ON COMMAND

Diane Marie Amann[*]

In *Justice in Extreme Cases*, Professor Darryl Robinson examines a legal discipline emergent in the last seven decades within the context of a much older field that helped to shape the newcomer; as stated more precisely in its subtitle, his book deploys "criminal law theory" in order to evaluate "international criminal law."[1] I am honored to have taken part in the lively and wide-ranging academic conversation that Temple University Beasley School of Law hosted while the book still was in press. My initial remarks at that roundtable concerned Annex 3 to the book. Titled "*Bemba*: ICC Engagement with Deontic Analysis," Annex 3 considers a 2018 appellate interpretation of the International Criminal Court (ICC) statutory provision respecting command responsibility.[2] This written contribution to the consequent journal edition likewise will respond to issues discussed in that annex as well as Annex 4, titled "The Pendulum Swing? Possible Questions from the *Bemba* Appeal Judgment."[3]

In this book, deontic analysis is said to comprise a trio of "deontic principles": first, "that persons are held responsible only for their own conduct"; second, that definitions of criminal behavior "not be applied retroactively and that they be strictly construed"; and third, "that the label of the offence should fairly express and signal the wrongdoing of the accused."[4] Labeled shorthand as "personal culpability," "legality," and "fair labelling," these three surely constitute standard components of criminal justice (to use Robinson's term, of "criminal law theory") within contemporary liberal democratic societies.[5] That said, the term "deontic" resonates most closely with the concept of duty, given that its Greek root, *δέον* (*déon*), connotes duty or obligation.[6] It is that connotation with which the instant

---

[*] Emily and Ernest Woodruff Chair in International Law and Faculty Co-Director of the Dean Rusk International Law Center, University of Georgia School of Law; Special Adviser to the International Criminal Court Prosecutor on Children in and affected by Armed Conflict. This article is written solely in my personal capacity, and does not purport to represent the views of any institution.

1. DARRYL ROBINSON, JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW iii (2020).

2. *Id.* at 257 (examining interpretation of Rome Statute of the International Criminal Court, art. 25(3), *opened for signature* July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002), https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf [hereinafter Rome Statute]; then examining use of Rome Statute in Prosecutor v. Bemba, ICC-01/05-01/08A, Judgment (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.pdf [hereinafter *Bemba* Appellate Decision]).

3. *Id.* at 272.

4. *Id.* at 9.

5. *Id.* (original italics omitted).

6. *See* Paul McNamara, *Deontic Logic*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., summer ed. 2019), https://plato.stanford.edu/archives/sum2019/entries

contribution engages.

I. DUTIES AND THE DEONTIC

This narrowed connotation of "deontic," as a term relating to duties owed by the actor whose conduct is under review, bears particular relevance to command responsibility doctrine. Yet I do not read Annex 3 of *Justice in Extreme Cases*, nor the opinions which the annex discusses, to engage fully with the duties inherent in the concept of command responsibility, at least not as I understand that concept. This opening salvo may point to the conclusion that command responsibility is "*sui generis*"—a conclusion that Annex 3 appears to reject, or at least to question.[7] It is not apparent that resolving that particular dispute is worth the candle. Rather, this contribution will ruminate on how commentators' understandings of international criminal law may predetermine their mode of analysis, and on how that, in turn, may affect their conceptualization of specific doctrines like command responsibility.

Not far below the surface of this discussion lies a web of unanswered and perhaps unanswerable questions: What is international criminal law? What are the aims of this relative newcomer among legal disciplines, and what reasonably can be expected of its operation? Is international criminal law a singular, evolving field—dare one call the field itself *sui generis*? Or does it exist, rather, at the intersection of multiple fields? If so, is it primarily international, primarily criminal, or primarily law—or none of these? Is it the offspring of public law, of transnational law, of humanitarian law, or of human rights law—or all of these? The answers put forward to these foundational questions will narrow the scope of possible resolutions of whatever is the particular issue at hand.

By way of example, some judges, as well as some others who comment on the work of the ICC, seem to view international criminal law as a criminal law discipline that is rooted in the internal practices of nation-states, yet happens to play out in an international, or internationalized, forum.[8] Accompanying that view seems to be an assumption that fairness requires the application of all the evidentiary and procedural standards to which the most rigorous and most highly resourced national legal systems lay claim. Some in this group tend to speak of such standards as if they were, in fact, practiced.[9] But based on my own experience as a criminal defense practitioner within the well-funded U.S. federal system, not to mention my scholarly examination of that and other national systems, it beggars belief that the most rigorous standards enjoy routine application. Even in the most highly resourced system, rather, the highest standards remain aspirational goals; in the less-resourced, they may be unattainable.

/logic-deontic/ (defining deontic logic as a branch of symbolic logic dealing with duties, obligations, and notions of what ought to follow from what).

7. ROBINSON, *supra* note 1, at 258–59 (referring to side of debate that posits command responsibility as a novel *sui generis* construct).

8. James G. Stewart, *The End of 'Modes of Liability' for International Crimes*, 25 LEIDEN J. INT'L L. 165, 206–07 (2012) (discussing how the ICC adopted the German concept of functional perpetration).

9. *Id.* at 205–07.

What is more, some standards treated by some commentators as "fundamental"—as "essential," even "natural"—may appear alien to persons trained in other systems. One example is the principle that persons may not be forced to incriminate themselves. Although it found expression in national systems as early as 1791,[10] the non-incrimination principle is not mentioned in Europe's venerable human rights treaty, and it was not until 1996 that the European Court of Human Rights acknowledged non-incrimination as a "generally recognised international standard . . . of a fair procedure."[11] Even then, that court chose not to adopt the consequent rule of evidentiary exclusion that applies in at least some national settings.[12] Another example has surfaced within international criminal jurisprudence: the nature and degree of witness preparation. While considered essential for U.S.-trained attorneys, as a matter of ethical obligation to one's client, witness preparation is deemed in other national systems to constitute unethical "witness proofing," and international criminal tribunals have been called upon to determine which stance ought to govern their proceedings.[13] In short, criminal justice operates in flows of global convergence and divergence. Norms that might appear fundamental in one country's courts in fact may prove contingent, neither easily nor advisedly transplanted to other national, let alone international, systems.[14]

II. ~~MODES OF LIABILITY~~ INDIVIDUAL CRIMINAL RESPONSIBILITY

Among the areas of ICC doctrine susceptible to this critique is the one that many commentators call "modes of liability,"[15] despite both the disadvantages of

10. U.S. CONST. amend. V (stating in part that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself").

11. Murray v. United Kingdom, App. No. 18731/91, ¶ 45 (Feb. 8, 1996) (interpreting Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221).

12. *See id.* ¶¶ 41–45 (holding that the guarantee against self-incrimination was not violated when a Northern Ireland court drew adverse inferences from an accused's silence after arrest). *See generally* Jenia Iontcheva Turner, *The Exclusionary Rule as a Symbol of the Rule of Law*, 67 SMU L. REV. 821 (2014) (discussing the application of self-incrimination rules in international context).

13. *See generally* Kai Ambos, *"Witness Proofing" Before the ICC: Neither Legally Admissible Nor Necessary*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 599 (2009); *see generally* John D. Jackson & Yassin M. Brunger, *Witness Preparation in the ICC: An Opportunity for Principled Pragmatism*, 13 J. INT'L CRIM. JUST. 601 (2015) (considering the controversy around witness proofing in the ICC); *see generally* WAR CRIMES RESEARCH OFFICE, AM. UNIV. WASH. COLL. L., WITNESS PROOFING AT THE INTERNATIONAL CRIMINAL COURT (July 2009), https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-7-witness-proofing-at-the-international-criminal-court/ (discussing the use of witness proofing in the ICC).

14. *See* Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 811 (2000) (stating that convergence depends on "acceptance of a shared norm, of a body of internationally recognized rights," yet cautioning that "[e]ven when both are present, however, states will reject components of convergence that they believe threaten their security or position within the world community").

15. *E.g.*, ROBINSON, *supra* note 1, at 15 (referring to "modes of liability" as if it were the standard terminology, in this first and in subsequent references); Miles Jackson, *The Attribution of Responsibility and Modes of Liability in International Criminal Law*, 29 LEIDEN J. INT'L L. 879 (2016); Stewart, *supra* note 8; Elies van Sliedregt, *Article 28 of the ICC Statute: Mode of Liability*

this term and the fact that it cannot be found in the Rome Statute.[16] In this area, the complexity of ICC jurisprudence seems almost to increase in inverse relation to the relative paucity of ICC decisions thus far rendered. That may surprise, given that at first blush, the pertinent Rome Statute provisions appear straightforward. The principal one is Article 25, titled not "Mode of liability" but rather "Individual criminal responsibility."[17] (Hence the subheading style above.) Subparagraph 3 of Article 25 specifies that "a person shall be criminally responsible and liable for punishment" by the ICC if the person acts, or attempts to act, in one of several ways; in brief, if the person:

– commits the crime, alone or with another;

– orders, solicits, or induces the crime;

– aids, abets, or otherwise assists in the crime;

– contributes to such a crime by a group acting with a common purpose; or

– incites others to commit the crime of genocide.[18]

---

and/or Separate Offense?, 12 NEW CRIM. L. REV. 420 (2009). *See also* Susana SáCouto, Leila Nadya Sadat & Patricia Viseur Sellers, *Collective Criminality and Sexual Violence: Fixing a Failed Approach*, 33 LEIDEN J. INT'L L. 207, 209 (2020) ("These doctrines of criminal participation, known as modes of liability, are the subject of significant scholarly commentary.").

16. *See* Stewart, *supra* note 8, at 166 n.2 (analyzing what the author calls "misleading" and "unclear" ramifications of adopting "modes of liability" terminology).

17. Rome Statute, *supra* note 2, art. 25(3).

18. *Id.* The article, subparagraph 3 of which is paraphrased in the text for ease of comprehension, reads in full:

Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
    (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
    (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
    (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
    (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
        (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
        (ii) Be made in the knowledge of the intention of the group to commit the crime;
    (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
    (f) Attempts to commit such a crime by taking action that commences its

Early ICC decisions larded these statutory terms of individual criminal responsibility with multi-pronged statements of the requisite elements for various modes of liability. Often this included the addition of multiple words implicating mens rea. By way of example, in *Prosecutor v. Lubanga*, the first ICC case tried to verdict, judges interpreted conviction for child-soldiering to require proof of what "the accused meant to" do and, in three different contexts, proof of what the accused "was aware of."[19] This doctrinal development drew criticism.[20] The complexity represented in no small part an importation—a legal transplant—from a national legal system that required such complexity as a means to calibrate sentencing.[21] The Rome Statute sentencing framework, however, entails no such matrix calibration. This legal transplantation embedded within the ICC an evidentiary bar that has proved extremely difficult for prosecutors to surmount.

> execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Id. at art. 25.

19. Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶ 1018 (Trial Chamber I, Mar. 14, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.pdf [hereinafter *Lubanga* Judgment]. Specifically, when interpreting the Rome Statute, which prohibits "[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities," the Trial Chamber required proof "in relation to each charge that":

> (i) there was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events;
>
> (ii) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime;
>
> (iii) the accused meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or he was aware that by implementing the common plan these consequences "will occur in the ordinary course of events";
>
> (iv) the accused was aware that he provided an essential contribution to the implementation of the common plan; and
>
> (v) the accused was aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct. Rome Statute, *supra* note 2, art. 8(2)(e)(vii).

20. *See*, *e.g.*, *Lubanga* Judgment, *supra* note 19, ¶¶ 14–20 (Separate Opinion of Judge Adrian Fulford) (applying individual criminal responsibility framework set out in the Rome Statute, yet advocating use of less stringent test in future cases); Diane Marie Amann, *Children and the First Verdict of the International Criminal Court*, 12 WASH. U. GLOBAL STUD. L. REV. 411, 420–21 n.53 (2013); Kai Ambos, *The First Judgment of the International Criminal Court (*Prosecutor v. Lubanga*): A Comprehensive Analysis of the Legal Issues*, 12 INT'L CRIM. L. REV. 115, 138–51 (2012).

21. *See* Stewart, *supra* note 8, at 179 n.70, 186–91 (describing Germany's "taxonomy" of crime and sentencing). *But cf*. Jens David Ohlin, *Co-Perpetration: German* Dogmatik *or German Invasion?*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 517 (Carsten Stahn ed., 2015) (questioning whether German criminal law theory has overly influenced ICC jurisprudence while arguing that the court itself has not sufficiently justified its reasoning when adopting certain principles from national criminal law systems).

All this took place without sufficient analytical demonstration that fundamental fairness in an international system requires such a high bar. Developments then and since have failed to move me from an instinctive affinity toward Professor James G. Stewart's call, in a 2012 article, for unification of the so-called modes of liability in international criminal law.[22] At least, interpretation of Article 25 ought to bear some fidelity to the text of the article itself. Admittedly, those inclinations correspond to my own experience as a practitioner in the U.S. national legal system; that is, my implicit bias and sense of what is "natural" in criminal justice. That fact underscores the mischief caused by assertions of broad application to what may be particular, even unique, ways of administering criminal justice. In the end Stewart's call may be too radical, too unrealistic given two decades of contrary jurisprudence. But it remains relevant, nevertheless, as a note of caution with respect to the potential consequences of embroidering statutory terminology.

III. RESPONSIBILITY OF COMMANDERS ~~AND OTHER SUPERIORS~~

With this caution in mind, let us turn to the Rome Statute provision on command responsibility. It appears in Article 28(a), which states:

> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[23]

This passage does not read like a mode of liability along the lines of commission, ordering, aiding and abetting, or incitement as set out in Article 25.[24] What is more, Article 28 of the Rome Statute is situated several articles below Article 25. In between lie two articles unrelated to what are now called modes of liability: one article sets a minimum age for ICC prosecution, while the other provides that official capacity is no defense to such prosecution. This structure likewise begs the question whether command responsibility as described in Article 28 belongs in the same

22. Stewart, *supra* note 8; for a contrary view, see Jackson, *supra* note 15.

23. Rome Statute, *supra* note 2, art. 28(a). With regard to the extension in Article 28(b) of responsibility beyond military commanders to "other superiors," see GARY SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 400–01 (2010) (writing that Article 28(a)(ii) could be interpreted to enlarge potential liability, yet noting, by means of a quotation of WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 85 (3d ed. 2007), that "other superiors" liability under Article 28(b) requires a mens rea higher than that for military commanders).

24. *See supra* note 18 (setting out full text of Rome Statute, *supra* note 2, art. 25).

category as individual criminal responsibility. Put another way, is it in point of fact a mode of liability just like the conduct described in Article 25?[25]

Article 28 itself seems to invite the answer "yes," in that it prefaces its descriptions by stating that they are presented "[i]n addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court";[26] it is reasonable to construe "other grounds" as including those grounds set out in Article 25.

Complicating that easy conclusion, however, is the nature of the first form of responsibility set out in Article 28, that of military commanders. The "Responsibility of commanders and other superiors," as it is subheaded, has origins so different from other forms in the Rome Statute that it cannot neatly be pigeonholed into an all-purpose compartment labeled "modes of liability." In contrast with conduct named in Article 25, command responsibility's origins do not lie in criminal law. To the contrary, they have grown out of norms of military discipline that seldom were conjoined with criminal proceedings, of either a national or international nature, until the mid-twentieth century.[27] It is my position that these origins, in national military law and in international humanitarian law, must be taken into account by any court that aspires to interpret and apply command responsibility properly.

Yet the title of Article 28 undercuts this position. The article's full title is, of course, "Responsibility of commanders and other superiors," a joinder that may reflect the impulses of the drafters of post-Cold War statutes—impulses, grounded more in international human rights law and far less in international humanitarian law.[28] It is true that in the Nuremberg era nonmilitary individuals were convicted on theories that today would be called superior responsibility.[29] But they were few, and the prosecutions, many of which occurred in the subsequent proceedings before the Nuremberg Military Tribunals, were not without controversy. This contribution does not engage in any extended scrutiny either of those instances or of the concept of nonmilitary superior responsibility. (Hence the subheading style above.) Rather, it endeavors to determine what is the responsibility of military commanders within international criminal law. In my view, what command responsibility is cannot be answered without taking into account the historical, ethical, and practical

25. *See* ROBINSON, *supra* note 1, at 165 (recognizing the complex nature of this question and stating that most tribunals would answer "yes" to this question).

26. *Compare* Rome Statute, *supra* note 2, art. 25 (describing individual criminal responsibility), *with* Rome Statute, *supra* note 2, art. 28 (describing additional criminal responsibility for commanders and other superiors).

27. Notably, the most well-known, and controversial, case of this era involved not an international tribunal but rather a national military commission. *See In re* Yamashita, 327 U.S. 1 (1946).

28. Article 28's separation of standards for military and other superiors contrasts with provisions in contemporary instruments that speak only of "a subordinate" and "his superior." *Compare* Rome Statute, *supra* note 2, art. 28. (providing separate standards for military commanders and other superiors), *with* S.C. Res. 955, art. 6(3), Annex (Nov. 8, 1994) (providing only one set of standards for all superiors), *and* S.C. Res. 827, art. 7(3), Annex (May 25, 1993) (providing, also, only one set of standards).

29. *See* van Sliedregt, *supra* note 15, at 421 n.6 (listing leading cases on superior responsibility during this period).

implications of the doctrine.

Evident upon consideration of command responsibility is the multiplexity of international criminal law. The doctrine of command responsibility found implementation in international criminal courts or tribunals by application of a statute or charter of international criminal law. And yet it is the progeny of humanitarian law, or the law of armed conflict, a field with origins in and aims at variance from some aspects of international criminal law. It is my argument that this variance matters. Even within an international criminal tribunal, the doctrine must be effectuated in a manner consistent with international humanitarian law. Command responsibility is thus not simply a "mode of liability" in some generalized international criminal law sense, but should be treated, rather, as a distinct manner of imposing criminal punishment.

In 1863, Professor Francis Lieber, in U.S. Army general instructions drafted as a compilation of the then-contemporary customs and usages of war, wrote: "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God."[30] The pronouncement pointed to the heavy onus imposed on anyone—even on the lowest-rank military draftee—who was granted the permission to kill. Since the Civil War era when Lieber wrote, legal constraint has joined the assertion of a "moral," or ethical, obligation.[31] States regulate combatant behavior by application of their own national law and that international law to which they have subscribed. Foremost in the latter category is international humanitarian law, for every state in the world is party to the four Geneva Conventions that form the backbone of contemporary international humanitarian law.[32] Like the Lieber Code that is one of its sources, this body of law privileges some persons to kill in combat; what is more, it also constrains those same persons, by rules designed to serve the principles of humanity, distinction, proportionality, and military necessity.[33] And since the trials at Nuremberg and Tokyo, any person who acts outside these constraints incurs a risk of individual

30. *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, art. 15 (Apr. 24, 1863), https://ihl-databases.icrc.org/ihl/INTRO/110.

31. "Moral" garners quotations in the text because of its double-edged nature in the law. The role of moral considerations in the legal classification of conduct as a crime often is salutary, as in the classification of intentional homicide as the grave criminal offense called murder. Nevertheless, moral claims must be scrutinized in light of tendencies to justify as "moral" legal restrictions that might better be called "vestigial"—vestigial in the sense that public opinion of the conduct has so altered that the legal restriction no longer is defensible. The post-World War II evolution of legal restrictions on sexual conduct is an obvious example. *See, e.g.*, Linda C. McClain, *Reading* DeBoer *and* Obergefell *Through the "Moral Readings Versus Originalisms" Debate: From Constitutional "Empty Cupboards" to Evolving Understandings*, 31 CONST. COMMENT. 441, 470–71 (2016) (describing the evolving nature of restrictions on sexual conduct recounted in *Obergefell*). So too is the role of women in society. *See id.* at 479–80 (detailing the U.S. Supreme Court's long history of failing to treat women as equals to men).

32. *See South Sudan: World's Newest Country Signs Up to the Geneva Conventions*, INT'L COMM. RED CROSS (July 19, 2012), https://www.icrc.org/en/doc/resources/documents/news-release/2012/south-sudan-news-2012-07-09.htm (stating that with South Sudan's accession, the treaties enjoy universal joinder).

33. *See* SOLIS, *supra* note 23, at 268–69 (providing examples of military necessity in the law of armed conflict).

criminal punishment before an international tribunal.[34]

Even weightier than the burden of the privilege to kill is the acceptance of authority over the persons to whom the law accords that privilege. The gravity of the commander's responsibility—a responsibility far different from that of the subordinate—is reflected in legal doctrine dating back centuries. Some scholars date the doctrine to 1439; others, to thousands of years earlier.[35]

By no means does leadership status remove the risk of individual criminal punishment before an international or internationalized tribunal. Many prosecutions of the post-World War II period have involved leaders. That said, the nature of the leader's liability is quite different from that of the subordinate. In accepting authority over persons privileged to kill, the commander accepts the duty to be responsible for the actions of those persons. That relational duty stands apart from—in addition to—any duty of responsibility for the commander's solo actions. There is, of course, a moral or ethical dimension. Supervision of permitted killings, no less than the killings themselves, stands in tension with societal valorizations of human life; indeed, tension may be greater for the reason that the commander has power to control the behavior of many persons beyond herself.

The doctrine of command responsibility also entails a dimension of military practicality. Both the effectiveness of military operations and the protection of one's own military forces depend on military discipline. It is the duty of the commander to discipline all persons under her authority, through training, oversight, and correction. This significance may be found in command responsibility's deep roots and continued force, as indicated in legal expressions ranging from a 1907 treaty that confers only upon troops that are "commanded by a person responsible for his subordinates" the "rights . . . of war"[36]—that is, the privilege of killing—to the 2017 terms of reference for the Syria investigative mechanism, which train focus on "the principle of command or superior responsibility."[37] As with other modes of international criminal liability, persons have stood trial, been convicted, and undergone punishment on charges of command responsibility ever since the post-World War II period.

---

34. *See* Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle I (1950), http://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf (outlining principles recognized at the Nuremberg Tribunal). For a definitive account of pre-World War II underpinnings for this principle, see WILLIAM A. SCHABAS, THE TRIAL OF THE KAISER (2018).

35. *E.g.*, SOLIS, *supra* note 23, at 382 (quoting1439 edict first quoted in LESLIE C. GREEN, ESSAYS ON THE MODERN LAW OF WAR 283 (2d ed. 1999)); William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 3 (1973) (quoting Sun Tzu circa 500 B.C.).

36. Hague Regulations annexed to the Hague Convention No. IV Respecting the Laws and Customs of War on Land art. 1, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

37. *Terms of Reference of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes Under International Law Committed in the Syrian Arab Republic Since March 2011*, INT'L, IMPARTIAL & INDEP. MECHANISM ¶ 6, https://iiim.un.org/terms-of-reference-of-iiim/ ("The Mechanism . . . focuses on evidence pertaining to mens rea and to specific modes of criminal liability, including under the principle of command or superior responsibility established under international criminal law.") (last visited Feb. 6, 2021).

It bears stressing that convictions have hinged upon the commander's own behavior; that is, on the commander's own failure to act as military, moral, and legal considerations require him to do. "It must be accentuated," Professor Yoram Dinstein has written, "that command responsibility is all about dereliction of duty. The commander is held accountable for his own act (of omission), rather than incurring 'vicarious liability' for the acts (of commission) of the subordinates."[38] Conviction is based not on a theory of strict liability, because command status alone does not compel a finding of guilt. Rather, conviction requires proof that a commander breached his duty by failing to act when he knew, or should have known, that his troops were about to, or already had, committed violations of the laws of war. This connotes a mens rea lower than actual knowledge. But in this unique circumstance of responsibility, that does not thwart justice. To the contrary, it removes any "invitation to the commander to see and hear no evil," as Professor Roger S. Clark put it—an invitation that would undercut the "serious effort to make the command structure responsive to the humanitarian goals involved."[39]

IV. CONTRA: *BEMBA*

These observations do not jibe with the ruling that Robinson examines in Annexes 3 and 4 of his book *Justice in Extreme Cases*;[40] that is, the ruling of the ICC Appeals Chamber in *Bemba*. In my view, however, these observations must be taken into account if one is to consider fully the question of command responsibility.

The appeal in *Bemba* reviewed the war-crimes and crimes-against-humanity convictions of an accused Congolese "Commander-in-Chief" [41] —convictions grounded in the Trial Chamber's 2016 evaluation of the accused's liability for acts that his militia's troops had committed in the Central African Republic. In 2018, the Appeals Chamber applied a *de novo* standard of review and issued, by a vote of three to two, a full acquittal.[42]

Central to this result was the appellate majority's discussion of the element described in Article 28(a)(ii), which concerns the commander's failure to "take all necessary and reasonable measures within his or her power to prevent or repress their commission . . . ."[43] The words "all" and "necessary" would seem to favor setting high expectations on what it is "reasonable" to expect of a commander; however, the appellate majority set a low bar. In Paragraph 191, it wrote that the

38. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 238 (2004).

39. Roger S. Clark, *Medina: An Essay on the Principles of Criminal Liability for Homicide*, 5 RUTGERS CAMDEN L.J. 59, 78 (1973).

40. *See generally* ROBINSON, *supra* note 1, at 257–81.

41. *Bemba* Appellate Decision, *supra* note 2, ¶ 13. The analysis in this essay amplifies remarks I made in the wake of this decision. *See generally* Diane Marie Amann, *In* Bemba*, Command Responsibility Doctrine Ordered to Stand Down*, ICC FORUM (May 27, 2019), https://iccforum.com/responsibility#Amann; Diane Marie Amann, *In Bemba and Beyond, Crimes Adjudged to Commit Themselves*, EJIL:TALK! (June 13, 2018), https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/.

42. ROBINSON, *supra* note 1, at 273.

43. Rome Statute, *supra* note 2, art. 28(a)(ii).

Trial Chamber had "fail[ed] to fully appreciate the limitations that Mr Bemba would have faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country had an important impact on the overall assessment of the measures taken by Mr Bemba."[44] The statement effectively excused the commander for having absented himself from the field.

Paragraph 170 posited, without citation to authority: "Commanders are allowed to make a cost/benefit analysis when deciding which measures to take, bearing in mind their overall responsibility to prevent and repress crimes committed by their subordinates."[45] A quantitative measure derived from economics and popular in business schools, cost-benefit analysis seems ill-suited to assessing the qualitative concerns about protection—force protection, as well as protection of civilians and persons *hors de combat*—that underlie the legal doctrine of command responsibility.

The majority's acceptance of the defense assertions of "costs" said to outweigh the "benefits" is curious for yet another reason. The Trial Chamber found that the accused had failed to satisfy the Article 28(a)(ii) duty of care after positing a list of measures that it ruled the accused could have taken to prevent or repress the crimes his subordinates committed.[46] But the appellate majority rejected this line of reasoning on the ground that the accused had not been given notice that such possibilities would be taken into account.[47] Removal of this method of legal reasoning provokes questions about what methods of legal reasoning remain within the ken of ICC Trial Chambers.

The majority's construction treats an accused commander like an ordinary defendant, and command responsibility like an ordinary mode of liability. It thus saps the doctrine of its unique, duty-bound identity. In so doing, it disregards a duty of care that is justified by military practice as well as humanitarian concerns, that is prescribed by law, and that the commander himself accepted when he assumed that command.

V. CONCLUSION

The Rome Statute's preamble demands attention to "the most serious crimes of concern to the international community."[48] The court itself confronts an undersupply of resources and an overabundance of potential defendants. These factors mean that the *auteurs*, the persons who wielded the actual weapons of atrocity, are not likely to stand trial before the ICC. At best it will be their commander who appears in their stead—the commander who led, acquiesced, turned a blind eye to, or at the very least failed to punish, their criminality. To tolerate such derelictions of duty is to condone indiscipline and so to increase the risks of the very harms that the doctrine of command responsibility is intended to dispel. That in turn increases the risk that before courts like the ICC no one can be held to account—a result at odds with the purposes of the command responsibility doctrine and of such courts themselves.

---

44. *Bemba* Appellate Decision, *supra* note 2, ¶ 191 (punctuation as in original).
45. *Id.* ¶ 170.
46. *Id.* ¶ 185.
47. *Id.* ¶ 187.
48. Rome Statute, *supra* note 2, pmbl.