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Command Responsibility *The Contemporary Law*

The doctrine of “command responsibility” was established by the Hague Conventions IV (1907) and X (1907) and applied for the first time by the German Supreme Court in Leipzig after World War I, on the *Trial of Emil Muller*. Miller was sentenced by the Court for failing to prevent the commission of crimes and to punish the perpetrators thereof. Command responsibility is an *omission* mode of individual criminal liability: the superior is responsible for crimes committed by his subordinates and for failing to prevent or punish (as opposed to crimes he ordered). The doctrine was invoked by the International Military Tribunals after World War II and developed further through international and domestic jurisprudence: *inter alia*, the *High Command*, *In Re Yamashita*, *Hostages* and *Abbaye Ardenne* cases after World War II, and the *Medina* case dealing with war crimes in Vietnam.

By 1977 the doctrine of command responsibility was accepted as customary international law and was codified in the Additional Protocol I to the Geneva Conventions, relating to the International Armed Conflicts. Its status as customary law was confirmed with the explicit inclusion of command responsibility in article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and article 6(3) of the Statute of the International Criminal Tribunal for Rwanda (ICTR), as well as article 28 of the Rome Statute for an International Criminal Court (ICC). It should be noted that international law recognizes the principle of command responsibility both in *international* and in *internal* armed conflict. Thus, the ICTR Statute explicitly provides for command responsibility, including for grave breaches of common article 3 of the Geneva Conventions, in the context of the conflict in Rwanda, which is by definition application of superior liability in a non-international conflict.

The ICTY in the *Celebici* case elaborated a threefold requirement for the existence of command responsibility, which has been confirmed by subsequent jurisprudence:

1. the existence of a superior-subordinate relationship;

2. that the superior knew or had reason to know that the criminal act was about to be or had been committed; and
3. that the superior failed to take the reasonable measures to prevent the criminal act or to punish the perpetrator thereof.

In this sense, command responsibility is a form of complicity under international law, with imputed knowledge of the criminal act on the part of the commander.

I. The superior-subordinate relationship

Depending on the origin of the command structure (or, the source of authority), the requirement may be established in two independent ways: *de jure* if the source of authority is the state; and *de facto* if the source of authority is a paramilitary structure.

- a) ***De jure command*** – may be both military and civilian state organization, as established by the ICTR in the *Akayesu* case.

It has been accepted that what matters in this context is not rank as such, but subordination. There are four structures of hierarchy for the purpose of *de jure* command responsibility:

1. *Policy command*: heads of state, high-ranking government officials, monarchs
2. *Strategic command*: War Cabinet, Joint Chiefs of Staff
3. *Operational command*: military leadership; in *Yamashita* it was established that operational command responsibility cannot be ceded for the purpose of the doctrine of command responsibility – operational commanders must exercise the full potential of their authority to prevent war crimes, failure to supervise subordinates or non-assertive orders don't exonerate the commander
4. *Tactical command*: direct command over troops on the ground

There are two special cases of *de jure* commanders that have been developed in international case law:

1. *Prisoners-of-war (POW) camp commanders*: the ICTY established in *Aleskovski* that POW camp commanders are entrusted with the welfare of all prisoners, and subordination in this case is irrelevant
2. *Executive commanders*: supreme governing authority in the occupied territory – subordination is again irrelevant, their responsibility is the welfare of the population in the territory under their control, as established in the *High Command* and *Hostages* cases after World War II.

- b) ***De facto command*** – international law is interested in effective control as opposed to formal rank or status; evidence of *de facto* control requires proof of superior-subordinate relationship, i.e. a chain of command (exceptions: executive and POW camp commanders)

There are three indicia of *de facto* command:

1. *Capacity to issue orders*
2. *Power of influence*: influence is recognized as a source of authority in the *Ministries* case before the US military Tribunal after World War II
3. Evidence stemming from *distribution of tasks*: the ICTY has established the *Nikolic* test – superior status is deduced from analysis of distribution of tasks within the unit, it applies both to operational and POW camp commanders

II. Applicable standards of knowledge

- a) ***Actual knowledge*** – it is difficult to prove; in *Celebici* the ICTY ruled that actual knowledge may be established by either direct or indirect evidence.
- b) ***“Had reason to know” requirement*** – article 7(3) of the ICTY statute states that absence of knowledge is not a defense where the accused didn’t take reasonable steps to acquire such knowledge.

The jurisprudence of the ICTY and the ICC Statute have developed the “had reason to know” standard:

1. *Celebici case*: in order to satisfy the “had reason to know” standard, the commander should have had at least information to put him on alert
2. *Blaskic case*: ignorance can’t be a defense where the absence of knowledge is the result of negligence in the discharge of duties
3. *ICC Statute*: article 28(1) provides that for military commanders the “had reason to know” standard is preserved; **but** article 28(2) provides that for civilian superiors the court must prove they “knew or consciously disregarded information which clearly indicated” that crimes are or are about to be committed This provision is **contra Celebici** and has been criticized by legal scholars as regressive development in international criminal law.

III. The duty to prevent or punish

The duty to prevent the commission of criminal acts or to punish the perpetrator after their commission is established by all authoritative sources of international criminal law: Additional Protocol I and the Statutes of the ICTY, the ICTR, and the ICC.

- a) ***The duty to prevent*** – in the *Akayesu* case the ICTR stated that it is irrelevant if the commander could prevent the crimes or not, where he didn’t attempt to do so.
- b) ***The duty to punish*** – after the criminal act is committed, commander has obligation to punish the perpetrator(s).

In *Blaskic* the ICTY defined the obligation to prevent or punish, stating that this standard doesn't provide the commander with two alternative paths to pursue: where the superior knew or had reasons to know the criminal acts were to be committed and failed to prevent their commission, he cannot merely punish the perpetrators and escape from criminal responsibility.

Comment: Command Responsibility in Serbia and Montenegro

Command responsibility is not directly codified in the Criminal Code of Serbia and Montenegro. Courts in the country have so far abstained from applying the command responsibility provisions of Additional Protocol I, to which SFRY and its accession state, Serbia and Montenegro, is a Party. Direct application of international treaty law is problematic in domestic criminal proceedings, as the Constitution sets out the requirement that criminal offences and applicable punishment must be provided for in specific domestic legislation.

As Serbia and Montenegro has ratified the Rome Treaty of the ICC, the government has a duty to adopt implementing legislation spelling out the provisions of the Treaty, including article 28 on command responsibility. Thus, a future *Serbia and Montenegro ICC Act* could either directly quote the command responsibility provisions of the Rome Statute, or elaborate further on these provisions.

A legal problem arises, however, with respect to the applicability of any *future* legislation codifying command responsibility to war crimes committed before its adoption. It has been noted that even if codified now, invoking command responsibility in any war crimes trials concerning the conflicts in the former Yugoslavia throughout the 1990s would violate the *ex post facto* clause of the Constitution. In this analysis, command responsibility cannot be applied retroactively in current and future war crimes trials in Serbia and Montenegro.

However, there are arguments supporting the opposite thesis: **command responsibility could be invoked by domestic courts** if it is incorporated in special legislation. Three things should be noted in this regard:

1. It could be argued that by the beginning of the conflicts in the former Yugoslavia, command responsibility was established as a doctrine in the Federal Republic of Yugoslavia (FRY) on the basis of
 - a) the obligation stemming from FRY ratification of Additional Protocol I;
 - b) the 1992 Constitution of FRY, providing in article 16 that ratified international treaties form an integral part of the internal legal system and, furthermore, they are on a higher level than both the federal and the republic laws (applicable to, *inter alia*, Additional Protocol I);
 - c) domestic provisions explicitly establishing command responsibility in the army – article 21 of the Instructions on the Application of Rules of International Laws and Customs of War in the Armed Forces of SFRY, adopted in 1988, which deals with the

responsibility of subordinates, implementing the provisions of the Geneva Conventions and Additional Protocols on command responsibility.

2. On the basis of the mentioned above, the doctrine of command responsibility was *de jure* part of the domestic law. The problem that remains for its applicability by domestic courts is the requirement of article 27 of the 1992 FRY Constitution that “criminal offences and criminal sanctions may only be determined by statute.” For the purpose of command responsibility, the relevant Criminal Code of the Federal Republic of Yugoslavia (CCY) provision is article 30, which establishes the *omission* mode of liability for criminal acts in the CCY, including Chapter 16 “Crimes against Humanity and International Law.” As mentioned above, command responsibility amounts to a particular omission mode of liability of commanders for criminal acts of their subordinates. (see **Part III** above). Thus, domestic courts in Serbia could invoke article 30 read in conjunction with the relevant Chapter 16 provisions of the CCY, defining the specific criminal acts, in order to establish the basis for the command responsibility of indicted persons. Furthermore, apart from the CCY article 30 provisions on omission, other modes of liability that might be invoked for establishing command responsibility are: co-perpetrating (article 22), inciting (article 23), aiding and abetting (article 24), and organizing a criminal enterprise (article 26).
3. **Legal Precedent:** The doctrine of command responsibility has already been applied on the territory of the former Yugoslavia by the District Court of Pristina, Kosovo, in the *Lapp Group* case. The Court elaborated and confirmed the applicability of command responsibility to the *internal* conflict in Kosovo, drawing on article 142 read in conjunction with article 30 of the CCY and the rule of customary international law, namely that command responsibility applies both to international and internal armed conflict by the time the Kosovo conflict began in 1998. The Sentencing Judgment of 16 July 2003 (District Court of Pristina, C.Nr.425/2001), reads in the part “Command Responsibility in internal armed conflict and the Applicability of Customary International Law in Kosovo”:

In the Context of this case, liability for command responsibility in an internal armed conflict: 1) would not create a new criminal offence, but would amount at most to an adaptation or better understanding of the criminal offence of war crime envisaged by Article 142 in connection with Article 30 (command responsibility as a criminal act by omission); 2) would implement and reflect the principle of international criminal law namely that command responsibility can apply as a customary rule of international criminal law in both internal as well as international armed conflict in accordance with the evolution of the doctrine of human rights...

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