

Causation and the Legal Character of Command Responsibility after *Bemba* at the International Criminal Court

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Abstract

This article concerns the issue of causation under Article 28 of the Rome Statute of the International Criminal Court and the related foundational question of the legal character of command responsibility under that provision. It has two aims. First, it notes that across the proceedings in Bemba, judges were united in understanding command responsibility as a mode of liability. It then sets out four different positions on the question of causation in Bemba and argues that none is convincing — that none is able to escape the tensions that follow from that understanding of the legal character of command responsibility. Second, it suggests that the Court revisit that foundational understanding itself: it proposes that the Court interprets Article 28 as establishing a separate offence of omission and argues that such a reading of the Statute is plausible and attractive in principle and policy terms.

1. Introduction

The acquittal in June 2018 of Jean-Pierre Bemba Gombo by the Appeals Chamber of the International Criminal Court (ICC) raises a number of contentious questions of law.¹ Some of these questions are institutional — notably

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1 Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", *Bemba* (ICC 01/05-01/08-3636-Red), Appeals Chamber, 8 June 2018 (hereafter, '*Bemba*, Appeal Judgment').

concerning the respective roles of the Trial Chamber and Appeals Chamber.² Others are substantive — they concern the precise elements of the doctrine of command responsibility under Article 28 of the Rome Statute.³ Within this latter category, the question of causation — whether a causal relationship between the commander's dereliction and their subordinate's crimes is required — has received comparatively less attention.⁴ Perhaps this is no surprise for, as noted apologetically by Judges Van den Wyngaert and Morrison in their Joint Concurring Opinion, the *Bemba* judgment could not 'give the long-awaited judicial answer' to the question.⁵ It could not do so, they note, because the judges are divided.⁶

The judges are indeed divided — and one aim of this article is the exposition of those different positions. In addition, however, there is something else of interest here: I suggest that these divisions flow from a foundational understanding on which the judges in *Bemba* are united. That understanding is that command responsibility under Article 28 is a mode of liability. It operates as to render the commander a party to the crimes of their subordinate. From this starting point, the judgments and opinions in *Bemba* try to make sense of the text of Article 28, the question of causation, and fundamental principles of criminal law. Across these judgments and opinions, four approaches are evident. It is argued here that none succeeds. None is able to convincingly escape the tensions that follow from the foundational understanding that command responsibility is a mode of liability.

Instead, this article proposes that the Court revisit that foundational understanding itself. It proposes that the Court interprets Article 28 as establishing a separate offence of omission and argues that such a reading of the Statute is plausible and attractive in principle and policy. To make this argument, the Article is structured as follows. Section 2 sets out some preliminary matters,

2 See e.g. A. de Beer and M. Bradley, 'Appellate Deference versus the *De Novo* Analysis of Evidence: The Decision of the Appeals Chamber in *Prosecutor v Jean-Pierre Bemba Gombo*', 22 *Yearbook of International Humanitarian Law* (2019) 153–185; L. Sadat, 'Prosecutor v Jean-Pierre Bemba Gombo', 113 *American Journal of International Law* (2019) 353–361.

3 See e.g. S. SáCouto and P. Sellers, 'The *Bemba* Appeals Judgment: Impunity for Sexual and Gender-Based Crimes', 27 *William and Mary Bill of Rights Journal* (2018–2019) 599–622; A. Galand, 'Bemba and the Individualisation of War: Reconciling Command Responsibility under Article 28 Rome Statute with Individual Criminal Responsibility', 20 *International Criminal Law Review (ICLR)* (2020) 669–700; M. Bradley and A. de Beer, "'All Necessary and Reasonable Measures" — The Bemba Case and the Threshold for Command Responsibility', 20 *ICLR* (2020) 163–213.

4 See though A. Heinze, 'Some Reflections on the Bemba Appeals Judgment', *Opinio Juris*, 18 June 2018, available online at <http://opiniojuris.org/2018/06/18/some-reflections-on-the-bemba-appeals-chamber-judgment/> (visited 17 February 2022); A. Hoskins, 'After Bemba: Article 28 of the Rome Statute and the Requirement of Causation' (Comment on the Responsibility Question), ICC Forum, 25 May 2019, available online at <https://iccforum.com/forum/permalink/116/31937> (visited 17 February 2021); Galand, *supra* note 3.

5 *Bemba*, Appeal Judgment, *supra* note 1, Separate Opinion of Judges Van den Wyngaert and Morrison, § 51.

6 *Ibid.*, § 51.

covering the proceedings in *Bemba*, how the judges in the case understood the character of command responsibility, and identifying the culpability problem which follows from that characterization. Section 3 then sets out the four approaches to causation that are evident across the proceedings in *Bemba* and argues that none of them is convincing. Thereafter, Section 4 proposes that the Court revisits its characterization of command responsibility as a mode of liability — addressing, in turn, the meaning of the clause ‘as a result of’ in Article 28 and the plausibility of a characterization of the provision as establishing a separate offence of omission. Finally, Section 5 discusses the bases of liability when Article 28 is understood in this way and certain implications that follow from such a characterization.

2. Preliminary Matters

A. *The Proceedings in Bemba*

Jean-Pierre Bemba Gombo, leader of the Movement for the Liberation of Congo (MLC), was arrested in Belgium and surrendered to the ICC in May 2008.⁷ The charges related to crimes committed by forces said to be under his command in the course of an intervention by the MLC on the territory of the Central African Republic between October 2002 and March 2003. These were war crimes of murder, rape and pillage, under Article 8 of the Statute, and crimes against humanity of murder and rape under Article 7 of the Statute.⁸ Bemba’s responsibility, in part, was said to arise under Article 28, which in the relevant part provides:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (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.⁹

7 Judgment pursuant to Article 74 of the Statute, *Bemba* (ICC 01/05-01/08-3343), Trial Chamber III, 21 March 2016 (hereafter, ‘*Bemba*, Trial Judgment’), § 1.

8 *Ibid.*, § 2.

9 Art. 28 ICCSt.

The proceedings encompass (i) the decision of the Pre-Trial Chamber on the Confirmation of Charges in June 2009;¹⁰ (ii) the Judgment of the Trial Chamber convicting Bemba in March 2016;¹¹ and (iii) the Judgment of the Appeals Chamber in June 2018 acquitting Bemba by a majority of three votes against two.¹² As to opinions, in the Trial Chamber Judges Ozaki and Steiner wrote separately.¹³ In the Appeals Chamber, Judges van den Wyngaert and Morrison, part of the majority, appended a Separate Opinion.¹⁴ President Eboe-Osuji, also in the majority, wrote a Concurring Separate Opinion.¹⁵ Finally, Judges Monageng and Hofmański set out a lengthy Joint Dissenting Opinion.¹⁶

B. The Legal Character of Command Responsibility in Bemba

The first issue concerns the legal character of command responsibility.¹⁷ As has been widely discussed, the legal character of command responsibility under custom was a matter of controversy in the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹⁸ In that context, both case law and

10 Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba* (ICC 01/05-01/08-424), Pre-Trial Chamber II, 15 June 2009 (hereafter '*Bemba*, Confirmation').

11 *Supra* note 7.

12 *Supra* note 1.

13 *Bemba*, Trial Judgment, *supra* note 7, Separate Opinion of Judge Steiner; *Bemba*, Trial Judgment, *supra* note 7, Separate Opinion of Judge Ozaki.

14 *Bemba*, Appeal Judgment, *supra* note 1, Separate Opinion of Judges Van den Wyngaert and Morrison.

15 *Bemba*, Appeal Judgment, *supra* note 1, Concurring Opinion of Judge Eboe-Osuji.

16 *Bemba*, Appeal Judgment, *supra* note 1, Joint Dissenting Opinion of Judges Monageng and Hofmański.

17 For an overview of the roots of the doctrine, see W. Parks, 'Command Responsibility for War Crimes', 62 *Military Law Review* (1973) 1–104; O. Triffterer and R. Arnold, 'Article 28 — Responsibility of Commanders and Other Superiors', in O. Triffterer and K. Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., Beck/Hart/Nomos, 2016) nn. 1–84.

18 See B. Jia, 'The Doctrine of Command Responsibility Revisited', 3 *Chinese Journal of International Law* (2004) 1–42; A. Danner and J. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* (2005) 75–169; B. Bonafé, 'Finding a Proper Role for Command Responsibility', 5 *Journal of International Criminal Justice (JICJ)* (2007) 599–618; C. Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' 5 *JICJ* (2007) 619–637; B. Burghardt, *Die Vorgesetztenverantwortlichkeit im völkerrechtlichen Straftatsystem: Eine Untersuchung zur Rechtsprechung der internationalen Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda* (Berliner-wissenschafts, 2008); M. Nybondas, *Command Responsibility and its Applicability to Civilian Superiors* (Asser, 2010); M. Frulli, 'Exploring the Applicability of Command Responsibility to Private Military Contractors', 15 *Journal of Conflict and Security Law (JCSL)* (2010) 435–466; B. Sander, 'Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence', 23 *Leiden Journal of International Law (LJIL)* (2010) 105–135; G. Mettraux, *The Law of Command Responsibility* (2nd edn., Oxford University Press (OUP), 2016), 37–47; M. Jackson, 'Command Responsibility', in J. de Hemptinne et al., *Modes of Liability in International Criminal Law* (Cambridge University Press (CUP), 2019) 409–432.

scholarship draw out (at least) three possibilities.¹⁹ On the first approach, command responsibility is characterized as a mode of liability, as a doctrine that inculcates the commander as a party to their subordinate's crimes.²⁰ On the second approach, command responsibility is described as *sui generis*, as entailing a mix of a mode of liability and a separate offence of omission.²¹ On the third approach, command responsibility is a separate offence of omission, i.e., an offence defined by the commander's own dereliction of duty.²²

The question, then, is how command responsibility was understood in *Bemba*. As noted above, here the judges across the proceedings were united: on the question of legal character there was agreement that Article 28 is best characterized as a mode of liability. The decisions, judgments and opinions express this point in different terms.

As to the Pre-Trial Chamber, although noting that Article 28 entails a 'different form of criminal responsibility from that found under Article 25(3)(a)', it held that under Article 28 the superior is 'held responsible for the prohibited conduct of his subordinates'.²³ As to the Trial Chamber, the judgment is explicit that Article 28 'provides for a mode of liability, through which superiors may be held criminally responsible for' the crimes of their subordinates.²⁴ In the Separate Opinions, Judge Ozaki explicitly endorsed 'the Chamber's finding that Article 28(a) provides for a mode of liability for crimes committed by a commander's subordinates. This is as opposed, for example, to it constituting a separate crime of omission'.²⁵ Judge Steiner, likewise, held that '[u]nder Article 28, the crimes for which the commander is made responsible are those committed by his subordinates'.²⁶ And finally, in the Appeals Chamber, the Majority Judgment does not address the issue explicitly. As to the opinions: after a detailed analysis, President Eboe-Osuji concludes that Article 28 entails a form of accomplice liability rather than an offence based on dereliction of

19 Nybondas, *supra* note 18, at 158. See further R. Arnold and M. Jackson, 'Article 28: Responsibility of Commanders and Other Superiors', in K. Ambos (ed.), *Rome Statute of the International Criminal Court* (Beck, 2021) mn. 6–16.

20 R. Cryer, 'The Ad Hoc Tribunals and the Law of Command Responsibility: A Quiet Earthquake', in S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (OUP, 2010) 174.

21 E. Van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP, 2012), 196. For criticism of the label, see Meloni, *supra* note 18, at 631–633; J. Stewart, 'The Ends of "Modes of Liability" for International Crimes', 25 *LJIL* (2012) 165–219, at 205; D. Robinson, *Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law* (CUP, 2020) 169–172.

22 Judgment, *Hadžihasanović* (IT-01-47-AR72), Appeals Chamber, 22 April 2008, Partially Dissenting Opinion of Judge Shahabuddeen, § 32. For discussion, see Meloni, *supra* note 18; Sander, *supra* note 18.

23 *Bemba*, Confirmation, *supra* note 10, § 405. See also § 421.

24 *Bemba*, Trial Judgment, *supra* note 7, § 171. The judgment also describes command responsibility as *sui generis* — § 174. As Robinson notes, this appears simply to mean that command responsibility is 'distinct' from other modes — Robinson, *Justice in Extreme Cases*, *supra* note 21, at 259.

25 *Bemba*, Trial Judgment, *supra* note 7, Separate Opinion of Judge Ozaki, § 5.

26 *Ibid.*, Separate Opinion of Judge Steiner, § 16.

duty.²⁷ Judges Monageng and Hofmański clearly understand Article 28 as a mode of liability.²⁸ Lastly, Judges Morrison and Van den Wyngaert are not explicit on the question, but may be read to implicitly accept that Article 28 is a mode of liability.²⁹

This is to say, that across the decisions, judgments and opinions in *Bemba* there is no disagreement on the legal character of command responsibility: a commander is responsible as a party to the crimes of their subordinate.

C. A Culpability Problem

This agreement on the legal character of command responsibility, when considered in the light of the duties articulated in Article 28, immediately provokes concerns of principle. This is Robinson's 'culpability contradiction',³⁰ an issue widely discussed in the literature.³¹ Simply put, the contradiction is caused by two elements. On one hand, in order to hold an individual responsible as a party to crime, the principle of culpability demands some form of personal contribution.³² This point was recognized by the Trial Chamber in *Bemba* itself: it is 'a core principle of criminal law that a person should not be found individually criminally responsible for a crime in the absence of some form of personal nexus to it'.³³ On the other hand, in addition to the duty to prevent, Article 28 explicitly refers to a commander's duties in relation to crimes that have already taken place. Aspects of the duty to 'repress', as well as the duty to 'submit the matter to the competent authorities for investigation and prosecution', relate to events in the past. As the Pre-Trial Chamber noted in *Bemba*, 'it is illogical to conclude that a failure relating to those two duties can retroactively cause the crimes to be committed'.³⁴

27 *Bemba*, Appeal Judgment, *supra* note 1, Concurring Opinion of Judge Eboe-Osuji, § 215.

28 *Ibid.*, Joint Dissenting Opinion of Judges Monageng and Hofmański, §§ 333–334.

29 *Ibid.*, Separate Opinion of Judges Van den Wyngaert and Morrison, § 33. Cf. Galand, *supra* note 3, at 690.

30 D. Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution', 13 *Melbourne Journal of International Law* (2012) 1–58; Robinson, *Justice in Extreme Cases*, *supra* note 21, 143–176. See also *Bemba*, Appeal Judgment, *supra* note 1, Concurring Opinion of Judge Eboe-Osuji, § 191 speaking of the discomfort that a 'superior could be punished for subordinates' crimes, when he neither participated in the *actus reus* nor shared the *mens rea* of the crimes in the primary sense of desiring it'.

31 See e.g. M. Damaška, 'The Shadow Side of Command Responsibility', 49 *American Journal of Comparative Law* (2001); Meloni, *supra* note 18; Robinson, *How Command Responsibility Got So Complicated*, *supra* note 30.

32 Robinson, *How Command Responsibility Got So Complicated*, *supra* note 30, 12–14. See further K. Ambos, *Treatise on International Criminal Law: Foundations and General Part* (2nd edn., OUP, 2021), 150–152; Sander, *supra* note 18, 123–124.

33 *Bemba*, Trial Judgment, *supra* note 7, § 211. For an exploration of the boundaries of this idea, see Robinson, *Justice in Extreme Cases*, *supra* note 21, 177–193.

34 *Bemba*, Confirmation, *supra* note 10, § 424. In addition, there is the issue of the reduced fault element — see below and further K. Ambos, 'Article 28: Individual Criminal Responsibility', in Ambos, *supra* note 19, mn. 64; Meloni, *supra* note 18, at 621.

3. Four Approaches in *Bemba*

This, then, is a central interpretive challenge under Article 28: how to do justice to its terms and fundamental principle at the same time. Four approaches are evident in *Bemba*.

A. No Causation

The first approach is found in the Separate Opinion of Judges Van den Wyngaert and Morrison. For them, Article 28 does not require a relationship of causation at all:

We do agree with the point made by many that a causation requirement cannot be upheld from a logical point of view. It is indeed not possible that an omission after a fact has occurred (that is, failure to refer criminal behaviour to the competent authorities) causes this fact.³⁵

...

[W]e are of the view that article 28 does not — and should not — require that the commander's failure caused his or her subordinates to commit crimes.³⁶

In relation to the duty to *prevent*, aspects of reasoning in the Separate Opinion are not altogether easy to understand.³⁷ Nonetheless, the more important point is its overall approach to the question: Article 28 entails responsibility as a party to crime absent any contribution on the part of the commander. In other words, the first approach attempts to resolve the tension set out above by interpreting Article 28 in a way contrary to a fundamental principle. Those who make no contribution to a crime are responsible as a party to it.³⁸

Moreover, when considered in the light of Article 28's fault elements, this approach is more problematic still in terms of principle. For military commanders, the lower fault element is one of 'should have known'; for non-military superiors, it is one of 'conscious disregard' for information 'which clearly indicated' that their subordinates were committing the underlying crimes. Therefore, for military commanders, the standard is negligence. As pointed out by Damaška two decades ago, this too is a problem in relation to the principle of culpability.³⁹ In his telling phrase, '*sub silentio*, as it were, a

35 *Bemba*, Appeal Judgment, *supra* note 1, Separate Opinion of Judges Van den Wyngaert and Morrison, § 52.

36 *Ibid.*, § 56.

37 Robinson, *Justice in Extreme Cases*, *supra* note 21, 269–270.

38 Although simple speculation, it may be that Judges Van den Wyngaert and Morrison's strict application of the doctrine in their Separate Opinion is connected to the discomfort they felt about rendering a commander a *party* to another's crime absent causal contribution and with a diminished *mens rea*. For thoughts in this direction, see too D. Amann, 'On Command', 35 *Temple International and Comparative Law Journal (TICJL)* (2021) 121–131, at 130–131.

39 Damaška, *supra* note 31, at 455–496, 463–464. For a defence of the 'should have known' standard, see Robinson, *Justice in Extreme Cases*, *supra* note 21, 194–223.

negligent omission has been transformed into intentional criminality of the most serious nature'.⁴⁰

B. Causation Applies only to the Duty to Prevent

The first approach — no causation at all — is, thus, open to objection in terms of principle. A second approach is that of the Pre-Trial Chamber in *Bemba*. In sum, the Pre-Trial Chamber made four findings: (i) Article 28 entails a relationship of causality between the superior's dereliction and the underlying crimes;⁴¹ (ii) this relationship of causality flows from the inclusion in the statute of the term 'as a result of';⁴² but (iii) causation only applies in relation to the duty to prevent — that is, in relation to prospective crimes;⁴³ and (iv) the test of causation is whether the omission 'increased the risk' of the underlying crimes occurring.⁴⁴

On review, it is true that the broad statement in (i) and the specific statement in (iii) are in tension with each other. Robinson, for instance, suggests that we ought to downplay the Pre-Trial Chamber's statement in (iii) and rather, in cases concerning the duty to punish, require a causal relationship to *subsequent* crimes.⁴⁵ This is how Judges Monageng and Hofmański in the Appeals Chamber appear to understand the Pre-Trial Chamber's judgment. Indeed, their Joint Dissenting Opinion reads out the Pre-Trial Chamber's statement in (iii) altogether, proposing that the Pre-Trial Chamber held that causation is required in *all* cases.⁴⁶ Although it is doubtful that this is a correct reading of the Pre-Trial Chamber's judgment — that judgment is explicit that 'the element of causality only relates to the commander's duty to prevent the commission of future crimes'⁴⁷ — this interpretive dispute does not much matter for present purposes. What matters is the approach itself: an interpretation of Article 28 that requires causation for the duty to prevent but not for the retrospective duties.

This approach is subject to the same principled objections as set out in the previous sub-section. Of course, it is less objectionable, in that (a form of) causation is added for a sub-set of cases — those relating to the duty to

40 *Ibid.*, at 463–464. See also N. Jain, 'A Tale of Two Cities: Reflections on Robinson's Twinning of International Criminal Law and Criminal Law Theory', 35 *TICLJ* (2021) 25–35, at 32–35.

41 *Bemba*, Confirmation, *supra* note 10, § 423.

42 *Ibid.*

43 *Ibid.*, § 424.

44 *Ibid.*, § 425. See further Y. Hamuli-Kabumba, 'Les éléments objectifs de la responsabilité pénale du supérieur hiérarchique en droit international pénal', 3 *Revue de science criminelle et de droit pénal comparé* (2017) 445–464, at 458–462.

45 Robinson, *How Command Responsibility Got So Complicated*, *supra* note 30, at 57.

46 *Bemba*, Appeal Judgment, *supra* note 1, Joint Dissenting Opinion of Judges Monageng and Hofmański, § 333. As discussed below, this then leads to their adoption of the consequent crimes approach.

47 *Bemba*, Confirmation, *supra* note 10, § 424. See further Van Sliedregt, *supra* note 21, at 199; K. Yokohama, 'The Failure to Control and the Failure to Prevent, Repress and Submit: The Structure of Superior Responsibility under Article 28 ICC Statute', 18 *ICLR* (2018) 275, at 294.

prevent. But for other cases, the dual problem of culpability remains. A commander may be responsible as a party to crimes on the basis of failing to submit a matter to the competent authorities where they did not know, but should have known, about their commission.⁴⁸ There is a gulf between the commander's conduct and fault, on one hand, and their responsibility, on the other.⁴⁹

C. The 'Consequent Crimes' Approach

The first two approaches — either entirely or partially — deny that Article 28 entails a relationship of causation between the commander's dereliction and the subordinate's crimes. By contrast, the third and fourth approaches do require a form of causality in all cases.⁵⁰ Taking them in order, the third may be termed the consequent crimes approach. It seeks to resolve the tension by denying that failure to punish a completed crime is alone sufficient for criminal liability under Article 28. What is required is *further* crimes. As Robinson explains, 'failing to punish past crimes and thus failing to send a signal of disapproval and deterrence, the commander culpably elevates the risk of subsequent crimes'.⁵¹ Crucially, however, it is only if those subsequent crimes occur that the commander is liable.

In the Appeals Chamber in *Bemba*, this approach was adopted by President Eboe-Osuji in his Concurring Separate Opinion and by Judges Monageng and Hofmański in their Joint Dissenting Opinion.⁵² As noted above, Judges Monageng and Hofmański miscast the Pre-Trial Chamber as also having adopted this approach but, again, that point is not central to the present analysis. On their view:

[A]s far as the duties to repress and to punish are concerned, causation needs to be demonstrated in respect of *subsequent* crimes that were committed because of the failure to punish earlier crimes.⁵³

As to the relevant standard of causation, they adopt the risk-based theory of causation developed in Judge Steiner's Separate Opinion in the Trial Chamber.⁵⁴

48 Damaška, *supra* note 31, 464.

49 *Ibid.*, 464, at 468; K. Ambos, 'Superior Responsibility', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, 2002) 823–871, at 852.

50 For a fifth approach, see Mettraux, *supra* note 18, at 89. This approach suggests that there must be a causal relationship between the superior's failure to punish and the *resulting impunity*. To be clear, as with the second approach above, in relation to the duty to punish here there is no causal requirement as between the superior's omission and the subordinate's crimes.

51 Robinson, *How Command Responsibility Got So Complicated*, *supra* note 30, at 56.

52 *Bemba*, Appeal Judgment, *supra* note 1, Concurring Opinion of Judge Eboe-Osuji, §§ 210–211; Joint Dissenting Opinion of Judges Monageng and Hofmański, § 333.

53 *Ibid.*, Joint Dissenting Opinion of Judges Monageng and Hofmański, § 333 (emphasis added).

54 *Ibid.*, § 339.

There is something to be said for the consequent crimes approach.⁵⁵ Starting from the premise that command responsibility is a mode of liability and assuming that the risk-elevation test is applied stringently, it may satisfy the principle of culpability.⁵⁶ But, overall, it entails some difficulties. First, it interprets out of Article 28 certain situations — simple failures to punish prior crimes without requiring the commission of further crimes — explicitly contemplated in the instruments of each of the ICTR, ICTY, the Extraordinary Chambers in the Courts of Cambodia, and the Special Court for Sierra Leone.⁵⁷ It would be surprising if this were the intention of the drafters of the Statute. Secondly, it seems to collapse the duty to punish — repress and submit in Article 28's terms — into the duty to prevent the consequent crimes.⁵⁸ That is, conduct amounting to a failure to punish a preceding crime would nonetheless have been captured as conduct that fails to prevent the later crime,⁵⁹ even if, as a matter of practice, 'separate life'⁶⁰ is given to the different failures. And third, as a matter of policy it leaves untouched by command responsibility backward-looking duties in relation to a significant category of international crimes — entailing both isolated crimes and all of those committed towards or at the end of a conflict.⁶¹

D. The 'Twofold Duties' Approach

Finally, there is a fourth solution found in *Bemba*: the twofold duties approach.⁶² As developed by Triffterer, this approach points to language in the *chapeau* of Articles 28(a) and 28(b) that refers to the commander/superior's 'failure to exercise control properly' over their subordinates.⁶³ This general duty is distinct from the specific duties set out in the sub-paragraphs that follow — the duties to prevent, repress and submit.⁶⁴ Responsibility, thus, arises on demonstrating that the commander failed in *both* their general

55 For a developed defence, see Robinson, *How Command Responsibility Got So Complicated*, *supra* note 30.

56 I leave aside here the issue of *mens rea* and its relationship to the principle of culpability — see Damaška, *supra* note 31.

57 Art. 7(3) ICTYSt.; Art. 6(3) ICTRSt.; Art. 29, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea; Art. 6(3), Statute of the Special Court for Sierra Leone.

58 E. Mayr, 'International Criminal Law, Causation, and Responsibility', 14 ICLR (2014) 855, at 865; R. O'Keefe, *International Criminal Law* (OUP, 2015), at 205. Cf. Robinson, *Justice in Extreme Cases*, *supra* note 21, at 160.

59 Arnold and Jackson, *supra* note 19, mn. 46; Damaška, *supra* note 31, at 467.

60 *Bemba*, Appeal Judgment, *supra* note 1, Concurring Opinion of Judge Ebbo-Osuji, § 206.

61 Damaška, *supra* note 31, at 468. To be clear, Damaška's principled worry about the legal character of command responsibility applies in these instances too.

62 See similarly Yokohama, *supra* note 47, at 279–281.

63 O. Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?' 15 LJIL (2002) 179–205, at 203. See also V. Nerlich, 'Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible', 5 JICJ (2007) 665–682, at 678.

64 Yokohama, *supra* note 47, at 279–281; Nerlich, *supra* note 63, at 678.

duty to exercise control and in relation to one of the specific duties.⁶⁵ Moreover, and pertinently for the present analysis, the twofold duties approach seems to resolve the problem of causation. For duty to punish cases, it is of course conceded that the failure cannot have a retrospective effect on the preceding crime.⁶⁶ But, crucially, in these cases there is the preceding failure to perform the general duty of control. As Triffterer put it, there 'always remains the causal connection between the failure to control properly and the commission of the completed crime'.⁶⁷

In *Bemba*, none of the decisions — in the Pre-Trial Chamber, the Trial Chamber, or the Appeals Chamber — explicitly adopts this approach. It does, however, receive conflicting attention in the separate opinions. In the Trial Chamber, both Judge Ozaki and Judge Steiner adopt it.⁶⁸ For Judge Ozaki, the 'duty of a commander to exercise control properly may extend both temporally and substantively beyond the specific Article 28(a)(ii) duties'.⁶⁹ Likewise for Judge Steiner, who also emphasized the complex interplay between the general and specific duties.⁷⁰ For both judges, causality is, therefore, required as between the dereliction in the general duty and the subordinate crimes.⁷¹ By contrast, in their Joint Dissenting Opinion in the Appeals Chamber, Judges Monageng and Hofmański reject it explicitly.⁷²

As with the consequent crimes approach, there is something to be said for understanding Article 28 in this way. As above, starting with the premise that Article 28 is a mode of liability, it may satisfy the principle of culpability in relation to causation⁷³ across the specific duties imposed to commanders, and it also gives content to the language in the chapeau.⁷⁴ It too, however, is open to criticism, as Yokohama has convincingly argued.⁷⁵ First, it bears noting that this interpretation entails a significant structural reorganization of the doctrine as developed by the ad hoc tribunals,⁷⁶ where there is no evidence in the preparatory works of such an intention. Second, the requirement of a two-fold dereliction on the part of the commander renders the doctrine under-

65 Nerlich, *supra* note 63, at 678; Yokohama, *supra* note 47, at 277.

66 Triffterer, *supra* note 63, at 202; Nerlich, *supra* note 63, at 678.

67 Triffterer, *ibid.*, at 202.

68 *Bemba*, Trial Judgment, *supra* note 7, Separate Opinion of Judge Steiner, § 11; *Bemba*, Trial Judgment, *supra* note 7, Separate Opinion of Judge Ozaki, § 15.

69 *Ibid.*, Separate Opinion of Judge Ozaki, § 15.

70 *Ibid.*, Separate Opinion of Judge Steiner, § 11.

71 *Ibid.*, Separate Opinion of Judge Steiner, § 17; *Bemba*, Trial Judgment, *supra* note 7, Separate Opinion of Judge Ozaki, § 17.

72 *Bemba*, Appeal Judgment, *supra* note 1, Joint Dissenting Opinion of Judges Monageng and Hofmański, fn. 765.

73 As above, there remains the issue of the reduced fault element.

74 Again, this is assuming that the causation requirement is properly applied — for discussion, see K. Ambos, 'Critical Issues in the *Bemba* Confirmation Decision', 22 *LJIL* (2009) 715–726, at 721–722. There remains the question of the fault element too.

75 Yokohama, *supra* note 47, at 284.

76 *Ibid.* See further Arnold and Jackson, *supra* note 19, mn. 46; G. Werle and F. Jessberger, *Principles of International Criminal Law* (4th edn., OUP, 2020), at 275.

inclusive.⁷⁷ So long as the commander discharges their general duty of control, a subsequent failure to undertake specific duties of prevention or punishment does not lead to liability.⁷⁸ Third, it introduces additional complexity into a provision which the Court is already struggling to delineate.

4. Revisiting the Starting Point

The preceding section set out four approaches evident in *Bemba* to the question of causation. None is entirely convincing. Instead of proposing a fifth approach, this section revisits the starting point on which the judges in *Bemba* were united: the legal character of command responsibility as a mode of liability.⁷⁹ It argues that the Court in *Bemba* trapped itself unnecessarily by proceeding from the starting point that Article 28 establishes a mode of liability. Contrary to the prevailing approach, it is open to the Court to characterize Article 28 as establishing a separate offence of omission. First, this section discusses an important element of this debate: the meaning of the term ‘as a result of’ in Article 28. It suggests that the application of the rules on authentic language texts in the Vienna Convention on the Law of Treaties (VCLT) points towards a non-causal reading of the term. Second, it suggests that the orthodox objections to interpreting Article 28 as a separate offence of omission are less convincing than they first appear and sets out why such an interpretation is plausible and attractive in principle and policy.

A. A Textual Question: ‘as a result of his or her failure ...’

A central, and much discussed, issue in relation to Article 28 is whether its terms demand a causal contribution between the commander’s omissions and the underlying crimes. This issue is relevant to the present discussion, for if the terms of Article 28 themselves require a causal contribution it would make more sense to understand Article 28’s legal character as entailing a mode of liability.⁸⁰ Two positions arise. First, it is often said, including by the Pre-Trial Chamber in *Bemba*,⁸¹ that a causation requirement follows from the inclusion

77 Yokohama, *supra* note 47, at 284. Yokohama also asks whether the default mental element set out in Art. 30 would apply in relation the general duty of control — see 290–292.

78 *Ibid.*, using the example given by in G. Werle and F. Jessberger, *Principles of International Criminal Law* (3rd edn., OUP, 2014), at 233. Alternatively, as Yokohama explains, in order to respond to this objection in duty to prevent cases, the general duty of control and the specific duty of prevention might be collapsed into each other in practice — 285.

79 For discussion of another approach, one founded on ratification after the fact, see Robinson, *How Command Responsibility Got So Complicated*, *supra* note 30, at 46–51; A. Sepinwall, ‘Failures to Punish: Command Responsibility in Domestic and International Law’, 30 *Michigan Journal of International Law* (2009) 251–303.

80 See Galand, *supra* note 3, at 690 referring to Judgment, *Halilović* (IT-01-48-T), Trial Chamber I, Section A, 16 November 2005, § 78. There would remain the principled worry about the standard of negligence in the fault element.

81 *Bemba*, Confirmation, *supra* note 10, § 423.

of the clause ‘as a result of his or her failure’ in Article 28. On this approach, the clause ‘as a result of’ relates to the subordinate’s crimes:

- A military commander ... shall be criminally responsible for *crimes* ... committed by forces under his or her effective command and control ... *as a result of his or her failure* to exercise control properly over such forces ...

This is certainly a plausible reading of the English text: that the *crimes* must result from the commander’s failure. It is not the only reading, though. A second approach is that the clause ‘as a result of’ relates to the commander’s responsibility:

- A military commander ... shall be *criminally responsible* for crimes ... committed by forces under his or her effective command and control. ... *as a result of his or her failure* to exercise control properly over such forces. ...

On this approach, put forward by Amnesty International as *amicus curiae* in the Pre-Trial Chamber in *Bemba*, the relevant clause is simply a statement that criminal responsibility results from the commander’s failure.⁸² This reading of the English text is also plausible — as noted by Judge Ozaki in the Trial Chamber⁸³ and Judges Van den Wyngaert and Morrison in the Appeals Chamber.⁸⁴ As Judge Ozaki put it, ‘linguistically, in the English version of the Statute, either interpretation is possible’.⁸⁵

Judge Ozaki’s reference to the English version of the Statute points to an important element of the analysis. As set out in Article 128 of the Statute, the English text is one of six equally authentic texts of the Statute — along with Arabic, Chinese, French, Russian and Spanish. As Judge Ozaki herself notes, three of these texts ‘appear to each be, at least, capable of being read as either attaching the clause to the criminal responsibility of the commander or to the commission of the crimes’.⁸⁶ These are the texts in Spanish, Arabic and Russian. But the same is not true of the texts in Chinese and French.⁸⁷ As to the Chinese, the relevant clause — translated into English — provides simply ‘if he or she failed to exercise control properly over such forces ...’.⁸⁸ As to

82 Amicus Curiae Observations on Superior Responsibility Submitted Pursuant to Rule 103 of the Rules of Procedure and Evidence, *Bemba* (ICC-01/05-01/08-406), Pre-Trial Chamber II, 20 April 2009 (hereafter, ‘*Bemba*, Amicus Curiae Observations’). For detailed analysis, see also Yokohama, *supra* note 47, at 296–301.

83 *Bemba*, Trial Judgment, *supra* note 7, Separate Opinion of Judge Ozaki, § 8.

84 *Bemba*, Appeal Judgment, *supra* note 1, Separate Opinion of Judges Van den Wyngaert and Morrison, § 51, fn. 40. See also A. Kiss, ‘Command Responsibility under Article 28 of the Rome Statute’, in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP, 2015) 608–648, at 637.

85 *Bemba*, Trial Judgment, *supra* note 7, Separate Opinion of Judge Ozaki, § 8.

86 *Ibid.*, Separate Opinion of Judge Ozaki, § 11. See also *Bemba*, Amicus Curiae Observations, *supra* note 82, § 44.

87 *Ibid.*; *Bemba*, Appeal Judgment, *supra* note 1, Separate Opinion of Judges Van den Wyngaert and Morrison, § 51, fn 40.

88 ‘... 如果未对 ... 适当行使控制 ...’

the French, it provides ‘when he or she did not exercise control ...’.⁸⁹ These texts, then, are consistent with the second of the meanings set out above: the relevant clause relates simply to the criminal responsibility of the commander.⁹⁰

In thinking about this issue, the starting point is that each of these authentic texts, as per Article 128 of the Rome Statute, is equally authoritative.⁹¹ Key, then, is the presumption in Article 33(3) VCLT: ‘[t]he terms of the treaty are presumed to have the same meaning in each authentic text’.⁹² In practice, as the ILC put it, this ‘presumption requires that every effort should be made to find a common meaning for the texts before preferring one to another’.⁹³ If no common meaning exists, then the interpreter has recourse to the rule in Article 33(4) — the best reconciliation of the texts.⁹⁴ In the present instance, it is possible to find a common meaning of the texts: only four of the six texts admit a reading of the relevant clause as relating to the commission of the underlying crimes; all six admit a reading where the relevant clause relates to the responsibility of the commander.⁹⁵ On this basis, the language provisions of VCLT suggest a reading of the relevant clause — ‘as a result of’ — that does not require a causal relationship between the commander’s omission and the subordinate’s crimes.

There is one counterargument to be addressed — one set out in Judge Ozaki’s Separate Opinion in *Bemba*. It is not disputed that the ordinary rules of interpretation in the VCLT might be modified by the specific terms of a treaty itself.⁹⁶ This is the case with the Rome Statute — Article 22(2) provides: ‘The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted’. This, for Judge Ozaki, resolved the matter of competing interpretations on the side of the causal reading:

In the circumstances, I consider that the principle of strict interpretation established in Article 22(2) of the Statute requires the Chamber to favour the interpretation which links

89 ‘... lorsqu’il ou elle n’a pas exercé le contrôle ...’. See further Hamuli-Kabumba, *supra* note 44, 460–461.

90 *Bemba*, Amicus Curiae Observations, *supra* note 82, §§ 44. See further Yokohama, *supra* note 47, at 300–301.

91 Art. 33(1) Vienna Convention on the Law of Treaties (VCLT) 1155 UNTS 331. See also Judgment pursuant to Article 74 of the Statute, *Bemba et al.* (ICC 01/05-01/13), Trial Chamber VII, 19 October 2016, § 17; § 33.

92 On the customary status of Article 33, see *LaGrand Case (Germany v. United States of America)*, International Court of Justice, 27 June 2001, ICJ Reports (2001) 466, § 101; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, International Court of Justice, 17 March 2016, ICJ Reports (2016) 4, § 25.

93 ILC, ‘Draft Articles on the Law of Treaties with Commentaries’ [1966] YILC, Vol II, 225, § 7.

94 R. Gardiner, *Treaty Interpretation* (2nd edn., OUP, 2017), at 424; O. Dörr and K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn., OUP, 2018), at 648–649.

95 *Bemba*, Amicus Curiae Observations, *supra* note 82, § 44.

96 D. Akande, ‘The Sources of International Criminal Law’, in A. Cassese et al. (eds), *The Oxford Companion to International Criminal Justice* (OUP, 2009) 41–53, at 44–45.

the failure on the part of the commander to exercise control properly to the commission of the crimes.⁹⁷

On reflection, this reasoning does not seem convincing.⁹⁸ To give effect to the Rome Statute's own determination that each of the six languages is equally authentic, the rules on language in the VCLT ought to be applied prior to the principle in Article 22(2).⁹⁹ In this instance, the application of the presumption in Article 33(3) VCLT itself resolves the issue — and, thus, there is not remaining ambiguity of meaning in the terms of the treaty. To put that another way, to turn to the rule in Article 22(2) on the basis of ambiguity in the English text is to implicitly assume that that text is to be given priority.¹⁰⁰

B. A Separate Offence of Dereliction of Duty

If the inclusion of the clause 'as a result of his or her failure' does not lend support to the idea that command responsibility is a mode of liability, what else can be said in favour of such a legal characterization? In *Bemba*, following the majority view in the scholarship,¹⁰¹ the Trial Chamber emphasized three factors — two textual and one contextual — in support of its position. As to the textual factors, there is, first, the opening clause of Article 28 — '[i]n addition to other grounds of criminal responsibility' — and second, the provision that the superior 'shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control ...'.¹⁰² As to the contextual factor, the Trial Chamber pointed to the position of Article 28 in Part 3 of the Statute — General Principles of Criminal Law.¹⁰³ It does not appear within Part 2, which sets out crimes within the jurisdiction of the Court.¹⁰⁴

97 *Bemba*, Trial Judgment, *supra* note 7, Separate Opinion of Judge Ozaki, § 11. See similarly Galand, *supra* note 3, 22.

98 See relatedly Yokohama, *supra* note 47, at 301. Judge Ozaki is, however, correct in her implicit assumption that the rules in Art. 22(2) also apply beyond the definition of substantive crimes themselves to principles of criminal responsibility in Art. 28 (and Art. 25) of the Statute. On this point, see Judgment pursuant to Art. 74 of the Statute, *Ngudjolo Chui* (ICC-01/04-02/12), Trial Chamber II, 18 December 2012, Concurring Opinion of Judge Van den Wyngaert, § 18: 'There can be little doubt that this fundamental principle applies with equal force in relation to the definition of criminal responsibility.'

99 See Judgment pursuant to Art. 74 of the Statute, *Katanga* (ICC-01/04-01/07), Trial Chamber II, 7 March 2014, § 53.

100 In this respect, Judge Steiner's conclusion that 'there remains no ambiguity in the interpretation of Article 28' unduly prioritizes the English text — *Bemba*, Trial Judgment, *supra* note 7, Separate Opinion of Judge Steiner, § 8.

101 See e.g. Cryer, *supra* note 20, at 159–183; X. Ru, 'On the Legal Basis of Command Responsibility', 22 *Journal of Xi'an Politics Institute* (2009) 93–97, at 93.

102 *Bemba*, Trial Judgment, *supra* note 7, § 173. See also *Bemba*, Appeal Judgment, *supra* note 1, Concurring Opinion of Judge Eboe-Osuji, § 190.

103 *Bemba*, Trial Judgment, *supra* note 7, § 173.

104 See also *Bemba*, Appeal Judgment, *supra* note 1, Concurring Opinion of Judge Eboe-Osuji, § 197.

There is something to be said for each of these points. Indeed, in the scholarship they ground a worry that even if understanding Article 28 as a separate dereliction offence would be preferable as a matter of policy, such an interpretation is foreclosed as for the Court to adopt it would be a form of judicial legislation.¹⁰⁵ On reflection, however, these points are not as conclusive as they might seem. To start with the contextual factor — that command responsibility appears in Part 3 of the Statute rather than Part 2 — a powerful response is that Part 3 itself includes the substantive crime of direct and public incitement to genocide.¹⁰⁶ Part 3 also includes inchoate liability in the form of attempts in Article 25(3)(f) which, as Robinson puts it, is adjunct to the referent crimes set out in Part 2.¹⁰⁷ In other words, it is simply not the case that the crimes within the jurisdiction of the Court are exhaustively set out in Part 2. Indeed, this point can be put more strongly: given the doctrine of command responsibility's *generality* — that is, that it applies in respect of each of the other crimes — it makes sense for it to appear in Part 3 — even as an offence of dereliction.

That leaves the two textual points. Here, again, the language used in the Statute's provision for direct and public incitement to genocide and attempts liability show that those arguments are not unimpeachable. To spell that out, the relevant provisions of Article 25(3) read:

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:

...

(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 execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions ...¹⁰⁸

In relation to Article 25(3)(e), there is no doubt that a person convicted thereunder is responsible *for* direct and public incitement to genocide itself, even if the prefatory language provides that they 'shall be criminally responsible ... *for* a crime within the jurisdiction of the Court'.¹⁰⁹ The same goes for attempts liability under Article 25(3)(f). In other words, the very same language — 'for (a) crime(s) within the jurisdiction of the Court' — is naturally and straightforwardly read to mean responsibility for (i) incitement to genocide

105 Robinson, *How Command Responsibility Got So Complicated*, *supra* note 30, 34–35.

106 Art. 25(3)(e) ICCSt. On the legal character of direct and public incitement, see Judgment, *Nahimana et al.* (ICTR-99-52-A), Appeals Chamber, 28 November 2007, § 723; Judgment, *Kalimanzira* (ICTR-05-88-T), Trial Chamber III, 22 June 2009, § 512.

107 See further Robinson, *How Command Responsibility Got So Complicated*, *supra* note 30, at 32–33.

108 Art. 25(3)(e) and (f) ICCSt.

109 Art. 5 ICCSt., entitled 'Crimes within the jurisdiction of the Court' provides that 'The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.'

and (ii) attempt, respectively. In a similar sense, Article 28's reference to 'other grounds of criminal responsibility' — i.e. those set out in Article 25 — is a reference to a heterogeneous forms of responsibility: ordinary modes of participation in Articles 25(3)(a)–(d), a substantive crime of incitement in Article 25(3)(e), and inchoate liability for attempts that applies in relation to each other substantive crime in Article 25(3)(f). That phrase does not itself determine what the defendant is responsible for.

This is all to say that the textual and contextual points set out above do not demand the characterization of Article 28 as a mode of liability.¹¹⁰ Is there any reason to think that it should be characterized in a different way — that is, as a separate offence defined by the dereliction of the commander? In short, the answer is yes: there is reason on the face of the provision itself.¹¹¹ As Yokohama explains, Judge Ozaki's reasoning in the Trial Chamber reasons *from* legal character of command responsibility — for her, a mode of liability — *to* delineate the doctrine's specific elements.¹¹² The same order is true in the Pre-Trial Chamber and Trial Chamber — the judgments first consider the legal character of liability under Article 28 before drawing out its specific elements.¹¹³ In relation to causation, the preceding characterization of the doctrine as a mode of liability informs the interpretation of the elements of causation.¹¹⁴

But a better way approach is to reason in reverse — to determine the legal character of command responsibility in the light of the doctrine's elements.¹¹⁵ As to those elements, three points may be stressed. First, as argued above, the provision does not itself require a relationship of causation between the commander's omission and the subordinate's crime. Second, and relatedly, the text of Article 28 *explicitly and unambiguously* prescribes duties in relation to crimes that have already been committed.¹¹⁶ This is to say that consistently with the position in preceding international criminal instruments, liability can arise under Article 28 in relation to entirely retrospective failures. And third, for military commanders Article 28 includes a standard of negligence. Relative to other participants in international crimes, liability arises for commanders on the basis of a lower standard of culpability.

These three elements should be taken to inform the legal character of command responsibility. As a matter of interpretation, we should be cautious about

110 See further Frulli, *supra* note 18, at 452.

111 For an additional argument drawing on command responsibility's origins in international humanitarian law, see Amann, *supra* note 38.

112 Yokohama, *supra* note 47, at 286.

113 *Bemba*, Confirmation, *supra* note 10, § 405; *Bemba*, Trial Judgment, *supra* note 7, §§ 171–173.

114 *Ibid.*, § 423 and more clearly *Bemba*, Trial Judgment, *supra* note 7, § 211.

115 Arnold and Jackson, *supra* note 19, mn. 48–49.

116 The explicit provision of retrospective duties in Art. 28 — 'repress their commission or to submit the matter to the competent authorities for investigation and prosecution' is also context in the sense of Art. 31 VCLT that points towards the interpretation of the term 'as a result of' in the chapeau proposed above.

finding a shared intention of the parties to establish a form of liability that conflicts with basic principles of criminal law.¹¹⁷ In formal terms, this may be explained in terms of the object and purpose of the Rome Statute,¹¹⁸ which may be taken to incorporate basic principles of criminal law that protect the interests of accused persons.¹¹⁹ This would not be judicial legislation — a departure, as Robinson suggests, from the applicable law of the Court.¹²⁰ It would no more be judicial legislation than judicial recognition that attempts liability under Article 25(3)(f) is properly inchoate, rather than a doctrine pursuant to which an individual is ‘criminally responsible and liable for punishment for a crime within the jurisdiction of the Court’.¹²¹ In less formal terms, this would be giving a reasonable construction to a provision that on its face criminalizes negligent, non-causal failures in relation to another’s crimes.¹²²

Such a characterization — changing the starting point by characterizing Article 28 as establishing a separate dereliction offence — resolves the culpability contradiction set out above.¹²³ It does without excessive complexity and accurately captures a commander’s wrongdoing.

There remain two other objections to such a change. First, there is the worry that such a characterization undervalues the responsibility of certain commanders — say, the commander who knowingly fails to intervene to prevent their subordinate from committing a war crime where intervention would have prevented it.¹²⁴ There is something to this point — and it is certainly the case that Article 28 would capture individuals with dramatically different levels of culpability.¹²⁵ However, the problem recedes when we consider the potential liability of commanders under other forms of responsibility in Article 25(3) of the

117 Arnold and Jackson, *supra* note 19, mn. 48–49.

118 Art. 31 VCLT.

119 See Robinson, *How Command Responsibility Got So Complicated*, *supra* note 30, fn. 135, at 55. For a helpful discussion, see A. Haque, ‘Jurisprudence in Extreme Cases’, 35 *TICJL* (2021) 11–23. See further Bemba, Trial Judgment, *supra* note 7, § 211.

120 Robinson, *Justice in Extreme Cases*, *supra* note 21, at 165.

121 In the interpretation proposed in this piece, the term ‘for’ in the clause ‘shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control’ might thus be better read as ‘in relation to’ or ‘with regard to’ — see Van Sliedregt, *supra* note 21, 195.

122 See similarly Judgment, *Hadžihasanović and Kubura* (IT-01-47-AR72), Appeals Chamber, 22 April 2008, Partially Dissenting Opinion of Judge Shahabuddeen, § 32. For discussion, see Sander, *supra* note 18, at 130–131.

123 Yokohama, *supra* note 47, at 302–303. See also Sander, *supra* note 18, at 125; Robinson, *Justice in Extreme Cases*, *supra* note 21, at 164.

124 See J. Stewart, ‘MJIL Symposium: A Response to Darryl Robinson by James Stewart’, *OpinioJuris*, 15 November 2012, available online at <http://opiniojuris.org/2012/11/15/a-response-to-darryl-robinson-by-james-stewart/> (visited 5 March 2022). See also Nerlich, *supra* note 63, at 672–674.

125 This is an inevitability given the drafting of the provision — Cryer, *supra* note 20, at 183. On the German implementing provisions, which splits the doctrine into separate provisions, see T. Weigend, ‘Superior Responsibility: Complicity, Omission or Over-Extension of the Criminal Law?’ in C. Burchard et al. (eds), *The Review Conference and the Future of the International Criminal Court* (Kluwer, 2010) 67.

Statute. It is likely the case that certain knowing omissions of commanders — their dereliction in the face of their duty to prevent — will ground liability under Articles 25(3)(c) or 25(3)(d) of the Statute.¹²⁶

Second, there is a concern, expressed by Judge Ozaki in *Bemba*, that command responsibility as a dereliction offence would be insufficiently serious to warrant intervention by the Court. As she put it, the Court ‘should focus on addressing the most serious crimes of concern to the international community and those persons most responsible for them, rather than addressing a dereliction of duty as such’.¹²⁷ In this regard, it is true that the proposed interpretation entails a less serious form of responsibility — something that should be reflected at sentence.¹²⁸ However, that does not mean that a commander’s putative failures are insufficiently serious to warrant liability at the international level. Article 28 reflects a justifiable policy choice to locate responsibility in those who are best placed to ensure compliance with international law and remedy any breaches.¹²⁹

5. Basis and Implications in Practice

What remains is to draw out the basis of responsibility when the doctrine is understood in this way. In this respect, it is necessary to distinguish the prospective and retrospective duties. To start with the retrospective duties to submit/punish, as these are easier to understand, the bases of responsibility are two-fold. First, there is the creation of impunity itself — the commander’s failures contribute to leaving un-remedied the underlying infringement of protected interests entailed by the subordinate’s crimes.¹³⁰ Those crimes, in almost all cases, constitute a violation of fundamental rights, engendering in turn remedial duties.¹³¹ Second, it is fair to assume that failure to remedy past wrongdoing increases the

126 K. Ambos, ‘General Principles of Criminal Law in the Rome Statute’, 10 *Criminal Law Forum* (1999) 1–32, at 19–20; Bonafé, *supra* note 18, at 611–615; Meloni, *supra* note 18, at 635; Robinson, *Justice in Extreme Cases*, *supra* note 21, at 148. For longer accounts, see too M. Jackson, *Complicity in International Law* (OUP, 2015), at 66–124; M. Aksenova, *Complicity in International Criminal Law* (Hart, 2016); M. Ventura, ‘Aiding and Abetting’, in De Hemptinne et al., *Modes of Liability in International Criminal Law* (CUP, 2019) 173–256.

127 *Bemba*, Trial Judgment, *supra* note 7, Separate Opinion of Judge Ozaki, § 5. See also Robinson, *Justice in Extreme Cases*, *supra* note 21, 176.

128 Meloni, *supra* note 18, at 620–621; Burghardt, *supra* note 18, at 402 *et seq.*

129 In this respect, see Judgment, *Hadžihasanović and Kubura* (IT-01-47-T), Trial Chamber, 15 March 2006, § 66: ‘[M]ore than anyone else, [commanders] can prevent breaches by creating the appropriate frame of mind, ensuring the rational use of the means of combat, and by maintaining discipline’. See further Mayr, *supra* note 58, at 871–872.

130 Arnold and Jackson, *supra* note 19, mn. 50.

131 In law, see UNHRC, ‘General Comment 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant’, CCPR/C/21/Rev.1/Add. 13, 26 May 2004. More widely, see J. Waldron, ‘Rights in Conflict’, 99 *Ethics* (1989) 503–519 and, on the status of these duties, M. Jackson, ‘Amnesties in Strasbourg’, 38 *Oxford Journal of Legal Studies* (2018) 451–474.

risk of the establishment of a culture of impunity.¹³² Such a culture of impunity creates a general risk of commission of future crimes.¹³³

In relation to the commander's prospective duties, Article 28 is best understood as establishing an offence of endangerment.¹³⁴ On the objective level, the commander's failure to perform their duty creates a risk to the underlying interests protected by the substantive offences.¹³⁵ To use Duff and Hörnle's classification, this is a 'mediated' endangerment offence, in that the 'actualisation of the risk depends on the conduct of another person who might be held (wholly or in part) responsible for the resulting harm.'¹³⁶ Here, that person is the subordinate. Crucially, though, as argued above, the commander is blamed only for the creation of the risk — knowing endangerment or negligent endangerment, as the case may be on the subjective level.

It is true, however, that this understanding of the prospective duties in Article 28 creates one point of awkwardness. Even though the commander is not blamed for the wrongful result — i.e. the crimes of their subordinates — it is nonetheless required that those crimes do occur for any liability on the international plane to arise.¹³⁷ Those crimes are thus best understood, as Olásolo puts it, as 'objective requirements for punishment' of the superior.¹³⁸ It follows, then, that there will be a category of commanders who are equally derelict in the performance of their duties for whom no international liability *at all* will arise. This will be the case where that commander's subordinates do not commit the underlying crimes for reasons unrelated to the commander's behaviour. It will be an instance of moral luck.¹³⁹

Certain implications that flow from this characterization can be drawn out. As to sentence, three points may be made. First, characterized as a separate offence of omission, in general command responsibility is a significantly less grave form of responsibility than those arising under Articles 25(3)(a)–(d). This should be reflected in sentencing.¹⁴⁰ Second, the doctrine remains heterogeneous: the bases of liability for the prospective and retrospective duties are different, and it covers three different mental states: the knowledge, 'should have

132 Damaška, *supra* note 31, at 467; Robinson, *How Command Responsibility Got So Complicated*, *supra* note 30, at 17; Triffterer, *supra* note 63, at 204. See also T. Weigend in *Münchener Kommentar zum Strafgesetzbuch* (MüKo StGB), § 15 VStGB.

133 See R. Arnold, 'Command Responsibility: A Case Study of Alleged Violations of the Laws of War at Khiam Detention Centre', 7 JCSL (2002) 191–231, at 208–209 classifying this aspect of the doctrine as a form of inchoate endangerment.

134 See R.A. Duff, 'Criminalizing Endangerment', 65 *Louisiana Law Review* (2005) 941–965.

135 A. Duff and T. Hörnle, 'Crimes of Endangerment', in K. Ambos et al. (eds), *Core Concepts in Criminal Law and Criminal Justice: Volume 2* (CUP, 2021), at 12–13.

136 *Ibid.*, 13.

137 See relatedly P.H. Robinson, 'Rules of Conduct and Principles of Adjudication', 57 *The University of Chicago Law Review* (1990) 729–771.

138 H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart, 2009), at 107. See further Nerlich, *supra* note 63, at 669.

139 See, in general, S. Wolf, 'The Moral of Moral Luck', 31 *Philosophic Exchange* (2001) 2–16.

140 See Meloni, *supra* note 18, at 620–621; Olásolo, *supra* note 138, at 107.

known', and conscious disregard standards.¹⁴¹ These differences ought to be reflected at sentence too. And third, even though the superior is not blamed for the crimes of the subordinate, the gravity of those crimes is relevant to sentencing.¹⁴² This is justifiable in terms of principle. With respect to prospective duties, the gravity of the interests endangered by the superior's dereliction bears on their culpability. It is more blameworthy to negligently risk, through one's dereliction, the commission of genocide than the commission of a direct attack against a civilian object.¹⁴³ Similarly, as to the commander's retrospective duties, the gravity of the subordinate's crimes — i.e. the crimes left unremedied by the superior's dereliction — bears on their blameworthiness. As before, it is more blameworthy to fail to take the necessary steps to investigate and punish genocide than the destruction of property.

Finally, the characterization proposed here ought to be reflected in the charges brought by the prosecutor and convictions entered by the Court.¹⁴⁴ That is, it is crucial to accurately label the commander¹⁴⁵ — both as a matter of fairness to the defendant and in terms of the criminal law's wider communicative and stigmatic functions.¹⁴⁶ What this means in practical terms is complicated by the heterogeneity of Article 28, as well as the countervailing problem of introducing excessive complexity into the relevant label. In the light of the argument above, the best solution might be a charge and conviction for dereliction of duty as a commander/superior.

6. Conclusion

The decisions and judgments across the proceedings in *Bemba* leave a range of issues in the doctrine of command responsibility uncertain. One of these issues

141 See relatedly Meloni, *supra* note 18, at 634–636; Nerlich, *supra* note 63. In relation to how certain national systems have dealt with this issue, see E. van Sliedregt, 'Article 28 of the ICC Statute: Mode of Liability and/or Separate Offence', 12 *New Criminal Law Review* (2009) 420–432.

142 On this point, see e.g., Judgment, *Orić* (IT-03-68-T), Trial Chamber II, 30 June 2006, §§ 727–729.

143 Relatedly, as Duff and Hörnle explain, a number of domestic legal systems do not include a *general* endangerment offence — i.e. an offence of endangering any interest protected by criminal law. Instead, endangerment offences tend to focus on specific, serious risks — most notably risks to human life — Duff and Hörnle, *supra* note 135, at 9–10. This is not to diminish the seriousness of directing attacks at civilian objects.

144 See Yokohama, *supra* note 47, at 289; Robinson, *How Command Responsibility Got So Complicated*, *supra* note 30, at 35–36.

145 See generally J. Chalmers and F. Leverick, 'Fair Labelling in Criminal Law', 71 *Modern Law Review* (2008) 217; D. Guilfoyle, 'Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law', 64 *Current Legal Problems* (2011) 255. For application, see M. Jackson, 'The Attribution of Responsibility and Modes of Liability in International Criminal Law', 29 *LJIL* (2016) 879–895; Robinson, *Justice in Extreme Cases*, *supra* note 21, at 249–256; T. de Souza Dias, 'Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law', 18 *ICLR* (2018) 788–821.

146 For a detailed discussion, see Chalmers and Leverick, *supra* note 145.

is causation. When these questions return, as they no doubt will, the Court should take the chance to re-cast the legal character of Article 28. Such a change would not resolve all remaining problems, but it would place the doctrine on a sounder basis.