

# SUPERIOR RESPONSIBILITY

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## 1. Introduction

International law imposes individual criminal liability upon those who commit international crimes. Such liability is normally direct, i.e. focused on the personal conduct of the actual perpetrators.<sup>1</sup> An individual is prosecuted for the active and direct commission of a crime (i.e. principal perpetrator) or for a crime committed by others if he instigated, ordered, planned or assisted the commission of that crime (i.e. aider or abettor). International crimes, however, are often committed during armed conflicts or other unstable situations being a component of large scale atrocities that involve many different perpetrators on various levels. As a result, it is often very complicated to determine the personal criminal liability of each individual who contributed to the commission of specific international crimes. Herein lies the paradox: although international criminal law is essentially individual-oriented, it usually must be concerned with collective criminal phenomena as well. For these reasons, international criminal law has developed some additional forms of liability, namely joint criminal enterprise and superior responsibility.

Superior responsibility is a form of indirect liability as the superior is not held criminally liable for the criminal acts in which he participated (e.g. planned, gave orders, assisted), but in connection with the criminal acts committed by his subordinates.<sup>2</sup> Nevertheless, it is wrong to assume that a superior is simply liable for the criminal acts of his subordinates – his liability derives from his failure to prevent and punish such acts, and to exercise proper supervision and control over his subordinates. This is because international crimes are often committed in the framework of hierarchical organisations, e.g. armed forces or rebel movements, where some individuals physically perpetrate the crimes (subordinates) and certain individuals are not usually directly involved, but indirectly enable the commission of such

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<sup>1</sup> See Statute of the International Criminal Tribunal for the former Yugoslavia [hereinafter the ICTY Statute], Article 7(1); Statute of the International Criminal Tribunal for Rwanda [hereinafter the ICTR Statute], Article 6(1); Rome Statute of the International Criminal Court [hereinafter the Rome Statute], Article 25.

<sup>2</sup> ICTY Statute, Article 7(3); ICTR Statute, Article 6(3); Rome Statute, Article 28.

crimes or create favourable conditions by inactivity (superiors). Such “facilitation” may have a decisive role in the commission of international crimes and therefore it is necessary to hold superiors liable in order to prevent atrocities and to ensure that the duty of exercising proper supervision and control over their subordinates is fulfilled.

Although superior responsibility has been recognised as a part of customary international law for quite some time already, its precise content is still controversial and open to debate. This paper first examines briefly the historical background and codification of a superior’s duties and responsibility and then analyses the required elements of superior responsibility. Before venturing any further, a comment on terminology is necessary. Traditionally, the notion “command responsibility” has been used because it is associated foremost with *military* commanders, but it is preferable (more accurate) to use the notion “superior responsibility” that clearly covers both *military* and *civilian* leaders.

## 2. Historical Background

The earliest origins of superior responsibility trace back to the fifteenth century,<sup>3</sup> but the modern doctrine did not develop until the Second World War. The post-war trials of Japanese and German commanders and leaders established the fundamental principles (although the beginning was controversial), but the elements of responsibility were first elaborated by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). In the end, the practice and theory were codified in the Rome Statute.

The International Military Tribunal in Nuremberg did not deal with superior responsibility. The Tribunal of Tokyo applied the concept in a way (very broadly) that it effectively became a joint criminal enterprise in the modern sense.<sup>4</sup> It is the *Yamashita* case which was before the United States Military Commission that brought prominence to the principle of superior responsibility in the aftermath of the Second World War.<sup>5</sup> The case itself was

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<sup>3</sup> See, for example, **W. H. Parks**. 1973. Command Responsibility for War Crimes. – Military Law Review, Vol. 62, pp. 4–5.

<sup>4</sup> **N. Boister & R. Cryer**. 2008. The Tokyo International Military Tribunal: A Reappraisal. Oxford: Oxford University Press, pp. 205–236.

<sup>5</sup> See **Parks** 1973, pp. 22–38 for detailed discussion.

controversial and deserves a more detailed discussion.<sup>6</sup> General Tomoyuki Yamashita took command of the Japanese army in the Philippines on 9 October 1944. His headquarters were moved to the mountains, 125 miles north of Manila in December. The United States forces reached Manila on 4 February 1945 and the entire Japanese naval forces defending the capital were destroyed by 3 March. While defending the city, the Japanese forces tortured and killed thousands of civilians.<sup>7</sup> Yamashita was at his headquarters during the operation and supposedly knew nothing of what was happening in the city as communications were cut off. He had given the order to evacuate Manila, but his order was resisted by the Japanese army and navy (only 1,600 left and about 20,000 remained). In September, Yamashita was detained and charged with “unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit brutal atrocities and other high crimes against the people of the United States and of its allies and dependencies, particularly the Philippines”.<sup>8</sup> He was sentenced to death and was hanged on 23 February 1946.

The military commission found that there had been widespread atrocities and Yamashita failed to effectively control his troops as was required by the circumstances, but drew no express conclusion regarding his knowledge of these crimes. After being found guilty, he appealed to the United States Supreme Court, but the petition was rejected. The trial has been criticised widely for not showing any culpability on the side of Yamashita.<sup>9</sup> Supreme Court Justices Murphy and Rutledge disagreed with the majority. The former wrote an especially critical dissenting opinion:

He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts

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<sup>6</sup> The overview is mostly based on **K. Ambos**, 2002. *Superior Responsibility*. – A. Cassese et al. (eds). *The Rome Statute for an International Criminal Court: A Commentary*. Oxford: Oxford University Press, pp. 825–828.

<sup>7</sup> Figures differ considerably. Over 8,000 killed and over 7,000 wounded in **Parks** 1973, p. 25, but nearly 100,000 in **A. M. Prévost**, 1992. *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*. – *Human Rights Quarterly*, Vol. 14, p. 314.

<sup>8</sup> *In re Yamashita*, 327 US 1 (1945), pp. 13–14.

<sup>9</sup> For example, **Prévost** 1992, p. 337.

of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge.<sup>10</sup>

Still, it seems that Yamashita was not convicted under strict liability, i.e. simply because he was the superior of the Japanese forces in Manila. There are two potential explanations for the outcome – the commission did not believe the plea of ignorance given the extensiveness of the atrocities and it was not sure whether the requirement of knowledge should be applied. But it is still impossible to say whether the commission believed that Yamashita knew or should have known about the atrocities. Nevertheless, such a broad interpretation of superior responsibility was not applied in the subsequent cases.

Superior responsibility was used in several cases after the Second World War. These cases (e.g. *Pohl, Brandt, Hostage, High Command*) referred to the case of *Yamashita* in order to prove the existence of the concept of superior responsibility, but did not apply the case as a precedent. Indeed, they partially rejected the low standard of *Yamashita* and adopted approaches more similar to contemporary superior responsibility.

### 3. Codification of Duties and Responsibility

The first international instrument to expressly address a superior's duties and responsibility was Additional Protocol I to the Geneva Conventions (1977).<sup>11</sup> Its provisions serve as a basis for further codifications (foremost ICTY, ICTR and the Rome Statutes) and their interpretations. The Protocol confirms the general obligation of States to repress grave breaches of the four Geneva Conventions (1949) and the Protocol in question, "which result from a failure to act when under a duty to do so".<sup>12</sup> This provision indicates that a superior can only be held responsible if two conditions are met, namely subordinates have committed such breaches and the superior had a duty to act in regard of these breaches. Next, the Protocol explains the nature and conditions of a superior's responsibility (parallel to subordinates):

The fact that a breach of the [Geneva] Conventions or of [Additional Protocol I] was *committed by a subordinate* does not absolve his superiors from

<sup>10</sup> Cited in M. C. Bassiouni. 2011. *Crimes against Humanity: Historical Evolution and Contemporary Application*. Cambridge: Cambridge University Press, p. 535.

<sup>11</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3.

<sup>12</sup> *Ibid.*, Article 86(1).

penal or disciplinary *responsibility*, as the case may be, if they *knew*, or *had information which should have enabled them to conclude* in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take *all feasible measures within their power to prevent or repress* the breach.<sup>13</sup>

Then, the Protocol describes what is expected from a superior.<sup>14</sup> *First*, military commanders must (with respect to members of the armed forces under their command and other persons under their control) prevent and suppress the above-mentioned breaches as well as report them to competent authorities. *Second*, in order to prevent and suppress these breaches, commanders must ensure that members of the armed forces under their command are aware of their obligations under the Geneva Conventions and Additional Protocol I. *Third*, any commander, who is aware that subordinates or other persons under his control are going to commit or have committed these breaches, is required to take such steps as are necessary to prevent such breaches and, where appropriate, to initiate disciplinary or penal action against the perpetrators.

The ICTY Statute contains a provision that is similar to Additional Protocol I:

The fact that [crimes were] committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>15</sup>

The corresponding provision in the ICTR Statute is essentially the same.<sup>16</sup> The provisions in the Protocol and the statutes have different temporal references regarding a superior's duty of intervention – the Protocol covers situations where a subordinate “was committing or was going to commit” a crime, but the phrasing of the statutes is “was about to commit [a crime] or had done so”. Additionally, when referring to taking measures to prevent crimes, the statutes omit the clarifying condition of “within [a superior's] power” and therefore potentially extending responsibility.

<sup>13</sup> *Ibid.*, Article 86(2) (emphasis added).

<sup>14</sup> *Ibid.*, Article 87 (to be precise, the article imposes upon States an obligation to ensure that superiors carry out these duties; it is also vital for the clarification of a superior's duties).

<sup>15</sup> ICTY Statute, Article 7(3).

<sup>16</sup> ICTR Statute, Article 6(3).

The Rome Statute provides a much more elaborate formulation (reflecting essentially both the statutes and case law of the ICTY and ICTR). After extensive negotiations,<sup>17</sup> it was agreed that there should be separate conditions for military commanders and other (civilian) superiors:

- (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.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
  - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
  - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
  - (iii) The superior 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.<sup>18</sup>

#### 4. Nature of Responsibility

Superior responsibility is an original creation of the international criminal justice system, although the idea has been adopted afterwards by numerous domestic systems. Although superior responsibility is generally considered to be a part of customary international law,<sup>19</sup> its precise legal nature is still

<sup>17</sup> **P. Saland.** 1999. *International Criminal Law Principles*. – R. S. Lee (ed.). *The International Criminal Court: The Making of the Rome Statute*. The Hague: Kluwer Law International, pp. 202–204.

<sup>18</sup> Rome Statute, Article 28.

<sup>19</sup> See, for example, **L. C. Green.** 1995. *Command Responsibility in International Humanitarian Law*. – *Transnational Law and Contemporary Problems*, Vol. 5, p. 350; **A. Cassese.**

open to debate. Foremost, for what exactly is the superior responsible? Is it responsibility for complicity?<sup>20</sup> Is it a separate crime for dereliction of a superior's duty to control, prevent or punish?<sup>21</sup> Is it a special mode of liability for the crimes committed by subordinates?<sup>22</sup>

It should be the latter. The superior is not directly responsible for the crimes committed by his subordinates, but for his omission, failure to properly discharge his duty. Even though the superior is considered responsible in connection with the same crimes committed by the subordinates (i.e. if they have committed war crimes, the superior is also charged with war crimes), it does not mean that the superior becomes an accomplice and actually committed these crimes. It was correctly stated already in the *Yamashita* trial that "it is absurd ... to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape".<sup>23</sup> How could the superior physically deport thousands of civilians in a day? So, when it is claimed that the superior is responsible for the crimes committed by subordinates, it does not mean that the superior personally committed these crimes, but that the punishment for his failure to exercise proper authority is measured in the light of the crimes committed by subordinates. But this does not transfer the actual criminal conduct from the subordinates to the superior.

True, there is some resemblance to complicity and joint criminal enterprise.<sup>24</sup> However, unlike aiding and abetting, there is no requirement that the superior actually knew what the subordinates were doing (level of awareness is discussed below). Unlike a joint criminal enterprise, there is no requirement of a plan or common purpose. This may leave a misleading impression that it is easy to obtain a conviction under superior responsibility, but in fact, the elements of responsibility (discussed below) usually render it quite difficult. Practice has shown that superior responsibility has not turned into a

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2008. International Criminal Law. 2nd edn, Oxford: Oxford University Press, p. 241; *Zejnir Delalić and Others*, Case No IT-96-21-T, ICTY, Judgement of the Trial Chamber, 16 November 1998, paras 333, 343.

<sup>20</sup> For example, United Kingdom's International Criminal Court Act (2001), Section 65.

<sup>21</sup> *Ambos* 2002, p. 851.

<sup>22</sup> *Enver Hadžihasanović and Amir Kubura*, Case No IT-01-47-T, ICTY, Judgement of the Trial Chamber, 15 March 2006, para. 75.

<sup>23</sup> Cited in *Bassiouni* 2011, p. 535.

<sup>24</sup> **W. A. Schabas**. 2006. *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*. Cambridge: Cambridge University Press, p. 315.

“silver bullet” – delivering convictions where traditional grounds of responsibility are inadequate – as once was predicted.<sup>25</sup>

The ICTY has experimented with different ideas on superior responsibility, but has settled (so it seems) upon a similar interpretation, i.e. superior responsibility is the responsibility for omission in connection with the crimes committed by subordinates. It was well explained in the case of *Halilović*:

[C]ommand responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus “for the acts of his subordinates” as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed.<sup>26</sup>

This position has been confirmed by other chambers<sup>27</sup> and this paragraph has been frequently cited as an authoritative statement. In the case of *Blaškić*, it was emphasised that direct and superior responsibility are distinct grounds of criminal responsibility and it is not appropriate to convict under both grounds for the same count. In such a case, the accused should be convicted for direct responsibility and his superior position should be considered as an aggravating factor in sentencing.<sup>28</sup> Full enquiry into superior responsibility would be “a waste of judicial resources”<sup>29</sup> if the liability of a person is already convicted as a principal perpetrator or accomplice.

<sup>25</sup> **W. A. Schabas**, 2011. *An Introduction to the International Criminal Court*. 4th edn, Cambridge: Cambridge University Press, p. 234.

<sup>26</sup> *Sefer Halilović*, Case No IT-01-48-T, ICTY, Judgement of the Trial Chamber, 16 November 2005, para. 54.

<sup>27</sup> For example, *Zlatko Aleksovski*, Case No IT-95-14/1-T, ICTY, Judgement of the Trial Chamber, 25 June 1999, para. 67; *Milorad Krnojelac*, Case No IT-97-25-A, ICTY, Judgement of the Appeals Chamber, 17 November 2003, para. 171; *Enver Hadžihasanović and Amir Kubura*, Case No IT-01-47-A, ICTY, Judgement of the Appeals Chamber, 22 April 2008, para. 39.

<sup>28</sup> *Tihomir Blaškić*, Case No IT-95-14-A, ICTY, Judgement of the Appeals Chamber, 29 July 2004, para. 91.

<sup>29</sup> *Milomir Stakić*, Case No IT-94-24-T, ICTY, Judgement of the Trial Chamber, 31 July 2003, para. 466.



Under the Rome Statute, the nature of superior responsibility is slightly different – it is treated more like a form of liability for underlying crimes. Article 28 provides that “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”.<sup>30</sup> This implies that the crimes of subordinates are imputable to the superior, which is more similar to complicity (e.g. aiding, abetting) than to the form of liability discussed above. In other words, the superior is responsible and should be punished for the principal crime committed by his subordinates. However, it is necessary to avoid the risk of holding someone guilty for an offence committed by others in violation of the principle of individual and culpable criminal responsibility.<sup>31</sup>

The ICTY clarified that superior responsibility applies equally to non-international armed conflicts although Additional Protocol I (establishing superior responsibility) concerns only international armed conflicts.<sup>32</sup> This rational position was reaffirmed by the inclusion of superior responsibility in the ICTR Statute (concerning a non-international armed conflict) and the Rome Statute (applicable to both international and non-international armed conflicts).

## 5. Elements of Responsibility

Fortunately, the ICTY has elaborated on the conditions of superior responsibility. The commission of crimes by subordinates is evidently a necessary prerequisite of superior responsibility. But additionally, three essential elements were identified:

1. The existence of a superior-subordinate relationship;
2. The superior knew or had reason to know that crimes were about to be or had been committed;
3. The superior failed to take the necessary and reasonable measures to prevent these crimes or punish their perpetrators.<sup>33</sup>

<sup>30</sup> Emphasis added. See also *Jean-Pierre Bemba Gombo*, Case No ICC-01/05-01/08, ICC, Decision on the Confirmation of Charges, 15 June 2009, para. 405.

<sup>31</sup> C. Meloni. 2007. Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior. – *Journal of International Criminal Justice*, Vol. 5, p. 633.

<sup>32</sup> *Enver Hadžihasanović, Mehmed Alagic and Amir Kubura*, Case No IT-01-47-AR72, ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003.

<sup>33</sup> *Zejnir Delalić and Others* (Trial), para. 344.

### 5.1. Superior-Subordinate Relationship

Establishing a superior-subordinate relationship has proved to be a major obstacle in the practice of the ICTY and ICTR. If there is a clear and formal chain of command (typical regular armed forces), it should not be difficult to determine who the superior is, who the subordinates are and whether the former is responsible for the crimes of the latter. But the reality is often much more difficult, for example, in modern conflicts like those in the former Yugoslavia and Rwanda “where previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures, may be ambiguous and ill-defined”.<sup>34</sup> So, who is a genuine superior? It is a crucial question because “only those superiors, either *de jure* or *de facto*, military or civilian, who are clearly part of a chain of command, either directly or indirectly, with the actual power to control or punish the acts of subordinates may incur criminal responsibility”.<sup>35</sup> This sentence holds several key aspects to the understanding of the superior-subordinate relationship.

The ICTY adopted a concept of “effective control over a subordinate” referring to a “material ability to prevent or punish criminal conduct, however that control is exercised”.<sup>36</sup> This was taken over by the ICTR which emphasised that general influence is not sufficient to establish a superior-subordinate relationship.<sup>37</sup> At the same time it is not necessary to show direct or formal subordination, but “the accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator”.<sup>38</sup> Therefore both the ICTY and ICTR have underlined that an official position is not determinative for superior responsibility because it is the actual possession or non-possession of powers to control subordinates that may lead to conviction or acquittal.<sup>39</sup>

In the case of *Orić*, the ICTY stressed that the possession of *de jure* authority does not result in a presumption of effective control, because

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<sup>34</sup> *Ibid.*, para. 354.

<sup>35</sup> *Dario Kordić and Mario Čerkez*, Case No IT-95-14/2-T, ICTY, Judgement of the Trial Chamber, 26 February 2001, para. 416.

<sup>36</sup> *Zejnir Delalić and Others*, Case No IT-96-21-A, ICTY, Judgement of the Appeals Chamber, 20 February 2001, para. 256.

<sup>37</sup> *Laurent Semanza*, Case No ICTR-97-20-T, ICTR, Judgement of the Trial Chamber, 15 March 2003, para. 415.

<sup>38</sup> *Sefer Halilović*, Case No IT-01-48-A, ICTY, Judgement of the Appeals Chamber, 16 October 2007, para. 59.

<sup>39</sup> *Zejnir Delalić and Others* (Appeals), paras 186–198.

otherwise the prosecution would be exempted from its burden to prove effective control beyond a reasonable doubt.<sup>40</sup> Such a possession provides merely some evidence of effective control.<sup>41</sup> For example, Milan Milutinović was the President of the Republic of Serbia (1997–2002) of the Federal Republic of Yugoslavia. According to the Serbian Constitution (1990),<sup>42</sup> the president commands the armed forces in peacetime and in war. The ICTY found that this function was actually a reserve competency to be triggered in the event that Serbia became an independent state. Accordingly, in 1998 and 1999, Milutinović was not given any commanding authority over the Yugoslav army (confirmed by the questioned senior military and political figures). Instead, Slobodan Milošević was the actual commander-in-chief.<sup>43</sup>

These standpoints were basically endorsed by a Pre-Trial Chamber of the ICC,<sup>44</sup> which provided a compilation of factors that may indicate the existence of a position of authority and effective control (taken from the case law of the ICTY).<sup>45</sup> These include a person's official position, the power to issue or give orders, the capacity to ensure compliance with the issued orders, the capacity to order units under his command to engage in hostilities, the capacity to re-subordinate units or to make changes to command structure and the power to promote, replace, remove or discipline any member of the forces. Several elements refer, directly or implicitly, to the authority to issue orders. Giving orders may indeed be good evidence of being a superior, but if they are not obeyed, it seems to prove the opposite.<sup>46</sup>

Command is not necessarily permanent, but may well be temporary, for example, a soldier taking command in the battlefield.<sup>47</sup> Additionally, analogous to this example, the effective commander might not outrank his subordinates. In more complicated situations, a person may come under the concurrent command of several superiors, which may extend command responsibility to multiple individuals.<sup>48</sup>

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<sup>40</sup> *Naser Orić*, Case No IT-03-68-A, ICTY, Judgement of the Appeals Chamber, 3 July 2008, para. 91.

<sup>41</sup> *Ibid.*, para. 92.

<sup>42</sup> Article 83(5).

<sup>43</sup> *Milan Milutinović and Others*, Case No IT-05-87-T, ICTY, Judgement of the Trial Chamber, 26 February 2009, paras 106–107, but also 108–143.

<sup>44</sup> *Jean-Pierre Bemba Gombo*, paras 414–416.

<sup>45</sup> *Ibid.*, para. 417.

<sup>46</sup> *Tihomir Blaškić* (Appeals), paras 69, 399.

<sup>47</sup> *Dragoljub Kunarac*, Case Nos IT-96-23-T & IT-96-23/1-T, ICTY, Judgement of the Trial Chamber, 22 February 2001, para. 399.

<sup>48</sup> *Zlatko Aleksovski*, para. 106.

The superior-subordinate relationship applies also to civilian superiors.<sup>49</sup> While the tribunals reached this conclusion in their findings, the Rome Statute explicitly states that superior responsibility covers both military commanders and civilian superiors (although the rules are not identical as discussed below).<sup>50</sup>

In sum, a superior (whether military or civilian) is thus the one who possesses the power or authority in either a *de jure* or *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed.

### **5.2. A Superior's Knowledge of Criminal Conduct**

If the superior is not responsible directly for the principal crime committed by subordinates, but rather assumes liability through omission in connection with that crime, it is then necessary to demonstrate that the superior has a certain degree of knowledge (actual or constructive knowledge) of that crime. The mental element (*mens rea*) has been the most controversial element of superior responsibility, mainly because knowledge was not proven beyond reasonable doubt or the judges imposed an unrealistic duty to know on the superior. A superior's knowledge is often presumed either from the official position in the state hierarchy or from the notorious and widespread character of the crimes committed by subordinates.<sup>51</sup> Although these assumptions are not completely unreasonable (e.g. a true superior should make sure that he is adequately informed of what his subordinates are doing, as it is not plausible that a superior can remain unaware of widespread and long-lasting horrific crimes committed by his subordinates), this is not a proper approach for judicial institutions.

There are usually few difficulties if the superior had actual knowledge ("knew") of the crimes committed by subordinates. The problems arise when the superior has, at most, constructive knowledge ("had reason to know" in the ICTY and ICTR Statutes and "should have known" or "consciously

<sup>49</sup> *Clément Kayishema*, Case No ICTR-95-1-T, ICTR, Judgement of the Trial Chamber, 21 May 1999, paras 213-215; *Zejnir Delalić and Others* (Trial), paras 355-363; *Ignace Bagilishema*, Case No ICTR-95-1A-A, ICTR, Judgement of the Appeals Chamber, 3 July 2002, para. 52.

<sup>50</sup> Respectively, Article 28(a) for military commanders and Article 28(b) for civilian superiors.

<sup>51</sup> **B. I. Bonafé**. 2007. Finding a Proper Role for Command Responsibility. – *Journal of International Criminal Justice*, Vol. 5, p. 606.

disregarded information which clearly indicated” in the Rome Statute) of those crimes. So, what amounts to constructive knowledge?

The ICTY has frequently explained that superior responsibility is not a form of strict liability (the ICTR has concurred), i.e. a person is responsible simply because he is the superior.<sup>52</sup> In the leading case of *Zejnir Delalić and Others*, the ICTY (both the trial and appeals chamber) found that a superior

may possess the *mens rea* for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes ... or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.<sup>53</sup>

Accordingly, the superior has no “duty to know” (as in the case of *Yamashita*).<sup>54</sup> The mental element is “determined only by reference to the information in fact available to the superior”.<sup>55</sup> However, it is not necessary to prove that the superior had specific information about the crimes – even general information in his possession, which would put him on notice of possible unlawful acts by his subordinates, is sufficient to prove that he “had reason to know”.<sup>56</sup> Additional Protocol I puts an emphasis on the information actually available to a superior which should have enabled him to conclude in the circumstances at the time that crimes were committed by subordinates.<sup>57</sup> Therefore, constructive knowledge should not be evaluated retrospectively in the light of information that became available afterwards. The ICTR has underscored the need to make the distinction between information about the general situation prevailing in a certain area at the time and general information which should put the superior on notice that his subordinates might commit crimes.<sup>58</sup> But neither is the awareness of a general form of criminality enough,<sup>59</sup> although such information can be relevant for proof that the

<sup>52</sup> *Zejnir Delalić and Others* (Appeals), paras 226, 239.

<sup>53</sup> *Zejnir Delalić and Others* (Trial), para. 383.

<sup>54</sup> *Zejnir Delalić and Others* (Appeals), paras 228–239.

<sup>55</sup> *Pavle Strugar*, Case No IT-01-42-T, ICTY, Judgement of the Trial Chamber, 31 January 2005, para. 369.

<sup>56</sup> *Zejnir Delalić and Others* (Appeals), para. 238.

<sup>57</sup> Article 86(2).

<sup>58</sup> *Ignace Bagilishema*, para. 42.

<sup>59</sup> *Krnojelac*, para. 155.

superior had reason to know.<sup>60</sup> Regarding the form of information, it may be written or oral and does not need to have the form of specific reports submitted pursuant to official procedures.

In the case of *Blaškić*, the Trial Chamber suggested a broader approach for interpreting “had reason to know” condition. The latter was satisfied

if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties.<sup>61</sup>

Although this argument sounds reasonable and has found considerable academic support, it has not prevailed and was rejected by the Appeals Chambers.<sup>62</sup> Hence, the statement in the case of *Zejnir Delalić and Others* remains authoritative.

The Rome Statute approaches the mental element a little bit differently. *First*, it has separate rules for military commanders and civilian superiors. In case of military commanders, the prosecution must show that they “knew or, owing to the circumstances at the time, should have known”.<sup>63</sup> The standard is higher for civilian superiors because the prosecution must demonstrate that they “knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes”.<sup>64</sup> This is probably a progressive development, not the codification of existing customary international law.<sup>65</sup> *Second*, the standard for military commanders is higher than in the ICTY and ICTR Statutes. While the ICTY and ICTR have stressed that the mental element is not about negligence (“had reason to know”), the ICC Statute introduces negligence (“should have known”), i.e.

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<sup>60</sup> *Pavle Strugar*, Case No IT-01-42-A, ICTY, Judgement of the Appeals Chamber, 17 July 2008, para. 301.

<sup>61</sup> *Tihomir Blaškić*, Case No IT-95-14-T, ICTY, Judgement of the Trial Chamber, 3 March 2000, para. 332.

<sup>62</sup> *Tihomir Blaškić* (Appeals), para. 63; *Ignace Bagilishema*, paras 34–35.

<sup>63</sup> Article 28(a)(i).

<sup>64</sup> Article 28(b)(i).

<sup>65</sup> **G. Vetter**. 2000. Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC). – *Yale Journal of International Law*, Vol. 25, pp. 89–143. The ICTR has rejected the idea that military commanders and civilian superiors have different standard for the mental element. *Ignace Bagilishema*, paras 26–37.

failure to look for information may lead to criminal liability.<sup>66</sup> In the case of *Jean-Pierre Bemba Gombo*, the Pre-Trial Chamber confirmed explicitly that the “had reason to know” and “should have known” standard are different, but the interpreting criteria developed by the tribunals may still be useful when applying the “should have known” standard.<sup>67</sup>

### **5.3. Failure to Prevent and Punish**

The superior must take “necessary and reasonable measures” to prevent or punish the crimes. There are two distinct obligations, i.e. duty to prevent and duty to punish, and disregard of both may lead to criminal liability.<sup>68</sup> These obligations do not present a choice, e.g. if the superior knowingly does not prevent the crimes, then the subsequent punishment of the perpetrators does not release the superior from responsibility.<sup>69</sup> In other words, “a superior’s failure to prevent the commission of the crime by a subordinate, where he had the ability to do so, cannot simply be remedied by subsequently punishing the subordinate for the crime”.<sup>70</sup> However, if the superior really did not know or have reason to know that crimes were committed, but learns about these crimes later, he must punish the perpetrators. Otherwise, the failure to punish may be considered an implicit acceptance of the crimes.<sup>71</sup>

The ICTY has, on several occasions, explained which measures are necessary and reasonable. In the case of *Blaškić*, the Appeals Chamber expected the superior to take, generally, measures that “can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates” and noted that “what constitutes such measures is not a matter of substantive law but of evidence”.<sup>72</sup> Hence, the assessment is inherently subjective, taking into consideration the situation and actual control exercised by the superior. In the case of *Orić*, the Trial Chamber elaborated on the criteria for failure to prevent, e.g. the measures depend on the degree of effective control over the conduct of subordinates at the time a superior is expected to act; measures must be taken to prevent

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<sup>66</sup> *Jean-Pierre Bemba Gombo*, paras 432–433.

<sup>67</sup> *Ibid.*, para. 34.

<sup>68</sup> *Tihomir Blaškić* (Appeals), paras 78–85; *Sefer Halilović* (Trial), para. 94; *Naser Orić*, Case No IT-03-68-T, ICTY, Judgement of the Trial Chamber, 30 June 2006, paras 325–326.

<sup>69</sup> *Tihomir Blaškić* (Trial), para. 336; *Pavle Strugar* (Appeals), para. 373; *Jean-Pierre Bemba Gombo*, para. 436.

<sup>70</sup> *Naser Orić* (Trial), para. 326.

<sup>71</sup> *Sefer Halilović* (Trial), para. 95.

<sup>72</sup> *Tihomir Blaškić* (Appeals), para. 72.

subordinates from planning, preparing or executing the prospective crimes; the more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentive and quicker the superior is expected to react; although the superior is not obliged to do the impossible.<sup>73</sup> Regarding the last criterion, the superior's obligation to take necessary and reasonable measures is a due diligence obligation, not an absolute obligation to achieve results no matter what.

The Rome Statute includes an explanation of what is expected from the superior. He is responsible if he "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".<sup>74</sup> These include measures

- (i) to ensure that superior's forces are adequately trained in international humanitarian law; (ii) to secure reports that military actions were carried out in accordance with international law; (iii) to issue orders aiming at bringing the relevant practices into accord with the rules of war; (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command.<sup>75</sup>

The ICTY has clarified that "the duty to punish commences only if, and when, the commission of a crime by a subordinate can be reasonably suspected" (indeed, the superior is acting before the perpetrator is convicted in the court of law).<sup>76</sup> It does not mean that the superior must conduct the investigation or dispense the punishment in person, but that he has initiated the investigation, submitted the case to a higher level, taken extra precautionary measures to prevent future crimes, etc.

Additional Protocol I provides that the superior may initiate disciplinary or penal action against violators.<sup>77</sup> In the cases of international crimes, disciplinary action is unlikely due to the gravity of crimes, which means that the duty to punish is primarily the duty to take the necessary and reasonable measures to trigger the action of another body, ideally an independent judiciary.<sup>78</sup>

<sup>73</sup> *Naser Orić* (Trial), para. 329.

<sup>74</sup> Article 28(a)(ii).

<sup>75</sup> *Jean-Pierre Bemba Gombo*, para. 438.

<sup>76</sup> *Naser Orić* (Trial), para. 336.

<sup>77</sup> Article 87(3).

<sup>78</sup> *Naser Orić* (Appeals), para. 12.



## 6. Conclusion

Superior responsibility is a mode of liability which may help in situations where it is difficult or impossible to demonstrate that the superior participated in the commission of crimes, but where it is clear that he played an indirect role in enabling their commission or creating favourable conditions by inactivity. Despite the fact that superior responsibility is a generally recognised principle of international criminal law, its precise content and criteria of application are still open to debate.

The superior is not directly responsible for the crimes committed by his subordinates, but for his omission, failure to properly discharge his duty, i.e. to prevent the crimes or punish the perpetrators. This is not a form of vicarious responsibility, where one may assume that superior is certainly responsible for his subordinates no matter what. To be held criminally liable, it must be shown that the superior had actual or constructive knowledge of the crimes in question and failed to take “necessary and reasonable measures”, within his power, to prevent or punish. Case law emphasises that the possession of actual authority over subordinates is decisive (*de facto* superiors), while an official position does not equal effective control (*de jure* superiors) and may be some evidence of such control.

Although superior responsibility was once seen as a “silver bullet” for the prosecution, it has proved to have limited practical impact. There have been few convictions based purely on superior responsibility due to the fact that most persons charged under such responsibility are found guilty for direct participation in the crime, in one form or another. But this does not diminish the importance of superior responsibility in international criminal proceedings.

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Statute of the International Criminal Tribunal for the former Yugoslavia, SC Res 827, 25 May 1993 (amended several times).

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