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Responsibility for an Omission?
Article 28 of the ICC Statute on Command Responsibility.

The law of command responsibility has been explained as a unique creation of international criminal law for which there are no exactly comparable rules in national legal systems[2]. Statements of the elements of the law of command responsibility are found both in the statutes and cases from the international criminal tribunals and in the statute of the International Criminal Court. Article 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia says that a commander is criminally responsible 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." Article 28(a) of the Statute of the International Criminal Court says "a military commander … shall be criminally responsible for crimes …, where (i) that military commander … knew … that the forces were committing or about to commit such crimes; and (ii) … 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." It is important to note that Article 28 of the ICC statute expressly makes omissions a criminal act as a matter of principle only in cases of command responsibility and nowhere else in the statute[3].

1. Command Responsibility in the Case of Sefer Halilović

Sefer Halilović was a general in the Army of the Republic of Bosnia and Heregovina during the Bosnian war. He was indicted on the basis of superior criminal responsibility under Article 7(3) of the ICTY Statute. He was accused of being responsible for the massacres that occurred in the villages of Grabovica and Uzdol in September of 1993[4] and was eventually acquitted and released. According to the ICTY case of Prosecutor v. Sefer Halilovic, "Command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law

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[2] Verlich, 2007 pg. 665.
[3] Cryer, 2004 pg. 236.
[4] Halilovic indictment, 2001.

imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates[5]." In light of Article 28 of the ICC statute, is this statement from the Halilovic case appropriate?

2. Command Responsibility as part of International Customary Law

The Delalic et al case of 1998 stated that the law of command responsibility is now a part of customary international law[6]. Responsibility for an omission presupposes a duty to act on the part of the commander[7]. The duties of a commander include the following of international law as laid out in Article 1 of the Hague Convention of 1907 and Article 4(A)(2) of the Geneva Convention III of 1949 in addition to the customary international expectations in regards to humanitarian law and the law of armed combat as developed through the ICC, ICTY and the other international tribunals. In this paper I will argue that the additional duties and expectations imposed on commanders by Article 28 of the ICC statute represent a deviation from the international customarily accepted definition of the law of command responsibility.

3. Knowledge

Command responsibility imposes liability for crimes including specific intent crimes such as genocide on the grounds of an actus reus that is an omission and mens rea that is less than actual knowledge[8]. The element of the requisite mens rea in regard to command responsibility is fragmented between the definitions in the case law of the tribunals and the plain statement of Article 28 of the ICC statute. Article 28 contains the idea that the superior is held responsible for the acts of others, irrespective of his knowledge[9] while according to the text of article 7 (3) of the ICTY in addition to actual knowledge, it is enough that the commander "had reason to know that the subordinate was about to commit such acts or had done so." The apparent incongruity regarding the element of knowledge in command responsibility is unfortunate but not nearly as concerning as the deviation regarding the command responsibility being the responsibility for an omission versus the additional expectation of Article 28.

4. Relationship

The Delalic case sets out three requirements for the command responsibility of a superior within an organization: (1) the existence of a superior to subordinate relationship, (2) the superior's failure to take the necessary and reasonable measures to prevent the criminal acts of his

[5] 2005, Paragraph 54.
[6] Paragraph 346.
[7] Ambos, 2007 pg. 176.
[8] Martinez, 2007 pg. 642.
[9] Cryer, 2004 pg. 258.

subordinates or punish them for those actions, and (3) the superior's knowledge or reason to have knowledge that a criminal act was about to be committed or had been committed[10]. There must be an organized military force because military organization implies responsible command and this implies command responsibility[11]. The Halilovic case required that 'the accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator'[12]. The law of command responsibility is a law that when properly utilized is in a unique position to influence and prosecute commanders within the military hierarchy of a fighting force. The scope of the law rests on commanders and the proper level of supervision and direction of their troops on the ground.

5. The Omission

As the court said in the Halilovic case, command responsibility is responsibility for an omission. This means that the commander is criminally liable not for something that he has actively performed but for the failure to to perform an act that is required by international law. He is responsible for the breach of an international legal obligation incumbent on any commander to prevent crimes by his subordinates[13]. In the ICC Lubanga case, the ICC Pre-Trial Chamber generally referring to actions or omissions held that liability for an omission is included in the ICC Statute[14]. The omission is the central focus of the law of command responsibility as the commander did not actively cause the crime by his positive actions but still may be held liable if his command was deficient enough so as to create a breach of his duty to prevent (and in some instances discover) war crimes.

6. Critical Analysis in Light of Article 28 of the ICC Statute

Article 28 is inconsistent with the statement from the Halilovic case because it covers too many different forms of liability including everything from knowledge of failures to failure to intervene to essentially negligent dereliction of duty[15]. This extrapolation of duties is an unfortunate tendency of the ICC and is inconsistent with the statement regarding omission in the Halilovic case. It is important to note that the ICC statute was drafted after the ICTY cases as this may partially explain the inconsistency. The drafters of the ICC statute were perhaps influenced by the previous ICTY cases but nevertheless wrote Article 28 in a way that they thought would correct deficiencies in the earlier application of the law of command responsibility. However, I feel that they were overzealous in creating a positive duty to report crimes that occurred due to negligent command supervision.

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[10] Ambos, 2007 pg. 161.
[11] Cassese 2008 pg. 242, quoting the Hadzihasanovic et al case.
[12] Paragraph 59.
[13] Cassese, 2008 pg. 242
[14] Paragraph 351.
[15] Cryer, 2004 pg. 258 - 259.

Article 28 does not technically classify command responsibility as only the responsibility for an omission. It states that a commander has both the responsibility to properly make sure criminal omissions do not occur but then gives a second layer of responsibility, the responsibility to proactively report and attempt to rectify crimes committed under his command. This dual responsibility and adding more layers to the responsibility for an omission contradicts the Halilovic case in a critical way. It leaves the potential harmonizing of the ideas and understandings of command responsibility in the ICTY and the ICC Statute doomed for consistent legal analysis and usage in future international criminal prosecutions. I contend that the most fair and logical way to remedy this situation would be to classify the failure to report crimes previously committed as a separate and distinct charge not falling under the rubric of command responsibility.

According to Article 28(a), a military commander can be held accountable if he either knew of the subordinate's crime or "owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes". In the first case, the superior had actual knowledge of the subordinate's crime and in the second case such knowledge is not requisite. It would be sufficient if the superior was in the possession of information that would have enabled him or her to know of the previous crime[16].

Whereas the omission occurs by failing to live up to the commander's responsibility to failing to prevent something that occurred while acting as commander, Article 28 of the ICC statute imposes a new duty, the duty to report and attempt to rectify wrongs that have occurred. Failure to do so is a breach, and this particular failure is not an *omission* but the failure to take an active and energetic step forward, the failure to *commit* himself to the reporting of the previous crimes.

The ICC has adopted a broad approach regarding the mens rea for military commanders in the Rome Statute, asserting that 'should have known' is a negligence standard and that failure to seek out information could lead to liability. In relation to civilians, the ICC Statute sets a higher mens rea standard than exists for military superiors and civilian superiors in customary law[17].

The 1993 report of the Secretary General in regards to the ICTY states that a commander should be held responsible for failing to prevent crimes or deter the unlawful behavior of his subordinates, in essence purporting a rule of imputed responsibility or criminal negligence[18]. This statement represents another piece of international commentary refining the responsibilities and scope of negligence.

In addition to the definition and elements discussed above, the ICC Statute has added another requirement, which is causation[19]. This means that the negligent supervision and deficiencies in command responsibility must have in some way caused the crimes in question. There needs to have been a causal relationship between the negligent command of the supervisor and the crimes committed. Liability for negligence that helps to cause an illegal act can be attributed to the commander even though the commander did not know of the criminal

[16] Nerlich, 2007 pg. 668.
[17] Cryer, 2010 pg. 394.
[18] Paragraph 56.
[19] Cryer, 2010 pg. 389.

conduct[20]. A commander not reporting previous crimes committed by his soldiers that he just now discovers does not establish a credible link to the crime for which he is being held responsible. This is obviously proven when you read the wording of the ICTY Statute which only mentions the act of punishing[21].

The questions remains: How can a commander be responsible for an act that has already been committed without his involvement? What is the commander actually being blamed for? According to the Ćelibici case, aiding and abetting is not a necessary element of command responsibility. The failure to fulfill the obligation to report and punish the crime or crimes is itself an offense that is loosely connected to the original perpetrator's crimes under Articles 2 through 5 of the ICTY Statute and the commander cannot be responsible for these crimes[22].

– The Solution

a) Aiding and Abetting

As previously mentioned, according to the Ćelibici case aiding and abetting is not a necessary element of command responsibility. However this statement did not take into account the subsequent requirement of Article 28 of the ICC statute requiring commanders to alert authorities for crimes already committed without their knowledge. This extra duty of a commander to report crimes inferiors committed in the course of a criminally inept command should logically and rightfully be a separate and distinct charge or alternatively be included under the ICC crimes of aiding and abetting or complicity. To do anything less renders the law of command responsibility entirely too broad and stretched too thin as to be uniquely effective.

The failure of the commander to actively report crimes that occurred during his negligent command should be considered as helping those particular crimes go unpunished and this act can be placed squarely within the category of the international crime of aiding and abetting and not command responsibility. The existence of liability for aiding and abetting is recognized in Article 7(1) of the ICTY Statute, Article 6(1) of the ICTR Statute and Article 6(1) of the SCSL Statute, all of which make it a crime those ". . . who aided and abetted in the planning, preparation or execution of an international crime"[23].

The threshold of responsibility for being one who has aided and abetted is not as high as that of a coperpetrator. The Vasiljevic case stated that "aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a coperpetrator"[24].

The commander is not a coperpetrator, but is one who has helped the crime go undiscovered. As discussed above, he has a duty to be aware and informed of acts of war, including war crimes, carried out by his troops. He has the duty to stop and correct their criminal acts, including stopping their acting with impunity. He can do this by reporting their

[20] Verlich, 2007 pg. 676.
[21] Trechsel, 2010 pg. 32.
[22] Trechsel, 2010 pgs. 31-32.
[23] Cryer, 2010 pg. 374.
[24] Vasiljevic appeal, Paragraph 182.

crimes to the appropriate international bodies. The failure to proactively report their acts is not an abuse of command, an abuse by omission or even an omission at all, which is what the ICTY says that a crime of command responsibility is. It is aiding and abetting the troops by not bringing these crimes to a final end by reporting them. The commander aids and abets the criminal acts by not cooperating with the correct precepts of international criminal law that includes accountability for war crimes and crimes against humanity. Failure to report abuses by soldiers in one's command is a crime, but it is not the crime of command responsibility.

It is entirely permissible that a failure to report crimes committed by inferiors of a superior commander can still keep their nature as crimes of omission while being excluded from the crime of command responsibility and included in the crime of aiding and abetting. Robert Cryer states that "omissions may suffice for aiding or abetting, provided that there is a legal obligation on the defendant to prevent the crime and the ability to intervene."[25]. One of the primary duties of a commander is to see to it that all international legal obligations are met in regards to the holistic prevention of war crimes. When this legal obligation is not met, the crime should not automatically be included under the law of command responsibility regardless of whether the breach was caused by an omission or the failure to report the atrocity. The failure to report a crime is not to have caused it but to have prevented its prosecution, which has nothing to do with the nature of command responsibility but more closely resembles aiding and abetting.

b) The Ascertainable Nature of Mens Rea in Aiding and Abetting

Far from a convoluted, vague, inconsistently and newly-applied "duty of knowledge" (a term coined by Stanford Law Professor Jenny Martinez to describe the mental duty required by a commander), the international crime of aiding and abetting has a clear and understandable definition of mens rea, one that may be more effective and easily utilized when prosecuting liable commanders. The Furindijiza case from the ICTY reads that:

> In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the acts reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens era required is the knowledge that these acts assist the commission of the offense.[26]

Placing the additional command responsibility duty of Article 28 into the category of aiding or abetting would clear up the confusion between the mens rea requirements as listed in the ICTY statute and cases versus the ICC statute.

[25] Cryer, 2010 pg. 376.
[26] Paragraph 249.

8. Conclusion

Since its formal inception at Hague Conventions IV and X in 1907, the law of command of responsibility (in one form or another) has been an active and prominent rule of law in high-profile international criminal prosecutions for war crimes. Its character now, in its most modern and widely-used form, is effective and necessary in its application with the exception of the discrepancy in additional duties as set forth in Article 28 of the ICC statute. Crucial to its character and usefulness is its identity as being a rule of law that sets forth its responsibility as being a responsibility for an omission rather than a duty to affirmatively correct crimes that a commander did not cause. To the extent that the text and application of Article 28 infringes on the definition of responsibility as given by the ICTY, it harms the effective usage and understanding of the law of command responsibility.

In many domestic systems of law, failing to report a crime that one did not actively cause are classified as either aiding or abetting or an accessory after the fact. In this instance, international criminal law would be well served to take notice of these distinctions when attempting to customarily codify and establish the elements of the law of command responsibility and when to apply it during war time incidents. As the Halilovic case said, "command responsibility is responsibility for an omission". Any other definition of responsibility when discussing command responsibility is tortured and incorrect. I contend that Article 28 is out of sync with the internationally accepted customary definition of the law of command responsibility and should be changed accordingly.

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