Command Responsibility Under Fire

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Some say the charge is too often misused and misapplied, while others insist it is a vital way to protect human rights.

Two weeks after the death of former Yugoslav president Slobodan Milosevic, the storm of criticism against the Hague tribunal from analysts and political observers continues.

Questions are being asked about whether the prosecution is placing too much reliance on the concept of command responsibility – where a senior figure is held accountable for the actions of those further down the chain of command.

Milosevic was charged with a series of crimes - persecutions, murders, rapes - spanning three countries, allegedly carried out by his henchmen and supporters.

Proponents of the concept - a customary principle of international law since the beginning of the last century - say the ability to hold commanders to account for the actions of their subordinates is crucial if the customs of war are to be upheld and human rights violations prevented.

But even before Milosevic's death raised new questions about protracted trial proceedings, some observers had accused the tribunal of misusing the charge and applying it to the wrong cases.

The main criticisms come from defence lawyers at the tribunal, who have told IWPR that such charges are being used as a "last resort" by prosecutors who feel obliged to indict a senior officer, even though there is little evidence against them.

Strikingly, many charges based purely on command responsibility have been brought against Bosnian Muslim indictees.

Stephane Bourgon is defence counsel for Muslim commander Enver Hadzihasanovic, who along with Amir Kubura was ruled to have failed to prevent or punish crimes carried out by Bosnian army troops during clashes with Bosnian Croat forces in central Bosnia in 1993. He alleges that tribunal prosecutors may be using command responsibility for persecutions as a way of "reach[ing] high level commanders in the absence of evidence that they were involved in the perpetration of crimes".

Others who've faced or face the charge include Sefer Halilovic who was acquitted of responsibility for murders of Bosnian Croats in the Bosnian territories of Grabovica and Uzdol. Rasim Delic - Halilovic's superior - will now face the same allegations. Meanwhile, the trial of Bosnian commander Naser Oric, who is charged with failing to prevent looting by Muslim fighters in the Srebrenica region, is scheduled to end in April.

Judges in at the tribunal have been instrumental in expanding the scope of command responsibility legislation to include those who failed to prevent or punish crimes committed by those under their control. In these cases, command responsibility has become a crime of omission or negligence.

John Jones, who represents Oric, told IWPR that prosecutors use the omissions or negligence argument as a “fallback position” when they don’t have sufficient evidence to prove that commanders had planned or ordered war crimes themselves.

Another problem with command responsibility as a crime of omission is that it may not be appropriate to apply this to the most serious crimes.

One of the cases that critics have focused on is that of Radoslav Brdjanin, a Bosnian Serb official charged with responsibility for atrocities occurring in prison camps in the Bosnian Krajina region. In September 2004, trial judges in his case ruled that superiors could be found to have command responsibility for acts of genocide committed by their subordinates.

However, this goes against the idea that the accused must have “special intent” to commit genocide, which is a key requirement of any genocide conviction.

Brdjanin was not convicted of genocide, but his case - which is still on appeal - confirms that legally, he could have been. This interpretation has won little support from legal experts.

Professor Beth van Schaack, who formerly worked for the tribunal’s prosecution and now teaches at the Santa Clara University School of Law, told IWPR that it does “intuitively feel wrong” to apply command responsibility in genocide charges, “especially considering the stigma that genocide has”.

For their part, prosecutors face an uphill struggle when trying to prove command responsibility charges. The worst wartime atrocities can be the most difficult to bring to justice, as prosecutors battle to prove the link between the lofty political intentions of high-level accused and the acts of genocide and ethnic cleansing carried out on the ground.

These links must be demonstrated with military orders and official records of army command structures and backed up by the testimony of numerous insider witnesses.

It was through the command responsibility doctrine that Nazi generals were prosecuted at Nuremberg, but while the Nazi government may have left a complete administrative archive - a goldmine for Nuremberg prosecutors - details of the Balkans conflicts were not so obsessively documented.

Witnesses testifying in defence of Oric have described how, as Serb forces besieged Bosnia’s Srebrenica enclave in 1992 and 1993, resources were so scarce that Bosnian army officials lacked the pens and paper to make even the most basic written orders.

And even when relevant documents do exist, the tribunal has to battle to have access to them. Minutes of meetings held by the Supreme Defence Council, the body which oversaw the actions of the Yugoslav army, were disclosed to the prosecutor only after protracted negotiations and are subject to strict confidentiality clauses.

A further hurdle for prosecutors is that there must be sufficient proof that the commander exercised

“effective control” of the troops he is alleged to have presided over.

After the first-ever command responsibility trial, that of Japanese General Tomoyuki Yamashita who sentenced to death for crimes during World War Two, US Supreme Court Judge Frank Murphy criticised the guilty conviction on the basis that in the chaos of battle, Yamashita was simply unable to control his troops.

In a damning dissenting judgment, Justice Murphy said that to use the “inefficiency and disorganisation created by the victorious forces as the primary basis for condemning officers of the defeated armies” bore “no resemblance to justice or to military reality”.

A similar complexity arose in the case against Hadzihasanovic and Kubura, who were both charged with responsibility for crimes committed by the Mujahedin, Muslim soldiers who came to Bosnia from Saudi Arabia and North Africa to aid their fellow Muslims in the fight against Serb forces.

Even though some of the Mujahedin formally became part of the Bosnian army with the establishment of the El Mujahed detachment in August 1993, defence witnesses in the trial of the Muslim commanders recalled how the foreign fighters had been disruptive and almost impossible to discipline.

This case also raised the issue of when a commander’s criminal responsibility should begin. In 2003, the appeals chamber ruled that Kubura should not be held responsible for failing to punish his troops for abuses committed before they came under his command.

But according to van Schaack, “It is sending out a bad message to say that if you inherit a rag-tag army then you’re not responsible for their actions.

“It is your duty to investigate abuses and carry out prosecutions even if the crimes didn’t occur on your watch.”

Professor Michael Scharf, director of the Frederick K Cox International Law Centre in Cleveland, agrees. He told IWPR that if commanders cannot be prosecuted for crimes committed before they assumed their post, “a country can just move commanders around like a shell game in order to avoid the duty to prosecute”.

“This makes a gap in the law of command responsibility so big you could drive a truck

through it,” he added.

Both prosecutors and defence counsel agree that command responsibility trials can have an effect which reaches beyond the courtroom.

According to Jones, the defence against command responsibility charges usually involves the accused throwing similar accusations at his opponents.

“If you charge a general with having command control over troops then he will say, ‘It was very difficult to

control the forces because terrible crimes were being committed against us',” he said.

In the long term, this animosity can only have a negative effect.

“The [tribunal's] excessive use of command responsibility has compromised truth and reconciliation in the region because the trials involve mutual recriminations, and everyone is as bitter as they were throughout the war. It is the worst thing that has happened at the tribunal,” said Jones.

However, Anton Nikiforov, special advisor to the prosecutor at the tribunal, told IWPR, “Throughout many trials we have always insisted on the responsibility of a commander to protect civilians, non-combatants and prisoners of war regardless of the actions of the other side in the conflict. This is the essence of the laws and customs of war. The defence cannot simply say, 'The other side were committing crimes also.' It was never considered to be a good or complete defence.”

But Jones remains pessimistic, saying the prosecutions “encourage a bureaucratic commander who covers himself with memos, a commander who is much more concerned with the paper trail than the results of his actions”.

Van Schaack sees it differently. “Command responsibility creates enormous incentives for commanders to stay in touch with their troops, to get out into the field, to create a system of oversight,” she said.

Meanwhile, Bourgon is keen to point out that even if he criticises the tribunal's use of command responsibility, he is strongly in favour of the doctrine which he believes to be a “special and unique” way of holding commanders to account.

This, he says, is one of the key means of applying legal and humanitarian regulations to conflict situations, which remain otherwise “awful, impersonal and inhuman”.

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