

Leaders' Responsibility in International Criminal Law *مسؤولية القادة في القانون الجنائي الدولي*

Rima Mokrane ^{1,*}

¹ Echahid Cheikh Larbi Tebessi University, Algeria

rima.mokrane@univ-tebessa.dz

Received: 28 /8 / 2024 Accepted: 19 /12 / 2024 Published: 18 /05 / 2025

Abstract:

International criminal responsibility of state leaders is an important part of accountability under international law. This article dives into the complexity of the subject, highlighting the legal duties and liabilities that state officials carry for their acts. It investigates the concepts and processes by which leaders may bear responsibility for international crimes .

Demonstrating such culpability requires establishing a hierarchical connection between leaders and their subordinates, as well as proof that leaders failed to take essential precautions to avoid or rectify crimes committed under their command.

Key words: Leadership, Responsibility, International Criminal Law, ICC...

المخلص:

تعتبر المسؤولية الجنائية الدولية لقادة الدول جزء أساسي من المسؤولية في مجال القانون الدولي. تتناول هذه الدراسة الإشكاليات التي تحيط بالموضوع، مع التركيز على التزامات القانونية والمسؤوليات التي يتحملها قادة الدول عن أفعالهم. كما تبحث في المبادئ والآليات التي يمكن بها متابعة القادة عن الجرائم الدولية، مثل جرائم الإبادة، وجرائم ضد الإنسانية، وجرائم الحرب.

يتطلب قيام هذه المسؤولية إقامة علاقة تسلسلية بين القادة وتابعيهم، بالإضافة إلى إثبات أن القادة لم يتخذوا التدابير اللازمة لمنع أو التصدي للجرائم التي ارتكبت تحت سلطتهم.

الكلمات المفتاحية: القيادة، المسؤولية، القانون الجنائي الدولي، المحكمة الجنائية الدولية.

* Rima Mokrane

Introduction

In the sphere of international crimes, a crucial difficulty is identifying the persons who may bear criminal responsibility for the offenses in question. Does responsibility depend on the perpetrator's role or unique characteristics? Alternatively, may any person, regardless of job or personal characteristics, be held responsible for the violation? Before examining the leadership criterion in relation to the specific crime, it's important to acknowledge that existing international criminal law does not disregard the violations of those who are immune under international or domestic legal frameworks.

Recent developments in Gaza (Kirane Lamia, 2017) and Ukraine have rekindled interest in holding state leaders accountable for international crimes. Within this framework, it is essential to remember that the Rome Statute formally established the principle of individual criminal responsibility, serving to reaffirm and bolster global initiatives aimed at achieving international justice, eliminating impunity for those who commit international crimes, and diminishing the frequency of conflicts and their associated atrocities. Individuals who commit international crimes, regardless of their official role, carry criminal culpability and are punishable within the International Criminal Court's authority.

The purpose of granting certain high-ranking individuals in states special immunity, which exempts them from prosecution for crimes committed before the national courts of their home countries or the courts of foreign countries, is linked to the necessities of public interest or the orderly functioning of international relations, as stated in the preamble of the Vienna Convention on Diplomatic Relations of 1961. However, immunity associated with a high-ranking position should not serve as a shield against accountability for international crimes. The severity of the offenses committed should be the determining factor, rather than the status or position of the accused. (Nasreddine Boussmaha, 2018)

The Rome Statute goes beyond this by establishing individual accountability for international crimes, but it also acknowledged leaders' and heads of state's accountability for crimes committed by their subordinates, whether military or civilian. This implies the emergence of international criminal responsibility for state leaders and rulers, subjecting them to punishment under the International Criminal Court's statute for crimes committed by their forces or subordinates under their control or actual authority.

This responsibility arises if they are aware of the commission of the crimes or have neglected to take the necessary measures to stop their occurrence, or if it is assumed that they should have known about the crimes and failed to act to stop them. The concept of criminal liability for individuals responsible for international crimes is not negated by their official position or authority.

As a result, the major emphasis of our research is on the following question: ***Can it be claimed that the International Criminal Court's Rome Statute succeeded in creating criminal accountability for state leaders for international crimes?***

To solve this topic, we used both descriptive and analytical approaches, taking into account the complexities of the subject, and divided it into three primary sections:

- Section 1 : leadership's concept.
- Section 2 : leaders' international criminal responsibility.
- Section 3 : Leaders' International Criminal Responsibility.

1. Leadership's concept.

Leadership is one of the behavioral notions that has provoked significant controversy and dispute. Definitions have altered according to the many methods provided by intellectual schools, and the conceptions of leadership have diversified across numerous theoretical frameworks and orientations across their developmental phases. Some scholars have defined leadership as a collection of human characteristics, whilst others have seen it as a formal jurisdiction and power. Modern research has shown, however, that leadership entails conduct, engagement, and influence over others.

1.1. Definition of Leadership

Leadership is a complicated term with many interconnected aspects that impact and are influenced by one another. There is no one complete definition that encompasses all of its connotations, since definitions of leadership have evolved based on many views, including personal attributes, personal ideals, conduct, group requirements, and the organization's attitude, among others. Many researchers and writers have sought to develop definitions for leadership.

To get a comprehensive understanding of leadership, we must first grasp that numerous crucial phrases are closely related with it, such as power, influence, and authority. These three words can be more precisely described as follows: Power is the latent power to influence others' behavior, which is usually coupled with control over valuable or limited resources. Influence occurs when an individual, deliberately or subconsciously, uses their power to influence another person's behavior and views. In contrast, authority refers to the power derived or awarded by a government or institution. (Naeem Nasir, 1987)

Tead's definition of leadership deserves mention: Leadership entails persuading others to work together to achieve a goal that they believe is worthwhile. Tead interprets leadership to include almost all aspects of supervisory tasks. (Ordway Tead, 1985)

A leadership may also be described as the practice of directing collective activity toward common goals. This definition consists of two key ideas. To begin, leadership is a relationship between one or more persons in which influence and authority are unequally divided.

This concept distinguishes between designated leaders of a group and informal leaders who demonstrate leadership behavior while being prominent members of the organization. Second, leaders don't live in isolation. Individuals can judge the depth of their leadership practice by looking behind them: are they being followed? Leadership is frequently not imposed on others in a certain manner; therefore, it needs the acceptance of followership in order to exert influence. When people accept someone as a leader, they voluntarily give up part of their decision-making autonomy in order to attain their goals. As a result, the leader-follower relationship constitutes an economic and psychological transaction.

In the latter, leadership can be understood as the ability, competence, and effectiveness of a leader, supported by the elite, to recognize and prioritize objectives, arrange them in ascending order of importance, select appropriate means to achieve these goals in alignment with the society's actual capacities, and to grasp the multiple facets of the situations faced, diagnose the problems accompanying them, and make the necessary decisions to confront all of this takes place inside a framework of interaction defined by societal norms and higher ideals. (Osama Khairy, 2013)

As a result, there is no universally accepted definition, or rather, no precise complete notion of leadership, which may be linked to differences across nations in terms of cultures, traditions, initiatives, and even religions. However, leadership may be described as the process by which a leader persuades and encourages their followers to actively devote their efforts to cooperative action. (Zaher Mahmoud Klaldah, 1997) Perhaps the simplest definition of leadership is to direct the conduct of others. (Ahmed Maher Al-Baqri, 1987)

2. Establishing Leaders' International Criminal Responsibility

It is widely assumed that providing persons rights under international law must be accompanied by their ability to bear duties under the law. This was especially clear during wartime, when the First and Second World Wars demonstrated the dangers of presidents' actions in affecting and jeopardizing world peace and security. It also demonstrated the potential of committing different international crimes not just during wartime but also during peacetime, leading to the emergence of the concept of personal accountability under international law. Consequently, the idea of individual liability for international crimes, particularly for state leaders, for international crimes has become doctrinally accepted and is now one of the fundamental principles of contemporary international law.

2.1 The International Criminal Responsibility of Heads of State and Government Officials

For around eighty years, international criminal law has established heads of state's criminal culpability for humanitarian crimes. The Nuremberg Charter recognized that the accused's official role, whether as heads of state or senior officials, did not provide immunity from culpability or a mitigating element in sentence. (Yves Terner, 1995)

This principle signifies the responsibility of the head of state and the absence of immunity for crimes committed, including war crimes and crimes against peace, on the grounds that it is neither logical nor just for subordinates executing illegal orders issued by the head of state or their aides to be punished while the president who devised or ordered the commission of these crimes is exempt. Many authors believe the president to be the leader of a criminal gang rather than the head of a law-abiding state. (Saeed Salem Juweli, 2003) The Tokyo Military Tribunal upholds this same concept. (Salem Mohammed Suleiman Al-Ojli, 2000)

The International Criminal Tribunal for Rwanda's Statute lists those subjects to prosecution before the court, including those who planned, inspired, directed, engaged in, facilitated, or assisted in any capacity in the planning, preparation, or commission of crimes as defined by law.

Finally, The Rome Statute reaffirmed that this system applies equally to all individuals without discrimination derived from official position. Specifically, an individual's official role - whether as a head of state, government official, parliament member, elected representative, or government employee - does not absolve them from criminal responsibility according to this statute. Furthermore, official capacity in itself does not constitute grounds for mitigating punishment. Immunity or specific procedural rules related to an individual's official position, whether under national or international law, do not preclude the court from asserting its jurisdiction over such individuals.

2.2 International Criminal Responsibility of Military Leaders

Alongside the criminal liability of heads of state and government officials, international criminal law has also established the concept of criminal accountability for military leaders who perpetrate serious international crimes against human rights and fundamental freedoms.

The debate of the notion of leader accountability for subordinates' crimes, which began with the World War II trials, does not imply that this principle was unknown before to that period. Some international law academics allude to King Charles VII's Ordonnance of Orleans, which was granted in France in 1439. It said that the monarch holds every commander or captain accountable for infractions, abuses of authority, and injury inflicted by any of the soldiers accompanying them. (De Vilevault L. G. & de Brequigny L, 1782)

However, the events and conditions of World War II offered the impetus to explore the concept of leadership responsibility for crimes carried out by their subordinates, particularly via

trials in the Middle East, notably the Yamashita case. This is one of the most significant and early instances to explore the notion of leader culpability for subordinates' crimes. (Veronika Šípošová, 2019)

According to the core principles of leadership authority and accountability, just standing by and passively observing a subordinate doing illegal activities does not clear them of criminal guilt, the court ruled. (ILC-UN, 1996) Similarly, the Yamashita case was used in several Nuremberg trials to demonstrate the idea of military leader accountability. What is notable is the absence of express reference of this concept, despite tacit admission in the Nuremberg Charter and other post-World War II legal opinions that implied its implementation.

Former Yugoslavia Tribunal used a similar approach, since Article 6 of its Statute stated that its jurisdiction extended to natural persons committing offenses mentioned in the Statute. Similarly, Article 6 of the previous Rwanda Tribunal's Statute used this technique. This pattern, seen throughout history, substantially strengthened the notion of individual responsibility. Since 1976, the preparatory committees of the ICC have established this principle. (Faiza Bin Nasser, 2006)

The ICC Statute incorporates the concept of military commander responsibility, whether exercised directly or indirectly. It asserts that a military commander, or an individual functioning in that role, is legally responsible for offenses committed by forces under their genuine command and oversight, or authority and supervision, that fall within the court's jurisdiction. The stipulation outlined in Article 28(a) encompasses specific conditions related to the accused's rank and the organizational hierarchy within the military framework.

The accused's standing as a military leader, which denotes both power and duties, is the first requirement. Second, it is necessary to have a functional hierarchical framework inside the military system. For both requirements, a distinction is formed between a human formally holding the office of military commander, equipped with command-and-control skills, and someone effectively performing the role of military commander, exerting power and oversight. (CILRP, 2016)

Depending on the situation, if the military commander or individual was aware or should have been aware, given the context at the time, that their forces were engaged in or about to engage in such crimes, they will be held accountable. They will also be liable if they failed to take all necessary and reasonable measures within their power to prevent or address these crimes, or to refer the matter to the appropriate authorities for investigation and prosecution.

2.3 International Criminal Responsibility of Others Superiors

Article 28 of previous Statute maintains the traditional differentiation between the Responsibility of military leaders and those who effectively assume the role of military commanders, in contrast to other superiors, often termed 'non-military' or 'civilian superiors'.

The preceding article, in paragraph "b", holds the superior criminally liable for offenses committed by subordinates under his effective control and authority. This implies that he is criminally responsible for offenses committed by subordinates under his effective control and authority due to his failure to exercise proper oversight over them, if he knew or deliberately ignored information indicating that his subordinates were engaging in or on the verge of committing these crimes. Alternatively, if the offenses pertain to actions within the superior's duty and supervision. Or he failed to adopt all necessary and sensible steps within his competence to avert or reduce the occurrence of these offenses, or to report the issue to the appropriate authorities for investigation and legal proceedings.

Consequently, it can be contended that Article 28 of the International Criminal Court Statute, in both its sections, when examined in comparison to Article 27, this has introduced a comprehensive and unprecedented framework at the level of international law concerning the

principle of accountability for presidents and leaders regarding crimes committed by their subordinates.

3. Criteria for Leaders' international criminal responsibility

In the realm of international law, supported by the case law of international criminal tribunals, there is broad consensus that establishing command responsibility requires meeting three essential criteria. First, there must be a hierarchical relationship between the superior and the subordinate. Second, the superior must have been aware of or had reasonable grounds to believe that one or more subordinates had committed or were about to commit a criminal act. Third, the superior must have failed to take appropriate and necessary measures to prevent or address the said offenses.

3.1 Effective Control and Authority

According to Article 28 of the Rome Statute, supervisors must demonstrate power or influence over their subordinates' acts before they may be held accountable for their crimes. This connection might be *de jure* or *de facto*. (Jamie Allan Williamson, 2008)

This principle of superior accountability applies not just to a subordinate's immediate superior, but also to his other superiors in the military chain of command or political hierarchy provided the required circumstances are satisfied. (Yael Ronen, 2021)

As a result, the commission of a single offense by a subordinate has the potential to implicate multiple superior officials at various levels within the hierarchical structure, as they are collectively assumed to be responsible for deterring or mitigating the offense. The subordinate's hierarchical distance from the relevant senior official has little legal importance aside from its impact on the evidentiary burden required to demonstrate the extent of effective control needed. (Ahmed F. Khalifa, 2010)

The NATO vocabulary defines control as a commander's authority over some aspects of the operations of subordinate entities, or entities normally outside their immediate command, including the responsibility to carry out commands or directives. This authority might be entirely or partially allocated or delegated. (Van Sliedregt, E, 2009)

3.2 Knowledge

Knowledge of subordinate offenses is another critical component of superior liability. The grounds for such understanding differ between national and international criminal law. "Actual knowledge" denotes intentionality, whereas "should have known" essentially represents negligence.

One of the most complex challenges facing international criminal justice is the implementation of the principle of command and superior responsibility for offenses committed by subordinates, especially concerning the superior's criminal intent or *mens-rea* in connection with the criminal acts carried out by those under their command.

The Rome Statute emphasizes the possibility of holding a commander or superior accountable not because they personally committed international crimes, but because of their position and authority, which allows them to be aware of large-scale actions occurring during both wartime and peacetime. (Belkheiri Hassina, 2006)

As a result, it is clear that both the commander and the highest authority bear full responsibility for their subordinates' actions when they have knowledge or, in cases of willful ignorance, when they ignore information indicating that individuals under their authority and effective control are engaged in or are on the verge of committing any crimes within the court's jurisdiction. (Mohammed Abdel Moneim Abdel Ghani, 2008)

On the other hand, the criminal responsibility of a commander or their successor may be presumed until such presumption is rebutted by demonstrating that they took reasonable and necessary measures within the scope of their authority to prevent or suppress these crimes, or that they referred this matter to the competent investigative and judicial authorities.

Given the greater difficulty in demonstrating crimes done by subordinates than those perpetrated by military commanders or their surrogates, a less strict threshold has been developed for civilian leaders. It must be proven that the civilian commander ignored information suggesting that their subordinates had or were going to commit international crimes.

3.3 Failure to take necessary and reasonable measures

A hierarchical relationship between the leader and subordinates cannot be assumed unless the leader or commander has supreme authority over the subordinates, allowing them to control their behavior, including preventing them from committing crimes and holding them accountable afterward.

To be held accountable for the crimes of their subordinates, a superior must have neglected to take the required measures to stop them.

from committing impending or continuing crimes. This, of course, assumes that the leader is capable of preventing such acts. If the subordinates' crimes have already happened, the leader is liable if they fail to take the required actions to bring those guilty accountable. The president or commander must have the ability to impose preventative or punitive actions; otherwise, they cannot be held accountable for something they cannot do.

International law mandates that commanders take direct action to stop subordinates from committing crimes or to punish them if they do, or alternatively, take indirect measures by sending the problem to appropriate authorities for inquiry or prosecution. The goal of intervention is twofold: first, to prevent the crime from occurring in the first place, and second, to prevent similar crimes from occurring in the future. If the commander fails to take the appropriate precautions, they will face criminal charges for the offenses committed by their subordinates. (Nasreddine Boussmaha, 2008)

Conclusion:

The command responsibility, as a jurisprudential doctrine in international criminal law, holds military commanders and civilian leaders accountable for crimes committed by subordinates that they failed to prevent or punish. This type of responsibility has received a lot of attention in recent years; yet, it still raises some unanswered concerns, and crucial obstacles exist in its implementation.

The first legal implementations of command responsibility are found in the Hague Conventions in 1907, but and crucial obstacles exist in its implementation. It can be traced back to military origins, with its initial emergence in international case law following World War II. Subsequently, the concept was further developed in the jurisprudence of the ad hoc Tribunals, which provided extensive analysis on the matter. Ultimately, it was codified in Article 28 of the Rome Statute of the International Criminal Court (ICC).

References:

• **Books :**

1. Ahmed Maher Al-Baqri. (1987). Leadership and Its Effectiveness in Light of Islam, University Youth Foundation, Alexandria,
2. Belkheiri Hassina. (2006). International Criminal Responsibility of Heads of State, Dar Al-Houda, Algeria.
3. Mohammed Abdel Moneim Abdel Ghani. (2010). International Criminal Law, A Study in the General Theory of Crime, Dar Al-Jamia Al-Jadida. Alexandria, Egypt.
4. Naeem Nasir. (1987). Leadership in Arab Management and its Position among Contemporary Theories and Arab-Islamic Heritage, Arab Organization for Administrative Sciences, Amman.
5. Nasreddine Boussmaha. (2008). International Criminal Court: Explanation of the Rome Statute Article by Article, Part One, Dar Houma for Printing, Publishing, and Distribution, Algeria.
6. Ordway Tead. (1985). The Art of Leadership, Whittlesey House, McGraw-Hill Book Company, Incorporated.
7. Osama Khairy. (2013). Innovations in Administrative Leadership, Dar Al-Raya Publishing and Distribution, First Edition, Amman, Jordan.
8. Saeed Salem Juweli. (2003). Implementation of International Humanitarian Law, Dar Al-Nahda Al-Arabiyya, Cairo, Egypt.
9. Salem Mohammed Suleiman Al-Ojli. (2000). Provisions of Criminal Responsibility for International Crimes in National Legislation, A Comparative Study, Dar Al-Jamahiriya for Publishing, Distribution, and Advertising, Libya.
10. Yves Ternon. (1995). The Criminal State, Genocides in the 20th Century, Seuil Editions, Paris, France.
11. Zaher Mahmoud Klaldah. (1997). Modern Trends in Administrative Leadership, Zahran Publishing and Distribution House, Jordan

• **Journal article:**

1. Ahmed F. Khalifa : Les conditions préalables à la responsabilité du supérieur hiérarchique devant les juridictions pénales internationales, Revue de science criminelle et de droit pénal comparé, 2010/4 (N°04), pp.786 à 803.
2. Jamie Allan Williamson. (2008). Some considerations on command responsibility and criminal liability, International Review of the Red Cross, Volume 90, Issue 870: Sanctions, pp. 303 – 317
<https://doi.org/10.1017/S1816383108000349>
3. Kirane Lamia. (2017) Israel's violation of the rules of international law in Palestine, Social Sciences and Humans Review, university of Tebessa, vol.10, no.01, pp.23-30.
4. Van Sliedregt, E. (2009). Article 28 of the ICC Statute: Mode of liability and/or separate offense? New Criminal Law Review, 12(3), 420-432.
<https://doi.org/10.1525/nclr.2009.12.3.420>

- **Internet websites:**

1. De Vilevault L. G. & de Brequigny L. (1782). (eds.) Ordonnances des rois de France de la troisième race recueillies par ordre chronologique, vol. 13, Imprimerie Royale, France. Available at : https://archive.org/details/bub_gb_Mrc-AAAACAAJ
2. International Criminal Law Guidelines, Command Responsibility. (2016). Case Matrix Network, Centre for International Law Research and Policy, Available at: <https://www.casematrixnetwork.org/cmn-knowledge-hub/elements-digest/mol/command-responsibility>
3. Report of the International Law Commission to the United Nations General Assembly on its Forty-Eighth Session and its dissolution. (1996). International Law Commission, Volume Two, United Nations, New York, p.53. Available at : https://legal.un.org/ilc/documentation/english/reports/a_51_10.pdf
4. Yael Ronen: Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings, Vanderbilt Law Review 313. (2021) Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol43/iss2/2>

- **Theses:**

1. Faiza Bin Nasser. (2006). Presidential Criminal Liability (Case of International Crime), Magister's Thesis, University of Blida, Algeria.
2. Veronika Šípošová. (2019). The Analysis of Article 28 of the Rome Statute in the light of the Jean Pierre Bemba Case, Faculty of Law, Masaryk University.