



الجامعة الإسلامية العالمية ماليزيا
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
يُونِيسْكَو: إِسْلَامٌ إِنْتَرَاكْشِنَا مِلْدِسْتَا

(Company No. 101067-P)

Garden of Knowledge and Virtue

PREMIER INTERNATIONAL ISLAMIC RESEARCH UNIVERSITY

AHMAD IBRAHIM KULLIYAH OF LAWS

IIUM/303/19/3/1

25th March, 2019

Prof. Dr. Mohamad Naqib Ishan Jan
Department of Civil Law
Ahmad Ibrahim Kulliyah of Laws

Dear Prof. Dr. Mohamad Naqib,

السَّلَامُ عَلَيْكُمْ وَرَحْمَةُ اللَّهِ وَبَرَكَاتُهُ

Symposium on Malaysia's Accession to the Rome Statute of the International Criminal Court

International Law and Maritime Affairs (ILMA) Research Unit of the Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia will hold a Symposium on “**Malaysia's Accession to the Rome Statute of the International Criminal Court**,” with the objective of having a lively dialogue on a very current national issue for Malaysia. The Symposium will be held as follows:

Date: 29 of March 2019 (Friday)
Time: 3.00 pm to 5.00 pm
Venue: An-Nawawi Conference Room, Level 4,
Ahmad Ibrahim Kulliyah of Laws

In conjunction with that, we would like to invite you to be an **Expert Speaker** on the Panel Session of this Symposium. You are discussing on the issue of: “**Command/Superior Responsibility : Are There Any Defenses?**” for about 15-20 minutes. There will be a Q&A Session after the Panel Discussion.

Should there be any inquiries, do not hesitate to contact Mr. Fajri Matahati Muhammadin (Mobile: 011-28218139); or email at: fajrimuhammadin@ugm.ac.id. We hereby attach the Symposium flyer and Tentative Programme of the Symposium.

Thank you for your kind consideration and we look forward to seeing you at the Symposium.

Wassalam.

FARID SUFIAN SHUAIB, PROF. DR.

Dean

Ahmad Ibrahim Kulliyah of Laws

International Islamic University Malaysia

c.c. Prof. Dr. Abdul Ghafur Hamid

Symposium Director



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Symposium on Malaysia's Accession to the Rome Statute of the International Criminal Court

Date: 29-03-2019 Friday
Time: 3.00 pm to 5.00 pm
Venue: Conference Room, Level 4, AIKOL

Tentative Programme

| Time | Agenda |
|-------------------|--|
| 2.45 pm – 3.00 pm | Arrival of Guests and Registration |
| 3.00 pm – 3.05 pm | Recitation of Al Qur'an by Ustaz Dr. Zainuddin Ismail |
| 3.05 pm - 3.10 pm | Welcoming Remarks by Prof. Dr. Farid Sufian Shuaib Dean, Ahmad Ibrahim Kulliyah of Laws |
| 3.10 pm | Panel Session |
| 3.10 pm – 3.25 pm | “The International Criminal Court and Principle of Complementarity” Asst. Prof. Dr. Mohd Yazid Zul Kepli |
| 3.25 pm – 3.40 pm | Will Malaysia's Accession to the Rome Statute be Affecting the Immunity of Malay Rulers? Assoc. Prof. Dr. Mohd Hisham Mohd Kamal |
| 3.40 pm – 4.55 pm | Command/Superior Responsibility: Are There Any Defenses? Prof. Dr. Mohd Naqib Ishan Jan |
| 4.55 pm – 4.10 pm | The Obligation to Cooperate with the ICC: The Way Forward for Malaysia Mr. Azril Mohd Amin Founder and Chief Executive of Human Rights Research and Advocacy (CENTHRA) |
| 4.10 pm – 4.25 pm | Incorporating the Rome Statute in the Malaysian National Legal System: Issues and Challenges Prof. Dr. Abdul Ghafur Hamid |
| 4.25 pm – 4.55 pm | Q & A Session |
| 4.55 pm – 5.00 pm | Delivering Souvenirs to Guest Speaker |
| 5.00 pm | End of Symposium and disperse. |

COMMAND OR SUPERIOR RESPONSIBILITY

ARE THERE ANY DEFENCES?

Prof. Dr. Mohammad Naqib Ishan Jan

Symposium on Malaysia's Accession to the Rome Statute of the International Criminal Court

Organized by International Law and Maritime Affairs (ILMA) Research Unit

Ahmad Ibrahim Kulliyah of Laws (AIKOL)

International Islamic University Malaysia

29th March 2019

Al-Nawawi Conference Room, AIKOL

Note: Traditionally the notion of 'command responsibility' has been used because it is associated foremost with military commanders, but it is preferable to use 'superior responsibility' that clearly covers both military and civilian leaders

INTRODUCTION

- The doctrine of C/SR basically refers to the responsibility of a superior for international crimes, falling within the jurisdiction of ICC, committed by his/her subordinates, because of
 - i. a failure to prevent the subordinate from committing the crime or
 - ii. a failure to punish the subordinate after the crime had been committed
- In other words, c/sr is form of liability for **omissions** or **inactions**.
- IL (IHL & ICL) makes it a duty of superior to act to prevent or punish subordinates' criminal actions.
- A superior who, in spite of having actual, constructive or imputed **knowledge** of subordinates' wrongful acts & **effective control** over them, fails to discharge his/her duty would be criminally responsible under the doctrine of c/sr.

- 
- I will briefly discuss the:

Evolution of the principle of CR/SR,

Nature of CR/SR

Differences between Individual CR & SR

Rational of superior responsibility

Elements of SR

Defences available to the superiors

2. EVOLUTION OF THE PRINCIPLE OF CR/SR IN BRIEF

- The contemporary notion of C/SR, as a form of criminal responsibility, emerged in the post World War II era case law.
- It was later codified in AP I to GCs (Arts 86 & 87).
- Today, the concept of c/sr is enshrined in the statutes of all major ICTs, including ICTY, Art. 7 (3), ICTR, Art. 6(3) & ICC, Art. 28.
- Thus, the principle that military & other superiors may be held criminally responsible for the acts of their subordinates is **well-established in conventional & customary international law.**

3. THE NATURE OF CR/SR

- Although c/sr is now part of IL, its precise legal nature is still open to debate. For what exactly is the superior responsible?
 1. Is it responsibility for complicity?
 2. Is it a separate crime for negligence of a superior's duty to control, prevent or punish? or
 3. Is it a special mode of liability for the crimes committed by subordinates?
- Some domestic legislation (including that of the UK, which follow Article 28 almost verbatim), **criminalizes superior responsibility as a form of complicity.**

(See UK International Criminal Court Act 2001, s. 65)
- Others believe, & the Canadian & German legislation imply, **that it is a separate offence of omission**, on the grounds that it would be unfair to hold a person vicariously liable for the serious crimes of another based on a relaxed mental element

THE NATURE OF CR/SR, CONTINUED

- In *Hadžihasanovic*' Judge Shahabuddeen challenged the idea that command responsibility is a form of complicity, opining that 'Command responsibility imposes responsibility on a commander for failure to take corrective action in respect of a crime committed by another; **it does not make the commander party to the crime committed by that other**

(Hadžihasanovic' Appeal, Judge Shahabuddeen, para. 33.)

- *'it is absurd to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape.'*

Yamashita trial

THE NATURE OF CR/SR, CONTINUED

- Relying, in part, on Judge Shahabuddeen's opinion, the ICTY Trial Chamber in Halilovic' asserted that:

command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus 'for the acts of his subordinates' as generally referred to in the jurisprudence of the Tribunal 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 imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed.

Halilovic' ICTY T. Ch. 16.11.2005 para. 54.

DIFFERENCES BETWEEN INDIVIDUAL RESPONSIBILITY AND SUPERIOR RESPONSIBILITY

Individual Criminal Responsibility

- ICR arises when a person directly commits or contributes to the commission of a crime (such as aiding, abetting, planning, ordering, instigating, inciting, and joint criminal enterprise).

Command (Superior) responsibility

- SR is a distinct form of criminal responsibility
- It arises where a superior **failed to prevent or punish the commission of a crime by his subordinates.**
- Thus, **the commander or superior is not charged with committing the crime**—but can be responsible for his or her omission relative to his or her subordinates who did commit the crime.

- Where an accused is **charged with both types of liability for a particular crime**, any conviction should be entered pursuant to ICR, with the accused's **command/superior position being regarded as an aggravating factor in sentencing.**
- For example, where a military commander ordered a crime perpetrated by his subordinates, he should be convicted for “ordering” the offence and not for superior responsibility for failing to prevent or punish that offence.

THE RATIONAL OF SUPERIOR RESPONSIBILITY

1. To enhance compliance with IHL,
 - as implementation of IHL depends on those in command/ superior position &
 - so, it is necessary to hold the commanders/superiors criminally liable
 - for their failures to
 - to adequately supervise their subordinates,
 - to prevent a crime
 - to punish subordinates' unlawful behaviour
 - the superior cannot turn a blind eye on the crimes committed or about to commit by the subordinates
2. To ensure respect for the rule of IL and
2. To deter the commission of future crimes

ELEMENTS OF C/SR RESPONSIBILITY

- To hold a person criminally responsible under the doctrine of C/SR for an international crime, the prosecution must prove the following elements:
 1. Commission of international crimes by subordinates;
 2. Effective command & **control** over the subordinates (**S-S relationship**);
 3. Knowledge (actual, constructive or imputed);
 4. Failure to act;
 5. Causation (added by Rome Statute): The crime resulted because of the superior's failure to properly control the forces under his or her command
- The elements 1-3 have been adopted by ICTY & ICTR jurisprudence (See *Aleksovski*, ICTY, T. 25/6/1999, paras 69-71; Kayishema and Ruzindana, ICTR, T. Ch. II, 21/5/1999)
- The 4th element, causation, was added by the Rome Statute of ICC (see Art. 28)

1. COMMISSION OF INTERNATIONAL CRIMES BY SUBORDINATES

- Art. 28 of the Statute of ICC defines command responsibility as a form of responsibility for the crimes that are “within the jurisdiction of the court” as set out in ICC Arts. 6 to 8.
- To hold a superior responsible under c/sr, the subordinate committed or was about to be commit any of the international crimes
- It is not necessary for the subordinates to have physically perpetrated the crimes.
- They may have engaged in criminal conduct under any head of liability, namely **perpetration, aiding and abetting, joint criminal enterprise to commit crimes**, etc.
- It does not matter whether the perpetrator committed the crimes in time of **IAC or NIAC**.

2. EFFECTIVE COMMAND & CONTROL OVER THE SUBORDINATES (S-S RELATIONSHIP);

- Existence of S-S relationship depends on whether superior was in “**effective control**”
- It does not matter whether the relationship is *de jure* (formal – eg., regular chain of command – armed force) or *de facto* (informal chain of command, eg., rebel groups)
- What matters is that the superior was in ‘**effective control**’, i.e., a material ability to prevent or punish criminal conduct (See *Celebici* case) - Substantial influence is not enough (See *Bemba Gomba* case, ICC)

- How to establish whether the superior was in effective control?

- He/she issued orders, which were obeyed

- G. Yamashita ordered his soldiers to leave Manila, but most of them did not follow the order yet he was tried & convicted for the war crimes committed by those soldiers- **A wrong decision**

- He/she had capacity to alter command structure, promote or remove & the ability to require people to engage or withdraw from hostilities

- These are some of the evidences of effective control.
- The perpetrator does not need to be directly subordinated to the superior, but can be several steps down the chain of command
- If two or more superiors have effective control, they can both be found criminally liable

3. KNOWLEDGE (ACTUAL, CONSTRUCTIVE OR IMPUTED)

- Superior knew or had reason to know that the crime was about to be or had been committed
- *Mens rea* or mental element
- SR is not a form of strict liability (ICTY, *Čelebić* 'i Appeal paras. 226 and 239
- It has to be established by evidence
- The ICTY has determined that:

“[A superior] ... may possess the mens rea for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes ... or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.”

- ‘Knew’ means having actual knowledge
- Actual knowledge can be determined by
 - i. a direct proof, or
 - ii. with reference to circumstantial evidence.
- Relevant circumstantial evidence includes
 - ‘the number, type and scope of illegal acts,
 - time during which the illegal acts occurred,
 - geographical location,
 - whether the occurrence of the acts is widespread,
 - modus operandi of similar illegal acts
- ‘Had reason to know’ or ‘should have known’ is a negligence standard, and that failure to seek out information could lead to liability.

G. Yamashita

His subordinates did commit war crimes in an IAC in Manila but he had no knowledge of it and yet he was convicted – what a controversial case?

4. FAILURE TO ACT.

- Superior failed to take the necessary and reasonable measures to prevent the criminal acts or punish the perpetrators thereof
- The principle of CR comprises two distinct legal duties for superiors:
 1. to prevent future crimes and
 2. to punish perpetrators of past crimes.
- The measures which “*can be taken [should be) within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates ... What constitutes such measures is not a matter of substantive law but of evidence.*”

- A Pre-Trial Chamber in the ICC has taken the view that the relevant measures include:
 - (i) to ensure that superior's forces are adequately trained in IHL;*
 - (ii) to secure reports that military actions were carried out in accordance with IL;*
 - (iii) to issue orders aiming at bringing the relevant practices into accord with the rules of war;*
 - (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command*

Bemba Gombo para. 438

- In relation to **the duty to punish**, the Oric' Trial Chamber noted that:

“the duty to punish commences only if, and when, the commission of a crime by a subordinate can be reasonably suspected. Under these conditions, the superior has to order or execute appropriate sanctions or, if not yet able to do so, he or she must at least conduct an investigation and establish the facts in order to ensure that offenders under his or her effective control are brought to justice. The superior need not conduct the investigation or dispense the punishment in person, but he or she must at least ensure that the matter is investigated and transmit a report to the competent authorities for further investigation or sanction ... Since the duty to punish aims at preventing future crimes of subordinates, a superior's responsibility may also arise from his or her failure to create or sustain, amongst the persons under his or her control, an environment of discipline and respect for the law.”

- Turning a ‘blind eye’ to international crimes is clearly unreasonable in this respect
- However, a superior is not ‘obliged to do the impossible.’

4. CAUSATION

- ICTY and ICTR find it difficult to recognize causation as an element of SR
- The Rome Statute of ICC makes it an element
- However, causation only applies to failure to prevent crime
- It does not apply to failure to punish the crime
- A Pre-Trial Chamber in the ICC stated that:
- *There is no direct causal link that needs to be established between the superior's omission and the crime committed by his subordinates.* Therefore, the Chamber considers that it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under article 28(a) of the Statute

Bemba Gombo paras. 424–5.

ARE THERE ANY DEFENSES?

- All those elements discussed above can be relied as defenses:
 - Subordinates did not commit international crimes; or
 - No power or effective control over those who committed the crimes; or
 - No knowledge, actual, constructive or imputed, of what was going on
 - Necessary and reasonable measures were taken to prevent and punish the crimes
 - Failure to prevent was not the cause of the crime
- Other defences under the Rome Statute including defences of insanity, intoxication, self-defence (including defence of others or, exceptionally, property), duress, necessity (Art. Article 31), mistakes, superior orders (Articles 32 &33) may or may not be applicable to c/sr



**Thank you for your kind
attention!**