

# COMMAND RESPONSIBILITY AND FAILURE TO ACT



International humanitarian law (IHL) provides a system for repressing serious violations of its rules based on the individual criminal responsibility of those responsible. The violations can also result from a failure to act. In armed conflict situations, armed forces or groups are generally placed under a command that is responsible for the conduct of subordinates. Accordingly, in order to make the repression system effective, superiors should be held individually responsible when they fail to take proper measures to prevent their subordinates from committing serious violations of IHL. It is the duty of States to incorporate punishment for the commander's failure to act into their domestic legislation.

## INTRODUCTION TO COMMAND RESPONSIBILITY

The responsibility of commanders includes two concepts of criminal responsibility.

First, the commander can be held directly responsible for ordering his subordinates to carry out unlawful acts. In this context, subordinates who invoke the defence of superior orders may avoid liability depending on whether, in the circumstances, they should have obeyed or disobeyed the order of superiors.

This is to be distinguished from the second concept, called command or superior responsibility, where the commander may be held liable for a subordinate's unlawful conduct. This concept of command responsibility is a form of indirect responsibility and is based on the commander's failure to act.

## PERPETRATOR RESPONSIBILITY FOR FAILING TO ACT

The system established in the Geneva Conventions of 1949 for repressing grave breaches targets persons who have committed or ordered the commission of such a breach. Persons who by failing to act have allowed a grave breach to happen can also be held criminally liable. Just as it is possible to kill someone by withholding food or proper care, the grave breach of depriving a prisoner of war of his right to a fair and regular trial can be and usually is committed simply by failing to take action.

Additional Protocol I of 1977 (AP I) is more explicit. Art. 86(1) specifies that:

"The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so".

The grave breaches referred to in Art. 85 of AP I also include those generally committed by a failure to act, such as the unjustified delay in repatriating prisoners of war or civilians.

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*Commanders can be held responsible for ordering their subordinates to carry out unlawful acts or for failing to prevent or punish unlawful acts committed by their subordinates.*

## COMMAND RESPONSIBILITY FOR FAILING TO ACT

At issue is the responsibility of a superior who fails in his duty by doing nothing to prevent or punish subordinates committing war crimes or other international crimes. In essence, the commander acquires liability by default or omission.

### ***The trials held after the Second World War***

Command responsibility became an important issue during the Second World War. Although the Charter of the Nuremberg International Military Tribunal contained no rules on this subject, the decisions in the various trials held after the war laid down broad outlines.

The mechanism of command responsibility, which imposes criminal responsibility for a superior's failure to act when under a duty to do so, may be summarized as follows:

- it involves a superior, i.e. a person having authority over a subordinate;
- the superior knew or, or had reason to know, that the subordinates were about to commit or were committing a crime;<sup>1</sup>
- the superior had the ability to prevent the criminal conduct and failed to take all necessary and reasonable measures within his power to prevent or punish the criminal conduct.

### ***The Geneva Conventions of 1949***

The Geneva Conventions are silent on this point and it is for national legislation to regulate the matter by express provision or by application of the general rules of criminal law.

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<sup>1</sup> This idea is expressed in various sources with slightly different formulations: "had reason to know" (Art. 7(3) of the ICTY Statute and Art. 6(3) of the ICTR Statute), "had information which should have enabled [the commander / superior] to conclude in the circumstances at the time" (Art. 86(2) AP I), the commander / superior "(owing to the circumstances at the time,) should have known" (Art. 28 of the ICC Statute). These formulations essentially cover the concept of constructive knowledge.

### **Additional Protocol I of 1977**

Principles that came out of the trials held after the Second World War were incorporated in Art. 86(2) of AP I:

“The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from 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.”

Art. 87 of AP I spells out the duties and obligations of military commanders with respect to their subordinates. The superiors must prevent and, where necessary, suppress and report to competent authorities grave breaches committed by their subordinates. Only in the event that he failed in these duties does a commander risk being held criminally responsible for taking no action.

A ‘superior’ is understood as someone personally responsible for the acts committed by subordinates placed under his control.

The issue of how much knowledge the superior should have of the acts or intentions of his subordinates is difficult to resolve. The knowledge of the superior cannot be presumed, but only established through circumstantial evidence. Actual knowledge of the crimes by the superior is not necessarily required, constructive knowledge may be sufficient. It should be borne in mind that the superior who fails to keep himself informed can also be held responsible.

Command responsibility is not a type of strict liability. The superior’s duty to act consists in initiating such steps as are necessary or reasonable to prevent or suppress the crimes of his subordinates. Only those steps that are within his power are required.

### **Customary Law**

Rule 153 of the ICRC Customary International Humanitarian Law Study<sup>2</sup> states that commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible. State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

*“Command responsibility is the responsibility of a superior who fails in his duty by doing nothing to prevent or punish subordinates committing war crimes or other international crimes.”*

*Under Article 87 of AP I, military commanders must prevent and, where necessary, suppress and report to competent authorities grave breaches committed by their subordinates. Failure by a commander to do so puts them at risk of being held responsible for taking no action.*

<sup>2</sup> See <http://www.icrc.org/customary-ihl/eng/docs/home>.

## **A SUPERIOR'S FAILURE TO ACT CONSIDERED AS A GRAVE BREACH**

The limits to criminal responsibility for failing to act are not clearly specified in criminal law. In IHL, a further difficulty stems from the fact that failure to act on the part of a superior is not expressly qualified as a grave breach, whereas the obligation of States to repress offences or extradite persons in the exercise of universal jurisdiction applies to grave breaches only.

In the system of repression established by IHL, the superior's criminal liability is considered as a form of participation in the commission of the crime.

## **CASE LAW OF THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS**

Firstly, the case law of the ad hoc international criminal tribunals has specified the degree of responsibility of a superior who has failed to act over his subordinate, mentioning that 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.

The case law has also clarified the conditions under IHL for holding superiors responsible for offences committed by their subordinates.

In particular, it establishes that it is not necessary to be the hierarchical superior de jure of the direct perpetrator of a crime to be held criminally responsible for his actions; it is sufficient to exercise authority over such a person de facto. What really matters is to determine whether the superior has actual powers to control the actions of his subordinates, and in this regard ad hoc international tribunals apply an "effective control" test based on the specific evidence of each case, which aims to identify if the superior has the material ability to prevent and punish criminal conduct.

The case law has also made it clear that belonging to the military is not a necessary condition, as political leaders or civilian, hierarchical superiors can also be held responsible for war crimes committed by subordinates. Finally, the case law has confirmed that there need be no direct causal relationship between a superior failing to take action and a subordinate committing a crime for the superior to be held responsible.

## **COMMAND RESPONSIBILITY ACCORDING TO THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)**

The Statute of the ICC distinguishes two kinds of 'superior' responsibility.

### ***Responsibility of military commanders***

Article 28 of the ICC Statute lays down that a military commander or a person "effectively" acting as a military commander is criminally responsible for crimes within the jurisdiction of the ICC committed by forces or persons under his effective command and control, or effective authority and control, where:

- he either knew, or owing to the circumstances, should have known that the forces or persons were committing or about to commit such crimes; and
- he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

### ***Responsibility of civilian superiors***

Similarly, a hierarchical superior in a non-military relationship with subordinates is criminally responsible for crimes within the jurisdiction of the ICC committed by subordinates under his effective authority and control, where:

- he knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- the crimes concerned activities that were within his effective responsibility and control; and
- he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

## **RESPONSIBILITY FOR FAILING TO ACT DURING A NON-INTERNATIONAL ARMED CONFLICT**

The Geneva Conventions and Additional Protocol II of 1977 make no explicit mention of any criminal responsibility on the part of hierarchical superiors for breaches committed by their subordinates during a non-international armed conflict. It should be noted, however, that the principle of responsible command within armed groups is one of the terms of application of Additional Protocol II. In addition, national criminal legislation in an increasing number of States provides for holding superiors criminally responsible for all war crimes, regardless of whether the armed conflict in which they are committed is international or non-international.




The Statutes of the International Criminal Tribunal for the former Yugoslavia (Art. 7(3)), the International Criminal Tribunal for Rwanda (Art. 6(3)), the Special Court for Sierra Leone (Art. 6(3)), UNTAET Regulation No. 2000/15 for East Timor and the ICC (Art. 28) expressly state that superiors bear responsibility, in particular if they fail to take action, for crimes committed by their subordinates in a non-international armed conflict.

That form of responsibility applies to all the crimes submitted to the jurisdiction of those tribunals. Article 4 of the Statute of the International Criminal Tribunal for Rwanda expressly asserts the Tribunal's power to prosecute serious violations of Art. 3 common to the Geneva Conventions and of Additional Protocol II, which apply to non-international armed conflict. The same power is claimed by the Special Court for Sierra Leone in Articles 3 and 4 of its Statute; in addition, the Court has jurisdiction in respect of other specified serious violations of IHL committed within the country. Art. 8(2)(c) and (e) of the ICC Statute asserts the ICC's jurisdiction in respect of serious violations of Art. 3 common to the Geneva Conventions and of other serious violations of the laws and customs applicable in armed conflicts not of an international character, for which a hierarchical superior can therefore be held responsible.

Finally, as mentioned above, Rule 153 of the ICRC Customary International Humanitarian Law Study is applicable to non-international armed conflicts.

## MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.

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