

# The Evolution of the Law of Command Responsibility and the Principle of Legality

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## 1.1 The shortcomings of international criminal law and the recognition of command responsibility

Though there had been a number of important war crimes trials prior to the Second World War, the prosecution of crimes committed during that conflict marked the birth of modern international criminal justice. By means of two monumental international trials in Nuremberg and Tokyo, as well as many other domestic trials, thousands of individuals, and through them the political, judicial, medical and industrial institutions of the Third Reich and its allies, were made to account for their actions.

The unprecedented nature of that enterprise raised many problems for those charged with the responsibility for managing these proceedings. One such challenge stemmed from the realization that international law lagged far behind the level of legal sophistication necessary and desirable for tackling the sort of criminality which had characterized this conflict. International criminal law was underdeveloped and a deep chasm existed between what was generally regarded as morally repugnant and the range of conducts that qualified as criminal offences under international law. There was therefore a general awareness of the necessity for international law to catch up with basic moral standards and for a judicial mechanism to sanction egregious violations of

human freedom and dignity which until then had stood beyond the realm of international criminal law:<sup>1</sup>

When some of the participants in war, whether in high or low place, violate those principles of decency, honour, fair play, and humanity which we have come to know as 'civilized', they must be punished. The machinery is new, but the principles are ageless. Some of the atrocities committed around the world during the past war were so revolting that if the perpetrators thereof were permitted to escape punishment for lack of proper machinery, the word 'civilization' would be a mockery and deserve the contempt it would receive.

Such evolutionary moments in the life of the law, as Justice Jackson acknowledged, 'rarely come and quickly pass'.<sup>2</sup> International criminal law evolved to meet these challenges and to maintain or reassert its relevance. New categories of crimes were duly established (e.g., crimes against humanity and aggression) and old defences disappeared (e.g., the defence of obedience to superior orders and the defence of *tu quoque*).<sup>3</sup> Most critical to that process was the recognition at Nuremberg that individuals could be held criminally responsible for their actions under international law and that an official position would not immunize those who committed an international crime:

Individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance to the authority of the state if the state in authorising action moves outside its competence under international law.<sup>4</sup>

No less momentous an advance was the concrete application of the principle of individual criminal responsibility to thousands of individuals, including many high-ranking civilian and military leaders who were brought to justice in the months and years following the end of the war. The shortcomings of existing

<sup>1</sup> See, e.g., statement of the 'Law Member' of the *Toyoda* War Crimes Tribunal (*United States v Soemu Toyoda* ('*Toyoda* case'), War Crimes Tribunal Courthouse, Tokyo, Honshu, Japan, September 1949, 19 *United States v Soemu Toyoda*, Official Transcript of Record of Trial), p 5004.

<sup>2</sup> *Report of Robert H. Jackson*, United States Representative to the International Conference on Military Trials, London, 1945 ('Jackson, *International Conference*'), p 37.

<sup>3</sup> The major leap forward of international law as occurred during that period was best described by Justice Jackson in his Nuremberg Report to the President of the United States:

International law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs. But every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. Report to the President by Mr. Justice Jackson, 6 June 1945 (reprinted in Jackson, *International Conference*, pp 42, 51–52).

<sup>4</sup> International Military Tribunal ('IMT') Judgment, p 223, cited with approval in *Furundžija* Trial Judgment, par 155.

international law in capturing what in effect was a system of state-sanctioned criminality required that innovative concepts and new mechanisms be found to criminalize certain forms of participation in that system.

Until that point, it had been common wisdom that criminal liability under international law could only be incurred where an individual had been personally involved in the commission of a crime. In the case of a military commander or civilian leader, this meant that to be liable he had to have taken a personal part in the commission of a crime as, for instance, by ordering that crime or by aiding and abetting it. One of the most significant advances of the post-war era was the development of a doctrine that attributes criminal responsibility to military and civilian leaders, not only where they have taken a personal or direct part in the commission of a crime, but also where they have failed to prevent or punish crimes of subordinates. Prior to that development, international law had offered precious little mechanism for criminalizing the passive acquiescence of a leader in the commission of crimes by his subordinates. What would later be coined as the doctrine of ‘command responsibility’ filled that gap by providing for a penally-enforced minimum standard of responsibility for leaders and commanders with respect to the conduct of their subordinates.<sup>5</sup> The recognition that military commanders and civilian leaders could be held accountable under international law for failing in their duties of supervision signified a qualitative leap in the way breaches of international criminal law were to be dealt with.

## 1.2 A doctrine born in sin—the *Yamashita* precedent

The doctrine of command responsibility was not born a detailed, nor a strictly defined, form of liability. Instead, it grew out of a fuzzy idea and remained, for a long time, the subject of much debate and contradictory opinions. Its birth is generally situated in the prosecution and trial of General Tomoyuki Yamashita by a U.S. Military Commission in Manila.<sup>6</sup> At the time of Yamashita’s trial in 1945,

<sup>5</sup> See, for instance, the comment of the representative of Austria during the negotiation of Additional Protocol I to the Geneva Conventions, noting whilst discussing what would become Article 86 of the Protocol that ‘[p]enal sanctions were inevitable to ensure the implementation of Protocol I in cases of grave breaches, and in order to be effective, the system of sanctions should be as comprehensive as possible [and] should include failure to act, which could be as harmful as the commission of a breach’ (Summary Record of the Fiftieth Meeting, 4 May 1976, CDDH/II/SR.50, at 115, par 38). See also, *ibid.*, at 120, par 68 (‘By and large, implementation of [Additional] Protocol I and of the Geneva Conventions depended on commanders. Without their conscientious supervision, general legal requirements were unlikely to be effective.’).

<sup>6</sup> See Judgment of the United States Military Commission, Manila, 8 Oct 1945–7 Dec 1945, as reprinted in the *Law Reports of Trials of War Criminals*, Selected and Prepared by the United Nations War Crimes Commission, Vol IV, London: HMSO, 1948, 1, at 35–36; see also, extracts of the Judgment, as reprinted in L. Friedman, *The Law of War, A Documentary History* (London: Random House, 1972) (‘Friedman, *Law of War*’), Vol II, pp 1596–1598. See also the U.S. Supreme Court decision in the same case (*Yamashita*, US Supreme Court, Judgment of 4 February 1946, 18

it would have been wrong to argue that a doctrine of ‘command responsibility’ formed part of existing customary international law.<sup>7</sup> In a personal account of this trial, Defence counsel for Yamashita, Frank Reel, recounts his first discussion of the charges against Yamashita:

Ruddock [a member of General MacArthur’s Judge Advocate] expressed himself in strong words about the charge. ‘Yamashita is being charged as a war criminal because his men violated the laws of war,’ he said. ‘They have nothing on him at all. They’re trying to establish a new theory—that a commanding officer is responsible if his troops violated the laws of war, regardless of whether he ordered the violations or even knew of them. Under such a principle, I suppose even MacArthur should be tried. It is bad law.’<sup>8</sup>

The case against General Yamashita was that, between 9 October 1944 and 2 September 1945, in the Philippine Islands, ‘while commander of armed forces of Japan at war with the United States of America and its allies, [he] unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he [...] thereby violated the laws of war’. The U.S. Military Commission charged with trying him found that a military commander could in some cases be held criminally responsible when there is no effective attempt on his part to discover and control the criminal acts of his subordinates.<sup>9</sup> The Commission did not lay down in

AIRC, 1–23 [327 US 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946), and reprinted, in part, in *Law Reports of Trials of War Criminals*, Selected and Prepared by the United Nations War Crimes Commission, Vol IV, London: HMSO, 1948, 1, at 37 *et seq.*). There is a great deal of academic literature discussing the *Yamashita* trial. See e.g.: R. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (Wilmington: Scholarly Resources, 1982); B. Landrum, ‘The Yamashita war crimes trial: command responsibility then and now’, 149 *Military Law Review* 293 (1995); A. Prévost, ‘Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita’, 14 *Human Rights Quarterly* 303 (1992); M. Smidt, ‘Yamashita, Medina, and beyond: command responsibility in contemporary military operations’, 164 *Military Law Review* 155 (2000); J. Martinez, ‘Understanding *Mens Rea* in Command Responsibility—From *Yamashita* to *Blaškić* and Beyond’, 5 *Journal of International Criminal Justice* 638 (2007).

<sup>7</sup> Suggestions made at the time that this doctrine was a well-known form of liability were unconvincing and often self-serving. For instance, in his Order of 6 February 1946 confirming the death sentence pronounced against General Yamashita, General Douglas MacArthur made the following claim: ‘No new or retroactive principles of law, either national or international, are involved. The case is founded upon basic fundamentals and practices as immutable and as standardized as the most matured and irrefragable of social codes.’ (Reprinted in Friedman, *Laws of War*, pp 1598–1599).

<sup>8</sup> A.F. Reel, *The Case of General Yamashita* (Chicago: The University of Chicago Press, 1949), at 8.

<sup>9</sup> See Judgment of the United States Military Commission, Manila, 8 Oct 1945–7 Dec 1945, as reprinted in the *Law Reports of Trials of War Criminals*, Selected and Prepared by the United Nations War Crimes Commission, Vol IV, London: HMSO, 1948, 1, at 35–36; see also, extracts of the Judgment, as reprinted in Friedman, *Laws of War*, pp 1596–1598. Most relevant in this matter are the following findings made by the Military Commission: ‘Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in

any detail the conditions under which such consequences could ensue for a commander. The Commission appears to have considered that a conviction under that legal theory did not require that the accused be shown to have known of the crimes committed by his troops, nor that he should have been able to control his troops at the time when the crimes were being committed. It was enough, the judgment suggests, that General Yamashita failed to maintain control over those troops.<sup>10</sup> The law of ‘command responsibility’, as the Commission viewed it, was thus much removed from the fundamental requirements of personal fault and culpable mindset which criminal law generally requires for a criminal conviction. In all but name, the standard of liability set out by the Military Commission amounted to a form of objective liability pursuant to which a commander could be held criminally responsible for crimes committed by his troops where he failed to discover and control the criminal acts of his subordinates and despite the absence of knowledge on his part that such crimes had been committed or, rather, regardless of any such awareness.

The U.S. Supreme Court to which a petition for *habeas corpus* had been directed on behalf of Yamashita did not fare much better than the Military Commission. In addition to declining to review the evidence that formed the basis of Yamashita’s conviction, the Supreme Court gave legitimacy to the (quasi) objective form of liability adopted by the Military Commission.<sup>11</sup> In denying Yamashita the remedy he sought and effectively endorsing the Commission’s findings, the Supreme Court adopted what one author rightly called ‘a highly questionable interpretation of existing rules of international humanitarian law, as well as a wrong application of the principles to the case at bar, in addition to total disregard for the required mental element for the crime.’<sup>12</sup> The course adopted by the majority of the U.S. Supreme Court gave rise to strident dissenting opinions by two of its members, which have left a lasting mark upon the legitimacy of the concept of command responsibility and have contributed, more than the

all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.’

<sup>10</sup> See Judgment of the United States Military Commission, Manila, 8 Oct 1945–7 Dec 1945, as reprinted in the *Law Reports of Trials of War Criminals*, Selected and Prepared by the United Nations War Crimes Commission, Vol IV, London: HMSO, 1948, 1, at 35–36. In its conclusions, the Commission pointed out that ‘during the period in question [General Yamashita] failed to provide effective control of [his] troops as was required in the circumstances’.

<sup>11</sup> See generally *Yamashita*, US Supreme Court, Judgment of 4 February 1946, 18 AILC, 1–23 [327 US 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946)], and reprinted, in part, in *Law Reports of Trials of War Criminals*, Selected and Prepared by the United Nations War Crimes Commission, Vol IV, London: HMSO, 1948, 1, at 37 *et seq.*

<sup>12</sup> A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), (‘Cassese, *International Criminal Law*’) at 203.

Judgment of the majority, to moulding this concept into a doctrinally-sound form of criminal liability.<sup>13</sup>

The *Yamashita* precedent stands out in the history of international criminal law as a warning against the unrestrained temptation of making law to fit a preferred judicial result. Yamashita's lawyer predicted that the judgment against his client would set a precedent if it came to be accepted as right and just but that it would turn into a curse if it was wrong and was not acknowledged as such.<sup>14</sup> His predication was correct in part only. *Yamashita* came to be accepted as a precedent, not for the position that the Military Commission or the Supreme Court took in relation to the elements of the doctrine of superior responsibility, but for the statement of principle that a commander could be held criminally responsible under international law in relation to crimes committed by his men.

### 1.3 The development of the law of command responsibility and the principle of legality

Judge-made law is 'one of the existing realities of life'.<sup>15</sup> Much like the common law, international criminal law has evolved primarily through the decisions and judgments of courts of law.<sup>16</sup> And just like the common law, it has developed 'to meet the needs of the times'.<sup>17</sup> A great deal of the law-making activity of international courts and tribunals was necessary to transform the doctrine of command responsibility from an anarchy of sometimes contradictory precedents

<sup>13</sup> See dissenting opinions of Justice Murphy and Justice Rutledge (available at <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=327&invol=1>>).

<sup>14</sup> See A. Reel, *The Case of General Yamashita* (London: Octagon Books, 1971), at 1.

<sup>15</sup> B. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale, 1921), at 10.

<sup>16</sup> See, e.g., *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No.10*, by Telford Taylor (Buffalo: William S. Hein & Co., Inc., 1997), 220–221 ('this search for a "definition" illustrates a fundamental problem about the nature of international law, and suggests that it may be useful to recall how our own common law came into being centuries ago. [...] The early communities sensed that their survival as such depended upon the establishment of a measure of peace and order, and the punishment of those who breached the peace. They did not look for authoritative definitions. They developed machinery for the trial and punishment of offenders which grew more elaborate as life grew more complicated, and after a multitude of cases the basis for a precise definition began to emerge. Surely it is apparent that international law is today in much the same state of development as was the common law centuries ago. If we reject international law unless it is embodied in codes and statutes, with all the paraphernalia of modern national judicial systems, we shall never find it at all, for it cannot exist in this form without a correspondingly highly developed world political organization. And it is, indeed, from the very process of enforcing law that political institutions develop.').

<sup>17</sup> Memorandum of Proposals for Prosecution and Punishment of Certain War Criminals and Other Offenders, presented to Foreign Ministers of the Allied Powers and to the Representatives at the London Conference, at San Francisco, 30 April 1945 (reprinted in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, London, 1945, p 37; and cited in D. Hunt, 'The International Criminal Court: High Hopes, "Creative Ambiguity" and an unfortunate Mistrust of International Judges', 2 *Journal of International Criminal Justice*, 56 ('D. Hunt, *High Hopes*') at 58–59).

into a consistent body of law.<sup>18</sup> The law of command responsibility also developed, as in the case of the recognition of so-called *de facto* superiors, to meet the needs of a changing world in which informal structures such as paramilitary groups play a growingly important part in military and combat activities.<sup>19</sup> Other developments in the law of command responsibility, such as removal of a causality requirement by the *Yugoslav* Tribunal, might have been motivated by a desire to make proof of liability less of a challenge for the prosecuting authorities.<sup>20</sup> In all these situations, '[t]he judge, exercising his historic function, is constantly enlarging the area of the law by applying old principles to new cases and by limiting and redefining existing principles in the light of new circumstances, and very occasionally he will be able to establish a new principle.'<sup>21</sup> This statement of principle is true of the common law judge and it is generally true of the international judge.<sup>22</sup>

The ability of war crimes tribunals to expand the reach of international criminal law is not unconstrained. On a number of occasions, the principle of legality has played its part in drawing a line between the permissible clarification of the law and what courts have declared to be the impermissible creation of new legal standards.<sup>23</sup> However, the striking feature of the judicial history

<sup>18</sup> See, generally, S. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International Law—Beyond the Nuremberg Legacy* (Oxford: Oxford University Press, 2nd ed., 2001), 19.

<sup>19</sup> See, generally, 6.5 *De jure* superiors and *de facto* superiors.

<sup>20</sup> See, generally, 4.5.4 Requirement of causation.

<sup>21</sup> Lord Wright of Durley, *Legal Essays & Addresses* (Cambridge: Cambridge University Press, 1939), at 328. It is no argument against the progressive development of the law that there is no precedent where that doctrine was applied to facts similar to those in issue in a particular case. See, e.g., *Hadžihasanović* Article 7(3) AC Decision, par 12; *Orić* Appeal Judgment, Declaration of Judge Shahabuddeen, pars 16–17; *Prosecutor v Karemera*, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ndirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11 May 2004, par 37. See also Memorandum of Proposals for Prosecution and Punishment of Certain War Criminals and Other Offenders, presented to Foreign Ministers of the Allied Powers and to the Representatives at the London Conference, at San Francisco, 30 April 1945 (reprinted in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, London, 1945, p 37).

<sup>22</sup> About the propensity of war crimes tribunals to make law, see generally G. Mettraux, 'Judicial Inheritance: The Value and Significance of the Nuremberg Trial to Contemporary War Crimes Tribunals', in G. Mettraux (ed.), *Perspectives on the Nuremberg Trial*, (Oxford: Oxford University Press, 2008) ('Mettraux, *Judicial Inheritance*'), 599, at 610–612. See also, G. Mettraux, 'International Crimes and the ad hoc Tribunals' (Oxford: Oxford University Press, 2005) ('Mettraux, *International Crimes*'), at 13 *et seq.*

<sup>23</sup> See, e.g. *Hadžihasanović* Article 7(3) AC Decision, pars 32 *et seq.*, 51 and 55 concerning the applicability of the doctrine of superior responsibility to crimes committed prior to a commander's assumption of command and *Čelebići* Trial Judgment, pars 402–408 combined with 390, concerning the rejection of the 'should have known' standard. There is often a fine line, and one that even experienced judges do not necessarily agree upon, as to where the difference lies between applying an existing principle to a new set of facts and making new law. Compare, for instance, the majority view of the ICTY Appeals Chamber in the *Hadžihasanović* Article 7(3) AC Decision (pars 37 *et seq.*) and the position of the two dissenting Judges (Separate and Partially Dissenting Opinion of Judge David Hunt; Partially Dissenting Opinion of Judge Shahabuddeen). See also Judge Schomburg's remark in the *Orić* Appeal (*Orić* Appeal Judgment, Separate and Partially Dissenting Opinion of

of the law of command responsibility is not the part which this principle has played in shaping and streamlining the evolution of that doctrine, but rather the limited role that it has had in that context. For instance, the findings that the doctrine of superior responsibility applies to civilian leaders, to *de facto* superiors and to ‘perpendicular’ relationships of subordination were all significant evolutionary moments in the life of that doctrine and considerations of legality appear to have played no or little part in the decision-making process of the relevant judicial bodies when coming to their conclusions.<sup>24</sup> The importance of the principle of legality as a restraining factor upon judicial excess in law-making might be most seriously undermined, not *frontally* through the creation of new legal standards, but indirectly in the context of factual findings by courts and tribunals which are making use of that doctrine. A few examples may be provided here by way of illustration. Under the jurisprudence of the *Yugoslav* Tribunal, the Prosecution is required to establish that the accused had knowledge, actual or constructive, of crimes committed by subordinates. Only information that is shown to have been in possession of the accused is relevant to establishing his *mens rea* and a failure to acquire such information is not a sufficient trigger to liability.<sup>25</sup> However, in an oral ruling of 2 July 2007, a Trial Chamber of the ICTY held that ‘evidence of a general publication which is directed to conduct of a department [in this case, the police as an institutional branch of the Ministry of Interior] is information which, on its face, *can be expected to be within the knowledge of the Minister* of that department and the Minister’s immediate successor’.<sup>26</sup> Despite the absence of any evidence that this information had in fact become available to the accused, who was Minister of the Interior of Macedonia at the relevant time, this information was regarded *prima facie* as relevant to establishing his *mens rea* for the purpose of the doctrine of superior responsibility. In another decision, the same Chamber took the

Judge Schomburg, par 15, footnote omitted: ‘The International Tribunal cannot expand customary international law.’).

<sup>24</sup> The *Boškoski* and *Orić* Chambers’ decisions regarding the ‘perpendicular’ applicability of the doctrine of superior of superior responsibility (*Prosecutor v Boškoski and Tarčulovski*, IT-04-82-PT, Decision on Prosecution’s Motion to Amend the Indictment, 26 May 2006, pars 18 *et seq.*; *Prosecutor v Boškoski and Tarčulovski*, IT-04-82-PT, Decision on Assigned Pro Bono Counsel Motion Challenging Jurisdiction, 8 September 2006, pars 15 *et seq.*; *Orić* Trial Judgment, pars 296–306; see also below, 8.2 Perpendicular command responsibility) and the *Čelebići* Trial Chamber’s judgment regarding the non-applicability of the requirement of causality (*Čelebići* Trial Judgment, pars 398–400; see also below, 4.5.4 Requirement of causation) are extraordinary examples of the *de facto* irrelevance of the principle of legality in the context of some important legal developments pertaining to the doctrine of superior responsibility. A reading of these decisions suggest that the principle of legality played no part in the reasoning of the relevant Chambers regarding those issues. See also S. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International Law—Beyond the Nuremberg Legacy* (Oxford: Oxford University Press, 2nd ed., 2001), at 22; H. Baade, ‘Individual Responsibility’, in C. Black and R. Falk (ed.), *The Future of the International Legal Order* (Princeton University Press, 1972), 291 *et seq.*

<sup>25</sup> See, generally, below 4.5.2 *Mens rea* and 10.1.2 Customary international law and the ICC.

<sup>26</sup> *Prosecutor v Boškoski and Tarčulovski*, Transcript, 2 July 2007, p 2921 (emphasis added).

view that although it could not be established that a particular report had been brought to the attention of the accused during the relevant time frame, it could be ‘assumed’ from the nature of the report that he would have become aware of its content.<sup>27</sup> Again, whilst the stated legal standard is one of actual possession of information relevant to establishing the state of mind of a defendant charged with superior responsibility, the evidential application of that standard appears to be much more lax. In *Strugar*, another ICTY case, the Trial Chamber held that it would be ‘quite improbable’ that the accused did not receive reports’ said to be relevant to establishing his awareness of subordinates’ crimes.<sup>28</sup> In such cases, the stated legal standards are effectively diluted by stealth through evidential inferences which have the practical effect of reshaping—and lowering—the standard relevant to establishing the accused’s liability under that doctrine.

From the time of the *Yamashita* trial, judicially-induced advances have been a feature of the law of command responsibility. Like with other parts of international criminal law, jurisprudential advances are generally the result of the felt necessity for the law to adapt to new challenges.<sup>29</sup> However, necessity alone does not suffice to create and to maintain a particular legal prohibition unless that prohibition comes to be generally accepted as an expression of existing law. The failed criminalization of ‘aggression’ at Nuremberg is an example of a prohibition whose desirability was outweighed by the refusal of a significant portion of the community of nations to regard it as binding upon them as a matter of law.<sup>30</sup> In contrast to that failure, the rippling effect of the jurisprudence of the *ad hoc* Tribunals suggests that the law of command responsibility and its main elements as have been identified by these tribunals are now generally accepted as a correct expression of international law.<sup>31</sup>

<sup>27</sup> *Bošković* Trial Judgment, par 441 (‘It is not known precisely when this report was brought to the attention of Ljube Bošković, but the Chamber assumes from the nature of the report that he would have become aware of it.’).

<sup>28</sup> *Strugar* Trial Judgment, par 423 (footnote omitted, emphasis added) (‘Of course, the objective circumstances suggest that the Accused, at least through his staff, would have been regularly advised by telephone or radio of the progress of the attack. It was an attack of considerable political sensitivity given the location and timing. The Accused had ordered the attack himself. It is quite improbable that he did not receive reports.’). See also *Strugar* Appeal Judgment, pars 138 *et seq.*, upholding this finding as not unreasonable.

<sup>29</sup> See P. Hazan, *Justice in a Time of War* (College Station: Texas A & M University Press, 2004), at 58, recording an exchange between Judges of the ICTY and then ICTY Chief Prosecutor, Judge Goldstone in the following terms: ‘The judges know full well that the Yamashita decision is, at best, a strained precedent, but necessity creates law to curb policies of murder and persecution. The judges are not to render justice in peacetime but to limit atrocities in war.’

<sup>30</sup> Mettraux, *Judicial Inheritance*, at 611.

<sup>31</sup> A number of national and international courts have now adopted in whole or in part the jurisprudence of the *ad hoc* Tribunals on the law of command responsibility, military manuals have been revised in light of that caselaw and the International Committee of the Red Cross has referred to their decisions as evidence of the status and elements of that doctrine under customary international law. See, e.g. *Fofana* Trial Judgment, par 233; *Brima* Trial Judgment, par 782; *Mandić* Trial Judgment, pages 151 *et seq.*; *Rašević and Todović* Trial Judgment, pages 146 *et seq.*; *Ferreira*

## 1.4 The ICC and judicial law-making

After the *creative* early years of the *ad hoc* Tribunals, the pace of judicial development of international criminal law has slowed down significantly. Greater certainty in the law and the realization that the long-term jurisprudential legacy of these tribunals lay in the solidity of their holdings, rather than in their originality, have contributed to a more modest and more incremental approach to the law-making process. It is likely that judicial creationism will be even less prominent before the ICC since the drafters of the Statute have set out stricter limitations upon the ability of the judges to develop the law by providing precise definitions of all relevant crimes and forms of liability.<sup>32</sup> This was observed, for instance, in Article 28 of the ICC Statute which contains a detailed definition of the doctrine of superior responsibility for the purpose of the Court which should reduce the need—and opportunity—for judges to develop that doctrine beyond its statutory framework.<sup>33</sup> Also, because the terms of Article 28 cover a relatively broad range of derelictions of duties, including relatively minor ones, there may be less of an incentive for judges to make new law to broaden the scope of that doctrine.

Judgment, par 507. See also UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), at 437–438 and J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law*, Volume I, (Cambridge: Cambridge University Press, 2005–2006), at 559–563. Also, whilst the regime adopted in the Statute of the ICC differs in some respects from the law of the *ad hoc* Tribunals, its main features clearly reveal their debt to the Tribunals' caselaw. For a discussion of the application and interpretation of the principle of legality in the context of the law of command responsibility, see *Strupar et al.* Trial Judgment, at 136–140.

<sup>32</sup> See, generally, Hunt, *High Hopes* and A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *European Journal of International Law* 144 (1999), at 163.

<sup>33</sup> The Statute of the ICC also provides for an explicit reference to, and definition of, the principle of legality which will further constrain the bench's interpretative discretion. See Articles 22–24 of the ICC Statute.