Command Responsibility as a Separate Offense

By
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INTRODUCTION

One of the difficulties specific to international criminal law consists of establishing a link between the “crime base,” the offenses committed by individuals such as murder, rape or destruction, and the accused, often a military commander or a highly-ranked politician. In international criminal law we find a number of specific legal constructions to establish such a link. Joint criminal enterprise is one example; command responsibility is another. It was the subject of a fine lecture which my senior colleague, Judge Bakone Justice Moloto,2 gave at the T.M.C. Asser Institute in The Hague. The speech was followed by a lively discussion. A controversy arose when someone from the audience asked the following question: “Assume a crime was committed in a unit. A few days later, before the perpetrator, whose identity is known, was punished, there is a change in command. Does the new commander have a duty to punish the suspect or to report him to the competent authorities? If he fails to do so, is he guilty under command responsibility?” Judge Moloto answered with a clear “no.” I took the liberty to dissent. After giving some more thought to the matter I have come to the conclusion that our dispute might have its roots in the different legal cultures that form our backgrounds. Judge Moloto hails from South Africa and is trained in the common law while I am Swiss and was educated in continental civil law, particularly in the German doctrine on criminal law and procedure. The common law is characterized, in my view, by a topical approach which is the logical result of a system developed case by case. Different crimes and modes of participation are considered as isolated phenomena. The Germanic approach to

* At the time I am writing this, I sit as a Judge ad litem in Prosecutor v. Prlić et al. an exceptionally complex procedure before the ICTY. It goes without saying that the views here presented express only my personal opinion and are meant as an abstract intellectual exercise. As this note is not an analysis of the law to be applied in this case but rather a critical assessment of a rule of international criminal law, the opinions expressed here are not applicable to the Prlić case.

law is of a fundamentally systematic character; a very complex analytical theory identifies the typical elements of crimes – mainly the fact that it is set out precisely in the Code, unlawfulness and personal imputability (guilt). This goes along with codification prepared with the assistance of scientifically trained lawyers. The present short note is deliberately based upon the Germanic approach, but it does not, of course, allow for an in-depth study of the issue and will be limited to observations of a relatively general character but limited in scope. I shall return to the hypothetical at the end.

I shall put my deck of cards on the table: I am convinced of the superiority of the theoretical construction of criminal law doctrine as developed in Europe and particularly in Germany. For a long time the different legal systems have been relatively incommunicado. In particular, there has been little interest in our approach in the United States. This may be changing and I wish to pay tribute to George Fletcher whose Rethinking Criminal Law is an impressive effort to build bridges.\(^3\)

This short note will rely heavily on the recent study by Guénaël Mettraux, The Law of Command Responsibility,\(^4\) for the actual law as applied by international tribunals. However, I do not intend to describe the existing law. Rather, I want to criticize it and show that it is not as logical and convincing as it might appear. I shall look at the rules on command responsibility, as it were, from the outside, from the moon, if you like.

**Command Responsibility in International Criminal Law**

According to Article 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (“ICTY Statute”), a commander bears criminal responsibility for a crime committed by a subordinate, “if he 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.”\(^5\) Similarly, in Article 28(a) of the Statute of the International Criminal Court (“ICC Statute”) we find the rule that “[a] military commander . . . shall be criminally responsible for crimes . . ., where (i) [t]hat military commander . . . knew . . . that the forces were committing or about to commit such crimes; and (ii) . . . failed to take all

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5. The full text is as follows: “3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he 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.” Statute of the International Criminal Tribunal for the Former Yugoslavia, annexed to Resolution 827, SC Res 827, UN SCOR, 48th sess., 3217th mtg., UN Doc S/RES/927 (1993). Article 7, from which the paragraph is taken, deals with the different forms of individual criminal responsibility,
necessary and reasonable measures . . . to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

The text of the ICTY Statute is particularly complex. First, there seems to be a general presumption that the commander is responsible for crimes committed by his subordinates; second, there is an implicit rule which says that he is normally relieved of that responsibility; finally, there is an exception: he is not relieved whenever the elements of command responsibility as described in the text are present. Under the ICC Statute, on the other hand, it is Article 28 that constitutes the punishability of the commander.

**TYPES OF RESPONSIBILITY FOR CRIMES COMMITTED BY OTHERS IN GENERAL**

Setting aside the ICTY Statute’s tortuous formulation, it is far from clear what Article 7(3) actually means. One thing cannot be disputed: it is related to crimes physically perpetrated by a person different from the accused commander. In other words, the offense committed by the commander is in some way accessory to those crimes.

In domestic criminal law, such situations are usually dealt with according to two different models. Responsibility can be established as a form of aiding and abetting, which in continental terminology would be called some form of participation (Teilnahme). In that case the aider or participator is punished for having in some way contributed to the main offense, e.g. by providing technical assistance or useful advice. The highest degree of responsibility is known as co-authorship (Mittäterschaft) – which means that two or more persons commit a crime in a way which makes them all fully responsible perpetrators, including persons whose contribution is merely of an intellectual nature (there seems to be no equivalent term in English); in addition, we usually find instigation (Anstiftung) and complicity (Gehilfenschaft). If the person concerned has a determinative role in the commission of the crime, so that he appears to have had control over whether it would be committed or not, the sanction incurred will in principle be the same as that for the physical perpetrator. One element of such

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6. It is clearly inspired, partly even copied from the Additional Protocol I of 1977 to the Geneva Conventions, Art. 85.

7. One author suggests in fact that command responsibility presupposes responsibility of the commander also under Art. 7(1), Chile Eboe-Osuji, *Superior or Command Responsibility: A Doubtful Theory of Criminal Responsibility at the ad hoc Tribunals, in From Human Rights to International Criminal Law: Studies in Honour of an African Jurist, the Late Judge Latif Kama*, 311, 321 (Decaux, Dieng, & Sow eds., 2007); on the relationship between Article 7(1) and (3) ICTY Statute, see Thomas Henquet, *Conviction for Command Responsibility Under Articles 7(1) and 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia*, 15 Leiden J. Int’l L. 805, 815 (2002).

8. E.g. Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, §§ 25 – 27 (Germany), but see also Art. 7 (1) ICTY Statute; the Austrian criminal law does not distinguish different forms of participation, cf. Strafgesetzbuch [StGB] [Penal Code] § 12 (Austria).
perpetration is that there must exist some sort of causal relationship between the behavior of the accomplice and the commission of the crime.

A different solution is to create a special offense for the third person, an offense that is connected much more loosely to the crime. Examples are the offense of obstruction of the course of justice (Begünstigung) or receiving of stolen goods (Hehlerei). These offenses still presuppose an offense committed by a third person but the issue of a nexus of causation to the original crime does not arise.

To which category does command responsibility belong? Mettraux argues that command responsibility does not entail actual complicity in the original offense. However, he recognizes that in both aiding and abetting and command responsibility, there must be a “substantial effect” on the actus reus of the crime. In the case of command responsibility, Mettraux argues, “the causal contribution is more indirect: it goes, in the alternative, to the general ability of the perpetrator to carry out his deeds (where there is a ‘failure to prevent’) or to his remaining unpunished (where there is ‘failure to punish’).”

**ON CAUSATION IN GENERAL**

If you apply simple logic to Mettraux’s argument, it no longer persuades. For one, can causality have different degrees? The nexus of causation, in popular terms, is established when a previous event, A, cannot be hypothetically eliminated without the later event, B, also disappearing. The event A is then called conditio sine qua non. Either A has caused B or it has not – tertium non datur. While there may be certain specificities and differentiations, aiding and abetting and command responsibility for failing to prevent the commission of a crime do not necessarily differ. One could regard the failure to prevent as complicity by omission.

What does make a big difference is the undisputed fact that command responsibility is characterized by an omission rather than a positive act (but there may also be many other forms of complicity by omission, and what is explained hereafter also applies to those). The commander commits a crime by not acting; that is, by not fulfilling his or her duty to prevent the crime. This differs from “normal,” “positive” causation in that an omission can never, strictly speaking, be causal to an effect. Ex nihilo nihil fit. All we can establish is a hypothetical causation. What is at stake here is not a conditio sine qua non, but the opposite, a conditio cum qua non. The question to be answered is: Would the crime have been committed if the commander had in fact been active, had in fact

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9. Mettraux, supra note 4 at 39 ss.
10. Mettraux, supra note 4 at 43.
done what his or her obligation as a commander required? As this is a purely hypothetical question, it can never be answered with certitude; there always remains an element of speculation. The best we can achieve is the result that in all probability, bordering on certainty, the intervention of the commander would have prevented the commission of the crime. Here, there is room for differentiation in the sense of higher and lower degrees of probability.

A closer look at the texts reveals, however, that there is no causal nexus needed at all, and here, of course ends the similarity to complicity. In fact, the commander is not really responsible for not having prevented the commission of the crimes, but only for not taking “all necessary and reasonable measures within his or her power to prevent or repress their commission.” It is true that the crimes have to have been committed in order to trigger the responsibility of the commander. However, the link between the actus reus of the latter and the commission of the crimes is broken. It is not necessary to establish whether, in the specific case, the “necessary and reasonable” measures would actually have prevented the crimes.

The fundamental idea behind responsibility for a crime that could and should have been prevented or repressed can be assimilated to the doctrinal construction of an attempted offense. As far as crimes of commission are concerned, the actor is liable to punishment if he has acted with the intention of committing an offense, but the result was not obtained or occurred for a different reason. An example would be the case of a killer aiming and shooting at the head of the target person; however, at the same moment that person is run over by a truck; the bullet hits the truck, not the intended victim; the latter is dead, but this result is not due to the behaviour of the actor. In the present case, the commander, who may have wanted the crimes to be committed, did nothing or not the reasonable thing to prevent the offense; yet even if he had, the crimes could have been perpetrated.

What the necessary and reasonable measures are, must, of course, be determined by analysing the situation ex ante. This analysis will lead to the result that the commander would have had to do α, β and γ. He only did α. Later, it turns out that due to unforeseen circumstances, e.g. the fact that additional perpetrators turned up, even α, β and γ could not have prevented the commission of the crimes. In that case, the commander would still be responsible. In order to have a nexus of causation, the formulation would have to read “failed to prevent . . .”. Neither the ICTY nor ICC Statutes use such wording.

THE TWO TYPES OF OFFENSES

About causation Mettraux writes, “The requirement that the conduct of an

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12. Prosecutor v. Oric’, Case No. IT-03-68-T, Judgment, § 338 (June 30, 2006); for the opposite opinion, see e.g. Kai Ambos, Joint Criminal Enterprise and Command Responsibility, 5 JICL 159, 178 (2007).
individual charged with a criminal offense must be causally linked to the crime itself is a general and fundamental requirement of criminal law.”¹³ I respectfully but firmly disagree. It depends. There are different types of offenses — some require causation, others do not. The very formulation that the conduct must be causally linked to the crime is somehow tautological. The question is: Which are the elements of the actus reus of an crime? Two varieties of crimes call to be distinguished, those which require the production of a result which can be distinguished from the conduct of the perpetrator (Erfolgsdelikt), and others, where no such result is required, i.e., where the conduct itself constitutes the offense (schlichtes Tätigkeitsdelikt).¹⁴ Murder is a typical example of the first type. The author must have “done” something — anything actually — which resulted in the death of the victim. Here it is clear that indeed there must be a causal link between what the person concerned has done and the death of the other person. Examples of the second type of offenses are rape or driving under the influence. In both cases the behavior immediately constitutes the actus reus — there is no room for establishing any further consequence and therefore the question of causation does not arise in the first place.

**TWO FACES OF COMMAND RESPONSIBILITY**

In my view, command responsibility is composed of two limbs that differ considerably from each other. First, we have the duty to “take the necessary and reasonable measures to prevent” crimes about to be committed by subordinates. Second, there is the obligation to “punish the perpetrators thereof” or, as the ICC Statute says more appropriately, “to submit the matter to the competent authorities for investigation and prosecution.” The first limb could conceivably be seen, if we disregard the awkward wording of the Statutes, as Erfolgsdelikt, in that the result would consist in the commission of the crimes the commander could have prevented. In simplified terms one would say that they were committed “because” the commander failed to take the required preventive action. The second is chronologically positioned after the offense has been committed; it comes, as it were, ex post facto. It stands like an isolated tree alone on the battlefield.

According to the systematic build-up of the Statutes, command responsibility belongs to the rules establishing the responsibility of a person for crimes committed by someone else. However, how can a person bear responsibility for an act that has already been committed without his involvement? The negative answer to this rhetorical question was correctly given in the Ćebići case.¹⁵ Aiding and abetting is not a necessary element of

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¹³. Mettraux, supra note 4 at 82.
¹⁵. Prosecutor v. Delalić et al, Case No. IT-96-21-T, Judgment, § 400 (Nov. 16, 1998); see
command responsibility. Failure to fulfill the obligation to punish constitutes an offense in itself that is only very loosely connected to the perpetrator’s crimes under Articles 2 to 5 of the ICTY Statute. It simply cannot be true that the commander, as the text of the Statutes declare, bears responsibility for those crimes.

Triffterer seems to follow a different line of thought when he describes the element of causation in the second limb by saying that “it can be presumed that, according to the ordinary course of events, [submitting the case to the competent authorities] would have resulted in an investigation and prosecution.” This may well be the case, but that is beside the point because it fails to establish any link to the crime for which the commander is held responsible. This becomes obvious when one recalls the wording of the ICTY Statute, which mentions only the act of punishing. This leaves no room for causality.

Logically, the commander cannot bear responsibility for a crime already committed. Of course, the law can say what it wants and is not bound by logic. According to an adage, the law could say, “The term of Santa Claus within the meaning of this law includes the Easter bunny.” In order to give some meaning to the text of the ICTY Statute, one will have to accept that here the term “responsibility” does not have its ordinary meaning but refers to an artificial doctrinal construction. In other words, the commander who fails to punish must himself be sanctioned as if he were responsible for the crime, and his sentence must definitely be less harsh.

Thus, the crime of not punishing resembles the offense of obstruction of the course of justice, with the particularity that here we are faced with an omission that requires reformulation. Instead of “obstruction,” the language would be “failure to set in motion.” The behavior of the fallible commander could be compared to that of a policeman who remains passive when he sees the criminal run away from the scene or a prosecutor who unlawfully fails to prosecute. Such a person will be punished not for the crime that was committed but for neglecting his duty to prosecute.

THE PURPOSE BEHIND THE SECOND ASPECT OF COMMAND RESPONSIBILITY

As Kai Ambos rightly observes, there is no parallel to this duty in domestic criminal law.

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17. Thus, the Trial Court in Prosecutor v. Naser Orić says that “it would make no sense to require a causal link between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence.” Orić at § 338.

18. Kai Ambos, Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer
offense. What is the value it is intended to protect? One might be tempted to say that its function is to fight impunity, but that would be a mere tautology, a circular argument; the purpose of punishment, of course, is to punish.

Today there is broad consensus that criminal law must protect a legitimate interest (Rechtsgut). This telos is an essential guide in the interpretation of the text of the penal law. The scope of the punishment for the offense of omitting to punish will have to be found, ultimately, in the values that govern why we punish. These values include life, physical and sexual integrity, personal liberty, etc. Entangled in these values is an unspoken hypothesis that the enforcement of criminal law has a preventive effect in that it de-motivates others from committing the same and similar offenses. I cannot help noticing that the protection afforded to potential victims by the offense of not prosecuting suspects of war crimes and crimes against humanity is rather remote. To liken a commander who does not set in motion the punishment of a murderer to the murderer himself is hardly convincing. The fact that punishing an offense of omission will not likely prevent the underlying crime is an element that must be taken into account in sentencing.

Damaška sees a separate variant of failure to punish where it may be seen as condoning or even encouraging his troops’ future crimes; while this may be a realistic observation, I find it difficult to give it specific significance in law. However, he is also of the view that the duty to punish “can stand alone.”

THE SOLUTION OF THE HYPOTHETICAL

If we now return to the question put to Judge Moloto, my analysis about the new commander who fails to prosecute a crime committed before his taking over is reasoned as follows: I start from the assumption that the second limb of article 7(3) constitutes an offense sui generis, which is characterized by the following elements:

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20. For a concise discussion, see CLAUS ROXIN, STRAFRECHT ALLGEMEINER TEIL I, 3. Aufl. § 3 (4th ed., 2005); id. at § 8 II 3(a), 68.; for a critical appreciation see, e.g., FRANÇOISE TULKENS & MICHEL VAN DE KERCHOVE, INTRODUCTION AU DROIT PENAL, 436 (1999).
22. Damaška, supra note 21 at 467.
23. Id. at 468; see also Bing Bing Jia, The Doctrine of Command Responsibility Revisited, 3 CHINESE J. OF INT’L L. 2, 35 (1994); for the opposite view, see Greenwood, supra note 21 at 603.
• The author is effectively in command of a military unit;
• a crime as listed in Articles 2 – 5 of the Statute has been committed by a person who is under the orders of the commander;
• the identity of that person is known;
• so far, no serious attempts have been made to punish that person or to inform the competent prosecuting authorities;
• all this is known to the commander; and
• the commander remains inactive, takes no reasonable steps to punish the offender or bring the case to the attention of the competent authorities.

A person who takes over the command of a unit finds himself in a situation comparable to that of a businessman who becomes CEO of a corporation. Assets and debts, rights and obligations are transferred. In the case of the command of a military duty, the same applies. Among the transferred duties may be an obligation to punish a suspected criminal. If the commander fails to execute this obligation, he commits an offense under the second limb of article 7 (3) of the ICTY Statute.

This and only this result is in line with the ratio legis, which can also be seen as an effort to implement the rule of law. Not extending the duty to punish to the new commander would lead to the opposite of what Art. 7(3) of the ICTY Statute and Art. 28 of the ICC Statute aim to do—namely to avoid impunity. This cannot be the result of a correct interpretation of that law.

In my view, the Trial Chambers of the ICTY in Halilović and Hadžihasanović correctly find that command responsibility does not imply responsibility for the crimes committed by subordinates but a responsibility sui

25. According to the text of article 7 (3) of the ICTY, in addition to actual knowledge it suffices that the commander “had reason to know that the subordinate was about to commit such acts or had done so.” This extension of the mens rea is justified in the case of failure to prevent (leaving aside the strange implication that it introduces an element of negligence into the crime, as William Schabas rightly observes. Schabas, General Principles of Criminal Law in the International Criminal Court Statute (Part III), 6 European Journal of Crime, Criminal Law and Criminal Justice 400-428, 417 (1998). However, it is difficult to understand in the case of a failure to punish. What is a commander supposed to do in order to find out whether any of his subordinates has committed a crime? That cannot possibly be his task. Here the element of his “having had reason to know” comes over only as a disguised rule of evidence permitting to presume knowledge if it is denied by the accused.

26. Jia, supra N 23 at 161 s. comes at the same conclusion, stressing the preventive scope of the disposition.

generis by omission.\textsuperscript{28}