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COMMAND RESPONSIBILITY IN THE CASE OF THE PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO DURING THE CONFLICT IN THE CENTRAL AFRICAN REPUBLIC IN 2002-2003

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ABSTRACT

The issues of human rights have remained the task of states, scholars and, above all, the international criminal justice system. The international criminal law acknowledges the concept of command responsibility. After the World War II, this concept become a landmark to convict numerous high-rank individuals in Nuremberg and Tokyo Trial. The ad hoc tribunals of Former Yugoslavia and Rwanda also adopts the command responsibility in a more comprehensive manner. Upon the urgency to establish a permanent judicial body, the command responsibility is also incorporated in the Rome Statute. The first individual who was convicted by command responsibility pursuant to Article 28of the Rome Statute is Jean Pierre Bemba Gombo, a Congolese political party leader and a general of *Mouvement de Libération du Congo*. The decision of the Appeals Chamber to acquit him on the basis that he does not bear command responsibility for the war crimes and crimes against humanity occurred in the 2002-2003 conflict received many critiques from legal scholars and non-governmental organization.

The acquittal of Bemba means there will be no reparation for the victims, particularly women and under aged girls. The legal concept of command responsibility faces challenges due to its contested jurisprudence and the intricate wording of Article 28a. To establish the liability of a military commander or an individual in a similar role under article 28a, it must be demonstrated that the forces were under their effective control, that they knew or should have known about the commission or imminent commission of crimes, and that they neglected to take all necessary and reasonable measures within their power to prevent or address the crimes. Notably, article 28 does not specify the criteria for determining the 'reasonableness' of a measure or how to ascertain if a commander has failed to take 'all' necessary available measures.

Keyword: command responsibility, Rome Statute, war crimes, crimes against humanity, motives

PREFACE

Give thanks to the Lord Jesus for He is good, due to his blessings only I could finish my case study as my final task in bachelor degree of law. Throughout the years being a law student and during the process of the writing of this case study, there are a lot of people who help me sincerely until I reach to this stage of my academic life, therefore, I would like to express my gratitude and appreciation for:

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CHAPTER 1
INTRODUCTION

1.1 Background

Humans were born with fundamental human rights. This means that fundamental rights were inherent, and therefore cannot be derogated. Human rights also behold universal character, which means human rights belong to every human being without any exception. This indicates that the ideal fulfillment of human rights is not based on the interest of certain groups, religion, or races. The fundamental human rights must be upheld among fellow human beings. Human rights are not just *any* rights, human rights are meant to protect every human being and also as a moral parameter. Hence, the fulfillment of human rights is the obligation of all entities, such as states, legal system, government, and society.

In international law, larger entity such as states are known to be the executor and organizer of human rights. However, non-state individual such as individual is also obligated to exercise and apply human rights. Hence, individual who violates human rights is legally responsible of his or her action. In such case, international criminal law acknowledges the notion of individual responsibility for the most serious crimes of concern to the international community as a whole, such as, crimes against humanity, war crimes, genocide, and crimes of aggression. In the aftermath of the Second World War ("World War II"), the international community suffered not only from economic losses, but also from countless serious crimes that threatened peace and security.[1] As a result, the international community was very eager to condemn all the masterminds of the cruel war.

Facing the horrendous tragedy and the aftermath of Holocaust, The Allies which consist of the United Kingdom of Great Britain and Northern Ireland (“UK”), United States of America (“USA”), France, and Union Soviet Socialist Republics (Russia Federation) established the International Military Tribunal (“Nuremberg Trial”) in 1945. Pursuant to the Charter of International Military Tribunal (“Nuremberg Charter”), the primary purpose of this trial is to prosecute those Nazis

[1] Transitional Justice: Postwar Legacies (Symposium: The Nuremberg Trials: A Reappraisal and Their Legacy) (2006) 27(4) Cardozo L. Rev. 1615, pg. 1615.

who were responsible for common plan or conspiracy, crimes against peace, war crimes, and crimes against humanity.[2] One of the landmark cases from this Trial is *U.S. v. Von Leeb et.al.* ("The High Command Case"). In this case, the Nuremberg Tribunal established the notion of commander responsibility, which mandates that a commander must possess knowledge regarding the offenses and either authorize or participate in their commission, or prevent their troops' crimes.[3]

In the wake of Japanese atrocities and war crimes during World War II, particularly the Japanese attack on Pearl Harbor in 1941, the Allies, under the command of Supreme Commander for the Allied Powers, General Douglas MacArthur, once again established a tribunal to prosecute Japanese commanders responsible for crimes against humanity and war crimes in 1946.[4] The notion of command responsibility is also adopted by the International Military Tribunal for the Far East ("Tokyo Trial") in the *Trial of General Tomoyuki Yamashita* ("Yamashita Case").[5] Tomoyuki Yamahsita faced charges for ordering his troops to commit war crimes and crimes against humanity on a massive scale in Philippine.[6] Yamashita was accountable as not only he ordered his troops to commit crimes, but he did not pursue any methods or take any measures to prevent the crimes committed by his troops.[7] Yamashita was accountable as not only he ordered his troops to commit crimes, but he did not pursue any methods or take any measures to prevent the crimes committed by his troops. [8] On the basis of Yamashita Case and The High Command Case, it can be determined that war crimes committed are the responsible of the commander.

Even though the Nuremberg and Tokyo Trials had set a precedent for accountability for war crimes and crimes against humanity, the crimes that affect the international community as a whole have not stopped. The killings, rapes, and

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[2] The Charter of the International Military Tribunal (1945), (adopted 8 August 1945, entry into force 8 August 1945) 82 UNTS 279 ("Nuremberg Charter"), Art. 6.
[3] U.S. v. Von Leeb et.al, Case No. 12 of United States Military Tribunal at Nuremberg, (1947-1948), para. 544
[4] Charter of the International Military Tribunal for the Far East (1946) (adopted 19 January 1946, amended 26 April 1946) TIAS 1589, 4 Bevans 20, 27 ("Tokyo Charter").
[5] Trial of General Tomoyuki Yamashita, 4 LRTWC 1, (1946), para. 3.
[6] Franklin A. Hart, 'Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised' (1972) 25(7) NWCR 19, pg. 21.
[7] *ibid*, pg. 22.
[8] *ibid*, pg. 22.

massive crimes against humanity in the former Yugoslavia in 1993 and the Hutu-Tutsi mass killings in Rwanda had forced the international community to establish judicial bodies to prosecute these perpetrators. In response, the United Nations Security Council passed two resolutions establishing *ad hoc* tribunals. The first resolution was passed on May 25th 1993, this resolution was passed as a legal basis to establish the International Criminal Tribunal for the Former Yugoslavia ("ICTY").[9] The second resolution was passed on November 8th 1994 as a legal basis to establish the International Criminal Tribunal for Rwanda ("ICTR").[10] Throughout the whole proceedings in these two *ad hoc* tribunals, commanders who were responsible for the war crimes and crimes against humanity were indicted on the basis of command responsibility. Commanders such as Jean-Paul Akayesu and Stanislav Galić were found guilty of failing to prevent the crimes committed by their subordinates.[11]

Despite the fact that the international community and the United Nations have established *ad hoc* tribunals over the years to address these serious crimes, the power of ad hoc tribunals remains limited. *Ad hoc* tribunals such as ICTR and ICTY are limited in their jurisdiction by both time and territory. Therefore, these tribunals can only prosecute crimes that took place within the specific territory they were granted jurisdiction over. These factors contributed to the urgency of making a permanent international criminal tribunal which are not bound by time and territory. With regard to the urgency of the matter, in 1994 the International Law Commission developed a Draft Statute for an International Criminal Court, and in 1996 a Draft Code of Crimes against the Peace and Security of Mankind. From these drafts, the Statute of International Criminal Court ("Rome Statute") was established in 1998. The jurisdiction of the International Criminal Court ("ICC") is enshrined in Article 5 of the Rome Statute as follows:

[9] United Nations Security Council 'Resolution 827 (1993)' (25 May 1993) UN Doc/S/Res 827.
[10] United Nations Security Council 'Resolution 955 (1994)' (8 November 1994) UN Doc/S/Res 955.
[11] Akayesu, ICTR-96-4-T, (1998), para. 691; Galic, IT-98-29-A, (2006), para. 374.

> "*The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:*[12]
> *(a) The crime of genocide;*
> *(b) Crimes against humanity;*
> *(c) War crimes;*
> *(d) The crime of aggression."*

On July 17th 2018, the ICC expanded its jurisdiction and incorporated crimes of aggression.[13] Despite the ICC's nature as an international court, it applies the complementary principle.[14] This principle dictates that ICC was not established to replace the position and sovereignty of national courts, but it rather adjudicate cases that cannot be tried by national courts.[15] In 2023, there are 137 States Parties to the Rome Statute, while 123 States have ratified the Rome Statute.[16]

This case study will focus on one of the crimes under the ICC's jurisdiction, which is war crimes. War crimes is defined as an international crime that can have a direct impact on the security of the international community. In International Humanitarian Law ("IHL"), the terminology of war is no longer used. The terminology of *armed conflict* is currently applicable in IHL instead of *war*. Armed conflict refers to the use of armed forces between states, or protracted armed violence between government authorities and organized armed groups, or between such groups in the same state.[17] IHL as the law that invokes during armed conflict has a set of core principles that must not be violated. Parties of the armed conflict are obliged to apply IHL's core principles of *distinction,*[18] *military necessity,*[19] *avoidance of unnecessary suffering,*[20] and *proportionality*.[21] As a result, war crimes

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[12] Rome Statute of the International Criminal Court (1998), (adopted 17 July 1998, entry into force 1 July 2002), 2187 UNTS 3 ("Rome Statute"), Art. 5.
[13] *ibid*, para. 30.
[14] *ibid*, para. 9.
[15] *ibid*.
[16] United Nations Treaty Collection, 'Depository of Rome Statute of International Criminal Court' (United Nations Treaty Collection, 8 December 2023) < https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en > accessed 8 December 2023.
[17] Tadić, (IT-94-1-A), para. 70.
[18] Rome Statute, Art. 8(2)(b)(i).
[19] Kordic and Cerkez, ICTY IT-95-14/2-A, para. 686.
[20]Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of *Victims* of International Armed Conflicts (adopted 8 June 1977, entry into force 7 December 1978) 1125 UNTS 3, Art. 50. ("AP 1")
[21] AP 1, Art. 51(5)(b).

can be understood as a violation to these principles, either in international armed conflicts ("IAC") or in non-international armed conflicts ("NIAC").[22]

War crimes are associated with a particular form of individual responsibility, specifically command responsibility. The concept of command responsibility was first introduced from the post-World War II and the ICTY and ICTR war crimes judgement.[23] Before the adoption of Geneva Convention, command responsibility was regulated under the Hague Regulations 1907. The Hague Regulations 1907 explicitly stipulates that a commander is liable for his troops' action.[24] The ICTY and ICTR's statute have also incorporated provisions for command responsibility and they were applied in war crimes cases in the former Yugoslavia and Rwanda.[25]

ICC specifically regulate the commander responsibility in Article 28(a) of the Rome Statute. Pursuant to Article 28a, a military commander is held liable for the crimes committed by the troops he or she command.[26] The IHL accommodates command responsibility in the First Additional Protocol to the Geneva Conventions ("AP 1").[27] The primary purpose of this rule of law is to ensure that commanders are held accountable for failing to prevent and punish crimes committed by their troops. The element of knowledge in command responsibility is essential as military commanders are obliged to have knowledge of crimes committed by their troops or crimes about to be committed by their troops. However, the command responsibility stipulated in Article 28(a) is not being fully implemented according to its intended purpose.

Article 28a of the Rome Statute embodies *should have known* standard. This standard requires that the commander has been negligent in failing to acquire

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[22] *Rome Statute of The International Criminal Court Statute*, Art 8(2). ("Rome Statute")
[23] Yale Law Journal Company, 'Command Responsibility for War Crimes' (1973) 82(3) Yale. L.J 1274, pg. 1274.
[24] Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 (adopted 18 October 1907, entry into force 1907) 2 AJIL Supp. 43, Art. 1. ("Annex to the Hague Regulation 1907")
[25] *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, Art. 7(3); *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994*, Art. 6(3).
[26] Rome Statute, Art. 28(a).
[27] AP 1, Art. 86 (1) and Art. 87.

knowledge.[28] In fact, should have known standard is challenging for the Court to assess due to numerous factors that influence the commanders' knowledge of the potential crime to occur or for them to have known that a crime would occur. This particular problem occurs in the case of *Prosecutor v. Jean-Pierre Bemba Gombo*, where ICC was faced to address the incompatibility between Article 28a of the Rome Statute and its application to the situation in Democratic Republic of Congo. In the Appeal Chamber judgement, The majority acquitted Jean-Pierre Bemba Gombo ("Mr. Bemba") of command responsibility, holding that he was a remote commander, meaning that he was not present at the scene of war crimes. Nevertheless, Mr. Bemba's absence from the scene appears to be the key factor in his impunity under Article 28a, while there is no legal provision in the Rome Statute that acquit a commander from command responsibility on the basis of or as a result of his absence from the scene. The Appeal Chamber's reasoning ("*Rationes Decidendi")* motivated the author to analyze and prove whether the absence of the commander at the scene of the incident is a factor in the exemption from command responsibility. Besides inconsistencies in the application of Article 28a, the ICC procedural law also fails to resolve this case. Instead of amending the decision made by the Trial Chamber, the judges of the Appeal Chamber overturned the verdict, resulting in Mr. Bemba's absolution from all accusations.[29]

Pursuant to Article 83(2), the Appeals Chamber has the power to amend the judgment of the Trial Chamber and Pre-Trial Chamber if it finds that (1) there is a material or formal defect in the law, (2) there has been an unfair trial which has an effect on the outcome of the judgment.[30] This judgment deserves to be studied further because the parameters of the element of knowledge in Article 28a of the Rome Statute are vague, since the factor of the presence of the commander at the scene of the crime is the reason why the Appeals Chamber acquitted Mr. Bemba from the responsibility of the commander. It is also relevant to examine the decision of the Appeal Chamber to reverse the judgement of the trial chamber, despite the

[28] Michael Stiel and Carl-Friedrich Stuckenberg, 'Article 28a: Responsibility of commanders and other superiors, in Mark Klamberg (ed.), Commentary on the Law of the International Criminal Court, 1st Edition (2017) 29, para. 288. ("Statute Commentary")
[29] Bemba, ICC-01/05-01/08 A (2018), pg. 4.
[30] Rome Statute, Art. 83(2).

fact that the Trial Chamber's judgement had met the standard of proof beyond reasonable doubt. Therefore, the author aims to examine this case in greater depth. Thus, the author is determined to conduct a case study concerning "**Case Study on Prosecutor v. Jean-Pierre Bemba Gombo through International Humanitarian Law Perspective**".

1.2 Statement of the Problem

Based on the background that has been described, the problems raised by the author in this paper are:

1. Was the application of Article 28a of Rome Statute in this judgement correctly applied?
2. Was the reversal of the Trial Chamber's judgement which had met the standard of proof beyond reasonable doubt in accordance with the Rome Statute?

1.3 Purpose and Benefits of Writings

a. Writing Purpose

This case study is aimed at achieving the following objectives:

1. To clarify the parameters of Article 28a of The Rome Statute
2. To determine whether the reversal of Trial Chamber's decision on *Prosecutor v. Jean-Pierre Bemba Gombo* complies with the Rome Statute

b. Writing Benefits

1. Theoretical Benefit

   This case study aims to enhance the range of knowledge on the development of international criminal law in the context of war crimes during armed conflict.

2. Practical Benefit

   A. The author expects this research to add insight and sharpen legal reasoning in the fields of international criminal law and international humanitarian law.

B. This case study aims to provide the reader an insight and a better understanding of the importance of understanding international criminal law and international humanitarian law.

1.4 Research Method

A. Type of Research

Pursuant to Peter Mahmud Marzuki, legal research is an empirical activity based on methods, systematics, and certain conceptions.[31] Ultimately, legal research aims to provide a thorough understanding of legal phenomenon, resolve legal issues, and examine particular legal theories.[32] In the view of Soerjono Soekanto, legal research can be classified into two types which are (1) normative legal research and (2) empirical legal research.[33] Normative legal research can be conducted with these following approaches:[34]

a. statute approach;
b. case approach;
c. historical approach;
d. comparative approach;
e. conceptual approach

Based on those following approaches above, this case study pertains to normative legal research that rely on case approach. The case approach was chosen to analyse the application of the legal principles of the Rome Statute and international humanitarian law in the case of *Prosecutor v. Jean-Pierre Bemba Gombo*. The case study sought to highlight the inconsistency between the application of the legal principles of the Rome Statute and the elements of command responsibility for crimes committed in Congo. In normative legal research, seven objects of study are: positive legal inventory, legal principles, legal systematics, vertical and horizontal levels of synchronisation, comparative legal research, legal history and legal findings *in concreto.*[35]

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[31] Dr. Muhaimin, SH.,M.Hum, *Metode Penelitian Hukum* (Mataram University Press 2020), pg. 19.
[32] *ibid*, pg. 21.
[33] *Ibid*, pg. 28.
[34] Peter Mahmud MZ, *Penelitian Hukum* (Prenada Media 2005), pg. 93.
[35] Abdulkadir Muhammad, *Hukum dan Penelitian Hukum* (PT. Citra Aditya Bakti 2004), pg. 52.

B. Nature of research

This case study applies a descriptive analytical methodology to assess the impact of the presence of a commander at *locus delicti* on his command responsibility and to analyse the decision of the Appeal Chambers reversing the decision of the Trial Chamber.

C. Data Collection Method

The data that includes and is included in this research will be collected by searching for literature sources through online and offline in the form of books, journals, and other sources. The primary legal materials in this case study include the Four Geneva Conventions and Additional Protocols, the Rome Statute, Rules of Procedure and Evidence, and Elements of Crimes. The Secondary legal materials in this case study include books, journals, articles, and dissertations that have relevance to the knowledge element of a commander in Article 28a of the Rome Statute, war crimes, crimes against humanity and ICC procedural law.

D. Data Analysist

The collected data will be developed using a qualitative method in which the data will be systematically arranged based on the quality and accuracy of the data to support the drawing of conclusions related to the issues raised in this case study.

1.5 Systematics of the Writing of the Thesis

The case study will consist of five chapters, each written as follows:

CHAPTER I INTRODUCTION

Chapter I outlines the background on the international humanitarian law's implication on Prosecutor v. Jean-Pierre Bemba Gombo.

CHAPTER II CASE BACKGROUND AND CASE SUMMARY OF THE CASE

Chapter II provides a case history and summary of the case Prosecutor v. Jean-Pierre Bemba Gombo

CHAPTER III PROVISIONS OF INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMANITARIAN LAW RELATED TO THE CASE

Chapter III consist of the author's examination on the doctrine of command responsibility both in Rome Statute and International Humanitarian Law's principles and conventions.

CHAPTER IV DISCUSSION ON THE RATIONES DECIDENDI OF THE CASE

Chapter IV provides the author's examination towards the application of the rules and doctrine of command responsibility in Chapter II in the case of Prosecutor v. Jean-Pierre Bemba Gombo

CHAPTER V CONCLUSION

Chapter V is the final chapter of this case study where the author will draw a conclusion from the thorough legal analysist and legal findings. This conclusion drawn is based on the analysist presented in the previous chapters.