



A CRITICAL ANALYSIS OF THE DOCTRINE OF COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW: THE BEMBA'S CASE SITUATION

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Abstract

Prosecutor v Jean-Pierre Bemba Gambo was the International Criminal Court's locus classicus case directly addressing the command responsibility doctrine. As the first permanent international criminal court who can exercise jurisdiction over a majority of the world's nation states, its interpretation of the doctrine was potentially an important development in international criminal law and an opportunity to affirm the legal responsibility of commanders for their subordinates' crimes. However, rather than providing a clear articulation of the doctrine and its scope, the Appeals Chamber's of the Court was split by 3-2 majority, it reversed the Trial Chamber's decision and the Appeals Chamber's Judges were sufficiently divided in their reasoning that they felt compelled to deliver separate opinions. A key disagreement within the doctrine is whether command responsibility is a mode of liability or a separate offence of dereliction of duty. This disagreement feeds into further contestation about the doctrine's core elements, including the standard of fault necessary under its actus reus or mens rea elements. This paper analyses the judges' reasoning in Bemba illustrate that, despite decades of jurisprudence and academic debate, there is still lacuna on these foundational elements. Instead of being settled law, the debate on command responsibility is still live. The paper maintains that the current law supports a mode of liability interpretation but proposes that reclassifying the doctrine as a separate offence could resolve many of its tensions while observing the culpability principle, satisfying its justifications, and facilitating an adequately wide scope of accountability.

Keyword: Command responsibility, Liability, Prosecutor, Jean-Pierre Bemba Gambo, *Culpability*, Offence.

Introduction

The command responsibility doctrine allows commanders to be convicted of crimes committed by their subordinates when they fail to take all necessary and reasonable measures to prevent, repress or punish their subordinates' crimes.¹ In 2018, the Appeals Chambers of the International Criminal Court (ICC) acquitted Jean-Pierre Bemba Gambo,² who had been charged under command responsibility, of the war crimes of murder, pillaging, rape, and committed by his subordinates.³ The Bemba's case is significant because it is the ICC's first case/judgement⁴ on command responsibility. As the first permanent international criminal court whose jurisdiction is accepted by a large number of states, its interpretation of the doctrine could have been an important step in clarifying the nature of command responsibility and defining its parameters.⁵ However, instead of providing that much-needed clarification, the Appeals Chambers' decision reflects the division and disagreement that has long surrounded the doctrine. The Appeal Chambers, by a 3-2 majority, reversed the Trial-Chambers judgement.⁶ The appeal judges were also so divided that they felt compelled to express their varying interpretations in separate opinions.⁷ From the majority, judges Van den Wyngaert and Morrison attached a separate opinion, and judge Eboe-Osuji attaches a Concurring separate opinion. Judges Monageng and Hofmanski attached their dissenting opinion.⁸ This paper outlines how the judges disagreed over core issues, including the nature of the doctrine, the degree of knowledge or mens rea required, and whether causation is an element of the doctrine. All of these elements have long been disputed. The Bemba's case demonstrates that, even after many decades of jurisprudence and academic debates, these disagreements have not been surmounted.

The question that arose for determination is whether the doctrine undermines the culpability principle and, if it does, whether that weakening of the principle is justified. The culpability principle is a core principle of many criminal justice systems which requires that a person must have the requisite mens rea and actus reus to be convicted of a crime.⁹ When command responsibility is classified as a mode of liability, it generally places a stain on the culpability principle.¹⁰ The division in the command responsibility doctrine reflects a dualism in international criminal law. International criminal courts are tasked with ending impunity for the most serious crimes of concern to the international community while also upholding the highest standards of criminal law and procedure.¹¹ Perhaps in aiming to advance an interpretation that

¹ B. Mayer, 'New Court same division: an illustration and the confusion regarding command responsibility' *Leiden Journal of International Law* [2022] (35) 1-21

² [8 June 2018] ICC-01/05-01-A Appeals Chamber 116 Majority Judgement

³ *supra*

⁴ *Locus classicus*

⁵ *Ibid.*

⁶ *Prosecutor v Kordic and Cerkez* [26 February 2001] IT-95-14/2-T

⁷ *supra*

⁸ *Ibid.*

⁹ *Prosecutor v Kayishema* [21 May 1999] ICTR-95-1-T Trial Chamber II

¹⁰ O. Triffterer, and K. Ambos, 'Rome Statute of the ICC: A Commentary' *Journal of International Law* [2016] (1)10-28

¹¹ *Ibid.*

balance these roles, the judges in Bemba' case, adopted varying positions on the core elements of the doctrine.¹² While some of the interpretations of command responsibility as a mode of liability do not undermine the culpability principle, they set a high standard that narrows down the doctrine's scope and does not fulfil some of the key rationales advanced to justify it. This paper submits that reclassifying command responsibility as a separate offence would uphold the culpability principle, clarify the doctrine's foundational elements, and provide it with an adequate scope. It would also satisfy the key rationales advanced to justify weakening the culpability principle and bring the dual role of international criminal courts into greater harmony. The jurisprudence and the literal interpretation of the enabling instrument of the ICC indicate that command responsibility is a mode of liability.¹³

Command responsibility doctrine for the Military commanders

Article 28 of the Rome Statute lists out the command responsibility doctrine for military and de facto military commanders.¹⁴ It states that the commander is criminally responsible for crimes committed by forces under his or her effective command and control, or effective authority and control.¹⁵ However, this criminal responsibility only arises if: (i) the crimes are committed as a result of his or her failure to exercise control properly over such forces, (ii) the commander knew or owing to the circumstances at the time, should have known that the forces were committing or about to commit the crimes, and (iii) the commander did not 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.¹⁶ Article 28 provides that commanders are liable if their subordinate commits a crime as a result of their failure to exercise proper control when they knew or should have known that the crime was being committed or about to be committed and they did not take all necessary and reasonable measures within his or her power to prevent or repress the crime or to submit the matter to a competent authority.¹⁷ Command responsibility allows holding commander liable for their failure to effectively control their subordinates rather than for directly participating in their crimes.¹⁸ Indeed, if the commander participates in, contributes to, or assists in the commission of the crime, they would be liable either as principals or as accomplices under the traditional modes of liability pursuant to Article 25 (3) of the Rome Statute.¹⁹ The traditional modes capture the conduct of a commander who orders or prompts the crime as well as a commander who does not initiate the crime but contributes to or aids and abets it.²⁰ If a commander intends to support the crime through their omission they could also be responsible as an aider and abetter.²¹ If a commander knows of a crime but fails to prevent

¹² Ibid.

¹³ Ibid.

¹⁴ The Rome Statute 2002

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ B. Sander, 'Unravelling the confusion concerning succession superior responsibility in the ICTY jurisprudence' LJIL [2010] (23) (1)105 16-20

¹⁹ Ibid.

²⁰ Not all traditional modes of liability require the same subjective mens rea in order to establish culpability. Some common law systems a person who participates in a crime can also be liable for additional incidental crimes committed by another member if the person could have foreseen the possibility of the additional incidental crime with that foresight.

²¹ Ibid.

it when under duty to do so and has the material ability to prevent it, then the mode of aiding and abetting by omission potentially applies.²² If a commander's omissions extend over a long period of time, their failure could constitute incitement and instigation as well as aiding and abetting in cases where the subordinates knew that the commander was aware of their continued criminal activities and the commander's omission contributed to the crimes.²³

Accordingly, the traditional modes of liability potentially capture a wide range of the commander's contributions, including their wilful omissions, intention, intentional support or continued failure over a long period of time.²⁴ Command responsibility provides for the commander's liability short of those traditional forms of participation in or contributions to the crime. Commanders responsibility is also solely concerned with crimes committed by persons in a superior-subordinate relationship and with commander's omissions, that is their failure to prevent, repress or punish²⁵. Where the commander's omission could fall under both command responsibility or a traditional mode of liability, international criminal tribunals tend to convict under the traditional modes. As such, command responsibility is a kind of default liability for when the other modes of liability cannot be sufficiently established. Command responsibility tends to work as a fall back and entails a lower level of personal culpability than the traditional modes.

In the case of *Prosecutor V Jean Pierre Bemba Gombo*,²⁶ the ICC on 21st March 2016 found the accused person guilty of a two count charge of crime against humanity (murder and rape) and three counts of war crimes (murder, rape and pillaging) the crimes were committed in Central Africa Republic from on or about 26 October, 2002 to 15 March 2003 by a contingent of movement De Liberation De Congo (MLC) Crops. Mr. Bemba was a person effectively acting as military commander with effective authority and control over the force that committed the crimes. He was sentenced on the 21 June 2016 to 18 years of imprisonment.²⁷

Confused nature of command responsibility

Command responsibility allows holding commanders liable for their subordinate's crimes, but the elements needed to establish the commander's guilts do not relates to the underlying crimes but rather to effectively supervise and control their subordinate.²⁸ This divergence raises questions about the nature of command responsibility, namely whether the doctrine represents a mode of liability for the underlying offence committed by the subordinate or a separate offence of dereliction of duty by the superior.²⁹ The issue is, are commanders criminally liable for their subordinate's crimes, such as murder, rape, torture or for an offence of failing to control, prevent or punish those crimes?

²² Ibid.

²³ A. Cassese, P. Gaeta, and J.R.W.D. Jones, 'The Rome Statute of International Criminal Court: A Commentary JILJ [2002] 833 10-30

²⁴ K. Ambos, 'General Principles of International Criminal Law: superior responsibility' JILJ [2002] (2) 823-850

²⁵ Ibid.

²⁶ <https://www.icc-cpi.int> car Bemba accessed 18 July 2022

²⁷ supra

²⁸ Ibid.

²⁹ Ibid.

Some persons maintain that command responsibility is a form of participation or mode of liability, such as accessory liability. In deed, this is the position favoured by numerous tribunal and finds basis in customary international law, as evidence by the International Criminal Tribunal for the Former Yugoslavia (ICTY) jurisprudence.³⁰ The United Nations thus created the international criminal tribunal for the former Yugoslavia through Resolution 827 on 25 May, 1993. It was the first war crimes tribunal since the Nuremburg and Tokyo trials however, it was also the first in its kind with an international character. The main purpose behind the tribunal was to bring to justice to those who perpetrated crimes such as crimes against humanity and genocide with the emphasis on the instigators or authorities that allowed the crimes to happen.³¹ Command responsibility is not consistent with traditional modes of liability.³² The mental standard may be lower than the one generally set for complicity and, under the ICTY legal framework, there is no requirement of a causal link to the underlying crime. The mens rea and actus reus standards may be different in command responsibility than under traditional modes of liability.³³

The other school of thought are of the view that command responsibility is a separate offence; it is a crime of omission comprised of the commander's failure to properly supervise and control their subordinates.³⁴ This position is supported by a number of scholars, especially in respect of commanders who failed to punish their subordinate's crime. There is also some judicial support for the position that commanders are only responsible for their failure to fulfil their duty and not for the subordinates' crimes. However, such judicial support is limited and generally originates from trial chambers or separate and dissenting opinions of individual judges and the underlying reasoning has faced academic challenge. It is also difficult to classify command responsibility as an independent offence when the commander's liability is strictly and necessarily dependent from the commission of the crime by Judge Eboe-Osuji in Bemba's case,³⁵ Article 28 of the Rome Statute provides that commanders are responsible for crimes within the jurisdiction of the Court and those crimes are genocide, crime against humanity, war crimes and the crime of aggression.³⁶ Dereliction of duty is not a listed crime. Also, bar a few limited exceptions, the actual practice of the international tribunals and the courts including in Bemba, has been to charge commanders with, convict/acquit and sentence them for the same underlying crimes of their subordinates, as opposed to dereliction of duty.³⁷

This division between advocates of the mode of liability approach and the separate offence approach resonates with international criminal law's dual objectives: ending impunity for the most serious crimes of concern to the international community, on the one hand, and upholding the highest standard of criminal justice and procedures on the other hand. These objectives do not have to but certainly can be in conflict. International court seek to ensure that those culpable of serious crimes do not escape the accountability.³⁸

³⁰ G. Boas, J.L. Bischoff, and N.L. Reid, 'International Criminal Law Practitioner Library Volume 1: forms of responsibility in International Criminal Law' JIL [2007] 178

³¹ Forsythe, D P Human Rights in International Relations (Cambridge University Press 2006) 97

³² B.B. Ija, 'The doctrine of command responsibility revisited' Chines Journal of International Law [2004] (1) 3-31

³³ J.G. Stewart, 'The end of modes of liability for international crimes' LJIL [2012] (21) 1 165-183

³⁴ Ibid.

³⁵ supra

³⁶ The Rome Statute 2002

³⁷ Ibid.

³⁸ Prosecutor v Hadzihasanovic [16 July 2003] IT-01-47-AR72 Appeals Chambers Decision on interlocutory Appeal Challenging jurisdiction in relation to command responsibility

Those who classify command responsibility as a mode of liability often rely on argument centered on ending impunity and ensuring that commanders do not evade justice. By contrast, advocates of separate offence approach often rely on foundational principles of criminal law to support their position.

Perhaps, in seeking to balance these objectives, scholars have also advanced interpretations of command responsibility that place it in the spectrum between separate offence and mode of liability.³⁹ Some maintain that it is a form of participation that is akin to but distinct from the traditional modes of liability, or a sui generis mode of liability or form of participation. Indeed, classifying command responsibility as sui generis was the predominant position at the ICTY.⁴⁰ It is sui generis because it contemplates a species of criminal liability more comfortably explained by the theory of the commander's dereliction of duty than by the theory of vicarious liability.

Several ICTY chambers also stated that the commanders do not bear the same responsibility as the subordinate. Rather, for means that because of the subordinate's crimes, the commanders are responsible for their failure to act.⁴¹ Darryl Robinson highlights that what the ICTY sought to articulate namely, that the commanders is not a perpetrator and is not vicariously liable due to the commander-subordinate relationship but is responsible because of their fault with respect to the crime is captured by the established mode of accessory liability.⁴² He argues that there is no need to fabricate an entire untested and vaguely-described conceptual category by labelling command responsibility sui generis.⁴³ Others argues that the command responsibility is a sui generis liability by omission, or that it is a sui generis crime, or that it is a mixture of a sui generis form of participation and a sui generis criminal act depending on the circumstances. Similarly, command responsibility has been explained as a responsibility for the act but not for the act, as sometimes-mode sometime-offence and as mode nor-offence.⁴⁴ The picture is further complicated in view of the arguments that, although it is characterized as a sui generis form of liability by the tribunals, it is de facto equated to a separate offence in the practice of the tribunal, or that command responsibility is an imputed liability, vicariously liability or criminal negligence.⁴⁵

In Bemba's case, most of the judgements or individual opinions did not address in detail the doctrine's nature. Where it was addressed, the judgements and opinions neither resolved the debate nor provided clarity.⁴⁶ The Trial Chamber followed the prevailing ICTY jurisprudence and classed command responsibility as a sui generis mode of liability.⁴⁷ Judge Steiner, however, preferred the term additional as opposed to sui generis.⁴⁸ The Trial Chamber also adopted similar rhetoric regarding whether the commander shared the same responsibility as the subordinate. It stated that commanders are criminally responsible for crimes committed by their subordinates but the responsibility of a commander is different from that of a

³⁹ K. Yohohama, 'The Failure to Control and Failure to prevent repress and submit: The Structure of Superior Responsibility under Article 28 ICC Statute' *International Criminal Law Review* [2018] (18) 2

⁴⁰ R. Cryer, 'The ad Hoc Tribunals and the Law of Command Responsibility: A Quiet Earthquake' *JCICT* [2010] 159 9-177

⁴¹ *Ibid.*

⁴² *supra*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *supra*

⁴⁷ *Ibid.*

⁴⁸ *Prosecutor v Kayishema* [16 November 1998] 7 JIC 1197 at 1197-1208

person who commits a crime within the jurisdiction of the Court.⁴⁹ Unfortunately, the Chamber did not elaborate on how exactly the responsibility is different when the commander is found responsible for the same crime as the principal perpetrator and did not engage deeply with the debate on the doctrine's nature. On appeal, judge Eboe-Osuji disagreed with the Trial Chamber and stated that command responsibility was *sui generis*.⁵⁰ Instead, he classed it as accomplice liability and specified that it is a special provision of accomplice liability outlined in Article 25 (3) (c) of the Rome Statute.⁵¹

It is pertinent to note that the nature of command responsibility has been the subject of considerable debate wherein varying positions have been advanced. The prevailing ICTY jurisprudence which favoured interpreting command responsibility as a *sui generis* mode of liability was subjected to scholarly criticism and a number of scholars endorsed the interpretation of the doctrine as a separate offence of dereliction of duty.⁵² Rather than solving this debate, the Bemba's case reflected the confusion.⁵³ Within the same Court, the judges were either silent on the issues or contradictory positions were advanced, evincing that the issue of the doctrine's nature is still alive.⁵⁴ This is not only of theoretical concern but has seriously practical repercussions, in particular it can determine whether a person is found liable of egregious crimes or not. It could also lead to serious inconsistencies within international criminal law and undermine its authoritativeness.

Stretching the culpability principle under the mode of liability approach

The culpability principle provides that to be criminally liable a person must have personally engaged or participated in the crime in some way. This is a core principle for liberal criminal justice systems, which international criminal law purports to be, and is well-accepted in the criminal of all major national legal systems.⁵⁵ Judge Monageng and Hofmanski recognized the importance of this principle to international criminal law in Bemba.⁵⁶ They stated that the commander's criminal liability for their subordinate's crime is only justified and indeed justifiable if there is a personal nexus between the crime and the superior.⁵⁷ Culpability or personal guilt has two elements. It requires the objective element of a personal connection to the crime and the subjective element of a blameworthy mental state.⁵⁸ Generally, a person should only be liable if they have contributed to the crime and have the requisite knowledge or intent.⁵⁹ As a mode of liability, command responsibility potentially undermines both in that the commander is punished for his subordinates' crimes, when he neither participated in the *actus reus* nor shared the *mens rea* of the crimes in the primary sense of desiring it.

⁴⁹ *supra*

⁵⁰ Judge Eboe-Osuji Opinion *supra* on why the law, in its current format, would not be compatible with command responsibility as a dereliction of duty offence.

⁵¹ 2002

⁵² M.C. Bassiouni, and P. Manikas, 'The Law of the International Criminal Tribunal for the former Yugoslavia' AJIL [1996] (93) 573

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ A. Williamson, 'Some Considerations on command responsibility' International Review of the Red Cross [2008] 90 303-317

⁵⁶ *supra*

⁵⁷ *supra*

⁵⁸ Prosecutor v Halilovic [30 June 2006] IT-03-68-T Judgement IT-03-68-T of the Trial Chamber II

⁵⁹ *Ibid.*

Mental element of a crime: element of a blameworthy mental state

Criminal liability generally demands intent and actual knowledge or some level of subjective awareness.⁶⁰ While many agree that command responsibility requires something lower than the traditional modes, Judges Monageng and Hofmasky in Bemba's case stated that the mental standard is significantly lower. The position advanced stretch the culpability principle further than others. Whether intent is required and, if so, which degree of intent, the standard of knowledge required, and what knowledge is required all impact on the culpability principle.⁶¹

The mens rea that the commander must be proven to possess has been variously argued to amount to willfulness or acquiescence to mere negligence.⁶² These represent vastly different standards and burdens for the prosecutor to satisfy before a commander can be found liable.⁶³ The different Judges reasoning in Bemba, often provided in dicta, reflects the intractable uncertainty. At one extreme, Judge Eboe-Osuji set a very high standard and required that commanders willfully fail to exercise effective control in a manner that truly amounts to connivance in or condonation of the the subordinate's crimes before they are responsible for their subordinate's crimes.⁶⁴ At the other extreme, the ICC Pre-Trial Chamber stated that commanders are criminally liable if they have been merely negligent in failing to acquire knowledge of their subordinate's crimes.⁶⁵

The negligence position is supported by the low knowledge standard under the doctrine. Command responsibility imposes liability when the commander had actual knowledge but also when the commander should have known of the crimes.⁶⁶ On appeal in Bemba's case, Judge Van den Wyngaert and Morrison argued that the standard captures a situation where the commander has an awareness that something is going on without having sufficiently clear and dependable information as to what is happening or has happened, or who is or was involved.⁶⁷ A subjective awareness that something is going on is a notable lower mental state standard than acquiescence, connivance or condonation or, indeed, the standard generally required in traditional modes of liability.⁶⁸ Under the Pre-Trial Chamber interpretation of 'should have known', commanders may not even need a subjective awareness that something is going on and instead require 'an active duty to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time of the commission of the crime.'⁶⁹ Under this construction, negligence in failing to act when aware that something may be happening would not need to

⁶⁰ Prosecutor v Halilovic [16 November 2005] IT-01-48-T Judgement of the Trial Chamber I

⁶¹ Ibid.

⁶² M.L. Nybondas, 'Command Responsibility and its Applicability to Civilian Superiors' JILJ [2010] (9) 9-133

⁶³ Ibid.

⁶⁴ supra

⁶⁵ [16 November 1998] IT-96-21-T Celebici Judgement of the Trial Chamber

⁶⁶ P.D. Marquardt, 'Law Without Borders: The Constitutionality of an International Criminal Court' Columbia Journal of Transnational Law [1995] (33) 73

⁶⁷ supra

⁶⁸ J.D. Ohlin, 'Complicity Negligence and Command Responsibility' Temple International and Comparative Law Journal [2021] (35) 1 17-116

⁶⁹ Ibid.

be established; negligence in failing to actively seek information and monitor, even when not aware of wrong doing will suffice.⁷⁰

The mental element standard is also potentially lowered by the interpretations of what knowledge the commander need to possess.⁷¹ The Trial Chamber in Bemba's case stated that the commander does not need to know all the details of each crime or the specific identities of the perpetrators.⁷² In addition, knowledge of the commission of the crime was held to necessarily implies knowledge of requisite contextual elements which qualify the conduct as a war crime against humanity. This was the position adopted by the Court as well in *Mohamed Ali's case*.⁷³ Ali was indicted on 8 March 2011 on five Counts of crime against humanity with regard to the situation in the Republic of Kenya. Ali, who at the time was the commissioner of The Kenya Police was alleged to have conspired with Francis Muthaura, an adviser of Kenyan President Mwaikibaki, to order the Police Forces that he commanded not to intervene in stopping violence perpetuated by Mungiki Forces Loyal to President Kibaki during post-election violence from 27 December 2007 to 29 February 2008.⁷⁴

Similarly, *Charles Blegoude*⁷⁵ was indicted on 21 December 2011 with four counts of crime against humanity with regard to the situation in the Republic of Cote d'Ivoire as a leader of the congress panafricain des jeunes et des patriotes, the youth organization that supported Ivorian President Laurent Gbagbo's organized plan of systematic attacks against civilian in and around Abidjan including in the vicinity of the Golf hotel, during post-election violence that began on November 2010. On the 27 June 2011, the ICC indicted *Muammar Gaddafi*⁷⁶ on two counts of crime against humanity with regard to the situation in Libya. As the Leader of the Revolution (the defector head of state) and commander of the Armed Forces of Libya he allegedly planned, in conjunction with his inner circle of advisers, a policy of violent oppression of popular uprisings in the early weeks of the Libyan civil war. He allegedly formulated a plan in response to the 2011 Tunisian and Egyptian revolutions whereby Libyan state security Forces under his authority were ordered to use all means unnecessary to quell public protest against his government. From 15 February 2011 until at least 28 February 2011.⁷⁷

The court in these cases held that the knowledge of these elements is central to the conviction of the principal perpetrators in the commission of these crimes. Several international crimes also require the principal perpetrator had not only knowledge and intent, but rather a special intent.⁷⁸ For instance, genocide, torture, and pillaging all require that the person participates in the crime for a specific purpose, such as, to destroy a group, to extract information or impose punishment, or to take goods for private or personal use respectively. It is this specific intent that elevates murder to genocide, beatings to torture, and theft to pillaging. The requirement of this higher mental state reflects the graver character of the crime.⁷⁹ If

⁷⁰ Ibid.

⁷¹ Clebici supra, where the Trial stated the requisite mental element for an act to constitute participation which contributes to or has an effect on the commission of a crime.

⁷² supra

⁷³ Appeal Case No.20 (1967)

⁷⁴ supra

⁷⁵ The Prosecutor v Laurent Gbagbo and Charles Ble'Goude [July 2021] ICC-02/11-01/15

⁷⁶ The Prosecutor v Saif Al-Islam Gaddafi [Jul 2021] ICC-01/11-01/11

⁷⁷ supra

⁷⁸ supra

⁷⁹ Ibid.

commander responsibility allows holding commanders liable as a principal, then it entails the much lower standard of knowledge or even hypothetical knowledge under should have known, than special intent.⁸⁰

Judges Van den, Wyngaert and Morrison's position is that a subjective awareness that something is going on satisfies the 'should have known' standard, which is notably lower than willful, connivance or condonation.⁸¹ As opposed to personal intent or sharing the principal perpetrator's intent, the prosecution would only need to establish knowledge or even hypothetical knowledge under 'should have known'. This lower mental state has led many scholars to hold that the command responsibility doctrine allows the negligent commander to be convicted of same crimes as their subordinates.⁸² If command responsibility is a form of principal liability, it converts a negligent omission into an intentional criminality. It is a crime of intent by negligence. It may even be a crime of special intent by negligence. It could be genocide, torture, or pillage by negligence⁸³.

However, the potential divergence between culpability under the traditional modes of liability and under the command responsibility depends on whether the doctrine is classed as a form of accessory liability.⁸⁴ Some, including Judge Eboe-Osuji in the Bemba appeal, maintain that command responsibility is a mode of accessory liability whereas others argue that it is not.⁸⁵ If this doctrine is a mode of liability akin to principal liability, then there is potentially a substantial culpability gap between it and other modes of principal liability. On the other hand, if the doctrine is a mode of liability akin to accessory liability, then the more appropriate comparable standards for mens rea or actus reus are those pertaining to accessory rather than principal liability.⁸⁶ This would narrow the gap between culpability standard under the traditional modes and the doctrine because lower standards of knowledge, intent and contribution are seen in several traditional modes of accessory liability. Under accessory liability, the person does not necessarily have to have the same special intent or the same knowledge of the details of the crime as the principal.⁸⁷ Nevertheless, negligence is often considered too low a standard for complicity, even for accessory liability. The interpretations of command responsibility that favour lower standards of intent and knowledge, including the subjective awareness that something is going on, combine to place the doctrine at the weaker end of the culpability principle to this extent is necessary and justified in order for the doctrine to be effective.⁸⁸

⁸⁰ Ibid.

⁸¹ Separate opinion of Judge Christine Van den Wyngaert and Howard Morrison in Bemba's case supra

⁸² Ibid.

⁸³ Ibid.

⁸⁴ A.K. Galand, 'Bemba and the Individualization of War: Reconciling Command Responsibility under Article 28 Rome Statute with Individual Criminal Responsibility' AJIL [2017] (3)3-19

⁸⁵ Concurring opinion of Judge Eboe-Osuji in Bemba's case supra.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

Physical element; Personal connection to the underlying crime

Traditional modes of liability generally require that a person participate in, contribute to, or have an effect on the commission of the crime.⁸⁹ While the importance of this personal connection to upholding the culpability principle is well recognized, what the commander's personal connection means under the command responsibility doctrine is disputed. There are varying views on whether casualty must be established. If it must, what is the degree or the extent of contribution needed? There is even disagreement on whether the subordinate needs to have completed the underlying crime or whether merely attempting the crime is sufficient.

One of the most contentious issues arises with respect to the commander who fails to punish their subordinate's crime. Punishing a crime requires the commander to act after the crime has already been committed and, accordingly, the commander's failure to do so cannot retroactively cause or contribute to that particular crime.⁹⁰ The commander's failure to punish may contribute to the commission of future crimes. When assessing causality under command responsibility, the ICTY did not restrict its interpretation to failures to punish that contribute to the subsequent crimes. Instead, in Celebici's case,⁹¹ the Trial Chamber used the inability of the commander's failure to punish past crimes to contribute to their commission to justify the lack of a causality requirement.⁹²

It is also worthy of note that, rather than providing a unity, Bemba's case sets out varying and conflicting positions.⁹³ While some judges followed the ICTY approach, others did not. The Trial Chamber held that there must be a causal link between the commander's omission and the crime committed. This reasoning aligns with a literal reading of the Rome Statute, which requires that the subordinate's crimes are committed as a result of the commander's failure to exercise proper control. By contrast, the ICTY Statute does not contain an explicit reference to a causality element.⁹⁴ Judge Monageng and Hofmanski agreed that causation was necessary under the Rome Statute's construction but distinguished between the different duties of the commanders.⁹⁵ They held that the causality element only related to the commander's duty to prevent future crimes. They reasoned that the commander's failure in their duties to punish or repress crimes cannot retroactively cause past crimes. The failure to punish or repress crimes could cause subsequent crime though.⁹⁶ In a similar vein, Judge Eboe-osuji stated that it must be shown that a failure to punish would not contribute to a past crime, such as the first or isolated crimes, but the failure could more readily, though not necessarily, be shown to have resulted in the subordinates' subsequent crimes. However, using the same reasoning of the illogicality of a failure to punish causing a past crime and arguing that whole the failure could cause subsequent crimes, this would only be in very exceptional circumstances, Judge Van den

⁸⁹ D. Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction' *Melbourne Journal of International Law* [2012] (13) 1-8

⁹⁰ *Ibid.*

⁹¹ *supra*

⁹² *Ibid.*

⁹³ *supra*

⁹⁴ Art 7 (3) ICTY Statute 2010 which stipulates that the commander's will be subject to criminal responsibility if he knew or had reason to know that the subordinate committed or was about to commit the crime and did not take necessary reasonable measures to prevent the crime or to punish the subordinate.

⁹⁵ *supra*

⁹⁶ *Ibid.*

Wyngeart and Morrison reached a very different conclusion and held that there is no causality requirement for any of the commander's duties.⁹⁷ They stated that such an interpretation would only lead to the absurd result of generally making it impossible to apply the duty to punish.

Even if there is an agreement that causality is required which appears to be the leaning of the ICC Judges, although there is less consensus on when causality must be shown, there is renewed disagreement over the strength or degree of causation needed. This uncertainty was reflected in the separate opinions in Bemba.⁹⁸ The Trial Chamber shield away from clarifying the degree of causation required. Instead, they merely asserted that it is a lower standard than the 'but for' test. On appeal, the Judges Monageng and Hofmanski held that the appropriate test was one of high probability.⁹⁹ That is, there must be a high probability that if the commander had fulfilled their duty, the crime would have been prevented or would not have been committed in the manner it was committed. However, Judges Wyngeart and Morrison explicitly rejected this test. They stated that the test does not withstand critical analysis because the commander's duty is to reduce the risk of a crime occurring and a failure to reduce a risk cannot be said to cause the manifestation of the said risk.¹⁰⁰ Judge Eboe-Osuji seemed to favour a test of whether the contribution was a significant and operating cause where significant should be interpreted as a contribution that it will be ignored under the de minimis principle. These represent vastly different standards stretching the continuum from a more than negligence contributed to the crime.

Conclusion

The creation of the ICC in 2002 is undoubtedly one of the major achievements of the international law. The Bemba's case demonstrates that despite decades of jurisprudence and academic critique, there is a lack of clarity and consistency regarding the nature of command responsibility and its core elements. Within the Bemba case alone, there are vastly different interpretations stretching from negligence to willful failure and from there being no causation requirement to the requirement of high probability that the omission contributed to the crime. This leads to the significantly different standards and corresponding liability.

One of the major contributory factor for this division is the very nature of the doctrine, namely whether command responsibility is a mode of liability or a separate offence of dereliction of duty. While international jurisprudence, including in Bemba, favours classifying the doctrine as a mode of liability, interpretations under this classification can undermine the core culpability principle to varying degrees. At its more extreme end, the culpability principle could be severely undermined thus eroding a central tenet of criminal justice in the name of ending impunity of the most serious crimes. Other interpretations, including those which class it as a mode of liability, do not undermine the culpability principle or undermine it to a lesser extent. While more aligned with the objective of upholding high criminal justice standards, such interpretations can notably restrict the doctrine's scope and inhibit the effective prosecution of high-ranking/strategic commanders.

⁹⁷ supra

⁹⁸ supra

⁹⁹ supra

¹⁰⁰ supra

My objective was not to reconcile the competing interpretations of command responsibility or to argue that the separate offence approach represents an accurate interpretation of command responsibility as it currently stands. Rather, the purpose is to highlight that confusion regarding the doctrine persist and that classifying it as a separate offence could present a coherent solution. As a separate offence, there would be greater consistency between the doctrine’s elements and the crime that the commander is convicted of which could ensure that the culpability principle is observed. It would also provide command responsibility with an adequate scope that do justice to the international courts’ objectives of combating impunity for serious crimes while upholding high standards of liberal criminal justice.

