**Session 6**

**Modes of Liability**

**CRYER – CHAPTER 15: GENERAL PRINCIPLES OF LIABILITY**

**Introduction: What is liability important for international criminal law?/what are they/what do they do/mean/relation to individual criminal responsibility ICL??**

The general principles of liability apply across the various different offences and provide for the doctrines by which a person may commit, participate in, or otherwise be found responsible for those crimes.

The various forms of liability have:

* Different conduct elements
* Different mental elements

They are not watertight compartments and there are overlaps between them.

When they overlap:

* Trial Chamber has a discretion to choose which is most appropriate
* Krnojelac, ICTY TC, para. 173
* May attach more than one mode of liability to a perpetrator
* If necessary to reflect the totality of an accused’s criminal conduct
* Al Mahdi, ICC TC, paras. 60-1

**Perpetration/commission**

**Commission**

The Statutes of the ICTY, ICTR and SCSL talk of commission (= the direct and physical perpetration), while the ICC Statute calls this perpetration

Criminalizing a person who commits such a crime whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible

* Article 25(3)(a)
* Doubt over whether it includes omission
* But is in customary law perpetration can occur by omission
  + As long as the charge relates to a failure to live up to a duty to act & the omission has a concrete influence on the crime
    - Orić, ICTY AC, para. 94
* Not expressly recognized, but probably not excluded
  + ICC Elements of Crimes deliberately avoids the term ‘acts’ in favour of ‘conduct’, the latter of which includes acts of omissions
* Three forms of perpetration:

1. Defendant physically carries out all elements of the offence
   * Commission of the crime as an individual
   * Basic perpetration
2. Defendant has, together with others, control over the offence by reason of the essential task assigned to him
   * Commission of the crime jointly with others
   * Co-perpetration
3. Defendant has control over the will of those who carry out the objective elements of the offence
   * Commission of the crime through another person
   * Vertical or indirect perpetration

* Then there is a form of hybrid between (b) and (c): indirect co-perpetration

**Joint criminal enterprise (JCE)**

Joint criminal enterprise (or common purpose) liability: those who participated in a common plan or conspiracy to commit any of the foregoing crimes (actually, just crimes against peace) are responsible for all acts performed by any person in execution of such plan

* Nuremberg IMT Charter, Art. 6; Tokyo IMT Charter, Art. 5(c)
* Not in ICTY, ICTR, ICC Statutes
* But ICTY jurisprudence (Tadic mostly)
* Article 7(1) of the ICTY Statutes does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons
  + Tadic, ICTY AC, paras. 189-90
  + Pointing to the nature of many international crimes, in particular that they are committed jointly by large numbers of people
* Actus reus, based on customary law
  + Three classes of cases:

1. Co-perpetration, where all participants in the common design process possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent)
   * + JCE 1
2. The “concentration camp cases”
   * + JCE II
3. Where crimes are committed by members of the group, outside its common purpose, but as a foreseeable incident of it
   * + JCE III
   * Common actus reus:
4. plurality of persons;
5. the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute;
6. participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute
   * + May occur by virtue of omission
       - Prlić et al., ICTYAC, para. 139; Karadžić, ICTY TC, para. 566

* Mens rea: Tadic, ICTY AC, para. 228
  + What distinguishes the different forms of JCE
  + JCE I: intent to perpetrate a certain crime
    - = the shared intent on the part of all co-perpetrators
    - Close to the concept of joint perpetration
      * The various participants share the intention to commit the crime that occurs
  + JCE II: personal knowledge of the system of ill-treatment + intent to further this common concerted system of ill-treatment
  + JCE III: intention to participate in and further the criminal activity or the criminal purpose of a group, and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group
    - + responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group, and (ii) the accused willingly took that risk
    - Foresight of a crime test
* Nature of joint criminal enterprise liability: a form of committing (as in Art. 7(1) of the ICTY Statute)
* So all are a form of primary liability
  + Means participants in the enterprise can be aided and abetted by those outside of it
  + In secondary liability, they cannot
* Many critiques for this: lumping together very different levels of culpability, especially regarding JCE III
* The ICC & JCE: not under its jurisdiction
* Katanga, ICC TC, para. 1619
* Attenuated form: liability for someone who contributes to the commission of such a crime by a group of persons acting with a common purpose
  + Art. 25(3)(d)
  + Such contribution shall be intentional and shall either:

1. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such or purpose involves the commission of a crime within the jurisdiction of the Court; or
2. Be made in the knowledge of the intention of the group to commit the crime.
   * Does not provide for JCE III: does not recognize recklessness; intentional contribution + knowledge of the intention of the group
     + Mbarushimana, ICC PTC, paras. 288-89
     + But largely covers what is caught under JCE I & II
       - Katanga, ICC TC, para. 1619
   * But: does not seem to require a significant contribution to the plan
     + Only that participation be in any other way than those identified in Articles 25(3)(a)-(c)

* Important difference: JCE is considered a form of perpetration, liability under Article 25(3)(d) is a form of complicity

**Co-perpetration**

The second form of perpetration, co-perpetration = rooted in the idea that when the sum of the coordinated individual contributions of a plurality of persons results in the realization of all the objective element of a crime, any person making a contribution can be held vicariously responsible for the contribution of all the others and, as a result, can be considered as a principal to the whole crime

* Lubanga, ICC PTC, para. 326
* Not customary
* Stakić, ICTY AC, para. 62
* Similar (function) to JCE, overlaps in part, but probably more narrow
* Lubanga, ICC, para. 994

Requirements:

1. There was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events
2. The accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime
3. The accused meant to … commit the relevant crime or he was aware that by implementing the common plan these consequences will occur in the ordinary course of events; and
4. The accused was aware that he provided an essential contribution to the implementation of the common plan

Actus reus requirements:

1. The existence of a common plan

* Analogous to that in JCE liability
* Need not be express
  + Lubanga, ICC PTC, para. 348
* May be inferred from later concerted action
  + Lubanga, ICC PTC, para. 345

1. Link common plan and crimes: crimes need to be foreseen as a virtual certainty (as a result of the plan)

* Plan does not necessarily have to be directed to committing a crime
* Lubanga ICC AC, paras. 446-8

1. Essential contribution: contribution must be essential to the commission of the objective elements of the crime

* He or she could frustrate the commission of the crime by not undertaking his or her part
* Lubanga, ICC PTC, paras. 347-8
* Comes from the basis of co-perpetration being the joint control of the crime + the fact that this is a form of primary liability
  + Lubanga, ICC AC, para. 469
* More serious forms of liability in Article 25(3)(b)-(d)
* Does not require physical presence at the scene of the crime or occur at the same time as the offence
  + Lubanga, ICC PTC, paras. 347-8

Subjective/mental elements:

1. Co-perpetrators, including the accused, must have the mental element for the relevant crime

* Lubanga, ICC PTC, paras. 349-60
* Bemba et al., ICC AC, para. 676.

1. Foresight that the crimes will occur

* Bemba et al., ICC AC, para. 835
* Lower mens rea threshold, such as dolus eventualis, recklessness and negligence, insufficient
  + Dolus eventualis = does not mean to bring about the unlawful consequence, but foresees the possibility of the it occurring on the basis of his act

**Indirect perpetration**

The third form of perpetration in the ICC Statute is indirect perpetration = perpetration through another person

* Two ways
* Innocent agency: a person commits a crime through an unwitting person, who cannot be considered to have any culpable part in the crime
  + Unwitting = not aware of the full facts / not having planned
  + For example, because they were incapable of understanding the nature of their acts, or because they were an inadvertent participant or were acting under duress
* Indirect or vertical perpetration: Perpetration through a guilty agent separate from joint perpetration
  + Expansion
* May occur through control of an organization
* Katanga and Ngudjolo, ICC PTC, paras. 500-10
* Idea: control over an organization can lead to perpetration through that organization
  + Theory of Organisationsherrshaft, Roxin
  + Although crimes are committed in the first instance by others, they are attributed to the controller of the organization
* Requirements for liability to accrue:
  + The defendant must control or be in functional domination of an organization, which must be hierarchically organized, with sufficient subordinates that if the orders are not carried out by one subordinate, another will do so nearly automatically
    - Katanga and Ngudjolo, ICC PTC, paras. 515-7
    - So, leader must be use his control over the apparatus to execute crimes, which means that the leader, as the perpetrator behind the perpetrator, mobilises his authority and power within the organization to secure compliance with his orders
      * Katanga and Ngudjolo, ICC PTC, para. 514
  + Awareness of the nature of their organization and their role within it + the facts that meant their compliance with their orders would be near automatic
    - Katanga and Ngudjolo, ICC PTC, para. 534
  + Mens rea of underlying crime

**Indirect co-perpetration**

Combination of co-perpetration and indirect perpetration:

* A horizontal co-perpetration in an organization can be responsible for the crimes committed by those for whom another co-perpetrator is vertically responsible through indirect co-perpetration (mixing horizontal and vertical perpetration)
* Example: a Foreign Minister may be a participant in a common plan with a Minister of Defence that will lead to the commission of war crimes. The Minister of Defence is in control of the armed forces, but the Foreign Minister is not. On the basis of the common plan, the Foreign Minister could be held responsible by indirect co-perpetration for the offences of the armed forces, as the criminality of the Defence Minister would be attributed to the Foreign Minister, and this would include the Defence Minister’s indirect perpetration of the offences by the armed forces.
* Also acts in a similar manner to JCE, since physical perpetrators did not have to be members of the JCE
* Requirements:

1. The suspect must be part of a common plan or an agreement with one or more persons
2. The suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which resulted in the fulfillment of the material elements of the crime
3. The suspect must have control over the organization
4. The organization must consist of an organized and hierarchical apparatus of power
5. The execution of the crimes must be secured by almost all automatic compliance with the orders issued by the suspect
6. The suspect must satisfy the subjective elements of the crimes
7. The suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and
8. The suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s)
   * Ruto et al., ICC PTC, para. 292

* (i) to (vii) are an amalgam of the requirements of co-perpetration and indirect perpetration
* Not customary type of liability
* Stakic, ICTY AC, para. 62
* ICC AC not yet expressly upheld existence indirect co-perpetration in Rome Statute

**Aiding and abetting**

Commission (primary liability) is, all things being equal, a more serious form of responsibility than secondary participation (such as co-perpetration)

* Lubanga, ICC AC, paras. 467-9

Aiding and abetting (or encouraging):

* The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime … the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal
* Tadić, ICTY AC, 15 July 1999, para. 229
* The conduct which aids or abets must have a direct and substantial effect on the commission of the crime
* Not a high standard: basically meaning any assistance
* An aider and abettor does not have to provide assistance in a particular manner
  + Such as providing assistance to the physical actor that is then used in the commission of the crime
  + Taylor, SCSL AC, para. 371
* Conduct itself need not be intrinsically criminal
* As long as its factual effect results in the assistance of the criminal act
* Taylor, SCSL AC, para. 395
* Aiding implies practical or material assistance
* Bemba et al., ICC TC, para. 88
* Examples: providing weapons to a principal or taking principals to the scene of a crime and pointing at people to be killed, standing near victims whilst armed to prevent them escaping, allowing resources for which a person is responsible to be used for crimes
* Abet: the moral or psychological assistance of the accessory to the principal perpetrator, taking the form of encouragement of or even sympathy for the commission of the particular offence.
* Does not need to be explicit
* Under circumstances, even the act of being present at the crime scene (or in its vicinity) as a silent spectator can be construed as tacit approval or encouragement of the crime
* Bemba et al., ICC TC, para. 89
* Not presence per se, but
* Examples: presence of a superior office at the scene of an offence abetment by tacit approval,
* Omissions may suffice
* If there is an obligation on the defendant to prevent the crime and ability to intervene
* Tribunal jurisprudence
* May occur before, during, or after the crime or underlying crime occurs
* Milutinovic et al., ICTY TC, para. 91

Requirements:

* The assistance in the commission (or attempted commission) of the crime must be provided for the purposes of facilitating such commission
* Without indicating whether the conduct must also have had an effect on the commission of the offence
* Bemba et al., ICC AC, para. 1327
* No specific threshold
* Mens rea: purpose of facilitating the commission of such a crime
* ICC Statute, Art. 25(3)(c)
* Higher requirement than knowledge (Tribunal jurisprudence)
* Requires determinations of motive
  + Relatively difficult, especially for acts which are seemingly neutral

**Ordering, instigating, soliciting, inducing and inciting**

**Ordering**

Because many international crimes are committed by a large number of people acting together, it is frequently the case that such crimes are committed at the behest of a superior authority (giving superior orders)

Although it is possible to see those giving orders to commit international crimes as perpetrators through innocent or guilty agents, the ICC Statute treats it as a separate form of liability

* ICC Statute, Art. 25(3)(b)

Core aspect: a person in a position of authority uses it to convince another to commit an offence

* Bemba et al., ICC TC, para. 77
* Requirements

1. A superior/subordinate relationship
   * Does not have to be legal
   * Factually: some position of authority on the part of the accused that would compel another to commit a crime in following the accused’s order
     + Semanza, ICTR AC, para. 361
2. The transmission of an order
   * Can be established by circumstantial evidence
     + Blaskic, ICTY TC, para. 281
   * Does not have to be the author; passing it down the chain of command can be enough
     + Kupreskic et al., ICTY TC, para. 862
3. The relevant mental element
   * Awareness of the substantial likelihood that a crime will be committed in the execution of that order
     + Blaskic, ICTY AC, para. 42
   * Not necessary that an order is illegal on its face
     + Baslkic, ICTY TC, para. 282

* Order must at least substantially contribute to the commission of the crime
  + Milutinovic et al., ICTY TC, para. 88
* Cannot attach to a pure omission
  + Galic, ICTY AC, para. 176
* Form of secondary liability
* ICC Statute, Art. 25(3)(b)
* Lubanga,, ICC AC, para. 462
* As it provides for responsibility only when the ordered crime occurs or is attempted

**Instigating, soliciting, inducing nad inciting**

Instigating crimes = conduct by which a person exerts psychological influence on another person as a result of which the criminal act is committed (Bemba et al., ICC TC, para. 73)

Soliciting and inducing art part of this

* Soliciting = someone asking or urging the physical perpetrator to commit the criminal act
* Bemba et al., ICC TC, para. 75
* Lower level of responsibility
* Inducing: involves influence, either by strong reasoning, persuasion or conduct implying the prompting of the commission of the offence
* Bemba et al., ICC TC, para. 76
* Stronger method of instigation
* Element of coercion

Requirements:

* Instigation can be express or implied
* Bemba et al., ICC TC, para. 78
* Causative factor: must be causative factor of the conduct element of the underlying crime
* But need not be the only one
* Bemba et al., ICC TC, para. 81
* Mental element: awareness
* Awareness of the substantial likelihood that a crime will be committed in the execution of that instigation
* Kordic and Cerkez, ICTY AC, para. 32

The giving of orders which are not carried out can be a form of incitement/instigation.

Particularly in the crime of genocide, which specifically criminalizes direct and public incitement

* ICC Statute, Art. 25(3)(e)
* Incitement to genocide = inchoate crime: Not necessary to prove that anyone even attempted to commit genocide
* Unlike the other crimes of encouragement
* ICTR’s Media case: Nahimana et al., ICTR TC, para. 678
* Purpose and context of any communication requirements: A call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television
* Media case, para. 1011

1. Incitement has to be public
   * + = when it is conducted through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication
       - Kalimanzira, ICTR TC, para. 515
     + Questions: internet and e-mail?
2. Direct
   * + Should be viewed in the light of its cultural and linguistic content
     + May be implicit
       - Akayesu, ICTR TC, para. 557
     + Simple hate speech not enough
       - Nahimana et al., ICTR AC, paras. 693
     + Difficult issues context, culture and interpretation

**Planning, preparation, attempt and conspiracy**

**Planning and preparing**

Planning or preparing a war of aggression was criminalized in Article 6(a) of the Charter of the Nuremberg IMT and Article 5(a) of the Charter of the Tokyo IMT

Limited to crimes against peace

* Such crimes usually considered at the national level to amount to inchoate crimes that are punishable without proof that the crime itself was completed
* Opportunity for the ICC to develop the details of this form of liability
* But I’m pretty sure that the ICC requires the act to be committed and not planning

**Attempt**

The ICC Statute expressly criminalizes attempts to commit international crimes

* Article 25(3)(f)
* Liable if he or she attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable if that person completely and voluntarily gave up the criminal purpose
* Difficult to interpret precisely when a person has commended its execution by a substantial step
* If an attempt is abandoned or a person prevents the crime not liable for attempt
* If they abandon their role and it is completed by others possible liability for aiding and abetting or participating in a joint criminal enterprise

**Conspiracy**

Conspiracy = the inchoate crime of agreeing to commit a crime

* Now only conspiracy to commit genocide
* Not present in ICC Statute

**Mental elements**

A person must have some form of culpability for his or her conduct, usually shown through his or her state of mind when he or she acted (or failed to act).

Different offences, and different forms of liability require different forms of mens rea.

But the ICC sets intention as default mental element to be applied for all crimes

Article 30 of the ICC Statute:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge
2. For the purposes of this article, a person has intent where:
3. In relation to conduct, that person means to engage in the conduct;
4. In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events
5. For the purposes of this Article, ‘knowledge’ means awareness that a circumstances exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly

* Article 30 applies in the ICC absent specific provisions in its documents
* ICC Elements of Crimes, General Introduction, Art. 2
  + As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.

The drafters of the ICC Statute excluded any lesser mental element, unless the Statute (or the Elements of Crimes) expressly provided for one (as in Article 28); this minimized the chance of the ICC going outside the Statute and Elements of Crimes to determine, for example, that customary international law set a lower standard than those instruments

Sets mental element bar high

No dolus eventualis or recklessness

* Lubanga, ICC AC, para. 449

**Command/superior responsibility**

The responsibility of a commander extends far beyond international criminal liability, and disciplinary or administrative action can be pursued even if there is no criminal liability

* Bagilishema, ICTR AC, para. 36
* Article 28 of the ICC Statute:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

1. 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:
2. 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
3. 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
4. With respect to superior and subordinate relationship 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:
5. The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
6. The crimes concerned activities that were within the effective responsibility and control of the superior; and
7. 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

* Requirements (Celebici case, ICTY TC, para. 344; Bemba ICC AC, para. 153)

1. A superior/subordinate relationship
   * For modern armies: easy, formal chains of command
     + Standard of effective control
       - = material ability to prevent or punish criminal conduct
         * Celebici case, ICTY AC, para. 256
       - Accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator
         * Bemba, ICC TC, para. 184
       - The factual ability to prevent and punish
         * De jure position of superior not determinative, but may be evidence (Delalic et al., ICTY AC, para. 197)
         * Delalic et al. ICTY AC, paras. 186-98
       - Issuance of orders also evidence
         * Even where the accused’s superior has also ordered the offences
         * Nizeyimana, ICTR TC, para. 1528
         * If they are not obeyed, this will count the other way

Blaskic, ICTY AC, paras. 69 & 399

* + - * Other factors: capacity to alter command structures and promote or remove people, and ability to require people to engage or withdraw from hostilities, payment of salaries and reliance on logistical support lines of reporting
        + Bemba, ICC TC, para. 188
      * The fact that it is necessary to use force to enforce authority does not automatically mean that person does not have effective control over subordinates
        + Hadžihasanović and Kubura, ICTY AC, para. 228
  + Case-by-case basis
  + For civilian superiors
    - Superior responsibility also attaches to civilian superiors
      * ICC Statute, Art. 28(b)
    - Requirement: Effective control standard
      * He exercised a degree of control over subordinates which is similar to the degree of control of military commanders
        + Bagilishema, ICTR AC, para. 52
        + The way authority is exercised may not be the same
    - Requirement: Crime must fall within the area of responsibility of a civilian commander
      * ICC Statute, Art. 28(b)(ii)
    - Requirement: offences occur as a result of a superior’s failure to exercise control properly over such forces
      * Bemba, ICC PTC, para. 424

1. The mental element
   * For military superiors: superior knew, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes
     + Article 28, ICC Statute
   * For civilians: the superior knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes
   * Should have known = a criminal negligence standard
     + Bemba, ICC PTC, para. 429
     + Failure to seek out information could lead to liability
       - Bemba, ICC PTC, paras. 432-3
2. A failure to take reasonable measures to prevent or punish violations of international criminal law
   * A failure or refusal to take necessary and reasonable measures to prevent or punish the offences the superior knew or culpably ought to have known
   * Two separate types of liability:
     + Failure to prevent
     + Failure to punish
   * No necessity that a person knew or should have known of the offences before they occurred for failure to punish liability to arise
   * Not enough if superior knew or should have known of impending offences, it is no defence to a charge of failing to take adequate measures to suppress them that he chose to allow them to occur, then punished the perpetrators
     + Bemba, ICC PTC, para. 436
   * Failure to take measures may be considered tacit acceptance of the crime
     + Halilovic, ICTY TC, para. 95
   * What is expected: to do what is necessary and reasonable under the circumstances
     + Consideration of what measures were at his or her disposal in the circumstances at the time
     + Does not have to take each and every possible measure within his or her disposal
       - Irrespective of considerations of proportionality and feasibility
     + Bemba, ICC AC, para. 169
     + Depend on the precise nature of the control exercised by the superior
   * Acts intended to prevent or punish where that is possible, and/or, where appropriate, submitting the matter of the appropriate prosecutorial organs
     + See also Halilović, ICTYAC, 16 October 2007, para. 182
   * What measures may be expected: relates to what power the superior has, which requires a contextual analysis
     + Bemba, ICC AC
   * Commander cannot be blamed for not having done something he or she had no power to do
     + Bemba, ICC AC, para. 167
   * There are circumstances in which the possibility that the duty to punish may be fulfilled by the use of disciplinary sanctions rather than criminal prosecutions cannot be excluded, but, for international crimes, these will be rare
     + Hadžihasanović and Kubura, ICTY AC, para. 33
3. Causation: crimes occur as a result of a failure to supervise subordinates
   * Specifically to the ICC
   * The elements interact and are a medley of layers of evidence, or moving parts, that must be reckoned with
   * Again, failure to prevent and failure to punish liability are separate
     + Bemba, ICC TC, para. 201
   * Contentious
   * Accused’s dereliction at least contributed in some way to crimes, for example by making them easier or more likely

Nature of superior responsibility

* Under ICC Statute: command responsibility is treated as a form of liability for the underlying offences
* Covers many different forms of liability, for example, aiding/abetting
* But not just deliberate failures to intervene, also negligent dereliction of duty

**DW NEWS (YOUTUBE) – ICC FINDS CONGO WARLORD BOSCO NTAGANDA GUILTY OF WAR CRIMES**

The International Criminal Court (ICC) in the Hague has found former Congolese warlord Bosco Ntaganda guilty of war crimes and crimes against humanity for atrocities committed in the northeast of the Democratic Republic of the Congo (DRC) between 2002 and 2003. In his role as military chief of staff of the National Congress for the Defense of the People (CNDP), Bosco was charged with a series of crimes including directing massacres of civilians and ordering the rape of men and women. Ntaganda maintained his innocence throughout the trial.

* 3 year trial
* Guilty on 18 charges
* Murder; Crimes against humanity
* intentionally directing attacks against civilians; war crime
* sexual slavery; crimes against humanity)
* 4th person found guilty by ICC
* Led a rebel army
* Tens of thousands of people suffered under his command
* Child soldiers, and torture of them to toughen them
* Rape
* Became general in Congolese army, but lost power
* Crimes committed by himself but also his troops