* ICTY Trial Chamber IT-01-47-T, 15 March 2006, at [65].

9 Ian Brownlie *Principles of Public International Law* (4th ed, Clarendon Press, Oxford, 1990) at 4 and 7; for a more detailed discussion of the requirements of customary international see Brownlie at 4-11 and Malcolm N Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2008) at 72-92.

10 Henckaerts and Doswald-Beck, above n 8, at 559.

11 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (opened for signature 8 June 1977, entered into force 7 December 1978) ["Additional Protocol I"], art 86.

12 Statute of the International Criminal Tribunal for the Former Yugoslavia 1993 ["Statute of the ICTY"], art 7(3); Statute of the International Criminal Tribunal for Rwanda 1994 ["Statute of the ICTR"], art 6(3).

13 Rome Statute, art 28.

14 Henckaerts and Doswald-Beck, above n 8, at 3738.

15 United Kingdom Ministry of Defence *The Manual of the Law of Armed Conflict* (Oxford University Press, Oxford, 2010) at [16.36]-[16.37].

16 *Čelebići*, above n 8, at [343].

whether the knowledge standard of art 28(b) reflects the customary international law standard.[17] This article discusses whether art 28(a) and art 28(b) should have different knowledge standards. The acceptance of command responsibility as a norm of customary international law provides some support to this article's argument that the doctrine can be applied to superiors of PMSC personnel.

B. Form of the Doctrine

In its strict sense, command responsibility is liability for a crime of omission. The superior is not vicariously liable for the crimes committed by his or her subordinates, but rather individual criminal responsibility attaches to the superior for the failure to properly supervise and control those subordinates.[18] The superior may be held responsible even though he or she did not participate in the commission of the offence. This was confirmed by the ICTY in *Prosecutor v Halilovic*, where it found that "the commander is responsible for the failure to perform an act required by international law."[19] The United States' Military Tribunal at Nuremberg (Nuremberg Tribunal) ruled that, "criminality does not attach to every individual in [the] chain of command from that fact alone. There must be a personal dereliction."[20] The personal dereliction here is the failure of proper supervision or control.

The wider definition of command responsibility includes a superior's liability for ordering subordinates to commit crimes.[21] The Geneva Conventions require all High Contracting Parties to bring to trial "persons alleged to have committed, or to have ordered to be committed, such grave breaches".[22] The Rome Statute also contains liability for ordering the

17 Greg R Vetter suggests that the civilian knowledge standard in art 28(b) is weaker than the customary international law standard, while Guénaël Mettraux decides it is essentially the same. See Greg R Vetter "Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)" (2000) 25 YJIL 89 at 95; Guénaël Mettraux *The Law of Command Responsibility* (Oxford University Press, Oxford, 2009) at 195, cited in William A Schabas *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, Oxford, 2010) at 463.

18 Alexander Zahar and Göran Sluiter *International Criminal Law: A Critical Introduction* (Oxford University Press, Oxford, 2008) at 259; see also Meloni, above n 4, at 2; Vetter, ibid, at 99; Yoram Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, Cambridge, 2004) at 238.

19 *Prosecutor v Halilović (Judgment)* ICTY Trial Chamber IT-01-48-T, 16 November 2005, [*Halilovic*] at [54].

20 *United States v Wilhelm von Leeb et al (Judgment)* 30 December 1947-28 October 1948, in (1949) XII Law Reports of Trials of War Criminals 1 [*High Command Trial*] at 76.

21 Meloni, above n 4, at 2.

22 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (opened for signature 12 August 1949, entered into force 21 October 1950), art 49; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (opened for signature 12 August 1949, entered into force 21 October 1950), art 50; Geneva Convention III Relative to the Treatment of Prisoners of War (opened for signature 12 August 1949, entered into force

commission of a crime.[23] Article 25(3)(c) of the Rome Statute goes further, allowing for liability when a person "aids, abets or otherwise assists" in the commission of a crime. A superior who orders his or her subordinates to commit international crimes, or who aids or abets in the commission thereof, may be held responsible under these provisions. The Statutes of the ICTR and ICTY also contain this distinction between command responsibility and more direct forms of liability.[24] The ICC has made it clear that liability for command responsibility should only be pursued when more direct liability cannot be established.[25] For example, a superior of PMSC personnel who is found to have ordered the commission of an offence should not also be held responsible for that offence under command responsibility. This article discusses command responsibility in its strict sense of responsibility for a failure of supervision or control.

C. Rationales Behind Command Responsibility

The rationales behind the existence and use of the doctrine of command responsibility include its potential ability to prevent international crimes, the level of control that exists in a superior/ subordinate relationship and the responsibilities that come with that control. While these rationales all apply to the use of the doctrine generally, they provide the foundations for the argument advanced in this article that command responsibility should be applied to superiors of PMSC personnel.

The doctrine of command responsibility is primarily justified for its potential ability to prevent abuses of international criminal law:[26]

> By virtue of the authority vested in them, commanders are qualified to exercise control over troops and the weapons they use; more than anyone else, they can prevent breaches by creating the appropriate frame of mind, ensuring the rational use of means of combat, and by maintaining discipline.

Due to the level of control a superior has in a superior/ subordinate relationship, the superior is best placed to monitor the activities of his or her subordinates. It is because of this close supervision that a superior has the ability to ensure that the requirements of international humanitarian law (IHL) are adhered to. As Major Michael L Smidt describes it, "[c]orrect leadership may be the difference between heroic and evil conduct on the part of soldiers during war."[27]

21 October 1950), art 129; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (opened for signature 12 August 1949, entered into force 21 October 1950), art 146.

23 Rome Statute, art 25(3)(b).

24 Statute of the ICTR, art 6(1); Statute of the ICTY, art 7(1).

25 *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08, 15 June 2009, at [402].

26 *Prosecutor v Hadžihasanović*, above n 8, at [66]; see also Meloni, above n 4, at 27.

27 Major Michael L Smidt "Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Situations" (2000) 164 Mil L Rev 155 at 166.

This special position is particularly clear in relation to commanders within the military. Traditional military structures contain clear lines of communication and require frequent reporting to superiors in the command structure. In this context, the possibility of individual criminal responsibility under the doctrine provides an additional incentive for superiors to pay close attention to the activities of their subordinates and to correct their behaviour where necessary.[28] It also provides a strong incentive to educate subordinates in IHL. Failure to do so could constitute "failure to prevent" under the Rome Statute.

A further rationale behind the existence of the doctrine is the fact that responsibilities accompany the assumption of power. A superior holds great power and influence over his or her subordinates. This is especially so in the case of a military commander. It is a social norm in almost every society that soldiers are expected to follow the orders and instructions of their commander.[29] To this end, it is common for an almost unquestioning obedience to be instilled in new recruits during military training. This unquestioning obedience extends to all aspects of daily life, not just those activities associated with direct combat.

Further, within the military, command and obedience are institutionalised. A military commander has access to military resources, training and disciplinary procedures.[30] In this context, it is expected that a commander's authority and control will be sufficient to prevent the commission of international crimes among his or her subordinates. As a result, if there has been some failure in the commander's supervision or control, then he or she should be held liable for the offence the subordinate has committed.

This rationale is not so easily demonstrated with civilian superiors. It is true that the liability of the civilian superior arises from the superior/ subordinate relationship that exists.[31] A civilian superior will not be held responsible unless the requisite "effective control" is established.[32] The existence of this relationship, coupled with the degree of control the superior possesses, does create an atmosphere of obedience. However, the control and obedience in place in the civilian context is not institutionalised. It is not socially expected that a civilian superior will be obeyed without question in every situation. The duties of obedience that a civilian owes their mayor, boss or lecturer are very different from those owed by a soldier to their commander. The lack of an institutionalised command structure in the civilian context is one of the

28 Vetter, above n 17, at 93.

29 Andrew D Mitchell "Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes" (2000) 22 Sydney L Rev 381 at 382; see also Smidt, above n 27, at 166.

30 Lou Ann Bohn "Proceeding with Caution: An Argument to Exempt Non-Governmental Civilians from Prosecution on the Basis of Command Responsibility" (2004) 1 Eyes on the ICC 1 at 8.

31 This requirement was established by the ICTY in the case of *Čelebići* for both military and civilian superiors. It has been adopted by the ICC in relation to military commanders in the case of *Bemba*. *Čelebići*, above n 8, at [346]; *Bemba*, above n 25, at [414].

32 Rome Statute, art 28(b).

reasons why it will be harder to establish liability for a civilian state official or a civilian PMSC superior than it is for a state military commander or a PMSC de facto commander.

Despite this, in the case of both military commanders and civilian superiors, a superior's control over his or her subordinates enables the superior to set the standard of conduct. It is a common social practice for subordinates to look to their superior to determine what is required of them and what conduct is prohibited. This is the case in both the military and civilian contexts. For example, Additional Protocol I recognises this by placing a duty on commanders to ensure that their subordinates are aware of the requirements of IHL.[33] As Ilias Bantekas describes, in relation to the post-World War I prosecutions for command responsibility, "it became apparent that those in military or civilian authority provided a cornerstone for those under their command, and hence should carry some liability for their actions."[34] Both civilian and military superiors of PMSC personnel have the potential ability to control the conduct of their subordinates.

In addition, evidentiary problems also provide a rationale for the doctrine of command responsibility. In practice, it can be very difficult to establish that a superior had actual knowledge of subordinates' crimes or actually participated in some way.[35] This is especially the case in relation to superiors higher up in the command structure where there is a lack of administrative documents linking them to the commission of the crime,[36] for example, a PMSC superior high up in the company's management. If those higher up in the command structure are not held accountable alongside their subordinates, then international criminal law may lose some of its legitimacy. As Curt Hessler described after the My Lai trials of the 1970s:[37]

> Popular reaction to the Calley conviction revealed that war crimes law is distrusted because it strikes most harshly at low-level personnel, leaving virtually untouched the high level officials who [mould] an army's attitudes and abilities, decide its tasks, and benefit most palpably from its successes.

For these reasons, a wider conception of command responsibility helps to maintain the legitimacy of international criminal law.

However, while these positive rationales suggest that a wide approach to liability should be taken with respect to the doctrine, they must be balanced against the more negative aspects of command responsibility. First, if the scope of command responsibility is too wide it may deter individuals from taking up positions of command, rather than encouraging them to be more

33 Additional Protocol I, above n 11, art 87(2).

34 Ilias Bantekas "The Contemporary Law of Superior Responsibility" (1999) Am J Int L 573 at 573.

35 Ibid, at 587.

36 Mirjan Damaska "The Shadow Side of Command Responsibility" (2001) 49(3) Am J Comp L 455 at 471.

37 Curt Hessler "Command Responsibility for War Crimes" (1973) 82 YLJ 1274 at 1292. For an examination of the My Lai trials see Smidt, above n 27, at 186-200.

thorough in their supervision.[38] For example, if a strict liability standard were to be adopted, potential superiors may decide that the benefits gained from a command position are not worth the risk of prosecution. According to Mirjan Damaska, a potential commander "might be unwilling to run the risk of being tarred with egregious wrongdoing by their underlings on the basis of ex post judicial assessments of what was discernible in the fog of combat."[39] However, despite levelling this criticism of the doctrine, Damaska does not point to any evidence where a strict formulation of the doctrine has deterred people from accepting command positions. Therefore, the fact that it is unclear to what extent people would actually be deterred from accepting positions of command if a strict form of command responsibility were to be upheld means that this is not a strong argument.

However, this author does agree that strict liability is not the appropriate knowledge standard for the doctrine. Strict liability could make it hard to determine exactly how far up the command ladder responsibility should end. Under a strict liability interpretation, the United States' President, as Commander in Chief of the armed forces, could be potentially held responsible if an American military commander fails to properly supervise PMSC personnel who commit international crimes. This would extend liability far beyond any direct culpability.

Further, Damaska argues that command responsibility can result in an extreme separation of culpability and liability. Under the current formulation in art 28 of the Rome Statute, a military commander may be held responsible where he or she knew, or should have known, of the commission of the crime. Consequently, a morally upstanding commander, who would never condone the commission of a war crime, may be found liable under command responsibility for a negligent lapse in supervision.[40] A civilian superior may be found liable if he or she "consciously disregards information which clearly indicates" the commission of international crimes by his or her subordinates.[41] The knowledge standard on which a superior is held responsible may be lower than the knowledge standard that is required for the subordinate's crime.[42] Article 30 of the Rome Statute requires both intent and knowledge in relation to the material elements of the crime. As a result, the superior then has the stigma of being responsible for a crime of the worst order without having the same level of knowledge that is required for that crime. Damaska argues that this is inconsistent with the general domestic criminal law principle that the punishment of offenders should be linked to culpability.[43]

38 Damaska, above n 36, at 472; see also Mitchell, above n 29, at 382.
39 Damaska, above n 36, at 472.
40 Rome Statute, art 28(a).
41 Rome Statute, art 28(b).
42 Kai Ambos "Superior Responsibility" in Antonio Cassese, Paola Gaeta and John RWD Jones (ed) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002) at 852.
43 Damaska, above n 36, at 472.

However, Damaska's argument can be addressed by reference to the ICTY's reasoning in the case of *Halilovic*. The ICTY stated that command responsibility:[44]

> … does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act.

The tribunal found that, "a commander is responsible not as though he committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed".[45]

If the superior's responsibility is linked to the seriousness of the crime then the superior's punishment is not divorced from his or her culpability. A superior's failure of supervision that results in the subordinate committing a war crime is arguably more culpable than a failure of supervision that does not.

Further, even if this is a situation where the punishment does not reflect the level of culpability, there are examples of this in domestic criminal law. For example, New Zealand criminal law proscribes different punishments for careless driving and careless driving causing death.[46] The same conduct and same level of culpability may result in different levels of punishment.

Finally, it can be argued that the superior is in fact the most morally culpable for the commission of the crime.[47] As has already been discussed, the superior sets the standard of permissible conduct in a superior/ subordinate relationship. For command responsibility to exist, the superior must be in a position where he or she could have prevented, repressed or reported the conduct and the superior failed to do so. In this author's opinion, this failure to act makes the superior morally culpable for the commission of the crime. Therefore, Damaska's critique that the punishment of a superior does not reflect his or her culpability is not a significant problem for the doctrine.

In conclusion, there are strong rationales behind the use of command responsibility. The application of command responsibility to superiors of PMSC personnel will encourage close supervision of such personnel, potentially prevent the commission of international crimes, strengthen the legitimacy of international criminal law and ensure that those who are morally culpable for the commission of the crimes are punished.

D. Development of Command Responsibility

1. Post-World War II

The doctrine of command responsibility has developed alongside the major atrocities of the 20th century. Despite some early recognition of the existence of the doctrine in the military context, it was not until after the

44 *Halilovic*, above n 19, at [54].
45 *Halilovic*, above n 19, at [54].
46 Land Transport Act 1998, ss 37(2), 38(2).
47 Mitchell, above n 29, at 381.

horrors of WWII that it was accepted that a military commander could be held responsible in international criminal law under the doctrine of command responsibility.

The case of *United States v General Tomoyuki Yamashita* is perhaps the most well known in relation to the doctrine.[48] General Yamashita was held responsible under command responsibility for the massacre and rape of thousands of civilians in the Philippines at the hands of the Japanese army.[49] The General argued that since the Americans had cut his lines of communication, there was no way he could have gained knowledge that his subordinates were committing the offences. In the controversial decision, the majority held that due to the "extensive and widespread" nature of the crimes, General Yamashita must have either "wilfully permitted" or "secretly ordered" the atrocities.[50]

There were two very strong dissenting judgments in this case that highlighted the absence of any knowledge on the part of General Yamashita. Mr Justice Murphy disputed that there was any basis in international law for the victorious Americans finding the defeated General liable under command responsibility.[51] He argued that:[52]

> To use the very inefficiency and disorganisation created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality.

Mr Justice Rutledge stated:[53]

> There is no statement in the findings that the petitioner personally participated in, was present at the occurrence of, or ordered any of these incidents … Nor is there any express finding that he knew of any one of the incidents in particular or of all taken together.

Due to the strength of these two dissents, and the development of later case law, the majority judgment has been much criticised.

Command responsibility was also applied by both the Nuremberg Tribunal and the International Military Tribunal for the Far East (IMTFE). While there is no mention of the doctrine in the establishing statute of either tribunal, the two tribunals looked to the Hague Regulations of 1907 to determine the doctrine was applicable.[54]

In *United States v Wilhelm von Leeb et al* (*High Command Trial*), Field Marshal von Leeb and thirteen other high-ranking Nazi Officers were tried by the Nuremberg Tribunal for their part in the war.[55] The charges

48 For a more thorough discussion of this case see Michal Stryszak "Command Responsibility: How Much Should a Commander be Expected to Know?" (2002) 11 USAF Acad J Legal Stud 27 at 35-44; see also Smidt, above n 27.

49 *United States v General Tomoyuki Yamashita* (Supreme Court Judgment), 4 February 1946, (1948) IV Law Reports of Trials of War Criminals 1.

50 Ibid, at 34.

51 Ibid, at 51.

52 Ibid, at 51-52.

53 Ibid, at 58.

54 Meloni, above n 4, at 56.

55 *High Command Trial*, above n 20, at 1.

against them included both direct responsibility, for issuing illegal orders, and indirect responsibility, for failing to exercise proper control over their subordinates. The judges rejected the standard of almost strict liability that had been applied to General Yamashita and instead found that:[56]

> There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence.

The judges rejected the idea that the United States' President, as Commander in Chief of the Armed Forces, could be liable under command responsibility by virtue of this de jure position alone.[57]

In *United States v Wilhelm List et al* (*Hostages case*), also before the Nuremberg Tribunal, Army General Wilhelm List and eleven other high-ranking Nazi officers were tried for their involvement in the murder and deportation of thousands of civilians from Greece, Yugoslavia, Norway and Albania.[58] These crimes were committed by troops subordinate to the officers. In this case, the judges extended the knowledge requirement of the doctrine so that indirect proof of knowledge was sufficient for a conviction. This knowledge standard went beyond the actual knowledge required in the *High Command Trial* and allowed the judges to impute or infer knowledge on the part of the commander from the circumstances. Here, the judges inferred knowledge on the part of the commanders from the circumstances of discipline and communication within the German Army:[59]

> The German Wehrmacht was a well-equipped, well trained and well disciplined army … The evidence shows they were led by competent commanders who had mail, telegraph, telephone, radio, and courier service for the handling of communications. Reports were made daily, sometimes morning and evening …

The IMTFE is notable for the fact that it tried civilian members of the Japanese Government under the doctrine of command responsibility. The tribunal found that liability for war crimes committed against prisoners of war being held by Japan could be attributed to:[60]

> (1) Members of Government; (2) Military or Naval Officers in command of formations having prisoners in their possession; (3) Officials in those departments which were concerned with the well-being of prisoners; (4) Officials, whether civilian, military or naval, having direct and immediate control of prisoners.

This reasoning extended the doctrine beyond its solely military background.

56 *High Command Trial*, above n 20, at 76.
57 *High Command Trial*, above n 20, at 76.
58 *United States v Wilhelm List et al* (Judgment), 8 July 1947-19 February 1948, (1949) VIII Law Reports of Trials of War Criminals 34 at 35.
59 Parks, above n 5, at 59.
60 International Military Tribunal for the Far East, *Case of the Major War Criminals* (Judgment) 4-12 November 1948, Chapter II (The Law) at 11.

Kori Hirota was the Foreign Minister in the Japanese Government at the time of the Nanking atrocities, committed between December 1937 and February 1938. As Foreign Minister, Hirota received reports of the Japanese Army's activities soon after it entered Nanking.[61] Hirota responded to these reports by directing the "War Minister" to take action to stop the crimes. He then accepted the "War Minister's" assurances that such action had been taken. Nevertheless, the tribunal found Hirota guilty under the charge of "disregard of duty to secure observance of and prevent breaches of laws of war". The majority found that Hirota should have insisted to the Japanese government that measures be taken immediately to stop the atrocities.[62] Hirota was then sentenced to death.

In his dissenting judgment, Judge Roling considered that Hirota had done everything in his power to prevent the atrocities at Nanking and therefore should not be held responsible under the "negative responsibility" of command responsibility.[63] The division of powers within the Japanese State meant that a foreign minister had no authority or control over the actions of the Japanese Army. In Judge Roling's opinion, Hirota had fulfilled his duties once he had informed the relevant minister of the atrocities and directed that minister to take action. The Judge stressed that much care should be taken when finding civilian members of government responsible for actions of the military.[64]

These post WWII decisions have been criticised for a general confusion about the standards to be applied under command responsibility.[65] In particular, the knowledge standard differs between the judgments, ranging from almost strict liability in the majority decision of *Yamashita*, to an imputed knowledge standard in the *Hostages Case*. At times, the cases also confuse the strict sense of command responsibility with the wider sense and claim to hold people liable under command responsibility when in fact the accused has also ordered or participated in the commission of the crimes.[66] However, despite some confusion, these cases did set the stage for the doctrine to be applied by the ICTY and ICTR and extended to civilian superiors.

61 International Military Tribunal for the Far East, *Case of the Major War Criminals* (Judgment) 4-12 November 1948, Chapter X (Verdicts) at 458.

62 Ibid.

63 International Military Tribunal for the Far East, *Case of the Major War Criminals* (Judgment) 4-12 November 1948, Opinion of Justice Roling at 207, 208.

64 Ibid, at 209.

65 Materneau Chrispin"Holding Private Military Corporations accountable for their crimes: the applicability of the command/superior responsibility doctrine to crimes of PMCs" in Carsten Stahn and Larissa van den Herik (eds) *Future Perspectives on International Criminal Justice* (TMC Asser Press, The Hague, 2010) at 407; see also Beatrice I Bonafe "Command Responsibility" in Antonio Cassese (ed) *The Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009) at 270.

66 Chrispin, ibid, at 407.

2. Additional Protocol I and the Ad-Hoc Tribunals

The next significant development was the codification of the doctrine in art 86 of Additional Protocol I. Article 86 states:

> 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 within their power to prevent or repress the breach.

Command responsibility is also included in the Statutes of both the ICTY and the ICTR:[67]

> The fact that any of the acts referred to in … the present Statute was committed 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.

From this text, the ICTY in the case of Č*elebići* found that three elements were required to establish liability under command responsibility:[68]

1. the existence of a superior-subordinate relationship; and
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.

These three elements have been applied as a framework for the test of command responsibility in both the ICTY and the ICTR.

3. Extension of the Doctrine to Civilians

After some hesitation, the command responsibility provision in both the ICTY and ICTR Statutes has been interpreted to apply to both commanders and civilian superiors.[69] While the doctrine of command responsibility was commonly accepted in relation to military commanders after WWII, its extension to civilian superiors has occurred much more recently. Neither art 86 of Additional Protocol I, nor the Statutes of the ICTY or ICTR make any reference to the responsibility of civilians. The IMTFE's decision regarding Hirota did seem to pave the way for superior responsibility outside the military structure. However, due to extensive criticism of the majority judgment in this case,[70] it was not until the ICTY and ICTR considered the matter that this extension of the doctrine was more generally accepted in international criminal law.

z67 Statute of the ICTY, art 7(3); Statute of the ICTR, art 6(3).

68 *Čelebići*, above n 8, at [346].

69 *Čelebići*, above n 8, at [356]; see also *Prosecutor v Akayesu (Judgment)* ICTR Trial Chamber ICTR-96-4-T, 2 September 1998, [*Akayesu*] at [491].

70 Meloni, above n 4, at 75.

The ICTR was initially reluctant to recognise the extension of the doctrine to civilians. The issue was considered in the case of *Prosecutor v Akayesu* where a village mayor was charged under art 6(3) of the ICTR Statute.[71] The ICTR recognised that civilian authorities had been charged under this principle by the IMTFE, but remained cautious about its application. The ICTR found that, "in the case of civilians, the application of the principle of individual criminal responsibility, enshrined in art 6(3), to civilians remains contentious."[72] The judges stressed that:[73]

> … it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.

Akayesu was found guilty of genocide and crimes against humanity under art 6(1) of the Statute of the ICTR for aiding and abetting in, and ordering the commission of, these crimes. However, despite finding evidence of superior/subordinate relationships, the Court found that liability under art 6(3) could not be upheld.[74]

A few months later, the ICTY gave its judgment on the matter of civilian responsibility in the *Čelebići* case.[75] This case centred round a prison camp where Serb prisoners had been subjected to killings, torture, sexual assault and cruel and inhuman punishment. The judges of the ICTY appear to have been far more open to the extension of the doctrine to civilians than the judges of the ICTR were. The ICTY ruled that the use of the term "superior" rather than "commander" meant that the provision could be applied to civilian superiors.[76] The judges found this reasoning was confirmed by the reference in art 7(2) of the ICTY Statute to "Head[s] of State or Government" or "responsible Government official[s]". The court found that the juxtaposition of art 7(2) with art 7(3) meant that the latter "extends beyond the responsibility of military commanders to also encompass political leaders and other civilian superiors in positions of authority".[77] The ICTY then went further in finding that "this interpretation of the scope of Article 7(3) is in accordance with the customary law doctrine of command responsibility."[78]

However, the judges did put a limit on the extension of the doctrine by stating, "the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders."[79] Applying this reasoning,

71 *Akayesu*, above n 69.
72 *Akayesu*, above n 69, at [491].
73 *Akayesu*, above n 69, at [491].
74 *Akayesu*, above n 69, at [691].
75 *Čelebići*, above n 8.
76 *Čelebići*, above n 8, at [356].
77 *Čelebići*, above n 8, at [356].
78 *Čelebići*, above n 8, at [357].
79 *Čelebići*, above n 8, at [378].

the Trial Chamber found Zdravko Mućić, the de facto civilian camp commander, guilty of failing to prevent the commission of war crimes in the camp. However, Hazim Delić, the deputy camp commander, and Zejnil Delalić, the coordinator of the Bosnian Muslim and Bosnian Croat forces in the area, were acquitted because of the lack of the existence of a superior/ subordinate relationship.

Since these two initial decisions, the doctrine has been applied to civilian superiors in numerous cases before the ICTR and ICTY. In the ICTR, a manager of a tea factory was found to have both de jure and de facto authority over his employees.[80] He was held responsible under art 6(1) for aiding and abetting in the crimes and art 6(3) for failing to control his employees.[81] Other convictions of civilian superiors under the doctrine of command responsibility have included the leader of an extremist party for offences committed by the party's followers and the manager of a radio station for the hate speech broadcast by its employees.[82]

In conclusion, the 20th century saw many changes to the doctrine of command responsibility. The doctrine started out as one of almost strict liability before it passed through the Nuremberg Tribunal, the IMTFE, the ICTY and the ICTR. This overview of the doctrine shows a trend of a gradual extension of its application to cover new types of superior/ subordinate relationships. Now, in the 21st century, the doctrine should be extended further to apply to superiors of PMSC personnel.

III. Article 28 of the Rome Statute

Article 28 of the Rome Statute is the first explicit recognition in a treaty that command responsibility applies to civilian superiors.[83] The provision was the result of "extensive negotiations and … quite delicate compromises."[84] In a break with the previous formulations of the doctrine, art 28 contains different requirements for a commander and a civilian superior. The provisions of art 28 will now be examined in detail to determine how this framework can be applied to superiors of PMSC personnel.

80 *Prosecutor v Musema (Judgment)* ICTR Trial Chamber ICTR-96-13-T, 27 January 2000, at [882], [894].

81 *Čelebići*, above n 8, at [890]-[891] and [895]. This decision has been strongly criticised for the fact that Musema was charged under both art 6(1) and art 6(3). Alexander Zahar and Göran Sluiter highlight the conceptual difficulties of requiring a superior to take measures to prevent an attack that the superior actually ordered or participated in. Zahar and Sluiter, above n 18, at 270.

82 *Prosecutor v Nahimana et al (Judgment)* ICTR Trial Chamber ICTR-96-11-T, 3 December 2003. For a strong critique of the ICTR's use of command responsibility in this decision see Zahar and Sluiter, above n 18, at 266-267.

83 Article 28 of the Rome Statute is set out in full in Appendix One.

84 Schabas, above n 17, at 457; see also Ambos, above n 42, at 848.

A. Article 28(a) Commanders

In the only case regarding command responsibility to come before it, the ICC has ruled that five elements are required to find responsibility of a military commander under art 28(a).[85] Each requirement will now be examined.

1. The Suspect Must be Either a Military Commander or a Person Effectively Acting as Such

Under art 28, a superior's position may be either de jure or de facto. As the ICTY explained in the case of *Čelebići,* "[t]he mere absence of formal legal authority to control the actions of subordinates should … not be understood to preclude the imposition of such responsibility."[86] This is a rejection of the old conception that a rank relationship is required to establish command responsibility. The doctrine can now be applied to people who have not been formally appointed to a position of command, but have instead assumed the powers and responsibilities of such a position. This could include PMSC superiors in the field.

In the first part of art 28(a), "military commander" refers to those who are de jure commanders. A "military commander" has been "formally or legally appointed to carry out a military commanding function".[87] He or she may be found liable regardless of rank or level in the command structure.[88] State military commanders working with PMSC personnel fall into this category.

In contrast, "a person effectively acting as such" is a de facto commander. While the person has not been formally appointed to their command position, they "exercise effective control over a group of persons through a chain of command".[89] This includes commanders who have effective control over regular government forces such as armed police units.[90] Depending on the facts, this could also include PMSC superiors who are present in the field. It has been suggested that commanders of non-government irregular forces such as rebel groups or paramilitary units should also be included where their forces follow a chain of command or contain a military hierarchy structure.[91]

2. The Suspect Must have Effective Command and Control, or Effective Authority and Control Over the Forces (Subordinates) who Committed One or More of the Crimes Set Out in Articles 6 to 8 of the Statute

Effective control refers to the "material ability to prevent or repress the commission of crimes or submit the matter to the competent authorities".[92] The commander may have the de jure power to command his or her troops,

85 *Prosecutor v Bemba*, above n 25, at [407].
86 Čelebići, above n 8, at [354]; restated in *Prosecutor v Bemba*, above n 25. at [409].
87 *Prosecutor v Bemba*, above n 25, at [408].
88 Ambos, above n 42, at 856.
89 *Prosecutor v Bemba*, above n 25, at [409].
90 *Prosecutor v Bemba*, above n 25, at [410].
91 *Prosecutor v Bemba*, above n 25, at [410].
92 *Prosecutor v Bemba*, above n 25, at [415].

or may have de facto authority over them. The ICC has determined that there is no significant difference between command and authority. Command is a type of authority.[93] Referring to the 11th edition of the *Concise Oxford English Dictionary*, the ICC found that command means "authority, especially over armed forces" and authority, the "power or right to give orders and enforce obedience".[94] A lower standard of control, such as the ability to exercise substantial influence over subordinates, is not enough.[95] This is demonstrated by the ICTY's finding in *Čelebići* that while Hazim Delić possessed some influence over the other guards, "this influence could be attributable to the guards' fear of an intimidating and morally delinquent individual" and did not relate to a superior/subordinate relationship.[96] According to Kai Ambos, it is this ability to exercise effective control that justifies the superior's duty of intervention.[97]

Whether there is "effective control" depends on the facts of each situation. Both the ICC and the ad-hoc tribunals have stressed that the assessment is one of evidence rather than substantive law.[98] Factors that may determine if there is "effective control" include:[99]

> (i) the official position of the suspect; (ii) his power to issue or give orders; (iii) the capacity to ensure compliance with the orders issued …; (iv) his position within the military structure and the actual tasks that he carried out; (v) the capacity to order forces or units under his command … to engage in hostilities; (vi) the capacity to … make changes to command structure; (vii) the power to promote, replace, remove or discipline any member of the forces; and (viii) the authority to send forces [to] where hostilities take place and withdraw them at any given moment.

A further issue that arises is the time period in which the commander must have had effective control. The ICC in *Prosecutor v Bemba* found that "according to article 28(a) of the [Rome] Statute, the suspect must have had effective control at least when the crimes were about to be committed."[100] This suggests that a commander would not be held responsible under command responsibility if he or she assumes command as the crimes are being committed. The assessment of exactly where the line will be drawn must depend on the facts.

93 *Prosecutor v Bemba*, above n 25, at [412].
94 *Prosecutor v Bemba*, above n 25, at [413].
95 *Prosecutor v Bemba*, above n 25, at [415]; see also *Prosecutor v Kordić and Cerkez (Judgment)* ICTY Trial Chamber IT-95-14/2-T, 26 February 2001, at [412]-[413]; *Prosecutor v Delalić et al (Judgment)* ICTY Appeals Chamber IT-96-21-A, 20 February 2001, at [266].
96 *Čelebići*, above n 8, at [806]. Ilias Bantekas has criticised this finding, stating that "Delić's influence over the Čelibići guards was the culmination of his intimidating and overwhelming personality which enabled him to issue and enforce his own orders". Bantekas suggests that there was a superior/ subordinate relationship between Delić and the guards due to the fact that "being feared by others and enforcing one's might over others renders an individual superior to those with lesser power or greater fear". Bantekas, above n 34, at 582.
97 Ambos, above n 42, at 853.
98 *Prosecutor v Bemba*, above n 25, at [416].
99 *Prosecutor v Bemba*, above n 25, at [417].
100 *Prosecutor v Bemba*, above n 25, at [419].

3. The Crimes Committed by the Forces (Subordinates) Resulted from the Suspect's Failure to Exercise Control Properly Over Them

The words "as a result of his or her failure to exercise control properly over such forces" in art 28 have been interpreted to require a causation element. The ICC noted that:[101]

> The failure of a superior to fulfil his duties during and after the crimes can have a causal impact on the commission of further crimes. As punishment is an inherent part of prevention of future crimes, a commander's past failure to punish crimes is likely to increase the risk that further crimes will be committed in the future.

A strict "but for" test was found to be inappropriate because "the effect of an omission cannot empirically be determined with certainty."[102] Instead, to satisfy this causation element, it must be shown that the "commander's omission increased the risk of the commission of the crimes charged."[103]

4. The Suspect Either Knew or, Owing to the Circumstances at the Time, Should Have Known that the Forces (Subordinates) Were Committing or About to Commit One or More of the Crimes Set Out in Articles 6 to 8 of the Statute

Article 28(a) contains two knowledge standards. Under the first, a commander will be liable where he or she had actual knowledge. Actual knowledge may not be presumed from the commander's de jure position, but instead, must be established by direct or circumstantial evidence. The circumstantial evidence may include:[104]

> … the 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 means of available communication, the modus operandi of similar acts, 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. Actual knowledge may be also proven if, "a priori, [a military commander] is part of an organised structure with established reporting and monitoring systems".

Under the second knowledge standard, a commander will be liable where he "should have known".[105] Ambos suggests that this is a form of negligence.[106] The standard "requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time [of] the commission of the crime."[107] This knowledge standard goes further

101 *Prosecutor v Bemba*, above n 25, at [424].
102 *Prosecutor v Bemba*, above n 25, at [425]; see also Ambos, above n 42, at 860.
103 *Prosecutor v Bemba*, above n 25, at [425].
104 *Prosecutor v Bemba*, above n 25, at [431]; see also *Čelebići*, above n 8, at [386]; *Prosecutor v Blaskić (Judgment)* ICTY Trial Chamber IT-95-14-T, 3 March 2000, at [307]; *Prosecutor v Strugar (Judgment)* ICTY Trial Chamber IT-01-42-T, 31 January 2005, at [368].
105 Rome Statute, art 28(a)(i).
106 Ambos, above n 42, at 867; see also Schabas, above n 17, at 457.
107 *Prosecutor v Bemba*, above n 25, at [433].

than both the "had reason to know" standard of the ICTY Statute and the standard in art 86 of Additional Protocol I.[108] While the ICC in *Bemba* recognised that there was a difference between the knowledge standard in art 28(a) and the standard in the ICTY Statute, the Court did not consider it necessary to consider the exact nature of the differences in this case. The judges found that, despite the difference in knowledge standards, "the criteria or indicia developed by the ad-hoc tribunals to meet the standard of 'had reason to know' may also be useful when applying the 'should have known' requirement."[109]

Depending on the facts of each situation, a commander will be considered to have knowledge where (i) "he had general information to put him on notice of crimes committed by subordinates or of the possibility of occurrence of the unlawful acts"; and (ii) "such information was sufficient to justify further inquiry or investigation."[110] The information concerned does not need to be from official reports. Reputable media accounts that the subordinates are committing crimes may be enough.[111] If the information has been conveyed to the commander in reports, it is not a defence that the commander did not read them.[112]

It is clear that the knowledge requirement in art 28(a) is not a strict liability provision. A commander will not be held liable from the fact of his or her position alone.

5. The Suspect Failed to Take the Necessary and Reasonable Measures Within His or Her Power to Prevent or Repress the Commission of Such Crime(s) or Failed to Submit the Matter to the Competent Authorities for Investigation and Prosecution

The provision does not state exactly what the "necessary and reasonable" measures are. As a result, what is "necessary and reasonable" must be assessed on a case-by-case basis by the court.

Under the duty to prevent the commission of the crime, these measures may include: (i) ensuring that the subordinates are trained in accordance with IHL; (ii) obtaining reports as to how military actions have been carried out; (iii) issuing orders requiring compliance with IHL; and (iv) taking disciplinary measures to prevent atrocities being committed by the commander's subordinates.[113]

The duty to repress the crime requires the commander to prevent the further commission of any crimes and to punish those who have already committed crimes. The requirement to punish may be satisfied by the commander taking

108 Statute of the ICTY, art 7(3).
109 *Prosecutor v Bemba*, above n 25, at [434].
110 *Prosecutor v Bemba*, above n 25, at [434].
111 Dinstein, above n 18, at 240; C N Crowe "Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution" (1994) 29 URLR 191 at 226; *High Command Trial*, above n 20, at 112.
112 Dinstein, above n 18, at 240.
113 *Prosecutor v Bemba*, above n 25, at [438].

disciplinary action or referring the matter to the competent authorities.[114] The measures required will depend on the commander's position in the hierarchy and the disciplinary powers available to him or her. The commander is not expected to do the impossible. Therefore, what is "necessary and reasonable" must be assessed on a case-by-case basis.[115]

B. Article 28(b) Civilian Superior

Article 28(b) covers superior/ subordinate relationships that are not included in art 28(a). These superiors are civilians that cannot be classified as persons "effectively acting as" a military commander. There is yet to be a case before the ICC relating to a charge under art 28(b). As a result, where there are similarities between arts 28(a) and 28(b), the ICC's interpretation of art 28(a) in *Bemba* will be highly relevant in determining how the provisions of art 28(b) should be applied. Further, the cases regarding civilian superior responsibility from both the ICTY and the ICTR will be extremely useful in guiding the interpretation of the requirements of art 28(b).

There are some similarities in the provisions of arts 28(a) and (b). Both contain a causality link between the superior's omission and the subordinate's crime (element (c) above). The wording of art 28(b)(iii) is the same as 28(a)(ii) (element (e) above), although the "necessary and reasonable" measures required will be different in a civilian context. In recognition of the non-military nature of this superior/subordinate relationship, art 28(b) refers only to "effective authority and control".

However, there are also significant differences between the two provisions. Article 28(b)(ii) requires that "the crimes concerned activities that were within the effective responsibility and control of the superior". This provision is absent from art 28(a), reflecting the difference between the military and civilian context. A civilian superior is not expected to have "authority and control" over all aspects of their subordinates' lives.[116] The civilian superior may only be held liable for his or her subordinate's crimes when they are committed in relation to an activity over which the superior had control.

In addition, a higher level of knowledge is required to hold a civilian superior liable under the doctrine. Where actual knowledge is not found, the prosecution must prove that a civilian superior "consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes".[117] This is harder for the prosecution to establish than the "should have known" standard that applies to military commanders.

The knowledge requirement for a civilian superior is described as being akin to recklessness, or wilful blindness. The prosecution must prove that: (i) information existed that clearly indicated that the subordinates were

114 *Prosecutor v Bemba*, above n 25, at [439]-[440].
115 *Prosecutor v Bemba*, above n 25, at [441]; see also Ambos, above n 42, at 862.
116 Vetter, above n 17, at 120.
117 Rome Statute, art 28(b)(i).

committing, or were about to commit the illegal acts; (ii) that this information was available to the superior; and (iii) that the superior was aware that this information existed but refused to take notice of it.[118]

There are also differences in how the two provisions should be applied. As the ICTY has stated, "great care must be taken in assessing the evidence to determine command responsibility in respect of civilians, lest an injustice is done."[119]A civilian superior's duties and responsibilities towards their subordinates are not as clear as those of a military commander. For example, the civilian superior is unlikely to have as extensive powers to discipline his or her subordinates. A careful assessment of the facts is therefore required to determine whether a civilian superior has been vested with "effective authority and control" in each situation.[120]

C. Should There be a Different Standard for Commanders and Civilian Superiors?

The difference in standards of art 28 is justified by the "different levels of discipline, obedience, loyalty, and responsibility" in the military and civilian contexts.[121] A commander has clear duties of discipline and control over their forces. This is much harder to establish in a civilian context. As has been discussed in this article, command is not institutionalised in the civilian context.

In addition, Alexander Zahar and Göran Sluiter argue that not enough focus has been put on identifying the legal duties of civilian superiors. They suggest that the ad-hoc tribunals have "assumed that it follows from (mere) proof of the existence of a superior-subordinate relationship that the superior in question is under a legal obligation to restrain illegal acts of his or her subordinates."[122] According to Zahar and Sluiter, civilian superiors should only be liable "to the extent that they exercise a degree of control that is similar to that of military commanders."[123] This reflects the ICTY's reasoning in the case of *Čelebići*.[124] Zahar and Sluiter's critiques of the lack of clarity in identifying the legal duties of civilian superiors suggest that there should be a higher knowledge standard.

In the case of *Čelebići,* the ICTY found that "the criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act."[125] The Court goes on to say:

118 Schabas, above n 2, at 463.
119 *Prosecutor v Kordić and Cerkez*, above n 29, at [838]-[841].
120 *Prosecutor v Akayesu*, above n 18, at [491].
121 Schabas, above n 17, at 460.
122 Zahar and Sluiter, above n 18, at 260
123 Zahar and Sluiter, above n 18, at 264-265.
124 *Čelebići*, above n 8, at [378].
125 *Čelebići*, above n 8, at [334].

> As is most clearly evidenced in the case of military commanders by article 87 [of Additional Protocol I], international law imposes an affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility under Article 7(3) of the [ICTY] Statute.[126]

There is no equivalent document that imposes duties of supervision on civilian superiors under international law.

The argument advanced in this article is that the lack of clear legal duties for civilian superiors means that a higher knowledge standard is appropriate. If a civilian superior had actual knowledge of the crimes, or was wilfully blind regarding their commission, then the superior should be held responsible. The fact the civilian superior had knowledge, or consciously rejected knowledge, of the crimes, means the superior had the opportunity to prevent, repress or report the crime. The fact that the superior chose not to do so means that he or she is culpable and should be held responsible for any crimes committed by the subordinate. Where there is no clear legal duty of supervision that the civilian superior has breached, it is this moral culpability that makes it appropriate to punish the superior. While the "should have known" standard is appropriate for a military commander with clear legal duties and chains of command, it is too low a threshold for a civilian superior.

Further, due to their lack of formal training and education in IHL, it is unrealistic to expect civilian superiors to exercise the same level of supervision of military commanders. Civilian superiors may have very little knowledge of what is required of them when they take on the role. They are unlikely to have had the formal training in command and IHL that a commander has in the military. In the situations of instability that often accompany the commission of international crimes,[127] there may be very little time to put in place reporting mechanisms or establish exactly what each person's role is. Without formal appointment, it may remain unclear that a person is a superior until their status is determined by the courts. For these reasons, a different knowledge requirement for commanders and civilian superiors is appropriate.

In contrast, Greg R Vetter makes a strong argument that the same knowledge standard should apply to commanders and civilian superiors. Restricting the liability of civilian superiors may reduce the efficacy of the ICC. As Vetter argues, "Given that the ICC statute makes criminal only the most egregious of crimes, a weaker civilian command responsibility undercuts the court's goal of strong, individual deterrence."[128] It has been acknowledged by the ad-hoc tribunals that it is harder to establish evidence of a superior-subordinate relationship and "effective control" for civilian superiors. From this perspective, if the other elements can be established on the facts, then liability should not be restricted by the knowledge requirement.

126 *Čelebići*, above n 8, at [334].
127 *Čelebići*, above n 8, at [354].
128 Vetter, above n 17, at 94.

From this perspective, the potential danger in having a difference in knowledge standards is highlighted by paramilitary units, rebel groups and superiors within PMSCs. Andrew D Mitchell argues that, while these superiors may be covered under art 28(a) if a command structure is established, the accused may argue that they should be covered by the higher knowledge standard of art 28(b).[129] The unofficial nature of these groups means that evidence of whether a command structure is in place will largely depend on witness statements, which may be hard to obtain or verify.[130] As long as there are superior/ subordinate relationships in place, the knowledge required should not depend on how organised or disorganised the group is.

However, in this author's opinion, the problems identified by Vetter do not outweigh the arguments for a different knowledge standard. First, it is unlikely that the ICC's effectiveness will be significantly reduced by having a different knowledge standard. A civilian superior can still be found liable where he or she has actual knowledge or has been wilfully blind. It is unlikely that there will be a large number of cases where a civilian superior meets the other requirements of art 28(b) but then cannot be found responsible according to the knowledge requirement.

Further, both the ICC and the ad-hoc tribunals have emphasised that a finding of command responsibility will always be determined by the particular facts at issue. Whether a PMSC superior or a rebel leader should be tried under art 28(a) or (b) must also depend on the facts of the particular situation and exactly what activities the superior was engaged in. There may be some situations where it is inappropriate to try a PMSC superior under art 28(a), for example where the PMSC is not engaged in activities that have the potential to become direct combat situations. This will be discussed in more detail later in this article.

Therefore, the lack of clarity regarding a civilian superior's duties under international law and the lack of institutionalised command are important factors that distinguish the civilian context from the military context. For these reasons, there should be a different standard for commanders and civilian superiors. This will be highlighted in the discussion of how art 28 can be applied to superiors of PMSC personnel.

IV. Private Military and Security Companies

There has been a great increase in the use of PMSCs since the 1990s. The end of the Cold War brought with it a surplus of unemployed soldiers as states began to reduce the size of their standing armed forces and move towards a policy of privatisation of military services.[131] PMSCs are private corporations that provide many of the services that were once traditionally associated with

129 Mitchell, above n 29, at 405.

130 Vetter, above n 17, at 127.

131 Benedict Sheehy, Jackson Maogoto and Virginia Newell *Legal Control of the Private Military Corporation* (Palgrave MacMillan, Basingstoke, 2009) at 100.

the armed forces or police force of a state. The services that they provide can include transport, training and advising of armed forces, intelligence and technical assistance, operational and logistics support, guarding of buildings and individuals, maintenance of weapons systems, interrogation of suspects and even direct involvement in combat situations.[132] PMSCs may work for a state (to supplement or assist its armed forces), for a non-governmental organisation or for a rebel group.

Rather than being a passing trend, the use of and dependence on PMSCs is increasing. In 2006 it is estimated that there were between 48,000 and 100,000 PMSC personnel in Iraq.[133] The second largest private employer in the world is Group4Securicor, a PMSC based in 30 countries in Africa and 22 in Latin America that employs around 600,000 people.[134] The United Nations uses PMSCs to provide security for nearly 60 per cent of its 12,000 to 14,000 facilities worldwide.[135]

This extensive use of PMSCs raises the complicated issue of how PMSC personnel can be held liable for any international crimes that they commit. PMSCs have often been described as occupying a legal vacuum under international law.[136] As a non-state actor, PMSCs are not signatories to any conventions regarding IHL. There is also a lack of both domestic legislation and international law regulating the use of PMSCs.[137] While various international conventions prohibit the use of mercenaries, the restrictive wording of these conventions means that they do not also prohibit PMSCs.[138] In addition,

132 Emanuela-Chiara Gillard "Business goes to war: private military/ security companies and international humanitarian law" (2006) 88 International Review of the Red Cross 525 at 526; see also P W Singer "Private Military Firms" in Roy Gutman, David Rieff and Anthony Dworkin (eds) *Crimes of War: What the Public Should Know Revised and Updated Edition* (W W Norton & Company, New York, 2007) at 335.

133 P W Singer *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press, New York, 2003) at 245. The lower estimates include only PMSC personnel engaged in direct combat while the higher estimates include all personnel providing military services.

134 *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination* UN Doc, A/65/325 (2010) at 6 (*Report of the Working Group on the use of mercenaries*).

135 Ibid. at 11.

136 Singer, above n 133, at 238; see also Chia Lehnardt "Individual Liability of Private Military Personnel under International Criminal Law" (2008) 19(5) EJIL 1015 at 1016.

137 The United Nations Working Group on Mercenaries has presented a draft convention on the use of PMSCs to the United Nations General Assembly for consideration. The convention aims to establish minimum international standards for states to regulate PMSCs and their personnel, as well as an international monitoring mechanism. For a copy of the draft convention see *Report of the Working Group on the use of mercenaries*, above n 134.

138 For example, art 47(2) of Additional Protocol I, defines a mercenary as someone who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a

unless PMSCs have been integrated into the armed forces of a state, they are not directly covered by the military code of justice or disciplinary processes.[139] In the large majority of cases, PMSCs are not integrated, even though they may work very closely with, or assist a state's armed forces. These factors present a significant problem for attributing liability to PMSC personnel for international crimes.

For example, in the Abu Gharib prison scandal, PMSC personnel employed by Titan and CACI International Inc were found to have been involved in 36 per cent of the abuses committed there. While the American soldiers involved have since been court martialled, none of the PMSC personnel involved have faced charges. This is partly because the United States' Army was unsure whether it had jurisdiction over the PMSC personnel.[140] Personnel from the PMSC Blackwater have also been implicated in potential war crimes for the unprovoked killing of civilians in Iraq.[141] What is particularly worrying is that governments continue to hire PMSCs that are known to have engaged in legally dubious behaviour. In 2010 the PMSC XE, or Blackwater, was granted US $220 million worth of contracts by the Government of the United States.[142]

This lack of accountability is exacerbated by the fact that certain governments may negotiate immunity agreements for the PMSC personnel that they employ. In 2009 the United States negotiated an agreement with the Colombian Government that granted "privileges, exemptions and immunities" to the 600 PMSC personnel that the United States is permitted to station in Colombia.[143] This agreement follows the 2003 Coalition Provisional Authority Order 17, which contained a provision granting immunity to the PMSC personnel operating in Iraq under the employment of the United States' Government.[144] These difficulties in holding PMSC personnel to account for international crimes create an atmosphere of impunity.

The Montreux Document of 2008 is an initiative between the International Committee of the Red Cross and the Swiss Government that sought to address the apparent impunity surrounding the use of PMSC. The document emphasises that under current international law obligations, PMSC personnel do not occupy a legal vacuum. Instead, whether they are classified as civilians or combatants, PMSC personnel possess an obligation to comply with the

State which is not a Party to the conflict on official duty as a member of its armed forces. If the PMSC does not employ its personnel specifically to fight in the armed conflict then the personnel do not meet this definition.

139 Singer, above n 133, at 251.

140 Fred Rosen *Contract Warriors: How mercenaries changed history and the war on terrorism* (Aplha, New York, 2005) at 222; see also Lehnardt, above n 136, at 1016.

141 David Johnston and John M Broder "FBI Says Guards killed 14 Iraqis Without Cause" *New York Times* (New York, 14 November 2007) at A1.

142 *Report of the Working Group on the use of mercenaries*, above n 134, at 7.

143 *Report of the Working Group on the use of mercenaries*, above n 134, at 5

144 Ibid.

relevant norms set down by IHL.[145] The document also suggests that under current international law, command responsibility can be applied to superiors of PMSC personnel. It states that:[146]

> Superiors of PMSC personnel, such as:
>
> a. government officials, whether they are military commanders or civilian superiors, or
> b. directors or managers of PMSC may be liable for crimes under international law committed by PMSC under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law.

The findings of this document support the argument advanced in this article that art 28 of the Rome Statute can be used to hold superiors of PMSC personnel responsible.

Therefore, while it has been established that PMSC personnel are bound to follow IHL, the significant problem of how compliance with IHL can be ensured remains. Command responsibility under art 28 is one way to address the impunity surrounding PMSCs.

V. Private Military and Security Companies and Command Responsibility under the Rome Statute

This article advances the argument that command responsibility under the Rome Statute should be used to address the lack of accountability of PMSC personnel. The possibility of liability under command responsibility for the actions of PMSC personnel will encourage responsible command to be put in place. Further, if state officials can be held responsible using command responsibility it will discourage states from using PMSCs to try and avoid responsibility for legally questionable conduct. The doctrine is "an extraordinary legal and prosecutorial instrument because it is theoretically capable of extending to areas of liability where other forms of liability are unable to go."[147] Therefore, it should be used to combat the impunity surrounding the use of PMSCs.

Using command responsibility to end the impunity surrounding the use of PMSCs is consistent with the rationales behind command responsibility. Command responsibility in this context will help to ensure that both

145 International Committee of the Red Cross, *The Montreux Document: On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (Montreux Document)*, 17 September 2008, at 14. The document was initially developed by 17 states, including the United States, United Kingdom, France, China, Germany and Canada. These states all had some involvement or interest in the use of PMSCs. Currently 36 states have communicated their support for the document.

146 Ibid, at 15.

147 G Mettraux *The Law of Command Responsibility* (Oxford University Press, Oxford, 2009) at 272, cited in Micaela Frulli "Exploring the Applicability of Command Responsibility to Private Military Contractors" (2010) LexisNexis Academic <www.lexisnexis.com>.

state officials, whether military or civilian, and PMSC superiors pay closer attention to the actions and training of PMSC personnel. The threat of personal criminal liability will encourage these superiors to put in place proper reporting mechanisms, to foster an attitude of IHL compliance and to educate PMSC personnel in what conduct is prohibited under IHL. It will also enhance the legitimacy of international criminal law by ensuring that it is not just low-level personnel who face prosecution for international crimes. High ranking officials who hire PMSCs, determine policy regarding PMSCs and establish codes of conduct on the battlefield may face liability under command responsibility. There are four options for applying command responsibility to the offences of PMSC personnel under the Rome Statute. First, where the PMSC has been contracted by a state, a military commander of that state's armed forces may be held liable under art 28(a). Second, a civilian government official may be held liable under art 28(b). Third, and perhaps most probable, a superior within the PMSC itself may be found liable. In this third category, a PMSC superior could be tried as a "person acting as" a military commander, under art 28(a), or as a civilian superior under art 28(b). This classification will depend on the factual circumstances. In each of these four situations, the key to determining whether the superior can be found liable is whether a superior/subordinate relationship of control exists on the facts.

It is entirely possible for multiple superiors to be held responsible for the PMSC subordinate's crime under command responsibility. Depending on the circumstances and the superior/ subordinate relationships that are found to exist, both the civilian official who contracted the PMSC and the direct PMSC superior in the field may be found to be responsible under art 28.[148] There may be multiple superiors who have a relationship of effective control with the subordinate in question and who have failed to properly supervise and control that subordinate.

A. Jurisdiction of the International Criminal Court

As a court of last resort, the ICC has very limited jurisdiction. The narrow scope of its jurisdiction presents various issues for the prosecution of superiors of PMSC personnel under art 28 of the Rome Statute. These issues include limitations on the crimes that may come before the ICC and how the ICC gains jurisdiction.

The first limitation concerns the specific crimes that may come before the ICC. The ICC only has jurisdiction over the international crimes set out in art 5 of the Rome Statute. A superior can be held liable by the ICC for his or her subordinate's commission of a war crime, a crime against humanity or the crime of genocide.

148 Frulli, ibid; see also Meloni, above n 4, at 97.

The conduct that may constitute a crime against humanity is set out in art 7 of the Rome Statute. To be a crime against humanity, the acts described in the provision must be accompanied with the specific intent that they are "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[149]

Similarly, the conduct of a crime of genocide, set out in art 6, must be accompanied by the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group". Due to the PMSC personnel's lack of personal connection to the conflict zones they are employed in, it is more likely that they will commit a war crime than a crime against humanity or a crime of genocide. However, there may be situations where the actions of PMSC personnel do meet the requirements for a crime against humanity or a crime of genocide. This could be the case where the PMSC works alongside a state or rebel group that is carrying out these crimes and the PMSC personnel are working in a direct combat position.

Article 8 of the Rome Statute sets out the range of conduct that will constitute a war crime.[150] If a crime, such as murder or rape, is committed outside this context then it is not a war crime and it is not within the jurisdiction of the ICC. Article 8(1) of the Rome Statute states the ICC "has jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". The ICC will not have jurisdiction over the commission of one or two individual war crimes. PMSC personnel who have been employed to directly participate in hostilities, or to guard detainees or military objectives, could in principle commit war crimes.[151]

The second limitation relates to how the ICC gains jurisdiction over a case. The jurisdiction of the ICC over the crimes set out in art 5 is triggered when: (1) a state party to the Rome Statute refers the situation to the prosecutor of the ICC; (2) the United Nations Security Council refers the situation; or (3) the prosecutor decides to initiate an investigation of their own accord.[152] Under the first and third options the situation must have occurred in the territory of a state party to the Rome Statute, or the accused must be a national of a state party to the Rome Statute.[153] If the relevant state is not a party to the Rome Statute, the state can accept the jurisdiction of the ICC in relation to a particular crime.[154]

Therefore, the ICC may have jurisdiction when the offence committed by the PMSC personnel occurred in the territory of a state party. If the offence did not occur within the territory of a state party, the ICC may still have

149 Rome Statute, art 7(1).

150 *Prosecutor v Tadić (Judgment)* ICTY Appeals Chamber IT-94-1-A, 15 July 1999, at [239]. The ICTY discussed the requirement of a nexus between the acts in question and the armed conflict in relation to crimes against humanity under the statute of the ICTY. This discussion is also useful when considering war crimes.

151 Lehnardt, above n 136, at 1019.

152 Rome Statute, art 13.

153 Ibid, art 12.

154 Ibid.

jurisdiction where the superior concerned is a national of a state party. An interesting situation could arise where the relevant superior is a national of a state party, but the PMSC subordinate is not. What will be more difficult is if the subordinate is a national of a state party but the superior is not. In either case, the situation could arise where the superior is found responsible under command responsibility for an offence, but the ICC has no jurisdiction over the subordinate, or vice versa.

A further issue in relation to the ICC's jurisdiction, is that crimes are only admissible before the ICC when they are of sufficient gravity.[155] This means that a superior would only be tried before the ICC under command responsibility when the crimes of the PMSC personnel have reached a sufficient level of seriousness to engage international condemnation.

The ICC's jurisdiction limitations do present a potential problem for the use of command responsibility under art 28 of the Rome Statute in relation to superiors of PMSC personnel. It has already been stated in this article that a large number of PMSC personnel are being, or have been used, in Iraq. Iraq is not a party to the Rome Statute. Further, many of the PMSCs in place in Iraq are from the United States or are used in connection with the United States' armed forces. As a result, it is highly likely that the relevant military commander, civilian official or PMSC superior will be a national of the United States. The United States is also not a party to the Rome Statute. This makes it very difficult for art 28 of the Rome Statute to be used effectively in the context of the Iraq war.

Despite these jurisdictional difficulties in applying art 28 to the superiors of PMSC personnel, there may still be situations where its use is both possible and appropriate. The government of Iraq may submit the matter to the ICC or the superior involved may be from a state that has accepted the ICC's jurisdiction. Situations may also arise when the states involved are party to the Rome Statute.

In addition, the jurisprudence of the ICC in relation to art 28 may help to shape the application of the doctrine of command responsibility to PMSC superiors in domestic courts, or in the ad-hoc tribunals. The decisions of the ICC are one source of international law that these courts will look to in their decisions. As a court of last resort, the ICC must only step in where the relevant domestic courts are unable or unwilling to exercise their own jurisdiction.[156] It is hoped that superiors of PMSC personnel will be tried in domestic courts under command responsibility if they cannot be brought before the ICC. The use of command responsibility in relation to superiors of PMSC personnel in domestic courts is a complicated issue that is beyond the scope of this article.

155 Ibid, art 17(1)(d).
156 Ibid, art 17.

Therefore, while the Rome Statute has some jurisdictional limitations, these will not always apply. Because command responsibility under the Rome Statute can be used in some situations and because of its potential to influence the application of command responsibility in domestic courts, it is important to examine how art 28 may be applied to the superiors of PMSC personnel.

B. Application of Article 28 to State Officials

1. Military Commanders

The first potential avenue for applying command responsibility to the actions of PMSC personnel is to look at whether a military commander may be held responsible under the doctrine. It is common for PMSCs to work in close proximity with the armed forces of different states. While the PMSC may not be fully integrated into the armed forces, there could be some cross-over in supervision or command between the PMSC and the armed forces that they work alongside.

Materneau Chrispin states, "Many governments remain opposed to the idea that their military commanders could be held to be superiors of [PMSCs] in the sense required under the command/superior responsibility doctrine."[157] According to Chrispin, the governments justify this position by arguing that the "institutional veil" means that the relationship between the PMSC personnel and the armed forces they are working with is only a contractual relationship[158]. Chrispin identifies four scenarios where this "institutional veil" should be lifted and a military commander may be held responsible for the PMSC subordinate's crime. These situations are where: (i) the crime was committed by PMSC personnel inside the premises of a prison or detention facility;[159] (ii) the crime was committed inside military barracks or official premises;[160] (iii) the PMSC personnel were embedded with military units in operational situations;[161] and (iv) a specific duty exists under international law by virtue of status of territory.[162]

In this author's opinion, these scenarios are too narrow. While the scenarios will be useful in the analysis, there may also be circumstances outside of Chrispin's situations where the military commander should still be held responsible. Instead, this part of the article is structured around the five requirements from *Bemba* with a focus on how the superior/ subordinate relationship and effective control elements can be met. This is a more flexible approach that can be adapted to the different factual circumstances that may arise.

157 Chrispin, above n 65, at 411.
158 Chrispin, above n 65, at 411.
159 Chrispin, above n 65, at 412.
160 Chrispin, above n 65, at 414.
161 Chrispin, above n 65, at 415.
162 Chrispin, above n 65, at 415.

There is a general duty on military commanders that may cover their relationship with PSMC personnel. Article 87(1) of the Additional Protocol I states that a commander has a duty "to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol". This duty extends to "members of the armed forces under their command and other persons under their control". PMSC personnel could qualify as "other persons" under the control of the military commander.

(a) Application of the Bemba Elements

As a de jure commander under art 28(a), the test for command responsibility is that outlined above from the *Bemba* case. If the five elements are present then liability under command responsibility may be found. The key issue in this application will be whether the commander has "effective control, or effective authority and control over the [PMSC personnel] who committed" the crimes. The military commander will only be held liable if a sufficient superior/ subordinate relationship is found to exist. This will require close examination of the military commander's ability to issue orders to the PMSC personnel and his or her ability to enforce those orders. If the commander does not have this capacity then he or she is unlikely to have the requisite degree of control over the PMSC personnel.

The commander's capacity to issue orders to the PMSC personnel may be spelt out in the contract between the PMSC and the government. It could also arise from a document setting out state practice in these situations. In most cases however, it is unlikely that a military commander will have effective authority and control over the PMSC personnel. It is normally senior employees within the PMSC itself that issue orders and discipline their own personnel.[163] The assessment of whether effective control exists must be determined on a case-by-case basis.

It must also be established that the military commander "failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution".[164] The ICC has emphasised that the requirements for this element will be judged on a case-by-case basis.[165] If the military commander has been closely working with the PMSC personnel and has a strong superior/subordinate relationship with them, then it may be that the military commander has a duty to educate the PMSC personnel in IHL. At the very least, the military commander could be required to submit the matter to the competent authorities and trigger an investigation.[166] This could be in a report made to the government body that hired the PMSC or to the PMSC itself. If the military commander has the

163 Gillard, above n 132, at 556.
164 Rome Statute, art 28(a)(ii).
165 *Prosecutor v Bemba*, above n 25, at [441].
166 Frulli, above n 147.

ability to remove the PMSC personnel from their positions, or from the area, then he or she must do so. What will be required of the military commander will depend on the exact nature of his or her powers over the PMSC personnel.

The last two requirements to establish responsibility under art 28(a) are that the commander "knew, or owing to the circumstances at the time, should have known that the [PMSC personnel] were committing or about to commit" the crime. Examples of what may fulfill this condition have been discussed above in relation to the case of *Bemba* before the ICC. There must also be a causal link between the commander's omission in supervision and the PMSC personnel's commission of the crime. Again, these assessments will depend on the facts.

Therefore, a state military commander may be held responsible for crimes committed by PMSC personnel where it can be shown that a superior/subordinate relationship with the requisite degree of control exists. The other requirements of *Bemba* must also be met.

2. Civilian Government Officials

The civilian government official that hired the PMSC, or facilitated the hiring of the PMSC, could potentially be held liable under art 28(b) as a de facto superior of the PMSC personnel. It may be argued that where a civilian official contracted personnel he or she knew to be inadequately trained, or who failed to put in place adequate procedures for the supervision of the PMSC personnel, that civilian official could be held liable. The *Montreux Document* sets out the obligations that international law places on states that contract PMSCs. States must:[167]

a. ensure that PMSCs that they contract and their personnel are aware of their obligations and trained accordingly

b. take any appropriate measures to prevent any violations of IHL by PMSCs

c. take measures to suppress violations of IHL committed by the personnel of PMSCs through appropriate means, such as military regulations, administrative orders and other measures as well as administrative, disciplinary or judicial sanctions, as appropriate.

As a representative of the state, a civilian government official involved in contracting PMSCs must take these factors into account. Otherwise, he or she could be found to have "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" under art 28(b)(iii).

As a civilian, the knowledge standard of art 28(b)(i) will be met if the official "knew, or consciously disregarded information that clearly indicated, that the [PMSC personnel] were committing or were about to commit the crimes". The civilian official must have come across information that suggested he or she should inquire further into the activities of the PMSC personnel.

167 *Montreux Document*, above n 145, at 11.

Further, art 28(b)(ii) requires that the crimes committed by PMSC personnel must have "concerned activities that were within the effective responsibility and control of the superior". This means that the civilian government official could only be found responsible for the PMSC personnel's crimes when the crimes were committed in the context of their work under the PMSC's contract with the government. If the crimes were not committed in this context then the civilian superior cannot be held liable.

With a civilian government official it will be even harder to establish the required relationship of effective authority and control than it is with a military commander. The civilian government official will not work directly with the PMSC personnel in the field and is unlikely to have any personal involvement with them. As Emanuela-Chiara Gillard describes, when discussing the doctrine, "it should be recalled that the responsibility is generally limited to direct superiors with a personal responsibility for subordinates within their control".[168] It is essential to find a superior/subordinate relationship between the PMSC personnel and the civilian government official. However, while an indirect relationship will make effective control harder to establish, the lack of a direct, personal relationship does not necessarily preclude the finding of a relationship of effective control. As long as there is effective control, an indirect superior/subordinate relationship may be sufficient.

If the civilian government official has the ability to choose which PMSC personnel will accompany the armed forces, determine where they will be placed, remove them and sanction their conduct, then the superior/subordinate relationship may be made out in some circumstances. It is important that de facto control and authority is actually established on the facts. Legal, or de jure, control is not enough. The Montreux Document highlights that liability under command responsibility will not arise solely from the existence of a contract with the PMSC.[169]

Therefore, it may be possible in some circumstances to use command responsibility to hold a civilian government official responsible for his or her role in contracting PMSCs. However, the relationship of effective authority and control may be hard to satisfy.

C. Application of Article 28 to Superiors Within Private Military and Security Companies

There are two types of superiors that could be held liable within a PMSC. The first is a PMSC superior who is present in the field. This superior could potentially be tried under arts 28(a) or 28(b) depending on whether the superior can be classified as a de facto military commander or not. The second is a superior in the senior management of the PMSC who is not present in the field.

168 Gillard, above n 132, at 556.
169 *Montreux Document*, above n 145, at 15.

1. Private Military and Security Company Superiors in the Field

(a) Article 28(a) or (b)?

Article 28(a) of the Rome Statute includes military commanders and persons who are effectively acting as such. A PMSC superior who is present in the field may be found to be effectively acting as a military commander. Whether a PMSC superior is effectively acting as a military commander will require an assessment of the nature of the work that the PMSC superior and subordinates are engaged in and the organisation of the PMSC in question. Where the PMSC has been employed for the purpose of direct engagement in hostilities, the PMSC superior should be tried under art 28(a) because this type of work is a key part of the military's function. Also, where the PMSC has been involved in the guarding of suspects or buildings, or the interrogation of suspects, art 28(a) may be appropriate due to the fact that these types of activities have the potential to turn into direct combat situations.

Further, it has been found that a superior in a state's police force or an irregular armed group could be classified as "effectively acting as" as military commander.[170] A PMSC superior can be likened to a superior within a state's police force. While neither the police nor a PMSC is an official armed force, both contain strict hierarchies and some reporting mechanisms. If the PMSC has been engaged for armed combat, or is authorised to use weapons while guarding a person or building, then it is analogous to an irregular armed force. Since a PMSC superior in the field is similar to superiors in the police force and in irregular armed forces, there is a strong argument that PMSC superiors in the field should also be included in the category of de facto military commanders.[171]

The way in which PMSCs are organised also suggests that these superiors should be tried under art 28(a). According to Micaela Frulli, the structure and background of employees in PMSCs means that PMSC superiors in the field should be charged under art 28(a). Many employees of PMSCs have a background in state militaries and have brought some of the organisation and structure of the armed forces with them to the PMSC.[172] This can also be seen in the fact that the great majority of the services PMSCs now provide used to be exclusively provided by the armed forces of a state. PMSCs appear more like military organisations than other companies due to the strict hierarchies that are required to provide these services. This strict hierarchy makes it appropriate for the doctrine of command responsibility to be applied to PMSCs.[173] Frulli's analysis suggests that a PMSC superior in the field should be charged under art 28(a), due to the similarities between PMSCs and traditional armed forces.

170 *Montreux Document*, above n 145, at 15.
171 Lehnardt, above n 136, at 1029.
172 Frulli, above n 147.
173 Lehnardt, above n 136, at 1026.

However, this author does not think that it will always be appropriate to charge PMSC superiors in the field as de facto commanders. PMSCs may not always be structured in the same way as the military. Where the PMSC is solely involved in providing catering or transport services to the armed forces, the company may be structured horizontally rather than vertically. Rather than having an effective command structure in place, the PMSC may instead have most of its personnel working at one level with a few managers. If this is the case then it could be argued that the PMSC superior is not effectively acting as a military commander and, as a result, should be charged under art 28(b) instead. If there is no relationship of effective control on the facts then command responsibility will not be appropriate. In that situation, liability under a joint criminal enterprise should be explored.[174]

It is also open to the ICC to find that a PMSC superior in the field is a civilian commander and, as a result, should come under art 28(b). This will especially be the case where the PMSC is not directly involved in armed combat, but has instead been engaged to advise armed forces or to assist in interrogation. A superior of a PMSC engaged in transport, catering, training and advising of armed forces, technical assistance and maintenance of weapons systems may also be charged under art 28(b). It will depend how closely the PMSC's work is linked to military activities as to whether the superior should come under art 28(a) or (b).

(b) Analysis under Article 28(a)

For a PMSC superior in the field to be held responsible as a de facto military commander under art 28(a), it is essential that a relationship of effective control is established. This relationship of control may be established by showing that the PMSC superior is able to determine where PMSC personnel are placed, what activities they are engaged in and when they are withdrawn. The PMSC superior in the field may also have the power to fire PMSC personnel or to remove them from the particular area or field of work. These powers may be established by the PMSC superior's employment contract, the employment contracts of the PMSC personnel or some form of a code of conduct for the PMSC. The key is that the PMSC superior in the field must be able to issue orders and ensure they are followed. The fact that the PMSC superior is highly influential and is listened to by his or her subordinates is not sufficient.[175]

174 Cedric Ryngaert "Litigating Abuses Committed by Private Military Companies" (2008) 19(5) EJIL 1035 at 1052. Ryngaert suggests that the doctrine of joint criminal enterprise and party liability are "singularly appropriate as a doctrine of holding [PMSC]s and their leaders accountable". The question of whether command responsibility or joint criminal enterprise should be used is beyond the scope of this article. However, this author argues that it is important to encourage responsible command to be implemented in respect of PSMCs. Therefore, command responsibility should be considered alongside joint criminal enterprise and party liability rather than being completely discounted. Each form of individual criminal liability may be appropriate in a different situation.

175 *Prosecutor v Bemba*, above n 25, at [415].

Under art 28(a)(iii), the superior may be found to have failed to prevent the crime when he or she has failed to educate the PMSC personnel in the requirements of IHL. The problem here though is that there is no legal duty under international law for a PMSC superior to educate PMSC personnel in IHL. Additional Protocol I only explicitly places the duty to educate armed forces in the requirements of IHL on a de jure military commander.[176] As a result, it may be hard to establish that a PMSC superior failed to prevent the crime due to a failure to educate their subordinates in IHL. However, a PMSC superior could still order his or her superiors not to commit crimes against IHL and could make them aware of when a violation could occur.

Furthermore, the PMSC superior can still be found liable for failing to repress the crime or to "submit the matter to the competent authorities for investigation and prosecution".[177] While a PMSC superior may not have the same access to military discipline that a de jure military commander does, he or she can still report abuses to the proper authorities.[178] The PMSC superior could report the crime to his or her own superior in the organisation, to government officials of the state the PMSC is operating in, or to the commanders of the armed forces that the PMSC is working with. To discharge this duty, it is important that the PMSC superior reports the crime to a person or organisation that has the capacity to investigate and prosecute the crime. Reporting the crime may also qualify as repressing the crime. If the PMSC personnel know they will be reported if they commit a crime then they may be less likely to commit further crimes. If the PMSC superior has other disciplinary powers then he or she must exercise these powers in order to discharge the duty of repressing the crime.

If a PMSC superior in the field is tried under art 28(a) then a higher standard of supervision is imposed with the higher knowledge standard. The superior is liable if they knew or should have known of the crime.[179] Under this standard, a PMSC superior could be liable if he or she failed to put in place a proper reporting system or ignored information that suggested that crimes could be committed.

It could be argued that this knowledge standard places too high a burden on superiors within PMSCs. Unlike de jure military commanders, there is no legal duty for PMSCs to have a reporting system in place. It may be the case that the strict hierarchies within these companies will often be accompanied by some sort of reporting system. However, there is no legal duty that can be pointed to, to demonstrate that a PMSC superior has failed in his or her duty of supervision if a reporting system is not in place.

Therefore, in applying the five elements of the test in *Bemba*, there will be some situations in which a PMSC superior in the field can be successfully found liable under art 28(a). This demonstrates that command responsibility can effectively be used to combat the impunity surrounding PMSCs.

176 Additional Protocol I, art 87.
177 Rome Statute, art 28(a)(ii).
178 Frulli, above n 147.
179 Rome Statute, art 28(a)(i).

(c) Analysis under Article 28(b)

If the PMSC superior in the field is tried as a civilian superior, the knowledge standard will be satisfied if he or she knew or consciously disregarded information that suggests that the crimes were being or were about to be committed. This knowledge standard places less of a burden of supervision on the PMSC superior. He or she will only be liable in the case of wilful blindness or actual knowledge. Further, art 28(b)(ii) requires that the crimes committed be within the effective responsibility and control of the superior.

Therefore, a PMSC superior in the field may also be found responsible under art 28(b).

2. Private Military and Security Company Superiors in Company Management

A PMSC superior in the company's management who is not active in the field would come under art 28(b) as a civilian superior. The situation is very similar to that of a civilian state official so much of the analysis from that section above can be applied here. However, as with the PMSC superior in the field, there are no explicit legal duties of supervision and control that are placed on PMSC superiors, as there are on state officials.

A PMSC superior in the company's management could potentially be found to have effective control due to his or her ability to hire and fire the PMSC personnel. However, this legal control alone is not enough. The PMSC superior must also have de facto control.[180] As with a civilian government official, the fact of an employment contract between the PMSC and the personnel will not be enough to find responsibility.[181] If the PMSC superior can determine where the PMSC personnel are sent, what activities they are engaged in and can discipline them, then effective control may be established. It is also important that the PMSC superior can issue and enforce orders, despite the more administrative role.

A PMSC superior may be found liable for failing to prevent the crime where he or she has failed to put in place proper reporting mechanisms or procedures for educating PMSC personnel in IHL. As with PMSC superiors in the field, it is more likely he or she will be held responsible for failing to report the crime, due to the lack of legal duties at international law in relation to PMSC superiors.

VI. Conclusion

In conclusion, command responsibility is both a possible and appropriate way of addressing the current impunity that surrounds PMSCs. It ensures that those who direct and control the activities of PMSC personnel will not escape liability where they have failed to carry out proper supervision and control of such personnel.

180 Lehnardt, above n 136, at 1027.
181 Lehnardt, above n 136, at 1027.

Command responsibility for superiors of PMSCs is consistent with the rationales behind the doctrine. The application of responsibility under art 28 encourages proper supervision of PMSC personnel and provides an incentive for effective reporting mechanisms to be put in place. It reduces the danger that states will try to avoid liability for their armed forces by contracting PMSCs to carry out the more dubious activities. The requirement of responsible command is a key way of reducing the commission of international crimes by PMSC personnel.

Further, the doctrine's development to cover both military commanders and civilian superiors allows the doctrine to be effectively applied to the four possible superiors of PMSC personnel. Whether command responsibility can be found in relation to the different superiors will depend on an assessment of the facts of each situation. This article has discussed how the rules from the ICC in *Bemba* and the ad-hoc tribunals' decisions on command responsibility can provide guidance regarding the application of art 28 to these superiors. Command responsibility under the Rome Statute can be a useful tool in addressing the impunity of the actions of PMSCs.

If the impunity of PMSCs is not addressed then international criminal law will lose much of its legitimacy. The expanding use of PMSCs in conflict zones increases the risk that PMSC personnel will commit international crimes. If such a large body of people cannot be effectively held responsible and brought to justice then the whole existence of an international criminal law system is brought into question. It is essential to the continued respect for international criminal law that command responsibility is used to address the impunity of PMSCs.

Appendix One: Article 28 of the Rome Statute

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.