The command responsibility doctrine in international criminal law and its applicability to civilian superiors
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Annex II

Interview with Major-General Patrick C. Cammaert, The Hague, 27 October 2008

I have analysed the essence of the discussion, from the point of view of my PhD research questions on command responsibility, in the following way:

General command responsibility vs. command criminal responsibility

As an illustration of the relationship between general command responsibility and command criminal responsibility, the example of a ship, a frigate that sails on the Pacific Ocean at night, may be used. The commander of the ship is sleeping in his cabin and the officer of the watch is on the bridge. At a certain moment the ship collides with a Japanese trawler, causing the death of several people on board the fishing vessel. The commander is responsible for the ship and all activities on board at all times, even where the authority to exercise command and control is temporarily transferred to a subordinate officer. An investigation into the event will look into the responsibility of the commander – using the terminology of Hart – both his role responsibility and his liability responsibility. Also the responsibility of the officer of the watch will be the subject of the inquiries. While the commander bears overall responsibility, the question of his guilt is a different one. Where the officer of the watch had the required training and certificates to carry out the duties of that specific officer, but fell asleep while on duty, the commander of the ship will not be liable for the acts that occurred. Where the commander had allowed someone without the required training to carry out the tasks of an officer of the watch, the commander will be liable/held responsible, regardless of whether the officer of the watch fell asleep or not.

While the liability responsibility here is not strictly speaking the command responsibility as defined in international criminal law, from a commander’s point of view this example shows the difference between general command responsibility and command criminal responsibility. The example shows that the commander can only delegate authority, not responsibility. The responsibility remains the same, but liability may be avoided where the commander has fulfilled his supervisory and other duties as a commander.

The distinction between general command responsibility and command criminal responsibility also becomes evident when considering the case of sexual exploitation and abuse by UN soldiers on a peacemission in the Democratic Republic of Congo. In an area two and a half times the territory of France, the commander of the UN mission was responsible for more than 15,000 troops of 38 nationalities. While responsible for the acts of his men, the question has to be asked whether actual liability responsibility on the part of the commander arises when soldiers have sexually exploited Congolese women and girls. Of a commander of 15,000 men and women, it cannot be expected that he is aware of every act by every soldier. The hierarchical and even the physical distance between the commander and the perpetrator is too great. Commanders on a lower level are responsible for the supervision of, in this case, the soldiers committing the crimes. However, it will be considered whether the commander had not been negligent in his duties, allowing for a culture tolerating such behaviour to exist.

The same applies in a hypothetical example of soldiers on patrol, who bump into some Congolese and one of the soldiers opens fire. Two people die. No order to open fire had been given. The lieutenant will be asked how he had supervised his subordinates in order to see whether there was liability on his part. Of course, in such a case the liability of the superior/the commander, if there is any, is reduced the higher up in the ranks you go.

From a commander’s point of view, when assessing the blameworthiness of the commander, two factors seem to increase the blame that can be attributed to him. First, was the event an incident? If so, there may have been very little that the commander could do about the behaviour of the subordinates at that specific moment. If the acts occur regularly, a good commander will come to know about them. By a firm reaction to the misbehaviour the commander will avoid liability responsibility. Where the acts take place regularly, the blameworthiness of the commander increases if his inaction proves to be a toleration of the behaviour. The guilt of the commander increases even further where the use of language shows that the commander approves of such behaviour. However, to say that where a high-level commander was negligent in not acting when informed of crimes or misbehaviour, he permitted such acts is going too far. Secondly, the commander is increasingly guilty when, using an example from the ICTR, the commander was present at the scene of the crimes and did nothing. 844 It is a commander’s responsibility to ensure that subordinates are acting in accordance with the laws of war. His omission to prevent the crimes was a breach of this duty. Through his inaction he put the trust invested in him to shame. By permitting the acts he also made an escalation of the crimes possible. By acting he could also have prevented a further continuation of the crimes. In other words, his inaction was an abuse of power.

On the basis of the examples, it is clear that from a commander’s point of view, the liability responsibility of a commander increases where the possibilities to act increase. It is not for a commander to say where the dividing line lies between command responsibility for an omission and individual criminal responsibility for permitting the crime.

The deterrent effect of the command responsibility doctrine

As it never serves the interest of a commander to cause unnecessary suffering, a commander tries to avoid unnecessary violence being used or violations of the laws of war being caused, regardless of the existence or non-existence of provisions on criminal responsibility of the commander. In other words, the command responsibility doctrine does not change the way the commander exercises command and, thus, does not seem to have a deterrent effect.

On the elements of command responsibility (superior-subordinate relationship; knowledge requirement; and necessary and reasonable measures to prevent or punish)

The nature of the conflict, whether a war in which you defend your own country or a conflict in which you participate as part of a peacekeeping mission, does not seem to affect the relationship between the commander and his subordinates. A peacekeeping mission has the same effect on people and their behaviour. Based on experience with commanders of different nationalities, the way commanders view their general command responsibility seems universal. There are no differences worth mentioning.

844 See, for example, Ntagerura et al., TC Judgement and Sentence, para. 654. Imanishimwe was later acquitted by the Appeals Chamber under Art. 6(3) in relation to the Gashirabwoba massacre because the prosecution had failed to specify these charges in the Indictment. See Ntagerura et al., AC Judgement, paras. 164-165.
At the level of a division commander, orders are given that inform subordinate commanders what is to be done, not how the order is to be carried out. Where a written order is given, the intention of the mission is stated in the order. ‘In order to’ is an expression frequently used in written orders, to clarify the intention of the order. It is the task of the subordinate to act in accordance with the spirit of the commander, ‘to be in his mind’. The subordinate commander should be able to foresee what the commander ‘two levels up’ expects to be done.

With regard to information gathering, the commander has the possibility of being either reactive or proactive. The first method includes taking account of reports and other pieces of information that are being brought to your attention. The most effective way of keeping abreast of what is happening is acting proactively. As a commander you should keep your ear to the ground and try to find out what is happening by talking to various people. Listen and talk. The more experience you have, the easier it will be to hear and see things that are not being expressly spelled out. As a commander you should also try to create an atmosphere of trust in your unit. When subordinates trust their commander they will more easily confide in him. It will be easier for the commander to anticipate when things are developing in the wrong direction.

A ‘golden triangle’ in a unit consists of the commander, the doctor and the priest. Although both the doctor and the priest, and to some extent also the commander, are bound by professional confidentiality, a good relationship between the three persons is essential for a good unit. If these three people communicate and work well together, they know what is happening within their unit, which is of great support to the commander.

With regard to preventing crimes by subordinates, the most important measures include training, instructing and talking to your people. They should be aware of the code of conduct applicable to the situation. When instructing a subordinate commander does not lead to improved behaviour, sending him back home from a peacekeeping mission may be the only option. These measures have been taken and, thus, the example is not a hypothetical one. When it comes to preventing imminent crimes from occurring everyone, regardless of their rank, has the obligation to stop someone else from committing a crime. One may argue that a commander who fails to prevent a subordinate is bears a greater degree of guilt than a person who holds the same or a lower rank than the perpetrator and fails to prevent the violation.

Command responsibility and civilian superiors

From a commander’s point of view, it seems that a civilian superior has more or less the same possibilities of taking measures to prevent or punish crimes as military commanders. For instance, a mayor can give orders to the police to prevent the commission of crimes. He also has the possibility to turn to his superiors, such as a governor or the president. Also a minister has power, even where the perpetrators are not his direct subordinates. That a minister of foreign affairs was tried by the IMTFE for not preventing or punishing crimes committed by the Japanese is understandable, as you can expect that a person in his position should have acted. As a minister, you always have the option of resigning when you do not agree with the policy of the government. Admittedly, there is a certain difference between the civilian superior and the military commander, although both may have the possibilities to take measures to prevent crimes. Two things may be pointed out. First, the military commander always operates in situations of violence and misery, which has an effect on the subordinates

of the commander and his relationship with them. Secondly, while the civilian superior may have access to law enforcement agencies, there is not the same command relationship between him and the commander of that agency as that between the military commander and his subordinates. For instance the mayor may instruct the military police to act, but is more dependent on the willingness of that commander to carry out his request, than the military commander would be when giving an order.

The effect of ‘new warfare’ on command responsibility

With regard to the changing character of armed conflicts, peacekeeping missions certainly constitute a more difficult kind of conflict. Three reasons may be mentioned. First, in a traditional armed conflict, you knew who the enemy was. In present conflicts, you often do not know who the opponents are and what they look like. Secondly, peacekeeping missions are governed by more rules than the traditional war – Rules of Engagement etc. Finally, while the traditional armed conflict aimed at (simply stated) the destruction of the enemy, the aim of a peacekeeping mission is to attain peace. A commander in a peacekeeping mission constantly has to consider how much force is needed to stop the violence. The commander of a peacekeeping mission has to be proactive in this regard and balance more things in his mind, as he will be held accountable for the decisions he makes. At the stage of trying a commander under the command responsibility provision, these new requirements in relation to the decision-making process of the commander should be taken into account when considering whether he is criminally liable for violations committed by subordinates.

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