



Blending International and Domestic law: Attributing Command Responsibility for Transnational Organized Crime

D. Sathya Bulathwela

Independent Researcher, Attorney-at-Law, Member of the Bar Association of Sri Lanka,

sathyabulathwela@gmail.com

Abstract: There is a growing trend of organized criminals crossing borders illegally and seeking safe haven in third countries. Gang leaders, including those involved in drug and arms trafficking, plan, oversee, and execute criminal activities from abroad through their subordinates in their countries of nationality. In the international criminal law, particularly as defined in the Rome Statute (1998), command responsibility applies only to genocide, crimes against humanity, and war crimes committed by military commanders or other superiors through their subordinates. Given that the Global Organized Crime Index (2023) demonstrates an increasing rate of criminality worldwide, attributing command responsibility to organized criminal leaders who direct and control the criminal activities of their subordinates becomes crucial. The study aims to examine the principle of command responsibility under international law, compare the approaches of various states in prosecuting leaders of organized crime, and assess the effectiveness of integrating international and domestic legal frameworks. To achieve these objectives, the study employs doctrinal and comparative legal analysis, with reference to the Rome Statute, international criminal case law, and legal mechanisms adopted by states. The study recommends introducing command responsibility through domestic anti-organized crime legislation and establishing domestic jurisdiction to prosecute organized criminal leaders. Unless organized criminal leaders are held accountable under command responsibility, modeled on international criminal law, organized crimes are likely to continue even after the apprehension of subordinates, due to the extensive networks these leaders have established.

Keywords: Transnational Organized Crime, Command Responsibility, International Criminal Law.

1 Introduction

The Global Organized Crime Index (2023), which was published by the Global Initiative Against Transnational Organized Crime, headquartered in Geneva, Switzerland reveals that the global organized crime rate continues to rise with more than 80% of the global population experiencing excessive criminal activities. The fact that Asia leads the Crime Index is alarming, as the region is home to many developing countries, whose development strategies are significantly affected by high criminal levels (See Fig. 1). According to the 2023 Crime Index, the increase in global criminality, despite the Global Initiative Against Transnational Organized Crime’s efforts to enhance crime resilience, highlights the urgent need for pragmatic and informed mechanisms to combat organized crimes worldwide. Therefore, the present study proposes the application of command responsibility under international criminal law as a means to establish liability under domestic criminal law for leaders of transnational organized crime. This serves as an effective mechanism, given that such leaders employ sophisticated methods to commit crimes across borders through their subordinates.



Fig. 1. Criminality Scores by Continent

2 Methodology

The study employs doctrinal legal research incorporating a comparative analysis of international criminal law and domestic prosecution approaches. It examines the sources of public international law (PIL), as international criminal law, the focus of this research forms a part of PIL. Accordingly, it employs a qualitative analysis of primary sources, including the Rome Statute (1998), the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Statute of the International Criminal

Tribunal for Rwanda (ICTR). The analysis also draws on subsidiary sources such as international criminal case law developed particularly by the International Criminal Court (ICC), ICTY and ICTR, as well as relevant scholarly writings. Moreover, the study refers to domestic statutes and case law to examine domestic prosecution approaches concerning superior-subordinate relationship and to identify gaps that support proposing command responsibility for leaders of transnational organized crime.

3 Discussion

3.1 The Doctrine of Command Responsibility in International Criminal Law

The Rome Statute (1998) specifies the jurisdiction of the ICC over the most serious crimes of genocide, crimes against humanity, war crimes and the crime of aggression that affect the international community (art. 5). Article 28 of the Rome Statute establishes the criminal responsibility of military commanders and other superiors for these crimes when they are committed under their effective command and control or authority and control. Article 28(2) of the Rome Statute (as amended, 2021), which establishes liability for civilian superiors based on a superior-subordinate relationship, is particularly applicable to the present study, as the focus is on civilian leaders of transnational organized crime. Accordingly, a superior can be found guilty for failing to exercise control over their subordinates while having effective authority and control.

International Criminal Court and Ad Hoc Criminal Tribunals

While the ICC, established by the 1998 Rome Statute, serves as the main judicial body in international criminal law, ad hoc tribunals such as the ICTY and ICTR were formed by resolutions of the UN Security Council under their respective Statutes to try individuals for serious violations of international law (Max Planck Institute for Comparative Public Law and International Law, 2011). A landmark ICC judgement on command responsibility was *Bemba* (2016), which convicted the former Vice President of the Democratic Republic of the Congo for war crimes of murder, rape and pillaging, and crimes against humanity of murder and rape committed on the territory of the Central African Republic by a militia group under his command. The case demonstrated that a commander can be held liable for the actions of subordinates regardless of the commander's status or political power. However, in 2018, Mr. Bemba's conviction was reversed, and he was acquitted by the Appeals Chamber of the ICC, which found that the Trial Chamber had erred in examining his intention as a remote commander sending troops to a foreign land and in assessing his actions to prevent the commission of crimes by his subordinates (Appeals Chamber, ICC, 2018). This decision demonstrates that, in order to find a commander guilty under command responsibility, both effective control and the commander's intent are crucial.

Article 7 of the ICTY Statute (2009) establishes individual criminal responsibility for superiors who planned, ordered, aided or knew about crimes committed or about to be committed by their subordinates. In a landmark judgement on superior responsibility, *Mucić*, who was the commander of a detention camp was

held liable along with two others for inhumane treatment, murder and torture committed by his subordinates (*Čelebići Case*, 2001, ICTY). When applying this legal position to leaders of transnational organized crime, they can be found guilty as they generally plan, manage and order their subordinates to commit crimes often within their countries of nationality, while concealing themselves in other jurisdictions. The operations of such leaders are primarily facilitated by institutional weaknesses, corruption and political support. In *Blaškić* (2000), the ICTY held that the determining factor is whether the superior had control over the conduct of their subordinates.

In imposing individual liability, the theory of Joint Criminal Enterprise (JCE) has been applied by the ICTY when the accused acted with a common purpose within a group (Boas et al., 2010). In JCE, holding an individual liable requires establishing whether they acted knowingly and voluntarily for the commission of the crime under the common criminal plan. Ohlin (2011) proposed a method to define the scope of JCE with two categories. The first is co-perpetrating a JCE, which applies to individuals who participate at a high level of planning, intend to achieve the group's criminal goal, and play an indispensable role in ensuring its success. The second category is aiding and abetting a JCE, which applies to those who support the enterprise but do not meet all of the above conditions. Accordingly, leaders who plan, intend and play a crucial role in ensuring the success of a crime fall under the first category.

Like the ICTY Statute, Article 6 of the ICTR Statute identifies the individual criminal responsibility of superiors for the conduct of their subordinates. In *Ignace Bagilishema* (2002), the ICTR acquitted the accused, a mayor charged with seven counts including grave breaches of Article 3 common to the Geneva Conventions, genocide and crimes against humanity, holding that the prosecution failed to establish that he exercised effective control over the local population that killed Tutsis, who were a local minority in Rwanda. Therefore, establishing a superior's effective control over subordinates is crucial when prosecuting leaders of transnational organized crime under domestic legal systems.

3.2 Elements of a Crime and Command Responsibility

Generally, in criminal law, a suspect is found guilty of an offence if both the physical element (*actus reus*) and the mental element (*mens rea*) are satisfied. This requirement is condensed in the legal maxim *actus non facit reum nisi mens sit rea*, which provides that conduct alone does not constitute a crime; the offender's state of mind must also be examined (Awan, 2025). This maxim can be applied to the principle of command responsibility, as the mental element is crucial to establishing a superior's liability, given that the crimes are often committed not by the superior directly, but by their subordinates under their command or authority.

It is the mental element that gives command responsibility greater gravity than other superior-subordinate relationships. Article 28(1) and (2) of the Rome Statute provide comparatively similar provisions for the command responsibility of military superiors and civilian superiors respectively. However, their mental element is fairly different. While the prosecution must establish that military commanders knew or

should have known that their forces were committing or about to commit a crime (art. 28(1)(a), Rome Statute), in the case of civilian superiors, it must be shown that they knew or consciously disregarded information, suggesting that their subordinates were committing or were about to commit a crime (art. 28(2)(a), Rome Statute).

Robinson (2012) demonstrates three ways in which the accountability of commanders arises; First, if a superior orders the commission of a crime, he is liable for ordering, encouraging or committing the crime; Second, if the superior does not order the commission of crime, but is aware of it and contributes to it, he can still be held liable for aiding and abetting. Third, a superior is liable when he is aware of a crime being committed but fails to prevent it. The accountability for aiding by omission was affirmed by the ICTY Trial Chamber II in *Orić* for the commander of Bosnia and Herzegovinan Army, concerning plunder of public or private property and wanton destruction of villages, cities or towns (art. 3, ICTY Statute).

The above discussed provisions of the Rome Statute and the mental element required for command responsibility, establish that even if a superior does not order the commission of a crime, their deliberate ignorance in failing to prevent crimes committed by subordinates, despite having knowledge of such conduct, can make them liable under command responsibility. Therefore, even when leaders of transnational organized crime groups do not issue direct orders, the series of crimes often committed by their subordinates may still make those leaders accountable under command responsibility.

3.3 Domestic Approaches to Criminal Prosecution

While command responsibility remains as an international construct, several domestic legal systems have adopted functionally equivalent approaches, such as common intention and joint enterprise. Although not closely similar to command responsibility, most common law jurisdictions such as Singapore, India, Sri Lanka and Bangladesh utilize the doctrine of common intention under their respective Penal Codes to hold suspects individually liable for collective criminal acts committed pursuant to a shared intention (s.34, Singapore Penal Code; s.34, Indian Penal Code now replaced by s. 3(5), Bharatiya Nyaya Sanhita; s.32, Sri Lanka Penal Code; s.34, Bangladesh Penal Code).

In establishing common intention, both the shared intention of the contributors to the offence and their participation in the commission of the crime are required in India (*Surender Chauhan v. State of Madhya Pradesh*, 2000). Statutory provisions on common intention have been interpreted as requiring the physical presence of a person at the scene when the offence is committed (*Ramaswami Ayyangar and Others v. State of Tamil Nadu*, 1976). Amirthalingam (2008) notes that section 34 of the Singapore Penal Code, which deals with common intention is silent on *actus reus* and *mens rea*. *Lee Chez Kee v. Public Prosecutor* (2007) is a landmark decision in which the Singapore High Court clarified the position of section 34. The court held that four elements are required to establish common intention: 1) criminal act 2) participation in the commission of the crime 3) a common intention shared by the offenders 4) conduct in furtherance of that common intention. It further held that participation does not require physical presence (Lee, *supra* note 1, at paras. 146-147).

In the absence of physical presence in relation to common intention, liability may still be attributed through principles of vicarious liability (*Surender Chauhan v. State of Madhya Pradesh*, 2000). Kreit (2008) discusses vicarious criminal liability, which holds a person accountable for the acts of another, and critiques it on the basis that the mental element of the accused is essential to establishing criminal responsibility. Therefore, approaches such as common intention will not always achieve justice in holding leaders of transnational organized crime liable for the acts of their subordinates, particularly because such leaders are often not physically present at the crime scene. On the other hand, in the absence of physical presence, these leaders also cannot be held accountable under vicarious liability, which remains controversial in the context of criminal offences.

Joint enterprise is another common law approach that focuses on collective criminal liability (Amirthalingam, 2008, p. 435). As practiced in jurisdictions such as the UK, joint enterprise operates as a form of secondary liability, under which both the principal offender who committed the crime and all those who involved in its commission are held accountable (UK House of Commons, Justice Committee, 2012). The House of Commons Judicial Committee (2012) emphasizes that over-prosecuting those involved in crimes under joint enterprise is not an effective solution to deter organized criminal activity. It further notes that the lack of clarity surrounding the scope of joint enterprise discourages even witnesses from coming forward due to fear of prosecution. Therefore, it highlights that joint enterprise, because it fails to clearly define its scope and often leads to the over-charging of suspects, is not a successful prosecutorial approach for targeting leaders of organized crime.

Irrespective of the collective responsibility imposed under the principles of common intention and joint enterprise, it is evident that individual responsibility disrupts the cycle of shared guilt and promotes fairness. This approach was demonstrated by the Nuremberg trials, which prosecuted Nazi war criminals. Danner and Martinez (2005) emphasize how individual responsibility was imposed on key leaders at Nuremberg, thereby releasing the broader population from collective responsibility. A former ICTY Judge Cassese (1998) also affirmed the value of individual responsibility over collective guilt, recognizing the justice it offers to those who did not genuinely participate in the crimes. Therefore, it can be argued that leaders of organized crime can be held individually liable under command responsibility when they plan and order the commission of crimes or when they know that their subordinates are committing a crime or are about to commit a crime.

Jurisdictions have adopted various criminal laws to prosecute organized criminals. In Germany, the German Criminal Code (1998) specifies in section 129 the criminal liability of criminal organizations consisting of more than two individuals. In the United Kingdom, the Crime and Courts Act (2013) established the National Crime Agency with a prime objective of combating organized crime. However, jurisdictions such as Sri Lanka are still in the process of introducing specific legislation on organized crime, as they currently prosecute such criminals under other legislation, such as the Prevention of Terrorism Act No.48 of 1979 (as amended). The Sri Lankan government stated during the 60th Human Rights Council in September 2025 that it is drafting an

anti-organized crime Bill to address the rising rates of organized crime in the country. Although these national laws address the prevention of organized crime, they do not specifically focus on those who plan and order the commission of criminal acts, primarily gang leaders. Therefore, it is significant for each jurisdiction, particularly those experiencing high crime rates, to incorporate provisions establishing the criminal responsibility of leaders of organized crimes, similar to the doctrine of command responsibility into their respective domestic laws.

4 Recommendations

Certain jurisdictions do not specifically possess anti-organized crime legislation. Consequently, organized criminals are apprehended under existing laws such as the Prevention of Terrorism Act and Criminal Laws. Therefore, each jurisdiction should introduce specific anti-organized crime legislation. Such domestic legislation should incorporate provisions on the criminal responsibility of leaders of organized crime, modelled on the principle of command responsibility. Accordingly, national laws would align with international criminal law standards by holding superiors liable when they plan, order, initiate or aid the commission of crimes. The article recommends that individual criminal responsibility be imposed on these leaders, as established in international judicial decisions concerning commanders and other superiors. States must also ensure effective implementation of provisions on command responsibility in national anti-organized crime legislation, as legislation alone is insufficient to achieve justice without effective enforcement.

5 Conclusion

Leaders of transnational organized crime exploit corruption, political assistance and systematic flaws to secure safe havens in foreign jurisdictions while directing criminal activities in their home countries through subordinates. When attributing command responsibility to such leaders, it is crucial to establish that they exercised effective control over their subordinates. Unlike the principles of common intention and joint enterprise, which impose collective liability, individual responsibility promotes fairness by ensuring that offenders are punished based on their own conduct and intent. Individual criminal responsibility of superiors can be precisely attributed to transnational organized crime, as the statutory provisions of international criminal tribunals permit for holding leaders individually liable when they plan, initiate, order, or aid the commission of crimes. Therefore, it is recommended that national anti-organized crime legislation incorporate the principle of command responsibility and ensure its effective implementation, thereby recognizing the individual liability of leaders and contributing to safer communities with low levels of organized crime.

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Disclosure of Interests

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