

Guénaél Mettraux. ***The Law of Command Responsibility***. Oxford: Oxford University Press, 2009. Pp. 307. £60.00. ISBN: 9780199559329.

The doctrine of command responsibility is one of the most important concepts which has been developed in international criminal law since the advent of that legal discipline post-World War II. Most of the very problematic issues which had originally been raised have, in the meantime, been resolved by the work of the ad hoc Tribunals and a clear structure of the elements of this mode of criminal liability has evolved. However, some aspects of the doctrine still remain highly disputed. Mettraux, in his book *The Law of Command Responsibility*, endeavours to give an account of the state of the doctrine in light of the jurisprudence of the International Military Tribunals (Nuremberg and Tokyo), the ad hoc Tribunals (ICTR and ICTY), and the Hybrid Courts (in particular the Special Court for Sierra Leone).

The book starts out with a brief introduction to the origins of the doctrine (at 3–21). Mettraux correctly identifies the *Yamashita*

trial as the modern birth of the doctrine of command responsibility. He then quickly turns to the matters at the core of the doctrine of command responsibility, which are at the heart of the book. Command responsibility, according to Mettraux, is a *sui generis* form of liability for culpable omission (at 38). The core of the commander's *culpa*, and the basis of his liability, stands not in the contribution that he has made to the crime of the subordinate but in a culpable dereliction of duty (at 40). Mettraux persuasively explores and explains the differences between aiding and abetting and criminal liability for command responsibility, which lie in the fact that the action of the aider and abettor has a 'substantial effect' on the commission of the crime, while the failure of a superior to act, by contrast, was just a 'significant contributing factor' in the commission of the crime (at 43).

Mettraux then moves on to the more technical elements of command responsibility. However, it must be pointed out that the differentiation between aiding and abetting and command responsibility only scratches at the surface of some very important questions with regard to the different modes of liability. The distinction between (indirect) commission of a crime by a superior (e.g. as a perpetrator behind the perpetrator¹) and command responsibility in particular probably deserved some more scrutiny in Mettraux' study, not least because there have been some prominent

cases before the ad hoc Tribunals where they had to decide whether the superior perpetrated the crime himself (in the context of a joint criminal enterprise) or was liable 'only' under the doctrine of command responsibility.

However, Mettraux correctly points out, in the chapter on 'Overlap of Types of Liabilities', that it would be wrong to punish an accused for taking part in the commission of a crime while at the same time holding him liable for failing to prevent or punish that crime (at 94–95). But these remarks are rather cursory, and, especially because command responsibility has sometimes been interpreted as being an omnibus clause,² it would have been worthwhile to scrutinize a tad more closely some borderline cases, such as, for example, the *Galić* case.³ Ultimately the question at the heart of the issue concerns the point at which the superior has such effective control over his troops and their actions that it amounts to control over the crime itself (which is perpetrated on the ground by his subordinates). If a critical threshold is crossed (e.g. by an omission that amounts to facilitation), the superior himself may become an indirect

¹ *Prosecutor v. Stakic (Trial Judgment)* IT-94-24-T (31 July 2003), at paras 421–467, although quashed by the Appeals Chamber, offers some interesting thoughts on the indirect commission of crimes by superiors and transfers the perpetrator-behind-the-perpetrator doctrine, which arguably shares some elements with command responsibility, to international criminal law (the doctrine is well-established in the jurisprudence of some important civil law jurisdictions: see, e.g., Germany (Politbüro Case, 45 BGHSt 270) with regard to killings at the Berlin Wall; and Argentina (Federal Criminal Court of Appeals, Judgment of 9 Dec. 1985) with regard to the Junta Trials.

² *Prosecutor v. Stakic (Trial Judgment)*, *supra* note 1, at para. 465; see also *Prosecutor v. Krnojelac (Trial Judgment)* IT-97-25-T (15 March 2002), at para. 173.

³ While *Galić* was convicted of committing the crime of terror against civilians under Art. 7(1) ICTY Statute, the argument can be made that, on the face of it, this was a classic case of command responsibility (for the crimes committed by troops under his command over which he had effective control and whose crimes he had enough opportunities to punish after he allegedly gained knowledge of them). In fact *Galić* had been charged by the Prosecution under Art. 7(1) as well as Art. 7(3) ICTY Statute, but the Trial Chamber found from circumstantial evidence that he had ordered the crimes and therefore abstained from further elaborating on command responsibility: see *Prosecutor v. Galić (Judgment)* ICTY-98-29-T (5 Dec. 2003), at paras 733–753.

(co-)perpetrator of the crime.⁴ Unfortunately Mettraux leaves these highly important questions almost untouched.

Apart from this shortcoming in distinguishing more effectively between command responsibility and the other modes of liability, the book is very good at explaining the special features of command responsibility and the elements comprising it. Mettraux succeeds in clearly structuring the elements of this mode of liability (at 129). At the centre of the doctrine is the superior–subordinate relationship. It does not matter whether it is a *de iure* or a *de facto* authority that the superior possesses; critical to the concept of command responsibility is his effective control. Mettraux correctly, and in conformity with the ad hoc Tribunals, defines effective control as the ‘enforceable power to prevent and punish crimes of subordinates’ (at 158). The duty to prevent crimes consists of the duty to take feasible (counter-)measures within one’s powers, while at the core of the duty to punish lies the duty to investigate or report the commission of crimes to relevant authorities. Mettraux points out that proof of superior responsibility always requires conclusive evidence of the actual exercise of command and control over an identifiable group of subordinates (at 161) and gives criteria for the establishing of effective control. Some of the criteria that Mettraux identifies seem to be narrow and might make it in some cases overly cumbersome, if not impossible, for the prosecution to establish evidence that a superior indeed had effective control over his subordinates. For example, Mettraux declares that only a binding order can be evidentially relevant to the issue of effective control, since an order the binding

power of which is not obvious does not demonstrate any exercise of commanding power (at 178). One would think that because, as stated by the ICTY, orders can be given in a wide variety of manners⁵ also orders the exact legal qualification of which is not entirely clear could be evidence of the degree of effective control that a superior exerts.

Furthermore, when Mettraux turns to analysing the mental elements of the superior’s responsibility, it becomes obvious that he sometimes tends to argue from the perspective of defence counsel. One such passage is where he discusses the ‘should have known’ *mens rea* standard of Article 28(a)(1) of the ICC Statute (at 210). The alleged problem with the provision, as described by Mettraux, lies in the fact that knowledge of a special intent of his subordinates may in some cases be attributed to a superior, e.g. in respect of the crime of genocide. Mettraux claims this to be highly worrying, because ‘[t]urning a commander into a murderer, a rapist or a genocidaire because he failed to keep properly informed seems, excessive, inappropriate and plainly unfair’ (at 211). The *mens rea* requirements of Article 28(a)(1) seemingly differ from what the ICTY established in the *Celebici* case.⁶ Therefore the academic debate on this provision has been quite extensive, and, unfortunately, Mettraux nowhere indicates that he has followed it; at least he does not elaborate on it in his book. The ‘should have known’ standard of the ICC Statute had been introduced by the United States in the discussions at Rome,⁷ and it has been argued that the ‘should have known’ standard of Article 28(a)(1) of the ICC Statute is in fact – or can be interpreted as being – the same standard as the ‘had reason to know’ standard of the ICTY.⁸ Others have convincingly

⁴ In this context it is interesting to note that the ICC decided to charge Sudanese President Al-Bashir under Art. 25(3)(a) of the Rome Statute, which reflects the abovementioned perpetrator-behind-the-perpetrator liability. The warrant of arrest explicitly states that Al-Bashir allegedly committed the crimes indirectly himself (and was not simply a superior in charge of subordinates): see ICC Doc 02/05-01/09 (4 Mar. 2009).

⁵ *Prosecutor v. Galić (Judgment)*, *supra* note 3, at para. 140.

⁶ *Prosecutor v. Delalić et al. (Trial Judgment)* IT-96-21-T (16 Nov. 1998), at para. 383.

⁷ See K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002), at 698.

⁸ Arnold, ‘Commentary Art. 28’, in O. Triffterer (ed.), *Commentary on the Rome Statute* (2008), states: ‘Therefore, even though it will be the

stated that the criminal liability of the superior in the lack-of-knowledge scenario is grounded in the responsibility for the result of the subordinate's criminal conduct, but not in the subordinate's criminal conduct itself.⁹ Even the ICTR has noted that the 'should have known' formula of the ICC Statute is completed by the phrase 'owing to the circumstances at the time', which seems to bring it into line with the 'had reason to know' requirement.¹⁰ Mettraux does not reflect on alternative interpretations of Article 28(a)(1) and comes to the rather harsh conclusion that it in no way represents the state of customary international law (at 213). Even if this finding is correct, which in the light of its history is disputable, Mettraux certainly takes the easy way out when he omits a thorough discussion of differing opinions with regard to the interpretation of Article 28(a)(1) (Garraway, for example, is of the opinion, that, although the wordings of the ICC Statute and the ICTY/ICTR Statutes differ, this does not necessarily mean that there is a risk that jurisprudence of the tribunals will develop in different directions;¹¹ and therefore ICC jurisprudence with regard to Article 28 could well be inside the boundaries of customary international law). The fact that Mettraux does not take account of this discussion weakens the power of his reasoning. As a consequence, the findings of this section are not entirely convincing.

ICC's task to define the details of the mens rea requirements under its Statute, it may be concluded that, notwithstanding a slightly different wording, the applicable test is still whether someone, on the basis of the available information had reason to know in the sense of Additional protocol 1.'

⁹ Nerlich, 'Superior Responsibility under Art. 28 ICC Statute', 5 *J Int'l Criminal Justice* (2007) 665, at 676.

¹⁰ *Prosecutor v. Kayishema and Ruzindabna (Trial Judgment)* ICTR-95-1-T (21 May 1999), at paras 225–228.

¹¹ Garraway, 'Command Responsibility: Victor's Justice or just Desserts?', in R. Burchill and N.D. White, (eds), *International Conflict and Security Law* (2005).

Another debatable conclusion drawn by Mettraux concerns the relevant state of mind of the superior with regard to his failure to act. Mettraux claims that the accused must have been aware of the fact that his own conduct was illegal and criminal (at 222). This is, if not wrong, at least highly disputable. There is good reason to argue that it is simply irrelevant whether or not the superior was aware that his grave failure to act would trigger his criminal liability through the doctrine of command responsibility. If the superior had complete information on the crime, effective control over his subordinates, knew of his duties, and had the factual opportunity to prevent/punish the crime, it simply does not matter whether he was positively aware of the fact that his failure to act would lead to him being criminally liable. Such (conscious or unconscious) error in judgement concerning his behaviour cannot prevent his criminal liability. To come to a different conclusion would render the doctrine of command responsibility useless, as it would in practice almost always be impossible to prove this standard of *mens rea* if the accused advanced the argument that, at the time when he failed to act, it happened *bona fide* (regarding his own criminal demeanour).

Finally, a last, but important, element of the doctrine is the requirement that the failure of the superior must be serious, i.e. his breach of duty must be 'gross'. According to Mettraux, with regard to the failure to punish crimes, factors such as the number of criminal incidents or victims might help to qualify the gravity of the consequences of the failure to act. It is cogent when Mettraux states that only a grave breach of duty is capable of being relevant to the doctrine of command responsibility, while a minor violation will be insufficient and disciplinary sanctions against a superior might be better suited to dealing with the matter in such situations (at 260).

In sum, and the above criticisms aside, Mettraux in his book precisely and for the most part with the necessary objectiveness states the constituting elements of the doctrine of command responsibility as they have been developed post-World War II by the various

international criminal tribunals. Mettraux certainly demonstrates impeccable knowledge of the relevant jurisprudence, especially of the two ad hoc Tribunals, the ICTY and the ICTR. *The Law of Command Responsibility* is an erudite and very good book where it analyses that case law. However, it is not always entirely convincing in passages where it appears that Mettraux argues from the perspective of defence counsel. Some of his conclusions, e.g. with regard to evidentiary issues and the standard of proof, are debatable, and one can vividly imagine that the book probably would have come to some quite different conclusions if it had been written by someone working in the prosecutor's office. However, this does not take too much away from this excellent study, and in the end Mettraux succeeds in giving a full account of the relevant jurisprudence. In this sense the book is probably more of a practitioner's guide than an academic appraisal of the doctrine of command responsibility, and, while one may not agree with all of Mettraux's conclusions, it is an important study.

Daniel Heilmann, Dr. jur., LL.M.

*Senior Research Fellow Max-Planck
Institute for Comparative Public and
International Law, Heidelberg
Email: dheilman@mpil.de*

doi: 10.1093/ejil/chq030