

PREFACE

The effective attribution of criminal responsibility to individuals involved in the commission of heinous, macro-dimension crimes is one of the challenges that the international community has had to contend with for the last 60 years, if not longer. Indeed the horrors of the Second World War highlighted the absolute necessity of finding proper judicial mechanisms for dealing with and reacting to the commission of war crimes, crimes against humanity and genocides. The practical difficulties involved in the ascertainment of the multi-level and complex web of responsibilities which lies behind the commission of such crimes triggered the debate as to whether it was at all possible to overcome their collective dimension. However, it was soon clear that only the timely attribution of individual criminal responsibilities to those implicated at various levels in the commission of the crimes could be an effective reaction. It was also immediately apparent that the need to bring the single individuals to justice was particularly important with regard to those occupying positions of authority, the 'most senior leaders' or, in other words, those with powers of command. It is upon these premises that international criminal law began to develop (see *infra* Chapter 1).

In recent years considerable attention has been devoted to the doctrine of *command responsibility* in international criminal law. Through this form of responsibility a military commander or a civilian superior may be held criminally responsible for crimes committed by his subordinates. By means of this form of responsibility what is punished is not the superior's active participation in the crime but his culpable omission. More precisely, the superior is held criminally responsible for his culpable failure to adopt necessary and reasonable measures to prevent or punish the crimes committed by his subordinates. Command responsibility is a concept that originated in the military field and then was applied in the context of international humanitarian law and finally in international criminal law (see *infra* Chapter 2).

This complex form of responsibility has been a source of debate since its first applications in the period following the Second World War, and continues to present particular difficulties for those who are called upon to interpret it. It is especially at the level of the subjective element that command responsibility presents its thorniest aspects and risks drifting towards forms of strict liability, as we shall see. The limits and boundaries of this responsibility are still much debated, as the jurisprudence of the *ad hoc* Tribunals shows (see *infra* Chapter 3).

Even more arduous is the attempt to establish the (legal) nature of command responsibility. Is it a form of responsibility pursuant to which the superior is held accountable for a specific offence of dereliction of duty or, instead, is he liable for the crime committed by the subordinates? In a nutshell, the question is: what exactly is

the superior to be punished for? The thesis put forward here is that it is erroneous to consider it as a unitary form of responsibility. Indeed, around a central *corpus* of common elements there are at least four different basic forms of command responsibility which can be differentiated on the basis of their various objective and subjective elements. We thus have superior responsibility cases of *intentional failure to prevent* or of *negligent failure to prevent*, and cases of *intentional failure to punish* or of *negligent failure to punish* the subordinates' crimes. Moreover, each of these basic forms assumes different characteristics depending on whether the superior is a military commander or a civilian superior (see *infra* Chapter 4).

Although the Statute of the International Criminal Court (ICC) regulates all of the aforesaid basic forms in a single norm – Article 28 –, each of these presents so different features that we may advance the thesis that the legal nature itself of command responsibility changes according to whether it is in turn a case of *intentional* or *negligent failure to prevent* or *to punish* (see *infra* Chapter 4, Part 2). Thus in order to understand this form of responsibility, besides the presence of common elements, it is in our view necessary for each of the different basic forms to be analysed separately. This is required if we want to reconcile command responsibility with the fundamental principles of individual and culpable responsibility, which are at the base of every liberal and democratic criminal system, including the international one.

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