

CRIMINAL RESPONSIBILITY OF COMMANDERS IN INDONESIAN AND DUTCH CRIMINAL LAW (A COMPARATIVE LEGAL STUDY)

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ABSTRACT

Command responsibility is a form of criminal responsibility that aims explicitly to ensnare commanders who know and allow not to prevent their subordinates from committing criminal acts, as well as commanders who fail to take steps in the form of handing over their subordinates who have become perpetrators of certain crimes to the investigation, investigation and prosecution process. The concept of command responsibility is regulated by several international court forums such as the ICTR, ICTY, and ICC. In its development, command responsibility is regulated in national criminal law. Several countries that regulate command criminal responsibility include Indonesia and the Netherlands. The two countries hold command responsibility in criminal laws outside the Criminal Code and exclusively apply command responsibility to certain types of crimes. These crimes are classified as the most severe or gross human rights violations.

Keyword: *Command responsibility, ICTR, ICTY, international court*

INTRODUCTION

One of the basic principles in criminal law states that no punishment can be imposed unless there is an unlawful act or a culpable error.¹ The principle is then formulated into an adage “no punishment without fault” or, in Dutch, *geen strafzonder schuld*.² This adage is fundamental, so according to Muladi, the adage then permeates and echoes in almost all criminal law teachings.³ The adage is also the basis of the concept of criminal responsibility whose formulation is sometimes not found in criminal law.

In criminal law discourse, criminal responsibility becomes one of the three main issues or *trials* of criminal law: criminal offense, criminal responsibility, and punishment.⁴ Van Hamel stated that criminal responsibility is a psychological state that brings three kinds of abilities, namely: (1) the ability to understand the meaning and consequences of the act, (2) the ability to realize that the act is contrary to public order and (3) the ability to determine the will to act.⁵ It can be stated that criminal responsibility is a concept to hold accountable a person who has committed a criminal offense.

To determine the criminal responsibility, it must first determine who is the perpetrator of the criminal offense⁶ or the perpetrator of the criminal offense, namely the person who commits an act prohibited by criminal law. In classical criminal law teachings, criminal responsibility for perpetrators of criminal acts also includes attempts to commit unlawful acts, aiding, facilitating,

⁶Muladi, Dwidja Priyatno, *op.cit.*, pp. 84

abetting, participating, planning, and inciting the commission of a criminal act,⁷ This teaching is then known as the teaching on *individual criminal responsibility* or individual criminal responsibility.

Along with the development of criminal law, the theory of criminal responsibility has also developed. Theories of criminal responsibility that do not only include *individual criminal responsibility* have also emerged. The theory of criminal responsibility that considers the individual perpetrator as the direct perpetrator is deemed insufficient, so theories other than the doctrine of personal responsibility have emerged.

For example, the theory of *vicarious liability* or substitute criminal responsibility is a transfer of responsibility from an individual who commits a criminal offense to another person.⁸ Substitute criminal responsibility is an exception to the no punishment without conviction principle.⁹ There is also the theory of *corporate criminal* responsibility, which wants to demand criminal responsibility for corporations as legal entities (*rechtspersoon*).

In developing the concept of criminal responsibility, command responsibility/superior responsibility is also known. This system of responsibility is essential to trap field commanders, who are often untouched by legal accountability. In the military context, for example, every person who is appointed as an army commander has command responsibility for his troops (subordinates), so as a commander, he must act appropriately and wisely towards his troops, especially in terms of providing training and orders so that his troops do not make mistakes when carrying out a military operation.¹⁰

A critical function of command responsibility is mainly in regulating the *most severe crimes* or what in Indonesian law is equivalent to the term “gross human rights violations.” Command criminal responsibility can be used to trap the superiors of the perpetrators in charge of the field. Therefore, command criminal responsibility is considered quite essential, considering that gross human rights violations are.

Crimes committed systematically or involve structural power.¹¹ Thus, the legal process can trap not only the perpetrators in the field but also the command structure, in particular commanders who know and allow or do not prevent their subordinates from committing gross human rights violations, as well as commanders who fail to take steps to submit their subordinates who have become perpetrators of gross human rights violations to the process of investigation, investigation, and prosecution.

The concept of command responsibility was developed in the 1899 and 1907 Hague Conventions, which regulated the law of war (*jus in bello*) and war crimes. The theory of command responsibility was then used by international *ad hoc* criminal tribunals such as the *International Military Tribunal for the Far East* (IMTFE) in Tokyo, which tried war criminals in World War II, the *International Criminal Tribunal for Rwanda* (ICTR), which tested Genocide in Rwanda and the *International Criminal Tribunal for Former Yugoslavia* (ICTY) which tried perpetrators of War Crimes that occurred in former Yugoslavian countries such as Serbia. After

⁷https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule102#:~:text=It%20is%20a%20basic%20principle,the%20commission%20of%20a%20crime, accessed June 14, 2023.

⁸<https://www.lexisnexis.co.uk/legal/glossary/vicarious-liability#:~:text=Vicarious%20liability%20is%20the%20liability,the%20acts%20of%20another%20person>.

⁹N i n e <https://kepaniteraan.mahkamahagung.go.id/glosarium-hukum/1895-vicarious-liability>, accessed June 24, 2023.

¹⁰Gheanina Priscilla Kaban, Elements of Command Responsibility in International Criminal Law (Study of the Decision of The Prosecutor V. Jean-Pierre Bemba Gombo/Icc-01/05-01/08), *Alathea Journal of Legal Sciences*, Volume 1 Number 2, February 2018, p. 158. 158.

¹¹KontraS, *Critical Notes on the Draft Criminal Code: It's Getting Harder to Bring Perpetrators to Justice!*, Commission for the Disappeared and Victims of Violence, 20

being used in various *ad hoc* tribunals, the concept of command responsibility was also added as a form of criminal responsibility in the Rome Statute, which gave the *International Criminal Court* (ICC) the authority to apply the doctrine of command responsibility in prosecuting genocide, crimes against humanity, war crimes, and aggression.

In the *status quo*, apart from the scope of international criminal law after the entry into force of the Rome Statute, the concept of command responsibility is also recognized in the national legal systems of various countries, both members and non-members of the Rome Statute. Indonesia itself, through Article 42 of Law No. 26 of 2000 concerning Human Rights Courts (Human Rights Court Law). This law “established” the Human Rights Court and gave it the authority to prosecute Gross Human Rights Violations, namely Genocide and Crimes Against Humanity.

In addition to Indonesia, one of the countries that introduced the concept of command responsibility in its legal system is the Netherlands, which regulates command responsibility in Article 9 of the *Wet Internationale Misdrijven* (*International Crimes Act*). This research. It intends to analyze how command responsibility is regulated in Indonesia through Article 42 of the Human Rights Court Law and then compare it with the concept of corporate responsibility in the Dutch *Wet Internationale Misdrijven*. A comparative study using the Dutch national criminal law as a comparator is chosen, considering that Indonesian criminal law itself was initially quite influenced and adopted the rules of Dutch criminal law.

On the other hand, discourse on command criminal responsibility is quite rare, so the author considers it necessary to specifically discuss it so that it can be used as a reference in the discourse of Indonesian criminal law.

This paper does not intend to analyze the shortcomings or strengths of the Human Rights Court Law’s command responsibility provisions or its application. This paper will explore the differences between the regulation of command responsibility in Indonesia and the Netherlands. The Netherlands was chosen because, historically, the Indonesian criminal law system resembles and even adopts the Dutch criminal law system.

METHODS

This paper is a dogmatic legal research using the comparative method. With the comparative method, the author will compare the regulation on command responsibility in Indonesian criminal law with the regulation on command responsibility in Dutch criminal law. Legal materials in this paper are obtained through literature studies from books, journal articles, Indonesian and Dutch illegal law regulations, and other reading sources.

DISCUSSION

1. Overview of Command Responsibility

According to Robert Cryer, command responsibility is an extraordinary doctrine in international criminal law. This form of responsibility justifies orders' privileges, honors, and responsibilities.¹² The doctrine of command responsibility first received serious attention when the United States Supreme Court found Tomoyuki Yamashita guilty of war crimes

We were committed by Japanese soldiers in the Philippines.¹³ Yamashita was the commander of Japanese troops serving in the Philippines in 1944-1945. Yamashita's troops were accused of being responsible for the murder, torture, and rape of civilians.¹⁴

For the actions of his men, Yamashita was later tried by a US court and charged with war crimes. Although Yamashita was not directly involved in the actions committed by his troops, as a military commander, Yamashita was considered to have failed to carry out his duties to control and take action against his men who had violated the laws of war.¹⁵ The verdict against Yamashita was the first court decision to impose criminal sanctions using the doctrine of command criminal responsibility.

Furthermore, in developing international criminal law, the doctrine of command criminal responsibility is also regulated in several *ad hoc* international courts, such as the *International Criminal Tribunal for Rwanda* (ICTR) and the *International Criminal Tribunal for Former Yugoslavia* (ICTY). The ICTR is an *ad hoc* international tribunal established to try those responsible for genocide and other serious violations of international humanitarian law that occurred in Rwanda and several neighboring countries between January 1, 1994, and December 31, 1994.¹⁶ The ICTY is a court established by the United Nations (UN) to prosecute war crimes committed during the conflicts in the Balkans in the 1990s.¹⁷

The Statutes of the ICTR and ICTY provide for command responsibility to ensure that both military and civilian commanders can still be held accountable for genocidal war crimes.

Article 6(3) of the ICTR Statute states:¹⁸

"The fact that any of the acts referred to in Articles 2 to 4 of the present Statute committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

The article explicitly states that an act committed by a subordinate does not release the superior from criminal liability if the act committed by the subordinate was engaged with the knowledge of the excellent and the exceptional failed to take steps to prevent or punish the subordinate.

By the ICTY Statute, command responsibility is set out in Article 7(3), which states: ¹⁹

The fact that any acts referred to in articles 2 to 5 of the present Statute were committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason

¹²Robert Cryer, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridgeshire University Press, 2010, pp. 385

¹³Jamie Allan Williamson, "Some Considerations on command responsibility and criminal liability," *International Review of the Red Cross*, Vol. 90, No. 870, 2008, pp. 304

¹⁴<https://www.internationalcrimesdatabase.org/Case/199>

¹⁵Jamie Allan Williamson, *op. cit.*, p.

¹⁶<https://unictr.irmct.org/en/tribul>

¹⁷<https://www.icty.org/>

¹⁸*Statute of the International Tribunal for Rwanda*, Article 6(3), accessed from https://legal.un.org/avl/pdf/ha/ict_rw_01.pdf

¹⁹*Updated Statute for the International Criminal Tribunal for Former Rwanda*, Article 7(2), accessed from https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

to know that the subordinate was about to commit such acts or had done so. The superior failed to take reasonable measures to prevent such acts or punish the perpetrators.

Like the ICTR, the ICTY also explicitly stipulates that a commander of troops can be held criminally responsible if he fails to prevent or punish his members who commit crimes. It is essential to underline that the ICTR and ICTY are two *ad hoc* tribunals authorized to try crimes that, in international legal discourse, are referred to as the most serious crimes, namely genocide (ICTR) and war crimes (ICTY). The international legal discourse has specificity, so the concept of criminal responsibility also has specificity. The authority to prosecute the most severe crimes is *obligation erga omnes*²⁰ or an obligation for the entire international community.

Along the way, several landmark decisions from the ICTR and ICTY can provide a deeper picture and definition of the doctrine of command responsibility. By ICTR, in the trial of the defendant named Ignace Bagilishema, the judges formulated to determine command responsibility there are three main elements, namely:²¹ (i) the existence of a superior-subordinate relationship or effective control between the accused and the field perpetrators and (ii) the knowledge of the accused that the crime was about to be, was being,

or had been committed; and (iii) the failure of the accused to take necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrators.” In other judgments, the ICTR has further stated that the superior-subordinate relationship is not limited to a formal military hierarchical relationship,²². That command responsibility can apply to civilian commanders as well or not only to military commanders.²³ Like the ICTR, the ICTY also formulated the elements of command responsibility. In the Tihmir Blaskic trial, the ICTY judges developed that command responsibility contains three elements, namely:²⁴ (i) there is a superior-subordinate relationship between the commander (accused) and the perpetrator of the crime; (ii) the accused knew or had reason to know that the crime would be or had been committing; and (iii) the accused failed to take necessary and reasonable measures to prevent the crime or punish the perpetrator.”

The ICTR and ICTY have contributed much to the command responsibility discourse. Tribunals explicitly regulate command criminal responsibility in their statutes and formulate essential elements of command criminal responsibility in their decisions.

Command criminal responsibility is also regulated by the Rome Statute. The Rome Statute is an international treaty that established the *International Criminal Court* (ICC), which has jurisdiction to try four types of crimes, namely genocide, crimes against humanity, war crimes, and aggression. The ICC is based in The Hague, Netherlands.

By Article 28 of the Rome Statute, it is formulated:²⁵

(a) A military commander or person effectively acting as an army commander shall be criminally responsible for crimes within the jurisdiction of the court committed by forces under their

²⁰United Nations General Assembly, *Report of the International Law Commission*, A/74/10 accessed from <https://legal.un.org/ilc/reports/2019/english/chp5.p>

²¹*The Prosecutor v. Ignace Bagilishema (Trial Judgement)*, ICTR-95-1A-T, International Criminal Tribunal for Rwanda (ICTR), June 7, 2001, para. 38 accessed from <https://www.refworld.org/cases,ICTR,48abd5170.html>

²²*The Prosecutor v. Laurent Semanza (Judgement and Sentence)*, ICTR-97-20-T, International Criminal Tribunal for Rwanda (ICTR), para. 402, accessed from <https://www.refworld.org/cases,ICTR,48abd5a30.html> ²³ *The Prosecutor v. Elizaphan and Gérard Ntakirutimana (Judgment and Sentence)*, ICTR-96-10 & ICTR- 96-17-T, International Criminal Tribunal for Rwanda (ICTR), para. 819, accessed from <https://www.refworld.org/cases,ICTR,48abd58c1a.html>

²³*Ibid*

²⁴*Prosecutor v. Tihomir Blaskic (Trial Judgement)*, IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY), March 3, 2000, para. 29 accessed from <https://www.refworld.org/cases,ICTY,4146f1b24.html>

²⁵*Rome Statute of the International Criminal Court*, Article 28

effective command and control, or effective authority and control as the case may be, as a result of their failure to exercise proper control over such forces, where:

- (i) 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*
 - (ii) That military commander or person failed to take all necessary and reasonable measures to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*
- (b) Concerning superior and subordinate relationships not described in paragraph (a), a special shall be criminally responsible for crimes within the jurisdiction of the court committed by subordinates under their effective authority and control as a result of their failure to exercise proper control over such subordinates, where:*
- (i) The superior either knew or consciously disregarded information that indicated that the subordinates were committing or about to commit such crimes;*
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior and*
 - (iii) The superior failed to take all necessary and reasonable measures to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*

Slightly different from the ICTR Statute and the ICTY Statute, the Rome Statute also explicitly provides that command criminal responsibility can be applied to military commanders and other superior-subordinate relationships. Reflecting on this rule, command criminal responsibility can also be used by civilian superiors whose subordinates commit crimes under the jurisdiction of the Rome Statute.

Based on these formulations, one of the characteristics of the concept of command criminal responsibility is that this concept demands criminal responsibility from the commander for his negligence to punish or take preventive measures for criminal acts committed by his subordinates.²⁶ Based on the above formulations, command criminal responsibility differs from criminal participation. Command criminal responsibility holds the commander accountable as a party to the criminal acts committed by their subordinates. Still, on the other hand, it also criminalizes the failure of the commander to act.²⁷ In other words, the concept of command criminal responsibility does not require the

Defendant to have an active role in the criminal event that has occurred, but instead punishes the failure or unwillingness of the defendant to act.

Based on the provisions in the ICTR Statute, ICTY Statute, and Rome Statute, it can be seen that command responsibility is regulated as a form of criminal responsibility for crimes that are considered the most severe crimes in international law, such as genocide, crimes against humanity, and war crimes. It should also be underlined that the doctrine of command responsibility is a doctrine of criminal responsibility developed in international criminal law. Even in developing national criminal law in several countries, command responsibility is also regulated to prosecute certain crimes.

The following analysis will explain how countries such as the Netherlands and Indonesia, two countries with strong *civil law* traditions, regulate command criminal responsibility in their criminal law.

²⁶Jens David Ohlin, "Complicity, negligence, and command responsibility. *Temple International & Comparative Law Journal*, Vol. 35, No. (1), 109-110, 2021

²⁷Miles Jackson, "Causation and the Legal Character of Command Responsibility after Bemba at the International Criminal Court," *Journal of International Criminal Justice*, 2020, pp. 442

2. Command Criminal Liability in Indonesian Criminal Law

Command responsibility in Indonesia is regulated by Law No. 26/2000 on Human Rights Courts. The Human Rights Court Law is a law that establishes a special court under the general judiciary and is a *lex specialis* of the Criminal Code.²⁸ In addition to establishing a special court, the Human Rights Court Law also gives the court jurisdiction to try two types of crimes, genocide, and crimes against humanity, which are then referred to as Gross Human Rights Violations.

Command criminal responsibility is regulated in Article 42 of the Human Rights Court Law, which states:²⁹

Article 42

- (1) A military commander or a person effectively acting as a military commander may be held accountable for a criminal offense within the jurisdiction of the Human Rights Court, committed by troops under their effective command and control or under their effective dominion and control, and the criminal offense results from the failure to exercise proper control over the troops, namely:
1. The military commander or person knew or, in the circumstances, should have known that the troops were committing or had recently committed gross human rights violations and
 2. The military commander or such person fails to take appropriate and necessary measures to prevent or stop such acts or to hand over the perpetrators to the competent authorities for investigation and prosecution.
- (2) A superior, whether police or other civilian, is criminally responsible for gross human rights violations committed by a subordinate under their influential power and control because the superior did not exercise proper control over the subordinate i.e. :
1. The superior knows or knowingly disregards information that indicates that the subordinate is committing or has recently committed a gross human rights violation and
 2. The superior does not take appropriate and necessary measures within the scope of their authority to prevent or stop such acts or to hand over the perpetrators to the competent authorities for investigation, prosecution, and investigation.

At first glance, the formulation of command criminal responsibility in the Human Rights Court Law looks similar to the Rome Statute. The following matrix compares the formulation of command criminal responsibility in the Human Rights Court Law and the Rome Statute to see their differences.

²⁸Zainal Abidin, *Human Rights Courts in Indonesia: Regulation, Development and Implementation*, ELSAM, accessed from https://referensi.elsam.or.id/wp-content/uploads/2014/09/25.-Pengadilan-Hak-Asasi-Manusia-di-Indonesia_Regulasi-Penerapan-dan-Perkembangannya.pdf

²⁹Law No. 26/2000 on Human Rights Court, Article 42

Rome Statute	Human Rights Court Law
(a) A military commander or person effectively acting as an army commander shall be criminally responsible for crimes within the jurisdiction of the court committed by forces under their effective command and control, or effective authority and control as the case may be, as a result of their failure to exercise proper control over such forces, where:	(1) A military commander or a person effectively acting as a military commander may be held accountable for a criminal offense within the jurisdiction of the Human Rights Court, committed by troops under their effective command and control or under their effective dominion and control and the criminal offense results from the failure to exercise

(i) that the 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 (ii) the military commander or person failed to take all necessary and reasonable measures within their power, repress their commission, or submit the matter to the competent authorities for investigation and prosecution. (b) Concerning superior and subordinate relationships not described in paragraph, a fine shall be criminally responsible for crimes within the jurisdiction of the court committed by subordinates under their failure to exercise proper control over such subordinates, where: (i) The superior either knew or consciously disregarded information that indicated that the subordinates were committing or about such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior and (iii) The superior failed to take all necessary and reasonable measures to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.	Proper control over the troops, namely: 1. The military commander or person knew or, in the circumstances, should have known that the troops were committing or had recently committed gross human rights violations and 2. The military commander or such person fails to take appropriate and necessary measures to prevent or stop such acts or to hand over the perpetrators to the competent authorities for investigation and prosecution. (2) A superior, whether police or other civilian, is criminally responsible for gross human rights violations committed by a subordinate under their influential power and control because the superior did not exercise proper control over the subordinate, i.e. : 1. The superior knows or knowingly disregards information that indicates that the subordinate is committing or has recently committed a gross human rights violation and 2. The superior does not take appropriate and necessary measures within the scope of their authority to prevent or stop such acts or to hand over the perpetrator to the competent authorities for investigation, prosecution, and investigation.
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Article 42 point (1) of the Law on Human Rights Courts uses the word “may” so that it can be interpreted that the provision does not explicitly require the commander of the troops to be responsible for criminal acts committed by his subordinates. In addition, the Human Rights Court Law states expressly that command criminal responsibility can also be applied to police superiors or civilian superiors. The Rome Statute does not explicitly mention civilian or police superiors, only stating “*concerning superior and subordinate relationships not described in*

paragraph (a).” This shows that the Rome Statute also opens space for applying command criminal responsibility in addition to military commanders, even though it does not explicitly mention civilian superiors or police superiors like Indonesia.

Other than the Human Rights Court Law, no other laws and regulations in Indonesia allow for applying command criminal responsibility. Because it is only regulated by the Human Rights Court Law, the types of criminal offenses that can involve command criminal responsibility are only genocide and crimes against humanity. Command criminal responsibility can also only be charged to defendants undergoing trial at the Human Rights Court. The trial process in the scope of general justice certainly cannot trap the perpetrator with command criminal responsibility.

Therefore, it can be stated that the regulation of command responsibility in Indonesia is exclusive because it can only be applied to suspects of Gross Human Rights Violations and can only be used within the scope of the Human Rights Court. In its development, although genocide and crimes against humanity were later included in the New Criminal Code (Law No. 1 of 2023),³⁰ the regulation on command responsibility was not included in it. The New Criminal Code has included another form of criminal liability, namely corporate criminal liability. However, command criminal liability is not recognized in the form of criminal liability in the New Criminal Code.

3. Command Criminal Liability in Dutch Criminal Law

Command criminal responsibility in the Netherlands is regulated by the *Wet Internationale Misjdreven* or *International Crimes Act*, a law relating to international crimes and international humanitarian law. The reason for enacting this law was the ratification of the Rome Statute, the establishment of the *International Criminal Court* (ICC), and the ratification of the Convention Against Torture and the Convention Against Enforced Disappearances. The law was passed in 2001 and allows for the application of the jurisdiction of the Dutch courts to investigate and prosecute offenses covered by the law, including offenses committed abroad by foreign nationals.³¹ The *Internationale Wet Misjdreven* also replaces two laws, the *Uitvoeringswet Genocideverdrag* (the act Implementing the Genocide Convention) and the *Uitvoeringswet Folteringverdrag* (the act Implementing the Convention Against Torture), as well as replacing several articles in the *Wet Oorlogsstrafrecht* (the Wartime Crimes Act).³²

The crimes within the scope of the *Wet Internationale Misjdreven* are genocide in Article 3, crimes against humanity in Article 4, war crimes in Articles 5-7, torture in Article 8, and enforced disappearance in Article 8a.³³ The articles on genocide and crimes against humanity contained in Article 3 and Article 4, respectively, of the *Wet Internationale Misjdreven*, are generally similar to the formulations of these two crimes in the Rome Statute.³⁴

Regarding the prosecution mechanism, the *Wet Internationale Misjdreven* gives discretion to law enforcement to conduct investigations and prosecutions and requires that suspects are in Dutch territory when investigations and prosecutions are conducted.³⁵ *Wet Internationale Misjdreven* also adheres to the notion of subsidiarity, which means that prosecution of crimes within its scope will only occur if neither the ICC nor the state where the crime occurred has prosecuted it.

The Netherlands imposes command criminal responsibility for *crimes* categorized as *international crimes*. *International crimes* are criminal offenses regulated in international treaties ratified by the Netherlands.

By Article 9, *Wet Internationale Misjdrijven* command criminal liability is controlled as:³⁶

³⁶Netherlands, *Wet International Misrdrijven*, accessed from <https://wetten.overheid.nl/BWBR0015252/2020-01-01#Paragraaf3>

- 1 *Met gelijke straf als gesteld op de in § 2 en in article 1, vierde lid, bedoelde feiten wordt gestraft de meerdere die:*
 - a. *opzettelijk toelaat dat een aan hem ondergeschikte een zodanig feit begaat;*
 - b. *opzettelijk nalaat maatregelen te nemen, voor zover die nodig zijn en van hem kunnen worden gevegd, indien een aan hem ondergeschikte een zodanig feit heeft gepleegd of voornemens is te plegen.*
- 2 *Met een straf van ten hoogste twee derde van het maximum van de hoofdstraffen, gesteld op de in § two en in article 1, vierde lid**For those who have been convicting of a crime of which they have been condemning, or for those who have been convicting of a crime of which they have been convicting, or for those who have been convicting of a crime of which they have been condemning, or for those who have been convicting of a crime of which they have been convicting, or for those who have been convicting of a crime of which they have been condemning, or for those who have been convicting of a crime of which they have been convicting, or for those who have been convicting of a crime of which they have been condemning.*
Which, when translated into Bahasa Indonesia, becomes:

Bosses who

- a. knowingly permits a subordinate to commit such offense;
 - b. Intentionally fails to take action, to the extent necessary and demandable from him, if a subordinate has committed or intends to commit such an act.
- 2 Whoever, through his fault, fails to take measures, to the extent necessary and reasonably to be expected of him, if a person subordinate to him, as he must reasonably suspect, has committed or intends to commit such an act.

At first glance, the formulation of articles on command criminal responsibility regulated by *Wet Internationale Misdrijven* looks similar to that controlled by the Rome Statute. However, *Wet Internationale Misdrijven* adds the element of “allowing” subordinates to commit criminal acts as one of the elements of command criminal responsibility.

Furthermore, if the Rome Statute only regulates four types of criminal acts, namely genocide, crimes against humanity, war crimes, and aggression, the *Internationale Wet Misdrijven* regulates five types of criminal acts with the addition of torture and enforced disappearance without controlling aggression.

Regarding “permitting,” the Rome Statute does not classify “permitting the commission of a criminal offense” as an element of command criminal responsibility but rather as an element of individual criminal responsibility.³⁷ The element of “permitting” a subordinate to commit a criminal offense is an element that is not formulated by either the ICTR Statute and the ICTY Statute or the Rome Statute. In other words, the element of a criminal offense in command criminal responsibility in Dutch criminal law is regulated more broadly. Superiors can be punished not only for failing to take action to prevent or punish subordinates who have committed criminal acts but also for allowing subordinates to commit such acts.

It is important to note that command criminal responsibility in the Netherlands is not regulated in the *Wetboek van Strafrecht* or the Dutch Criminal Code but in illegal law regulations outside the Criminal Code. Therefore, command criminal responsibility in the Netherlands can only be applied to offenses outside the Criminal Code, namely genocide, crimes against humanity, war crimes, torture, and enforced disappearance. Command criminal responsibility cannot be

³⁷Rome Statute of the International Criminal Court, Article 25 (3)(b)

applied to offenses within the Criminal Code or other offenses regulated by illegal law outside the *Wet Internationale Misdrijven*.

4. Comparison of Command Criminal Liability Arrangements in the Netherlands and Indonesia

Based on the previous explanation, it can be seen that there are some similarities and differences between the regulation of command criminal responsibility in the Netherlands and Indonesia. Both countries regulate command criminal responsibility in criminal laws outside the Criminal Code; the Netherlands regulates command criminal responsibility in *Wet Internationale Misdrijven*, while Indonesia regulates it in the Human Rights Court Law. This shows that the concept of command criminal responsibility is a concept of criminal responsibility that developed long after the existence of the Criminal Code of both countries. Because it is exclusively regulated in one law, command criminal responsibility cannot be applied to criminal offenses other than those controlled by the *Wet Internationale Misdrijven* and the Human Rights Court Law.

Although the Netherlands revised its Criminal Code in July 2023 and Indonesia passed the New Criminal Code through Law No. 1 Year 2023, both countries still do not include command criminal responsibility in their latest version. This shows the “specificity” and exclusivity of command criminal responsibility, as well as showing that command criminal responsibility is intended to ensnare commanders whose troops have committed the most serious crimes, such as genocide and crimes against humanity.

Furthermore, although there are more criminal offenses regulated by the *Wet Internationale Misdrijven* than the Human Rights Court Law, there are similarities in several types of criminal offenses that can apply to command criminal responsibility. According to the *Internationale wet Misdrijven* and the Human Rights Court Law, command criminal responsibility can be used for genocide and crimes against humanity. The application of command criminal responsibility for genocide and crimes against humanity can be stated as an adoption of similar arrangements in the Rome Statute. Referring to the timeline of the enactment of the Rome Statute, namely 1998, it can be stated that the Rome Statute has more or less influenced the regulation of command criminal responsibility in both countries, considering that the *Wet Internationale Misdrijven* was enacted in 2001 while the Human Rights Court Law was enacted in 2000.

The fundamental difference between the regulation of command criminal responsibility between the Netherlands and Indonesia can be seen in the elements of command criminal responsibility. The elements of Indonesian command criminal responsibility are similar to the Rome Statute, namely (i) the commander had effective control, (ii) the commander knew his subordinates would or had committed a criminal offense, and (iii) the commander failed to take appropriate steps to punish the perpetrator. In addition to these three elements, the Netherlands adds one more element: a commander who “authorizes” his subordinates to commit a criminal offense. Therefore, the elements of Dutch command criminal responsibility are broader than those of command criminal responsibility in Indonesia.

CONCLUSION

Command criminal responsibility is a unique form of criminal responsibility that aims to trap the commander of the perpetrators of *crimes* classified as the *most severe*. Command criminal responsibility is regulated in the Statutes of international criminal tribunals such as the ICTR, ICTY, and ICC.

In its development, command criminal responsibility is recognized in the Statutes of international court forums and by national criminal law, among others by Indonesian and Dutch criminal law. Both countries specifically regulate command criminal responsibility in criminal laws outside the codification of criminal law; in Indonesia, command criminal responsibility is held in the Human Rights Court Law, while in the Netherlands, it is regulated in *Wet Internationale Misdriften*.

The formulation of command criminal responsibility in Indonesian and Dutch criminal law resembles the formulation of command criminal responsibility regulated by the Rome Statute. However, the Dutch elements of command criminal responsibility in the Netherlands are handled more broadly.

Furthermore, both Indonesia and the Netherlands specifically open space for the application of command criminal responsibility in certain types of criminal offenses, such as genocide and crimes against humanity. Command criminal responsibility in Indonesia and the Netherlands can only be applied to certain criminal offenses and not to “general” criminal offenses regulated in the Criminal Code of each country.

Therefore, command criminal responsibility can now be seen as a new form of criminal responsibility regulated in several countries’ national criminal laws. On the other hand, countries that hold command criminal responsibility, such as Indonesia and the Netherlands, also show the specificity or exclusivity of command criminal responsibility, that command criminal responsibility can only be applied strictly to certain types of criminal acts, namely criminal acts that are considering as the *most severe crimes*.

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